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BELLIGERENT TRANSMISSIONS THROUGH NEUTRAL CYBERINFRASTRUCTURE: WHY THE ANARCHY OF CYBERSPACE DEMANDS SPECIAL TREATMENT UNDER THE LAW OF NEUTRALITY

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> *The Internet is the first thing that humanity has built that humanity doesn't understand, and the largest experiment in anarchy that we've ever had.*[1]

I. Introduction: Belligerent Cyber Transmissions and the Law of Neutrality

In 2009, cyber attackers released a malicious computer code into cyberspace, hopeful that it would make its way to its target: the fortified, digital heart of an Iranian nuclear plant.[2] Unable to control its route,

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[1] Jerome Taylor, *Google Chief: My Fears for Generation Facebook*, INDEP. (Oct. 22, 2011, 10:44 PM), https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-chief-my-fears-generation-facebook-2055390.html (quoting Eric Schmidt).

[2] Zachary P. Augustine, *Cyber Neutrality: A Textual Analysis of Traditional Jus in Bello Neutrality Rules Through a Purpose-Based Lens*, 71 A.F. L. REV. 69, 75 (2013).

attackers remotely monitored the code's path as it infected new machines.[3] The worm—later dubbed "Stuxnet"—was sophisticated malware initially designed to spread through local area networks when a user connected an infected device.[4] As the worm traveled through cyberspace, it installed malware on every device it burrowed through,[5] remaining dormant unless the infected computer ran the specific software used by the systems at the Iranian nuclear facility.[6] Once it detected the desired software, the malware sent commands to the nuclear plant's centrifuges, causing them to spin at irregular and dangerous speeds, resulting in physical damage to the system.[7] Although tailored to the unique features of the nuclear plant's isolated systems, the code's embedded propagation mechanisms ultimately failed to prevent Stuxnet's spread beyond its intended target.[8] Instead, Stuxnet proliferated uncontrollably as infected devices were unpredictably connected to other networks, and the attackers modified the code to behave more aggressively.[9] Stuxnet eventually infected at least 100,000 computers located in over 150 countries.[10]

Stuxnet's spread illustrates the anarchy of the domain through which it transited: an interdependent network of devices, information, and

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[3] KIM ZETTER, COUNTDOWN TO ZERO DAY 27–28 (Broadway Books, 2014) (explaining that every time Stuxnet infected a new system, it transmitted data related to the machine and networks through the internet to servers in Denmark and Malaysia that functioned as command centers for the attack).

[4] *Id.* at 92–93 (noting that while most malware uses the internet to spread, Stuxnet relied on human carriers to transport the code between local networks); Augustine, *supra* note 2, at 101–02; *see* George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1094–99 (2000) (explaining that when information is sent through the internet, data is separated into small packets of data that may be routed through various networks in a random manner).

[5] Augustine, *supra* note 2, at 102 (describing that Stuxnet spread through 155 different countries through countless networks and was facilitated by automatic installation processes).

[6] *Id.*

[7] *Id.* at 100–02 (comparing the effects of the Stuxnet worm to those of a "damage-inflicting conventional weapon" and explaining the attack's goal to force the plant's centrifuges into failure).

[8] ZETTER, *supra* note 3, at 96 fn 14 (Broadway Books, 2014) ("The fact that Stuxnet spread via USB flash drives and local networks instead of through the internet should have made it less likely to spread so widely, yet it did. This probably occurred because some of the companies infected in Iran had satellite offices outside Iran or used contractors who had clients in other countries and spread the infection each time they connected an infected laptop to another client's network or used an infected USB flash drive at multiple sites.").

[9] Nate Anderson, *Confirmed: US and Israel Created Stuxnet, Lost Control of it* ARSTECHNICA (June 1, 2012, 6:00 AM), https://arstechnica.com/tech-policy/2012/06/confirmed-us-israel-created-stuxnet-lost-control-of-it/.

[10] ZETTER, *supra* note 3, at 97; Augustine, *supra* note 2, at 102.

infrastructures, including private and public virtual networks, subject to varying degrees of government regulation and characterized by automated components designed to promote efficiency and speed. Stuxnet likely involved state sponsorship, but experts disagree on whether its employment amounted to the use of force under international law.[11] Nevertheless, the worm's uncontrolled journey through cyberinfrastructure across multiple state borders illustrates an extraordinary challenge in regulating cyberspace activities: determining when the presence of unwelcome transmissions violates state sovereignty.[12]

Cyber architecture morphs daily as countless devices connect to the internet for the first time, spawning fresh pathways and associated vulnerabilities.[13] User demand for speedy access to virtual amenities generates new platforms and connections between network providers.[14] Automated routing components, designed to expeditiously direct internet traffic around congested networks, may send data through unexpected pathways—including through neighboring states—without the knowledge of the end users or the owners of cyberinfrastructure.[15] Some of these users are hostile actors, venturing boldly into this new domain

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[11] Ellen Nakashima & Joby Warrick, *Stuxnet Was Work of U.S. and Israeli Experts, Officials Say*, WASH. POST (June 2, 2012), https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAlnEy6U_story.html; *see* Andrew C. Foltz, *Stuxnet, Schmitt Analysis, and the Cyber "Use-of-Force" Debate*, 67 JOINT FORCES Q., 4th Quarter 2012, at 40.

[12] Eric T. Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT'L L.J. 815, 824 (2012) (posing the question as to whether packets of information traversing cyberspace can violate state sovereignty); *see* Symposium, *Computer Network Attack and International Law*, 76 INT'L L. STUD. 1 app. at 463–65 (2002).

[13] *See* Convention on Cybercrime, pmbl., Nov. 23, 2001, T.I.A.S. No. 13174, 2296 U.N.T.S. 167 (discussing the "profound changes brought about by the digitali[z]ation, convergence and continuing globali[z]ation of computer networks").

[14] *See generally* NAT'L PROT. & PROGRAMS DIRECTORATE, U.S. DEP'T OF HOMELAND SEC., THE FUTURE OF SMART CITIES: CYBER-PHYSICAL INFRASTRUCTURE RISK 2 (2015) ("As technology pervades into our everyday lives, once simple devices have become smarter and more interconnected to the world around us. . . . Removing the cyber-physical barriers in an urban environment presents a host of opportunities for increased efficiencies and greater convenience, but the greater connectivity also expands the potential attack surface for malicious actors.").

[15] Doug Madory, *Large European Routing Leak Sends Traffic Through China Telecom*, ASIA PACIFIC NETWORK INFORMATION CENTRE (APNIC) (June 7, 2019), https://blog.apnic.net/2019/06/07/large-european-routing-leak-sends-traffic-through-china-telecom (observing that internet traffic from Switzerland, Holland, and France was unexpectedly routed through China Telecom's network for several hours earlier in the day).

with increasing frequency.[16] The Stuxnet incident is not anomalous; many states have been victims of cyber attacks,[17] yet the state of the law remains uncertain.[18]

Although the Stuxnet incident occurred outside the context of an international armed conflict, it illustrates the difficulty in controlling—and even predicting—how cyber transmissions travel to their destinations and what they may affect along the way. Belligerent cyberspace operations during an armed conflict may unexpectedly traverse through uninvolved states due to the internet's design: boundary-less, primarily privatized, and with an ever-evolving, fluid architecture. It does not neatly align with state borders or possess static terrain features that promote the application of traditional notions of sovereignty.[19] Inextricably intertwined with sovereignty, neutrality is a fundamental concept in international law denoting a special status during times of armed conflict.[20] The international community must urgently determine the boundaries of state territorial and jurisdictional sovereignty within cyberspace to proscribe belligerent conduct involving neutral cyberinfrastructure. Belligerents must know what conduct is prohibited so they may comply with international law. If transmitting malicious code through neutral cyberinfrastructure violates the law of neutrality, the responsible

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[16] HARRIET MOYNIHAN, THE APPLICATION OF INTERNATIONAL LAW TO STATE CYBERATTACKS: SOVEREIGNTY AND NON-INTERVENTION 1 (2019) (estimating that over twenty-two states are known to have sponsored cyber operations against other states and that "the number and scale of these operations is growing"); *see generally* Ellen Nakashima, *Pentagon to Boost Cybersecurity Force*, WASH. POST (Jan. 27, 2013), https://www.washingtonpost.com/world/national-security/pentagon-to-boost-cybersecurity-force/2013/01/27/d87d9dc2-5fec-11e2-b05a-605528f6b712_story.html.

[17] *MOYNIHAN, supra* note 16 (listing a number of attacks on European companies and governments attributable to China, Iran, and Russia, costing billions of dollars in economic losses).

[18] *See* GEORGE LUCAS, ETHICS AND CYBER WARFARE: THE QUEST FOR RESPONSIBLE SECURITY IN THE AGE OF DIGITAL WARFARE 64–78, 113–19 (Oxford Univ. Press, 2017) (summarizing the international community's failure to achieve consensus in the Tallinn Manual regarding legal approaches to cyberspace and describing the emergent, but still developing, legal norms following cyber incidents in Estonia, Syria, Georgia, and Iran).

[19] William M. Stahl, *The Uncharted Waters of Cyberspace: Applying the Principles of International Maritime Law to the Problem of Cybersecurity*, 40 GA. J. INT'L & COMP. L. 247, 253–54 (2012) (describing the structure of the internet as a "network of networks," both privatized and government, which are connected by wired and wireless communication links, wherein host computers communicate using protocol language to format data for transfer through routers to other connections that gives rise to "essentially anonymous global access").

[20] *See generally* Jensen, *supra* note 12, at 816–17.

belligerent has broken the rules, and the aggrieved neutral state may be obligated to respond.[21]

To prevent confusion over what actions may trigger such undesirable results, a legal framework that applies the law of neutrality to cyberspace must be established. However, the anarchic international legal system displays no consensus on whether transmitting a belligerent's malicious cyber code through neutral cyberinfrastructure is permissible under the law of neutrality. While some experts and a few states have addressed this issue, consensus is far beyond reach.[22]

Relying on its adaptive features, an exception related to neutral communications systems, and its primary purpose, this article posits that the law of neutrality is not violated when malicious code is transmitted through neutral cyberinfrastructure. Using the Hague Conventions of 1899 and 1907 as guides, Part III of this article summarizes the rights and obligations of belligerents and neutral states and identifies the fundamental purposes of the law of neutrality. Part IV evaluates the international treatment of this issue in the *Tallinn Manual 2.0* and explores divergent views therein. Part V exposes the flaws in the *Tallinn Manual 2.0*'s majority opinion, including its failure to acknowledge traditional flexibility in the law of neutrality and its untenable practical implications that undermine the law of neutrality's essential purposes. Part VI explains that transmitting any malicious code, including cyber weapons, through public-neutral cyberinfrastructure should not violate the law of neutrality and urges the United States to lead the international community in adopting this position.

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[21] OFF. OF GEN. COUNSEL, U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 15.4.2 (2016) [hereinafter LAW OF WAR MANUAL].

[22] *See* U.N. Secretary-General*, Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266,* U.N. GAOR, 76TH SESS., AGENDA ITEM 96, U.N. DOC. A/76/136 (JULY 13, 2021) (stating that "[t]he precise threshold of what constitute [sic] a cyber operations in violation of sovereignty is not settled in international law, and will depend on a case-by-case assessment."). *See also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0] (constituting a comprehensive attempt by international experts to apply international law governing cyberspace to both war and peacetime legal regimes but constituting only the personal views of the authors and not necessisarily customary international law).

II. Definitions and Presumptions

Before proceeding to the primary discussion of the law of neutrality, it is vital to define its parameters. This article presupposes the context of an international armed conflict between states. It does not address the challenges of attribution in cyberspace and assumes that all cyber transmissions are attributable to a belligerent party to the international armed conflict. There will be no discussion as to whether particular activities in cyberspace qualify as armed attacks or otherwise meet the threshold requirements for the use of force under international law.[23] Legal theories that justify or limit a state's response to a violation of the law of neutrality will not be investigated; the word "response" will encompass all actions that belligerent and neutral states may take in accordance with *jus ad bellum* and *jus in bello* principles, including the use of force or employment of countermeasures.[24]

Whether malicious cyber code is itself a "munition," "communication," or "information" is widely debated and central to the question of whether a particular belligerent transmission violates a neutral state's sovereignty.[25] Such discussion is irrelevant here, as this article proposes that transmitting any malicious code, even code that produces effects tantamount to those of an armed attack, should not violate the law of neutrality when transmitted through neutral cyberinfrastructure on the way to its target. The term "malicious cyber code" refers to *all* types of belligerent transmissions in cyberspace, including transmissions of cyber weapons used in qualifying armed attacks, cyber communications that effectuate command and control, and cyber information and intelligence operations falling below the threshold of the use of force. Finally, "neutral cyberinfrastructure" includes all of a neutral state's sovereign territory and platforms, whether owned by the government or private entities.[26]

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[23] U.N. Charter art. 2, ¶¶ 3–4; LAW OF WAR MANUAL, *supra* note 21, § 1.11.

[24] TALLINN MANUAL 2.0, *supra* note 22, at 554–55; LAW OF WAR MANUAL, *supra* note 21, §§ 1.11, 3.4.

[25] The problem of categorizing cyber transmissions relates to whether data itself is an object. The experts who authored the *Tallinn Manual* were unable to arrive at a consensus on this issue due to data's intangibility. TALLINN MANUAL 2.0, *supra* note 22, at 437; *see* Tim McCormack, *International Humanitarian Law and the Targeting of Data*, 94 INT'L L. STUD. 222, 223 (2018) (describing digital data as a "complex succession of 1s and 0s" that presents challenges to the traditional notions of the word "object").

[26] TALLINN MANUAL 2.0, *supra* note 22, at 553.

III. The Law of Neutrality

A neutral state is one that is not a party to an international armed conflict.[27] The rules relating to neutral states' protections, rights, and obligations are considered customary international law and enshrined in the Hague Conventions of 1899 and 1907.[28] Save for a few recognized exceptions, the law of neutrality compels belligerent states to respect the sovereignty of neutral states. It prohibits entry into and operations within a neutral state's territory, waters, or airspace "by armed forces or instrumentalities of war."[29]

The law of neutrality serves several purposes. It first seeks to shield the territory and persons of neutral states from the harmful effects of hostilities.[30] Second, it strives to prevent the escalation and spread of an armed conflict by prohibiting the involvement of neutral powers in the hostilities to benefit one belligerent over another.[31] The protection of international commerce is another crucial goal.[32] To accomplish these aims, the law of neutrality proscribes the conduct of belligerents and neutral states in all battlefield domains.[33] Most fundamentally, belligerents must respect the sovereignty of neutral states and may not exercise belligerent rights within neutral territory.[34] Neutral states must treat belligerents equally and avoid assisting one party to the other's

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[27] LAW OF WAR MANUAL, *supra* note 21, § 15.1.2.2. The law of neutrality applies only during times of international armed conflict. *See generally id.* § 15.2 (discussing the application of the law of neutrality in armed conflicts).

[28] Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V]; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII].

[29] LAW OF WAR MANUAL, *supra* note 21, § 15.3.1.1.

[30] Hague V, *supra* note 28, art. 1 ("The territory of neutral Powers is inviolable."); TALLINN MANUAL 2.0, *supra* note 22, at 553; *see also* LAW OF WAR MANUAL, *supra* note 21, § 15.1.3 (describing the purpose of the law of neutrality).

[31] TALLINN MANUAL 2.0, *supra* note 22, at 553; *see* LAW OF WAR MANUAL, *supra* note 21, § 15.1.3.

[32] TALLINN MANUAL 2.0, *supra* note 22, at 553; LAW OF WAR MANUAL, *supra* note 21, § 15.1.3; OFF. OF THE CHIEF OF NAVAL OPERATIONS, DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 7.1 (2017) [hereinafter COMMANDER'S HANDBOOK].

[33] LAW OF WAR MANUAL, *supra* note 21, § 15.3.

[34] Hague V, *supra* note 28, art. 1.

detriment.[35] The objective is to minimize the involvement of third parties and thus contain the conflict, preventing its escalation and spread.[36]

A. The Hague Conventions: The Foundation for the Law of Neutrality

The law of neutrality is rooted in the Hague Conventions of 1899 and 1907, which encompass several conventions dedicated to regulating the behavior of states during times of armed conflict. Hague Conventions V and XIII—which will be referred to as Hauge V and Hauge XIII for the purposes of this article—are the most important in defining the law of neutrality: they articulate specific precautions that neutral states must take to avoid assisting belligerent parties and the measures belligerent parties must take to respect neutral states' territories and citizens.[37] Hague V deals with the rules for neutrality during conflicts on land, and Hague XIII addresses conflict at sea.[38] The law of neutrality adapts to each domain's unique characteristics through subtle modifications that effectively advance its purposes: protecting neutral state sovereignty and persons, preventing conflict escalation, and shielding commerce from harmful interference.[39] Although the Hague Conventions are well over a century old, they constitute current customary international law.[40] At the same time, most attempts to apply the law of neutrality to cyberspace begin with relevant provisions of the Hague Conventions; states and international law experts do not agree on how to adapt them to cyberspace.[41] In particular, experts diverge on whether belligerent transmission of malicious code through neutral cyber infrastructure violates the law of neutrality.

1. Rights and Obligations of Belligerents on Land and at Sea

The Hague Conventions articulate the rights and obligations of belligerents and neutrals in the distinct domains of land and sea. Hague V addresses land warfare and requires belligerents to respect the inviolability of neutral territory, explicitly prohibiting the exercise of belligerent rights

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[35] *Id.* art. 9.
[36] LAW OF WAR MANUAL, *supra* note 21, § 15.1.3.
[37] *See* Hague V, *supra* note 28; *see also* Hague XIII, *supra* note 28.
[38] *Id.*
[39] LAW OF WAR MANUAL, *supra* note 21, § 15.1.3.
[40] U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF "TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020, at 557.
[41] *See generally* TALLINN MANUAL 2.0, *supra* note 22.

when it violates the territorial sovereignty of a neutral state.[42] This includes the transporting belligerent forces, supplies, or munitions over a neutral state's land.[43] A belligerent may not construct new communications infrastructure on neutral territory or use pre-existing communications infrastructure to communicate with its forces.[44] An exception exists for belligerent use of pre-existing neutral communications infrastructure, which is also open to the public.[45] Finally, belligerent parties may not recruit or raise troops from neutral territories.[46] These prohibitions address belligerent actions involving deliberate, knowing intrusions of neutral sovereignty as consequences of a military operation that are also likely to contribute measurably and directly to the belligerent's success.

Hague XIII is consistent with Hague V, applies the same principles to the seas, and helps interpret the intent underlying Hague V's provisions.[47] Fundamentally, belligerents may not use a neutral state's sovereign waters to advance its wartime objectives. For example, a belligerent may not arm its vessels in a neutral port or waters or use them as a base for naval operations.[48] Like Hague V, Hague XIII prohibits the erection of communications infrastructure in neutral ports and waters "for the purpose of communicating with the belligerent forces on land or sea."[49] However, unlike Hague V's prohibition on the movement of belligerent convoys across a neutral state's land, the mere passage of a belligerent's vessels through neutral waters does not violate the law of neutrality.[50] In fact, up to three belligerent vessels may dock in a neutral port at one time, so long as they do not remain longer than twenty-four hours or engage in prohibited activities.[51] This critical distinction, wherein belligerent vessels may transit neutral waters and dock in neutral ports under certain conditions while similar acts are *per se* prohibited on land, provides one example wherein the unique characteristics of a battlefield domain may

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[42] Hague V, *supra* note 28, art. 1.
[43] *Id.* art. 2. The article prohibits the transit of "troops or convoys of either munitions of war or supplies across the territory of a neutral Power." *Id.*
[44] *Id.* art. 3. Belligerents may not build "a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea" or make use of "an installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes." *Id.*
[45] *Id.*
[46] *Id.* art. 4. Belligerents may not form "[c]orps of combatants" or open "recruiting agencies . . . on the territory of a neutral Power to assist the belligerents." *Id.*
[47] Augustine, *supra* note 2.
[48] Hague XIII, *supra* note 28, art. 5.
[49] *Id.*
[50] *Id.* art. 10.
[51] *Id.* arts. 12–20.

necessitate a more permissive interpretation of the law of neutrality. International law regularly employs exceptions and modifications to uphold key principles across domains, which is critical to correctly applying the law of neutrality in cyberspace.

2. Rights and Obligations of Neutral States on Land and at Sea

Article 5 of Hague V articulates that the most fundamental duty of neutral states during armed conflict on land is, in short, to stop belligerent parties from engaging in any of the prohibited wartime activities enumerated in Articles 2–4.[52] Neutral powers may even use force to fulfill this obligation.[53] One exception to this mandate relates to the use of communications infrastructure. Specifically, neutral states are *not* "called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals."[54] While they may impose restrictions if they so choose, neutral states must do so impartially and apply the same rules to belligerents on both sides of the conflict.[55] A neutral power is thus not required to prevent belligerents from using its communications infrastructure but may do so at its option so long as restrictive measures are fair. Therefore, a belligerent's mere *use* of neutral communications infrastructure within neutral territory is not a violation of the law.

Pertaining to conflict at sea, Hague XIII stipulates that neutral states may not directly or indirectly supply a belligerent with any war material, including warships and ammunition;[56] however, a neutral state is not required to prevent the export or transit of arms, ammunition, or supplies that could be of use to an army or fleet.[57] As mentioned, the mere passage of belligerent vessels through a neutral state's territorial waters and the docking of belligerent vessels in neutral ports for innocent purposes does not violate the law of neutrality.

In sum, while Hague V and Hague XIII both require neutral states to stop *impermissible* belligerent conduct on their sovereign territory or waters, neutral states are not required to stop *all* belligerent conduct. A belligerent's ability to control its conduct relates to whether the conduct is permissible; when it is permissible, there is no obligation for a neutral state

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[52] Hague V, *supra* note 28, art. 5.
[53] *Id.*
[54] *Id.* art. 8.
[55] *Id.* art. 9.
[56] Hague XIII, *supra* note 28, art. 6.
[57] *Id.* art. 7.

to act. Further, knowledge of belligerent acts is a prerequisite for a neutral state's response to prohibited conduct.[58] Thus arises an implicit requirement for a neutral state "to monitor, to the best of its ability, its own territory and infrastructure."[59] When it is infeasible for a neutral state to detect belligerent activity, such as that on the seas and over radio waves, the law does not impose a strict requirement to stop belligerent conduct.[60] The Hague Conventions accordingly account for both belligerent and neutral state intent and capabilities in proscribing conduct and imposing obligations.

3. Consequences of a Neutral State's Failure to Comply

The aggrieved belligerent may intervene when a neutral state fails to fulfill its obligations to terminate illegal belligerent action in its territorial seas or on its land.[61] Examples of neutral states' violations of these obligations could range from overtly assisting a belligerent to failing to terminate the belligerent use of sovereign territory. The law of neutrality permits an aggrieved belligerent to remedy such a situation by taking action to end the violation where the neutral state is unwilling or unable to do itself.[62] The aggrieved belligerent may execute a countermeasure that could ordinarily constitute an internationally wrongful act.[63] However, a belligerent's right to respond to a violation of the law of neutrality is limited: countermeasures are authorized only in situations where the violation resulted in a relative military advantage for the enemy.[64] In cases where a violation did not harm the aggrieved belligerent's security interests, the belligerent may not act.[65] Even when the violation negatively affected the belligerent, notification to the neutral state is ordinarily

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[58] *See generally* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 19–22 (Apr. 9) (holding that that a neutral state must not allow knowingly the use of its territory for acts contrary to the rights of other states and determining that constructive knowledge is sufficient).
[59] Jensen, *supra* note 12, at 826.
[60] *See* Hague V, *supra* note 28, art. 8.
[61] LAW OF WAR MANUAL, *supra* note 21, § 15.4.2.
[62] LAW OF WAR MANUAL, *supra* note 21; *see also* COMMANDER'S HANDBOOK, *supra* note 32.
[63] Augustine, *supra* note 2, at 81; *see* Jensen, *supra* note 12, at 823 (explaining that belligerent actions in response to a neutral state's failure to maintain its neutrality, whether willing or unwilling, "would most certainly constitute a violation of the neutral state's sovereignty"). *See also* LAW OF WAR MANUAL, *supra* note 21 (stating that armed attacks are appropriate under some circumstances).
[64] Jensen, *supra* note 12, at 823.
[65] *Id.*

required before executing a countermeasure.[66] Finally, the countermeasure taken is subject to scrutiny in accordance with the *jus ad bellum* principles of necessity and proportionality.[67]

IV. Neutrality in Cyberspace

The international community agrees that international humanitarian law generally applies to cyberspace.[68] The International Court of Justice (ICJ) further asserts that the law of neutrality applies to every international armed conflict irrespective of weaponry, declaring that "international law leaves no doubt that the principle of neutrality . . . is applicable . . . to all international armed conflict, whatever type of weapons might be used."[69] While the court did not mention cyber weapons specifically, the opinion confirmed that the international community agrees that the principles of neutrality are universally applicable to every domain.[70]

Despite this consensus, few treaties directly address cyber operations, and state practice has yet to emerge to the extent required to constitute customary international law applicable to the cyber domain.[71] The classified and imperceptible nature of most cyber activities gives states little incentive to express their positions and policies publicly, leading to a dearth of *opinio juris*.[72] Therefore, the consensus that international law generally applies to cyber operations does not extend to *how* it applies. In areas where limited consensus does exist, it does not yet amount to customary international law.[73]

The absence of formal state agreement is only partly due to the infancy of the cyber domain and state reluctance to publish national policies and positions. Direct application of existing international law to the unique aspects of the cyber domain is impractical and results in divergent opinions. The law of neutrality developed from situations where entrance to or exit from a neutral state's territory was a *physical act*.[74] Unlike land, sea, and

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[66] *Id.*
[67] LAW OF WAR MANUAL, *supra* note 21, § 15.4; COMMANDER'S HANDBOOK, *supra* note 32, para. 7.3.
[68] TALLINN MANUAL 2.0, *supra* note 22, at 553.
[69] The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 89 (July 8).
[70] *See, e.g.*, Wolff Heintschel von Heinegg, *Neutrality in Cyberspace*, *in* 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 35, 37–38 (Christian Czosseck, Rain Ottis & Katharina Ziolkowski eds., 2012).
[71] MOYNIHAN, *supra* note 16, at 1.
[72] *Id.*; *see also* TALLINN MANUAL 2.0, *supra* note 22, at 3.
[73] TALLINN MANUAL 2.0, *supra* note 22, at 3.
[74] *Id.* at 554.

air, the internet is virtual and has no territorial boundaries; cyber transmissions cross national borders at the speed of light, undetected, and on paths determined by autonomous equipment—not by the volition of the sender.[75] Due to how information travels through cyberspace, belligerent cyber transmissions are highly likely to traverse through neutral cyberinfrastructure, potentially violating state sovereignty.[76] International experts disagree on whether transmitting a belligerent's malicious code through neutral cyber infrastructure violates the law of neutrality.[77] Due to the physical structure of networks and the automation of packet routing, the resolution of this disagreement will affect the conduct of all military communications and operations in cyberspace during armed conflict. The *Tallinn Manual 2.0* presents the minority and majority views on this topic, which are based in conflicting interpretations of Articles 2 and 8 of Hague Convention V.[78]

A. The *Tallinn Manual 2.0*: Revealing an International Divide

The *Tallinn Manual 2.0* comprises the most comprehensive effort to address the application of international law to cyberspace during times of armed conflict and peace. It proffers 154 rules governing cyber operations and includes commentary from renowned international law experts.[79] While it does not constitute law, it is the best starting place to evaluate the legality of belligerent transmissions through neutral cyberinfrastructure.[80] Chapter 20 addresses neutrality and reveals consensus on some matters, acknowledging "widespread agreement that [the law of neutrality] applies to cyber operations taken against, or by use of, cyberinfrastructure that is located within the territory of neutral states."[81] This consensus is based on the "well-established principle" prohibiting belligerents from "conducting hostilities within neutral territory."[82]

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[75] *Id.* (acknowledging that automatic routing of data may mean that "the sender or the owner of the neutral cyber infrastructure cannot necessarily control the route it takes"); Walker, *supra* note 4, at 1096. *See generally* Stahl, *supra* note 19, at 253 ("[R]outers operate by identifying data's destination addresses and transferring that data to another router closer on the network to its destination until it reaches its destination. The system of routers ensures that there are multiple paths data can take to reach its destination, which allows the system to continue to function in the event that communication links or routers are out of service." (citations omitted)).

[76] Jensen, *supra* note 12.

[77] TALLINN MANUAL 2.0, *supra* note 22, at 559.

[78] *Id.* at 555–57.

[79] *Id.* at 2–3.

[80] *Id.*

[81] Heintschel von Heinegg, *supra* note 70, at 35.

[82] TALLINN MANUAL 2.0, *supra* note 22, at 555.

Of the two proffered rules most directly address the meaning of this prohibition in cyberspace, neither presents a definitive answer as to whether belligerent transmission of malicious cyber code through neutral territory is a violation. First, Rule 150 prohibits belligerent action taken against neutral cyberinfrastructure.[83] The prohibition of such action, defined as action "intended to detrimentally affect neutral cyberinfrastructure," is uncontroversial.[84] Damage to cyber infrastructure from malicious code represents a clear violation of a neutral state's rights.[85] The rule does not discuss belligerent actions that do not result in harm.[86] Second, Rule 151 deals with a belligerent's use of neutral cyberinfrastructure.[87] This rule limits "use" to belligerent cyber activities that originate from within neutral territory or that remotely control neutral cyber infrastructure from outside the neutral state.[88] "Use" of neutral cyber infrastructure thus does not include a belligerent's transmission of malicious cyber code *through* it.[89]

Where such a transmission originates and terminates at points outside the territory of the neutral state, the international group of experts could not agree.[90] The majority and minority views are rooted in the disparate interpretation and application of Articles 2 and 8 of Hague V.

1. Belligerent Use of Neutral Telecommunications Systems

Article 8 of Hague Convention V contains a significant exception to the law of neutrality related to belligerent use of neutral communications infrastructure that is open to the public.[91] Specifically, a neutral state has no obligation to prevent "the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals."[92] The majority of *Tallinn* experts rely on Article 8 to assert that the same exception applies in cyberspace if the character of a belligerent transmission is merely communicative.[93] Under this interpretation, if a neutral state were aware belligerents were

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[83] *Id.*
[84] *Id.* ("The exercise of belligerent rights by cyber means directed against neutral cyber infrastructure is prohibited").
[85] *Id.*
[86] *Id.* at 556.
[87] *Id.*
[88] *Id.* at 556–57.
[89] *Id.* at 556.
[90] *Id.* at 556–57.
[91] Hague V, *supra* note 28, art. 8.
[92] *Id.*
[93] TALLINN MANUAL 2.0, *supra* note 22, at 556–57.

exercising command and control via emails transiting through its cyber infrastructure, it would be under no obligation to take action to stop them.

The Article 8 exception is logical because belligerent radio transmissions are, in most cases, far less intrusive and disruptive to a neutral state than the physical penetration of its territory by equipment or personnel. Records from the Hague Conventions indicate that this exception stems from the practical problems associated with stopping belligerents from using open, public communications systems.[94] The exception is also consistent with the Hague Conventions' tendency to permit belligerent conduct when such acts do not involve deliberate control and operation.[95] While the *Tallinn Manual 2.0* aptly observes that "a single email message sent from belligerent territory may automatically be routed through neutral cyberinfrastructure before reaching its intended destination; the sender or the owner of the neutral cyberinfrastructure cannot necessarily control the route it takes," experts rely exclusively on the character of the transmission to conclude that it is permissible.[96] The majority does not remark on comparative degrees of intrusion or the practical challenges inherent in preventing such transmissions.

2. Transport of Belligerent Munitions and Supplies Across Neutral Territory

The *Tallinn Manual 2.0*'s experts compare the transmission of cyber weapons to activities prohibited in Article 2 of Hague Convention V.[97] Specifically, a belligerent's transportation of munitions or supplies across the neutral sovereign territory violates the law of neutrality.[98] The majority directly applies this provision to the belligerent transmission of cyber weapons through neutral cyberinfrastructure and concludes that such transmissions are illegal.[99] They arrived at this conclusion even after

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[94] CARNEGIE ENDOWMENT FOR INT'L PEACE, THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 543 (James Brown Scott ed., 1917) [hereinafter THE HAGUE REPORTS] ("We are here dealing with cables or apparatus . . . the operation of which, for the transmission of news, has the character of a public service. There is no reason to compel the neutral State to restrict or prohibit the use by the belligerents of these means of communication. Were it otherwise, objections of a practical kind would be encountered, arising out of the considerable difficulties in exercising control, not to mention the confidential character of telegraphic correspondence and the rapidity necessary to this service.").

[95] *See* Augustine, *supra* note 2, at 75 (observing that relevance of a state's ability to effectuate control and operation over situations to the law of neutrality at sea).

[96] TALLINN MANUAL 2.0, *supra* note 22, at 554.

[97] *Id.* at 557.

[98] *Id.*

[99] *Id.*

acknowledging the unique nature of cyberspace, wherein data is broken into packets during transmission.[100] The minority group, however, rejected Article 2's direct application to the transmission of any kind of data, even cyber weapons, citing the article's purpose as "to prevent the physical transport of weapons."[101] Like the analysis pertaining to Article 8, the experts mention neither the conduct's relative degree of intrusiveness nor the practicality of observing and stopping belligerent transport of physical supplies and munitions over land.[102] Notably, the U.S. Department of Defense adopts the minority view, illustrating that the divide has surfaced in national policies and thus prompting a fresh examination of Hague Convention V's provisions.[103]

V. Transmitting Malicious Code: Why the *Tallinn* Majority Gets It Wrong

The Hague Conventions addressed a need for specific rules governing the conduct of hostilities in order to protect the rights of belligerents and neutrals alike. Although the rules are relatively straightforward, they do not amount to a rigid framework. Scrutiny reveals the general principles adapt to specific domains and the inclusion of special exceptions to account for a range of belligerent conduct.[104] Belligerent use of neutral public communication systems is one such exception.[105] Embracing common sense flexibility, this exception arose to account for practical challenges inherent in monitoring and preventing the use of radio signals.[106] Similarly, reports document that Hague V's explicit prohibition on belligerent transportation of supplies and munitions through neutral territory addresses the physical intrusion inherent in logistical operations over land.[107] The *Tallinn* majority's approach, based on the character of the transmitted data, problematically ignores the purpose of these

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[100] *Id.* The experts "saw no reason to differentiate between the transmission of a complete cyber weapon or a cyber weapon . . . on the basis that the transmission of individual components would violate neutrality." *Id.*

[101] *Id.*; *see also* THE HAGUE REPORTS, *supra* note 94, at 539 (emphasizing the inviolability of neutral territory and the seriousness of physical intrusion resulting from the passage of troops or convoys).

[102] TALLINN MANUAL 2.0, *supra* note 22, at 557.

[103] LAW OF WAR MANUAL, *supra* note 21, § 16.4.1 (stating that relaying information through neutral communications infrastructure generally would not violate the law of neutrality and that this rule appears applicable even if that information "may be characterized as a cyber weapon or otherwise could cause destructive effects in a belligerent State (but no destructive effects within the neutral State or States)").

[104] Hague V, *supra* note 28, art. 8.

[105] *Id.*

[106] THE HAGUE REPORTS, *supra* note 94.

[107] *Id.* at 539.

provisions.[108] The majority approach also ignores its practical implications and the importance of intent when proscribing state conduct, ultimately contravening the law of neutrality's purposes.

A. Misapplication of Hague V Provisions

The majority view distinguishes between belligerent cyber communications and cyber weapons in evaluating belligerent transmissions through neutral cyberinfrastructure and applies two Hague V articles by analogy to cyber transmissions to support its position.[109] Applying Article 8, which permits belligerent use of neutral public communications structure, the majority concludes that belligerent transmissions with a communicative purpose do not violate the law of neutrality when transmitted through a neutral, open, and publicly accessible network.[110] However, transmissions of cyber munitions violate the law of neutrality, even when said munitions are broken into packets; the application of Article 2's prohibition of transporting belligerent supplies and munitions across the neutral territory is the basis for this conclusion.[111] The majority thus believes that the *character* of a transmission is dispositive.[112]

There are several problems with the position that the character of a transmission determines whether the law of neutrality is violated. Reports from Hague V clarify that the Article 8 exception results from the impracticality of preventing belligerent use of neutral communications towers.[113] It is not clear that this exception is based, in any way, on the purpose or character of communications. The same reports indicate that Article 2's explicit prohibition of the transport of belligerent supplies and munitions across a neutral state relates to the physical intrusion of such operations.[114] Indeed, the fact that the prohibition applies equally to *supplies* and *munitions* is instructive and suggests that the character of the transported items is less relevant than the nature of the intrusion itself.[115]

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[108] *Id.* at 539, 543.
[109] TALLINN MANUAL 2.0, *supra* note 22, at 556–57.
[110] *Id.*
[111] *Id.* at 557.
[112] Another way to describe the majority's distinction would be the "purpose" of the transmission. A transmission could, however, have multiple purposes. For example, the purpose of transmission between a headquarters element and a forward operating unit that communicates the command to fire a weapon could be classified as a communication or the first step in an attack. The word "character" was selected as there is no evidence in the *Tallinn Manual 2.0* clearly indicating that the majority adopted an effects-based approach.
[113] THE HAGUE REPORTS, *supra* note 94.
[114] *Id.* at 539.
[115] Hague V, *supra* note 28, art. 2; THE HAGUE REPORTS, *supra* note 94, at 539.

Considering Articles 2 and 8 together, the degree and magnitude of the belligerent intrusion is essential. Belligerent communications via radio waves above neutral territory are far less physically invasive to a neutral state than a convoy of vehicles maneuvering over its terrain. In cyberspace, all data transmissions result in the same relative degree of intrusiveness, irrespective of whether a transmission qualifies as a communication or a weapon.[116] Even if the majority accounted for this reality and distinguished the character of transmissions using an effects-based approach, its analysis remains flawed. Cyber communications, like radio transmissions, can directly contribute to achieving physical effects on a target. It is not difficult to imagine a situation wherein military communication—transmitted over radio waves or through cyberinfrastructure—serves as the command signal to execute an attack, gaining a measurable military advantage as compared to delivering foodstuffs via convoy across the neutral territory. Whether founded in the character or likely effects of a particular transmission, the *Tallinn* majority view is flawed. The better view is that no belligerent cyber transmission, regardless of its character or purpose, violates the law of neutrality when transmitted through neutral cyber infrastructure without affecting the neutral state.

B. Untenable Practical Implications

The Hague Conventions account for the intent and capabilities of both belligerent and neutral parties through exceptions and domain-specific adaptions to ensure that the rules are practical. Article 8's exception is one such example, recognizing a neutral state's limited ability to stop belligerent use of their communications towers and, equally, the limited ability of belligerents to manipulate the direction of radio waves.[117] Neutral detection and attribution of belligerent conduct in radio communications is challenging due to a transmissions' high speed and invisible nature.[118] If a neutral state became aware of belligerent radio transmissions and was obligated to stop them, its failure to do so may invite a response from the aggrieved belligerent.[119] This would impose an unreasonable requirement on neutral states to detect and stop unintentional belligerent conduct, likely without success. Like radio transmissions, the speed and nature of all cyber transmissions make them nearly impossible for a neutral

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[116] *See* McCormack, *supra* note 25, at 223 (explaining that all digital data is reduced to strings of 1s and 0s).
[117] Hague V, *supra* note 28, art. 8; THE HAGUE REPORTS, *supra* note 95.
[118] THE HAGUE REPORTS, *supra* note 94.
[119] LAW OF WAR MANUAL, *supra* note 21.

state to detect or reliably attribute to a belligerent party.[120] Imposing a duty on neutral states to stop belligerent use of their cyberinfrastructure fails to account for states' limited capabilities and ignores the futility of a rule designed to deter unintentional belligerent conduct.

