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Articles

USALSA Report

U.S. Army Legal Services Agency
Trial Judiciary Note

Book Review

To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military

Major Maria Doucettperry[*]

I. Introduction

Permitting families of recently deceased Soldiers to collect semen from the Soldier for the purpose of artificial insemination implicates many moral, ethical, and legal issues. This practice should therefore be limited to cases where the servicemember has voluntarily surrendered a specimen prior to death and has clearly indicated the intended disposition of such specimen in the event of his death or incapacity. Additionally, military benefit eligibility criteria should be redefined to encompass any children conceived from this process within a specified period from the servicemember's death. The following Sergeant (SGT) Smith and First Lieutenant (1LT) Perry hypotheticals demonstrate the perplexities raised by unanswered moral and legal questions surrounding sperm cryopreservation[2] as they may be presented in the military arena.

The first hypothetical concerns SGT John Smith, a twenty-three-year-old Army Reservist who was seriously wounded in Iraq. After being stabilized, he was medically evacuated to Brooke Army Medical Center in Fort Sam Houston Texas, where he was met by his parents and his fiancée. After what appeared to be a miraculous recovery during a two month period where SGT Smith was competently communicating with his family and physicians and had gained enough strength to move about with assistance, SGT Smith's health began to decline to the point where he entered a persistent vegetative state.[3] Before life support was removed, SGT Smith's parents, the next-of-kin and attorneys-in-fact pursuant to SGT Smith's Durable Power of Attorney for Health Care, petitioned the hospital to extract SGT Smith's sperm so that his fiancée may later bear his child.

The second hypothetical concerns First Lieutenant (1LT) James Perry, an Army officer stationed at Fort Carson, who received orders notifying him that he would be deploying to Afghanistan in six months. Before deploying, 1LT Perry and his wife visited a sperm bank, where he deposited several specimens. He explained to his wife that he was leaving the specimens as insurance that his legacy and his dream of having three children could be carried out even if he did not come back.

With recent advances in assistive reproduction technology[4] and the high rate of injury and death among military servicemembers stationed in Iraq and Afghanistan,[5] the military is ripe for issues surrounding the posthumous conception[6] of

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[2] Sperm Cryopreservation is an assistive reproduction technique wherein liquid nitrogen is used to freeze reproductive cells for future use. *See* Tyler Medical Clinic, *Sperm Cryopreservation*, http://www.tylermedicalclinic.com/cryobank.html (last visited May 14, 2008).

[3] *See In re* Jobes, 529 A. 2d 434, 438 (N.J. Sup. Ct. 1987).

> Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Id.

[4] Assistive Reproduction technology includes "all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, [and] zygote intrafallopian transfer . . . ." THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES ch. 2, § I.A.1.a.(i). (2004) [hereinafter PRESIDENT'S COUNCIL ON BIOETHICS] (citing 42 U.S.C. § 263a-7(1)), *available at* http://www.bioethics.gov/reports/reproductionandresponsibility/index.html (follow "Chapter Two: Assisted Reproduction" hyperlink). "Most methods of assisted reproduction involve five discrete phases: (1) collection and preparation of gametes; (2) fertilization; (3) transfer of an embryo . . . to a woman's uterus; (4) pregnancy; and (5) delivery and birth." *Id.* § I.

[5] Since March 2003, there have been 3965 military fatalities resulting from the war on Terrorism. An additional 29,320 servicemembers have been wounded in action. Defense Manpower Data Center, Statistical Information Analysis Division, Global War on Terrorism - Operation Iraqi Freedom, *available at* http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OIF-Total.pdf (last visited May 14, 2008).

children conceived to individuals killed on active duty.[7] Moreover, family members faced with the decisions associated with the medical care of brain dead individuals[8] or with the otherwise untimely death of their servicemember relative, are frequently seeking out options for continuing the legacy of their loved ones.[9] For many pursuing this goal, the only hope lays in the birth of a child, "the servicemember's child," a child who could bear his name and carry on his legacy. With that hope, these optimistic family members turn to posthumous reproduction.

Posthumous reproduction is the birth of a child after the death of a parent.[10] While posthumous births have always occurred, in cases where a husband died from illness, accident, or war before his pregnant wife could deliver their child,[11] advances in reproductive technologies have given birth to a whole new aspect of posthumous reproduction—conception after death of a parent. Various assistive reproductive procedures are being employed routinely to freeze sperm, eggs, and even embryos, later reviving them in a completely viable form.[12] Although the processes for achieving this wonder vary greatly, the majority of issues that arise concerning posthumous reproduction[13] can generally be traced back to the process of cryopreservation.

Sperm cryopreservation is the scientific process used to freeze a man's sperm for later use. Using this process, collected sperm is frozen at a temperature of -196°C where it can be preserved for an indefinite amount of time.[14] Although this process, also known as "sperm-banking," is typically employed by men who are about to undergo chemotherapy or a vasectomy,[15] rapid deployments into extremely perilous areas have spurred a huge interest in sperm-banking by servicemembers and their loved ones.[16]

Unfortunately, however, the myriad of issues surrounding the military family's decision to bank sperm are vast. In addition, because of the unique nature of the military, they face many obstacles never contemplated by individuals in the civilian sector. For instance, in many cases, the injured servicemember, or his remains as the case may be, must remain under military care for examination and autopsy for an average of seven to ten days after death.[17] Even in instances where the remains can be released sooner, it is often too late for the family to have the servicemember's sperm collected and cryopreserved.[18] Similarly, there are often issues regarding government control, consent and jurisdiction because of the

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[6] Posthumous conception occurs when a child is conceived via assistive reproduction technology after one or both genetic parents have died. *See generally* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 258 (Jan. 1999).

[7] *See, e.g.*, Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY, Jan. 27 2003, at 1A; Ellen Gamerman, *For U.S. Troops, A Personal Mission*, BALT. SUN, Jan. 27, 2003, at 1A; Marilyn Dunlop, *Fearing Injury, Soldiers Bank Sperm*, TORONTO STAR, Feb. 13 1991, at A14 (referencing a campaign to inform military men that sperm banks were an option for them); Ivor Davis, *Posterity Insurance: AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, 1988, at 1 (noting that sperm donors included men on military duty who were posted to possible war or volatile zones).

[8] Brain dead refers to a state wherein there is irreversible cessation of all functions of the brain, including the brain stem. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 589 (1996).

[9] *See, e.g.*, *Israeli Court: Family Can Have Dead Soldier's Sperm*, CNN.com, Jan. 29, 2007, *available at* http://cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&title=Israeli+court%3A (reporting of a families struggle to have a sample of their son's sperm that was taken after he was shot four years ago by a sniper, released to them for insemination by a surrogate mother).

[10] John A. Robertson, *Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994).

[11] *Id.*

[12] RICHARD M. LEBOVITZ, NATURAL SELECTION IN FAMILY LAW ch. 5.2 (2005), *available at* http://www.biojuris.com/natural/5-2-0.html.

[13] "Most current conflicts about posthumous reproduction arise from the ability to freeze and thaw gametes and embryos . . . . In each case, the question is whether the freezing, thawing, inseminating, implanting, and other activities that lead to posthumous offspring should occur or continue." Robertson, *supra* note 10, at 1030.

[14] *See* CryoGam Colorado, LLC., Sperm Banking, http://www.cryogam.com/Sperm%20Banking.html (last visited 15 May, 2008).

[15] Teresa Burney, *War Boosts Sperm Deposits*, ST. PETERSBURG TIMES (Florida), Feb. 19, 1991, at 1B.

[16] *See* Ann Denogean, *Davis-Monthan Airmen Bank Sperm as They Gird for Conflict*, TUCSON CITIZEN, Feb. 15, 2003, at 1B; Gamerman, *supra* note 7, at 1A (citing Angela Cruz, the fiancée of an Army reservist who was scheduled to deploy who stated "[i]f he were to die over there, I'm definitely going to use the sperm sample (deposited by her fiancée) to get pregnant.").

[17] FALLEN HEROS FUND, HANDLING ESTATE MATTERS, *available at* http://www.fallenheroesfund.org/content/pdf/Handbook_Chapter_2__6_1_6123.pdf (last visited 15 May, 2008).

[18] Posthumous sperm retrievable for sperm cryopreservation is only medically feasible within the first twenty-four to thirty hours after death. CORNELL UNIVERSITY, DEP'T OF UROLOGY, NEW YORK HOSPITAL GUIDELINES FOR CONSIDERATION OF REQUESTS FOR POST-MORTEM SPERM RETRIEVAL (2006) [hereinafter N.Y. HOSP. GUIDELINES], *available at* http://www.cornellurology.com/guidelines.shtml.

effect of the transient nature of the military family and the unique relationship between the servicemember and the government.

Analyzing the hypothetical facts surrounding SGT Smith and 1LT Perry, this article will discuss four issues surrounding posthumous conception resulting from assistive reproduction technology by means of the posthumous removal and insemination of sperm[19] in cases where the servicemember clearly intended such a result, as well as in cases where the servicemember's desire was unknown. First, this article will then address the status of any resulting child and the right to government benefits of any child conceived posthumously from cryopreserved sperm. Second, this article will address the government's responsibility to make a Soldier's remains accessible for sperm retrieval in a reasonable amount of time following the servicemember's death and any government requirements to assist in such removal when the body cannot be released for sperm removal during the time period wherein cryopreservation is medically feasible. Third, this article will then propose an amendment to the definition of "child" as this term applies to those benefits payable to dependants of servicemembers who die on active duty. Finally, this article will propose appropriate disclosures and advice for servicemembers prior to deployment, on the issues of cryopreservation and consent.

II. The Issue of Issue

> At the time of a man's sudden death, intense bereavement may cause a woman to attempt to "hold on" to her deceased partner by requesting sperm retrieval. Denial, a normal process of self-deception that is part of the grief process following a tragic loss, may initially drive the wife to request the procedure. A pregnancy may be planned as an act of love or memorial in the face of death. Sperm preservation could provide the false impression that the man will live on through his retrieved sperm and its fertility potential.[20]

A. Fundamental Right to Children

It is a widely accepted belief that all individuals possess a fundamental right to have children.[21] In *Skinner v. Oklahoma*,[22] the Supreme Court found that a law authorizing sterilization of certain felons interfered with marriage and procreation rights, which were among "the basic civil rights of man."[23] Similarly, in *Meyer v. Nebraska*,[24] the Court listed a person's right "to marry, establish a home and bring up children"[25]among those fundamental liberties guaranteed by the Constitution.

In striking down a law requiring habitual criminals to be sterilized, the Court in *Stanley v. Illinois*[26] opined: "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' . . . ."[27] This was made abundantly clear in *Eisenstadt v. Baird*, where the Court noted, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[28] While these cases clearly affirm an individual's right to marry and

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[19] Although recent developments in assistive reproduction have expanded the possibility of gamete conservation for later conception, including the possibility of preserving eggs, this paper will not address this option due to the additional issues related to surrogacy that arise from this scenario. *See, e.g.*, Jessica Weiner & Lori Andrews, *The Donor Egg: Emerging Issues in Liability and Paternity*, 25 FAM. ADVOC. 15 (2002); *see World's First Children Born from Frozen Egg and Sperm*, CHI. SUN-TIMES, Dec. 30, 2000 at 14. *See, e.g.*, Jessica Weiner & Lori Andrews, *The Donor Egg: Emerging Issues in Liability and Paternity*, 25 FAM. ADVOC. 15 (2002).

[20] N.Y. HOSP. GUIDELINES, *supra* note 18.

[21] "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[22] 316 U.S. 535 (1942).

[23] *Id.* at 541.

[24] 262 U.S. 390 (1923).

[25] *Id.* at 399; *see* KENNETH D. ALPERN, THE ETHICS OF REPRODUCTIVE TECHNOLOGY 252 (1992).

[26] 405 U.S. 645 (1972).

[27] *Id.* at 651 (quoting *Meyer*, 262 U.S. at 399; *Skinner*, 316 U.S. at 541).

[28] 405 U.S. 438, 454 (1972).

to have children, the Court has not been inclined to find such a right where one of the parties to the marriage has declined or withdrawn their consent to have children.[29] Moreover, the Court has clearly established that no one can be forced to parent a child against his or her wishes. However, the question remains unanswered as to whether consent to procreate can be inferred to an individual who has not made his desires known. While an argument can be made for allowing such an inference, there are equally strong reasons for disallowing it.

> Posthumous conception . . . affects the deceased's interests, because it recasts the content and contours of the deceased's life. When it occurs without the person's consent, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter in his or her life. Indeed, this is one of the reasons why any attempted analogy between posthumous conception and organ donation fails. Controlling the fate of gametes is different from—and more significant than—controlling the fate of cadaveric organs, because procreation is central to an individual's identity in a way that organ donation is not. As the consequences of posthumous conception profoundly affect core values held by the deceased while alive, respect for autonomy requires that this procedure should not be permitted unless the deceased's consent is clear.[30]

Unfortunately, in cases such as the hypothetical SGT Smith where the desires of the servicemember are presumably unknown, the issue of consent is often anything but clear. In these cases, the courts and legislature are all silent as to whether a spouse or parent could lawfully consent to the cryopreservation of the servicemember's sperm and if so, what constitutes the proper use of such sperm.[31] This silence has led to a host of different outcomes as those left behind struggle to balance competing interests of fulfilling their loved one's lifelong dream of having children with the issues associated with pursuing the posthumous conception of such a child.[32]

In our hypothetical concerning SGT Smith, SGT Smith's parents, (the Smiths) the individuals making the request, were not only SGT Smith's next-of-kin, but also the named agents in SGT Smith's Durable Power of Attorney for Health Care (DPAHC).[33] This raises two issues with regard to the element of consent. First, generally, the DPAHC "enables patients to appoint persons legally authorized to make decisions for them concerning medical treatment when the patients become mentally incompetent."[34] Accordingly, consent given pursuant to a validly executed DPAHC serves as the lawful consent of the patient so long as such consent is limited to healthcare decisions about treatment and diagnostic procedures. "Treatment and Diagnostic procedures" are typically construed to include, "any care, treatment, service or procedure to maintain, diagnose, or treat an individual's physical or mental condition."[35] As retrieving semen or other reproductive matter for the purpose of later inseminating another individual, cannot be deemed to provide care or treatment to the patient from whom the reproductive matter is taken, consent to such a procedure given pursuant to a DPAHC is void.[36]

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[29] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[30] Anne Schiff, Editorial, *Posthumous Conception and the Need for Consent*, 170 MED. J. AUSTL. 53 (1998), *available at* http://www/mja.com.au/public/issues/jan18/schiff/schiff.html.

[31] There have been several civilian cases arising from the posthumous conception of children when sperm had been cryopreserved by the wife after the death of her husband; however, none of these cases specifically address the issue of the lawfulness of the removal and subsequent insemination of the sperm. *See Ex rel.* Stephen v. Barnhart, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002); *In re* Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); *see also* Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000) (discussing the moral and legal issues arising out of a request form a mother to have her son, who had shot himself, kept alive long enough to have his sperm surgically removed so that she might one day become a grandmother).

[32] *See* Schiff, *supra* note 30, at 53.

> Any attempt to formulate a coherent ethical framework in this area must be sensitive to the many interests at stake. In addition to considering the grieving family member's desire to produce a child, policymakers must identify and evaluate other important interests. For example, protecting the psychological well-being of the resulting child should receive serious attention. Might the child be adversely affected by being knowingly denied access to one biological parent? Also, the interests of the deceased's family are important, as posthumous conception of a child will probably have enduring emotional, psychological and financial implications for the family. However, the issue most easily overlooked, as the dead have no voice, concerns the interests of the deceased. Specifically, what significance ought to be afforded the deceased's interests when we have little or no evidence regarding his or her wishes for, or objections to, posthumous procreation?

Id.

[33] A durable power of attorney for healthcare is an advanced directive that survives the incompetence of the drafter. Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Health-Care Decisions Act § 2 (1993), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uhcda93.pdf.

[34] Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 246 (1999/2000).

[35] *Id.*

[36] *Id.*

Similarly, the second consent issue arising out of the SGT Smith hypothetical relates to the consent of the next-of-kin. "In the absence of a living will[37] or DPAHC that is executed in compliance with applicable state statutes, . . . the next of kin has legal authority to consent to the providing or withholding of life-preserving medical treatment for mentally incompetent patients."[38] In applying such consent, the next of kin is limited to acting in a manner consistent with the course of medical treatment the patient would have chosen if he were competent. Where the next-of-kin does not know what the patient would have chosen, he must act in the best interest of the patient.[39]

Although the argument could be made that consent from the next-of-kin of a mentally incompetent patient, to withdraw that patient's sperm for later insemination, is valid as "consent for life preserving medical treatment," this argument should not prevail. Such an argument implies that the consent of the next-of-kin could be substituted for any procedure that is "life preserving" notwithstanding whether the procedure is life preserving for the incompetent patient, or as in the case of sperm retrieval, for another, such as a possible future child. Therefore, unless applying the "substituted judgment" of the patient, in a case where the patient's decision is known, the best-interest standard must be applied. Therefore, consent of life-preserving treatment is limited to only those procedures which are life-preserving to the patient himself.[40] In such cases, unless it is clear that posthumous conception was actually considered and desired by the servicemember prior to his incompetence, it should be avoided.[41] Accordingly, under this analysis, the Smiths' request is denied.

That conclusion contrasts with the Government's goal of avoiding interference with SGT Smith's right to procreate. Thus, if it is deemed medically feasible to move SGT Smith, the family could be given an option to transport SGT Smith to another facility where his reproductive matter could be retrieved and then, after the procedure is completed, returning or transporting SGT Smith back to the military facility. A second option available to the family calls for the removal of the reproductive matter after SGT Smith's death.[42] However, because of the relatively short time frame during which this procedure is medically feasible, this is only a viable option if the government foresees being able to release SGT Smith's body within the first eighteen to twenty-four hours of his death. As such, mission requirements should be evaluated to ascertain any prevailing need to hold the body for an extended period beyond this timeframe, such as requirements for autopsy. If it is not likely that the government would be able to release the body within the first eighteen to twenty-four hour period, only the first option should be given to the Smiths. In essence, although the Government should not perform the requested procedure for the Smiths, government action that would further frustrate their desire to have the procedure performed should be minimized wherever possible.

> When the living can only speculate about the deceased's wishes, posthumous conception should not be permitted. Even if there is evidence that the deceased desired parenthood in life, it is a considerable leap to assume that he or she would have wished to become a parent posthumously. Evidence indicating a desire for the former does not necessarily support a conclusion that the latter was also desired.[43]

Where it is clear that the deceased did in fact intend for his sperm to be used for the posthumous conception of his offspring as in the hypothetical raised concerning 1LT Perry, different issues must be addressed—the most prevalent of which being whether advance consent to posthumous conception remains valid after death and, if so, how is it impacted by state legislation pertaining to artificial insemination.

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[37] A living will is a document executed by patients while competent that specifies "those life-sustaining medical procedures they would want provided and those they would want withheld, should they become terminally ill." *Id.* Most living wills are derived from the Uniform Rights of the Terminally Ill Act which authorizes a person to manage decisions regarding life-sustaining treatment should he be unable to make medical treatment decisions due to an illness or condition deemed medically terminal. *Id.* This language would likely serve to prohibit consent to sperm retrieval or similar procedures by an agent acting pursuant to a Living Will. *Id.*

[38] *Id.* at 248.