Another example of flexibility in the law of neutrality exists in its application to the maritime environment; specifically, Hague XIII is replete with situations wherein belligerent vessels may penetrate a neutral state's sovereign waters or dock in its ports without violating the law of neutrality.[121] These adaptions acknowledge that the sea often presents unforeseen challenges to the deliberate maneuver of forces, as conditions and *force majeure* may compel a belligerent vessel along an unintended path.[122]

So long as a belligerent vessel moves expeditiously through a neutral state's territorial waters and docks only for harmless purposes, it has not violated the law of neutrality.[123] This right of belligerent vessels to move expeditiously through neutral waters is known as "innocent passage."[124] It stems in part from the features of the maritime regime that limit the number of available paths through which vessels may transit safely.[125] Characteristics of the cyber domain resemble features of the maritime environment. The automated, uncontrollable manner by which data moves through the internet may cause belligerent transmissions to unintentionally enter a neutral state's cyberinfrastructure, similar to maritime *forces majeure*. Similarly, internet architecture may present limited pathways between points; if all paths utilize neutral cyberinfrastructure, the sender

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[120] TALLINN MANUAL 2.0, *supra* note 22, at 115 (explaining that "it is often difficult to attribute cyber activities to a particular State or actor with unqualified certainty" and providing examples of domain-specific operations that serve to "mask or spoof" the originator of a transmission).

[121] *See* Hague XIII, *supra* note 28. Examples where the domain of the sea proves less restrictive toward belligerent conduct include: (1) Article 7, which does not require neutral states to prevent the export or transit of "anything which could be of use" to belligerent forces in the maritime regime; (2) Article 10, which clarifies that the "mere passage" of belligerent vessels through a neutral power's territorial waters does not violate the law of neutrality; (3) Article 11, which permits a neutral power's licensed pilots to be employed by, and thus assist, belligerent vessels transiting through its waters; and (4) Articles 14–20, which relate to the conditions under which belligerent vessels may dock and make use of neutral ports.

[122] *Id.* art. 14 (mentioning the "stress of weather" as a reason for a belligerent ship to prolong its stay in a neutral port).

[123] *Id.* art. 10.

[124] LAW OF WAR MANUAL, *supra* note 21, § 13.2.2.4.

[125] THE HAGUE REPORTS, *supra* note 94, at 847 (discussing the "special condition of straits which might be situated within the area of territorial waters" and recognizing that straits which serve to connect open seas may never be closed).

has no option save to send a transmission through it. The proclamation that transmitting any variety of belligerent code through neutral cyber infrastructure violates the law of neutrality represents a departure from its historical flexibility, which adapts to other domains and provides exceptions recognizing states' limitations to control their conduct within them.

VI. Conclusion: Preserving the Law of Neutrality's Key Purposes

In addition to its imprecise application of Hague V's articles to cyberspace and its failure to account for the realities of state capabilities and domain features, the *Tallinn* majority view also results in consequences that undermine the very purposes of the law of neutrality.[126] In light of states' limited capabilities to detect and characterize belligerent transmissions, an obligation to prevent belligerent use of cyberinfrastructure is impractical and burdensome. More importantly, incapable states' failure to uphold this obligation begets the right of aggrieved belligerents to respond themselves.[127] Post-cyberattack, an aggrieved belligerent could then justify the destruction of a neutral state's cyberinfrastructure based on the assumption that the malicious code transited through its networks. The neutral state is thus drawn into the hostilities, resulting in an escalation of the conflict: the very consequence the law of neutrality seeks to prevent.[128] Finally, to prevent an aggrieved belligerent from responding, a neutral state may be forced to shut down its networks; considering modern society's reliance on the internet for basic functions such as banking and commercial activities, communication, commerce, and the management of critical infrastructure, the negative impact to neutral governments, persons, and commerce could prove colossal.[129] The majority view thus contravenes the aim of protecting commerce, the neutral state, its functions, and its people.

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[126] LAW OF WAR MANUAL, *supra* note 21, § 15.1.3.

[127] *See* Augustine, *supra* note 2, at 82 (discussing the risk that a neutral state will be dragged into a conflict as the result of impermissible use of its cyber infrastructure).

[128] *See* Horace B. Robertson, Jr., *The "New" Law of the Sea and the Law of Armed Conflict at Sea*, 68 INT'L L. STUD. 263, 302 (1995) (explaining that the overtaxing of neutral states to enforce their duties to prevent belligerent conduct in an expansive maritime environment may result in "increased tension between neutral and belligerent states," thus "widening the area of conflict and drawing neutral states into it). Importantly, the exceptions for belligerent vessels at sea significantly reduce a neutral state's obligation to monitor and address belligerent conduct in its waters, thus decreasing the identified risk. *Id.*

[129] Stahl, *supra* note 19, at 248 ("The advent of the Internet has brought with it a fundamental change in the way nations and their citizens engage in global economic activity, manage critical infrastructure, and communicate with one another. Although the Internet is ubiquitous in modern society and plays a critical role in many aspects of everyday life, it was never intended to be used by so many and for the vast number of functions it performs today.").

The superior position is that the transmission of any belligerent data through neutral cyberinfrastructure, whether constituting communications or malicious code, does not violate the law of neutrality. The anarchy of cyberspace is analogous to the maritime domain, which is unpredictable and defies human control, necessitating exceptions to account for unintentional belligerent conduct and the impracticality of obligating neutral states to regulate it. Cyber transmissions are unique, but they are more similar by analogy to radio transmissions than a convoy of supplies regarding intrusiveness and neutral states' ability to detect and attribute them to belligerent actors. If belligerent transmissions through neutral cyber infrastructure do not violate international law, neutral states will not incur an obligation to prevent or stop them. Aggrieved belligerents will not derive a right to target neutral states' cyberinfrastructure from their failure to act. Neutral states will not become ensnared in the conflict due to events they could not foresee or affect and will not be forced to take action that may impair their economies, communications systems, and basic government functions.

In absence of international consensus, the United Nations maintains that "case-by-case" assessments will determine whether cyber operations violate state sovereignty,[130] and by implication, the law of neutrality. This unacceptable solution allows inconsistent legal interpretations to govern state practice, thus eroding the law of neutrality's normative force. Unpredictable state behavior undermines deterrent efforts that rely on the certainty of state responses to real or perceived provocation. The United States should highlight the shortcomings of the United Nations' case-by-case approach in international forums and urge formulation of clear rules that promote stability in cyberspace via foreseeable consequences for state behavior. They should equally argue against impractical legal frameworks that declare belligerent transmissions through neutral cyber infrastructure *per se* violations of international law. Universal application of an exception—like that of Article 8 in Hague Convention V—to *all* belligerent transmissions is the superior solution and preserves the law of neutrality's central purposes. The United States has wisely adopted this minority position[131] and now must advocate for other states to do the same.

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[130] U.N. Secretary-General, *supra* note 22, at 26/142.
[131] LAW OF WAR MANUAL, *supra* note 21, § 16.4.1.

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FUELING INNOVATION: RESOLVING AMBIGUITY AND STRIKING A BALANCE FOR MARKINGS ON UNLIMITED-RIGHTS DATA

MAJOR SARA J. HICKMON*

I. Introduction

A lawyer gets a call from a contracting officer located at a base that they support. The contracting officer oversees a contract for the acquisition of a major weapon system. The contractor must deliver all technical data for that weapon system as part of the contract. This critical information contains all the engineering data and descriptive documentation required to support the weapon system throughout its lifecycle. This data is voluminous, and ensuring the contractor delivers as required per the contract is a time-intensive process. To complicate matters, the markings on the technical data deliverables do not match the markings outlined in the applicable clauses of the Defense Federal Acquisition Regulation Supplement (DFARS). The contracting officer wants to know if they should accept or reject the deliverables as non-conforming. How will this issue impact the Department of Defense's (DoD) rights and ability to use and maintain this weapon system?

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The United States spends billions of dollars yearly on major weapon systems for the armed forces.[1] Just one of these systems contains thousands of drawings, millions of lines of software code, and hundreds of technical manuals.[2] A contractor's intellectual property markings on just a portion of this can significantly restrict the DoD's use of this data and its options for sustainment and future upgrades. This can ultimately lead to an undesirable vendor-lock situation where the government is locked into a sole-source contract with the contractor.[3] The DoD negotiates for certain data rights, and contractors' non-conforming markings placed on this data jeopardize all of the DoD's contracting teams' efforts and taxpayer dollars. Ambiguity and confusion in this area, as illustrated in the example above, cost even more taxpayer dollars. Every unclear marking that a contracting officer has to call and check on draws the acquisition process out even longer, costing time and valuable resources.

However, this problem is bigger than wasted taxpayer dollars. Today, more than ever, there is pressure for our military to develop and integrate new technologies to maintain and defend our nation's competitive edge against our adversaries.[4] The future of warfare lies within new technologies.[5] The use of autonomous and semi-autonomous drones in the conflict between Ukraine and Russia is just one recent example that demonstrated this firsthand.[6] Recognizing this, past and current

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[1] *Budget Basics: National Defense*, PETER G. PETERSON FOUNDATION (June 1, 2022), https://www.pgpf.org/budget-basics/budget-explainer-national-defense (citing OFF. OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2023 (2022)). In 2021 alone, the United States spent $141 billion on the procurement of weapon systems. *Id.*

[2] Howard Harris, Vanessa Cruz, David Frank, *Intellectual Property Markings*, DEF. ACQUISITIONS UNIV. (Nov. 26, 2022), https://www.dau.edu/library/defense-atl/blog/Intellectual-Property-Markings.

[3] *See* Virginia L. Wydler, *Gaining Leverage over Vendor Lock to Improve Acquisition Performance and Cost Efficiencies*, THE MITRE CORP. 7–8 (Apr. 1, 2014), https://www.mitre.org/sites/default/files/publications/gaining-leverage-over-vendor-lock-14-1262.pdf.

[4] Dr. Simona R. Soare & Fabrice Pothier, *Leading Edge: Key Drivers of Defence Innovation and the Future of Operational Advantage*, THE INT'L INST. FOR STRATEGIC STUD. (2021), https://www.iiss.org/blogs/research-paper/2021/11/key-drivers-of-defence--innovation-and-the-future--of-operational-advantage.

[5] GOVINI, NATIONAL SECURITY SCORECARD: CRITICAL TECHNOLOGIES EDITION (2022), https://govini.com/wp-content/uploads/2022/06/Govini-National-Security-Scorecard-Critical-Technologies.pdf [hereinafter GOVINI REPORT].

[6] *Id.*

presidential administrations have stressed the importance of innovation to keep pace with our adversaries in order to secure our national security.[7]

Accordingly, innovating and modernizing our military is a top priority included in the most recent National Security Strategy and the National Defense Strategy (NDS).[8] Data is critical to this innovation.[9] The 2022 NDS explicitly acknowledges that our military operations "rely on data-driven technologies and the integration of diverse data sources."[10] The most recent NDS pledges to "implement institutional reforms that integrate our data, software, and artificial intelligence efforts and speed their delivery to the warfighter."[11] To speed up this delivery, however, that data must be both readily accessible and implemented.[12] Allowing contractors to have the ability to muddy the waters by placing ambiguous markings on data, we risk losing the edge on the innovation that is so critical to fighting and winning the nation's wars. In the current operating environment, where the speed of data delivery is everything, this ambiguity in necessary data for DoD assets is something we cannot afford.

DFARS 227.252-7013(f) addresses what markings contractors can include on data deliverables to the government. In cases where the government has funded the complete research and development of an acquisition, the government receives an unlimited-rights license to the

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[7] *Id.*

[8] *See* PRESIDENT JOSEPH BIDEN, NATIONAL SECURITY STRATEGY (2022) [hereinafter BIDEN NSS] https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf . The NSS emphasizes that to have a "free, open, prosperous, and secure international order" we must "modernize and strengthen our military so it is equipped for the era of strategic competition with major powers." *Id.* at 10–11; *see also* U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY (2022) [hereinafter 2022 NDS], https ://media.defense.gov /2022/Oct/27/2003103845/-1/1/1/2022 -NATIONAL-DEFENSE-STRATEGY-NPR-MDR.PDF (discussing a systematic approach to technology innovation that places importance on data rights).

[9] *See* Michael C. Horowitz & Lauren Kahn, *Why DoD's New Approach to Data and Artificial Intelligence Should Enhance National Defense*, COUNCIL ON FOREIGN RELATIONS (Mar. 11, 2022, 7:17 AM), https://www. cfr.org /blog/why-dods-new-approach-data-and-artificial-intelligence-should-enhance-national-defense (explaining how the innovation of new technologies, especially artificial intelligence, relies on data access and integration).

[10] 2022 NDS, *supra* note 8, at 19.

[11] *Id.*

[12] *See* Matt Rumsey, *Envisioning Comprehensive Entity Identification for the U.S. Federal Government*, DATA FOUNDATION 14 (Sept. 12, 2018), https://static1.squarespace.com/static/56534df0e4b0c2babdb6644d/t/5bf43dea0ebbe8893997e363/1542733295008/2018-09-12_GLEIF-and-Data-Foundation_ResearchReport_Envisioning-Comprehensive-Entity-Identification-for-the-US-Federal-Government_v1.1.pdf.

intellectual property.[13] This means that while the contractor retains the "ownership rights" to the intellectual property, the contractor may not restrict the government's use and disclosure of data without the government's approval.[14]

Unlike other types of licenses, currently, under the DFARS, there is no standardized marking for data delivered under an unlimited-rights license. [15] This creates confusion on how exactly this data can be marked. This confusion played out firsthand in the Federal Circuit Court of Appeals case, *Boeing Co. v. Secretary of the Air Force*.[16] There, the Federal Circuit issued an opinion casting this area of the law into uncertainty when it ruled that markings that included language outside of the prohibitions contained in DFARS 252.227-7013(f) would be allowed as long as they did not interfere with the government's data rights.[17] However, the court left unsettled what that means.[18]

This decision created ambiguity for both the government and contractors regarding what exact markings are allowed on data deliverables. While this issue may appear benign at first glance, it is far from it. Data is crucial to the DoD acquisition strategy because it empowers the government to manage, sustain, and evolve defense systems.[19] The markings on this data dictate its use. Ambiguous markings create confusion, and confusion in intellectual property discourages innovation. Every questionable marking can cause a clog in the defense acquisition process and create potential litigation.[20] This slows down the already lengthy acquisition process, which ultimately slows down the delivery of key data and software to the warfighter. The United States

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[13] 10 U.S.C. § 3771(b)(1).
[14] DFARS 252.227-7103-5(a) (January 2025).
[15] DFARS 252.227.7013(f) (January 2025).
[16] Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321, 1323 (Fed. Cir. 2020).
[17] *Id.* at 1327.
[18] *See id.* at 1334.
[19] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-839, WEAPONS ACQUISITION: DOD SHOULD STRENGTHEN POLICIES FOR ASSESSING TECHNICAL DATA NEEDS TO SUPPORT WEAPON SYSTEMS (2006).
[20] *See* Stephanie Burris & Howard Harris, *Resolving Data-Rights Markings a Legal Battlefield*, DEF. ACQUISITION UNIV. (July 1, 2021), https://www.dau.edu/library/defense-atl/blog/Resolving-Data-Rights-Markings-a-legal-Battlefield.

cannot afford to slow down this process—timing is everything when trying to innovate technology to win wars.[21]

In 2022, the DoD proposed to amend various data rights clauses in the DFARS.[22] Among other provisions, the proposed amendment included a required marking on all noncommercial data deliverables where the government has unlimited rights.[23] In addition, the proposed amendment prohibited any other restrictive markings not outlined in the clauses of the DFARS.[24] After two years and much backlash from private industry, the final published rule struck any mention regarding markings on unlimited-rights data, leaving this issue unresolved.[25]

An amendment to the DFARS should be implemented to create a standard unlimited-rights marking that clears up the current ambiguity caused by the *Boeing* case but also allows the industry to put third parties on notice to protect its intellectual property rights. While the current state of the law surrounding data-rights markings needs to be clarified, the previously proposed rule, as drafted, should not be implemented as it strips contractors' ability to protect their intellectual property from third parties. Part IIA of this article will briefly define intellectual property and explain how data rights and data rights markings fit within the intellectual property legal construct. Part IIB of this article will discuss the current regulatory system surrounding data rights and data-rights markings, including the history and policies behind its implementation. Part III will discuss *Boeing Co. v. Sec'y of the Air Force* and the ambiguity left in its aftermath. Part IV will outline the DoD's prior proposed regulation and discuss the considerations for and against implementing this type of language, including a discussion of the concerns of the DoD and private industry. Finally, Part V will propose language for a sample marking that strikes a balance between the DoD and industry. This sample marking would resolve ambiguity by creating a standard unlimited-rights marking but

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[21] *See Promoting DOD's Culture of Innovation: Hearing Before the Committee on Armed Services House of* Representatives, 115th Cong. 115-102 (2018) (statement of Hon. Michael D. Griffin, Under Sec'y of Def. for Rsch. and Eng'g, Dept. of Def.).

[22] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. 77,680 (Dec. 19, 2022) (to be codified 48 C.F.R. pt. 212, 227, 252).

[23] *Id.* at 77,681.

[24] *Id.*

[25] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. 103,338 (Dec. 18, 2024) (to be codified 48 C.F.R. pt. 212, 227, 252).

would also allow the industry to put third parties on notice to protect its intellectual property rights.

II. Background

A. Intellectual Property & Data Rights

When a contractor enters into an agreement with the government to develop an acquisition, for example, a large weapons system containing complex technology, there are also associated intellectual property rights provisions negotiated and included in the contract. Intellectual property is the "intangible rights protecting commercially valuable products of the human intellect."[26] Under the current legal paradigm, categories of protections include patents, copyrights, trademarks, and trade secrets.[27] Under this construct, it is very common for owners of intellectual property to include various markings and symbols to protect their ownership rights and put other parties on notice.[28]

When contracting for a given acquisition, the government only receives a use license for the intellectual property, with the contractor retaining the actual ownership rights.[29] It can be helpful to think of intellectual property rights as a bundle of sticks. These sticks are different things that can be done with intellectual property now and in the future. The contractor gives the government some of the sticks out of that bundle but retains the rest.[30] For example, some of these uses may include the ability to use and modify the data or potentially even give it to another contractor to use in a government contract.[31] But, the government could

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[26] *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[27] *Id.*
[28] DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464; 33,465 (June 28, 1995) (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets." *Id.*); OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS, at 4-4 (Oct. 15, 2001) [hereinafter NAVIGATING THROUGH COMMERCIAL WATERS] (explaining that the "DoD's way of handling a contractor's previously developed, copyrighted material, proprietary data, and trade secrets is through the application of restrictive legends on deliverable data." *Id.*).
[29] JAMES G MCEWEN ET AL., INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS: PROTECTING AND ENFORCING IP AT THE STATE AND FEDERAL LEVEL 66 (1st ed. 2009).
[30] *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773–74 (Tex. 2021).
[31] MCEWEN, *supra* note 29, at 74–80.

not sell the data outright to another contractor for profit as it does not own the underlying intellectual property rights in the data. The license obtained by the contractor allows the government to use the intellectual property in specific ways but does not transfer ownership outright, as various restrictions would still apply.[32]

This license the contractor provides the government covers both technical data and computer software.[33] Technical data is all recorded data that goes into the manufacture, design, and repair of items or processes acquired by the government.[34] Computer software is the actual program and the source code that can recreate the computer program.[35] (From here out, these terms will be referred to collectively as "data.") The rights in this data can be an extremely valuable intellectual property right in and of itself.[36] This data is inextricably interwoven into all of the DoD's weapon systems and infrastructure, and the regulatory framework of how intellectual property rights have been divided between the government and contractors over the years has varied dramatically.[37]

B. Regulatory History & Framework Around Data Rights

Balancing the division of data rights between private industry and the government has been a struggle for decades.[38] While challenging to achieve, this balance is of national importance. Early approaches by the government primarily focused on keeping maximum rights in all data.[39]

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[32] *Id.* at 65–66.
[33] *Id.* at 65–69.
[34] DFARS 252.227-7013(a)(15) (January 2025).
[35] DFARS 252.227-7013(a)(3) (January 2025).
[36] *See Valuing Intellectual Property Assets*, WORLD INTELL. PROP. ORG, https://www.wipo.int/sme/en/ip-valuation.html (last visited Mar. 10, 2023); *see also* Jeff E. Schwartz, *The Acquisition of Technical Data Rights by the Government*, 23 PUB. CONT. L.J. 513, 521(1993) (explaining how in some instances the intellectual property rights and ability to go and commercialize the technology is worth far more than what the government is paying the contractor to develop the technology).
[37] *See* Cubic Def. Applications, Inc., ASBCA No. 58519, 2018-1 B.C.A. ¶ 37049, 180359.
[38] *Id.*
[39] ACQUISITION LAW ADVISORY PANEL, REPORT OF THE ACQUISITION LAW ADVISORY PANEL TO THE U.S. CONGRESS, Executive Summary at 53-54 (1993) [hereinafter SECTION 800 PANEL REPORT], https://apps.dtic.mil /sti/pdfs/ADA264919.pdf. This report was transmitted to the congressional defense committees as directed by §800 of the 1991 National Defense Authorization Act (NDAA), Public Law No. 101-510, and is commonly known as the Section 800 Panel Report.

This changed during the 1980s and 1990s when it became apparent that the private sector's technological innovation in weapon systems was dramatically outpacing the DoD.[40] The DoD's old approach to data rights and intellectual property left contractors reluctant to work with the government for fear their intellectual property would be lost.[41]

Then, in 1986, Congress intervened by amending the Rights in Technical Data statute.[42] This amendment required the DoD to "prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."[43] In addition, it required that "[s]uch regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law."[44] Congress additionally set up a data-rights scheme based on the funding source, i.e., whether the government or the contractor funded the project, and outlined corresponding license types for the different funding variations.[45]

To fulfill this congressional mandate, the DoD issued different iterations and drafts of various contract clauses within the DFARS.[46] These regulations are intended to establish a balance between the interests of the DoD and industry. The regulations were designed to promote creativity and innovation and to encourage firms to offer the DoD new technology.[47] In addition, the drafters specifically distinguished data from products commonly sold on commercial markets from noncommercial data from specialized government products.[48] Generally, noncommercial acquisitions are those in which there is no commercial market; e.g., these are "highly specialized" acquisitions involving items such as "advanced fighter jets, precision munitions, [and] nuclear submarines."[49] When

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[40] *Id.* at 53–54.
[41] *Id.*
[42] Rights in Technical Data, 10 U.S.C. § 2320 (1986) (current version at 10 U.S.C. § 3771).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *See* DFARS: Rights in Technical Data, 59 Fed. Reg. 31,584 (June 20, 1994); DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464 (June 28, 1995).
[47] DFARS: Rights in Technical Data, 59 Fed. Reg. at 31,584 (June 28, 1995).
[48] *Id.* at 31,587.
[49] ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE U.S. CONGRESS, at 1 (2007), https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITIONADVISORY-PANEL-2007-Report_final.pdf.

dealing with noncommercial data, the DFARS set up categories of standard rights licenses that contractors provide to the DoD.[50]

Congress first created these categories, which were further defined by DFARS 227.7103, establishing four licenses for noncommercial data.[51] These categories include unlimited rights, government purpose rights, limited rights, and specially negotiated license rights.[52] Consistent with the statute, the funding source is the key criterion in determining which license rights the government obtains.[53] For the most part, the greater level of government funding equates to a greater level of rights granted.[54] The unlimited-rights license pertains to situations where the item being developed was exclusively government-funded.[55] Importantly, under this license, the government has no restrictions, and contractors may not restrict the government's use and disclosure of data without the government's approval.[56]

While the effect of data markings on the government's unlimited-rights license is the primary focus of this article, understanding the other license types is also helpful in understanding the broader legal construct. The two types of licenses that provide the government with the fewest rights and the contractor with the most intellectual property protections are limited use (applicable for technical data) and restricted use (applicable for computer software). [57] These licenses are applicable when the technology is financed entirely with private funding.[58] These licenses only allow for the use and distribution of data within the government and, with only a few exceptions, prohibit any release outside the government.[59]

Government purpose rights licenses are applicable when a mix of government and private funding is used to develop an acquisition.[60] In

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[50] DFARS 252.227-7103-5.
[51] DFARS 227.7103-5(a)–(d).
[52] *Id.*
[53] *See, e.g.*, DFARS 227- 7103-5(a)(1), (b)(1)(i), & (c)(1)(i).
[54] 10 U.S.C. § 3771(b)(1) (mandating that when an item or process is "developed by a contractor or subcontractor exclusively with Federal funds," the government "shall have the unlimited right to- (A) use technical data pertaining to the item or process; or (B) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons." *Id.*)
[55] DFARS 252.227-7013(b)(1); DFARS 252.227-7014(b)(1).
[56] MCEWEN, *supra* note 29, at 80; DFARS 252.227-7103(b).
[57] DFARS 252.227-7013(a)(14); DFARS 252.227-7014(b)(3).
[58] DFARS 252.227-7013(b)(3); DFARS 252.227-7014(b)(3).
[59] DFARS 252.227-7013(a)(13); DFARS 252.227-7014(a)(14)(i)-(iii).
[60] DFARS 252.227-7013(b)(2); DFARS 252.227-7014(b)(2).

these cases, the government obtains a license allowing unlimited use and distribution within the government, which can also be released to parties outside the government if there is a "Government Purpose."[61] Unless the parties agree otherwise, a government-purpose license will become an unlimited-rights license after five years.[62] Finally, parties can craft whatever license agreement they can agree upon under a specially negotiated license.[63] This allows the parties to agree on whatever restrictions they believe are appropriate as long as the license provides no less than the limited/restricted use license.[64]

The DFARS further requires that contracts dealing with noncommercial data delivered to the government contain a particular clause outlined in DFARS 7013.[65] This clause, referred to as -7013(f), requires two main things. First, it "require[s] a contractor that desires to restrict the government's rights in technical data to place restrictive markings on the data."[66] Second, it instructs the "placement of the restrictive markings, and authorizes the use of certain restrictive markings."[67] Finally, the DFARS provides the government the right to conformity within the markings placed on data deliverables. Specifically, it provides, without qualification or exception, that "[a]uthorized markings are identified in the clause at 252.227-7013, Rights In Technical Data-Noncommercial Items" and "[a]ll other markings are non-conforming markings."[68]

The interpretation of the above-discussed statutes and regulations was directly at issue in an appeal the Boeing Company made to the Armed Services Board of Contract Appeals (ASBCA) after the contracting officer, in that case, rejected data deliverables that Boeing made under a large contract with the United States Air Force.[69]

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[61] DFARS 252.227-7013(a)(12); DFARS 252.227-7014(a)(11).
[62] DFARS 252.227-7013(b)(2)(ii); DFARS 252.227-7014(b)(2)(ii).
[63] DFARS 252.227-7013(b)(4); DFARS 252.227-7014(b)(4).
[64] *Id.*
[65] DFARS 252.227-7103-6(a).
[66] DFARS 252.227.7103-10(b).
[67] *Id.*
[68] DFARS 227.7103-12(a).
[69] Appeals of Boeing Co., ASBCA Nos. 61387, 61388, 2021-1 BCA ¶ 37,762, 183308; Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).

III. The *Boeing* Case—Exposing Ambiguity in Data-Rights Markings

A. The ASBCA: Only Markings Contained Within the DFARS Are Authorized.

Boeing entered into a contract with the Air Force to equip the Air Force's F-15 with the Eagle Passive Active Warning Survivability System (EPAWSS).[70] The F-15 "is an all-weather, extremely maneuverable, tactical fighter designed to permit the Air Force to gain and maintain air supremacy over the battlefield."[71] The EPAWSS was designed to "equip the F-15 with advanced capabilities to jam radar, detect and geolocate threats to the aircraft, and fire antiaircraft missiles and expendable countermeasures."[72]

The contract required Boeing to deliver technical data to the government with an unlimited-rights license.[73] While performing the contract, Boeing submitted numerous technical data deliverables to the Air Force. The deliverables were originally marked with the following marking:

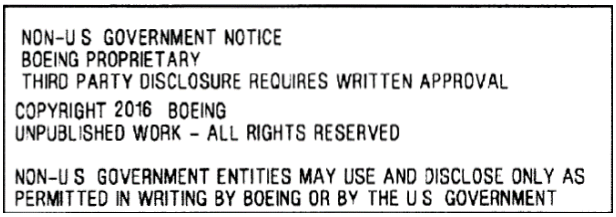

Figure 1. Boeing's Non-Conforming Marking[74]

The Air Force rejected the deliverables, maintaining that the markings on the data did not conform with DFARS 252.227-7013(f).[75] Boeing appealed the contractor's decision to the Armed Services Board of Contract Appeals (ASBCA) and requested a summary judgment.[76] Boeing

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[70] *Boeing Co.*, 983 F.3d at 1324-25.
[71] UNITED STATES AIR FORCE, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104501/f-15-eagle/ (last visited June 12, 2025).
[72] Brief for Appellant at 8, Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321, No. 2019-2147 (Dec. 20, 2019), ECF No. 15.
[73] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183309.
[74] *Id.*
[75] *Id.* at 183310.
[76] *Id.* at 183308.

argued that the markings on the technical data conformed with the contract and DFARS 252.227-7013(f) and asserted that the Air Force wrongly rejected the deliverables.[77] The board denied the summary judgment and dismissed Boeing's appeal.[78]

At the core of the dispute was the interpretation of DFAR 252.227-7013(g), [79] which provides:

> (g) Marking requirements. The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (g)(6) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; or the special license rights legend at paragraph (g)(5) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402. [80]

Focusing on the first sentence, Boeing took the position that because it was not asserting restrictions on the government's data rights, only the rights of third parties therefore, paragraph -7013(f) had no bearing on the dispute.[81] In contrast, the government relied on the second sentence in paragraph -7013(f) and took the position that the only authorized markings were those specifically referenced.[82]

Applying core principles of contract interpretation, the board found that Boeing's markings were non-conforming under the terms of the contract.[83] The board agreed with the Air Force that the second sentence in paragraph -7013(f) provided that the referenced markings are the only permissible markings for limiting data rights and that no other markings

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[77] *Id.*
[78] *Id.*; Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).
[79] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183313.
[80] DFAR 252.227-7013(g).
[81] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183313.
[82] *Id.*
[83] *Id.* at 183312–14.

are allowed.[84] In coming to this conclusion, the board reasoned that paragraph -7013(f) "speaks not only of legends that limit the government's rights but also a notice of copyright that would, in fact, provide notice to or limit the actions of third parties."[85] The board also concluded that other parts of the DFARS supported this reading of the regulation. Specifically, DFARS 227.7103-12(a)(1) states that "[a]uthorized markings are identified in the [-7013 clause]" and admonishes explicitly that "[a]ll other markings are non-conforming markings."[86]

Another important aspect of the board's decision is its discussion of Boeing's trade secret protections and the interplay they would have when delivering data under an unlimited-rights license. Boeing argued that the government's interpretation of the statute "fail[ed] to protect its intellectual property rights as required by 10 U.S.C. § 2320."[87] While refusing to rule on the issue in the summary judgment forum, the board, *in dicta*, concluded that Boeing lost any potential trade secret protections as soon as it delivered the data to the government with an unlimited-rights license.[88]

B. The Federal Circuit Court of Appeals Reversed the ASBCA.

After losing at the ASBCA, Boeing appealed to the Federal Circuit Court of Appeals. The Federal Circuit ultimately reversed the ASBCA's decision and remanded the case for further proceedings.[89] Interpreting paragraph -7013(f) entirely differently from the ASBCA, the Federal Circuit agreed with Boeing that this particular paragraph was only applicable when the markings interfered with the government's data rights.[90] The court concluded that the "plain language of the first sentence in Subsection [-]7013(f) makes clear that the two sentences together are describing the way in which a contractor 'may assert restrictions on the

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[84] *Id.* at 183313.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 183311.
[88] *Id.* (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Conax Florida Corp. v. United States, 824 F.2d 1124, 1128–30 (D.C. Cir. 1987) (holding that a contracting officer's reasonable determination that Navy received unlimited data rights meant that contractor had no trade secret to protect)).
[89] Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).
[90] *Id.* at 1327.

government's rights.'"[91] Citing a canon of statutory interpretation, the Federal Circuit reasoned that the board's interpretation was flawed because it stripped away the meaning of the first sentence of the paragraph in question.[92] This interpretation rendered it superfluous when each word and sentence in a statute and regulation should be given meaning.[93]

The court further dismissed the board's logic regarding the inclusion of copyright license markings to mean that this also applied to markings that affected third parties.[94] In so doing, the court stated that the "fact that an authorized restriction might also restrict the rights of third parties in addition to the government's rights is immaterial."[95] The court concluded this point by surmising that because the copyright legend could restrict the government, it was consistent with the court's interpretation. [96]

Finally, the Federal Circuit dismissed the government's argument that the regulatory history supported the reading that the two sentences in paragraph -7013(f) addressed two separate issues and did not limit each other.[97] The court was unpersuaded by these arguments, stating that the regulatory history did not convince them to abandon what the court believed to be the plain reading of -7013(f).[98] Ultimately, the court reversed the board's summary judgment decision.[99] However, the "unresolved factual dispute remain[ed] between the parties regarding whether Boeing's proprietary legend, in fact, restricts the government's

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[91] *Id.*

[92] *Id.* at 1327–28 (citing TRW Inc. v. Andrews, 534 U.S. 19, 32 (2001)) (holding that "[i]t is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' . . . . We are 'reluctant to treat statutory terms as surplusage in any setting.'" *Id.*) (internal citations omitted)).

[93] *Boeing Co.*, 983 F.3d at 1327-28.

[94] *Id.* at 1328.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1331. The government argued that prior to the implementation of Subsection -7013(f), there were numerous ways for a contractor to restrict government data rights. Therefore, the government's argument was that the purpose of the first sentence in paragraph -7013(f) was to establish marking as the only way to restrict the government's rights. *Id.* (citing the Brief for Appellee, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147 (Mar. 30, 2020) ECF No. 22) (citing *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415 (Sept. 23, 1985)).

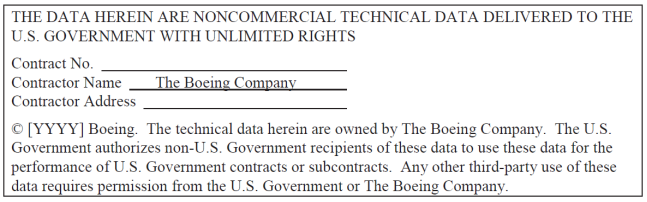
[98] *Id.*

[99] *Id.* at 1334.

rights." [100] The court remanded the case to the board for further proceedings consistent with its decision.[101]

C. Reaching a Settlement Agreement.

Instead of litigating the remaining issue of whether the disputed proprietary marking actually restricted the government's rights, the parties entered into a settlement agreement on November 17, 2022.[102] As part of the settlement, the parties compromised and agreed to affix the following marking, referred to as the "Permissible Third-Party Legend," to all noncommercial technical data delivered under the EPAWSS contracts with unlimited rights:


THE DATA HEREIN ARE NONCOMMERCIAL TECHNICAL DATA DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No. _____
Contractor Name The Boeing Company
Contractor Address _____

© [YYYY] Boeing. The technical data herein are owned by The Boeing Company. The U.S. Government authorizes non-U.S. Government recipients of these data to use these data for the performance of U.S. Government contracts or subcontracts. Any other third-party use of these data requires permission from the U.S. Government or The Boeing Company.

Figure 2.Permissible Third-Party-Legend.[103]

Interestingly, the parties' agreement went even further. They agreed that in order to "minimize further disagreements on this subject . . . and to improve consistency of markings, the Parties agree to consider the use of the Permissible Third-Party Legend for noncommercial, unlimited rights technical data delivered under other contracts between the Parties."[104] While the parties agreed to consider using this Permissible Third-Party Legend, they also stated that each case would be decided on a case-by-case basis, considering factors such as pre-existing agreements and changes in law, regulation, or policy.[105]

In addition, the Air Force carefully included a disclaimer in the settlement agreement that it took no position on "whether the Permissible

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[100] *Id.*
[101] *Id.*
[102] Order of Dismissal at 7, *Appeals of Boeing Co.*, 2018 ASBCA LEXIS 352 (Dec. 6, 2022) (No. 61387, 61388) [hereinafter Order of Dismissal].
[103] *Id.* at 4.
[104] *Id.* at 5.
[105] *Id.*

Third-Party Legend does, or does not, preserve any proprietary or trade secret interests that Boeing might have, if any, in the underlying technical data. . . [nor] whether the Permissible Third-Party Legend does, or does not, create third-party liability under DFARS 252.227-7025(c)(2) or other legal theories."[106] Finally, the parties agreed that the government would have the unilateral right to strike through the Permissible Third-Party Legend if the Air Force decided to authorize the underlying data for public release.[107]

D. What Ambiguities Are Left Unresolved?

With the entire case saga now at an end, there are still numerous questions left unanswered. Despite the ASBCA discussing trade secrets at length, the Federal Circuit's decision did not mention trade secret rights and the effect that providing an unlimited-rights license to the government had. [108] Even though the Air Force strenuously argued in its brief to the Federal Circuit that Boeing lost any trade secret or proprietary interest in the data when it was delivered with unlimited rights to the government,[109] the settlement agreement included a provision that the Air Force took no position regarding this point.[110]

While the Federal Circuit held that paragraph -7013 only applied to markings that restricted the government's rights, it said nothing about whether that particular marking actually restricted the government's rights. Instead, the court simply reversed the decision of the ASBCA and remanded for further proceedings. However, because the parties entered into the settlement agreement, the board will never issue a decision settling the ultimate issues.

Because neither the ASBCA nor the Federal Circuit ever settled these issues, numerous questions remain, leaving uncertainty and ambiguity in this area of the law. It is currently unclear what exact markings are allowed on unlimited-rights data. Does a marking that contains third-party notices similar to Boeing's original marking restrict the government's rights? Does not allowing a contractor to include a notice to third parties

[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Brief for Appellee, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147, 55–60 (Mar. 30, 2020), ECF No. 22.
[110] Order of Dismissal, *supra* note 102, at 5.

impermissibly restrict their rights in its intellectual property? These questions currently leave a legal grey zone that demands to be answered.

IV. DoD Proposed to Amend the DFARS, Adding an Unlimited-Rights Data Marking

On December 19, 2022, the DoD took steps to clarify this area of the law by proposing to amend various data-rights clauses contained in the DFARS.[111] The proposed rules focused on implementing data-rights portions of the Small Business Innovative Research Program and Small Business Technology Transfer Program.[112] Included within the proposed revisions, the DoD proposed to update the marking requirements to require an "unlimited rights" marking for technical and software data provided to the government.[113] The newly proposed unlimited-rights marking was as follows:

Unlimited Rights
Contract Number _____
Contractor Name _____
Contractor Address _____

The Government has unlimited rights in this technical data or computer software pursuant to DFARS 252.227–7013, Rights in Technical Data—Noncommercial Items; DFARS 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; or DFARS 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of the above identified contract, as applicable. This marking must be included in any reproduction of this technical data, computer software, or portions thereof.

Figure 3.DoD's Proposed Unlimitied-Rights Marking.[114]

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[111] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,680–81.
[112] *Id.* at 77,680. Advanced notice of proposed rulemaking was previously provided on August 31, 2020. *Id.* Based on public comments, edits were made to the proposed rule to include changes to other DFARS clauses—specifically, the unlimited rights clauses discussed in Parts II.B. and III.A. of this article. *Id.*
[113] *Id.* at 77,680–81. These proposed amendments added to the pending DFARS case 2019-D043 that dealt with implementing the data-rights portions of the Small Business Innovative Research Program Policy directives. *Id.* at 77680.
[114] *Id.* at 77,692.

The announcement of the proposed regulation explained that these provisions were included to ensure clarity and consistency for data-rights markings under the DFARS.[115] Under the current regulatory paradigm, there are no "unlimited-rights" marking.[116] As such, government personnel may find it unclear whether data provided with no markings has been provided with unlimited rights or whether a restrictive marking was accidentally omitted.