[39] *Id.*

[40] *Id.*

[41] Even after death, the rights of the next of kin at common law with respect to any interest in the deceased's body would not normally permit removal of the deceased's reproductive matter. *See id.* at 355. Similarly, as the Uniform Anatomical Gift Act (UAGA) permits limited postmortem removal of organs and tissue used for transplantation or therapy, it should not be considered to include or permit posthumous sperm retrieval. *Id.*

[42] This is the current policy in the Army. *See* Memorandum from Brigadier General William T. Bester, Deputy Chief of Staff for Operations, Health Policy and Services, to Commanders, MEDCOM Military Treatment Facilities, subject: Sperm Collection from Deceased Active Duty Army Personnel (4 Aug. 2000).

[43] Schiff, *supra* note 30, at 53 (discussing posthumous conception and the need for consent).

B. New Age Conception

When he deposited his sperm for cryopreservation, 1LT Perry expressed his desires for his wife to use the cryopreserved specimens to have up to three children. The rights afforded by the Constitution necessitate protection of personal decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education."[44] Applying this broadly, "[p]rocreative liberty includes not only the right not to procreate but a right to procreate; in essence, to do those things that will lead to biological descendants."[45] This said, however, "[t]he Constitution does not forbid a State . . . from expressing a preference for normal childbirth. It follows that States are free to enact laws to provide a reasonable framework for a [person] to make a decision that has . . . profound and lasting meaning."[46] Although there is little law directly regulating or otherwise addressing the right to have children,[47] this suggests that if a state or other government entity were to place reasonable limitations on the right to reproduce through assistive reproduction technology, such limitations would be upheld.

"Although the Uniform Parentage Act sets forth legal rules concerning the paternity of children conceived posthumously,"[48] it fails to address the issues of consent to artificial insemination or consent by the man or his next of kin with regard to the use of sperm for procreation.[49] This being the case, the states could address this issue otherwise. For instance, the states could limit an individual's right to consent to postmortem sperm retrieval or the use of previously supplied sperm in much the same manner that they regulate contractual agreements or other conveyance actions. Under this reasoning, "if a man consents in advance to having his sperm harvested at his death, the male may have made an enforceable third party beneficiary contract with the doctor in favor of his intended female beneficiary."[50] Accordingly, the state would apply standard contract law to resolve any issues concerning the validity of the agreement. Therefore, to ensure compliance with the Statute of Frauds for contracts performed after death, the state could require that such contract be made in writing and meet other standard requirements.[51]

Another means of dealing with the issue could be to apply property law concepts. In *Hecht v. Superior Court*,[52] William Kane cryopreserved fifteen vials of his sperm designating on his storage agreement that in the event of his death, the sperm bank should release the vials to his girlfriend, Deborah Hecht.[53] Kane also executed a will in which he left a large part of his estate to Hecht as well as the sperm, specifying that the sperm was so that Hecht could bear children by him if she desired.[54] Kane's adult children contested the will and petitioned the court to have the sperm destroyed.[55] The trial court found in favor of the adult children and ordered that the sperm be destroyed;[56] however, the appeal's court found that "at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking [sic] authority as to the use of his sperm for reproduction."[57] Thus, they overturned the lower court decision by applying a property law analysis using ownership terminology and applying it to the personal property at issue,[58] thereby avoiding the matter of consent.[59]

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[44] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[45] Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?* 3 DEPAUL J. HEALTH CARE L. 39, 70 (1999).

[46] Dwyer, *supra* note 31, at 889 (citing *Casey*, 505 U.S. at 872).

[47] Kerr, *supra* note 45, at 71.

[48] Strong, *supra* note 34, at 252.

[49] *Id.* at 252–53.

[50] Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS L.J. 451 n.12 (2000).

[51] *Id.*

[52] 16 Cal. App. 4th 836 (1993).

[53] *Id.* at 840.

[54] *Id.*

[55] *Id.* at 841, 843–44.

[56] *Id.* at 844 n.3 (noting that before ruling the court stated, "[o]bviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories.").

[57] *Id.* at 850.

[58] *Id.*

[59] *See* Strong, *supra* note 34, at 253 (noting that the *Hecht* decision leaves open the argument that consent by the sperm provider prior to death is valid authority to permit postmortem insemination with the sperm provided).

Assuming the state would apply the contract or property law concepts discussed above to the 1LT Perry hypothetical, Mrs. Perry would likely be given the sperm since presumably 1LT Perry's intent to transfer ownership of the specimens was clear.[60] Seeing that there has been no legislative guidance on the matter of assistive reproduction,[61] Mrs. Perry would likely then be able to use the sperm for artificial conception without legal interference. For, as stated by the court in *Hecht*, "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy."[62] Thus, although ethical questions may remain,[63] when the donating Soldier has clearly indicated his intent to convey reproductive matter and has physically deposited such matter in a means accessible to the recipient, the transfer should be permitted.

In cases where the servicemember has clearly demonstrated an intent to have his reproductive matter made available for use by a designated recipient for the express intent of posthumous conception, but has not physically made such matter available, still other issues arise. Although, as discussed previously, some courts have addressed the status of sperm and have applied property law concepts to it, none of these cases have considered the issue of whether sperm may be posthumously removed for distribution purposes.[64] Once again the absence of legislative guidance has resulted in a myriad of outcomes. In an effort to address this growing concern, the Ethics Committee of the American Society for Reproductive Medicine (ASRM) has distributed guidance to assisted reproduction facilities, stating that a spouse's request for the posthumous removal of sperm "without the prior consent or known wishes of the deceased spouse need not be honored."[65] They opine that since these requests pose judgmental questions, they should be considered individually in light of circumstances and relevant state law.[66]

In an attempt to maintain some level of consistency in these cases, many assistive reproduction facilities, and many hospitals, have adopted their own policies for addressing this issue.[67] These policies rely on evidence of the actions and discussions of the deceased prior to his death to determine whether there is a reasonable expectation that he would have consented to having his sperm used for procreation after his death. Most of these policies also go on to find that "as next of kin, the wife should have responsibility for giving permission for sperm retrieval and should maintain responsibility for storage and subsequent disposition of sperm."[68] The rationale is that the next of kin is typically vested with control of the deceased's remains[69] and is empowered with the ability to consent to anatomical gifts believed to be within the consent of the deceased.[70] Notwithstanding this ability to consent, the spouse is required to make the request for sperm retrieval in writing and retrieval is often limited to cases where the sperm will be used only to inseminate the deceased's spouse.[71] Inasmuch as

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[60] Although the hypothetical did not mention a written document, it is likely that Mrs. Perry could still prove 1LT Perry's clear intention to leave the sperm for her use in conceiving his child or children posthumously, based on his statement and any writing provided to the storage facility.

[61] Currently, there is no federal oversight of assisted reproduction technology that addresses the issue of consent or any other ethical concern raised in the area.

> There is only one federal statute that aims at the regulation of assisted reproduction: the Fertility Clinic Success Rate and Certification Act of 1992 ("the Act"). The purposes of the statute and its related regulations are twofold: (1) to provide consumers with reliable and useful information about the efficiency of ART services offered by fertility clinics, and (2) to provide states with a model certification process for embryo laboratories."

PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § III.A.1.

[62] *Hecht*, 16 Cal. App. 4th at 861 (quoting Johnson v. Calvert, 5 Cal. 4th 84, 100 (1993)).

[63] "Spouses should not automatically have the right to their dead partner's sperm . . . the intent to have a child with another living person does not necessarily translate into the rights to the use of your partner's gametes after they've died." Dinah Wisenberg Brin, *Dead Men's Sperm Raises Ethical Debate*, COLUMBIAN (Vancouver, Wash.), May 29, 1997, at A3 (quoting the executive director of the National Advisory Board on Ethics and Reproduction).

[64] *See Hecht*, 16 Cal. App. 4th at 861; Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[65] The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTILITY & STERILITY SUPP. 1, S262, Sept. 2004.

[66] *Id.*

[67] Although ASRM provides guidance on ethical issues that the "actively encourage" compliance with, compliance of ART facilities and practitioners with these guidelines is entirely voluntary. What is more, ASRM's entire system of "professional self-regulation is voluntary" thus no penalties or consequences are accessed for violations, as such, there is a general lack of compliance with ARSM. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § 1. Accordingly, where state law is silent, the clinics are free to act in the manner they feel most appropriate under the circumstances. *Id.*

[68] N.Y. HOSP. GUIDELINES, *supra* note 18.

[69] Robertson, *supra* note 10, at 1034.

[70] N.Y. HOSP. GUIDELINES, *supra* note 18.

[71] *Id.*

the result of cases based on this scenario would be so tenuous and diverse on otherwise similarly situated individuals, absent concise legislation on the subject, cases that lack both clear intent and pre-death retrieved reproductive matter should be rejected as candidates for post-mortem assisted reproduction.

Having determined that posthumous insemination is sustainable in cases where the servicemember has consented to the use of his sperm for this purpose and has made the sperm available, we return to our hypothetical 1LT Perry to determine the status of the resulting child or children.

III. Parental Status Determined by Location

Let us assume that 1LT Perry was killed in action. After a period of mourning and counseling, his wife Logan was inseminated with the sperm left to her by 1LT Perry. Twenty-two months after 1LT Perry's death, Logan gave birth to twin girls in her hometown, Baton Rouge, Louisiana. After the birth of the twins, Logan applied for Social Security benefits on behalf of the girls and for increased indemnity compensation payments from the Veterans Administration because she is now the mother of two of 1LT Perry's surviving children. Both actions were denied at the agency level initially and on appeal. Logan then filed an action in federal court.

A. Federal Silence

To date, there is no federal guidance on the issue of posthumous reproduction.[72] Although cases involving posthumously conceived children have been brought in a number of state and federal courts, with increased frequency since 1993, most of these cases have dealt exclusively with the issue of inheritance rights or benefits of some type.[73] In each of these cases, the federal court looked to underlying state law as a predicate for determining whether the posthumously conceived child was in fact a child of the decedent before determining whether the child was eligible to inherit or otherwise receive benefits as a descendant of the deceased.[74] Accordingly, the outcome varied depending on the law of the state where the conception occurred.[75]

Noting a need for consistency, the Uniform Parentage Act (UPA) was amended to address the issue of posthumous conception. The UPA eliminates the possibility of parentage posthumously in cases where an individual dies after having provided reproductive matter, unless he or she has provided written consent to the posthumous insemination and to becoming the parent of the resulting child.[76] Notwithstanding the increased number of cases arising out of this very issue, only seven states have codified the UPA, making it necessary to consider in detail the individual states laws on the subject.[77]

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[72] Although it is acknowledged that "[c]ryopreservation of sperm and embryos make posthumous parentage possible," currently, there is no federal oversight of assisted reproduction technology that addresses the issue of posthumous conception. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § II.C.

[73] *See, e.g.*, Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002); Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002); *In re Estate of* Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

[74] *See, e.g.*, *Gillett-Netting*, 231 F. Supp. 2d at 963; *Stephen*, 386 F. Supp. 2d 1257 (finding child did not qualify as the decedent's child under Florida intestacy law); *Woodward*, 760 N.E.2d 257 (finding posthumously conceived children entitled to inherit under applicable state law); *In re Estate of* Kolacy, 753 A.2d 1257 (finding posthumously conceived children entitled to inherit under applicable state law).

[75] *See In re Marriage of* Adams, 551 N.E.2d 635, 639 (Ill. 1990) (holding that the lower courts should have applied Florida law instead of Illinois law when determining parentage issues concerning a child conceived through artificial insemination when the insemination had occurred in Florida).

[76] The Uniform Parentage Act § 707 (UPA), entitled Parental Status of Deceased Individual, states that:

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of . . . sperm . . . the deceased individual is not a parent of the resulting child unless the deceased [individual] consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Uniform Parentage Act § 707 (2000) (amended 2002).

[77] The UPA has been codified by Colorado, Texas, Delaware, North Dakota, Utah, Washington, and Wyoming. It was considered for adoption in Minnesota and West Virginia but was not enacted. It is currently being considered by Alabama and New Mexico. *Id. See* Carole M. Bass, *What If You Die, and Then Have Children?*, EST. PLAN. & TAX'N, Apr. 2006, at 20, 26, *available at* http://www.sonnenschein.com/docs/docs_te/Bass.pdf.

B. States Divided

As previously stated, few states currently address the issue of posthumously conceived children, addressing only inheritance rights benefits.[78] Those states, as well as states that have not yet enacted any legislation on the matter, disagree with regard to whether and when posthumously conceived children can lawfully be considered children of the deceased.

For instance, under Florida law, a posthumously conceived child must have been provided for in the deceased individual's will before such child can lawfully be considered a "child" of the decedent.[79] Similarly, Virginia and California treat the child as issue of the decedent only if there is written consent by the decedent[80] and the child is born within ten months of the decedent's death in Virginia,[81] or is in utero within two years of the decedent's death in California.[82]

Louisiana takes a similar position, recognizing the posthumous child as the child of the decedent if there is written consent by the decedent, the child's mother is the decedent's surviving spouse, and the child is born within three years of the decedent's death.[83] Contrary to this position, some states, like Arizona, treat all natural children as legitimate children of the decedent,[84] ignoring entirely the issue of posthumous conception. While still other states, like Idaho, consider the issue head-on and intentionally exclude children from posthumously implanted gametes from rights as a child of the decedent.[85]

With the parentage determination varying among states, it is foreseeable that there may be an inequitable distribution of benefits based on the designation of child as determined by state statute or case law. For instance, in *Gillett-Netting v. Barnhart*,[86] the Ninth Circuit considered the issue of whether twins conceived with cryopreserved sperm, eighteen months after the death of their father, were eligible to receive Social Security benefits as dependent children of the decedent.[87]

Shortly after getting married in 1993, Rhonda Gillett and her husband Robert Netting had begun trying to have a child, albeit unsuccessfully.[88] In 1994, Netting was diagnosed with cancer, but before beginning chemotherapy, he cryopreserved some of his sperm.[89] The facts revealed that when he deposited the sperm, Netting knew his sperm could possibly impregnate his wife after his death and Gillett continued fertility treatments throughout the duration of Netting's cancer treatments.[90] Notwithstanding this, and evidence from the decedent's wife that the decedent had requested her to continue to try and have children after his death, the district court determined that the children did not meet the definition of "child" under the Social Security Act.[91] Specifically, the district court found that the Social Security regulations required that the children prove that they could inherit from the decedent under the relevant intestacy laws and that they could meet all of the criteria that define a child under the intestacy laws of the state.[92]

On appeal, the twins were awarded benefits when the court determined that the Social Security Act's definition of child would only apply when parentage was in dispute.[93] Because Arizona treated all natural children as legitimate children,

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[78] Bass, *supra* note 77 at 26; *see also* Karen Salmon, *Determining the Inheritance Rights of Posthumously Conceived Children*, NEW ENG. SCH. OF L., Spring 2007 (advanced legal research paper), *available at* http://www.nesl.edu/research/rsguides/Karen_Salmon.htm.

[79] *See* FLA. STAT. § 742.17(4) (2006).

[80] VA. CODE ANN. § 20-158 (LexisNexis 2006); CAL. PROB. CODE § 249.5 (2006).

[81] VA. CODE ANN. § 20-164.

[82] CAL. PROB. CODE § 249.5.

[83] LA. REV. STAT. ANN. § 9.391.1 (2008).

[84] ARIZ. REV. STAT. § 8-601 (2006).

[85] IDAHO CODE SEC. 15-2-108 (2005).

[86] 371 F.3d 593 (9th Cir. 2004).

[87] *Id.*

[88] *Id.*

[89] Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002).

[90] *Id.*

[91] *Id*

[92] *Id.* at 966–67.

[93] *Gillett-Netting*, 371 F.3d at 599.

parentage could not be in dispute.[94] The court then looked to the Social Security Act's dependency requirements and concluded that, notwithstanding the fact that the children could not show actual dependence on the decedent as they were not born during his lifetime, dependence could be presumed because of the Arizona statute deeming them legitimate,[95] and the fact that "[i]t is well-settled that all legitimate children automatically are considered to have been dependent on the insured individual."[96]

The courts in *In re Estate of Kolacy*,[97] and *Woodward v. Commissioner of Social Security*,[98] also found that posthumously conceived children were children of the decedent. Similar to the facts in *Gillett-Netting v. Barnhart*,[99] the decedent in *Kolacy* had cryopreserved sperm prior to undergoing chemotherapy treatment for cancer which ultimately took his life. Just as in *Gillett-Netting v. Barnhart*,[100] in *In re Estate of Kolacy*,[101] twins were conceived using cryopreserved sperm, after the decedent's death.[102] Initially, the court denied the Kolacy twins the right to receive their father's Social Security benefits because the Social Security Act only allows a child to collect the benefits of his deceased parent if he is entitled to inherit from his deceased parent's intestate estate, and because New Jersey does not recognize a posthumously conceived child born more than 300 days after the father's death as a child of the father eligible to receive benefits.[103] The court then applied New Jersey law which required that posthumously conceived children be born with the decedent's consent.[104] The court rationalized that the children were conceived of sperm intended for their mother's use.[105] The court went on to acknowledge the gap between the state intestacy law and the "basic legislative intent to enable children to take property from their parents,"[106] ultimately finding that the twins were children of the decedent.[107]

Woodward involved a similar situation with twins conceived using the frozen sperm of their deceased father who had died of cancer.[108] After learning that he had leukemia, Warren Woodward froze his sperm before undergoing a bone marrow transplant.[109] He died shortly thereafter.[110] Lauren Woodward retrieved the cryopreserved sperm for insemination and two years later, gave birth to twin girls.[111] After the birth of the twins, Lauren Woodward obtained a judgment listing Warren as the twin's father on the birth certificate.[112] The court in that case applied Massachusetts law and upheld the inheritance rights of the children.[113] Before coming to this conclusion, however, the *Woodward* court set out criteria to be fulfilled before a child can be considered "issue" under the intestacy laws of Massachusetts.[114]

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[94] *Id.*

[95] *Id.* at 598–99.

[96] *Id.* at 598.

[97] 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

[98] 760 N.E.2d 257 (Mass. 2002).

[99] *Gillett-Netting*, 371 F.3d at 598.

[100] *Id.* at 598–99.

[101] *In re Estate of Kolacy*, 753 A.2d at 1259.

[102] *Id.*

[103] *Id.*

[104] N.J. STAT. § 9:17-43 (2008).

[105] *In re Estate of Kolacy*, 753 A.2d at 1259.

[106] *Id.* at 1262.

[107] *Id.* at 1264.

[108] Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002).

[109] *Id.* at 260.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 260–61.

[113] *Id.* at 260.

[114] *Id.* at 259, 272.