In addition, the DoD proposed to amend certain provisions in the DFARS to prohibit any restrictive marking on noncommercial technical data and software other than those restrictive markings expressly provided for in the DFARS.[117] This change directly addressed the Federal Circuit's decision in *Boeing Co. v. Sec'y of the Air Force*, even mentioning the case by name when explaining this provision.[118] The proposed rule states that this provision clarifies the "long-standing intent of the DFARS marking requirements to limit restrictive markings on noncommercial technical data and software to those specified in the clauses."[119] This was essentially the argument made by the government in the *Boeing* case that the Federal Circuit rejected.[120]

The DoD's announcement included an analysis of the expected impact of the proposed rules.[121] This analysis focused almost exclusively on small businesses and the proposed changes that would directly impact them.[122] The analysis does mention that it would require all contractors only to use the newly proposed restrictive markings contained in the DFARS clauses.[123] However, the proposed rule provides no analysis of the potential widespread impact that the other more general provisions would have on industry as a whole.[124]

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[115] *Id.* at 77,681.
[116] DFARS 252.227-7013.
[117] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,681.
[118] *Id.*
[119] *Id.*
[120] Brief for Appellee, *supra* note 111, at 26–28; *Boeing Co.*, 983 F.3d 1327, 1330–31.
[121] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,685–86.
[122] *Id.*
[123] *Id.* at 77,691.
[124] *Id.* at 77,685–86.

Not surprisingly, private industry strenuously objected to the new proposed marking requirements.[125] Among them, the concern that the proposed marking requirements would result in contractors losing all rights in their technical data upon delivery to the Government.[126] After multiple comment period extensions to address the numerous concerns, all regulatory changes not relating to Small Business Innovation Research (SBIR) were removed from the final rule.[127]

Even though the language having to do with unlimited-rights data markings was removed from the final rule, it was only done so in order to finalize the other SBIR portions and to allow additonal consideration on the unlimited-rights data markings.[128] It is clear that there is still a need to clarify this area of the law and additional regulation is necessary. This article will next analysize the previously proposed provisions having to do with unlimited-rights markings and discuss the impacts and considerations of both the DoD and contractors of implementing this type of language.

A. Considerations That Support Implementation

1. Current Ambiguous State of the Law

After the Federal Circuit's opinion in the *Boeing* case, it is unclear what exact markings would and would not restrict the government's unlimited-rights license and, therefore, would be prohibited by the current regulatory data-rights scheme. As there is no case law providing parameters to prevent contractors from putting third-party markings on data, they currently have carblanche to put whatever marking they desire, as long as it is aimed at third parties and not the government. This creates confusion, especially when no specified unlimited-rights marking exists.

As noted in the previously proposed rule, whenever data deliverables are left blank under the current state of the law, it is unclear whether this

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[125] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. at 103,338; *see also* Aerospace Indus. Assc., Comments to the Proposed Rule for DFARS Case 2019–D043, "Small Business Innovation Research Data Rights" (Mar. 20, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0022.

[126] Aerospace Indus. Assc., Comments to the Proposed Rule for DFARS Case 2019–D043, "Small Business Innovation Research Data Rights" (Mar. 20, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0022, at 8.

[127] DFARS: Small Business Innovation Research Data Rights, 89 Fed. Reg. at 103,338.

[128] *Id.*

is because it was inadvertently omitted or because it was delivered with unlimited rights.[129] This problem would benefit from the standardization of one unlimited-rights marking for all unlimited-rights data deliverables. One standardized marking would greatly assist with the government's review of data deliverables to ensure it was getting what it bargained for, and that the contractor was delivering as agreed upon under the contract. Standardization would help in other regards as well.

2. One Standardized Marking Could Save Money & Fuel Innovation

As discussed at the beginning of this paper, the United States spends billions of dollars yearly on major weapon systems.[130] The data in these weapon systems is absolutely critical to the innovation, operation, and sustainment of these DoD assets.[131] When the government spends the money to fund the development of these assets, it is crucial that the government gets the unlimited-rights license that it contracted for, and that is often desired for the lifecycle management of the weapon system. This avoids numerous potential issues later in the acquisition's lifecycle, especially an undesirable vendor-lock situation.[132]

One of the fundamental concepts underlying government procurement law is that competition in the market keeps overall prices down and increases quality.[133] Competition would be negatively affected when a contractor places markings on data, potentially restricting the government from providing that data to third parties to solicit follow-on maintenance

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[129] *Id.* at 77,681.

[130] *Budget Basics: National Defense*, *supra* note 1.

[131] *See DOD Issues New Data Strategy,* U.S. DEP'T OF DEF. (Oct. 8, 2020) https://www.defense.gov/News/Releases/Release/Article/2376629/dod-issues-new-data-strategy/.

[132] *See* DFARS 207.106(b)(1)(B)(2); *see also* Burris, *supra* note 21 (explaining that non-conforming markings on data impacts "DoD's ability to use data in competitive procurements, potentially interfering with the DoD's ability to comply with competition requirements in the Competition in Contracting Act, 41 U.S.C. §253, and FAR Part 6, Competition Requirements." *Id.*).

[133] *See* ADAM SMITH, THE WEALTH OF NATIONS 477 (Edwin Canaan, ed., Univ. of Chi. Press 1976) (1776); *see also* Professor Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

and sustainment services.[134] This situation should not happen where the government has unlimited rights. However, a third party could easily see the marking and not want to get involved with an acquisition if it thought it could potentially be liable for infringing the original contractor's intellectual property rights.[135] A standardized marking resolves ambiguity not only for the government but industry as a whole, leading to an increased opportunity for competition which thereby saves taxpayer dollars in the long run.

The standardization would also save governmental time and effort, which would, in turn, also pass savings along to the taxpayer.[136] Currently, because of the ambiguity and lack of standardization, it takes a considerable amount of time for the government to check the thousands and thousands of pages of data deliverables from any given acquisition to ensure that the markings conform with the contract. As the scenario at the beginning of this article illustrates, every ambiguous marking causes a potential obstacle in an already complex system. Every call back to a contractor or an attorney causes delays in the overall acquisition process and additional expenses.

The second- and third-order effects of standardizing unlimited-rights markings would also further technological innovations. As discussed above in Part I, data fuels innovation. Many new technologies, including artificial intelligence, depend on mass amounts of data to develop and maintain the technology.[137] Allowing contractors to muddy the waters by placing any marking they want on data slows down the entire acquisition process. These data deliverables are often hundreds and thousands of pages. The government must inspect all of these pages to ensure that any markings conform with the contract provisions. Then ideally, the data has to be able to be shared easily within the government and uploaded to

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[134] *See* Elec. Sys. U.S.A., Inc., B-200947, 81-1 CPD ¶ 309 (Comp. Gen. Apr. 22, 1981) (sustaining a protest in a sole-source award for lack of competition where the agency failed to do adequate research and based justification of sole source primarily on the claim that the incumbent contractor owned proprietary rights in the required technology).

[135] *See* Burris, *supra* note 20 (explaining that non-conforming markings can lead to "[t]hird parties' refusal to accept documents with nonconforming, restrictive markings. This refusal can create a sole-source environment and increase the risk of suboptimal outcomes." *Id.*).

[136] *Id.* (Another impact of non-conforming marking on data is an "enormous loss of time, effort, and taxpayer dollars spent by DoD personnel addressing and resolving disputes with contractors over nonconforming markings. This also leads to a loss of productivity and efficiency in executing critical programs.")

[137] *See DOD Issues New Data Strategy*, *supra* note 131.

various databases in order for it to be utilized efficiently to innovate within the DoD.[138] Any pause in this process will cause ripple effects that ultimately lead to a delay in delivery to the warfighter. This is especially true in the area of unlimited-rights data markings because this typically involves the development of specialized noncommercial large weapon systems—the innovation of which our country cannot afford to delay.

While a standardized unlimited rights marking would resolve ambiguity, save taxpayer dollars, and fuel innovations, there are also considerations against implementing the types of marking that was previously proposed that could have an overall negative impact.

B. Considerations Against Implementation

1. Protection of Intellectual Property Rights from Third Parties.

As discussed in Part IIA, various ways to protect intellectual property include patents, copyrights, trademarks, and trade secrets.[139] Out of the various options available, contractors often rely on trade secrets to protect their intellectual property rights contained in the technical data and computer software provided to the government for an acquisition.[140] The main reason contractors rely on trade secrets versus a patent is because obtaining a patent requires that the information first be publicly disclosed through a patent application.[141] Patents also have costs associated with the filing and maintenance required to obtain and maintain the patent, whereas trade secrets do not.[142] However, in order for intellectual property to be protected as a trade secret, the owner must make reasonable efforts to keep the information secret, and the information must provide an economic

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[138] *See* Rumsey, *supra* note 12, at 14; *see also DOD Issues New Data Strategy*, *supra* note 131.

[139] *Intellectual Property*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* DFARS: Rights in Technical Data, 60 Fed. Reg. 33,464, 33,465 (June 28, 1995) (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets"); NAVIGATING THROUGH COMMERCIAL WATERS, *supra* note 29, at 2-1.

[140] S. A. Browne, Patents for Soldiers 74 (June 10, 2016) (MMAS dissertation, U.S. Army Command and General Staff College); *see also* U.S. DEP'T OF ARMY, CHANGE 1, IMPLEMENTATION GUIDANCE TO ACCOMPANY ARMY DIRECTIVE 2018-26 ENABLING MODERNIZATION THROUGH MANAGEMENT OF INTELLECTUAL PROPERTY 7 (17 Dec. 2020) [hereinafter ARMY DIR. 2018-26 GUIDE].

[141] ARMY DIR. 2018-26 GUIDE, *supra* note 140; Browne, *supra* note 140, at 75.

[142] Browne, *supra* note 140, at 74–77.

advantage to the owner over competitors who do not know the information.[143] The protection of trade secrets stems from state laws, as there was no federal trade secret law until 2016.[144]

While a trade secret may have advantages, a patent has much greater legal protections.[145] A patent holder can sue for infringement of their patent.[146] Whereas with a trade secret, if someone discovers the information on their own, the trade secret loses its value.[147] In addition, the only way to legally enforce a trade secret is after an "unauthorized disclosure" has occurred.[148] The requirements to enforce a trade secret are one of the reasons industry tries to limit and restrict the government's ability to use and disclose trade secret information.[149] Finally, because trade secret protections stem from state law, the protections offered and requirements to enforce trade secret protections can vary from jurisdiction to jurisdiction.[150]

Trade secret protections and the effect granting an unlimited rights license has on those protections was hotly contested in the *Boeing* case, both at the ASBCA and the Federal Circuit.[151] While the ASBCA agreed with the government in *dicta* that an unlimited rights license extinguishes any trade secret, the Federal Circuit did not address this issue.[152] There is case law to support each side's position. The government asserts that if an individual discloses their trade secret to someone who is under no obligation to protect the secrecy of the information, then its property rights are extinguished, and there is no longer trade secret protection.[153] The government argued that Boeing lost any trade secret protections as soon

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[143] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[144] Congressional Research Services. (Jan. 27, 2023) *An Introduction to Trade Secrets Law in the United States* (CRS Report No. IF12315). https://sgp.fas.org/crs/secrecy/IF12315.pdf.
[145] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[146] *Id.*
[147] *Id.*
[148] Browne, *supra* note 140, at 75.
[149] ARMY DIR. 2018-26 GUIDE, *supra* note 140, at 7.
[150] *See* CRS, *supra* note 144; *see also* R. Mark Halligan, *Protecting U.S. Trade Secret Assets in the 21st Century*, 6 LANDSLIDE 12 (2013).
[151] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183311; Brief for Appellant, *supra* note 72, at 51–57; Brief for Appellee, *supra* note 109, at 55–60.
[152] *Appeals of Boeing Co.*, 2021-1 BCA ¶ 37,762, at 183311; *Boeing Co*., 983 F.3d 1321.
[153] Brief for Appellee, *supra* note 109, at 59 (citing Ruckelhaus v. Monsanto, Co., 467 U.S. 986 (1984); L-3 Comms. Westwood Corp. v. Robichaux, No. 06-279, 2008 WL 577560, at *6–7 (E.D. La. Feb. 29, 2008)).

as it provided the data to the government under an unlimited-rights license.[154] The government reasoned that as it is under no obligation to protect Boeing's property rights, Boeing would lose any trade secret protections because the government can do anything with the data under an unlimited-rights license.[155] This includes giving it to a third party or making it entirely public.[156]

Boeing argued that the government's position essentially meant that Boeing lost all property rights in the data as soon as it was delivered to the government. Boeing asserted that this was a position that the legislative and regulatory policy and history did not support.[157] The government made this argument, despite agreeing with Boeing that it still possessed all remaining property interests in the data after it was delivered to the government.[158] Boeing also cited numerous cases that supported its position that a contractor can still retain trade secret protections from third parties after data is delivered under an unlimited-rights license.[159] Ultimately, the Federal Circuit did not discuss trade secrets specifically. But, the court did agree with Boeing that it was entitled to protect its intellectual property rights from third parties, which lends support that the

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[154] Brief for Appellee, *supra* note 109, at 56–60.
[155] *Id.*
[156] *Id.*
[157] Appellant's Reply Brief at 35, *Boeing Co.*, 983 F.3d 1321, No. 2019-2147 (June 10, 2020) ECF No. 27.
[158] *Boeing Co.*, 983 F.3d at 1325, 1332.
[159] Brief for Appellant, *supra* note 72, at 51–57 (citing United States v. Liew, 856 F.3d 585, 601 (9th Cir. 2017) (explaining that "*Monsanto* does not stand for the principle that disclosure of trade secret information to a competitor who is not required to protect it destroys trade secret protection, nor has any court read *Monsanto* as establishing this principle"); GlobeRanger Corp. v. Software AG, 27 F. Supp. 3d. 723, 748 (N.D. Tex. 2014) (holding that if a "[i]f a voluntary disclosure occurs in a context that would not ordinarily occasion public exposure, and in a manner that does not carelessly exceed the imperatives of a beneficial transaction, then the disclosure is properly limited and the requisite secrecy retained"); Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir. 1991) (holding that filing architectural plans with a city does not make them public information within the context of trade secrets for the same reason); Vianet Grp. PLC v. Tap Acquisition, Inc., No. 3:14-cv-3601, 2016 WL 4368302 (N.D. Tex Aug. 16, 2016); Wellogix, Inc. v. Accenture, LLP, 823 F. Supp. 2d 555, 564 (S.D. Tex. 2011), aff'd, 716 F.3d 867 (5th Cir. 2013)).

court did, in fact, agree that trade secrets could survive a grant of an unlimited-rights license.[160]

One argument that the Federal Circuit specifically rejected was the government's argument that should Boeing want to include notices to third parties in the markings, it should have negotiated for a special license.[161] The court cautioned that this logic was problematic, explaining that if every contractor who needed to put third parties on notice had to negotiate a special license instead of using the standardized DFARS clause, the standardized clauses would no longer be useful.[162] Basically, these special licenses would cease to be special. This point is also a relevant consideration against implementing the proposed rule as written. If the proposed rule's language is not changed, a contractor would be left with no choice but to negotiate a special license to protect its trade secrets. Besides making the standardized contract clause no longer useful, this option is not feasible as so few government personnel are available with sufficient experience to be qualified to negotiate this type of license.[163]

Ultimately, to keep trade secret protection, the owner of the information must make reasonable efforts to keep the information secret.[164] In a typical situation where a contractor provides data to the government, the reasonable effort that the contractor takes to protect its trade secrets is ensuring that the information is marked properly.[165] This ensures that if the government gives the data to anyone outside the government, third parties are notified that there are still remaining intellectual property rights that the contractor owns. The DoD's previously

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[160] *Boeing Co.*, 983 F.3d at 1332 (explaining that "[o]ur interpretation of Subsection 7013(f) allows Boeing a bare minimum of protection for the data, namely, the ability to notify the public of its ownership" and the court concluded that "[a] contrary interpretation would result in Boeing *de facto* losing all rights in any technical data it delivers to the government." *Id.*).

[161] *Id.* at 1332.

[162] *Id.*

[163] *See* GOVERNMENT-INDUSTRY ADVISORY PANEL ON TECHNICAL DATA RIGHTS, 2018 REPORT, Paper 16 at 2 (Nov. 13, 2018) [hereinafter 813 PANEL REP.] https://www.ndia.org/-/media/Sites/NDIA/Policy/Documents/Final%20Section%20813%20Report (explaining the problem "that [Specially Negotiated License Rights (SNLR)] are difficult to negotiate, and that there are too few Government personnel available with enough experience, who are qualified to negotiate SNLR").

[164] Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 179 (7th Cir. 1991).

[165] DFARS: Rights in Technical Data, 60 Fed. Reg. at 33,465 (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets"); NAVIGATING THROUGH COMMERCIAL WATERS, *supra* note 28, at 4-4.

proposed rule would strip this ability away from the contractor, thus potentially stripping trade secret protections.

The previously proposed amendments to the DFARS data-rights clauses included a blanket prohibition against any other restrictive marking other than those specifically provided in the DFARS.[166] Any other markings, including those not directed at the government but directed explicitly at potential third parties, are not authorized and would be considered non-conforming markings.[167] Contractors are opposed to these proposed changes.[168] This is unsurprising given that intellectual property is often the "lifeblood of their company and often a primary source of profit."[169] However, the potential stripping away of intellectual property rights protections has even more significant implications.

2. The Previously Proposed Rule as Written Would Conflict with Statute.

Under 10 U.S.C. § 3771, Congress has tasked the DoD with the duty to "prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."[170] The statute then specifically prohibits any regulation that may "impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law."[171] If a contractor cannot include ownership notices in its data, it could be impaired—in violation of 10 U.S.C. § 3771(a)(2)—in its ability to discourage competitors from unauthorized use of its data.[172] Contractors must make reasonable efforts to keep the information secret. The proposed

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[166] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,691, 77,694.
[167] *Id.*
[168] Aerospace Indus. Ass'n, Comment Letter on Proposed Rule to DFARS: Small Business Innovation Research Data Rights (Feb. 2, 2023), https://www.regulations.gov/comment/DARS-2020-0033-0014.
[169] Burris & Harris, *supra* note 20.
[170] 10 U.S.C. § 3771(a)(2).
[171] 10 U.S.C. § 3771(a)(2). This was formerly 10 U.S.C. § 2320(a)(1) before the NDAA reorganized the statute.
[172] *Cf.* DFARS: Rights in Technical Data, 60 Fed. Reg. at 33,465 (noting that "[s]uch markings are commonly used in commercial practice to protract proprietary data or trade secrets").

rule's general restriction barring third-party notices strips that ability away and thus impairs the trade secret rights of contractors because they arguably would not be able to enforce their rights in a court of law. As the Federal Circuit concluded, this is the "bare minimum" protection a contractor would be entitled to—"namely, the ability to notify the public of its ownership."[173] The previously proposed rule would result in a contractor "*de facto* losing all rights in any technical data it delivers to the government."[174]

This type of regulation risks being struck down as unconstitutional if implemented in the proposed form. When implementing a statute into regulation, an agency must stay within the bounds of the authority granted to it by statute.[175] A regulation can be declared unconstitutional when it exceeds the scope of the statute under which it was promulgated.[176] This is evidenced by the regulation being contrary to or not in harmony with the statute's overall purpose.[177] Here, 10 U.S.C.§ 3771 specifically provides that the regulations implementing the statute shall not impair a contractor's rights in technical data. The general prohibition on additional markings contained in the proposed rule would infringe on a contractor's trade secret protections and therefore be contrary to the statute's scope. Because of this, the provision would likely be struck down as unconstitutional.

When Congress amended the Rights in Technical Data statute, it did so with the intent to strike a balance between the government and industry.[178] This was the legislative intent behind the implementation of this statute that specifically prohibits the impairment of any right of the government or any contractor with respect to their rights in technical data.[179] Disruption of this carefully-struck balance is not only contrary to the statute, but it could also stifle innovation.

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[173] *Boeing Co.*, 983 F.3d at 1332.
[174] *See id.*
[175] City of Arlington v. FCC, 569 U.S. 290, 297 (2013).
[176] *Id.*; Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337, 356 (E.D.N.Y. 2014); Barber v. La. Workforce Comm'n, 266 So. 3d 368, 380 (La. Ct. App. 2018).
[177] *Rocha*, 44 F. Supp. 3d at 356; *Barber*, 266 So. 3d at 380.
[178] *See* SECTION 800 PANEL REPORT, *supra* note 39, at 53–54, 5-1; *see also* Schwartz, *supra* note 36, at 524, 527.
[179] SECTION 800 PANEL REPORT, *supra* note 39, at 53–54, 5-1.

3. The Proposed Rule as Written Could Discourage Innovation

History should teach us lessons in this regard. Prior to Congress amending the Rights in Technical Data statute and its implementation into the DFARS, the government approached data rights with a take as much as you can type of attitude.[180] This policy discouraged private industry from wanting to do business with the government because it was essentially stripped of its intellectual property rights.[181] Because of this, a major policy shift occurred.[182] Beginning with adopting the DFARS provisions that implemented the amendments made to the Rights in Technical Data statute, the DoD's policy changed to only acquire the data rights necessary to satisfy its actual needs.[183] The new data-rights scheme that was implemented sought to establish a balance between the interests of the government and industry, specifically seeking to "encourage creativity, encourage firms to offer [the DoD] new technology, and facilitate dual-use development."[184]

The previously proposed rule would contradict this policy, as the DoD would now strip private industry's ability to protect its intellectual rights from third parties. The government does not need to do this. Industry can be allowed to put third parties on notice of its ownership rights without conflicting with the government's interests. Those same concerns that outlined the data-rights policy and regulatory scheme are still imperative today. The DoD needs creative, innovative contributions from industry and to maintain a robust industrial base. Industry needs to retain its ability to commercialize and protect its intellectual property rights in federally funded technologies. A balanced policy approach to data rights has continually been reaffirmed and linked to the importance of our national security. In 2018, then-Secretary of the Army Mark Esper reiterated the importance of being:

> [C]areful to ensure that the policies and practices governing [intellectual property] provide us with the

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[180] *See* 10 U.S.C. § 2320 (1986) (current version at 10 U.S.C. § 3771); s*ee also* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37 at 516–18, 521.

[181] *See* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37 at 516–18, 521.

[182] *See* SECTION 800 PANEL REPORT, *supra* note 41, at 53–54, 5-1; *see also* Schwartz, *supra* note 37, at 527.

[183] DFARS: Rights in Technical Data, 59 Fed. Reg. at 31,587.

[184] *Id.* at 31,585.

> necessary support for our weapon systems, but do not constrain delivery of solutions to the warfighter and do not dissuade commercial innovators from partnering with us. *This partnership with the industrial base is critical to developing the capabilities we need to be successful during future conflicts.*[185]

Currently, the United States is dealing with threats from near-peer adversaries, and specifically, U.S. National Security and National Defense Strategies are concerned with keeping pace with those adversaries.[186] Often, these adversaries have authoritarian-type governments that can make streamlining and encouraging technological innovations much easier and faster.[187] Democratic governing structure and economic systems of capitalism force the U.S. Government to work with industry in order to fuel innovation. Industry cannot be forced into compliance and be expected to continue to seek partnerships with the government. The proposed rule may make it easier for the government in the short term, but it will likely drive industry away and ultimately discourage innovation.

V. Balance Between the Two Positions Can and Should Be Struck

On the one hand, increasing competition and avoiding vendor-lock situations is important. There is also the need for clarity concerning what markings are authorized on data. Standardizing and streamlining the process of getting crucial data into the hands of the warfighter so it can actually be used is critical to innovation. However, these concerns must be balanced with the other policy objectives—primarily encouraging industry to invest its time, effort, and resources in working with the DoD to create these innovations in the first place.

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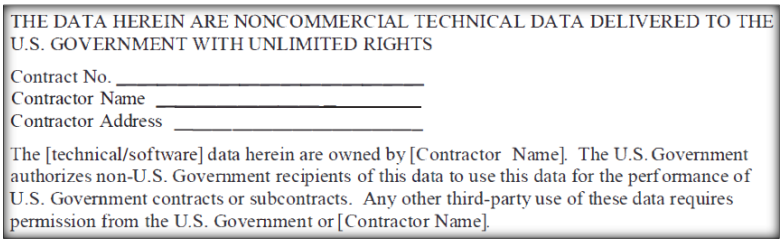
[185] U.S. DEP'T OF THE ARMY, DIR. 2018-26, ENABLING MODERNIZATION THROUGH THE MANAGEMENT OF INTELLECTUAL PROPERTY para. 2 (Dec. 7, 2018) [hereinafter AD 2018-26] (emphasis added).
[186] BIDEN NSS, *supra* note 8, at 23, 32; 2022 NDS, *supra* note 8, at 5, 7, 17.
[187] U.S. DEPT. OF STATE, MILITARY-CIVIL FUSION AND THE PEOPLE'S REPUBLIC OF CHINA, https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf (last visited June 12, 2025).

A. The "Permissible Third-Party Legend" Is a Great Place to Start to Strike a Needed Balance

Instead of the unlimited-rights marking contained in the previously proposed rule, the DoD should amend the DFARS to include an unlimited-rights marking that is similar to the "Permissible Third-Party Legend"[188] agreed upon by the parties in the *Boeing* settlement agreement. With some slight changes, this marking provides a great place to begin when striking a balance between the interests and concerns of the DoD and industry. Below is a sample marking created based on the Permissible Third-Party Legend:


THE DATA HEREIN ARE NONCOMMERCIAL TECHNICAL DATA DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The [technical/software] data herein are owned by [Contractor Name]. The U.S. Government authorizes non-U.S. Government recipients of this data to use this data for the performance of U.S. Government contracts or subcontracts. Any other third-party use of these data requires permission from the U.S. Government or [Contractor Name].

Figure 4. Sample Marking.[189]

This example would provide the standardized marking that the government needs and bring much-needed clarity to unlimited-rights data markings. But unlike the proposed rule's unlimited-rights marking, this sample marking would also allow contractors to protect their intellectual property by allowing them to have some ability to put third parties on notice that another contractor owns the data.

The proposed rule asserts that the amendments "allow the DoD to better protect the [intellectual property] interests of all of its industry partners."[190] As the proposed changes were written, that statement is simply not true. However, the sample marking allows contractors to notify the public of its ownership, thereby not infringing on the contractor's ability to enforce trade secret protections against third parties' unauthorized use of its intellectual property. As the Federal Circuit states, this is the "bare minimum protection for [its] data" a contractor is entitled

[188] Order of Dismissal, *supra* note 104, at 7.
[189] *Id.*
[190] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,681.

to under the law.[191] A marking that does not allow the contractor to have this ability would "result in [the contractor] *de facto* losing all rights in any technical data it delivers to the government."[192]

The sample marking is also much easier to read and understand than the marking contained in the proposed rule. When creating a marking, it is essential to think of the long-term implications of the marking itself. Most individuals reviewing these markings will not be lawyers, and markings should be created in a format a layperson can read and understand.[193] It should also be created in a way that assists the reader in understanding it without having to reference numerous outside sources. The majority of the information needed to understand the marking should be contained inside the actual marking. The marking in the proposed rule references four different sources that the reader would potentially have to go and look at to understand what can and cannot be done with the document in which the marking is affixed.[194] Additional confusion is unnecessary in an area already fraught with complex laws and regulations. The sample marking provided in this article is much simpler to read and understand as it has the majority of everything needed on its face to inform the reader what can and cannot do with the data.

Contractors could argue that the sample marking in this article would still be problematic. This is mainly because the proposed rule includes a provision that prohibits any other restrictive markings not explicitly provided for in the newly proposed DFARS 252.227–7013.[195] However, removing this entire provision would open back up the floodgates and reinsert similar ambiguity into the problem the proposed rule largely attempts to resolve. There is a need for a "transparent and consistent framework" that allows the DoD to efficiently process and correct any

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[191] *Boeing Co.*, 983 F.3d at 1332.

[192] *Id.* (emphasis in the original).

[193] *See* CREATIVE COMMONS, *About the Licenses*, https://creativecommons.org/licenses/ (last visited June 12, 2025).

[194] DFARS: Small Business Innovation Research Data Rights, 87 Fed. Reg. at 77,692. The marking in the proposed rule contains three references to various DFARS clauses and a reference to the clause in the contract that is also supposed to be referenced in the marking. *Id.*

[195] *Id.* at 77,691. The current proposed rule includes the following provision: "(2) Other restrictive markings. Any other restrictive markings, including markings that describe restrictions placed on third-party recipients of the technical data, are not authorized and are nonconforming markings governed by paragraph (i)(2) of this clause." *Id.*

non-conforming data markings.[196] Allowing contractors the ability to include any marking, so long as it does not restrict the rights of the government, would bring us back to a similar position that we were in without any amendments to the DFARS. Moreover, the concerns outlined in this article would remain unresolved.

V. Conclusion

It is clear that the current ambiguity in the realm of markings on unlimited-rights data needs to be resolved. Numerous considerations support the implementation of a standardized unlimited-rights marking, including increased competition, savings to the taxpayer, clarity for government and industry alike, and improved data usability to fuel innovation. However, none of these considerations justify the infringement on a contractor's ability to protect its intellectual property when another alternative is also available. The *Boeing* settlement agreement demonstrates that the government does not need to prevent a contractor from including third-party notices. A balance can and should be struck between the two positions. Maintaining the delicate balance between the government and industry in the realm of data rights is crucial to our country's continued national security. As such, the DoD should amend the DFARS to include a standardized unlimited-rights marking similar to the sample provided in this article.

[196] *Id.* at 77,686.

VOIR DIRE, VOIR DIRE, EVERYWHERE, BUT NOT A STRIKE TO SPARE: A DEFENSE-FOCUSED PROPOSAL TO INCREASE PEREMPTORY CHALLENGES IN MILITARY CAPITAL CASES

MAJOR JOSHUA R. STORM*

> *[D]eath is different in kind from any other punishment imposed under our system of criminal justice.*[1]

I. Introduction

Article 41(b)(1) of the Uniform Code of Military Justice (UCMJ) affords the accused and the prosecution each a sole peremptory challenge in any court-martial with members, making no distinction between capital and non-capital cases.[2] Notwithstanding decades of debate over the future of peremptory challenges in the United States legal system writ large, the peremptory challenge is critical to ensure a fair trial in capital courts-martial. In order to ensure that a military accused in a capital case fully benefits from such an important mechanism and to enhance the legitimacy and fairness of those proceedings, Congress should increase the number of peremptory challenges in capital courts-martial by providing every

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[1] Gregg v. Georgia, 428 U.S. 153, 188 (1976).

[2] UCMJ art. 41 (2016).

capital accused with ten peremptory challenges and the prosecution with five peremptory challenges per accused. This proposed increase will ensure military capital accused can leverage modern capital voir dire methods to shape panels that will fairly consider the question of life or death. By providing the accused twice as many peremptory challenges as the prosecution, the asymmetric increase will guard against discriminatory government challenges, the paramount concern of those seeking to abolish peremptory challenges entirely, while having little practical impact on the overall length of a capital case and the efficiency in the military justice system.

Notwithstanding the 1950 extension of this right to each accused in a joint trial[3] and the 1990 addition of a single additional peremptory in limited circumstances requiring additional members after initial challenges,[4] the single peremptory challenge persists unchanged in American military justice practice since first enacted by Congress for the Army within the 1920 amendments to the Articles of War.[5] This standard has resisted calls for expansion over the ensuing decades primarily due to concerns over the operational impact of detailing additional members to courts-martial to accommodate more peremptory challenges.[6] Concurrently, military justice reforms in general and increased constitutional requirements for imposing the death penalty, in particular, have resulted in a system in which capital courts-martial are far more complex, lengthy, and resource-intensive compared to general courts-martial under the 1920 Articles of War.[7]

The military justice system's single peremptory challenge is strikingly low compared to capital jurisdictions throughout the United States. Federal capital defendants have been entitled to twenty peremptory challenges since 1865, with the prosecution receiving the same amount.[8]

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[3] UCMJ art. 41(b) (1950).

[4] *Compare* UCMJ art. 41 (1950) *with* UCMJ art. 41 (1990).

[5] Article of War 18, Act of June 4, 1920 (Volume II), Pub. L. No. 66-242, 41 Stat. 759, 790. The pre-UCMJ Articles of War governed military justice only within the Army. Prior to the 1950 enactment of the UCMJ, members of the Navy facing court-martial had no right to a peremptory challenge under the Articles for the Government of the United States Navy, even in capital cases. *See* H.R. REP. NO. 81-491, at 22 (1949).

[6] *See infra* Part VI.

[7] *See infra* Part IX.

[8] *See* Act of March 3, 1865, sec. 2, 13 Stat. 500, 500 (providing twenty peremptory challenges to a capital defendant and providing the government five); FED. R. CRIM. P.

The twenty-seven states with extant capital punishment systems vary significantly in terms of the number of peremptory challenges permitted but afford the defense an average of 12.2 in single-defendant capital cases.[9] Although many states (and the federal government) previously

24(b)(1) (providing each side in a federal capital case with twenty peremptory challenges); *see also* An Act To Codify, revise, and Amend the Laws Relating to the Judiciary, Pub. L. No. 61-475, ch. 231, sec. 287, 36 Stat. 1087, 1166 (1911) (pre-Federal Rules of Criminal Procedure legislation increasing the number of government peremptory challenges from five to six in federal capital cases while leaving the number for defense at twenty).

[9] As of March 2023, this includes three states with gubernatorial or court-imposed execution moratoriums. States vary widely in peremptory challenge procedures applied in joint trials. Some states require joint defendants to join in (share) the peremptory challenges, while most states provide the same number to each defendant as if he or she was being tried individually. Other variations exist, as well, with varying complexity and amounts of judicial discretion. Accordingly, the number cited below for each state is for single-defendant capital cases. *See*, *e.g.*, ALA. CODE § 12-16-100 (2023) (Alabama utilizes a "strike list" system under which the defendant and the state alternate in striking prospective jurors following voir dire and causal challenges. The minimum number of jurors on the "strike list" in a capital felony case is 36, meaning that the defendant and state would each be able to exercise a minimum of twelve "strikes." The Supreme Court has treated these strikes as peremptory challenges for analytical purposes, as does this Article. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994)); ARIZ. R. CRIM. PROC. 18.4 (2023) (no peremptory challenges); ARK. CODE ANN. § 16-33-305 (2023) (defendant permitted twelve challenges, prosecution permitted ten peremptory challenges); CAL. CRIM. PROC. CODE § 231 (West 2023) (both sides permitted twenty peremptory challenges); FLA. STAT. ANN. § 913.08 (West 2023) (both sides permitted ten peremptory challenges); GA. CODE ANN. § 15-12-165 (2023) (both sides permitted fifteen peremptory challenges); IDAHO CODE § 19-2016 (2023) (both sides permitted ten peremptory challenges); IND. CODE § 35-37-1-3 to -4 (2022) (both sides permitted twenty peremptory challenges); KAN. STAT. ANN. § 22-3412 (West 2023) (both sides permitted twelve peremptory challenges); KY. R. CRIM. PROC. 9.40 (West 2023) (both sides permitted eight peremptory challenges); LA. CODE CRIM. PROC. ANN. art. 799 (2023) (both sides permitted twelve peremptory challenges); MISS. CODE ANN. § 99-17-3 (2023) (both sides permitted twelve peremptory challenges); MO. ANN. STAT. § 494.480 (West 2023) (both sides permitted nine peremptory challenges); MONT. CODE ANN. § 46-16-116 (West 2023) (both sides permitted eight peremptory challenges); NEB. REV. STAT. § 29-2005 (2022) (both sides permitted twelve peremptory challenges); NEV. REV. STAT. ANN. § 175.051 (Lexis 2023) (both sides permitted eight peremptory challenges); N.C. GEN. STAT. § 15A-1217 (2023) (both sides permitted fourteen peremptory challenges); OHIO REV. CODE ANN. § 2945.21 (West 2022) (both sides permitted twelve peremptory challenges); OKLA. STAT. ANN. tit. 22, S. 655 (West 2023) (both sides permitted nine peremptory challenges); OR. REV. STAT. ANN. § 136.230 (West 2022) (both sides permitted twelve peremptory challenges); PA. R. CRIM. PROC. 634 (West 2023) (both sides permitted twenty peremptory challenges); S.C. CODE ANN. § 14-7-1110 (2022) (defendant permitted ten challenges, prosecution permitted five); S.D. CODIFIED LAWS S. 23A-20-20 (2023) (both sides permitted twenty peremptory challenges); TENN.

afforded a capital defendant more peremptory challenges than the prosecution,[10] all but two of the remaining death penalty states now provide an equal number to each side.[11] Except for Arizona, whose state supreme court abolished peremptory challenges in 2021,[12] no judicial system in the United States besides the military provides a capital defendant with fewer than eight peremptory challenges.[13]

With these disparities in mind, Congress should amend Article 41 of the UCMJ to provide each accused in a capital court-martial with ten peremptory challenges and to provide the trial counsel with five peremptory challenges per accused. This expansion will allow military capital counsel to fully utilize information gained from the advanced voir dire methods required of capital defenders. As this article shows, the historical military efficiency arguments against expanding peremptory challenges are inapposite for capital cases, given the already-considerable rarity, length, and complexity of these cases in modern practice.

After introducing the larger debate over peremptory challenges in the American legal system, the following section explores capital sentencing procedures in the military. Theory and practice show these procedures simultaneously provide individual panel members substantial power to

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CODE. ANN. § 40-18-118 (2022) (both sides permitted fifteen peremptory challenges); TEX. CODE CRIM. PROC. ANN. art. 35.15 (West 2021) (both sides permitted fifteen peremptory challenges); UTAH R. CRIM. PROC. 18(d) (West 2023) (both sides permitted ten peremptory challenges); WYO. STAT. ANN. § 7-11-103 (2022) (both sides permitted twelve peremptory challenges).

[10] *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONS. L. 3, 14 & n.19 (2001).

[11] *See* ARK. CODE ANN. *supra* note 9 (citing Arkansas Code, which provides the defense and the government with twelve and ten peremptory challenges, respectively), and S.C. CODE ANN. *supra* note 9 (which provides the defense and the government with ten and five peremptory challenges, respectively (in single-defendant capital cases for both states)).

[12] Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 2:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/. Arizona has continued to conduct capital trials since eliminating peremptory challenges. *See*, *e.g.*, Kevin Dayton, *An Arizona Jury Fails to Agree on Death Sentence for a Hawaii Inmate*, HONOLULU CIVIL BEAT (Feb. 16, 2023), https://www.civilbeat.org/beat/an-arizona-jury-fails-to-agree-on-death-sentence-for-a-hawaii-inmate/ (hung jury during 2023 capital sentencing proceeding); *Inmates on Death Row in Arizona*, USA TODAY (Feb. 3, 2023, 2:05 PM), https://www.usatoday.com/picture-gallery/news/local/arizona/2014/02/25/inmates-on-death-row-in-arizona/1854012/ (one death row inmate convicted and sentenced to death in 2022). The author is unaware of any Arizona capital case conducted without peremptory challenge yet reaching appellate review.

[13] *See supra* text accompanying note 9.

prevent a death sentence but also create conditions in which group dynamics place tremendous pressure on minority-view members to conform with the majority. The following section explores the particular importance of jury selection and voir dire in capital cases, examining the development of advanced voir dire methods in capital practice and the learned counsel standard, which requires counsel to consider implementing these voir dire strategies. These advanced methods all share the common thread of gathering as much information as possible about the attitudes and beliefs of prospective jurors. That information is then operationalized through challenges—with peremptory challenges providing a crucial stopgap for improperly denied challenges for cause, for deployment against jurors who sense the "right" answer and quickly rehabilitate, and in a variety of other scenarios.

In light of the factors favoring increased numbers of defense peremptory challenges in capital cases, this article investigates the legislative history surrounding the military's single peremptory challenge, both its creation in 1920 and later debates about its expansion, in order to determine whether historical rationales weigh against the proposal. The next sections demonstrate that increasing the number of peremptory challenges would continue the general trend towards alignment between military and federal civilian capital procedure and that an asymmetrical increase of these challenges is justified in the military system. Finally, analysis of the voir dire process in a recent capital court-martial demonstrates this proposed increase will lengthen a capital case by only three to four days, a truly *de minimis* amount in light of the rarity of capital cases, and the already lengthy investigation, trial, and appellate processes.[14] Increasing the number of peremptory challenges in capital cases will preserve the legitimacy of the military capital system by arming defense counsel with the tools necessary to shape a panel that will fairly decide the fate of the accused.

[14] *See infra* part IX.

II. Background Principles and the Post-Batson Debate

Like many aspects of criminal procedure, the Constitution does not require peremptory challenges.[15] Rather, "[t]hey are a means to achieve the end of an impartial jury."[16] As a right afforded by statute or court rule, federal and state governments have broad discretion regarding both the number of peremptory challenges and the procedures through which parties exercise these challenges.[17] Indeed, federal or state governments could eliminate peremptory challenges altogether without running afoul of the Constitution.[18] The right to peremptory challenges is only violated if a court deprives a defendant of what he or she is entitled to by statute or court rule[19] or if a peremptory challenge is used to exclude a protected class in contravention of the Fourteenth Amendment's Equal Protection Clause under *Batson v. Kentucky* and its progeny.[20] Nonetheless, the Supreme Court has long recognized that peremptory challenges are among "the most important of the rights secured to the accused"[21] and help "reinforc[e] a defendant's right to trial by an impartial jury."[22]

In recent decades, the legal community has engaged in sharp debate over the future of peremptory challenges, with "equally passionate" arguments for and against abolition.[23] Many of these arguments emerged

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[15] United States v. Martinez-Salazar, 528 U.S. 304, 317 (2000) (conducting analysis under the Fifth Amendment); Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (citing, Gray v. Mississippi, 481 U.S. 648 (1987) (conducting analysis under the Sixth Amendment)).

[16] *Ross*, 487 U.S. at 88.

[17] *Id.*

[18] Rivera v. Illinois, 556 U.S. 148, 157 (2009).

[19] Ross, 487 U.S. at 89.

[20] Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting race-based peremptory challenges); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (extending *Batson* by prohibiting gender-based peremptory challenges). *Batson* applies to both the prosecution and defense. Georgia v. McCollum, 505 U.S. 42 (1992). The Court of Appeals for the Armed Forces has ruled that *Batson* and its progeny apply at courts-martial. United States v. Witham, 47 M.J. 297, 300 (C.A.A.F. 1997).

[21] Ross, 487 U.S. at 96 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894) and Batson v. Kentucky, 476 U.S. 79, 99 n.22 (1986)).

[22] United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) (citations omitted).

[23] Baldus et al., *supra* note 10, at 36–38 & nn. 111–13 (summarizing the debate and citing several pre-2001 articles for and against abolition). For more recent debate, *see*, *e.g.*, Payton Pope, Note, *Black Lives Matter in the Jury Box: Abolishing the Peremptory Strike*, 74 FLA. L. REV. 671 (2022) (calling for abolition); Laurel Johnson, Note, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They*

in the early years after *Batson*, discussing how *Batson*—and related cases—drastically restrict parties' abilities to use peremptory challenges[24] or arguing whether the *Batson* framework sufficiently addresses their discriminatory use.[25] Others propose reforms to the use of peremptory challenges while also arguing for their retention.[26] A post-*Batson* survey shows most litigators oppose abolition.[27] The debate has extended to the court-martial system as well.[28] Indeed, as decades of post-*Batson* debate suggest, peremptory challenges are an imperfect tool. This article neither seeks to resolve this debate nor proposes the expansion of peremptory challenges in courts-martial generally. In capital courts-martial, however, the peremptory challenge is particularly crucial in ensuring a fair trial for the accused.

Provide, U. DEN. CRIM. L. REV. 215 (2015) (arguing for retention); Brian W. Wais, Note, *Actions Speak Louder Than Words: Revisions to the* Batson *Doctrine and Peremptory Challenges in the Wake of* Johnson v. California *and* Miller-El v. Dretke, 45 BRANDEIS L.J. 437 (2007) (arguing for retention of peremptory challenges despite flaws in preventing discriminatory use).

[24] *See*, *e.g.*, Major Robert W. Best, *Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off*, 183 MIL. L. REV. 1 (2005) (proposal to eliminate peremptory challenges at court-martial entirely, primarily based on post-*Batson* concerns as well as concerns over gamesmanship related to fluctuating panel sizes (writing prior to Congress's decision to establish fixed panel sizes for all courts-martial in 2016)).

[25] See, e.g., Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607 (2005).

[26] *See*, *e.g.*, Caren M. Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1 (2014) (proposing a consent-negotiation framework in which the parties could exercise peremptory challenges only through agreement); Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory* Challenge, 12 KAN. J.L. & PUB. POL'Y 323 (2002); Charles J. Ogletree, *Just Say No: A Proposal to Eliminate Racially Discriminatory Use of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994) (proposing additional restrictions on prosecution use of peremptory challenges to curb discrimination while also arguing for the retention of defense challenges on a number of grounds).

[27] *See* Jean Montoya, *The Future of the Post*-Batson *Peremptory Challenge: Voir Dire by Questionnaire and "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 998–1003 (1996) (discussing results of 1994 survey of government and defense practitioners at the California state and federal levels).

[28] *See*, *e.g.*, Colonel (ret.) Norman G. Cooper & Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of* Batson v. Kentucky *and its Progeny*, ARMY LAW., Oct. 1992, at 10 (discussing the arguments for and against abolishing peremptory challenges at court-martial); Best, *supra* note 24.

III. Individual Members, Decreased Anonymity, and Group Dynamics in Capital Court-Martial Sentencing

Since peremptory challenges shape court-martial panels, any argument for increasing their numbers necessarily begins with consideration of the role of the panel in a capital case. As shown below, capital sentencing procedures produce three interrelated phenomena in the panel room compared to panel deliberations on the merits in non-capital cases[29]: an individual panel member's outsized influence on the outcome, deliberation and voting procedures less conducive to anonymity, and a higher probability that group dynamics and social conformity will influence the outcome. Due to the relative rarity of capital courts-martial, many civilian and military practitioners may be unfamiliar with these procedures.[30]

Like all modern capital punishment systems in the United States, the military's capital sentencing procedures underwent substantial reform after a series of landmark Supreme Court decisions in the 1970s.[31] Although at least 35 states and the federal government revised their capital systems by 1976,[32] the military continued conducting capital courts-martial under legacy procedures until the Court of Military Appeals

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[29] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2019) [hereinafter 2019 MCM] (governing deliberations and voting on findings during the merits portion of a case). In current non-capital courts-martial, the military judge determines the sentence unless the accused is convicted by members and elects sentencing by members. UCMJ art. 53 (2017). Since December 27, 2023, the military judge will determine the sentence for future non-capital courts-martial in which all offenses occur on or after December 27, 2023. National Defense Authorization Act for Fiscal Year 2022 § 539E, Pub. L. No. 117-81, 135 Stat. 1541, 1700 (2021) (modifying UCMJ art. 53, effective two years after enactment); MANUAL FOR COURTS-MARTIAL, UNITED STATES, Art. 53 (2024) [hereinafter 2024 MCM].

[30] *See* United States v. Akbar, 74 M.J. 364, 422 (C.A.A.F. 2015) (Baker, J., dissenting) (arguing the low number of capital cases coupled with relative short tours for military defense counsel results in few opportunities for military litigators to develop capital expertise).

[31] In 1972, the Supreme Court invalidated the capital punishment systems of Texas and Georgia based on Eighth Amendment concerns, triggering a *de facto* nationwide moratorium on executions until jurisdictions reformed their systems. Furman v. Georgia, 408 U.S. 238 (1972). In 1976, the Supreme Court upheld a death sentence based on a revised Georgia statute which addressed Eighth Amendment concerns about "capricious and arbitrary" death sentences by allowing for particularized analysis by the jury of the aggravating or mitigating circumstances specific to an individual case. Gregg v. Georgia, 428 U.S. 153, 197 (1976).

[32] *Gregg*, 428 U.S. at 179–80.

invalidated the existing system in 1983.[33] Less than four months later, President Reagan established new death penalty procedures by executive order that went into effect as Rule for Courts-Martial (RCM) 1004 in the 1984 *Manual for Courts-Martial*.[34] This began the modern era of capital punishment in the United States military. Modified several times thereafter, RCM 1004 and related UCMJ provisions continue to govern capital courts-martial.[35]

Under current rules, a capital court-martial remains death-eligible at sentencing only upon conviction of a death-eligible offense, either by unanimous vote of a twelve-member panel or by a military judge pursuant to a guilty plea.[36] RCM 1004 incorporates the general presentencing procedures from RCM 1001, which governs matters presented by the prosecution (including aggravating evidence), crime victims, and the defense (including extenuating and mitigating circumstances).[37] In capital cases, the court must allow the accused "broad latitude" in presenting extenuating and mitigating evidence.[38] The Government must also prove beyond a reasonable doubt at least one aggravating factor enumerated by RCM 1004, using evidence from either or both the merits and sentencing portion of the case.[39]

After the presentation of evidence, sentencing arguments, and instructions, the members deliberate in a closed session and vote by secret

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[33] *See* United States v. Matthews, 16 M.J. 354, 382 (1983) (striking down a death sentence and allowing a rehearing involving a capital sentence only "if constitutionally valid procedures are provided by the President or Congress.").

[34] *See* Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 7–8 (2006) (discussing the historical development of RCM 1004).

[35] *See id.* at 9–10 (discussing legislative and executive modifications to R.C.M. 1004 and related military capital provisions).

[36] 2019 MCM, *supra* note 29, R.C.M. 1004(a); *see* UCMJ art. 25a (2016) (requiring a fixed panel size of twelve members for capital cases). In the event of non-unanimous vote on the merits that still meets the three-fourths threshold necessary for a regular court-martial conviction, the case becomes non-capital for sentencing purposes. *See* UCMJ art. 52 (2016). Prior to a 2016 amendment to Article 45, an accused could not plead guilty to a death-eligible offense in a capital case. *See* Military Justice Act of 2016, § 5227, Pub. L. No. 114-328, 130 Stat. 2000, 2911 (modifying Article 45, UCMJ). No such death-eligible guilty plea appears to have occurred since the 2016 modification.

[37] 2019 MCM, *supra* note 29, R.C.M. 1004(b) (incorporating R.C.M. 1001).

[38] *Id.* R.C.M. 1004(b)(3).

[39] *Id.* R.C.M. 1004(b)(4), 1004(c). The Government must generally provide notice to the accused prior to arraignment of the aggravating factors it will pursue at sentencing. R.C.M. 1004(b)(1).

ballot on a series of issues.[40] Imposing a death sentence requires three unanimous findings by the panel (in addition to a unanimous finding of guilt at the earlier merits stage if contested).[41] First, the panel members vote on each aggravating factor at issue in the case and must concur unanimously on at least one of the factors.[42] Second, the members must find unanimously "that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances."[43] Both of these votes occur before the members vote on a sentence itself.[44] Third, the members must vote unanimously to impose a death sentence under the procedures for proposing and voting on sentences set forth in RCM 1006.[45] These three inquiries closely mirror those posed to a federal capital jury, which must reach unanimous findings on each of the three to impose a death sentence.[46]

Under RCM 1006, any panel member may propose a complete sentence; the panel only votes on a given sentence if a member proposes it.[47] The panel votes on the proposed sentences in order of severity, starting with the least severe.[48] In a premeditated murder case, for example, this means the members could, in many cases, vote on a sentence of life without parole before voting on a death sentence (provided a member proposed each sentence).[49] Of course, if only one of these two sentences were proposed by a member, the panel would only vote on that sentence. Sentences other than death require the concurrence of three-fourths of the members, whereas a death sentence must be unanimous.[50] The process of proposing and voting on sentences continues until the panel adopts one, unless they are unable to do so.[51] This means that a panel could vote on the death penalty multiple times, even if the initial votes are non-unanimous, so long as no other sentence (such as life in prison) receives

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[40] *Id.* R.C.M. 1001, 1004, and 1006.
[41] *Id.* R.C.M. 1004(b)(7).
[42] *Id.* R.C.M. 1004(b)(7).
[43] *Id*.
[44] *Id.*
[45] *Id.* (incorporating R.C.M. 1006).
[46] *See* 18 U.S.C. §§ 3593–94 (federal capital sentencing procedures).
[47] 2019 MCM, *supra* note 29, R.C.M. 1006(d).
[48] *Id.*
[49] *See id.* at pt. IV, ¶ 56(d) (presidentially prescribed mandatory minimum of life without parole for premeditated murder).
[50] *Id.* R.C.M. 1006(d).
[51] *Id.* R.C.M. 1006(d)(3)(A).

the required concurrence.[52] Once a sentence receives the required concurrence in a secret vote, the panel does not vote on other sentences unless the panel subsequently votes to reconsider the sentence.[53] Unlike at findings—where a failure to reach the required concurrence for a conviction results in an acquittal—a panel can deadlock at sentencing, resulting in a mistrial.[54] In a premeditated murder case, for example, this could occur if one member kept proposing and voting for life without parole and eleven members kept proposing and voting for death.

At any time until a sentence is announced in court, any panel member may propose reconsideration of any of the three types of votes at issue during capital sentencing: that an aggravating factor exists, that the aggravating evidence substantially outweighs the circumstances in extenuation and mitigation, and the sentence itself.[55] When a member proposes reconsideration of a non-unanimous vote on either of the first two questions, or reconsideration with a view towards increasing the sentence, a majority of the members must vote by secret ballot to reconsider the issue.[56] By contrast, the vote of a single member triggers reconsideration of a unanimous vote that found an aggravating factor was proven, that the aggravating circumstances substantially outweighed the

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[52] *See* United States v. Hennis, 75 M.J. 796, 847–48 (A. Ct. Crim. App. 2016), *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (finding that a panel can vote multiple times on a death sentence so long as no other sentence (life imprisonment) has received the required concurrence, and noting that a then-existing provision to the contrary in the Military Judges' Benchbook "is incorrect as a matter of law."). The Benchbook no longer includes the incorrect provision. *See* DEP'T OF THE ARMY, PAMPHLET 27–9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, Electronic Version 2.21, para. 2-7-18 n.1 (May 1, 2023).

[53] 2019 MCM, *supra* note 29, R.C.M. 1006 (discussion).

[54] *Id.* R.C.M. 1006(d)(7).

[55] *Id.* R.C.M. 1006 (discussion).

[56] *Id.* R.C.M. 1006(e). Prior to the 2019 version of the *Rules for Courts-Martial*, a panel could not reconsider votes on the aggravating factors and whether the aggravating factors substantially outweighed mitigation and extenuation, meaning that a single member's anonymous vote on one of those questions would irrevocably take death off the table for the panel. *Compare* 2019 MCM, *supra* note 29, R.C.M. 1006(e) *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1006(e) (2016) [hereinafter 2016 MCM]; *see also* Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 10–11 (discussing capital reconsideration procedures under the more defense-friendly former rule).

circumstances in extenuation and mitigation, or a unanimous vote imposing a death sentence.[57]

Reconsideration often seems theoretical in military practice—merits deliberations end with a single vote, guilty or not guilty, so reconsideration would only occur if several panel members were displeased enough with the outcome that they were willing to hold the panel back from announcing the verdict.[58] Yet, reconsideration is a real possibility during capital sentencing. For example, suppose a single panel member votes that the aggravating circumstances do not substantially outweigh the extenuating and mitigating circumstances. In that case, the panel cannot vote to impose a death sentence. However, a subsequent vote on mandatory life without parole may fail to garner the necessary three-quarters agreement because the other eleven members favor death. A majority vote could then force reconsideration of the earlier "weighing" vote, leaving it up to the life-favoring member to either hold fast or abandon their position. Given that the members continue to deliberate, propose, and vote on sentences until a sentence reaches the required concurrence,[59] a reconsideration vote is much more likely during capital sentencing than during a non-capital trial on the merits.

These presentencing rules fuel three interrelated phenomena unique to panel deliberations during capital sentencing compared to panel deliberations in the merits phase of a non-capital court-martial. First, an individual panel member can have a decisive impact on deliberations and the outcome. A single member's vote on any of the three primary questions can prevent a death sentence. Second, despite secret voting, anonymity necessarily breaks down during the iterative process of proposing, voting, re-proposing, and re-voting on sentences.[60] Using the earlier example, in which one member consistently proposes and votes for a life sentence while eleven members consistently propose and vote for death, the life-favoring member could not remain anonymous because he or she would need to keep proposing the life sentence. Subsequent deliberations would then inevitably focus on this minority-view panel member.[61] Of course,

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[57] 2019 MCM, *supra* note 29, R.C.M. 1009(e).
[58] *See id.* R.C.M. 924.
[59] *Id.* R.C.M. 1006(d)(3)(A).
[60] *See* Carpenter, *supra* note 56, at 11–12.
[61] *See id.*

anonymity may likely have already broken down during earlier deliberations.[62]

The third phenomenon in capital sentencing is that group dynamics in general, and pressures towards social conformity in particular, have a much greater likelihood of impacting panel decision-making during the sentencing phase of a capital courts-martial relative to the merits phase, in which the panel members vote once in secret on the merits, resulting in either a conviction or acquittal.[63] The influence of group dynamics and social conformity builds in part on the first two phenomena, the critical role of individual panel members and the breakdown of anonymity during capital sentencing. More generally, as discussed below, it reflects a fundamental reality of human interaction—that many people will change their stance on an issue when they find themselves merely *amongst* a group holding the opposite stance, even in the *absence* of overt pressure from the group.

Social psychologist Solomon Asch demonstrated this fundamental reality through research in the 1950s examining how individuals respond when they find themselves holding a minority position on an apparently objective fact amidst a group unanimously holding the opposing position.[64] In what has been described as "the classic conformity study,"[65] Asch conducted a series of experiments in which a researcher showed a group of eight individuals a series of cards with three reference lines of varying lengths as well as a fourth separate line, which was the same length as one of the three reference lines.[66] For each card, the researcher asked each member to state publicly which of the three reference lines

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[62] *See id.* at 13; *see also* SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 83 (2005) (noting based on interviews with civilian capital jurors that "while some jurors reported that their juries had used secret ballots and that they had guessed incorrectly for several ballots as to a holdout's identity, the very nature of a jury's decision-making process necessitates that a juror's position ultimately will come into the open").

[63] *See* Carpenter, *supra* note 56, at 8–9.

[64] Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Guetzkow ed. 1951) [hereinafter Asch, *Effects of Group Pressure*]; *see also* Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against A Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS, no. 9, 1956, at 1 (a comprehensive seventy-page discussion of the earlier study's methodologies and results).

[65] PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 56 (1991).

[66] Asch, *Effects of Group Pressure*, *supra* note 64, at 178–79.

correctly matched the fourth.[67] Unbeknownst to one of the group members, last in the order for questioning, the other members had been instructed to answer incorrectly for some of the cards.[68]

When this occurred, it suddenly placed the subject "in the position of a minority of one in the midst of a unanimous majority."[69] Objectively, the correct answer was clear; subjects rarely made errors during control experiments in which they were unaware of the other members' answers.[70] However, subjects facing the unanimously incorrect majority joined the majority's incorrect answer nearly one-third of the time without any discussion or prodding from either the group members or the facilitator.[71] This finding demonstrates the impact of social conformity on decision-making, even in what otherwise appears to be a non-coercive environment (and removed from the emotionally charged environment of jury room in a capital case).[72]

Subsequent interviews of the conforming subjects revealed most answered incorrectly after concluding (wrongly) that their own perceptions were inaccurate based on the answers of the rest of the group.[73] By contrast, other conforming subjects did not doubt their own perceptions but joined the group's incorrect response out of a desire not to appear different from the group.[74] Variations on the experiment in which just one other group member answered correctly prior to the test subject significantly reduced the likelihood the test subject would yield to the majority's incorrect position (but did not erase the effect entirely).[75] However, in another variation in which this "partner" would "desert" the subject after a few rounds and start answering incorrectly with the majority, the impact of social conformity on the test subject returned to almost the same level as in the original experiment.[76]

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 179.
[70] *Id.* at 181.
[71] *Id.* at 180–82.
[72] *See* SUNDBY, *supra* note 62, at 163–65 (discussing conditions and personality conflicts in capital juries).
[73] *Id.* at 183–84.
[74] *Id.* A third category consisting of "very few" of the conforming subjects came to perceive the majority's answer as correct without awareness that their own perception had been "displaced or distorted." *Id.*
[75] *Id.* at 184–87.
[76] *Id.*

Research by several legal scholars demonstrates that group dynamics such as those revealed in the Asch conformity experiments have a clear impact on juries.[77] In-depth research interviews with capital jurors who unanimously imposed a death sentence in one California case revealed how the confidence of the last holdout for life quickly eroded after the penultimate holdout changed his vote, mirroring the Asch findings regarding the impact of a partner defecting to the majority position.[78] In at least one respect, the impact of social conformity is even greater in capital juries than in the Asch experiments, in which the majority effect decreased dramatically where a single other person gave the right answer (creating a minority of two). By contrast, interviews of hundreds of actual capital jurors across over a dozen states conducted as part of the Capital Jury Project show that a death sentence "almost always" results when 25% or fewer jurors vote for life on the first vote, indicating that life-favoring minorities of even two or three jurors frequently give way to majority pressure.[79]

Conversely, life-favoring minorities of at least 33% (at least four jurors) "almost always" maintain their position, resulting in life verdicts.[80] These findings are especially important in light of another Capital Jury Project finding: "most juries start deliberations with at least some jurors who support a life sentence."[81] In this manner, the group dynamics and social conformity pressure illustrated by the Asch studies profoundly impact capital jury decision-making.

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[77] *See*, *e.g.*, Sophie E. Honeyman, *Escaping Death: The Colorado Method of Jury Selection*, 54 U. ILL. CHI. JOHN MARSHALL L. REV. 247 (2021) (discussing how the Asch conformity studies impacted the development of the Colorado Method of capital voir dire); Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103 (2010); Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J. L. Reform 569 (2007).

[78] SUNDBY, *supra* note 62, at 80–84 (discussing both the juror's experience and the Asch conformity findings).

[79] *See* Carpenter, *supra* note 56, at 8 (citing John H. Blume et al., *Lessons from the Capital Jury Project*, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 144, 173 (Stephen P. Garvey ed. 2003) (emphasis omitted)). Started in 1991, the Capital Jury Project was a decades-long multidisciplinary study sponsored by the National Science Foundation in which trained interviewers conducted interviews from over a thousand jurors who sat on over three capital trials in at least fourteen states. Empirical analysis of the information generated by these interviews forms the basis of dozens of articles and books. *See* Carpenter, *supra* note 56, at 7.

[80] Carpenter, *supra* note 56, at 8 (emphasis omitted).

[81] *Id.* at 22.

The impact of these three interrelated phenomena on capital courts-martial is not just theoretical. Indeed, a key analysis of capital courts-martial identified two modern-era cases resulting in death sentences in which at least one member voted consistent with life at some point in the deliberations and a third in which facts strongly suggest the same.[82] Put another way, despite secret ballot voting, life-favoring panel members in these cases abandoned their positions in the face of a death-favoring majority.[83] In two of these cases, the record on appeal regarding the panel presidents suggests that rank may also have influenced deliberations, at least on an unintentional or subconscious level.[84] Under court-martial sentencing procedure then, both theory and practice show the critical importance of panel composition in a capital case. In this war of inches, designed to vest an individual panel member with the ability to preserve life but in which the pressure to conform is tremendous, the make-up of a capital panel takes on outsized importance.

IV. Panel Selection, Voir Dire, and Challenges in Capital Cases

With the dynamics of a capital panel in mind, peremptory challenges are best understood in the broader context of their role in shaping a panel or jury. At its core, jury selection is a process through which the court and the parties first gather information about potential jurors and then use procedural tools, such as excusals and challenges, to shape the final jury.

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[82] *Id.* at 13–16 (concluding that group dynamics and social conformity likely impacted the outcome of three capital courts-martial: United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) (panel member affidavits indicating initial vote on death sentence of seven in favor and one opposed), United States v. Thomas, 39 M.J. 626 (N.M.C.M.R. 1993) (panel member affidavits indicating panel voted multiple times on the finding of guilty (in contravention of the rules prohibiting re-voting on merits findings to obtain an unanimous result and preserve death eligibility) with one to two members voting not guilty on initial vote), and United States v. Hennis, 75 M.J. 796 (A. Ct. Crim. App. 2016) (panel question to military judge during sentencing deliberations strongly indicated at least one member had already voted against a death sentence; panel deliberated for six more hours before imposing death sentence)). Then-Lieutenant Colonel Carpenter analyzed *Hennis* based on news reports at the time, as appellate review had not yet occurred. The Army Court of Criminal Appeals (ACCA) appears to have neither received nor reviewed panel member affidavits when denying relief in the case, including on the deliberations issue. 75 M.J. at 847–51, *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021)).

[83] Carpenter, *supra* note 56, at 13–16.

[84] Carpenter, *supra* note 56, at 14-15 (discussing United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) and United States v. Thomas, 39 M.J. 626 (N.M.C.M.R. 1993)).

Information gathering begins before trial as parties conduct independent investigations of prospective jurors and through the use of tools like pretrial questionnaires, where permitted.[85] Information gathering continues through voir dire, the "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified to serve on a jury."[86] In the United States, judges generally have wide latitude in determining the scope and managing the voir dire process.[87] The stakes are high because, as the Supreme Court has recognized, "[*v*]*oir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored."[88]

The parties operationalize the information learned during voir dire through the exercise of challenges. A military accused can challenge a member on a number of grounds, most frequently for bias (either actual or implied).[89] Actual bias is "any bias . . . 'that . . . will not yield to the evidence presented and the judge's instructions.'"[90] In addition to actual bias, military courts apply a specialized test for implied bias, which calls for the excusal of a prospective panel member if "most people in the same position as the court member would be prejudiced."[91] Pursuant to the concept referred to as the liberal grant mandate, military judges further must "liberally grant" defense challenges for cause (but not government challenges).[92] Despite the implied bias standard and liberal grant mandate,

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[85] *See* 2019 MCM, *supra* note 29, R.C.M. 912(a).
[86] *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[87] *See*, *e.g.*, FED. R. CRIM. P. 24(a); 2019 MCM, *supra* note 29, R.C.M. 912(d).
[88] Morgan v. Illinois, 504 U.S. 719, 729 (1992) (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).
[89] *See* United States v. Armstrong, 54 M.J. 51, 53-55 (C.A.A.F. 2000) (noting how R.C.M. 912(f)(1)(N) "encompasses both actual and implied biases" and that these biases "are separate legal tests, not separate grounds for challenge"). R.C.M. 912(f) contains several other grounds for challenge unrelated to bias that are more concrete in nature, such as whether a member will be a witness at trial. 2019 MCM, *supra* note 29, R.C.M. 912.
[90] United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 2007)).
[91] United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008) (citation omitted) (discussing the legal tests based on R.C.M. 912(f)(1)(N). Implied bias is evaluated "objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." *Id.* (internal quotations and citations omitted). The Supreme Court has interpreted the Sixth Amendment to prohibit only actual bias, declining to embrace a Constitutional theory of implied bias. Smith v. Phillips, 455 U.S. 209 (1982).
[92] United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting United States v. Downing, 56 M.J. 419, 422 (C.A.A.F.2002)) (discussing how military appellate courts

military appellate courts routinely rule that judges improperly denied defense challenges in courts-martial.[93]

To the extent a court rejects a party's causal challenge based on actual or implied bias, peremptory challenges are the last mechanism available to shape the final jury. In addition to providing a fail-safe for denied challenges, parties also use peremptory challenges to strike prospective jurors whom they view as problematic but for whom they do not have an articulable basis for a causal challenge.[94] In this manner, voir dire is inextricably linked to peremptory challenges, and "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule."[95]

In capital cases, *voir dire* takes on an additional dimension because the parties must gather information on prospective jurors' attitudes and perspectives on the death penalty. The inquiry is both constitutional and prudential in nature. The Supreme Court has recognized limits on both ends of the spectrum of juror death penalty views. On one end, the Supreme Court requires courts to exclude jurors who oppose the death penalty to such an extent that their views would "prevent or substantially impair the performance of [their] duties."[96] On the other end of the spectrum, courts must remove jurors "who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of

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developed the "liberal grant" mandate to address unique features of the military system, such as the selection of members by the convening authority and the limited number of peremptory challenges relative to civilian practice).

[93] *See*, *e.g.*, United States v. Rogers, 75 M.J. 270 (C.A.A.F. 2016); United States v. Woods, 74 M.J. 238 (C.A.A.F. 2015); United States v. Peters, 74 M.J. 31 (C.A.A.F. 2015); United States v. Briggs, 64 M.J. 285 (C.A.A.F. 2007); United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001); United States v. Covitz, 2022 CCA Lexis 563 (A.F. Ct. Crim. App. Sept. 30, 2022); United States v. Kashin, 2022 CCA Lexis 194 (A. Ct. Crim. App. March 28, 2022); United States v. Pyron, 81 M.J. 637 (N.-M. Ct. Crim. App. 2021); United States v. Leathorn, 2020 CCA Lexis 450 (A. Ct. Crim. App. Dec. 11, 2020).

[94] *See generally* Jim Goodwin, Note, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

[95] Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). As discussed *infra*, the Supreme Court has ruled that there is no absolute constitutional right to peremptory challenges and that the right is instead a creature of statute or court rule. United States v. Martinez-Salazar, 528 U.S. 304 (2000); Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

[96] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (refining the standard first set forth in *Witherspoon v. Illinois*, 291 U.S. 510 (1968)).

laws."[97] Similarly, a capital juror must be willing "in good faith" to consider mitigating circumstances and evidence during sentencing.[98] A juror unwilling to consider mitigation evidence, such as one already set on the death penalty after finding the accused guilty of premeditated murder and before hearing the defense sentencing case, is known in practice as "mitigation impaired."[99] Under all of these standards, capital voir dire necessarily involves questioning both to "death qualify" and to "life qualify" potential jurors.[100]

Due to the confluence of these constitutional requirements, the aggravated facts at issue in most capital cases, and the heightened scrutiny regarding potential ineffective assistance of counsel, the capital defense bar has developed advanced jury selection methods specific to capital practice (by contrast, prosecutors have largely tended to apply methods more common to complex litigation in general).[101] These methods vary significantly but share the common thread of gathering extensive information from panel members for use in challenges.

However, the military's single peremptory challenge handicaps capital defense counsel from fully leveraging these strategies at court-martial. Instead, well-executed capital voir dire methods will invariably leave military defense counsel with a large amount of information about the attitudes and beliefs of prospective panel members, but limited ability to shape the panel by removing those members for whom the information does not justify a challenge for cause or for whom a challenge for cause is denied. A brief exploration of two of the advanced voir dire methods illustrates the magnitude of information they can produce (and, implicitly, the corresponding extent the single peremptory challenge hinders the use of this information in capital courts-martial).

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[97] Morgan v. Illinois, 504 U.S. 719, 725–26 (1992).

[98] *Id.* at 729; *see also* Lockett v. Ohio, 438 U.S. 586 (1978) (striking down Ohio death penalty statute because it limited mitigation evidence to a specific list of factors).

[99] John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing Life Qualification through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 ,1211-1212 (2001).

[100] United States v. Johnson, 366 F.Supp.2d 822, 826–27 (N.D. Iowa 2005) (using the quoted terminology while extensively analyzing the scope of constitutionally-required questions during capital voir dire). For an in-depth analysis of the framework for hypothetical questions developed in *Johnson* and its application in courts-martial, *see* Major Janae M. Lepir, *Hypothetically Speaking: The Constitutional Parameters of Capital Voir Dire in the Military after Morgan v. Illinois*, 225 MIL. L. REV. 375 (2017).

[101] Lepir, *supra* note 100, at 394–95.

The Colorado Method is perhaps the most well-known of capital voir dire methods.[102] Developed by Colorado litigator David Wymore, this method involves two concurrent strategies: first, eliciting jurors' views on capital punishment and mitigation on the record to use in challenges for cause and in prioritizing peremptory challenges; second, educating jurors to respect the individual moral views of other jurors during deliberations and, for life-leaning jurors, to remain firm in their convictions even if they are in the minority.[103] Writing in a publication for the National Association of Criminal Defense Lawyers, Matthew Rubenstein summarizes the Colorado Method's key principles:

> (1) jurors are selected based on their life and death views only; (2) pro-death jurors (jurors who will vote for a death sentence) are removed utilizing cause challenges, and attempts are made to retain potential life-giving jurors; (3) pro-death jurors are questioned about their ability to respect the decisions of the other jurors, and potential life-giving jurors are questioned about their ability to bring a life result out of the jury room; and (4) peremptory challenges are prioritized based on the prospective jurors' views on punishment.[104]

The Colorado Method recognizes that many prospective jurors have pro-death penalty inclinations that do not rise to the level of constitutional impairment justifying a challenge for cause under *Morgan v. Illinois*.[105] For example, there is likely no constitutional impairment for a juror who

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[102] *Id.* at 395.

[103] Carpenter, *supra* note 56, at 22–23. Colorado abolished the death penalty in 2020. *See* Act Concerning The Repeal of the Death Penalty, 2020 Colo. Sess. Laws Ch. 61, 204. The state and defendant were each entitled to ten peremptory challenges in Colorado single-defendant capital cases. COLO. REV. STAT. § 16-10-104 (2022) (this relict provision persists in Colorado state law despite the abolition).

[104] Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION, Nov. 2010, at 18; *see also* Sophie E. Honeyman, *Escaping Death: The Colorado Method of Jury Selection*, 54 U. ILL. CHI. JOHN MARSHALL L. REV. 247 (2021) (providing a comprehensive overview of the Colorado Method, its advantages and disadvantages, and proposing incremental changes to increase effectiveness of the method in future cases).

[105] *See* Rubenstein, *supra* note 104, at 18–19 (describing the seven categories used in the Colorado Method to rank jurors based on their views of capital punishment, four of which involve death penalty-inclined jurors who nonetheless would escape a for-cause challenge under *Morgan*).

articulates life-long support for the death penalty in general but agrees he or she will follow the court's instructions and consider evidence in mitigation and other available sentences.[106] The Colorado Method seeks to gather as much information as possible to identify these types of jurors and prioritize them for peremptory challenges if causal challenges are unsuccessful.[107] The educational component of the Colorado Method recognizes that some of these pro-death penalty jurors will likely end up on the jury.[108] Accordingly, this component seeks to address the group dynamics that cause minority-view jurors to cede ground to pro-death penalty jurors and change their vote (even though, according to a major research study, most capital sentencing deliberations begin "with at least some jurors who support a life sentence").[109]

Put differently, under the Colorado Method, educating death-inclined jurors is the latter part of a belt-and-suspenders approach in which challenges are the first line of defense.[110] However, as one military commentator has recognized, military capital defense counsel cannot fully operationalize the Colorado Method because they are limited to a single peremptory challenge (and thus, instead, must focus on challenges for cause and educating the panel).[111] Nonetheless, according to the same commentator, "training in the Colorado [M]ethod is the most important capital-specific training" for capital defense counsel.[112]

Of course, jurors are more than their views on the death penalty. Samuel Newton, a law professor and capital litigator, recommends capital defense counsel expand upon the Colorado Method through a more holistic voir dire and ranking process.[113] Professor Newton argues attorneys should conduct case-specific and juror-specific inquiries into factors influencing how individual jurors will interact with other jurors in the deliberation room and how jurors may empathize with either the victim

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[106] Rubenstein, *supra* note 104, at 18–19.
[107] *Id.*
[108] *See* Carpenter, *supra* note 56, at 22 (discussing the Colorado Method in light of the intersection between the findings of the Capital Jury Project and findings from general behavioral studies regarding social conformity).
[109] *See id.*
[110] *See* Rubenstein, *supra* note 104, at 18–19
[111] *See* Carpenter, *supra* note 56, at 22-23 & n.217.
[112] *Id.* at 23.
[113] Samuel P. Newton, *Getting to Know You: An Expanded Approach to Capital Jury Selection*, 96 TUL. L. REV. 131 (2021).

or the defendant.[114] In cases involving theories of actual innocence or expert testimony, Professor Newton recommends evaluating jurors on how they are likely to respond to these arguments and evidence.[115] In short, under Professor Newton's proposed method, capital litigators gather extensive information on broad aspects of jurors' views and beliefs to better inform for-cause and peremptory challenges, with an even wider focus than the Colorado Method.

Modern capital practice and the learned counsel standard all but require these forms of robust voir dire, for which a single defense peremptory challenge is ill-suited.[116] Instead, the military's single peremptory challenge leaves practitioners unable to use robust voir dire to shape the panel. This incongruity is fundamentally unfair for the military capital accused—they are entitled to defense counsel who will conduct robust, piercing voir dire but not to the additional peremptory challenges that allow defense counsel to fully act on the information from voir dire to shape the panel.

V. Peremptory Challenges Fill Important Gaps in Capital Cases

Perhaps the most crucial role of the peremptory challenge in a capital case is as a backstop to eliminate constitutionally-impaired panel members who evade challenges for cause. Empirical evidence demonstrates that constitutionally-impaired pro-death penalty jurors frequently serve on capital juries. One broad study of Capital Jury Project ("CJP") data

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[114] *See id.*; *see also* Honeyman, *supra* note 104 (recommending increased implementation of cultural factors when utilizing the Colorado Method).

[115] Newton, *supra* note 113, at 182–83.

[116] *See* United States v. Akbar, 74 M.J. 364, 384–85 (C.A.A.F. 2015) (analyzing whether capital defense counsel's military-specific "Ace of Hearts" voir dire strategy amounted to ineffective assistance of counsel); *see id.* at 421–26 (Baker, J., dissenting) (criticizing the defense counsel's voir dire strategy and discussing the extensive and advanced voir dire methods utilized by experienced defense attorneys in civilian capital cases). Under the "Aces of Hearts" strategy, capital defense counsel would avoid conducting robust voir dire or challenging members to preserve as large of a panel as possible, under the theory that each additional panel member beyond twelve could be the "ace of hearts" who would vote against the death penalty. *See id.* at 384–85 (there was no maximum number of panel members for capital cases at the time). Congress rendered this head-in-the-sand-style strategy obsolete in 2016 by establishing a fixed panel size of twelve for capital courts-martial. *See* Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25(a), UCMJ).

showed that many capital jurors make premature pro-death decisions before hearing sentencing evidence, sentencing arguments, or the judge's instructions on sentencing, indicating "a substantial failure to purge capital sentencing of jurors who are predisposed to death as punishment" and unwilling to consider constitutionally-required mitigation factors.[117] The study's authors identified "no easy or obvious remedy."[118] While recognizing the limits of what voir dire can accomplish, they noted that when effective voir dire reveals a constitutionally-impaired juror, practitioners "often must use peremptory challenges as a fail safe."[119]

A subsequent analysis of CJP interviews across several states similarly identified an abundance of automatic death penalty, burden-shifting, and mitigation-impaired jurors on capital juries.[120] One underlying cause of this phenomenon is the impact of the phrasing of voir dire questions, which leads many jurors to "sense" the supposed correct answer to questions regarding automatic imposition of the death penalty and willingness to consider mitigation evidence and respond accordingly, often without intent to lie.[121]

Importantly, it appears that jurors whose initial responses indicate a death-favoring constitutional impairment (such as automatically imposing the death penalty upon conviction) are more often successfully rehabilitated compared to jurors whose initial responses indicate life-favoring constitutional impairment (unwilling to consider imposing the death penalty in the case).[122] In either instance, the record would not reflect an adequate basis for a challenge for cause (amplified by the fact that "[t]he adequacy of *voir dire* is not easily the subject of appellate review.").[123] Nonetheless, a juror's demeanor, pattern of speech, and overall behavior may give a party pause about the reliability of that juror's statements during voir dire.[124] In such a scenario, peremptory challenges

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[117] William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions Guilt-Trial Experience and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1477 (1997-1998).
[118] *Id.* at 1546.
[119] *Id.* at 1537.
[120] Blume, Johnson & Threlkeld, *supra* note 99, at 1219–31.
[121] *See id.* at 1233–39.
[122] *See id.* at 1238.
[123] Morgan v. Illinois, 504 U.S. 719, 730 (1992) (citing Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).
[124] *See generally* Jim Goodwin, Symposium, Securities Litigation: *The Fundamental Issues, Note, Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

provide an essential safeguard, especially in light of how death-favoring jurors are more easily rehabilitated than life-favoring jurors and how each additional death-favoring juror amongst a death-leaning majority increases the likelihood that group dynamics will work to overwhelm a life-favoring minority of three or fewer jurors.[125]

In addition to providing a fail-safe for capital defense counsel to eliminate constitutionally-impaired panel members, peremptory challenges also provide an important backstop, allowing defense counsel to benefit from the robust voir dire they are effectively required to undertake.[126] A capital defense counsel conducting voir dire under either the Colorado Method or an expanded method must necessarily sometimes engage in deeply personal questioning to bring forth a prospective member's true beliefs and values.[127] If voir dire becomes contentious with a particular member, but the member's responses do not justify a challenge for cause, a peremptory challenge allows the defense counsel to remove a member who the attorney feels they have alienated.[128] In either of these scenarios—a denied challenge for cause, lingering suspicions about a rehabilitated panel member, or alienation during voir dire—peremptory challenges are essential to preserve a fair capital panel or jury.