The court determined that the child must prove a genetic relationship between the child and the decedent.[115] The court also found that the child must show that the decedent affirmatively consented to the posthumous conception prior to death; and that the decedent affirmatively consented to the support of any resulting child.[116] After applying this criterion, the court found that legislative intent supported a ruling in favor of the descendants.[117] The Massachusetts Supreme Court noted that the term "posthumous children" was not defined in the state's intestacy statutes,[118] yet, the court went on to hold that where all of these criteria were met, and there were no time limitations at issue, posthumously conceived and born children were "children" of the decedent eligible for benefits.[119]

This same criterion proved lacking however, when considered under New Hampshire law. In *Eng Khabbaz v. Commissioner, Social Security Administration*,[120] the facts indicated that before dying, Mr. Khabbaz had banked his sperm so that his wife could conceive a child through artificial insemination.[121] Mr. Khabbaz then executed a consent form indicating that the sperm was for his wife's use, specifying in writing that he desired and intended to be legally recognized as the father of any resulting child.[122] After Mr. Khabbaz's death his wife became pregnant using the inseminated sperm.[123] She later applied for social security survivor's benefit for her daughter as the surviving child of Mr. Khabbaz.[124] The benefits were denied.[125] The court held that a posthumously conceived child was not a surviving child eligible to inherit from her father under New Hampshire intestate law[126] regardless of the intent or preparation of the father.[127] The court reasoned that although the issue of posthumously conceived children was not specifically addressed, the statues clearly intended to provide for "surviving" issue.[128] Here, although there was no doubt that the child was in fact the issue of the deceased, she was not "surviving" issue, since in order to "survive" the father, the child would have necessarily had to already be in existence at the time of Mr. Khabbaz's death.[129]

Applying Florida law, the court in *Stephen v. Commissioner of Social Security*[130] came to a similar conclusion, notwithstanding strikingly similar facts to those in *Gillett-Netting*.[131] In this case, a child was denied Social Security benefits after being found not to be a child of the decedent[132] because Florida had specifically addressed the issue of the rights of posthumously conceived children and the court found that the child did not "qualify" as the decedent's child.[133] Unlike Arizona law, which had been silent on the issue, Florida law specifically limits the rights of posthumously conceived children unless they were provided for in the decedent's will.[134] In so ruling, the court in *Stephen* distinguished the case from *Gillett-*

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[115] *Id.*

[116] *Id.*

[117] *Id.* at 265–66.

[118] *Id.* at 264, 272.

[119] *Id.*

[120] 930 A.2d 1180 (N.H. 2007).

[121] *Id.* at 799.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 800.

[126] *Id.* at 802.

[127] *Id.* at 808. See Judge Broderick's concurrence noting, "Mr. Khabbaz did not execute a will, but his intentions to have and to provide for his child were clear. Our reading of RSA 561:1, however, leaves Christine unprotected and ignores what we know to be his intent." *Id.* (Broderick, J., concurring).

[128] *Id.* at 802.

[129] *Id.*

[130] 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

[131] Gillett-Netting v. Barnhart, 371 F. 3d 593 (9th Cir. 2004).

[132] *Stephen*, 386 F. Supp. 2d at 1261.

[133] *Id.*

[134] *See* FLA. STAT. § 742.17(4) (2006).

Netting, citing the fact that Arizona law was silent on the issue of posthumously conceived children whereas Florida law was not.[135]

A similar approach was taken by the Arkansas Supreme Court in *Finley v. Astrue*.[136] The Finleys were a married couple who had pursued fertility treatments during the course of their marriage.[137] As part of those treatments, Mr. Finley willingly provided his sperm for use to fertilize his wife's eggs.[138] In June 2001, ten embryos were created.[139] Two of these embryos were implanted into Mrs. Finley's womb while four of the remaining embryos were frozen for preservation.[140] One month later, Mr. Finley died intestate.[141] Subsequently, Ms. Finley miscarried both fetuses.[142] In June 2002, Ms. Finley had two of the frozen embryos implanted into her womb.[143] She later gave birth to a child and filed for child's insurance benefits on behalf of her child as a surviving child of her husband.[144] Initially the claim was denied, but in 2006 an administrative law judge awarded child's insurance benefits.[145] An appeals council later reversed the decision and Ms. Finley filed her complaint with the district court.[146] Since, however, the federal issue of benefits eligibility would be tied to the question of whether the child would inherit as a surviving child under Arkansas state law, the parties filed a joint motion to stay the federal court proceeding and the issue was certified to state court. The state court considered whether an embryo created using in vitro fertilization during his parents' marriage and implanted into his mother's womb after the death of his father could inherit from his father as a surviving child.[147] The court determined that since under Arkansas law a posthumous heir could only inherit if he were conceived before the decedent's death, the Finley baby was not a surviving child.[148] In making this finding, the court rejected an argument that conception had occurred at the time of fertilization, holding that when enacted the Arkansas code had not intended to include a child created through in vitro fertilization and implanted after the father's death since it was enacted in 1969, years before technology even made such a thing possible.[149] Accordingly, in Arkansas, regardless of the father's intent, a posthumously conceived child is not a "surviving child" for inheritance or benefit purposes.

What all of these cases indicate is that "unless and until a uniform set of statutory laws gain a universal recognition, the status of posthumous children of assisted reproduction will remain doubtful and probably be the subject of conflicting judicial treatment."[150] This may have an even greater detrimental effect on military servicemembers and their families because of the increased transient rate of military families that increases the likelihood of more than one jurisdiction being applicable. For example, in our hypothetical, the Perry twins were born in Louisiana. However, prior to the deployment the Perrys lived in Colorado, where 1LT Perry had cryopreserved his sperm and where the insemination occurred. After learning that she was pregnant with twins, Logan decided to move back to Louisiana to be close to family. However, 1LT Perry was legally a resident of Florida.

As state laws have been deemed applicable, even when considering benefits under the Federal Social Security Act,[151] it can be concluded that state laws will also be fundamental in determining eligibility for many military survivor benefits. If

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[135] *Stephen*, 386 F. Supp. 2d at 1257.

[136] 372 Ark. 103 (2008).

[137] *Id.* at 105.

[138] *Id.*

[139] *Id.*

[140] *Id*. at 106.

[141] *Id.*.

[142] *Id.*

[143] *Id*.

[144] *Id.*

[145] *Id.*.

[146] *Id.*

[147] *Id.* at 107.

[148] *Id.* at 109–12.

[149] *Id.* at 110.

[150] Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 583 (2005).

[151] *See* 42 U.S.C. § 416(h)(2)(A) (2000). With regard to determining eligibility of a child to collect social security benefits, the provision provides:

that were the case, Logan Perry's federal court action would likely be governed by 1LT Perry's home state laws[152] since those laws would be determinative of whether the children would be found to be 1LT Perry's heirs. To ascertain the logical impact of state law on military benefits as they relate to the eligibility of a posthumously conceived child, it should prove helpful to consider each of the benefits concerned.

IV. The Benefits at Stake

A. Dependent Status

> Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be "entitled," insofar as possible, "to the same rights and protections of the law" as children conceived before death.[153]

There are a number of benefits that individuals enjoy solely as a result of their sponsor's service on active duty.[154] Survivor benefits include different allowances that specified surviving family members are eligible to receive due to the deaths of their servicemember sponsor.[155] The requirements for eligibility for any of these benefits is usually met where the death of the servicemember occurred in the line of duty[156] while on active duty.[157]

Beyond this requirement, where children are concerned, there must be evidence that the beneficiary is indeed the child of the deceased servicemember.[158] Accordingly, "posthumous conception is relevant in certain claims for survivor's benefits because the conception and birth of the child applicant occurs after the death of his . . . putative wage earner parent,"[159]or in military terms, after the death of the veteran. A literal reading would lead one to believe that only those who are alive, and could thus, outlive the soldier, would be entitled to "survivor's" benefits. However, as this might result in children within the same family "having different survivor's status and benefits,"[160] courts have typically rejected such a literal approach with regard to Social Security benefits,[161] and should arguably reject it with regard to military survivors' benefits for the same reasons.

Moreover, as military survivor benefits often mirror Social Security benefits and includes them to some extent,[162] distribution of payments for survivors' benefits should be similar under both programs. As with Social Security benefits,

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> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Id.

[152] John Doroghazi, Gillett-Netting v. Barnhart *and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1616 (2005).

[153] Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266 (Mass. 2002).

[154] Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1.

[155] Major Dana Chase, Legal Assistance Notes: *Person Authorized to Designate Disposition (PADD) Update*, ARMY LAW., Feb. 2006, at 25.

[156] An injury, disease, or death is considered to have occurred in the line of duty when, at the time the injury was suffered, the member was in active military service regardless of whether on active duty or in an authorized leave status, unless the injury resulted from the person's own willful misconduct. Cole, *supra* note 154, at 2.

[157] For purposes of benefits, active duty is defined as, "full-time duty in the armed forces." *Id*.

[158] 38 C.F.R. § 3.57 (2007).

[159] Banks, *supra* note 6, at 310.

[160] *Id.*

[161] *Id.* (citing Robert J. Kerkes, *My Child . . . But not My Heir: Technology, the Law, and Post Mortem Conception*, 31 REAL PROP PROB. & TR. J. 213, 232–240 (1996)). *But see* Eng Khabbaz v. Comm'r of Soc. Sec. Admin., 930 A.2d 1180 (N.H. 2007) (applying a literal definition to the term "survivor").

[162] Cole, *supra* note 154, at 3.

military survivor benefits are payable on a monthly basis to the beneficiary, depending on the relationship of the beneficiary to the deceased military sponsor.[163] Therefore, "[t]he establishment of an applicant's relational status to a deceased wage earner is paramount in qualifying for survivor's insurance under social security"[164] and is equally important when determining beneficiary status as a military survivor.[165] Both social security and military survivor benefits are payable to "a range of family members."[166] Under both systems, qualifying family members include the spouse of the deceased as well as unmarried children under the age of eighteen.[167] Considering that monetary benefits are often decreased[168] or withheld[169] in cases where the deceased has no children, posthumous conception issues are not only relevant, but paramount.

B. Monetary Concerns

> Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their servicemember provider. These allowances include Dependency Indemnity Compensation (DIC) [38 U.S.C.S. §§ 1301–1323], Service Member's Group Life Insurance (SGLI) [38 U.S.C.S. § 1970], Survivor Benefit Program (SBP) [10 U.S.C.S. § 1450], Dependent Education Assistance (DEA) [38 U.S.C.S. §§ 3501–3567], Social Security, death gratuity, and other benefits.[170]

1. Dependency and Indemnity Compensation

Dependency and indemnity compensation (DIC) is a monthly benefit paid by the Veteran's Administration to eligible survivors of military servicemembers who died while serving on active duty and other specified deceased veterans.[171] Survivors eligible for DIC include spouses who were married to a servicemember who died on active duty and who is not currently remarried, and unmarried natural, step or adopted children of the deceased veteran under the age of eighteen.[172] Currently, DIC is paid to a surviving spouse at a monthly rate of $1,091[173] and increases with inflation, for as long as the spouse maintains eligibility.[174] The spouse who has children receives an additional $271 per child each month.[175] Where

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> Eligibility for Social Security survivor benefits is determined by the "insured status" of the deceased. The survivors of a military member are eligible for Social Security due to the military status of the deceased. What this means is that even if a military member has not been employed for a long enough period of time to be either currently or fully insured under Social Security, the member will still be treated as if fully insured. The surviving spouse of a veteran is not entitled to monthly [Social Security] survivor benefits until the spouse has reached the age of sixty. However, the surviving spouse will receive benefits as a custodial parent for any child of the fully or currently insured individual who is under the age of sixteen.