VI. Historical Rationales for the Single Peremptory Challenge Do Not Justify Its Retention in Capital Cases

Given the critical roles peremptory challenges perform in a capital case, why does the UCMJ afford the capital accused only one? When examined, the background of the single peremptory challenge in the military reveals that it persists in modern military capital trials primarily due to inertia and arguments promoting deference to military efficiency rather than an intentional procedural choice for trying cases with the highest stakes under law—life or death of the accused.

A. Challenges Under the Articles of War Prior to World War I

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[125] *See supra* text accompanying notes 80–82.
[126] *See* Johnson, *supra* note 23, at 224.
[127] *See* Section IV, *supra*.
[128] Cooper & Milhizer, *supra* note 28, at 11 (discussing this principle in court-martial practice).

In June 1775, the second Continental Congress implemented the first American Articles of War governing justice in the Continental Army, less than three weeks after resolving to raise that force.[129] Congress derived these rules primarily (and for many provisions entirely) from the British Articles of War of the same period.[130] An accused had no right to challenge these members, peremptorily or for cause, either in the 1775 Articles or in subsequent versions adopted in 1776 and 1786.[131] Congress first afforded the accused (but not the government) the right to challenge members for cause in the Articles of War of 1806.[132] The lack of any peremptory challenge at courts-martial continued throughout the nineteenth century, including in the next major revision to the Articles in 1874,[133] even though federal law and most states at the time provided peremptory challenges in some form.[134]

In 1912, the House of Representatives considered, without passage, a substantial revision to the Articles of War supported by the War Department.[135] At a House hearing on the bill, multiple members of the Committee on Military Affairs pressed the Judge Advocate General at the time, then-Brigadier General Enoch H. Crowder, regarding whether Congress should implement peremptory challenges for court-martial (citing their use in civilian practice).[136] General Crowder demurred, maintaining that such addition would be "unwise" and "fraught with grave consequences," while acknowledging that the omission of peremptory challenges in the military system "is a concession to the summary character of the military jurisdiction."[137]

Efforts to enact a substantial revision of the Articles of War continued through 1916, when Congress passed the most significant revision to the

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[129] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 21 (2d ed. 1920). The June 30, 1775 Articles of War are reprinted in WINTHROP at 953–960.
[130] WINTHROP, *supra* note 129, at 21–22.
[131] *See* WINTHROP, *supra* note 129, at 205.
[132] Article 71, Articles of War, 2 Stat. 359, 368 (1806), *reprinted in* WINTHROP, *supra* note 129, at 976, 982–83. The 1806 Articles constituted a "complete revision of the code" and persisted with only minor amendments until 1874. *Id.* at 23.
[133] *See* Articles of War, 18 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 129, at 986. Article 88 of the 1874 Articles contained the causal challenge provision. *Id.*
[134] *See* WINTHROP, *supra* note 129, at 206.
[135] H.R. 23628, 62nd Cong. (1912).
[136] Hearing on H.R. 23628 Being a Project for the Revision of the Articles of War before the H. Comm. on Mil. Affairs, 62nd Cong. 30–32 (1912) (statement of Brigadier General Enoch H. Crowder, Judge Advocate General).
[137] *Id.*

Articles since 1874.[138] Despite many structural reforms, the bill made no change to the challenges provision from 1874 except to renumber it.[139] At a Senate hearing on the bill, General Crowder maintained his opposition to introducing a peremptory challenge, citing concerns regarding the impact of peremptory challenges in wartime courts-martial and an apparent "absence of complaint" regarding the historical lack of peremptory challenges in courts-martial.[140]

B. Post-World War I Creation of the Single Peremptory Challenge

The next major reforms to the Articles of War, including the adoption of the single peremptory challenge, occurred in the immediate aftermath of World War I. The dramatic expansion of the armed forces attendant to this conflict brought military life—and military justice—into the public eye of American citizens in a manner not experienced since the American Civil War.[141] For military justice in particular, two resulting dynamics spurred drives for reform: (1) the incorporation of a large number of lawyers with substantial experience in civilian practice and academia into the JAG Department, and (2) the significant multiplication of courts-martial often being carried out by (and enforcing discipline amongst) populations inexperienced with military customs and life.[142] Substantial debate occurred within the War Department regarding the extent of reform

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[138] Articles of War, Act of August 29, 1916, Pub. L. No. 62-242, 39 Stat. 619, 650–70.
[139] *See id.* at art. 18, 39 Stat. at 653.
[140] *Hearing on S. 3191, Being A Project for the Revision of the Articles of War before the S. Subcomm. on Mil. Affairs*, 64th Cong. (1916), *printed in* S. REP. NO. 64-130, at 43 (statement of Brigadier General Enoch H. Crowder, Judge Advocate General).
[141] JONATHAN LURIE, ARMING MILITARY JUSTICE 46 (1992).
[142] *See id.* at 46–47. Some of the distinguished lawyers and legal scholars who served in the JAG Department during World War I include future Supreme Court Justice Felix Frankfurter, Harvard law professors Eugene Waumbaugh and Edmund Morgan, and John H. Wigmore, who served as Dean of Northwestern University Law School both before and after the conflict. *Id.* at 46 & n.3. Of note, although the raw number of courts-martial increased significantly during World War I, the relative number of courts-martial compared to the number of soldiers in the Army actually decreased. *See* William C. Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 84, 88 (1921).

called for by these experiences, [143] including over whether to introduce peremptory challenges to the military justice system.

As set forth in the introduction, the single peremptory challenge under the UCMJ originated in the 1920 amendments to the Articles of War.[144] However, the original Senate bill introduced in May 1919 actually called for the accused to receive *two* peremptory challenges at all general courts-martial (the only level of court-martial authorized to impose the death penalty).[145] The reforms in this bill originated with General Crowder's principal assistant, Brigadier General Samuel Ansell, who prepared the bill at the request of Senator George Chamberlain (the Ansell-Chamberlain bill). [146] These reforms quickly sparked opposition from others within the War Department. In July 1919, a Special War Department Board released a report on court-martial procedure characterizing the Ansell-Chamberlain bill in general as a "radical change."[147] This report proposed a more modest set of reforms, including the introduction of one peremptory challenge for each side, rather than two.[148]

Later that same summer, Senate hearings on the Ansell-Chamberlain bill began and continued over several months, featuring testimony by several witnesses for and against introducing peremptory challenges to the court-martial process. In August 1919, former General Ansell testified in favor of adding peremptory challenges, citing concerns of convening

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[143] Rigby, *supra* note 142. This included acrimonious public strife between the aforementioned General Crowder and his more reform-minded principal assistant, Brigadier General Samuel Ansell. *See, e.g.*, *Ansell Sends Reply to Crowder Charge*, N.Y. TIMES, Mar. 12, 1919, at 11; *Gen. Crowder Denies Ansell's Accusation*, N.Y. TIMES, Oct. 26, 1919, at 2; LURIE, *supra* note 141, at 46–126.

[144] Article of War 18, Act of June 4, 1920 (Chapter II), Pub. L. No. 66–242, 41 Stat. 759, 790.

[145] A Bill to Establish Military Justice, S. 64, 66th Cong. at Article 23 (as introduced on May 20, 1919).

[146] *Hearing on S. 64 A Bill to Establish Military Justice before the S. Comm. On Mil. Affairs*, 66th Cong. 37 (1919) (comment by Senator Chamberlain during testimony on August 2, 1919).

[147] U.S. DEP'T OF WAR, PROCEEDINGS AND REPORT OF THE SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 5–6 (1919).

[148] *Id.* at 23. One member of the Special Board, Major General F.J. Kernan, opposed the introduction of peremptory challenges altogether. General Kernan asserted that they, like many proposed reforms, were primarily supported by lawyers from civilian practice in uniform only for World War I, who had "the erroneous assumption that what [was] necessary or useful in [civilian] practice must, as a matter of course, be desirable in the military practice." *Id.* at 23–24.

authority prejudice.[149] Mr. Ansell also noted in oral testimony and a written exhibit that General Crowder had historically opposed their introduction.[150] Brigadier General Walter Bethel of the JAG Department testified that he "heartily" supported two peremptory challenges for the accused, noting that they would increase the accused's perception of justice by allowing the removal of members viewed by the accused as unfair but against whom a challenge for cause would fail.[151] In addition, then-Yale and future Harvard professor Edmund M. Morgan testified in support of an unspecified number of peremptory challenges, while expressing doubt as to whether that number should be the same as in civilian practice.[152] In supporting added peremptory challenges, Professor Morgan cited in part to concerns about biased members evading challenge through less-than-forthcoming responses during voir dire (a phenomenon common enough in civilian practice that he presumed the subcommittee members were "undoubtedly" already aware of it).[153]

By contrast, a member of the Special *War* Department Board[154] and the Inspector General of the Army[155] both appeared before the subcommittee opposing the introduction of any peremptory challenge without much discussion. In addition, General Crowder appeared before the Subcommittee over several days.[156] Amidst a broadside of allegations regarding Mr. Ansell's purported misrepresentations of General Crowder's prior positions, the latter attempted to clarify his opposition to peremptory challenges earlier in the decade, maintaining he was generally not opposed to adopting more procedural protections from civilian courts.[157]

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[149] Hearing on S. 64 A Bill to Establish Military Justice before the S. Comm. On Mil. Affairs, 66th Cong. 267 (1919) (statement by Mr. Anselm on August 29, 1919).
[150] *Id.* at 249 (Ansell Exhibit A-2); 256–57 (statement by Mr. Anselm on August 29, 1919).
[151] *Id.* at 591 (statement by Brigadier General Bethel on September 25, 1919).
[152] *Id.* at 1373–74 (statement by Edmund M. Morgan on November 8, 1919). Professor Morgan had also served as an officer in the JAG Department from September 1918 to May 1919. *Id.* at 1371–72.
[153] *Id.* at 1374 (statement by Professor Morgan).
[154] *Id.* at 442 (statement by General Kernan on September 24, 1919) (General Kernan did not elaborate on his opposition to peremptory challenges during the Senate subcommittee hearing, but likely maintained the same rationale he expressed earlier that year in the Special War Department Board report, quoted in note 148, *supra*).
[155] *Id.* at 724 (statement by Major General John L. Chamberlain on October 23, 1919).
[156] *Id.* at 1133–338 (statements and submissions by General Crowder on October 24, 25, 28, and 29 of 1919).
[157] *Id.* at 1291–92 (submission by General Crowder on October 29, 1919).

Following the conclusion of the hearings, the Senate subcommittee changed course regarding many of the Ansell-Chamberlain reforms, including the proposal for two peremptory challenges, and towards the more limited reforms proposed by the Special War Department Board and now supported by General Crowder's JAG Department.[158] Although emerging from the subcommittee as ostensibly the same bill, the subcommittee had amended it by striking the original provisions in their entirety and adding instead most of the Special War Department's proposed reforms, including the introduction of one peremptory challenge, rather than two.[159] The House of Representatives adopted this version within a larger defense authorization bill,[160] which ultimately emerged from Congress as the enacted 1920 Articles of War.[161]

C. Peremptory Challenges Under the Uniform Code of Military Justice.

Like World War I before it, World War II spurred another wave of substantial military justice reform. This resulted in the Uniform Code of Military Justice, which standardized military statutory law across all branches for the first time and established civilian appellate review of courts-martial via the creation of the United States Court of Military Appeals.[162] However, one aspect that remained unchanged was the single peremptory challenge (at least for single-defendant cases), which simply moved to Article 41(b) where it remains to this day.[163] Notwithstanding public support for an increase to two peremptory challenges from the

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[158] *See* Rigby, *supra* note 142, at 84–85.
[159] *Compare* A Bill to Establish Military Justice, S. 64, 66th Cong. (as reported with amendment on April 15, 1920) *with* U.S. DEP'T OF WAR, PROCEEDINGS AND REPORT OF THE SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 5–6 (1919).
[160] *Compare* A Bill to Establish Military Justice, S. 64, 66th Cong. (as reported with amendment on April 15, 1920) *with* H.R. 12775 (Chapter II), 66th Cong. (as reported with amendment on April 20, 1920).
[161] Articles of War, Act of June 4, 1920 (Chapter II), Pub. L. No. 66-242, 41 Stat. 759, 787.
[162] *See* Fred L. Borch, *The United States Court of Military Appeals: The First Year (1951–1952)*, ARMY LAW., Feb. 2018, at 1 (discussing the historical context of the establishment of the Court of Military Appeals).
[163] *Compare* UCMJ art. 41 (1950) *with* UCMJ art. 41 (2016).

Veterans of Foreign Wars,[164] most discussions regarding these challenges during the development of the UCMJ revolved around whether to provide a peremptory challenge to each accused in a joint trial.[165]

During this period, a Navy report acknowledged the likelihood that the eventual UCMJ would adopt the single peremptory challenge from the Articles of War (thereby expanding it to naval practice) but generally opposed any increase beyond one peremptory.[166] One Navy captain who testified at House hearings in 1949 opposed multiple peremptory challenges in joint trials primarily out of concerns that an increase would divert more officers from their primary duties during the voir dire portion of a court-martial.[167] These concerns echoed the debate from the development of the 1920 Articles of War. Further, any potential differentiation in the number of peremptory challenges between capital and non-capital general courts-martial is absent in the key hearings leading up to the 1951 UCMJ.[168]

Debate regarding the number of peremptory challenges was relatively silent throughout subsequent rounds of major UCMJ reform during the

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[164] *Hearing on Sundry Legislation Affecting the Naval and Military Establishment Before the H. Comm. On Armed Services*, 80th Cong. 1947, 2115 (1947) (statement of Hon. Donald E. Long, Chairman of the Veterans of Foreign Wars Special Committee on Military Service).

[165] *See*, *e.g.*, H.R. REP. NO. 81-491, at 22 (1949); *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 821, 1026–28 (1949).

[166] *See* DEP'T OF THE NAVY, REPORT OF NAVY GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD 136 (1947) (describing opposition to more than one peremptory "because the number of members is usually small compared with a civil jury panel"). In addition to several naval officer members, the board was chaired by Arthur J. Keeffe, a Cornell Law professor, and co-chaired by Felix E. Larkin, future Assistant General Counsel for the Office of the Secretary of Defense, both of whom would later testify at House hearings on military justice reform. *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 837, 846 (1949).

[167] *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 1027 (testimony by Captain Woods, who responded to questions frequently throughout the larger testimony of Felix E. Larkin, then-Assistant General Counsel for the Office of the Secretary of Defense; Captain Woods' first name is omitted from the Hearing records).

[168] See generally H.R. REP. NO. 81-491 (1949); Hearings on H.R. 2498 [a UCMJ precursor] Before a Subcomm. of the H. Comm. On Armed Services, 81st Cong. (1949); Hearings on S. 857 and H.R. 4080 [later enacted as the UCMJ] Before a Subcomm. of the S. Comm. On Armed Services, 81st Congress (1949).

Vietnam War.[169] Serious discussions about providing additional peremptory challenges began again in 1982 when the Senate conducted hearings on a military justice reform bill that would have increased the number to three for each accused (as well as for the trial counsel).[170] That fall, the General Counsel of the Department of Defense and The Judge Advocate General of the Air Force both testified against increasing the number of peremptory challenges.[171] Both based their opposition almost entirely on concerns about taking more panel members temporarily away from their primary military duties to accommodate the additional challenges.[172] Neither discussed capital cases when setting forth these concerns.[173]

By contrast, a leader from the American Bar Association testified in favor of increasing the number of peremptory challenges in general.[174] However, he noted the Association only went so far as to support two but not three, citing a "grave concern" regarding small installations in which it may be difficult to obtain the "as many as 15 to 18" prospective members required to accommodate three peremptory challenges.[175] The American Veterans Committee submitted a statement supporting the increase to three and proposed a mechanism to conduct some peremptory challenges before trial as a way to reduce the number of members who would be taken from their duties.[176]

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[169] One exception occurred in 1966, when a former Air Force trial lawyer testified before a joint Congressional hearing in favor of expanding the number of peremptories to four or five (while discussing concerns with selection of panel members by the convening authority). *Joint Hearings on Bills to Improve the Administration of Justice in the Armed Services Before a Subcomm. on Const. Rts. of the S. Jud. Comm. and a Special Subcomm. of the Comm. on Armed Serv*., 89th Cong. 224, 231 (1966) (statement of Mr. Herbert Marks).

[170] S. 2521, 97th Cong. § 3(l) (1982).

[171] *Hearings on S. 2521 Before a Subcomm. on Manpower and Pers. of the S. Comm. on Armed Serv.*, 97th Cong. (1982) (statements of the Hon. William H. Taft and Maj. Gen. Thomas B. Bruton).

[172] *Id.* at 42 (Mr. Taft) and 49–50 (Maj. Gen. Bruton).

[173] *See id.* at 42 (Mr. Taft) and 49–50 (Maj. Gen. Bruton).

[174] *Id.* at 184 (statement of Mr. Ernest H. Fremont, Jr., Chairman of the American Bar Association's Standing Committee on Military Law). Mr. Fremont did not discuss the underlying rationale for his support of increased peremptory challenges.

[175] *Id.* at 184 (statement of Mr. Ernest H. Fremont, Jr., Chairman of the American Bar Association's Standing Committee on Military Law).

[176] *Id.* at 286 (statement of the American Veterans Committee Concerning Military Justice Legislation).

The three civilian judges of the Court of Military Appeals also expressed support for a theoretical future increase in the number of peremptory challenges, noting that it may reduce litigation of denied causal challenges on appeal.[177] However, the judges ultimately did not recommend immediate expansion due to concerns about workforce implications.[178] In this manner, consideration of the impact on command efficiency formed a common thread across all these statements, both for and against the increase in peremptory challenges. Ultimately, no further action was taken on the 1982 Senate bill. Congress enacted major reforms the next year, but this round of revisions left the single peremptory challenge unchanged.[179]

The issue of increasing the baseline number of peremptory challenges at courts-martial has remained largely dormant ever since. Congress did modify the peremptory provision in 1990 by providing the accused and the government each an extra peremptory in the limited circumstances in which additional members are detailed to the court (which would only occur if challenges or excusals reduce the pool of members to below the statutory minimum required).[180] In 2006, Congress also adopted the single peremptory challenge standard for trials of alien unlawful enemy combatants tried before military commissions.[181] Congress later modified the military commissions' peremptory provision by clarifying that the standard does not prohibit the military judge from granting additional challenges "as may be required in the interest of justice" (a provision absent from the UCMJ).[182]

In 2015, a comprehensive review of the military justice system by the Department of Defense acknowledged the disparity in the number of peremptory challenges between the military and civilian systems but neither discussed arguments for or against the disparity nor recommended

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[177] *Id.* at 99, 118 (statement of the Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals, who was accompanied by the Court's two associate judges).
[178] *Id.* (statement of Chief Judge Everett).
[179] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (codified in 10 U.S.C. § 801 *et seq*.).
[180] National Defense Authorization Act for Fiscal Year 1991 § 541, Pub. L. No. 101-510, 104 Stat. 1485, 1565 (1990) (modifying UCMJ, art. 41).
[181] Military Commissions Act of 2006 § 3, Pub. L. No. 109-366, 120 Stat. 2600, 2613 (codified at 10 U.S.C. § 948a *et seq.*).
[182] *Compare* 10 U.S.C. § 949f(b) *with* UCMJ, art. 41 (2016).

any increase or decrease.[183] Based in part on this comprehensive review, Congress adopted substantial military justice reforms in the Military Justice Act of 2016, which did not modify the number of peremptory challenges.[184] Notwithstanding over a century of military justice reform, the single peremptory challenge persists to the present, substantially unchanged.

VII. Providing Additional Peremptory Challenges is Consistent with the Trend Towards Increased Procedural Alignment with the Federal System for Military Capital Litigation.

Over time, military capital procedure has grown more closely aligned with federal civilian capital procedure. For example, Congress codified the right to at least one defense counsel "learned in the law applicable to capital cases" in 2016.[185] This was over two decades after Congress established the same standard for federal capital defendants in 1994[186] and seven years after Congress applied the standard for alien unlawful enemy combatants being tried before military commissions.[187] The Court of Appeals for the Armed Forces and the Military Justice Working Group had both publicly noted this deficiency.[188]

Another significant 21st-century alignment occurred in 2001 when Congress enacted Article 25(a),[189] which raised the minimum number of

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[183] DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 377–80 (2015). The review did recommend minor conforming amendments to Article 41 to align the provision's language with other proposed UCMJ amendments. *Id.*

[184] Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000, 2894 (2016).

[185] Military Justice Act of 2016, § 5186, Pub. L. No. 114-328, 130 Stat. 2000, 2902 (2016) (amending UCMJ art. 27).

[186] 18 U.S.C. § 3005. The Federal Death Penalty Act of 1994 replaced the earlier standard that required the appointment only of counsel "learned in the law." Pub. L. No. 103-322, § 60026, 108 Stat. 1796, 1982.

[187] 10 U.S.C. § 949a(b)(2)(C)(ii).

[188] United States v. Akbar, 74 M.J. 364, 399–400 (C.A.A.F. 2015) (holding that the court could not impose the learned counsel standard without congressional authorization); *see id.* at 421–26 (Baker, J., dissenting) (noting the lack of a death qualified bar in the military and recommending reform); DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 275–80 (2015).

[189] UCMJ art. 25(a) (2001). From 1786 to 1920, general courts-martial could consist of five to thirteen members, but not less than thirteen when thirteen could "be convened without manifest injury to the service." *E.g.* Article 6, Articles of War (1786), *reprinted in*

members in a capital case from five to twelve (although the services had utilized panels larger than five in some earlier capital cases).[190] Nonetheless, the new Article 25(a) reflected continued deference to military efficiency by leaving open the possibility of utilizing less than twelve members if members were not reasonably available due to physical conditions or military exigencies.[191] Congress did not eliminate the physical conditions and military exigencies exceptions until the Military Justice Act of 2016.[192] This legislation also established a fixed number of twelve panel members for capital cases.[193] By contrast, twelve jurors have been required under the federal rules since their genesis.[194]

The undercurrent of these developments is the implied recognition that, for modern capital cases, military efficiency concerns are increasingly less important than providing robust procedural protections. Concurrently, peremptory challenges are increasingly critical for capital defense counsel to fully benefit from robust capital voir dire processes (which reflect modern research into group dynamics in capital juries) and to address situations where challenges for cause are inadequate. Given that opposition to increased peremptory challenges was rooted in military efficiency arguments, Congress should continue to align military capital

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WINTHROP, *supra* note 129, at 972; Article of War 5, Pub. L. No. 64-242, 39 Stat. 619, 651 (1916). The 1920 revision to the articles imposed a simple minimum of five members (and no maximum), which persisted in the UCMJ until the Military Justice Act of 2016 fixed the number of members impaneled at eight for non-capital general courts-martial. *E.g.* Article of War 5, Act of June 4, 1920 (Chapter II), Pub. L. No. 66-242, 41 Stat. 759, 788; Military Justice Act of 2016, § 5161, Pub. L. No. 114-328, 130 Stat. 2000, 2897 (modifying Article 16, UCMJ).

[190] *See*, *e.g.*, United States v. Kreutzer, 61 M.J. 2005 (C.A.A.F. 2005) (1995 capital trial with twelve members); United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) (1989 capital trial with eight members); United States v. Curtis, 32 M.J. 252 (C.M.A. 1991) (1987 capital trial with nine members).

[191] UCMJ art. 25(a) (2001); see also Jonathan Choa, Note, *Civilians, Service-Members, and the Death Penalty: The Failure of Article 25A to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes*, 70 FORDHAM L. REV. 2065 (2002) (discussing the historical evolution of panel size in the court-martial system, criticizing Congress's 2001 decision to allow a military exigency exception to the twelve-member requirement in light of this history).

[192] Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25a, UCMJ).

[193] *Id.* By setting a fixed, rather than minimum number, Congress eliminated the "ace of hearts" strategy discussed in note 116, *supra*.

[194] *See* FED. R. CRIM. P. 23(b)(1).

procedure with civilian practice by providing military accused with ten peremptory challenges in capital cases.

VIII. An Asymmetric Increase in Peremptory Challenges is Appropriate in the Military System.

Expanding the number of peremptory challenges for each military capital accused to ten would generally increase conformity with civilian capital procedures across the country. By contrast, providing the prosecution with only half as many peremptory challenges—five per accused—would not. Indeed, all but two of the remaining U.S. death penalty jurisdictions provide an equal number of peremptory challenges to each side in single-defendant cases,[195] even though many previously afforded a capital defendant more than the prosecution (including five states that have abolished the death penalty since 2001).[196] At first blush, this proposal's departure from the trend away from asymmetrical peremptory challenges in civilian practice may seem at odds with this approach. However, while conforming with civilian procedures in part supports expanding defense peremptory challenges in military capital cases, the nature of panel selection in the military and continued concerns about discriminatory peremptory challenges in the American legal system both justify providing a lower number for the prosecution.

Throughout the American criminal justice system, standing courts draw a pool of prospective jurors randomly from the local population (typically using databases of voter registration, driver's licenses, and tax records).[197] By contrast, in the military justice system the "convening authority" personally selects prospective panel members to detail to a

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[195] *See* ARK. CODE ANN. § 16-33-305 (2023); S.C. CODE ANN. § 14-7-1110 (2022) (citing Arkansas Code, which provides the defense and the government with twelve and ten peremptory challenges, respectively, and to South Carolina Code, which provides the defense ten and the government five peremptory challenges respectively (in single-defendant capital cases for both states)).

[196] *See* Baldus et al., *supra* note 10, at 13–14 & nn.18–19 (discussing historical practice generally and citing then-existing asymmetrical capital peremptory procedures in Arkansas, Delaware, Massachusetts, New Hampshire, New Jersey, New Mexico, and South Carolina).

[197] *See*, *e.g.*, 28 U.S.C. § 1863 (requiring random selection procedures in U.S. district court); MINN. R. CRIM. P. 26.02 (random selection "from a fair cross-section of qualified county residents"); TEX. GOV'T CODE ANN. §§ 62.001 (random selection from current voter registration, driver's license, and personal identification card lists).

court-martial.[198] The convening authority, generally a flag officer, is typically the commander of the accused's unit at a high echelon.[199] At times, modern courts-martial panels may still include members of a convening authority's immediate staff or his or her immediate subordinate commanders.[200]

Historically and through the present, Article 25 of the UCMJ has largely precluded a randomized selection process, instead requiring the convening authority to select, based on his or her "opinion," those who are "best qualified" under a series of factors.[201] For courts-martial convened after December 23, 2024, a recent modification to Article 25 will require convening authorities to utilize a forthcoming randomization procedure when detailing members.[202] The President has not yet prescribed the randomization procedure in question. However, the modification to Article 25 leaves intact the "best qualified" in the "opinion" of the convening authority requirement.[203] This means that any resulting randomization procedure would still involve the personal discretion of the convening authority in identifying the pool from which panel members are

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[198] UCMJ art. 25 (2016).

[199] UCMJ art. 22 (2021). The convening authority cannot delegate this personal responsibility. United States v. Ryan, 5 M.J. 97, 100–01 (C.M.A. 1978).

[200] *See e.g.,* United States v. Badders, 2021 CCA Lexis 510 (A. Ct. Crim. App. Sept. 30, 2021) (convening authority's Public Affairs Officer served as a panel member in a sexual assault case; the member's primary duties around the time of trial included preparing press releases for the unit, including on ongoing efforts to eliminate sexual assault, and assisting the convening authority with statements to the public).

[201] UCMJ art. 25(e)(2) (2016) (specifically directing the convening authority to consider age, education, training, experience, length of service, and judicial temperament). The Army has conducted at least two experiments in court-martial panel selection with varying levels of convening authority involvement. A 1974 experiment at Fort Riley, KS involved random selection from a pool of candidates derived on four screening criteria prescribed by the convening authority and a records review (rather than hand-selection). A 2005 experiment by V Corps involved random selection from a pool of candidates nominated by subordinates and hand-selected by the convening authority. *See* Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 128–29 (2010).

[202] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 543 (2022) [hereinafter FY2023 NDAA] (amending Art. 25(e), UCMJ effective two years after the December 23, 2022, enactment of the Act); 2024 MCM, *supra* note 29, art. 25.

[203] *See id.* (amending Art. 25 only by adding the subparagraph regarding randomization, without striking any language from the Article).

randomly drawn (or, at the very least, the convening authority's personal discretion in setting screening criteria for the development of the pool).[204]

These same convening authorities—who will still exercise some level of personal discretion in panel selection—also bear other substantial military justice responsibilities. Traditionally, and for all offenses occurring prior to December 27, 2023, the convening authority is also the same individual responsible for ordering ("referring") charges in a specific case to be tried at a court-martial created ("convened") by the convening authority.[205] For some serious offenses occurring after December 27, 2023 ("covered offenses"), including all murder offenses, military prosecutors from the Office of Special Trial Counsel, independent of the chain of command, have sole discretion over referral decisions.[206] This reform does not deprive commanders of authority over other capital cases—they retain discretion and referral authority over all thirteen non-murder capital offenses under the UCMJ, such as espionage (at least when such offense is unrelated to a murder offense or other "covered offense").[207]

Regardless of who refers a capital case, the courts-martial trying such a case will still consist of members selected in part based on the convening

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[204] *Compare* UCMJ art. 25(e) (2016), *with* FY2023 NDAA, *supra* note 202, sec. 543.

[205] UCMJ art. 22 (2021); UCMJ art. 34(d) (2021). For felony-level cases, Article 34 requires the convening authority to obtain the advice of a senior attorney prior to referring charges to court-martial.

[206] UCMJ art. 24(a) (2022). Article 24a, which creates the "special trial counsel" system (independent military prosecutors), and the related procedural reforms enacted in the 2021 National Defense Authorization Act did not take effect until December 27, 2023. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, §539C, 135 Stat. 1541, 1699 (2021); 2024 MCM, *supra* note 29, art. 24(a).

[207] *See id.* (defining "covered offenses" and the special trial counsel's authority over known and related offenses). The thirteen non-murder capital offenses are UCMJ art. 85 (1956) (desertion, in time of war); UCMJ art. 89 (2016) (assault of a superior commissioned officer in execution of office, in time of war); UCMJ art. 90 (2016) (willfully disobeying superior commissioned officer, in time of war); UCMJ art. 94 (1956) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); UCMJ art. 95 (2016) (drunk on post, sleeping on post, or leaving post before being relieved, in time of war); UCMJ art. 99 (1956) (misbehavior before the enemy (defining nine subcategories of misbehavior)); UCMJ art. 100 (1956) (subordinate compelling surrender); UCMJ art. 101 (1956) (improper use of countersign); UCMJ art. 102 (forcing a safeguard); UCMJ art. 103 (2016) (spies); UCMJ art. 103a (2016) (espionage); UCMJ art. 103b (2016) (aiding the enemy); UCMJ art. 110 (2016) (improper hazarding of vessel or aircraft, when done willfully and wrongfully). The United States has not executed a Soldier for an offense other than murder or rape since World War II. *See* Colonel French L. MacLean, *The Seventh Annual George S. Prugh Lecture in Military Legal History*, 219 MIL. L. REV. 262, 269 (2014) (summarizing World War II executions).

authority's opinion (the independent military prosecutors cannot themselves convene courts-martial).[208] Moreover, although commanders serving as convening authorities will no longer decide to send most capital cases to trial, they nonetheless remain responsible for maintaining good order and discipline in their commands.[209] Regardless of how randomization is implemented under the amended Article 25, the convening authority's integral role in panel selection will still raise the question of why the prosecution must continue shaping the panel at trial. As one appellate judge has remarked, the convening authority's role in detailing panel members gives the Government "the functional equivalent of an unlimited number of peremptory challenges."[210] This feature of the system has contributed to previous calls for peremptory reform in the military justice system.[211]

There are limits to the "functional equivalent" argument, especially in light of the role randomization will play in future cases. Moreover, convening authorities are not lawyers and neither conduct *voir dire* nor try cases. A convening authority cannot possibly envision all potential grounds for a Government challenge to a panel member *ex ante*. For example, a panel member might disclose information during voir dire that could form the basis for a Government challenge (in a capital case, this could include a belief that the death penalty should never be applied). The military judge may improperly deny some of the trial counsel's for-cause challenges, and the trial counsel may desire to use a peremptory challenge in this situation, just as would the accused.

Nonetheless, the fact remains that the Government, through the convening authority, already possesses substantial ability to shape the panel *ex ante* to avoid members who do not possess adequate judicial temperament. Judicial temperament—the ability and desire to follow the

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[208] *Compare* 2024 MCM, *supra* note 29, art 24 (a) (establishing the special trial counsel's responsibilities and limiting command authority over "covered offenses") *with* UCMJ art. 22 (2021) (not including the special trial counsel in the list of those who may convene general courts-martial).

[209] *See* 2019 MCM, *supra* note 29, pt. V, ¶ 1.d.(1).

[210] United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).

[211] *See* Victor Hansen, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911 (2011) (proposal to increase the number of defense peremptory challenges to three for all general courts-martial (two for special courts-martial) and to eliminate the prosecution's peremptory challenge entirely); Robert William Best, *Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off*, 183 MIL. L. REV. 1 (2005) (proposal to eliminate peremptories at court-martial entirely).

law impartially—should, after all, be a prosecutor's main desired trait in a prospective member. Given this feature of the military justice system, increasing peremptory challenges to ten for each capital accused but only to five for the prosecution is appropriate, even if it departs from the more general trend in civilian jurisdictions to provide the prosecution and defense with an equal number of challenges.

An asymmetrical increase would also address concerns regarding prosecutors' discriminatory use of challenges, a central argument fueling calls to eliminate peremptory challenges altogether.[212] One study of 317 capital murder cases in Philadelphia in the 1980s and 1990s identified widespread discriminatory use of peremptory challenges on the basis of race and gender (in which prosecutors' peremptory challenges tended to result in less diverse panels, while defense challenges tended to preserve minority representation).[213] When the researchers applied a hypothetical restriction of peremptory challenges to real-world cases, five for the prosecution and ten for the defense, they found that such a balance "would have significantly reduced race and gender discrimination and limited its adverse impact on the jury decision making system."[214] In this manner, an asymmetrical balance of peremptory challenges would help preserve both fairness and the perception of fairness for capital accused.[215]

IX. De Minimis Impact on Command Efficiency and Length of Future Capital Cases

This article's proposed increase in peremptory challenges for military capital cases would have limited overall impact on command efficiency, the chief concern of most historical opposition to increasing the number available at a court-martial.[216] Certainly, thirteen additional peremptory challenges (beyond the current two) may require convening authorities to detail up to thirteen more panel members to capital cases. This will

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[212] *See supra* text accompanying notes 22–29.
[213] Baldus et al., *supra* note 10, at 127–30.
[214] *Id.* at 130.
[215] *See* Savanna R. Leak, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273 (2001) (arguing that the remaining jurisdictions that provide criminal defendants with more peremptory challenges than the prosecution should continue to do so to preserve both actual and perceived fairness).
[216] *See supra* section VI.

admittedly take those thirteen extra panel members away from their primary duties for the time needed for panel selection (but not for trial, which will still require only twelve members). However, capital cases are rare in the military and becoming rarer. From 1984 to 2006, the first twenty years of the modern military death penalty system, the military tried 47 capital cases across all services.[217] Of those cases, a significant majority occurred early in this period; only three capital courts-martial occurred from 1997 to 2006.[218]

The services tried five more capital cases in the next fifteen years, from 2007 to 2022 (including one capital resentencing hearing and not including cases referred as capital cases that did not remain death-eligible at trial).[219] This means that in the past twenty-five years only eight panels actually sat to hear a military capital case, an average of roughly one every three years across all services. Detailing thirteen additional members for voir dire this infrequently would create a virtually imperceptible change in overall readiness relative to the aggregate number of members who routinely sit non-capital courts-martial each week across the military.

The additional members required for this proposal will not impact ongoing combat operations or hinder small units. Unlike in World War II,

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[217] Sullivan, *supra* note 34, at 11–13 (analyzing known military courts-martial that remained capital-eligible cases at trial).

[218] *Id.* at 14–17 (attributing the decline in military capital trials to multiple factors, including opposition from European allies to capital courts-martial for crimes in Europe, increased complexity of capital litigation (deterring capital referrals and lengthening case time), and the availability for the first time of life without parole as an authorized punishment for offenses committed after November 1997). Another factor likely contributing to the decline is the post-Cold War reduction in the active duty military population, which fell approximately 35% between 1984 and 2006, with most of the decline occurring between 1990 and 1998 (end strength stabilized somewhat thereafter). *See* DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES 2017, APPENDIX D, TABLE D-39 (2017).

[219] United States v. Witt, 2021 CCA Lexis 625 (A.F. Ct. Crim. App. Nov. 19, 2021) (2018 Air Force capital resentencing proceeding in which panel declined to impose a death sentence for Airman whose previous 2004 death sentence was set aside on appeal); United States v. Wilson, 2021 CCA Lexis 284 (A.F. Ct. Crim. App. June 10, 2021), *rev. denied*, 2021 CAAF Lexis 1075 (C.A.A.F. Dec. 21, 2021) (2017 Air Force capital court-martial in which panel declined to impose a death sentence); United States v. Hasan, 80 M.J. 682 (Army Ct. Crim. App. 2020), *mand. rev. pending* (2015 Army capital court-martial in which panel imposed a death sentence); United States v. Hennis, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (2010 Army capital court-martial in which panel imposed a death sentence); Paul von Zeilbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES (Feb. 20, 2009), https://www.nytimes.com/2009/02/21/nyregion/21frag.html (2008 Army capital court-martial ending in an acquittal).

in which the military rapidly tried capital cases in theater (in part for an immediate deterrent effect),[220] it is nearly unimaginable the military would do so today. Take, for example, two prominent instances of soldier-on-superior killings from the Iraq war. In the March 2003 build-up to the invasion, Sergeant Hasan Akbar killed two officers from his unit and wounded fourteen others.[221] The Army did not try Sergeant Akbar in Iraq; his capital court-martial began over two years later, in April 2005, at Fort Bragg, North Carolina.[222] In June 2005, a different sergeant was alleged to have killed two officers from his unit while deployed to Iraq.[223] The Army sought the death penalty in a December 2008 trial at Fort Bragg, which resulted in an acquittal.[224] Both of these capital trials occurred over two years after the underlying incidents.[225] Far from being carried out at a small installation at which prospective panel members are scarce (a historical concern of some who opposed increased peremptory challenges),[226] they occurred on the single largest Army post in terms of active duty personnel.[227]

Just as the proposed increase in peremptory challenges will have little impact on command efficiency or combat operations in general, it will also have little practical impact on the already lengthy court-martial process.

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[220] *See* UNITED STATES ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975 at 192–99 (1975) (relating how Private Eddie Slovik deserted his forward-deployed infantry unit in October 1944, was sentenced to death in a two-hour court-martial in November 1944, had his death sentence confirmed by General Eisenhower in December 1944 during the Battle of the Bulge, and was executed in theater by firing squad in January 1945).

[221] United States v. Akbar, 74 M.J. 364, 372 (C.A.A.F. 2015).

[222] *Id.* at 375.

[223] Paul von Zeilbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES (Feb. 20, 2009), https://www.nytimes.com/2009/02/21/nyregion/21frag.html.

[224] *Id.*

[225] Two years is the current average time between an offense and a capital trial in the military justice system. By contrast, in the 1950s the military still tried multiple capital cases within two months of the underlying offenses. *See* Lieutenant Commander Stephen C. Reyes, *Dusty Gallows: The Execution of Private Bennett and the Modern Capital Court-Martial*, 62 NAVAL L. REV. 103, 119–20 (2013).

[226] *See supra* text accompanying note 175.

[227] *See* Michael Levenson, *These Are the 10 U.S. Installations Named for Confederates*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/us/military-bases-confederates.html (noting Fort Bragg has 57,000 active duty members).