Id.

[163] *See* 42 U.S.C.S. § 402(d) (LexisNexis 2008); *see also* DEP'T OF DEFENSE, YOUR GUIDE TO SURVIVOR BENEFITS, DFAS-CL 1340.3-G, Aug. 2006 [hereinafter GUIDE TO SURVIVOR BENEFITS], *available at* http://www.dfas.mil/retiredpay/survivorbenefits/Your-Guide-to-Survivor-Benefits.pdf.

[164] Banks, *supra* note 6, at 311.

[165] VETERANS AFF. ADMIN., ESTABLISHING RELATIONSHIP FOR A BIOLOGICAL CHILD, ADOPTED CHILD, AND STEPCHILD, at M21-1MR, Pt. III, iii, 5-G-2 (Aug. 14, 2006) [hereinafter M21-1MR], *available at* http://www.warms.vba.va.gov/admin21/m21_1/mr/part3/subptiii/ch05/ch05_secg.doc.

[166] Banks, *supra* note 6, at 311.

[167] *See* 42 U.S.C.S. § 402(d); *see also* 10 U.S.C.S. § 1487(11). In addition, there are provisions for children over eighteen and in college, or permanently disabled, to continue to receive benefits. *Id.*

[168] Under the VA system surviving spouses generally receive a basic rate of monetary benefits with additional payments assessed for dependant children.

[169] In order to be eligible to receive survivors' benefits under Social Security the surviving spouse must be at least sixty years old or fifty years old if disabled. *See* 42 U.S.C.S. § 402(e), (f).

[170] Chase, *supra* note 155, at 25 (noting that children may be eligible for other benefits including, death gratuity, medical care, emergency money, and exchange and commissary privileges); *see* Dep't of Veterans Aff., *Survivor Benefits*, http://www.vba.va.gov/survivors/vabenefits.htm (last visited May 23, 2008) [hereinafter *VA Survivor Benefits*].

[171] 38 U.S.C.S. § 1310.

[172] *Id.* § 1311.

[173] This rate is effective for the period from December 2007 through 30 November 2008. *See* Dep't of Veterans Aff., *Dependency and Indemnity Compensation*, http://www.vba.va.gov/bln/21/Rates/comp03.htm (last visited May 23, 2008).

[174] 38 U.S.C.S. § 1311; *see also* Military.com, Dependency and Indemnity Compensation, http://www.military.com/benefits/survivor-benefits/dependency-and-indemnity-compensation (last visited May 23, 2008) [hereinafter Military.com DIC].

[175] 38 U.S.C.S. § 1311; *see also* Military.com DIC, *supra* note 174.

there is no eligible surviving spouse but there is an eligible child or children, an increased individual DIC payment is made.[176]

Under the facts in our hypothetical, Logan Perry stands to gain an additional $542 per month if the Veterans Administration recognizes the twins as 1LT Perry's surviving children. Once the twins are so recognized, they would be entitled to such payment until they reach the age of eighteen.[177] Another significant fact is that even if Logan later remarries prior to attaining the age of fifty-seven, thereby loosing her own entitlement to a DIC payment, the children would still maintain their entitlement.[178] In fact, the children's payment level would increase since they would no longer be living with an eligible surviving spouse but would be entitled to the child(ren) only payment amount.[179] Accordingly, over the course of eighteen years, the amount of benefits at issue for a posthumously conceived child, or as in this case children, are significant.

2. Servicemembers Group Life Insurance

Although it is not as likely that the benefits at stake for posthumously conceived children pursuant to an entitlement under the Servicemembers' Group Life Insurance (SGLI)[180] program are as great, they too should be considered. The SGLI is a life insurance program made available to all members of the Uniformed Services.[181] Originally enacted pursuant to the Servicemen's Group Life Insurance Act of 1965,[182] the SGLI was intended to provide insurance coverage for the servicemember and his designated beneficiaries notwithstanding the inherently hazardous nature of the servicemember's duties.[183] Active duty servicemembers[184] are automatically insured under the SGLI for the maximum amount of $400,000[185] unless they file an election reducing the amount of insurance.[186] Upon the death of an active duty servicemember, the proceeds of this insurance are paid to designated beneficiaries under the policy.[187] If the servicemember has not designated a beneficiary, the proceeds of the policy are paid to the surviving spouse or, if none, to the children in equal shares.[188] Herein lies the opportunity for the posthumously conceived child to benefit.

Posthumously conceived children born to someone other than a surviving spouse would arguably be first in line to take pursuant to the statutory order of precedence in cases where the policy of an unmarried servicemember is distributed "by law." In these cases, just as in cases concerning other benefits, the definition of "child" will ultimately be determinative. Here, however, the various state interpretations of the term "child" will likely be less influential than in cases concerning other benefits. Moreover, because proceeds of the SGLI "do not pass by intestacy, but pass, rather, according to a federal statutory scheme wholly independent of the laws of intestate succession of any state,"[189] it is generally recognized that the definition of "child" as used in the SGLI incorporates the ordinary and natural use of the term.[190]

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[176] 38 U.S.C.S. § 1311; *see also* Military.com DIC, *supra* note 174.

[177] If after attaining the age of eighteen the twins are pursuing an education at an approved educational institution , they could maintain eligibility until they are twenty-three years old. 38 U.S.C.S. § 101(4)(A)(iii).

[178] DEPT. OF VETERANS AFFAIRS, DEPENDENTS AND INDEMNITY COMPENSATION (DIC) (2007) [hereinafter VA DIC], *available at* http://www.vba.va.gov/benefit_facts/Dependents_and_Survivors/English/DICeg_0107.doc; *see also* Owings v. Brown, 8 Vet. App. 17, 18–19 (1995).

[179] VA VIC, *supra* note 174.

[180] 38 U.S.C.S. § 1970.

[181] *VA Survivor Benefits*, *supra* note 170.

[182] Pub. L. No. 89-214, 79 Stat. 881 (1965).

[183] Ridgway v. Ridgway, 454 U.S. 46 (1981).

[184] A 1996 amendment substituted the term "servicemember" for the term "servicemen." 38 U.S.C.S. 1970 history (amendments1996).

[185] This amount was increased from $250,000 and became the standard permanent amount pursuant to the Servicemember's Group Life Insurance Enhancement Act of 2005. Servicemember's Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045.

[186] 38 U.S.C.S. § 1967(a)(3)(B).

[187] *Id.* § 1970(a).

[188] *Id.*; *see* Kathleen Moakler, *Thinking About the Unthinkable*, MIL. MONEY, Summer 2005, *available at* http://www.militarymoney.com/money/1116614601.

[189] Manning v. Prudential Ins. Co., 330 F. Supp. 1198, 1200 (Md. 1971).

[190] *Id.*; Cantrell v. Prudential Ins. Co., 477 S.W.2d 484 (Ark. 1972).

Specifically, in matters pertaining to the SGLI, "child" is defined as the natural, adopted or illegitimate child of the decedent where the "proof adduced . . . establishes unquestionably that the deceased was the natural father of the child."[191] What is more, the Supreme Court has held that notwithstanding the generally restricted application of federal law in domestic matters, the Supremacy Clause necessitates that the Servicemen's Group Life Insurance Act "prevail over and displace inconsistent state law."[192] Therefore, in evaluating the "proof" of parentage, the requirements of state law on the subject are substituted for a statutory scheme that "provides (1) reliable determinations of paternity; (2) quick and efficient administration of the insurance proceeds; and (3) a pattern of distribution which parallels the insured's own wishes, could they be discovered."[193]

The statute provides that "child" includes legitimate children, legally adopted children, illegitimate children of the mother, and illegitimate children of the father who: he has acknowledged in a signed writing; he has been judicially ordered to support; he was, while living, judicially determined to be the father of; have a certified copy of a public birth record or church baptismal record wherein the decedent was named as the father and served as the informant; or, who have public records naming the deceased as the father with his knowledge.[194] This language would likely prove problematic to the posthumously conceived child, as was demonstrated by the case of *Prudential Ins. Co. v. Moorhead*.[195] Although that case involved a challenge to the statute by a posthumous illegitimate child,[196] the holding of the case is probably quite indicative of the outcome of a claim pursued by a posthumously conceived child under the statute.

In *Moorhead*, Billie-Joe Moorhead was born seven months after her father, William Moorhead, an active-duty Sailor, was killed in a motorcycle accident.[197] After Billie-Joe's birth, a New York family court granted an order finding that William Moorhead was Billie-Joe's father and a birth certificate was issued by the state listing him as her father.[198] Both the court finding of parentage and the birth certificate listing the deceased as Billie-Joe's father had been obtained after the death of the servicemember and without his acknowledgement or consent, thus, the documents failed to operate to make Billie-Joe an eligible beneficiary under the statute.[199] Billie-Joe filed her action asserting that she was entitled to recover the SGLI proceeds as the servicemember's daughter and that the requirements of the statute deprived her of due process and the equal protection rights guaranteed her by the Fifth Amendment.[200]

The Court of Appeals for the Fifth Circuit found that "[i]t is well settled constitutional law that statutory classifications based on illegitimacy are subject to intermediate or heightened scrutiny."[201] Accordingly, the court sought to ascertain whether the statutory beneficiary requirements for illegitimate children to collect as a "child" pursuant to the SGLI were related to an important governmental objective.[202] The court noted that intermediate scrutiny was appropriate in cases involving illegitimate children to ensure that "additional strictures imposed" on them do not have a "constitutionally impermissible discriminatory purpose as their impetus. It is a response to the fear that legal hardship may be visited upon illegitimate children merely because of 'society's condemnation of irresponsible liaisons beyond the bonds of marriage.'"[203] The court went on to note that while intermediate scrutiny in such cases ensures a substantial relationship between the

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[191] Rodriguez v. Rodriguez, 329 F. Supp. 597, 599 (Cal. 1971) (citations omitted); *see* Prudential Ins. Co. v. Jack, 325 F. Supp 1194, 1196 (La. 1971) (finding that the legislative intent of the SGLI program included illegitimate children within the definition of the term "child" where there was a written acknowledgement of parentage).