Trial-level litigation in *United States v. Hennis* illustrates this point. [228] Over three years elapsed between when the Army arraigned Master Sergeant Hennis on September 18, 2007, to when the panel announced the death sentence on April 15, 2010, a process involving court sessions on forty-five separate days.[229] A total of thirty-nine members sat for voir dire over the course of 9.5 days of voir dire and challenges before the court arrived at a final panel of fourteen members. [230] During voir dire, prospective members generally had leave of court to go about their duties except on days needed for individual voir dire.[231] Although the length of voir dire varied for each individual member, panel selection progressed at an overall rate of just over four panel members per court day.[232] *Hennis* provides a useful rubric for the potential impact of voir dire for additional members on the length of future capital cases in part because defense counsel implemented the Colorado method for voir dire.[233] Utilizing the rate from *Hennis*, this Article's proposed increase of thirteen additional peremptory challenges would likely lengthen a future capital trial by just three to four days. Compared to the years of appellate litigation in capital

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[228] United States v. Hennis, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021). *Hennis* is the most recent Army capital court-martial in which the defense exercised challenges. In *United States v. Hasan,* a subsequent capital court-martial, the accused insisted on proceeding *pro se* and did not challenge any members (either peremptorily or for cause). 80 M.J. 682, 715–716 (A. Ct. Crim. App. 2020), *mand. rev. pending*.

[229] Transcript of Record of Trial, United States v. Hennis, No. 20100304 (Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C., April 15, 2010) at i–iii (hereinafter *Hennis*, Tr. of R.)

[230] *Id.* at 1709–3799. After voir dire, trial on the merits and sentencing required twenty days of court sessions. *Id.* at i–iii. The court-martial occurred before Congress established a fixed panel size of twelve for capital courts-martial. *See* Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25a, UCMJ). No capital court-martial has occurred under the new standard.

[231] *See Hennis*, Tr. of R., *supra* note 231, at 1709–3799.

[232] *See id*.

[233] On direct appeal, Hennis argued that various rulings by the trial judge restricted his counsel's ability to fully implement the Colorado method. The Army Court of Criminal Appeals rejected this claim, finding that "when we compare roughly 2,000 pages of voir dire transcript in this case to the method's principles, . . . it is difficult to imagine a defense voir dire more strictly adherent to the Colorado Method." The Court of Appeals for the Armed Forces (CAAF) did not consider the claim. United States v. Hennis, 75 M.J. 796, 828–29 (Army Ct. Crim. App. 2016), *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021).

cases, three to four extra days at the trial constitutes a truly *de minimis* impact on the overall length of the capital process.[234]

Moreover, as one former Chief Judge of the Court of Military Appeals recognized, an increased number of peremptory challenges may actually decrease litigation over denied challenges for cause.[235] Such a decrease may offset the three to four extra days incurred by increased challenges. To preserve appellate review of an improperly denied challenge for cause, a court-martial accused cannot use a peremptory challenge on the challenged member and instead must exercise their peremptory on a different member.[236] Put differently, using a peremptory challenge on a member for which the judge denied a causal challenge waives the issue of improper denial.[237] This presents the accused with "the hard choice" of whether "to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."[238] With life or death on the line, this is a "hard choice" indeed for a capital accused armed with only a single peremptory challenge. By contrast, a capital accused with ten peremptory challenges would likely be more willing (and able) to use a peremptory on a member for whom a challenge for cause was denied, thereby seeking to increase the likelihood of prevailing at the trial level, even it means not preserving the issue of improper denial for appeal. A capital accused would most likely do so on edge cases, the close calls that end up the subject of litigation on appeal.[239] In this manner, increased peremptory challenges may reduce litigation over denied challenges for cause.

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[234] *Cf.* Sullivan, *supra* note 34, at 3 (2006) ("Military death penalty cases average more than eight years between sentencing and resolution of the direct appeal.").

[235] *Hearings on S. 2521 Before a Subcomm. on Manpower and Pers. of the S. Comm. on Armed Serv.*, 97th Cong. 118 (1982) (statement of the Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals) ("Indeed, if [increased peremptories] were adopted, we might have fewer appeals to consider with respect to denials of challenges for cause.").

[236] 2019 MCM, *supra* note 29, R.C.M. 912(f)(4).

[237] *See id.*

[238] 2016 MCM, *supra* note 29, Appendix 21, Analysis of R.C.M. 912(f) (discussing the 2005 amendment implementing the restrictive standard).

[239] *See* United States v. Hennis, 79 M.J. 370, 383–88 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (court considering and denying appellant's claim that the trial judge improperly denied three challenges for cause).

X. Conclusion

While the larger debate over peremptory challenges continues, Congress should amend the UCMJ to provide each military capital accused with ten peremptory challenges and to provide the prosecution with five for each accused. Until Congress does so, capital defense counsel must continue to utilize advanced voir dire strategies. Capital defense counsel should also continue to consider requesting the court provide additional defense peremptory challenges and potentially limit government peremptory challenges, as one practitioner has recommended.[240] This asymmetrical increase will allow capital defense counsel to shape panels based on the information gained from advanced voir dire strategies like the Colorado Method. Peremptory challenges guard against flaws in the voir dire and challenge for cause processes, which result in many constitutionally-impaired jurors sitting on capital juries. These jurors then form part of the death-leaning majorities, which, intentionally or unintentionally, exert substantial pressure on life-leaning jurors to conform with the majority. Additional peremptory challenges are necessary to reduce this risk. Indeed, "[a]s is often said, death is different. It is different in kind. It is different in finality."[241] In a capital court-martial, peremptory challenges should be different, too.

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[240] Carpenter, *supra* note 56, at 23.
[241] United States v. Akbar, 74 M.J. 364, 425 (C.A.A.F. 2015) (Baker, J., dissenting).

IMPROVING CARE FOR THE ARMY'S YOUNGEST DEPENDENTS

Major Pamela M. Gaulin[*]

> *Service members can't focus on the mission when they have concerns about a family member's health or education needs.*[1]

I. Introduction

At the end of 2023, as part of the Army's previous "People First" strategy, the Army touted efforts to increase spouse employment opportunities, streamline moving processes, increase childcare availability, add parental leave entitlements, encourage economic stability through pay raises, improve infrastructure, and support health among the force.[2] However, increased support for military Families with special

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[1] *See* Press Release, DEP'T OF DEF., *New Defense Department Policy Standardizes Exceptional Family Member Program Across the Services* (June 23, 2023), https://www.defense.gov/News/Releases/Release/Article/3437493/new-defense-department-policy-standardizes-exceptional-family-member-program-ac/.

[2] Christopher Hurd, *Year in Review: Army's Quality of Life Changes Place People First*, U.S. ARMY NEWS SERVICE (Dec. 6, 2023), https://www.army.mil/article/272178/year_in_review_armys_quality_of_life_changes_place_people_first.

needs is notably lacking from the Army's highlighted achievements during the 2023 calendar year.[3] In highlighting the Department of Defense's (DoD's) policy to support Families, Secretary of Defense Lloyd Austin remarked that "[the DoD] is deeply committed to ensuring that family members with exceptional needs have access to superb care, support, and expertise."[4] This care should specifically address the needs of young children with disabilities.

Congress has recognized the need to support Families of children with special needs for many years, finding that for children from birth through the age of three, "there is an urgent and substantial need . . . to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first [three] years of life[.]"[5] Moreover, in April 2023, President Biden issued an executive order, noting that "[e]arly care and education give young children a strong start in life," and "[a]ccess to . . . care is also critical to our national security because it helps ensure the recruitment, readiness, and retention of our military [S]ervice members."[6] Given the expressly affirmed importance of special education by leaders and policymakers at all levels, the DoD and the Army should increase services and legal support for children with special needs, specifically those under the age of three.

Historical developments in special education law demonstrate Congress's intent to support children with disabilities. Congress promulgated what is now the Individuals with Disabilities Education Act (IDEA) in 1975, a significant statutory advancement to protect the educational rights of children with disabilities.[7] The protections established in the IDEA were specifically extended by Congress in 1991 and 1994 to children attending schools on a military installation in the United States and overseas, placing responsibility on the Department of

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[3] *Id.*

[4] Memorandum from Sec'y of Def. to Senior Pentagon Leadership, Commanders of the Combatant Commands & Def. Agency and Dep't of Def. Field Activities, subject: Strengthening Our Support to Service Members and Their Families 3 (22 Mar. 2023) [hereinafter Strengthening Our Support Memo].

[5] 20 U.S.C. § 1431(a)(1).

[6] Exec. Order No. 14,095, 88 Fed. Reg. 24669, § 1 (Apr. 18, 2023).

[7] *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1991); *see also* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587, § 1 (renaming the Education for All Handicapped Children Act of 1975 the Individuals with Disabilities Education Act).

Defense (DoD) to ensure special education needs were met in certain instances.[8] In 2009, Congress established the Office of Community Support for Military Families with Special Needs to "enhance and improve [DoD] support around the world for military families with special needs."[9] Since then, Congress has mandated improvements to the DoD's support of Families with special needs annually through the National Defense Authorization Act (NDAA) and continued prioritizing efforts to support special education through annual authorizations.[10] In response to congressional oversight and highlighting issues related to Families with special needs, the DoD has taken significant steps to advance its services and support for dependents with disabilities.[11] Recent improvements include mandating the standardization of Exceptional Family Member Programs (EFMPs)[12] across the military services; requiring medical

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[8] *See, e.g.*, Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (amending the Defense Dependents Education Act of 1978 to require IDEA implementation overseas); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 351, 108 Stat. 2663, 2727 (1994) (authorizing special education and early intervention on military installations within the United States).

[9] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 563(a)(1), 123 Stat. 2190, 2304 (2009).

[10] *See, e.g.*, *id.*; Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 582, 582(c), 124 Stat. 4137, 4226 (enhancing "community support for military families with special needs" and authorizing secretaries of the military departments to "establish or support centers on or in the vicinity of military installations under the jurisdiction of such Secretary to coordinate and provide medical and educational services for children with special needs of members of the Armed Forces who are assigned to such installations"); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 574, 125 Stat. 1298, 1427–1428 (2011) (appointing the Director of the Office of Community Support for Military Families with Special Needs to the DoD Military Family Readiness Council); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 714, 126 Stat. 1632, 1803 (expanding evaluation of Tricare Program effectiveness to include "dependents of members on active duty with severe disabilities and chronic health care needs"); Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 624(a)(1), 128 Stat. 3292, 3403 (2014) (adding survivor benefit plan annuities for special needs trusts); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 578, 130 Stat. 2000, 2144 (2016) (requiring evaluation and reporting on the effectiveness of Exceptional Family Member Programs across the military departments).

[11] *See* Press Release, *supra* note 1 (detailing improvements and standardization for the Exceptional Family Member Program (EFMP) in the areas of identification and enrollment, assignment coordination, Family support, disenrollment, and respite care).

[12] The EFMP model is to "work[] in concert with other military and civilian agencies, provid[ing] a comprehensive, coordinated, multiagency approach for community support,

coordination and documentation for enrollment in the program; ensuring branches use the same criteria to evaluate assignments for Service members who have dependents with special needs and communicating assignment issues; mandating annual contact with Family support providers; providing transparency and guidance for removal from the EFMP; and standardizing, and in some cases increasing, eligibility for respite care.[13] However, the DoD continues to struggle in many areas to ensure support for Families with special needs.[14] One of the areas most lacking support for individuals and Families with special needs is ensuring care for children with disabilities from birth through the age of three.

Many hurdles for family members receiving special needs care occur within the first few years of life.[15] The laws that govern early intervention services (EIS) and care for children with disabilities under the age of three are complex and vary significantly from State to State.[16] Nevertheless, within each State, there is one statewide standard for eligibility and provision of EIS.[17] Despite the complexity of current laws and support,

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housing, medical, educational, and personnel services to Families with special needs." U.S. DEP'T OF ARMY, REG. 608-75, EXCEPTIONAL FAMILY MEMBER PROGRAM para. 1-6 (27 Jan. 2017) [hereinafter AR 608-75]. The military requires Families to enroll in the EFMP to assist in tracking special needs for the Family and the support required. *Id.* paras. 1-7(a), 1-9.

[13] Press Release, *supra* note 1.

[14] INSPECTOR GEN., U.S. DEP'T OF DEF., NO. DODIG-2023-102, AUDIT OF THE DOD EXCEPTIONAL FAMILY MEMBER PROGRAM 10–15 (AUG. 1, 2023) (detailing the need for establishing and standardizing performance metrics and data repositories); *see also 2023 Update: EFMP Standardization*, PARTNERS IN PROMISE (June 27, 2023), https://thepromiseact.org/2023-update-efmp-standardization/ (finding that the DoD's recent update to the EFMP policy is "underwhelming" and "still fails to address the intersections of EFMP and special education").

[15] *See* CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., THE FOUNDATIONS OF LIFELONG HEALTH ARE BUILT IN EARLY CHILDHOOD 5 (2010) (finding that "[e]arly childhood is a time of rapid development in the brain and many of the body's biological systems that are critical to sound health. When these systems are being constructed early in life, a child's experiences and environments have powerful influences on both their immediate development and subsequent functioning").

[16] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106019, SPECIAL EDUCATION: ADDITIONAL DATA COULD HELP EARLY INTERVENTION PROGRAMS REACH MORE ELIGIBLE INFANTS AND TODDLERS app. II (2023) [hereinafter GAO-24-106019], https://www.gao.gov/products/gao-24-106019 (listing the varying standards for EIS eligibility by jurisdiction).

[17] *Id.*; *see also* 20 U.S.C. § 1400(d)(2) (stating the purpose of the Individuals with Disabilities in Education Act to "assist States in the implementation of a statewide,

there is no standard eligibility or application of EIS for military Families and their dependents, who are left to navigate a new EIS program for eligibility and related services each time a Service member moves to a new duty location.[18] Based on current DoD policy limitations, Family members with disabilities under the age of three are limited in receiving early intervention, and the DoD should resolve discrepancies in the policy to expand services for this demographic. Regardless of how the DoD resolves gaps in current policies and regulations, the Army should continue expanding legal support and expertise for Families with special needs.

Part II of this article begins by briefly examining the history of the IDEA and the applicability and implementation of regulations for special education services across the DoD. Part III then evaluates the justification for increasing services and legal support regarding disabilities identified before a child's third birthday. Next, Part IV addresses statutory and regulatory gaps related to early intervention within the military and how the DoD should resolve those gaps. Part V discusses the Fiscal Year 2021 (FY21) National Defense Authorization Act (NDAA) mandate to provide special education-trained attorneys across the DoD and the Army's subsequent actions to satisfy that mandate. Lastly, before concluding, Part VI proposes an expansion of the Army's legal expertise beyond the limited requirements of the NDAA mandate to advise units and organizations more effectively.

II. Background on Special Education Law in the Military

Legal protections in education for children with disabilities, including military dependents, have evolved significantly over the past 50 years in the United States. In September 1973, Congress passed the Rehabilitation Act of 1973, intending to eliminate widespread discrimination against

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comprehensive, coordinated, multidisciplinary, interagency system of early intervention services").

[18] While the DoD has a policy for providing EIS to dependents, such programs only exist for those at an installation with a DoD Education Activity school on their installation. *See* U.S. DEP'T OF DEF., INSTR. 1342.12, PROVISION OF EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS para. 4(a) (June 17, 2015) [hereinafter DODI 1342.12]. *See also EDIS Locations: CONUS & Territory*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/EDIS-Locations/Maps/ (last visited Apr. 13, 2025).

individuals with disabilities.[19] Amendments to the Act, subsequently codified in Title 29, United States Code, Chapter 16, Section 504, decree that "[n]o otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[20] Specifically, the Rehabilitation Act of 1973 provided protections against discrimination by school districts.[21] As this article focuses on increasing support for children under the age of three, it will not specifically address protections afforded to school-age children under the Rehabilitation Act of 1973, Section 504. However, it is helpful to note that this Act ignited educational protections for children with disabilities.[22] Only two years later, President Gerald Ford signed the Education for All Handicapped Children Act into law as Public Law 94-142, later renamed the Individuals with Disabilities in Education Act (IDEA), to ensure access to education and improved outcomes for children with disabilities.[23] This section will review the purpose and protections of the IDEA, its applicability to the DoD, and the current implementation of the IDEA within the Army.

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[19] Rehabilitation Act of 1973, Pub. L. 93–112, § 2, 87 Stat. 357 (amended 2022) (recognizing the need for disabled individuals to have independence and self-sufficiency and recognizing that the affected population was previously underserved and neglected); *see also Rehabilitation Act 50: Advancing Access and Equity—Then, Now and Next*, U.S. DEP'T OF EDUC. (Sept. 21, 2023), https://sites.ed.gov/osers/2023/09/celebrating-the-50th-anniversary-of-the-rehabilitation-act-of-1973/ (detailing the purpose, policy, and principles of the Rehabilitation Act of 1973 on the fiftieth anniversary of its enactment).

[20] 29 U.S.C. § 794(a).

[21] *See* 29 U.S.C. § 794(b)(2)(B) (prohibiting discrimination by "a local educational agency . . . system of career and technical education, or other school system").

[22] *See generally Frequently Asked Questions: Disability Discrimination, General FAQs About Disability Discrimination*, U.S. DEP'T OF EDUC. (Jan 17, 2025) https://www.ed.gov/laws-and-policy/civil-rights-laws/disability-discrimination/frequently-asked-questions-disability-discrimination.

[23] Presidential Statement on Signing the Education for All Handicapped Children Act of 1975, 2 PUB. PAPERS 707 (Dec. 2, 1975).

A. Purpose and Protections of the Individuals with Disabilities in Education Act

The primary purposes of the IDEA, building on previous legislation, [24] are:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . . (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities . . . ; and (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.[25]

The IDEA encourages a "whole-school approach" to address the learning and behavioral needs of children without having to "label children as disabled."[26] Overall, the IDEA comprises three main sections: Part A provides general definitions and applicability; Part B provides requirements for the education of school-aged children; and Part C provides the requirements to support special education services for children between birth and a child's third birthday.[27] Congress enacted the IDEA to codify the rights of children with disabilities and their parents and

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[24] *See* 20 U.S.C. § 1400(c)(3) (noting that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education [(FAPE)] and in improving educational results for children with disabilities"); *see also* 20 U.S.C. § 1400(c)(4) (acknowledging that "the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities").

[25] 20 U.S.C. § 1400(d).

[26] 20 U.S.C. § 1400(c)(5)(F).

[27] *See generally* 20 U.S.C. ch. 33.

assist States in the implementation of services for those families. In addition to funding educational services provided to the children, the IDEA seeks to support parents and educators to achieve maximum success.[28] The majority of support provided to children with disabilities occurs during the school-age years, from the time they reach the age of three until they turn 21 years of age.

One of the hallmarks of the IDEA, as identified in Part B, is that, between the ages of three and 21, children with disabilities must have the opportunity to receive "a free appropriate public education [(FAPE)] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]"[29] The established goal for States receiving funds through the IDEA is to provide a "full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal."[30] In support of these goals, the IDEA requires that each child have an individualized education program (IEP) detailing the child's specific needs and how the school plans to meet those needs.[31] If successful, a child

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[28] 20 U.S.C. § 1400(d)(3) (aiming "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services").

[29] 20 U.S.C. § 1400(d)(1)(A). A FAPE includes "special education and related services . . . provided at public expense, under public supervision and direction, and without charge[,]" that meet State educational standards at a preschool, elementary, or secondary school, and the requirements of an individualized education plan (IEP). 20 U.S.C. § 1401(9).

[30] 20 U.S.C. § 1412(a)(2).

[31] 20 U.S.C. § 1412(a)(4). IEPs are established in accordance with 20 U.S.C. § 1414(d) to assess a child's disability and the impact of that disability on a child's education. 20 U.S.C. § 1414(d)(1)(A)(i). In establishing an IEP, the program determines "measurable annual goals, including academic and functional goals," to meet that child's educational needs and make progress in the general education program. 20 U.S.C. § 1414(d)(1)(A)(i)(II). An IEP may include a requirement for the school to provide related services, including:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling,

will "be involved in and make progress in the general education curriculum[.]"[32] However, the need to establish the support required to reach these goals often begins even before a child reaches the age of three.

Another hallmark of the IDEA, as detailed in Part C of the IDEA, is the provision of EIS to infants and toddlers with disabilities.[33] The goal of EIS, similar to the requirements for children receiving special education through implementing an IEP, is to provide "statewide, comprehensive, coordinated, multidisciplinary, interagency" services.[34] Congress found that EIS would minimize developmental delays, reduce societal costs, maximize independent living, and enhance the capacity of parents and States to support infants and toddlers with disabilities.[35] Recognizing the significance and benefits of early intervention in development, Congress included provisions within Part C of the IDEA for financial assistance to the States to ensure the identification of needs and provision of services to children with disabilities from birth until their third birthday.[36] Similar to the provisions for support of a school-aged child, States are encouraged and supported in identifying disabilities before a child's third birthday and supporting those children and families through the provision of EIS.[37] Through the IDEA, states are encouraged to "expand opportunities for

> orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

[32] 20 U.S.C. § 1414(d)(A)(i)(II)(aa).

[33] 20 U.S.C. § 1400(d)(2).

[34] 20 U.S.C. § 1431(b)(1); *see also* 20 U.S.C. § 1412 (a)(11–12) (noting the requirements for states to conduct interagency coordination for school-age services).

[35] 20 U.S.C. § 1431(a).

[36] *See* 20 U.S.C. § 1431(b); *see also* 20 U.S.C. § 1432(5) (defining "infant or toddler with a disability" as a child "under 3 years of age who needs early intervention services" based on developmental delays, physical or mental diagnoses, or at-risk infants and toddlers).

[37] Early intervention services (EIS) include direct intervention services by a provider, including, but not limited to, physical therapy, occupational therapy, speech therapy, or special instruction. 20 U.S.C. § 1432(4)(E). EIS is designed to support the family and also includes "family training, counseling, and home visits" and "social work services[,]" which, in most instances, means a provider will come to the home and work with the family to implement therapy techniques and encourage maximum development for the child. *Id. See also Sec. 303.13 Early Intervention Services*, DEP'T OF EDUC. (May 2, 2017), https://sites.ed.gov/idea/regs/c/a/303.13.

children under three years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services." [38] In determining the Federal, State, and other agency requirements, it is essential to understand the applicability of the IDEA across the United States.

The IDEA contains limitations in both time and geography. With regard to timing, the IDEA requires periodic re-authorization by Congress.[39] From a geographic perspective, the IDEA applied only to the

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[38] 20 U.S.C. § 1431(b)(4). Under this subchapter, EIS includes:

> developmental services that– (A) are provided under public supervision; (B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees; (C) are designed to meet the developmental needs of an infant or toddler with a disability, as identified by the individualized family service plan team . . . (D) meet the standards of the State in which the services are provided, including the requirements of this subchapter; (E) include– [family training, counseling, and home visits; special instruction; speech-language pathology and audiology services, and sign language and cued language services; occupational therapy; physical therapy; psychological services; service coordination services; medical services only for diagnostic or evaluation purposes; early identification, screening, and assessment services; health services necessary to enable the infant or toddler to benefit from the other early intervention services; social work services; vision services; assistive technology devices and assistive technology services; and transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive another service described in this paragraph; (F) are provided by qualified personnel[] . . .; (G) to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate; and (H) are provided in conformity with an individualized family service plan adopted in accordance with section 1436 of this title.

20 U.S.C. § 1432(4).

[39] Ralph M. Gerstein & Lois Gerstein, *Parents' or Student's Proof in Action for Educational Services or Tuition Reimbursement Under the Special Education Laws*, 93 AM. JUR. PROOF OF FACTS 3d 1 §4 (2007) (database updated Sept. 2023). The last re-authorization of IDEA occurred in November 2004, with an amendment to IDEA in 2015 through Public Law 114-95, Every Student Succeeds Act. *About IDEA*, U.S. DEP'T OF EDUC., https://sites.ed.gov/idea/about-idea (last visited June 12, 2025).

50 States, outlying areas, and freely associated States at its inception.[40] However, when Congress reauthorized the legislation in 1991, the updates provided specific requirements for the DoD to meet various statutory provisions related to special education.[41] Specifically, Congress amended Section 1409(c) of the Defense Dependents' Education Act of 1978, applying the IDEA to all schools operated by the Department of Defense overseas and requiring the DoD to provide comparable early intervention services to eligible infants and toddlers overseas.[42] In 1994, Congress amended Chapter 108 of Title 10, United States Code, to authorize DoD domestic dependent elementary and secondary schools (DDESS) to provide early intervention services and special education.[43] To satisfy its statutory obligations, the DoD has since taken numerous steps to ensure compliance with the IDEA requirements.

B. Applicability of the Individuals with Disabilities in Education Act to the Department of Defense

The DoD most recently published DoD Instruction 1342.12 (DoDI 1342.12) on June 17, 2015, implementing the DoD policy to provide early intervention and special education services for eligible DoD dependents.[44] DoDI 1342.12 provides overarching guidance and policy regarding

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[40] *See, e.g.*, 20 U.S.C. § 1411(a)(1) (authorizing "grants to States, outlying areas, and freely associated States"); 20 U.S.C. § 1443(a)(1) (identifying the allocation of funds available to outlying areas and freely associated states for EIS implementation). Under the definitions in Part A, outlying areas include "the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands." 20 U.S.C. § 1401(22).

[41] Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (amending the Defense Dependents Education Act of 1978). The amendment also expanded applicability to the Secretary of the Interior to provide services for Indian tribes and programs affiliated with the Bureau of Indian Affairs. *See, e.g.*, 20 U.S.C. § 1411(a)(1) (authorizing grants to states, outlying areas, freely associated states, and the Secretary of the Interior); 20 U.S.C. § 1443(b) (noting the availability of funds to the Secretary of the Interior for tribes, tribal organizations, or consortia in implementing EIS). "The term 'Indian tribe' means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation . . . ." 20 U.S.C. § 1401(13).

[42] Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24.

[43] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 351, 108 Stat. 2727 (1994).

[44] DoDI 1342.12, *supra* note 18.

implementing the IDEA within the DoD Education Activity (DoDEA) Schools and providing early intervention and related services on DoD installations, with specific implementing instructions separately detailed in DoD Manual 1342.12 (DoDM 1342.12).[45]

1. School-Aged Implementation

Overall, the IDEA implementation within the DoDEA intends to mirror the implementation in any state-provided schooling and ensure that DoD dependents receive the same educational guarantees. The DoD implements similar responsibilities and programs within the DoD to ensure school-age children receive a FAPE, as detailed in Enclosure 4 of DoDM 1342.12.[46] The manual authorizes referral for evaluation by either a parent or teacher.[47] The manual also requires "child-find activities to locate, identify, and screen all children who are entitled to enroll in DDESS or in [DoDEA schools overseas] . . . who may require special education and related services."[48] The school then conducts an assessment and evaluation of the child's educational needs, followed by an eligibility determination and the development of an IEP based on the standards outlined in the IDEA, with many of the same procedural safeguards.[49] The DoD takes a similar approach to ensure that special education services and

[45] U.S. DEP'T OF DEF., MANUAL 1342.12, IMPLEMENTATION EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS (June 17, 2015) [hereinafter DoDM 1342.12]. Department of Defense Education Activity (DoDEA) schools also include schools operated under the oversight of DoDEA, including Domestic Dependent Elementary and Secondary Schools (DDESS) and Department of Defense Dependent Schools (DoDDS). *See id.* para. 2(a)(3).

[46] *See id.* at encl. 4; *see also id.* at encl. 2, para. 3(b) (requiring the Director, DoDEA, to ensure "a [FAPE] and procedural safeguards in accordance with Reference (b), the IDEA and [DoDM 1342.12] to children with disabilities who are entitled to enroll in DoDEA schools . . . .")

[47] *Id.* at encl. 4, paras. 4–5.

[48] *Id.* at encl. 4, para. 2(a)(1).

[49] *Id.* at encl. 4, paras. 6–8. DoDM 1342.12 requires education with non-disabled children to the maximum extent appropriate and requires schools to provide services in the least restrictive environment. *See id.* at encl. 4, para. 10. The manual also provides protections for the student concerning the provision of services in an extended school year. *See id.* at encl. 4, para. 11. DoDM 1342.12 also places specific limitations on discipline administration for children with disabilities, with specific procedural safeguards for parents concerning disciplinary actions. *See id.* at encl. 4, para 12.

protections are available to children and Families receiving early intervention services on eligible DoD installations.

2. Infant and Toddler Implementation

Department of Defense Manual 1342.12 recognizes the "urgent and substantial need" to provide early intervention services in accordance with the IDEA and details requirements for providing those services in Enclosure 3.[50] Under implementing regulations and the IDEA, the Secretaries of the Military Departments must "[e]stablish educational and developmental intervention services (EDIS) to ensure infants and toddlers with disabilities are identified and provided [early intervention services] where appropriate . . . ."[51] The manual requires Military Departments to implement, at a minimum, geographic child-find and public awareness programs related to the provision of early intervention services and authorizes referral of infants and toddlers to EDIS with parental consent and, in some limited circumstances, without consent.[52] The EDIS program is responsible for screening children after referral and determining whether an assessment and evaluation are necessary.[53] Children who meet the screening criteria are assessed and evaluated by a multidisciplinary team

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[50] *Id.* at encl. 3, para. 1.

[51] DoDI 1342.12, *supra* note 18, at encl. 2, para. 4(a).

[52] DoDM 1342.12, *supra* note 45, at encl. 3, para. 2. Referrals to Educational and Developmental Intervention Services (EDIS) do not require parental consent when an infant or toddler under three years of age is involved in a substantiated case of child abuse, involved in a substantiated case of child neglect, affected by illegal substance abuse, or experiencing withdrawal symptoms from prenatal drug exposure. DoDM 1342.12, *supra* note 45, at para. 2(b). Child-find is defined as:

> [a]n outreach program used by DoDEA, the Military Departments, and the other DoD Components to locate, identify, and evaluate children from birth to age 21, inclusive, who may require EIS or special education and related services. All children who are eligible to attend a DoD school under sections 921-932 of Reference (b) or Reference (c) fall within the scope of the DoD child-find responsibilities. Child-find activities include the dissemination of information to Service members, DoD employees, and parents of students eligible to enroll in DoDEA schools; the identification and screening of children; and the use of referral procedures.

DoDI 1342.12, *supra* note 18, at glossary, part II.

[53] DoDM 1342.12, *supra* note 45, at encl. 3, para. 2(e).

to determine the child's level of functioning in cognitive development, physical development, communication development, social or emotional development, and adaptive development to identify the services required to address the child's needs in those areas.[54] In the event a child requires services, EDIS develops an individualized Family service plan (IFSP) detailing the developmental levels, the Family's resources, priorities, and concerns, measurable desired results or outcomes, the specific early intervention services necessary, and the natural environments in which services will be provided, among other details.[55] While the DoD has taken measures to ensure early intervention services, similar to the aims of providing special education services to school-age children, other considerations may impact whether the DoD may provide services at a given installation.

3. Jurisdictional Limitations

In some instances, Families living on a military installation may depend on the DoD to provide EIS based on jurisdictional limitations. States have obligations and funding under the IDEA to provide services to individuals living within the State.[56] However, while the clear language of the IDEA explicitly requires States to provide special education services to "Indian infants and toddlers with disabilities . . . residing on a reservation geographically located in the State," the statute is silent regarding State obligations to provide similar services for Families residing on federal military installations.[57] Nothing in the IDEA prohibits States from providing such services to Families residing on a military installation geographically located in the State.[58] However, because services on a military installation are not explicitly required, a Service

[54] DODM 1342.12, *supra* note 45, at encl. 3, para. 3.
[55] DODM 1342.12, *supra* note 45, at encl. 3, para. 6. Based on the language of the IDEA, there are also procedural safeguards, similar to those for children on an IEP, in place for parents of an infant or toddler eligible for early intervention services. *See* DODM 1342.12, *supra* note 45, at encl. 3, para. 9.
[56] 20 U.S.C. § 1434(1) (requiring state assurances that EIS are "available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities . . . residing on a reservation geographically located in the State, infants and toddlers who are homeless children . . . and infants and toddlers with disabilities who are wards of the State").
[57] *Id.*
[58] *Id.*

member residing on a federal installation may not benefit from state legislation regarding special education services on the installation.[59]

A state may not be obligated to provide the same services depending on the type of legislative jurisdiction applicable to that installation.[60] The Army outlines and defines the four types of federal legislative jurisdiction in Army Regulation 405-20, each potentially impacting the provision of special education services on military bases.[61] In instances of exclusive federal legislative jurisdiction, responsibility may fall solely on the federal government to provide special education services for Families that live in installation housing.[62] In this example, a child who is two years old and lives on an exclusive jurisdiction military installation may not be eligible to receive EIS through the state because they live on a federal installation, and the military is then authorized, but not required, to provide such

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[59] U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 4(a) (21 Feb. 1974) [hereinafter AR 405-20].

[60] *See* 20 U.S.C. § 1434 (requiring a statewide system of services for individuals in the state, but not explicitly requiring services for individuals residing on federal property within the state).

[61] AR 405-20, *supra* note 59, para. 3. The four types of jurisdiction are exclusive legislative jurisdiction, concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. *Id*. Under exclusive federal legislative jurisdiction, Congress provides all legislation, the Federal Government provides all law enforcement, and the state has no obligation to provide governmental services such as sewage, trash removal, or road maintenance. *Id.* at para. 4(a).

> In some States residents on areas under exclusive legislative jurisdiction may be denied many of the important rights and privileges of a citizen of the State concerned, such as the right to vote and to have access to State courts. The language of the State statutes generally governs the remaining degree of State obligation where exclusive Federal legislative jurisdiction exists over an area.

Id. Under concurrent legislative jurisdiction, state and federal laws apply, and both entities may punish criminal conduct; most often, the state reserves the right to tax residents, and the state exercises regulatory powers when not impeding federal functions. *Id.* para. 4(b). With partial legislative jurisdiction, the state enacts, executes, and enforces laws reserved by the state as if the Federal Government has no jurisdiction. *Id.* para. 4(c). In contrast, the federal government enacts, executes, and enforces laws granted without reservation by the state to the federal government as if under exclusive federal legislative jurisdiction. *Id*. In some instances of partial legislative jurisdiction, the state may reserve concurrent jurisdiction over certain powers. *Id*.

[62] *See id.* at para. 4(a) (noting that the language of state statutes will dictate state obligations in areas of exclusive federal jurisdiction).

services.[63] However, when concurrent jurisdiction, partial jurisdiction, or a proprietary interest exists, the state and federal government may be responsible for providing special education services.[64]

Since AR 405-20 was implemented in 1974, the Department of the Army policy has been to obtain only proprietary interest in acquired land, rather than exclusive, concurrent, or partial jurisdiction. [65] When only a proprietary interest exists, "[t]he United States exercises no legislative jurisdiction. The Federal Government has only the same rights in the land as does any other landowner." [66] However, it is still important to understand the federal government's responsibility to provide special education services on land previously purchased. The federal government last developed an inventory of installations possessing exclusive federal jurisdiction in 1962, so each installation must be evaluated on a case-by-case basis.[67] In instances of exclusive federal jurisdiction, states cannot enforce or execute legislation on an installation, exacerbating the burden on the military to provide special education services.[68]

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[63] *See* 10 U.S.C. § 2164(a) (granting authority to provide educational programs when state programs are not available); *see also, e.g.*, 10 U.S.C. § 2164(f)(B) (granting substantive and procedural rights to infants and toddlers with disabilities); 10 U.S.C. § 2164(b) (providing guiding factors to determine whether to establish a DoDEA school, including: "(A) The extent to which such dependents are eligible for free public education in the local area adjacent to the military installation[; and] (B) [t]he extent to which the local educational agency is able to provide an appropriate educational program for such dependents[,]" but failing to address any criteria to determine whether appropriate EIS are provided and available).

[64] *See* AR 405-20, *supra* note 59, para. 4(b) (stating that "[t]he regulatory powers of the State may be exercised [in a concurrent jurisdiction area], but not in such a manner as to interfere with Federal functions").

[65] *Id.* para. 5.

[66] *Id.* para. 4(d).

[67] JONATHAN M. GAFFNEY & MAINON A. SCHWARTZ, CONG. RSCH. SERV., R47291, POTENTIAL ENFORCEMENT OF STATE ABORTION LAWS ON FEDERAL PROPERTY 2 (2022) (citing GEN. SERVS. ADMIN., INVENTORY REPORT ON JURISDICTIONAL STATUS OF FEDERAL AREAS WITHIN THE STATES AS OF JUNE 30, 1962 (1964), https://publiclandjurisdiction.com/wp-content/uploads/2020/01/JURISD1.pdf).

[68] AR 405-20, *supra* note 59, para. 4(a); *see also* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (recognizing the need for special education services provided by the Federal Government for military dependents).

C. Current Implementation of the Individuals with Disabilities in Education Act within the Army

Department of Defense Instruction 1342.12 mandates that the Army provide special education services and early intervention.[69] The IDEA is implemented on Army installations by two leading agencies: for school-aged children with special needs, the DoDEA is responsible for providing special education and related services;[70] for children under the age of three, EDIS programs are managed and operated by the military treatment facilities (MTFs) and provide EIS.[71]

1. School-Aged Implementation

Department of Defense Instruction 1342.12 requires the DoDEA to provide special education services within the Army. DoDEA follows these guidelines at each Army installation and is "committed to promoting inclusive education, which is defined as the participation of all students, including those with disabilities, limited English proficiency, identified gifts and talents, and other special needs in the general education program, as appropriate."[72] For students transferring into a DoDEA school, the Military Interstate Compact enables and guarantees that the school will continue to implement any previous IEPs until it conducts a new evaluation and subsequently establishes a new IEP.[73] Due to the DoD's oversight and responsibility for the special education implementation of school-aged children, the Army focuses less on providing services and more on supporting Families navigating the school systems.

The responsibility to manage and oversee special education in DoDEA schools is at the DoD level, and the Army supports implementation with school liaison officers and other support, as needed, from the Installation

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[69] DODI 1342.12, *supra* note 18, paras. 1(a)(1), 1(a)(3).
[70] *See id.* encl. 2, para. 3.
[71] *See id.* para. 4 (placing EDIS responsibility on Secretaries of the Military Departments); *see also* U.S. ARMY MEDICAL COMMAND, REG. 40-53, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES: EARLY INTERVENTION SERVICES para 1-9(a) (31 Jan. 2014) [hereinafter MEDCOM REG. 40-53] [note that access to this regulation requires a DoD Common Access Card].
[72] *Information for Parents*, DEP'T OF EDUC., https://www.dodea.edu/education/student-services/special-education/information-parents (last visited June 12, 2025).
[73] U.S. DEP'T OF DEF., INSTR. 1342.29, INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITY FOR MILITARY CHILDREN encl. 4, para. 2(b)(3)(a) (Jan. 31, 2017).

or Garrison Command.[74] School liaison officers assist parents in navigating resources for their children, including providing "information about the local educational options and enrollment processes" as well as answering questions regarding special education.[75] While this support model is also present for infant and toddler implementation of the IDEA, the Army has increased responsibilities in ensuring it provides EIS for military Families on an installation.

2. Infant and Toddler Implementation

Department of Defense Instruction 1342.12 and the related manual provide only general guidance to the military departments regarding EIS, which the military departments implement through additional service-specific regulations.[76] Department of Defense Instruction 1342.12 requires that military departments "[p]rovide EIS to infants and toddlers with disabilities and their families, and related services to children with disabilities as required by [the] Instruction at the same priority that medical care is provided to active duty military members."[77] While no Army Regulation specifically addresses special education services, the Army Medical Command published Medical Command Regulation 40-53 (MEDCOM Reg. 40-53), which defines requirements and instructs commands on implementing EIS.[78]

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[74] School liaison officers are part of an installation morale, welfare, and recreation (MWR) program. U.S. DEP'T OF ARMY, REG. 215-1, FEDERAL LEGISLATIVE JURISDICTION para. 8-15(a)(1) (24 Sept. 2010). MWR services fall under the management and supervision of the Garrison Commander. *Id.* para. 2-4(b).