[192] Ridgway v. Ridgway, 454 U.S. 46, 57 (1981).

[193] Prudential Ins. Co. v. Moorhead, 916 F.2d 261, 264 (5th Cir. 1990).

[194] 38 U.S.C.S. § 1965 (8) (LexisNexis 2008).

[195] *Moorhead*, 916 F.2d 261.

[196] The appellant in Moorhead, Billie-Joe Moorhead had bee conceived "traditionally" however, her father who had never married her mother, was killed in an accident prior to Billie-Joe's birth. *Id.* at 263.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.* at 264 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

[202] *Id.*

[203] *Id.* at 264 (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

statutory means and end, it does not serve to forbid a statutory scheme that serves a legitimate governmental function, even if the statute imposes an unavoidable "hardship on a particular individual subject to it."[204]

To that end, the court recognized that the governmental interests of accurately determining paternity and efficiently distributing insurance proceeds were important governmental interests justifying the government act of statutorily classifying children based on legitimacy to ensure greater accuracy in matters related to paternity.[205] Having made this finding, the court noted that there was a need for a determination of paternity during the father's lifetime, as was accomplished through the statutory provisions, because even "[t]he marvels of DNA testing . . . only solve the problem if the putative father can be tested."[206] The court then went on to find that the five means for establishing paternity listed in the statute promoted the governmental interest in accuracy of paternity notwithstanding Appellant's argument that only one of those five methods, the signed acknowledgment, was available to her because she was a posthumously born illegitimate child.[207] The court rejected this argument noting that "Congress . . . is not charged with making every option available to every illegitimate child—the fit between statutory purpose and statutory rule need not be perfect."[208] Accordingly they found that the statutory language describing "child" pursuant to the SGLI was related to an important government interest, met the test of intermediate scrutiny and did not violate the equal protection clause.[209]

In finding against Billie-Joe, a posthumously born child, the court struck down most of the arguments likely to be asserted in a similar claim by a posthumously conceived child. However, in cases where the decedent leaves a signed written document indicating his desires with respect to posthumous conception, it is foreseeable that the writing would serve as a "signed acknowledgement" as required under the statute. Thus, that writing alone or the writing coupled with DNA documentation establishing that the child is the natural, i.e., biological, child of the servicemember should suffice in qualifying the posthumously conceived child as a "child" eligible to receive SGLI proceeds under the statute. Accordingly, under our hypothetical, the Perry twins, who are born to a surviving spouse, would have no claim. A child born under circumstances similar to the facts in *Hecht*,[210] however, would be a "child" eligible to receive proceeds paid pursuant to a claim under the SGLI because the decedent made his intent clear.

As posthumously conceived children would likely not be born until sometime after the distribution under the SGLI,[211] however, it is not likely that many issues will arise with regard to this benefit. Of course it is possible that the servicemember would name a trust or similar entity, for the benefit of his children, as the beneficiary under such a policy. If this were the case, it is foreseeable that issues would arise with regard to children already born and their interest as well as to the question of whether to leave the trust open if, at the time of the veteran's death he does not yet have any children, but has left reproductive matter and something indicating his express desire that such matter be used for posthumous conception of a child or children.

In *Moorhead*,[212] the court stated in dicta "[t]o require that all disbursements be withheld for several years on the chance that a claim from an afterborn [sic] illegitimate might be forthcoming would be impractical."[213] While the court may be correct in that such an indefinite requirement is impractical and in direct contrast to Congress's stated interest in making quick insurance disbursements, in cases where a servicemember has left reproductive matter and a signed written statement of consent or acknowledgment to someone other than his spouse, a requirement withholding disbursement for a specified time period reasonable to accomplish the servicemember's desires, should be considered. Moreover, if posthumously

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[204] *Id.*

[205] *Id.*

[206] *Id.* at 265.

[207] *Id.*

[208] *Id.* at 266.

[209] *Id.*

[210] Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993).

[211] Payments made pursuant to claims under the SGLI are typically made fairly quickly since the code states that if a claim has not been filed by the person entitled to receive the payment under the language of the code within one year of the servicemember's death, payment should be made to the person who would be entitled to payment if the first person had predeceased the servicemember. 38 U.S.C.S. § 1970(b) (LexisNexis 2008). The code goes on to provide that if after two years of the servicemember's death there has still not been a claim for payment made by a claimant entitled pursuant to the order of precedence in the statue, payment may be made to an equitably entitled claimant and that such a distribution would bar recovery by any other person. *Id.*

[212] *Moorhead*, 916 F.2d at 265.

[213] *Id.* at 265 n.4.

conceived children are recognized as children of the servicemember with regard to other survivor's benefits, they should be treated similarly with regard to the SGLI where this can be accomplished within the current statutory infrastructure.

3. Survivor Benefit Program

Another benefit likely affected is the Survivor Benefit Program (SBP)[214] benefits. The SBP provides monthly payments to the surviving spouse or children of servicemembers who die in the line of duty while serving on active duty.[215] Payments under the SBP are made at 55% of the member's would-be retired pay based on 100% disability.[216] Additionally, the SBP is automatically adjusted annually for cost-of-living increases although payments are subject to federal income taxes.[217] If the spouse remarries before age fifty-five, SBP payments cease.[218] However, the spouse could opt to have payments made to children until they reach age eighteen (or age twenty-two if enrolled in school).[219] If the subsequent marriage ends in death, divorce or annulment, SBP payments may be reinstated.[220] Remarriage after age fifty-five has no effect on payment eligibility.[221] Payments made pursuant to the SBP are offset by dependency and indemnity compensation (DIC) payments unless such payments were made to a spouse who remarried after age fifty-seven.[222]

As the SBP is paid only to the surviving spouse or surviving children, a claim would not likely be filed on behalf of posthumously conceived children pursuant to the SBP unless and until the surviving spouse desires to remarry or is in some other way disqualified. At such time, it is foreseeable that she would petition to have the benefit paid to the surviving posthumously conceived children. Thus, any decision with regard to the status or eligibility of posthumously conceived children to receive other survivor's benefits would likely be determinative of a claim under the SBP. Such a determination might also be fundamental in cases where a posthumously conceived child is born to a servicemember who had no surviving spouse. As in the other benefits analyses, a determinative factor in such a case would be whether the posthumously conceived child is a surviving dependent child of the servicemember.

Since the SBP plan is akin to an insurance policy in that it is typically set up as an annuity payable to a named beneficiary which acts as an income maintenance program for the servicemember's survivors,[223] the same reasoning applied in determining the proper interpretation of "child" under the SGLI should be applied with respect to the SBP. Furthermore, proceeds paid should pass in accordance with the "federal statutory scheme wholly independent of the laws on intestate succession of any state."[224] This being the case, the language of the statute must be consulted.

Like "child" under the SGLI, "dependent child" under the SBP is also statutorily defined.[225] Unlike the definition of child under the SGLI, however, dependent child under the SBP is not defined in great detail. Moreover, the statute provides only that a dependent child is a person who is the child of a person to whom the plan applies, who is unmarried and under eighteen or between eighteen and twenty-two if in school, or is unmarried and incapable of self support because of a mental or physical incapacity that existed before the child was eighteen or when the child was between eighteen and twenty-two and in school.[226] Accordingly, the language should be given its natural meaning.[227] This being said, the posthumously conceived

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[214] 10 U.S.C.S. § 1448.

[215] GUIDE TO SURVIVOR BENEFITS, *supra* note 163.

[216] *Id.*

[217] *Id.*

[218] 10 U.S.C.S. § 1450(b)(2).

[219] *See* GUIDE TO SURVIVOR BENEFITS, *supra* note 163.

[220] 10 U.S.C.S. § 1450(b)(3).

[221] *Id.* § 1450(k)(1).

[222] *Id.* § 1450(c)(1); 38 U.S.C.S. § 1311; Sharp v. United States, 80 Fed. Cl. 422, 441 (2008).

[223] MacLean, 62 Comp. Gen. 553 (1983).

[224] Manning v. Prudential Ins. Co., 330 F. Supp. 1198, 1200 (Md. 1971).

[225] 10 U.S.C.S. § 1447(11)

[226] *Id.* § 1447(11) (listing child as including an adopted child, stepchild, foster child "or recognized natural child who lived with that person in a regular parent-child relationship").

[227] Rodriguez v. Rodriguez, 329 F. Supp. 597 (1971).

child is likely to be considered a "dependent child" under the statute since he would genetically be a "child of a person to whom the Plan applies."[228]

This, however, may present other issues. Specifically, since under the statute, surviving dependent children take in equal shares, issues concerning distribution with respect to other children of the deceased may arise. Moreover, dependent child annuity coverage under an elected SBP has been deemed to include all dependent children, not only those who were alive at the time of the election.[229] Such coverage "extends automatically and involuntarily to any child[ ] . . . thereafter acquir[ed]."[230] Logically, this reasoning should be applied to the analogous situation of the automatic SBP. Therefore, where there is no surviving spouse, but there are surviving dependent children who receive payments pursuant to the SBP, it is foreseeable that after having received monthly payments for a considerable time, even a few years, these dependent children could receive substantially reduced shares of the SBP payment as the result of posthumously conceived children being born. To ensure the most equitable result in such cases, a reasonable time period should be specified after which, posthumously conceived children should be precluded from receiving payments where it means reducing already established payments to other beneficiaries.