[75] *When do I Need and SLO*, ARMY MWR, https://www.armymwr.com/School-support/commanders-1/when-do-i-need-slo (last visited Apr. 13, 2025).

[76] *See* DODI 1342.12, *supra* note 18, encl. 2, paras. 3(b), 4(a) (noting that the Director, DoDEA, is responsible for evaluating special education needs and providing a FAPE for eligible children, while Secretaries of the Military Departments are individually responsible for establishing programs and providing EIS where appropriate). There are no service-specific regulations for special education because the DoD provides all school-age services, which are regulated by DODM 1342.12. *See generally id.* para. 2(a)(3) (applying the policies and requirements to "[a]ll schools operated under the oversight of the [DoDEA] . . .").

[77] *Id.* encl. 2, para. 4(e).

[78] *See generally* MEDCOM REG. 40-53, *supra* note 71. DODI 1342.12 requires Secretaries of the Military Departments to establish "educational and developmental intervention services (EDIS) to ensure infants and toddlers with disabilities are identified and provided EIS where appropriate . . . ." DODI 1342.12, *supra* note 18, encl. 2 at para. 4(a).

Through the Army model, the MTF provides EIS as the lead agent, working with other community agencies to ensure Families obtain necessary services.[79] Specifically, the Army EIS program intends to provide "early childhood special education and educationally related allied health services pursuant to IDEA . . . " providing services in "the child's natural environment─including homes, schools, day care facilities, or other settings where young children typically spend their time."[80] Ultimately, MEDCOM Reg. 40-53 places responsibility on the MTF Commanders to ensure installations correctly implement DODI 1342.12 and provide EIS.[81]

While the MTF Commander takes responsibility for implementing EIS on military installations, it is clear from MEDCOM Reg. 40-53 that several other entities must be involved. At a minimum, the regulation contemplates potential mediation, with mediators not employed by the MTF, to resolve disputes in the EIS provision.[82] MEDCOM Reg. 40-53 also encourages the MTF to coordinate and incentivize parent training, partnership activities, and support groups with the installation Child Youth School & Services organization or other local support groups.[83] In order to achieve these ends, the regulation contemplates using memorandums of agreement or understanding between various organizations and entities engaging in partnering activities.[84] The provision of EIS on an installation requires complex coordination; whether an entity is on or off the installation, there appear to be significant occassions for friction both for the installation and Families.[85] Navigating these services can be time-

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[79] MEDCOM REG. 40-53, *supra* note 71, para. 2-1 (noting that the military treatment Facility (MTF) will take the lead but coordinate with other organizations, including Army Community Services and Child Development Services).

[80] *Id.* para. 2-2.

[81] *Id.* para. 1-9(c). While installation MTFs theoretically monitor and implement services, the EDIS website currently lists only nine locations within the continental United States that coordinate the provision of EIS for eligible military dependents. *See EDIS Locations: CONUS & Territory*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/EDIS-Locations/Maps/ (last visited Apr. 13, 2025).

[82] MEDCOM REG. 40-53, *supra* note 71, at para. 4-1(b).

[83] *Id.* at para. 4-2(a). The regulation also suggests coordinating with spouse associations and morale, welfare, and recreation (MWR) programs to subsidize activities and events for affected populations. *Id.* para. 4-2(b).

[84] *Id.* para. 4-3(a).

[85] Appendix G outlines a detailed process for dispute resolution to resolve inevitable friction in the execution of services, encouraging mediation but with an opportunity for

consuming and stressful, ultimately detracting from the purpose of the IDEA and the Army mission.

III. Importance of Legal Support for Individuals Providing Care and Education for Infants and Toddlers with Disabilities

Improving care and legal support for infants and toddlers with disabilities is critical to support Army quality of life initiatvies.[86] First, it is essential to note that efforts to support military Families enrolled in EFMP are necessary steps toward improving early intervention outcomes for children. Additionally, increased support for children with Special needs directly aligns with the Army's recruiting and retention efforts.[87] Lastly, increased support for Families with special needs ensures that the Army's recent increased childcare needs align with increased support for EFMP Families.

A. Early Intervention Improves Outcomes for Children and Society

Some of the most significant impacts of increased support, including legal support, for early intervention are the impacts on a child's development and decreased burdens on society. The DoD must remain committed to lessening these burdens. As stated by Congress in the findings of the IDEA:

> [T]here is an urgent and substantial need [] to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to

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legal hearings requiring the calling of witnesses, evidence presentation, and argument. *Id.* at app. G. While the legal support may come from outside of the installation administrative law office, it is crucial for advising attorneys to understand the complexity of providing EIS.

[86] *See Who We Are: The Army's Vision and Strategy*, U.S. ARMY, https://www.army.mil/about/ (last visited Apr. 13, 2025). "Recognizing that our Soldiers, Civilians and families should have the best quality of life possible, the Army is reviewing the full range of its care, support, and enrichment programs, with an initial focus upon: housing and barracks, healthcare, childcare, spouse employment and permanent change of station moves." *Id*.

[87] *See Family Life*, U.S. ARMY, https://www.goarmy.com/army-life/family-living.html (last visited June 12, 2025) (highlighting the benefits for Family members and care placed on Families by the Army).

> recognize the significant brain development that occurs during a child's first 3 years of life; [and . . .] to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age[.][88]

Overall, a child's early experiences may have lifelong impacts on their development and function.[89] While many specific outcomes for a child are difficult to measure due to the disparity in disabilities upon entrance into early intervention,[90] participating families report perceived improved outcomes.[91] Beyond direct, measurable benefits for the children these

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[88] 20 U.S.C. § 1431(a)(1–2). The need to enhance development and lessen burdens were two among five key findings, the others of which include:

> (3) to maximize the potential for individuals with disabilities to live independently in society; (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and (5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care.

20 U.S.C. § 1431(a)(3–5).

[89] *See* CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *supra* note 15.

[90] *See* KATHLEEN HEBBELER ET AL., EARLY INTERVENTION FOR INFANTS AND TODDLERS WITH DISABILITIES AND THEIR FAMILIES: PARTICIPANTS, SERVICES, AND OUTCOMES 3-14 to 3-15 (2007) (following from a 10-year evaluation of participants in early intervention, "the strongest predictors of health status at 36 months were health status at [early intervention] entry. . . ."); *see also id.* at 3-15 to 3-24 (evaluating outcomes in overall health and functioning of vision, hearing, use of limbs, and communication).

[91] *Id.* at 3-15 ("76% of families indicated that [early intervention] had a lot of impact [on their child], with another 20% indicating some impact, and only 4% indicating no impact."). Another study evaluating the outcomes of EIS on families found that:

> parents perceived many positive family outcomes at the end of early intervention. Most reported that their family was better off as a result of the help and information received. Parents felt competent in their parenting role as well as in their ability to work with professionals and advocate for services. . . . Most were hopeful about the future and expected that their child's life situation and that of their family would be excellent or very good.

programs serve, there are significant societal benefits from promoting and supporting EIS programs.

Data suggests there are many socioeconomic benefits achieved by supporting early intervention,[92] even without considering the potential impacts of disability, increased lifelong academic success, improved behavior and emotions, improved health, and lessened burdens on the welfare and labor systems stem from early intervention.[93] One study of early intervention benefits determined that "the estimates of benefits per child served, net of program costs, range from about $1,400 per child to nearly $240,000 per child."[94] In addition to the direct benefits to children and subsequent societal benefits, increasing legal support for EFMP Families directly supports the Army's strategic goals.

B. Supporting the Army's Retention and Readiness Efforts

The Army has faced significant recruiting shortfalls in the past year, and supporting Army Families will help encourage recruitment and retention moving forward.[95] Before 2021, the Army had no formal survey process or data to understand why Soldiers were leaving the military.[96] However, since the launch of the Department of the Army Career Engagement Survey (DACES) in 2021, issues related to Family support

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Donald B. Bailey, Jr, et al., *Thirty-Six-Month Outcomes for Families of Children Who Have Disabilities and Participated in Early Intervention* 116 PEDIATRICS 1346, 1351 (2005).

[92] *See* GAO-24-106019, *supra* note 16, at 30 (finding that "[p]roviding early intervention through support and services is not only required by IDEA, but is also widely recognized as cost effective").

[93] *See* RAND LABOR AND POPULATION, PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS, RB-9145-PNC 2 (2005) (citing findings that early intervention provided benefits in "cognition and academic achievement, behavioral and emotional competencies, educational progression and attainment, child maltreatment, health, delinquency and crime, social welfare program use, and labor market success").

[94] *Id.* at 3.

[95] *See* David Vergun, *DOD Addresses Recruiting Shortfall Challenges*, U.S. DEP'T OF DEF. (Dec. 13, 2023) https://www.defense.gov/News/News-Stories/Article/Article/3616786/dod-addresses-recruiting-shortfall-challenges/ (noting that "during fiscal year 2023, the military services collectively missed recruiting goals by about 41,000 recruits").

[96] U.S. Army Public Affairs, *New Survey Examines Why Soldiers Decide to Stay in or Leave the Army*, U.S. ARMY (Nov. 19, 2021), https://www.army.mil/article/252098/new_survey_examines_why_soldiers_decide_to_stay_in_or_leave_the_army.

have been an annual driving factor in voluntary separations.[97] It is also significant that for the enlisted population surveyed in the 2023 DACES, 29.4 percent of the enlisted Soldiers cited "resources available to help care for my family" as one of the top ten reasons to stay in the military.[98] The FY21 NDAA and subsequent issuances by the military reflect the desire to support Families to support retention and future recruiting. [99]

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[97] *See, e.g.*, Loryana L. Vie et al., U.S. DEP'T OF THE ARMY, FIRST ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 10 (2021) [hereinafter 2021 DACES Report] (concluding that "the most cited reasons for considering leaving the Army centered on the various ways Army service impacts [Service members'] relationships and Families"); Loryana L. Vie & Adam D. Lathrop, U.S. DEP'T OF THE ARMY, SECOND ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 19 fig.1 (2022) (highlighting the "Top 'Extremely Important' Reasons to Leave the Army" which included: "1. Effects of deployments on Family or personal relationships[;] 2. Impact of Army life on significant other's career plans and goals[;] 3. Impact of military service on my Family's well-being[;] 4. The degree of stability or predictability of Army life[; and] 5. Impact of Army life on Family plans for children"); Loryana L. Vie et al., U.S. DEP'T OF THE ARMY, THIRD ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 9 (2023) [hereinafter 2023 DACES Report] (finding that "five of the top six 'Extremely Important' reasons to leave the Army center on family").

[98] *See* 2023 DACES REPORT, *supra* note 97, at 32 app. B tbl.B4. When considering the importance of statistics related to enlisted Soldiers, it is critical to understand that as of October 2022, enlisted Soldiers comprised 356,440 out of 463,083 active component Army Soldiers. Army DCS, G1 (DAPE-PRS), Army Component Demographics, at slide 1 (Oct. 31, 2022) (PowerPoint presentation) (on file with author); *see also id.* at 45 (noting that "30 out of 35 [Service members enrolled in EFMP] (86%) reported that the Army's ability to provide resources to help care for their Family was a positive influence (i.e., a 'Somewhat' or 'Extremely Important' reason to STAY in the Army) and that the Army's ability to address their Family's EFMP needs influenced their response"); *Cf.* Anne Marshall-Chalmers, *U.S. Military Kids with Autism Lack Treatment Under Tricare*, THE WAR HORSE (Oct. 19, 2023), https://thewarhorse.org/us-military-kids-with-autism-lack-treatment-under-tricare/ (detailing how for many Families, a lack of resources for their child's special education or medical needs may lead to voluntary separation from the service).

[99] Specifically, the Senate Armed Services Committee Executive Summary of the Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA) cites:

> The committee's top priority is, and always has been, supporting the more than 2.1 million men and women who bravely serve our nation in our Armed Forces. They, along with military families and the civilian workforce, are the backbone of America's national security. The [FY21] NDAA prioritizes their health and wellbeing — ensuring our troops have the resources, equipment, and training needed to succeed in their missions. The bill recognizes that family readiness

Recognizing the increased need to support Families, the Army is working to increase the availability of child care, and increasing services and legal support to Families enrolled in EFMP will support these efforts.

C. Matching Child Care Needs

The proposed expansion of legal support matches the military's increased availability of childcare programs for Service members and their Families in recent years. As supported by President Biden's 2023 Executive Order, "[w]hile the Congress must make significant new investments to give families in this country more breathing room when it comes to care, executive departments and agencies (agencies) must do what they can within their existing authorities to boost the supply of high-quality early care and education . . . ." [100] The call for significant improvements and oversight of the EFMP across the military departments came in addition to the FY21 NDAA provisions for additional research into childcare availability and capacity across the services.[101] Recognizing the continued importance of ensuring EFMP support, particularly in the child development centers (CDCs), Congress has most recently established a pilot program to hire special needs inclusion coordinators at select CDCs to: "(1) coordinate intervention and inclusion services at the center; (2) provide direct classroom support; and (3) provide guidance and assistance relating to the increased complexity of working with the

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> strengthens our force overall, and advocates for military spouses and children.

STAFF OF S. ARMED SERVS. COMM., 116TH CONG., EXEC. SUMMARY ON THE FISCAL YEAR 2021 NAT'L DEF. AUTHORIZATION ACT 2 (2021). *See also Strengthening Our Support Memo*, *supra* note 4.

[100] Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023).

[101] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 585(b), 134 Stat. 3388, 3654–55 (requiring the Secretaries of the Military Departments to submit reports to Congress on the department's five installations "experiencing the most extreme imbalance between demand for child care and availability of child care"). Following calls for action, Congress subsequently approved the military to build 14 new CDCs at various installations. Karen Jowers, *Congress Approves Construction of 14 More Military Child Care Centers*, MILITARY TIMES (Dec. 16, 2022), https://www.militarytimes.com/news/pentagon-congress/2022/12/17/congress-approves-construction-of-14-more-military-child-care-centers/.

behaviors of children with special needs."[102] While these efforts to increase the availability and quality of child care are laudable, these increases, and the proposed expansions of legal support, will be negligible unless the DoD and the Army take steps to address issues regarding the eligibility and availability of EIS for military Families.

IV. Eligibility Issues Within the Department of Defense and the Army

Generally speaking, special education and related services on a military installation are only present when an installation operates a DoDEA school. Currently, 317 military installations exist in 48 states and the District of Columbia across the contiguous United States.[103] However, since the transfer of most DoDEA schools to local education agencies in the early 1970s,[104] the DoDEA operates schools in only seven of those states.[105] The intent of transferring schools was to provide additional care for military dependents by the states.[106] Nevertheless, the push to transition responsibility for education back to the states has inadvertently created barriers to the smooth and efficient delivery of EIS for military dependents. To resolve this issue, the DoD and Army should interpret current statutory language to require MTFs to provide EIS for all

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[102] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 576(c), 136 Stat. 2395, 2605 (2022).

[103] *See Military Installations*, MILITARY ONE SOURCE, https://installations.militaryonesource.mil/view-all (last visited June 13, 2025) (noting that the website, while an official DoD website, does not list every installation but only those approved by the military departments).

[104] *See* RICHARD K. WRIGHT, A REVIEW OF DEPARTMENT OF DEFENSE EDUCATION ACTIVITY (DODEA) SCHOOLS I-1 through I-2 (Institute for Def. Analyses, Vol. 1 2000) (citations omitted)*; see also id.* at A-2 through A-3.

[105] *DoDEA Schools Worldwide*, DEP'T OF DEF. EDUC. ACTIVITY, https://www.dodea.edu/about/about-dodea/dodea-schools-worldwide (last visited June 12, 2025). The DoD also operates schools in all overseas locations, as required. *Id.*; *see also* 20 U.S.C. §§ 921–932.

[106] *See* WRIGHT, *supra* note 104, at A-I (noting that the DoD transferred schools to state local education agencies due to "(a) pressure from the U.S. Department of Education on states and localities to acknowledge responsibility for the education of military dependents; (b) population growth near installations; and (c) the integration of the public schools"); *see also DoDEA's 75 Year History*, DEP'T OF DEF. EDUC. ACTIVITY, https://www.dodea.edu/about/about-dodea/dodeas-75-year-history (last visited June 12, 2025) (noting that in 1985, Public Law 99-176 required the Secretary of Defense to submit a plan to transfer all Section 6 schools to the local education agencies, which the DoD subsequently submitted in 1986).

dependents living on an installation and provide EIS at each installation where the military operates a CDC.

A. Statutory and Regulatory Gaps Related to Early Intervention Services

While current statutory language requires an analysis of whether a state can provide comparable educational services for military dependents, no such requirement exists to evaluate the provision of EIS. The DoD's current authority to establish and operate schools for DoD Dependents is codified in 10 U.S.C. 2164, which states:

> If the Secretary of Defense makes a determination that appropriate educational programs are not available through a local educational agency for dependents of members of the armed forces and dependents of civilian employees of the Federal Government residing on a military installation in the United States (including territories, commonwealths, and possessions of the United States), the Secretary may enter into arrangements to provide for the elementary or secondary education of the dependents of such members of the armed forces and, to the extent authorized in subsection (c), the dependents of such civilian employees.[107]

The statute grants infants and toddlers with disabilities "all substantive rights, protections, and procedural safeguards" available under IDEA, but nothing within the statute discusses the responsibility to provide EIS or the criteria that should dictate the provision of EIS on a military installation.[108] Despite this gap in the statutory language, the DoD addresses the provision of EIS through its implementing policies and regulations.

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[107] 10 U.S.C. § 2164(a)(1). *But cf*. 20 U.S.C. § 927(c) (authorizing and requiring the DoD to provide developmental pre-school programs to eligible dependents when not otherwise available for dependents overseas, without discretion).

[108] 10 U.S.C. § 2164(f)(B)*; see also* 10 U.S.C. § 2164(b) (providing guiding factors to determine whether to establish a DoDEA school, including: "(A) The extent to which such dependents are eligible for free public education in the local area adjacent to the military installation[; and] (B) The extent to which the local educational agency is able to provide an appropriate educational program for such dependents[,]" but failing to address any criteria to determine whether appropriate EIS are provided and available).

Specifically, DoDI 1342.12 notes that: "It is DoD policy that [] [i]nfants and toddlers with disabilities and their families who (but for the children's age) would be entitled to enroll in a DoDEA school in accordance with sections 921-932 of [20 U.S.C. 921-932] or [10 U.S.C. 2164] shall be provided EIS."[109] In most instances, eligibility to attend a DoDEA school depends on whether a dependent resides on or off a government installation with a DoDEA school.[110] Overseas eligibility to attend a DoD school specifically includes children of officers and employees of the United States overseas, children of employees of certain contractors overseas, and other children when "the Secretary determines that enrollment of such children is in the national interest."[111] Within the United States, eligibility to attend a DoDEA school is limited to a "dependent of a Federal employee residing in permanent living quarters on a military installation at any time during the school year . . ." and dependents of "a United States Customs Service employee who resides in Puerto Rico, but not on a military installation. . ." with few exceptions.[112] While the DoDI links the provision of EIS to dependents who "would be entitled to enroll in a DoDEA school[,]" the instruction does not address whether the entitlement to EIS depends explicitly on the availability of a DoDEA school or simply the eligibility to attend.[113]

When read literally, the military provides EIS only in the nine states and territories of the United States and in overseas locations where DoDEA schools currently operate.[114] Mirroring the availability of DoDEA

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[109] DoDI 1342.12, *supra* note 18, at para. 4(a).

[110] U.S. DEP'T OF DEF. EDUC. ACTIVITY, ADMIN. INSTR. 1344.01, ELIGIBILITY AND ENROLLMENT REQUIREMENTS FOR DODEA SCHOOLS para. 4(1)(a) (Jan. 19, 2023) [hereinafter DoDEA AI 1344.01].

[111] 20 U.S.C. § 923(d)(1).

[112] 10 U.S.C. § 2164(c). *But see, e.g.*, 10 U.S.C. § 2164(c)(B) (providing exceptions for "a dependent of a United States Customs Service employee who resides in Puerto Rico, but not on a military installation . . . in accordance with the same rules as apply to a dependent of a Federal employee residing in permanent living quarters on a military installation"); 10 U.S.C. § 2164(a)(3) (allowing the Secretary of Defense to grant eligibility to enroll in a DoDEA school even though a dependent does not reside on a military installation when: "the dependents reside in temporary housing . . . (I) because of the unavailability of adequate permanent living quarters on the military installation to which the member is assigned; or (II) while the member is wounded, ill, or injured").

[113] DoDI 1342.12, *supra* note 18, para. 4(a). *Contra*, DoDI 1342.12, *supra* note 18, para. 2 (stating the Instruction "[a]pplies to infants and toddlers with disabilities and to children with disabilities who are eligible, *in accordance with this Instruction*, to receive EIS or special education and related services from the DoD") (emphasis added).

[114] DEP'T OF DEF. EDUC. ACTIVITY, *supra* note 105.

schools, currently: "EDIS programs exist at eight Army installations in the contiguous United States, one in Puerto Rico, and eight overseas military communities (scattered throughout four European countries and Korea)."[115] Such a reading of the DODI directly contradicts the purpose and spirit of the IDEA to ensure the development and potential of infants and toddlers with disabilities.[116] Additionally, such a limited and literal reading of the DODI would create inconsistencies in other applications throughout the Instruction.[117] With the limited availability of DoDEA

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[115] *Educational & Developmental Intervention Services*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/About/ (last visited June 12, 2025).

[116] *See* 20 U.S.C. § 1400(d).

> There is an urgent and substantial need to: (1) Enhance the development of infants and toddlers with disabilities to minimize their potential for developmental delay and to recognize the significant brain development that occurs during a child's first 3 years of life. (2) Reduce educational costs by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age. (3) Maximize the potential for individuals with disabilities to live independently. (4) Enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities.

DODM 1342.12, *supra* note 45, encl. 3, para. 1(a).

[117] A literal interpretation carried over into even the next paragraph of the Instruction would eliminate the requirement for the DoD to "engage in child-find activities for all children age birth to 21, inclusive" at installations that do not possess a DODEA-operated school. DODI 1342.12, *supra* note 18, at para. 4(b). The glossary definition supports a restrictive interpretation, defining the child-find as:

> An outreach program used by DoDEA, the Military Departments, and the other DoD Components to locate, identify, and evaluate children from birth to age 21, inclusive, who may require EIS or special education and related services. All children who are eligible to attend a DoD school under sections 921-932 of Reference (b) or Reference (c) fall within the scope of the DoD child-find responsibilities. Child-find activities include the dissemination of information to Service members, DoD employees, and parents of students eligible to enroll in DoDEA schools; the identification and screening of children; and the use of referral procedures.

Id. at 9. However, the Instruction does not define eligibility. *Id.* at 9–12. A restrictive interpretation also appears to contradict the requirement for the Assistant Secretary of Defense for Manpower and Reserve Affairs to develop a "DoD-Wide comprehensive child-find system" without reference to DoDEA school locations or eligibility. *Id.* at encl. 2, para. 1(d).

schools, despite an expanding availability of child care on military installations, the DoDI should not be read literally. Instead, the DoDI should be adjusted and interpreted to require the provision of EIS when a DoD dependent resides on a military installation and meets the relevant disability or developmental delay eligibility requirements.

B. Recommended Adjustments to the Provision of Early Intervention Services

To support compliance with the IDEA, the DoD should adjust the language of DoDI 1342.12, and the Army could interpret DoDI 1342.12 to require EIS and EDIS programs at all installations.[118] The terms "eligibility" or "entitlement" should be defined and evaluated based on whether an individual meets the disability or developmental eligibility requirements to start services and whether the individual would be eligible or entitled to attend a DoDEA school if offered at that installation.[119] The proposed eligibility expansion would replace the current definition of eligibility in the DoDI, which is more directly a requirement of "availability" and whether an individual lives in one of the nine states and territories within the United States that operate DoDEA schools.[120] By

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[118] A significant shift from the nine Army installations currently operating EDIS programs. DEFENSE MEDIA ACTIVITY, *supra* note 115.

[119] DoDI 1342.12, *supra* note 18, at glossary. The Instruction defines infants and toddlers with disabilities as:

> Children from birth up to 3 years of age, inclusive, who need EIS because[: they] are experiencing developmental delays as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: cognitive development, physical development including vision and hearing, communication development, social or emotional development, adaptive development; or [they] have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

Id. at 10.

[120] DoDEA AI 1344.01, *supra* note 110, para. 4(1)(a) (establishing eligibility for "Dependent students of members of the U.S. Armed Forces serving on active duty and full-time DoD civilian employees residing in permanent living quarters on a military installation in the Contiguous U.S. [] *if the installation is served by DoDEA schools in accordance with Section 2164 of Title 10, United States Code*") (emphasis added). The

adjusting the eligibility requirements, the DoD will better operate within the intent of the IDEA by linking EIS to the least restrictive environment, integrating the process for referrals and the provision of EIS, and ensuring that military dependents receive special education care when residing on a military installation.

1. Link the Provision of Early Intervention Services to the Least Restrictive Environment

While it is logical for the DoD to only provide school-age special education services at the DoD schools, the same thought process does not apply when designing early intervention programs. The IDEA entitles school-age children to a FAPE provided in the least restrictive environment, which is most often a classroom or school setting.[121] While early intervention also requires providers to serve children in their least restrictive environment, the definition varies significantly from the definition of a least restrictive environment for a school-aged child.[122] On a military installation, the least restrictive environment for a dependent from birth through the age of three is likely either in the installation housing area where the child resides with their Family or in the CDC, where the child attends daycare or preschool programming. First, the DoD should provide EIS for all eligible children who reside on base to ensure there is no gap in services when the state is otherwise unwilling or unable to provide services based on the jurisdiction of the installation. Second,

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exceptions to this Instruction include other limited military dependents who live in temporary housing because of the unavailability of on-post housing, the Service member is wounded, ill, or injured. *Id.* para. 4(1)(b). Other exceptions exist for dependents of certain deceased Service members and students of foreign armed forces who live on a military installation. *Id.* paras. 4(1)(c–d). The Instruction also authorizes enrollment for "[d]ependent students of West Point Athletic Association contract employees who reside on the military installation" and virtual enrollment for students returning from an overseas location where they were previously enrolled in a DoDEA school. *Id.* para. 4.2.

[121] 20 U.S.C. § 1412(a)(5) (establishing the least restrictive environment requirement, in which disabled children "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily").

[122] 20 U.S.C. § 1432(4)(G) (defining early intervention services that "to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate").

the DoD should consider expanding eligibility for any child enrolled in the installation CDC to ensure all children receive EIS in the least restrictive environment. Lastly, the DoD should consider providing EIS to all eligible military dependents, regardless of where they live or receive care.

Extending EIS to eligible children residing on a military installation is a logical application of the IDEA, Part C requirements to military installations. Under the IDEA, "it is in the national interest that the Federal Government have a supporting role in assisting state and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law."[123] In March 2023, Secretary of Defense Lloyd Austin noted that the "Department [of Defense] is deeply committed to ensuring that family members with exceptional needs have access to superb care, support, and expertise."[124] Ensuring EIS for eligible dependents on military installations is one of the first steps to fulfill this commitment.

The next logical application of the IDEA, Part C, to the military is providing EIS to eligible children attending daycare on the installation. While many Families choose not to live on a military installation, there is often a significant shortage of military housing, or of quality housing, which drives their decision to do so.[125] Additionally, beginning in 1996, the government started privatizing the majority of military housing areas, so "residing in government quarters" is likely not the most suitable

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[123] 20 U.S.C. § 1400(c)(6).

[124] *Strengthening Our Support Memo*, *supra* note 4, at 3.

[125] *See, e.g.*, Karen Jowers, *Gaps in Military Housing Improvements Lead to Frustration, Confusion*, MILITARY TIMES (Apr. 15, 2023), https://www.militarytimes.com/news/your-military/2023/04/15/gaps-in-military-housing-improvements-lead-to-frustration-confusion/ (reporting anguish by Service members with the execution of the privatized housing projects and updates to protect tenants); Paul J. Selva, *When it Comes to Housing, We are Failing Military Families*, SEATTLE TIMES (May 8, 2023), https://www.seattletimes.com/opinion/when-it-comes-to-housing-we-are-failing-military-families/ (suggesting that 70 percent of military Families do not live on a military installation due to a lack of available housing); Francis Torres, *Answering FAQs on Housing America's Military Families*, BIPARTISAN POLICY CTR. (Mar. 24, 2023), https://bipartisanpolicy.org/blog/faqs-housing-military-families/ (documenting concerns among military Families with long waitlists for housing and poor quality of homes on installations); Letter from Elizabeth Warren & Thomas Tillis, U.S. Senators, to Lloyd Austin, Secretary of Defense (Oct. 6, 2023), https://www.warren.senate.gov/imo/media/doc/2023.10.04%20Letter%20to%20DoD%20on%20EFMP.pdf (voicing concerns about the inadequacy and quality of housing for Service members and their Families who require housing accommodations for a disability).

criterion for consideration.[126] The DoD should instead establish eligibility criteria based on a child's enrollment in a daycare program on an installation. The eligibility to enroll in a CDC mirrors the eligibility to attend a DoDEA school in many aspects, except for the requirement to live on an installation.[127] In a time when there is a housing shortage on installations but a significant push to provide childcare on installations, the DoD should focus on providing EIS within those facilities.[128]

Ideally, the DoD could expand EIS eligibility even further to all military Families with a disabled child. According to 10 U.S.C. Section 2164(a), the Secretary of Defense may provide elementary and secondary education when "appropriate educational programs are not available" for Service members living on an installation.[129] The statute authorizes the Secretary of Defense to allow dependents of Service members to attend DoD educational programming when installation housing is unavailable and "the circumstances of such living arrangements justify extending the enrollment authority to include the dependents."[130] Thus, if state EIS programs are unavailable or inadequate, the military could provide services to eligible dependents. It is arguable, from recent Government Accountability Office (GAO) data, that most states are under-supported and understaffed in their EIS programs; this could allow the military to potentially fill the gap in services for eligible dependents rather than rely on the states to provide services.[131] However, there may still be challenges associated with such an expansion.

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[126] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105866, PRIVATIZED MILITARY HOUSING: UPDATE ON DOD'S EFFORTS TO ADDRESS OVERSIGHT CHALLENGES 3–4 (2022), https://www.gao.gov/assets/gao-22-105866.pdf (noting that "[a]s of March 2022, 14 private housing companies own and operate 78 privatized family housing projects—34 for the Army, 31 for the Air Force, and 13 for the Navy and the Marine Corps").

[127] *See* U.S. DEP'T OF DEF., INSTR. 6060.02, CHILD DEVELOPMENT PROGRAMS (CDPS) para. 4(d) (C2, Sept. 1, 2020); *see also* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 589C, 134 Stat. 3659 (establishing a pilot program to expand DoDEA eligibility to military Families living off-post).

[128] *See* sources cited *supra* note 125 (noting the shortfall of available housing on military installations).

[129] 10 U.S.C. § 2164(a).

[130] 10 U.S.C. § 2164(a)(3)(B)(ii).

[131] GAO-24-106019, *supra* note 16, at 14–15 (citing "Officials from the Infant and Toddler Coordinators Association. . . noting that *all* states have described provider shortages as an enduring challenge for providing early intervention services to eligible children" (emphasis added)).

Expanding EIS to military Families who do not live on an installation may pose challenges to providing EIS in the least restrictive environment. For example, depending on how far from an installation a Family lives, whether by choice or due to housing shortages, an EIS provider would either need to travel to provide services or have the Family transport the child to the installation to receive services. Either option poses logistical challenges for the Family and the EDIS provider.[132] Due to the limited number of EDIS providers and the number of Service members who currently live outside of an installation,[133] providing services outside of a military installation is likely an untenable goal. However, irrespective of the level or amount of EIS expansion by the DoD, the expansion for any category of military Families will provide better integration of medical care and referrals related to EIS.

2. Integrate Referrals and Provision of Services

Although early intervention does not include medical services,[134] primary care providers are crucial to successful referrals, diagnoses, and evaluations for children receiving EIS. Active-duty Service members must enroll in Tricare Prime and receive care from their local MTF when available.[135] While Service members are not required to enroll dependents in Tricare, there may be significant cost barriers to retaining alternative

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[132] President Biden stated in his April 2023 Executive Order, "Military families consistently cite access to high-quality child care as an impediment to military spouse employment and family economic security. Difficulty accessing care also poses a challenge for both spouses—and, as data shows, particularly for women in dual military couples—to continuing their service if they have caregiving responsibilities." Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023). Managing transportation to and from child care or the home for these appointments would likely only exacerbate these challenges. Additionally, with Army EDIS providers currently only serving "eight installations in the contiguous United States," expansion to all installations would require a significant expansion of EDIS personnel to support any expanded EIS eligibility. *EDIS About*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/About/ (last visited June 12, 2025).

[133] *See* ANDREW TILGHMAN, CONG. RSCH. SERV., R47728, MILITARY HOUSING 2 (2023) (citing data provided by the Office of the Assistant Secretary of Defense for Legislative Affairs to CRS, August 28, 2023, on file with the CRS) (finding that approximately 58 percent of all Service members live in community housing outside of a military installation).

[134] *See* 20 U.S.C. § 1432(4)(E)(viii) (defining EIS to include medical services *only for diagnostic or evaluation services*) (emphasis added).

[135] TRICARE, https://www.tricare.mil/prime (last visited June 12, 2025).

medical insurance.[136] Thus, primary care providers at an MTF are often responsible for making referrals to EDIS or a state EIS program when they suspect a child is eligible for services.[137] Delays in primary care appointments or referrals to early intervention can hinder a child's entrance into the appropriate program.[138] Alongside referral responsibilities, primary care providers may also play a significant role in supporting a child's IFSP as part of the interdisciplinary team.[139] Primary care providers are just one of many individuals who ensure children receive the services they need to succeed.

3. Ensure that Children Receiving Care on an Installation Receive Special Education Services

The final and most important reason for increasing the DoD's provision of EIS is to ensure that military dependents receive the early intervention and related services they need from birth through the age of three. For military Families living on an installation that operates a DoDEA school, the MTF commander, through the EDIS program manager, is ultimately responsible for providing EIS.[140] However, as previously discussed, there are no EDIS programs on installations without DoDEA schools, despite the fact that multiple CDCs may operate on those installations.[141] The purpose of EDIS is to provide a seamless provision of

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[136] Les Masterson, *How Much Does Health Insurance Cost in 2025?*, FORBES (Mar. 10, 2025, 1:33pm), https://www.forbes.com/advisor/health-insurance/how-much-does-health-insurance-cost/ (providing an estimated cost of health insurance between $445-505 per month in the United States, for an individual between the ages of 21-30 years old).

[137] *See* DODI 1342.12, *supra* note 18, at 11 (including pediatric clinics in the definition of a primary referral source); Bailey, *supra* note 91, at 1346 (noting the role of pediatricians in identifying and referring children with disabilities for early intervention) (citing American Academy of Pediatrics Committee on Children with Disabilities, *The Pediatrician's Role in the Development and Implementation of an [IEP] and/or an Individual Family Service Plan (IFSP),* 104 PEDIATRICS 124, 124–27 (1999)).

[138] *See* DODM 1342.12, *supra* note 45, encl. 3, para. 6(b) (requiring the initial IFSP meeting to be convened no later than 45 days after a child's referral for EIS); *see also* 20 U.S.C. § 1436(c) (requiring the IFSP to be developed "within a reasonable time after the assessment . . . is completed").

[139] Bailey, *supra* note 91, at 1351 (concluding there is a need to integrate pediatricians into early intervention, particularly for children with disabilities).

[140] *See* MEDCOM REG. 40-53, *supra* note 71, para. 1-9(c).

[141] *See* sources cited *supra* note 115 (noting that only nine Army installations in the United States/Territories currently provide EDIS services).

EIS, but on installations without a DoDEA school, parents are left to their own devices to manage the coordination of services with the state and other agencies on the installation.[142] Failing to provide service coordination can negatively impact children and Families receiving EIS.

Limiting access to EDIS to installations with a DoDEA school can impact a child's eligibility for early intervention and increase stress for Families. In its 2023 report on early intervention programs within the United States, the GAO evaluated the eligibility standards of all 50 states, outlying areas, and freely associated states.[143] In addition to identifying that almost all states have different eligibility standards, the GAO noted that many states have significant staffing shortages in their early intervention programs, making it difficult for children to receive services.[144] Expanding EDIS and EIS eligibility within the military would provide a unified standard for dependents, regardless of their living or childcare situation, when they move from one duty location to the next.[145] Moreover, providing one standard across the military and one organization to coordinate services will relieve additional burdens on Service members and Families related to finding and coordinating care.[146]

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[142] *See* MEDCOM REG. 40-53, *supra* note 71, para. 4-3.

> Although the MTF remains the lead agent for EIS, the overall program should be community based. The mission and structure for many of the required program components already exist within other agencies in the community (for example, ACS, Child and Youth Services (CYS), and so forth). The EDIS programs will not duplicate already existing programs and services on the installation or in the civilian community that are available to EDIS-enrolled Families at little or no cost. However, EDIS will work in collaboration with these agencies to ensure a seamless system of services for children and Families eligible for EDIS.

Id.

[143] GAO-24-106019, *supra* note 16, at app. II (listing the varying standards for EIS eligibility by jurisdiction).

[144] *Id.* at 12–15.

[145] Under the proposed expansion of eligibility, all dependents would fall under the applicability of DODI 1342.12 and receive EIS if eligible based solely on their developmental delays or disabilities. DODI 1342.12, *supra* note 18, para. 2(b); *see also id.* at glossary.

[146] Michael J. Guralnick, *Why Early Intervention Works: A Systems Perspective*, 24 INFANTS & YOUNG CHILDREN 6, 18 (2011).

The only logical reason to link EIS provision to whether an installation also provides a DoDEA school is to ease the transition between EIS and school-age special education according to an IEP, but this reasoning ignores the reality of the military. While some children may no longer require special education services by the time they reach the age of three, many will need to transfer to a pre-school or pre-kindergarten program.[147] Keeping a child in the same system (for example, transferring a DoD IFSP to a DoD IEP or transferring a state IFSP to a state IEP) may make the transfer easier and enable a smoother records transition.[148] However, this argument improperly assumes that a child will remain in the same location at the time they are eligible to transfer to an IEP, a minuscule likelihood for military children.[149]

A stronger argument against expanding EIS is that dependent children with disabilities may then be eligible to receive services from both the state and the DoD, duplicating efforts and costs. For example, if the DoD expanded services to all Service members, or even those who use the CDC, a Service member who lives off post would then be eligible to receive EIS from the state because they live in community housing outside of an installation, and also receive EIS through the DoD. For those dependents,

> Even when professional help is obtained by parents as their child's developmental problems become apparent, the recommendations that follow can be complex, confusing, and even contradictory. Without question, recruiting and organizing professionals can often be an overwhelming task even for the most conscientious of parents, and service coordination continues to be a major challenge in the EI field. All of this is made far more difficult for the many children at risk and those with established disabilities who face more frequent and certainly more complex health issues than children without these vulnerabilities. Indeed, parental adjustment to ensure the health of vulnerable children and their safety is a constant challenge, easily stressing the entire system of family patterns of interaction.

Id. (citations omitted).

[147] 20 U.S.C. § 1435(c); *see also* 20 U.S.C. § 1436(d)(7–8).

[148] 20 U.S.C. § 1436(d)(7–8) (noting that the statewide system must include plans in the IFSP to transition to pre-school). The DoD provides additional guidance on transitioning between an IFSP and an IEP within the DoDEA. *See* DODM 1342.12, *supra* note 45, at encl. 3, para. 7.

[149] U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105015, DOD PROGRAMS AND SERVICES FOR MILITARY-DEPENDENT STUDENTS WITH DISABILITIES 1 (2018) [hereinafter GAO-22-105015], https://www.gao.gov/products/gao-22-105015 (noting that the average military child will transfer schools nine times before graduation from high school).

it would mean potentially twice the early intervention programming but subsequent costs incurred by both the state and DoD.[150] On the other hand, despite the potential duplication of efforts to support infants and toddlers, there are many benefits to providing this option for military Families. Many states have a sliding fee for individuals to receive EIS, and expanding eligibility would enable Service members to choose to receive EIS from the DoD at no cost.[151] Expanding eligibility for EIS could also reduce interruptions in care and improve record management when a Service member transfers to a new duty station and has the option to continue EIS with the DoD.

Overall, there are significant benefits to expanding eligibility for EIS for military children, including supporting the intent and spirit of the IDEA, integrating the referral process, and ensuring military children receive services. The DoD ought to adjust its interpretation and the language of the DODI to maximize eligibility for dependents from birth through the age of three. Regardless of whether the policies, regulations, and interpretations change, the Army can take additional action now to improve legal support to Service members and Families enrolled in EFMP.

V. The Mandate to Provide Special Education Attorneys

As part of a larger requirement for the DoD to improve the EFMP, the FY21 NDAA specifically mandated the implementation of special education-trained attorneys at each installation.[152] The impetus for this mandate stems from years of frustration among DoD Families concerning implementing the military EFMPs across the Services.[153] In 2018, the

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[150] *See* 20 U.S.C. § 1431(b)(2) (noting that the policy is to provide "financial assistance to the States" to establish and implement EIS programs and help "facilitate the coordination of payment for early intervention services" but implying it does not cover the costs of the program in its entirety).

[151] *See* 20 U.S.C. § 1432(4)(B) (defining early intervention services "provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees").

[152] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7), 134 Stat. 3653.

[153] *See, e.g.,* Jennifer Barnhill, *Military Spouses Take EFMP Concerns to Congress*, MILITARY FAMILIES MAG. (Feb. 11, 2020), https://militaryfamilies.com/military-news/military-spouses-take-efmp-concerns-to-Congress/ (explaining that military spouses turn to EFMP when their children do not receive adequate special education because, at the

GAO conducted a study to review services plans, which document the support required for Families with an EFMP-enrolled Family Member.[154] The study focused on support provided to Families with special needs as they navigated relocation to another installation and found that:

> DOD's most recent annual reports to Congress do not indicate the extent to which each Service provides services plans or allocates sufficient resources for family support providers. According to GAO's analysis, the Military Services have developed relatively few services plans, and there is wide variation in the number of family support providers employed, which raises questions about potential gaps in services for families with special needs[.][155]

For example, while the Army had 43,109 Family members enrolled in the EFMP at the time of the study, only 5,004 service plans had been created for those Families.[156] Comparatively, while the Navy had 17,533 eligible Family members enrolled in the EFMP, only 31 service plans were created.[157] In recognizing the need to increase support for Families entitled

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time the article was published, legal services were only available in a limited amount for Families of Marines); *Exceptional Family Member Program—Are The Military Services Really Taking Care Of Family Members?: Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on the Armed Forces*, 116th Cong. 59 (2020) (detailing frustrations from Congresspersons and Family members on the efficacy and support of the EFMP).

[154] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-348, MILITARY PERSONNEL: DOD SHOULD IMPROVE ITS OVERSIGHT OF THE EXCEPTIONAL FAMILY MEMBER PROGRAM 3–7 (2018), https://www.gao.gov/assets/gao-18-348.pdf.

> A services plan describes the necessary services and support for a family with special needs, as well as documents and tracks progress toward meeting related goals. It also helps families identify family support services and plan for the continuity of these services during the relocation process by providing a record for the gaining installation. According to DOD, the most effective plan will meet its service goals and identify resources and information for the family.

Id. at 5 n.13.

[155] *Id.* at GAO Highlights.

[156] *Id.* at 12 tbl.3.

[157] *Id.*

to such services, among others, Congress implemented a requirement for attorneys trained in special education across the military departments.

A. The Mandate Two-Step

Section 582(b)(7) of the FY21 NDAA enacts:

> [a] requirement that the Secretary of each military department provide legal services by an attorney, trained in education law, at each military installation— (A) the Secretary determines is a primary receiving installation for military families with special needs; and (B) in a State that the Secretary determines has historically not supported families enrolled in the EFMP.[158]

While the mandate appears to require a plethora of attorneys trained in special education, the Secretaries of the military departments must evaluate these two criteria before the requirement is effective.

The first question is whether an installation is a "primary receiving installation for military families with special needs" in accordance with the mandate.[159] However, there are no accompanying definitions or standards for the Secretaries of the Military Departments to make this determination.[160] Also lacking definition or standardization in the mandate is whether the severity or degree of disability of a Family member impacts an installation's status. The 2018 GAO report provides a starting point, having determined how many installations from the departments have Family members enrolled in EFMP. [161] However, the military should conduct additional research to outline the number of individuals at each

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[158] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7), 134 Stat. 3653.
[159] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7)(A), 134 Stat. 3653.
[160] A 2022 GAO study found that the DoD Impact Aid for Children with Severe Disabilities program provided funding to civilian school districts when those districts served at least two military-connected students with "extensive mental, physical and/or behavioral impairment, or a combination of multiple impairments, likely to be permanent in nature and greatly compromising an individual's ability to function independently in the community, perform self-care, and obtain employment." GAO-22-105015, *supra* note 149, at 8 (citing the DoD Impact Aid for Children with Severe Disabilities program application).
[161] GAO-18-348, *supra* note 154, at tbl.3.

specific installation. Moreover, assessments may be impacted or impractical based on the fluid nature of service in the military.[162] While one installation may or may not be a "primary receiving installation for military families with special needs" during one calendar year, that status may change from yearly based on personnel moves and separations from the military.[163] Lastly, it may be important to consider whether the military should give additional weight to an installation based on whether it contains primarily operational units or training and force-generating units.[164] However, again, classifying the installation status is only the first step in determining whether an attorney trained in special education is required.

The second aspect for the Secretaries of the military departments to consider is whether the state concerned has historically supported Families enrolled in the EFMP.[165] Similar to the classification of installations, there is no definition or standardization of how Secretaries of the military departments should evaluate states regarding their support for EFMP Families. The 2021 GAO report on school options for military Families briefly addresses the availability of non-DoD schools near military installations, but the data does not begin to provide an analysis of whether a given state supports EFMP Families.[166] Additionally, it is essential to recognize that EFMP encompasses all military dependents and may

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[162] *See* GAO-22-105015, *supra* note 149, at 1 (citing U.S. Gov't Accountability Off. GAO-21-80, K-12 Education: U.S. Military Families Generally Have the Same Schooling Options as Other Families and Consider Multiple Factors When Selecting Schools (2021), [hereinafter GAO-21-80] https://www.gao.gov/products/gao-21-80).

[163] GAO-22-105015, *supra* note 149, at 1.

[164] *See* STAFF OF S. ARMED SERVS. COMM., 116TH CONG., EXEC. SUMMARY ON THE FISCAL YEAR 2021 NAT'L DEF. AUTHORIZATION ACT 2 (2021) (recognizing that "family readiness strengthens our force overall" and "[reemphasizing] a focus on training to ensure our serve members can conduct their missions safely"). The executive summary implies an understanding that Soldiers are more focused on the mission when their Families are taken care of. However, the summary does not prioritize any particular mission over another. *Id.* at 2, 15.

[165] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 582(b)(7)(B), 134 Stat. 3653.

[166] GAO-21-80, *supra* note 162, at 22–25. Although the 2021 GAO report on schooling options for military Families mentions private school choice programs, it only briefly mentions the impact of enrollment on special education services and how those choices may impact state support. *Id.* at 14. Additionally, while the 2018 GAO report on EFMP oversight by the DoD provides data for the number of exceptional Family members by installation, it does not provide any additional information or context on state-related support available. *Id.* at app. II.

include individuals who are not yet in school or have completed all schooling, so reviewing school-related data alone may not be sufficient.[167] Lastly, as discussed previously, there may be jurisdictional limitations on a state's ability to provide support services for a Family enrolled in EFMP, depending on the specific location.[168] Once an installation is designated a "primary receiving installation for military families with special needs[,]" and the Secretary of the military department determines the state has historically not supported Families enrolled in EFMP in that state, the military department must provide an attorney trained in special education to support that installation.[169]

B. The Army Application

Although the FY21 NDAA mandate to provide additional expertise concerning special education law gives weight to its importance, the Army Judge Advocate Generals Corps (JAGC) began taking measures in 2020 to expand its attorneys' special education law expertise.[170] Acknowledging the importance of supporting clients in this legal practice area, the Army Judge Advocate Legal Service established a policy to maintain an attorney trained in special education law at every

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[167] AR 608-75, *supra* note 12, para. 1-9(b) (noting that one purpose of the EFMP is: "[t]o assess, document, and code the special education and medical needs of eligible Family members in all locations, and forward these coded needs to the military personnel agencies in [accordance with the regulation] for consideration during the assignment process").

[168] *See* AR 405-20, *supra* note 59, para. 4(a) (explaining state obligations and limitations in an area of exclusive federal legislative jurisdiction).

[169] It is important to note that nothing in the FY21 NDAA restricts a military department from providing special education attorneys without meeting these criteria. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 582(b)(7), 134 Stat. 3653.

[170] *See* Devon L. Suits, *Special Education Legal Support Now Available to EFMP Families*, U.S. ARMY (Aug. 20, 2020), https://www.army.mil/article/238337/special_education_legal_support_now_available_to_efmp_families (noting that over 140 attorneys, paralegals, and EFMP providers across the Armed Services completed an online training course hosted by William & Mary Law School, including 40 Army legal practitioners). This article discusses only Army actions taken to train attorneys in special education law; the Air Force, Navy, and Marine Corps have also taken significant steps to increase their services' expertise in special education law. *See* GAO-22-105015, *supra* note 149, at 15–18 (explaining that all of the services have contracted with William and Mary Law School Special Education Advocacy Clinic, and the Air Force, Navy, and Marine Corps have all hired civilian attorneys to provide specific expertise to their respective legal assistance clients on special education and disability law).

installation.[171] At a minimum, the policy states that an attorney at each installation legal assistance office will "provide legal counseling on education subjects, including, but not limited to document review with respect to individual education plans, and plans pursuant to 10 U.S.C. [Section] 794 (504 plans)."[172] As the Army continues to develop its special education legal programming, the JAGC strives to support attorneys by establishing increased training opportunities and information repositories, but largely underdeveloped legal support related to EIS remains.

In order to provide the legal expertise needed at each installation, the JAGC currently offers several training opportunities. One option is an online, self-paced introduction to special education advocacy course.[173] This course is open to any member of the JAGC but requires a Judge Advocate General University account to enroll and gain access to the materials.[174] Topics covered during the introduction to special education advocacy course include: overviews of the IDEA, Section 504, Family Educational Rights and Privacy Act (FERPA);[175] eligibility; disabilities; evaluations; Section 504 of the 1973 Rehabilitation Act; IEPs and meetings; IEPs and FAPE; least restrictive environment; related services; transportation; functional behavior assessments; discipline; manifestation determination review; bullying; transition planning; extended school year; special education and COVID; [176] conflict resolution; remedies; and

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[171] Memorandum from Dir. of Soldier and Family Legal Services to Judge Advocate Legal Service Legal Assistance Practitioners et al., subject: Legal Assistance Services Related to Education Law (28 Jan. 2021).

[172] *Id.* para. 3.

[173] *Introduction to Special Education Advocacy (ISEA) Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited Jan. 11, 2024) (requiring course admission to access materials) [hereinafter ISEA Course]. As of the date of this paper, the course is broken into 21 lessons, with 48 videos and accompanying slides, as well as supporting resource documents for each lesson topic. *Id.*

[174] *Id.*

[175] 20 U.S.C. § 1232(g). The Family Education Rights and Privacy Act (FERPA) governs the rights of parents "to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of [20 U.S.C. § 1232(g)][]" and other access by all parties to educational records. *Id.*

[176] The lesson "special education and COVID" mainly addresses the significant procedural impacts and considerations of special education in an online or virtual learning environment. *Lesson 18: SPED & COVID – ISEA Course*, JAGU https://jagu.llc.army.mil

transferring schools.[177] Aside from the online programming, classes covering the basics of special education law were added to the JAGC's Officer Basic Course, starting in 2023, as part of the overview of legal assistance practice areas.[178] As of the 2024 Spring semester, graduate course students receive one hour of instruction related to special education law and could elect to receive two additional hours of class instruction on special education law, depending on the available elective classes during

/webapps/blackboard/content/listContent.jsp?course_id=_1390_1&content_id=_274372_1&mode=reset (last visited Jan. 11, 2024) (requiring course admission to access materials). Most schools returned to in-person learning following the end of the COVID-19 pandemic. *See* NAT'L CTR. FOR EDU. STATISTICS, U.S. EDUCATION IN THE TIME OF COVID 1 (2022) (noting that 98 percent of public schools planned to return to in-person learning for the 2021 fall semester). However, these topics are still helpful for military attorneys to understand, as remote learning still occurs. Natasha Singer, *Online Schools are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 11, 2021), https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html.

[177] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials). The Army does not have a special education law training contract with the William and Mary Law School, after the school temporarily discontinued its program. *See Special Education Advocacy Clinic*, WILLIAM AND MARY LAW SCHOOL, https://law.wm.edu/academics/programs/jd/electives/clinics/clinics_list/specialed/ (last visited June 8, 2025) (noting a "brief interlude in which the clinic was not offered" but that the clinic began again in the Fall 2023 semester). However, the materials available on the Army's online advocacy course largely mirror the topics and materials discussed in the William & Mary course. *Announcements – ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2024) (requiring course admission to access materials).

[178] Interview with Major Amanda McMenamin, Professor, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Mar. 15, 2024) [hereinafter Interview with Major McMenamin]. Active Duty, Reserve, and National Guard judge advocates must attend the officer basic course as part of their qualifications to practice law as an Army judge advocate. THE JUDGE ADVOC. GEN.'S LEGAL SERVICES, U.S. ARMY, MISC. PUB. 1-1, PERSONNEL POLICIES para. 7-2(b) (2023) [hereinafter JALS PUB 1-1]. During the officer basic course, students attend classes conducted over 55 training days and "stress[] military law in a law school environment." *Id.* While the course does not aim to provide expertise in any given area, students should be familiar with potential topics they will need to understand and the resources and sources of law they should consult when the issue presents itself. JUDGE ADVOCATE OFFICER BASIC COURSE, U.S. ARMY, STUDENT HANDBOOK 7 (14 Sept. 2023).

their attendance.[179] Lastly, the administrative law department at the Judge Advocate General's Legal Center and School teaches two hours of special education law during the annual Legal Assistance Course, which is open to attendance by Judge Advocates Legal Services (JALS) personnel in legal assistance billets across the Army.[180] In conjunction with these training opportunities, the JAGC also established a repository of military and state-specific resources for JALS personnel advising on special education.

The Introduction to Special Education Advocacy course webpage has links to various resources for practicing attorneys.[181] General topic areas for resources include: jurisdiction-specific resources; templates; military-specific materials; external websites; training videos; legal assistance policy division guidance; disabilities and accommodations; and assistance beyond education.[182] While the available information is not exhaustive, it provides a clear starting point for judge advocates navigating issues that arise concerning special education. Additionally, the JAGC is working within the organization to build and retain expertise, including hiring the

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[179] *See, e.g.*, THE JUDGE ADVOC. GEN.'S SCHOOL, U.S. ARMY, CIR. 351-6, JUDGE ADVOCATE OFFICER GRADUATE COURSE para. 7 (2023) [hereinafter TJAGSA CIR. 351-6] (detailing the course requirements for graduation from the graduate course); 72d Graduate Course, Electives Catalog (27 Oct. 2023) (providing course descriptions for each elective offered to students of the graduate course). Active Duty judge advocates, and some select Reserve and National Guard judge advocates, are required to attend the graduate course following promotion to the rank of major. JALS PUB 1-1, *supra* note 178, at para. 7-5(a). At the graduate course, students earn an ABA-reviewed Master of Laws degree in Military Law from the Judge Advocate Generals Legal Center and School. TJAGSA CIR. 351-6, *supra*, para. 15 (2023). One purpose of the course is to provide students with "[a] deeper knowledge of substantive law, legal systems and institutions, and the defense establishment, and a dedication to lifelong learning[,]" which supports expanding the course to include instruction in the area of special education. TJAGSA CIR. 351-6, *supra*, para. 3(b)(2). *See* MAJ Amanda McMenamin, Family Law Hot Topics (Jan. 31, 2024) (PowerPoint presentation) (on file with author). Interview with Major McMenamin, *supra* note 178.

[180] Interview with Major McMenamin, *supra* note 178. It is important to note that the curriculum for each course changes based on the preferences and priorities of the faculty member responsible for training students on legal assistance and client services. *Id.* Although course materials discussing special education are currently offered, those lessons could be altered in future years. *Id.*

[181] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited Jan. 11, 2024) (requiring course admission to access materials).

[182] *Id.*

first Army civilian attorney, an expert specializing in education law, to assist with complex cases involving Army Families.[183] Despite efforts to increase knowledge and resourcing for attorneys, there are notably no specific resources for Families with children under the age of three that require special education services under Part C of the IDEA.

The Army's efforts to provide special education-trained attorneys have been continuous; however, there are still gaps to fill, specifically when assessing efforts to support Families requiring EIS for their children.[184] One factor contributing to the lack of support for Families of children under the age of three may be the absence of evaluations on the efficacy of resources for that population.[185] Many DoD and GAO reports address the EFMP and support for special education for school-age children and the issues facing military Families of school-age children, but those reports do not address special education before the age of three.[186]

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[183] E-mail from Melissa Halsey, Chief, Legal Assistance Policy Division, to Legal Assistance Policy Division Personnel et al. (Dec. 19, 2023, 08:46 EST) (on file with author). As of 2024, the Army had approximately 57,777 exceptional Family members. E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author). Compared to 34,885 in the Air Force, 9,150 in the Marine Corps, and 17,533 in the Navy. GAO-18-348, *supra* note 154, at 12 tbl.3. Comparatively, while the Air Force has one civilian attorney serving as the EFMP legal assistance coordinator, the Marine Corps has four civilian special education attorneys at various locations who specialize in disability-related law, and the Navy has two attorneys specializing in special education law. GAO-22-105015, *supra* note 149, at 16–18.

[184] The DoD Office of Special Needs provides information on EIS resources through its online platform, *Military One Source*, and recommends contacting the EFMP Family support provider on the military installation for additional information. *Education & Employment: Early Intervention Services*, MILITARY ONE SOURCE, https://www.militaryonesource.mil/benefits/early-intervention-services/ (last visited Feb. 13, 2024). The website provides a brief overview of EIS and how EIS can help children, and the site directs individuals to either request services through the EDIS program at the MTF or through the state's EIS program, depending on whether they live on an installation with a DoDEA school. *Id.* The website also provides a link to assist individuals in finding their state's EIS program contacts. *Education Directory for Children with Special Needs*, MILITARY ONE SOURCE, https://efmpeducationdirectory.militaryonesource.mil /early-intervention-directory (last visited Feb. 13, 2024).

[185] *See generally, e.g.*, GAO-18-348, *supra* note 154; GAO-22-105015, *supra* note 149; GAO-21-80, *supra* note 162.

[186] *See generally, e.g.*, GAO-18-348, *supra* note 154; GAO-22-105015, *supra* note 149; GAO-21-80, *supra* note 162. *But see* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 4(a)(iv) (Apr. 18, 2023) (requiring updates under the order to "identify and disseminate evidence-based practices for serving children with disabilities and their families in high-quality early childhood education programs, including Head Start").

The GAO's most recent report on data collection enabling early intervention programs to reach more infants and toddlers did not address program efficacy on military installations or within the DoD.[187] Similarly, while organizations such as the American Bar Association Standing Committee on Legal Assistance for Military Personnel have provided training and materials on special education and the military, early intervention services are practically missing from the training.[188] Another reason for the lack of data and resources regarding special education needs before the age of three may be the DoD's limited oversight and involvement in the execution of EIS programs.[189] Unlike special education and related services that the DoDEA schools provide, the military departments individually manage EIS programs.[190] For the Army, providing EIS, tracking, and accountability are the sole responsibilities of the MTFs and regional coordinators, which leaves significant opportunities for disparate treatment based on the installation providing services.[191] Regardless of the source, the Army must take action to expand

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[187] *See generally* GAO-24-106019, *supra* note 16 (assessing barriers and inequities in access to early intervention within the United States, but notably lacking any assessment or data collection related to services provided by the Department of Defense).

[188] *See* Cheri Belkowitz, Sharon J. Ackah, Christina Jones, Brianna Crews & Brenda M. Shafer, Special Education and the Law: A Military Perspective (Apr. 6, 2022) (unpublished PowerPoint presentation) (on file with author); *see also* Grace E. Kim, Vickie M. O'Brien, COL (Ret.) Elizabeth L. Schuchs-Gopaul, Educational Issues for Military Families with Special Needs (Oct. 15, 2020) (unpublished PowerPoint presentation) (on file with author).

[189] While DODI 1342.12 requires the Assistant Secretary of Defense for Health Affairs to provide standards for staffing, oversight, and measures for EIS program outcomes, no current DHA publications address these requirements. *See Defense Health Agency Publications Library*, DEFENSE HEALTH AGENCY, https://www.health.mil/Reference-Center/DHA-Publications (last visited Jan. 9, 2024); *see also* E-mail from Venus Thompson, Publication Systems Branch, Defense Health Agency, to Author. (Jan. 10, 2024, 12:45 EST) (on file with author).

[190] *See generally, e.g.*, U.S. DEP'T OF NAVY, CHIEF, BUREAU OF MEDICINE AND SURGERY INSTR. 1755.1A CHANGE TRANSMITTAL 1, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES AND EARLY INTERVENTION SERVICES encl. 1 (11 Jan. 2023); U.S. DEP'T OF AIR FORCE, POL'Y DIR. 40-6, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES para. 3.1 (31 July 2018); U.S. MARINE CORPS, ORDER 1754.4C, EXCEPTIONAL FAMILY MEMBER PROGRAM ch. 3 (8 Oct. 2020); U.S. MARINE CORPS, ORDER 1755.3A, SCHOOL LIAISON PROGRAM para. 4(b)(4) (1 July 2021).

[191] *See* MEDCOM REG 40-53, *supra* note 71, para. 1-9(c)(8)(f) (noting MTF commander responsibility to ensure EDIS program managers conduct self-assessments of DoD standards).

legal training and support concerning special education entitlements from birth through the age of three to close these support gaps.

VI. Proposed Expansion of Legal Training and Support

The statutory and regulatory guidance regarding EIS and special education make it clear that the Army must work to provide services to eligible dependents from birth through the age of 21.[192] While the Army is well on its way to fulfilling these requirements for children eligible to attend DoDEA schools, efforts must recognize the necessity to support children from birth until they are eligible for special education under Part B of the IDEA.[193] Efforts to improve support should include expanding training for legal assistance attorneys and adding special education training for commanders. Beyond educating and training attorneys and commanders, the Army should increase its efforts to ensure Families enrolled in EFMP know and understand their rights related to special education services.

A. Expanded Legal Training and Support for Legal Assistance Attorneys

While the current training and resources for legal assistance attorneys sufficiently prepare them to advise Families regarding special education needs for school-aged children, those materials should address the relevant rights of children under the age of three. At a minimum, the JAGC should consider expanding training to include modules related to early intervention and increasing attorney expertise within the Army.

Using the existing JAGU platform, the introduction to special education advocacy course could easily be adjusted to include training on EIS. [194] Specifically, EIS modules should cover topics such as:

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[192] *See* 10 U.S.C. § 2164(f) (confirming that all children eligible to enroll in a DDESS retain their substantive and procedural rights related to special education and EIS); *see also* 20 U.S.C. § 927(c) (requiring DoDEA schools overseas to provide services for eligible toddlers, infants, and children in compliance with Part B and Part C of the IDEA).

[193] *See* 20 U.S.C. § 1435 (establishing requirements for providing EIS funded through the IDEA); *see also* DoDI 1342.12, *supra* note 18, para. 4(a) (establishing DoD policy to provide EIS for eligible infants and toddlers).

[194] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/

identification and screening; evaluations; eligibility; IFSP development and implementation; least restrictive environment; related services; transportation; and the transition from receiving EIS to receiving special education through an IEP.[195] Although some topics appear to overlap with the existing modules, it is vital to understand the differences between the definitions and services provided pursuant to an IFSP versus those provided pursuant to an IEP.[196] In addition to expanding training topics, the Army should consider expanding the expertise of its attorneys.

As of 2023, approximately 57,777 Family members are enrolled in EFMP, and the Army should hire additional subject matter experts in disability and special education law to actively support this population.[197] Hiring additional attorneys would support the burden of ensuring Families understand their legal rights and entitlements related to EIS or special education.[198] Perhaps more importantly, additional attorneys could assist in the event a school or EIS provider violated those rights, preparing for and representing Families in administrative complaints, mediation, or due process hearings.[199] Acknowledging that personnel resources are often limited, hiring additional attorneys with expertise in special education law

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announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials) (listing available special education lessons on the website which, in name, appear to mirror relevant topics related to EIS including: eligibility; evaluations; least restrictive environment; related services; transportation; and transition planning).

[195] These topics align with the main procedures discussed in DoDM 1342.12. *See generally* DoDM 1342.12, *supra* note 45, at encl. 3.

[196] Early intervention services are established and prescribed in Part C of the IDEA, while Part B prescribes special education services, which have varying requirements and burdens on the state. *Compare* 20 U.S.C. ch. 33, subch. II, *with* 20 U.S.C. ch. 33, subch. III.

[197] E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author). These numbers are up from the reported 43,109 Family members enrolled in EFMP in 2018. GAO-18-348, *supra* note 154, at 12 tbl.3.

[198] While all 57,777 potential EFMP clients will unlikely need assistance at once, a 1:57,777 expert-attorney ratio may be untenable for the JAGC long-term. *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS comment 2 to rule 1.3 (28 June 2018) [hereinafter AR 27-26] (stating that "[a] lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled competently").

[199] *See* DoDM 1342.12, *supra* note 45, at encl. 6 paras. 4(h–i); *see also id.* at encl. 6, para. 5(e) (holding that representation by counsel is authorized for due process hearings, although at each party's own expense).

may help alleviate burdens on installation legal assistance offices to understand these processes.[200]

Nevertheless, there may be some concerns with increasing the number of attorneys in the JAGC. Congress mandated creating and staffing the Office of Special Trial Counsel as part of the NDAA for Fiscal Year 2022.[201] To meet this requirement, the JAGC is already obligated to expand personnel billets.[202] In an age where there is a fight for personnel,[203] it may be impractical to seek additional attorney billets for special education. In the alternative, the JAGC should find ways to improve training and provide opportunities to build expertise related to special education and early intervention among judge advocates. Aside from efforts to obtain additional expertise in the field, the Army should continue advancing its support to Families enrolled in the EFMP by training administrative law attorneys on issues related to early intervention and special education.

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[200] *See* Vergun, *supra* note 95*; see also* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023) (finding that "Military families consistently cite access to high-quality child care as an impediment to military spouse employment and family economic security. Difficulty accessing care also poses a challenge for both spouses—and, as data shows, particularly for women in dual military couples—to continuing their service if they have caregiving responsibilities").

[201] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021).

[202] *See* Memorandum from Sec'y of Army to Gen. Counsel, Dep't of Def., subject: Fiscal Year 2022 National Defense Authorization Action (FY22 NDAA), Section 539F(a)(1) Brief – Office of the Special Trial Counsel (7 Feb. 2022) (establishing a need for increased personnel resources to adequately resource the Office of the Special Trial Counsel).

[203] *See* Vergun, *supra* note 95. It is also important to note that these increases in allocations for JAGC personnel are occurring when Congress has reduced the end strength authorization for the Army. *See*, *e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 401(1), 135 Stat. 1673 (authorizing an end strength of 485,000 for fiscal year 2022); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 401(1), 136 Stat. 2551 (authorizing an end strength of 452,000 for fiscal year 2023); National Defense Authorization Act for Fiscal Year 2024, H.R. 2670-100, § 401(1) (2023) (authorizing an end strength of 445,000 for fiscal year 2024).

B. Expanded Legal Training for Administrative Law Attorneys and Commanders

While legal assistance attorneys must prepare to advise Service members and their Families on special education issues, administrative law attorneys must prepare to advise commanders and other installation entities on their legal obligations related to special education. While it is imperative that Families have access to trained attorneys when consulting on special education and early intervention, the command may resolve many issues or problem areas if the attorneys advising the command and installation contribute to the process.[204] Potential expansion areas include requiring administrative law offices to train attorneys on special education law and establishing training for commanders and staff involved in the screening, evaluation, and provision of EIS and special education services.

In order to advise on any matter, judge advocates must be competent in their legal knowledge of the issue.[205] At a minimum, it would be helpful for administrative law attorneys to go through the same online training course required for legal assistance attorneys.[206] Understanding these modules may assist judge advocates in advising entities on the installation and assisting the Defense Office of Hearings and Appeals in the event of an investigation or complaint.[207] In addition to legal training for the attorneys, the Army must train commanders on requirements related to special education.

Commanders have limited formal opportunities for legal education, but addressing special education obligations should be added to the

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[204] DoDI 1342.12 requires secretaries of the military departments to "[t]rain command personnel to fully understand their legal obligations to ensure compliance with and provide the services required by this Instruction." *See* DoDI 1342.12, *supra* note 18, at encl 2, para. 4(h).

[205] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." AR 27-26, *supra* note 198, at rule 1.1.

[206] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials).

[207] *See* DoDI 1342.12, *supra* note 18, at encl. 2 para. 4(f) (requiring the secretaries of the military departments to "[p]rovide counsel . . . or request counsel from the Defense Office of Hearings and Appeals . . . to represent the Military Department in impartial due process hearings and administrative appeals . . . for infants and toddlers birth up to 3 years of age, inclusive, with disabilities who are eligible for EIS").

training curriculum for garrison and MTF commanders.[208] Garrison commanders need to understand their role in supporting EIS on an installation. Since providers conduct EIS in the least restrictive environment, such as a home or daycare, garrison commanders may also encounter issues related to provider access to an installation, housing issues, or issues at a CDC that they must address and appropriately resolve.[209] Concurrently, MTF commanders play a critical role in supervising the screening, evaluation, and implementation of EIS, and they should understand the key players within their organization and the resources required to execute all requirements.[210] Beyond educating and training attorneys and commanders, the Army should also increase its efforts to ensure Families enrolled in EFMP understand their rights related to special education services.

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[208] Battalion and brigade commanders attend the Senior Officer Legal Orientation course at the Judge Advocate General's Legal Center and School in Charlottesville, VA. The course is a week-long course designed to orient future commanders to the various legal issues they may face during their command and provide a baseline understanding of expectations and available support from the legal channels. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-338, MILITARY TRAINING: THE SERVICES NEED TO ENSURE THAT ALL COMMANDERS ARE PREPARED FOR THEIR LEGAL RESPONSIBILITIES 20–29 (2021), https://www.gao.gov/products/gao-21-338; *see also* Interview with Major McMenamin, *supra* note 178.

[209] *See, e.g.*, U.S. DEP'T OF DEF., DOD MANUAL 5200.08, 3 PHYSICAL SECURITY PROGRAM: ACCESS TO DOD INSTALLATIONS MANUAL sec. 3 (2 Jan. 2019) (outlining installation access requirements and multiple instances where an installation commander may have discretion to allow access or credentialing); INSPECTOR GEN., U.S. DEP'T OF DEF., NO. DODIG-2022-004, EVALUATION OF THE DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF OVERSIGHT PROVISIONS OF PRIVATIZED MILITARY HOUSING 6 (2021) (finding that in the Department of the Army, "[the] Garrison Commander serves as the Secretary of the Army's local representative to the landlords. The Garrison Commander assists with landlord and tenant disputes that the Property Manager or Garrison Housing Manager cannot resolve. The Garrison Commander also maintains order and discipline, health, safety, security, and protection of the project."); U.S. DEP'T OF ARMY, REG. 608-10, CHILD DEVELOPMENT SERVICES para. 2-3(a) (11 May 2017) [hereinafter AR 608-10] (noting that "[garrison] commanders are responsible for the management and operational supervision of all programs and services within CDS delivery systems.").

[210] *See* MEDCOM REG. 40-53, *supra* note 71, para. 1-9(c) (detailing the responsibilities of MTF commanders, including ensuring full compliance with DODI 1342.12 and MEDCOM REG. 40-53, allocating resources, staffing, ensuring appropriate prioritization of evaluations, handling medical privileges, and appointing and supervising EDIS managers).

C. Expanded Outreach to Families Enrolled in the Exceptional Family Member Program

An important area of expansion for the Army's special education efforts is increasing outreach and engagement with eligible EFMP Families. Despite the large number of Families enrolled in EFMP[211] and the availability of special education-trained attorneys in legal assistance offices,[212] the Army received less than 200 referrals for special education-related issues from 2020 to 2023.[213] While the EDIS program is responsible for drafting agreements and coordinating services with community agencies on and off the installation, additional opportunities for legal programming may be helpful in spreading awareness.[214] For example, installations should consider adding required briefings to all Service members with a Family member enrolled in EFMP during installation in-processing.[215] Another opportunity to reinforce the availability of resources is when a Family member is referred to, or enrolled in, EFMP.[216] In order to reach more Families, MTF commanders could require providers to refer Families to legal assistance for a consultation or initial brief on resources simultaneous with enrolling the Family member in EFMP.[217] To ensure legal support for Family members

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[211] E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author).

[212] Suits, *supra* note 170. This paper discusses only Army actions taken to train attorneys in special education law; the Air Force, Navy, and Marine Corps have also taken significant steps to also increase their service's expertise in special education law; *see* GAO-22-105015, *supra* note 149, at 15–18 (citing that all of the services have contracted with William and Mary Law School Special Education Advocacy Clinic, and the Air Force, Navy, and Marine Corps have all hired civilian attorneys to provide specific expertise to their respective legal assistance clients on special education and disability law).

[213] E-mail from Melissa Halsey, Chief, Legal Assistance Policy Division, to Legal Assistance Policy Division Personnel et al. (Dec. 19, 2023, 08:46 EST) (on file with author).

[214] MEDCOM REG. 40-53, *supra* note 71, para. 4-3(a).

[215] Service members are required to in-process at each installation upon their arrival. U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL READINESS PROCESSING para. 2-1 (6 Mar. 2018). Part of a Service member's in-processing includes an "appropriate welcome orientation[,]" which often involves briefs from different services and resources on the installation. *Id.* at 2-1(a).

[216] *See* AR 608-75, *supra* note 12, para. 3-1(a) (detailing current steps required by the EFMP case coordinator and physicians during enrollment).

[217] *Id.*

and guarantee they are aware of their rights to legal support, the Army should require program coordinators and managers to notify Family members of available legal assistance services at the start of the IFSP process or prior to a meeting with a multidisciplinary inclusive action team.[218] These recommended efforts would increase support for Families enrolled in EFMP, an essential precursor to improving care for infants and toddlers with disabilities.

VII. Conclusion

The DoD must expand eligibility for EIS, at a minimum, to all military dependents living on an installation and consider expanding eligibility to all military dependents in general. In the absence of such changes, the Army must continue its efforts to expand legal support for Families with special needs. While efforts to improve education and support for individuals with disabilities have evolved over the past several decades,[219] the military ought to do more. The need for continuous improvement is evident, given recent attention towards special education services for military dependents by the President, Congress, and senior DoD officials.[220] One of the most important aspects of these recent efforts has been advancing legal services for Families enrolled in the EFMP.[221] And despite the broad language of the FY21 NDAA,[222] the Army has made significant efforts to improve legal support to Families enrolled in the EFMP.[223] However, efforts to support children with disabilities from birth through the age of three are still lacking. While the statutes on special

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[218] *See* AR 608-10, *supra* note 209, para. 4-2(a)(4) (detailing requirements for a Special Needs Resource Team (SNRT)); *see also* U.S. DEP'T OF ARMY, DIR. 2015-44, UPDATED POLICY FOR ARMY CHILD, YOUTH, AND SCHOOL SERVICES PROGRAMS encl., para. 10 (14 Dec. 2015) (changing the term SNRT to "Multidisciplinary Inclusion Action Team").

[219] *See generally, e.g.*, 20 U.S.C. §§ 1400–1444.

[220] *See, e.g.*, Exec. Order No. 14,095, 88 Fed. Reg. 24669 (Apr. 18, 2023) (recognizing the impacts of care on Families); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 576, 136 Stat. 2605 (establishing special needs coordinators in child development centers); *Strengthening Our Support Memo*, *supra* note 4 (prioritizing support to EFMP Families for the DoD).

[221] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582, 134 Stat. 3653.

[222] *Id.*

[223] *See* Legal Assistance Services Related to Education Law Memo, *supra* note 171 (mandating special education law as a practice area for legal assistance attorneys).

education authorize the DoD to provide EIS for infants and toddlers with disabilities, current policies limit services to a minority of eligible dependents.

Ensuring special education support for military dependents from birth through the age of three must be an essential tenant of the Army's quality of life initiatives.[224] First and foremost, ensuring children receive EIS provides significant long-term benefits for both the child and society at large, and the DoD should seek to limit the impact a parent's service in the military has on whether a child receives these benefits.[225] Next, in an era where the military is struggling to recruit and retain personnel, it is critical to understand that ensuring care for these dependents could positively impact whether an individual joins or stays in the military.[226] Additionally, the growing need for quality childcare in the military supports the argument that there is a growing need to ensure that special education supports, specifically EIS, are in place to support those Families.[227] In the fight for people, the DoD must seek to provide this beneficial support for Service members and their Families.[228]

The DoD must resolve gaps in special education policies to maximize EIS for eligible military dependents. The DoD currently provides EIS for dependents living on a military installation that operates a DoDEA school, but this limits the DoD provision of EIS to only a small subgroup of military Families.[229] Instead, the DoD should authorize and provide EIS for all military Families living on an installation, and the DoD should consider expanding EIS to include all military Families who have an infant or toddler with a disability. Actions speak louder than words, and while the DoD has clearly stated its overarching policy to support military Families, the DoD must ensure that all policies, instructions, and manuals align with this goal.

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[224] *See* sources cited *supra* note 86.
[225] CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *supra* note 15.
[226] *See* 2023 DACES REPORT, *supra* note 97.
[227] *See* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023) (noting that "Congress must provide the transformative investments necessary to increase access to high-quality child care—including preschool and Head Start—and long-term care services, as well as high-quality, well-paying jobs that reflect the value the care workforce provides to families and communities").
[228] RAND LABOR AND POPULATION, *supra* note 93, at 3 (2005) (estimating the net benefit to society when EIS was provided to children ranged from approximately $1,400 to $240,000 per child).
[229] *See* sources cited *supra* note 115 (noting that EDIS services are only available at 9 Army installations within the United States and its Territories).

Regardless of whether the DoD ultimately adjusts its policy for EIS, there are actions the Army can take now to increase support and care for military children with special needs. Army Families need legal support to understand their rights and protections related to EIS, and the Army must expand training for legal assistance attorneys to cover topics related to early intervention. Similarly, commanders and their legal advisors must understand the requirements for early intervention and how to properly implement EIS on an installation. Thus, the Army must expand training to commanders and administrative law attorneys. Lastly, the Army should coordinate and expand outreach efforts early in the diagnosis to reach as many Families as possible.

Military Families are often seen as the "backbone" of the military, supporting Service members as they answer the Nation's call to serve.[230] It is vital to ensure that DoD and Army policies and regulations support even the youngest Family members in return.

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[230] *See* AMY MILLIKAN BELL, ET AL., ARMY PUBLIC HEALTH COMMAND, HEALTH OF THE ARMY FAMILY 70 (2021) (citing military spouses as the backbone of the Armed Forces); *see also* Congressman Sanford D. Bishop Jr., Opinion, *Supporting the Backbone of Our Military*, HOUSE.GOV, (Sept. 17, 2014), https://bishop.house.gov/media-center/op-ed/supporting-the-backbone-of-our-military) (stating that "the strength of our military is drawn from the resilience of their families"). "We have an all-volunteer force—and it continues only because of generations of Americans who see the honor, dignity, and patriotism of [military service]. How can we hope to keep our military strong if we don't give our families, survivors, and caregivers what they need to survive?" Jill Biden, First Lady, Remarks by First Lady Jill Biden for the Next Phase of Joining Forces in Virtual White House Event, WHITE HOUSE (Apr. 7, 2021), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/04/07/remarks-by-first-lady-jill-biden-for-the-next-phase-of-joining-forces-in-virtual-white-house-event/.