4. Survivor's Benefits Generally

Since these and other military survivor's benefits were established to ensure that the surviving dependents were not left destitute by the death of the servicemember,[231] a goal similar to that of Social Security,[232] it stands to reason that the analysis applied by courts in Social Security cases should also be applied to military beneficiaries. In Social Security cases, courts began by concluding that "the legislative intent behind [social security] payments [was] to support surviving children who were actually "dependent" upon the wage earner,"[233] an intent similar to that which underlies the allocation of Military survivor benefits.[234] The courts realized that this dependency could be presumed through the child's "relational status" with the wage earner. This was based on a recognized congressional intent that the actual dependency would not need to be shown in instances where the child would be entitled to inherit under state laws; where a marriage was invalid due to legal impediment; or where a parent had acknowledged in writing that the child was his child before his death or had been decreed by a court to be the father of the child.[235] Since it is not likely that a posthumous child, conceived with or without the consent or knowledge of her father, could meet any of this criteria, it is probably more appropriate to rely on the statutory definitions of qualifying child and thereby eliminate the requirement for actual dependency.[236]

V. A Proposed Change

A "child of the veteran" is statutorily defined as an unmarried legitimate child, an illegitimate child, an adopted child, or a stepchild acquired before reaching the age of eighteen years old and "who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death," and who is under eighteen when benefits are awarded or who became permanently incapable of self support before reaching the age of eighteen or who is under the age of twenty-three and pursuing an education at an approved school.[237]

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[228] 10 U.S.C.S. § 1447(11)(iii).

[229] MacLean, 62 Comp. Gen. 553 (1983).

[230] *Id.*.

[231] Cole, *supra* note 154, at 3.

[232] Banks, *supra* note 6, at 311.

[233] *Id.* at 314; *see also* Wolfe v. Sullivan, 988 F.2d 1025, 1028 (10th Cir. 1993).

[234] When a Servicemember dies, family members are offered several benefits to ease some of the financial burdens. *See* Military.com DIC, *supra* note 174.

[235] 42 U.S.C.S. § 416 (LexisNexis 2008).

[236] *See* U.S. DEP'T ARMY, REG. 40-400, PATIENT ADMINISTRATION (6 Feb. 2008) (defining family as a legitimate child or judicially legitimized unmarried child under the age of twenty-one regardless of dependency on the active duty or retired servicemember. The regulation also specifies that persons are also "family members" if the sponsor Soldier died while serving on active duty.).

[237] 38 C.F.R. § 3.57(a) (2007).

Looking at the face of this statutory language, it would appear that posthumously conceived children attempting to recover under this statute, will encounter the same problems encountered by the children in *Woodward*[238] and the other posthumous conception cases. Moreover, because the statute does not define the terms used to describe the child such as "legitimate" and "illegitimate,"[239] it is foreseeable that interpretation will be "totally reliant on inconsistent state laws."[240] This would also prove detrimental to the child where, as is likely in a military case, the law applied is that of the father's home of record, possibly a state with no real connection to the child and where the laws may be less favorable to the child.[241]

A. Child Defined

For this reason, the definition of child as applied to cases pertaining to military survivor's benefits should be expanded to reduce the need to rely on state law for interpretation. It can be argued that the need for an expanded definition has already been made apparent because of issues arising in other cases.[242] Moreover, over the past several years, the Veteran's Administration has been presented with questions pertaining to the eligibility of children because of the ambiguity of the definition and the varied results from having to apply many different state interpretations.[243]

To clarify the present definition of child, a change should be made to Topic 37 of the Veterans Administration's manual titled, M21-1MR, Pt. III, Subpt. iii, 5.G, *Establishing the Relationship Between the Veteran and His/Her Biological Child*, expanding the categories of children affected. Topic 37 currently reads:

> Evidence adequate to establish the child's age as outlined in M21-1MR, Part III, Subpart iii, 5.F.33 is also adequate to establish the relationship of a biological child to a male veteran married to the child's mother if the
> - veteran was married to the child's mother at the time of the child's birth, and
> - evidence shows that the veteran was the child's father.[244]
>
> If the veteran was not married to the child's mother at the time of the child's birth, acceptable proof of relationship consists of the following:
> - a written acknowledgement signed by the veteran
> - evidence that the veteran has been identified as the child's father by judicial decree ordering him to contribute to the child's support or for other purposes, and/or
> - any other secondary evidence that reasonably supports a finding that a relationship exists, such as
>
> —a copy of the public record of birth or church record of baptism showing that the veteran was the informant and was named as the father of the child
>
> —certified statements of disinterested persons who state that the veteran accepted the child as his, and/or
>
> —information obtained from a service department, or public records such as those maintained by school or welfare agencies, that show the veteran, with his knowledge, was named as the father of the child.[245]

Moreover, the language in Section 37c. *Establishing a Child's Relationship to Male Veteran Not Married to the Child's Mother*, should be amended to include language stating that "if the veteran was not married to the child's mother at the time of the child's birth, acceptable proof of relationship consists of the following: documentation that the veteran was married to the child's mother at the time of his death and the child is biologically related to the veteran or, a written document manifesting the veteran's intent to convey reproductive matter to the child's mother for insemination after his death together

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[238] Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass 2002).

[239] 38 C.F.R. § 3.57.

[240] Doroghazi, *supra* note 152, at 1616.

[241] *Id.* (citing Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (finding child did not qualify as the descendant's child under Florida intestacy law)).

[242] 38 C.F.R. § 10.42 (2007) (Dep't of Veterans Affairs, Claim of Child Other Than Legitimate Child).

[243] *See* Memorandum from the General Counsel to the Director, Compensation and Pension Service, subject: Apportionment of Benefits (July 1, 1994), *available at* http://www.va.gov/ogc/docs/1994/PRC16-94.DOC.

[244] M21-1MR, *supra* note 165, at 5-G-2, Topic 37b.

[245] *Id.* at 5-G-3, Topic 37c.

with documentation establishing that the child was: (1) conceived using such reproductive matter, and (2) born within three years of the veteran's death."

This change alone will effectively restore to posthumously conceived children the status of a legitimate child that they are effectively deprived of at birth. This is easily demonstrated by looking at the 1LT Perry hypothetical. With the change, the twins would clearly be eligible for benefits because their mother was married to 1LT Perry at the time of his death. The twins are biologically related to 1LT Perry, he consented to the posthumous conception, and the twins were born within three years of his death. In essence, this change would allow posthumously conceived children to receive survivors' benefits in the absence of their father while at the same time providing an avenue to prevent frivolous or untimely claims. This change will also help the servicemember maintain a sense of peace, knowing that if something were to happen to him, his desires would be carried out and his family would be cared for.

B. Advice to the Soldier

For this same reason, Soldiers preparing to deploy should be briefed on cryopreservation as part of their Soldier Readiness Process Training. Moreover, the military has established the Soldier readiness process program to help ensure that all Soldiers are administratively ready for deployment, at all times.[246] In preparing for deployment, soldiers are given legal advice on issues pertaining to estate planning, medical directives and other personal matters such as family plans and control and maintenance of personal property through powers of attorney and other legal documents.[247] This would be an opportune time to discuss the servicemember's issues, concerns, and desires relating to posthumous reproduction. If the stories cited in the newspaper articles[248] are accurate depictions of what is taking place regularly, it is time for the military to step up to ensure that servicemembers are accurately and adequately informed. If this is done, last minute issues of consent and intent can be eliminated or reduced so that the level of stress on family members at critical times when emotions are high can be minimized.[249] Additionally, having the servicemember consider and express his desires up-front may help the military to avoid the uncomfortable position of having to deny that finale request made by servicemember's loved ones in their attempt to carry out what they believe are his last wishes,[250] or in their own effort to continue his legacy.

VI. Conclusion

It is evident from reading headlines such as "*Fearing Injury, Soldiers Freeze Sperm,*"[251] "*War Boosts Sperm Deposits*,"[252] and "*Some Troops Freeze Sperm Before Deploying,*"[253] in popular newspapers, that posthumous conception will soon be a growing concern for the United States Military.[254] Already we have seen the fruition of these issues as newspapers recently reported "*Science Makes A New Father Of A Fallen American Soldier*"[255] as they introduced the world to seven-month-old Benton Drew Smith, the posthumously conceived child of Second Lieutenant Brian Smith who was killed in action in Iraq more than two years before his son's birth.[256] Although issues involving posthumous conception have already

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[246] *See generally* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION AND DEPLOYMENT PROCESSING) (28 May 2003).

[247] *Id.* para. 4-6b(1)(b).

[248] *See generally* Alvord, *supra* note 7, at 1A; Gamerman, *supra* note 6, at 1A; Dunlop, *supra* note 7, at A14 (referencing a campaign to inform military men that sperm banks were an option for them); Davis, *supra* note 7, at 1 (noting that sperm donors included men on military duty who were posted to possible war or volatile zones).

[249] *See generally* N.Y. HOSP. GUIDELINES, *supra* note 18 (briefly discussing the effect of bereavement on the decision making process).

[250] *See generally* Schiff, *supra* note 30.

[251] Dunlop, *supra* note 7, at A14.

[252] Teresa Burney, *War Boosts Sperm Deposits*, ST. PETERSBURG TIMES (Florida), Feb. 19, 1991, at 1B.

[253] Alvord, *supra* note 7, at 1A.

[254] *See also* Video: Widow Gets Pregnant with Fallen Soldier's Frozen Sperm (MSNBC.com), *available at* http://today.msnbc.msn.com/id/21134540/vp/19070167#19070167 (last visited June 4, 2008).

[255] Gregg Zoroya, *Science Makes Fallen Soldier a Father*, USA TODAY, Feb. 12, 2007, at 1.

[256] *Id.*; *see also* Arthur Caplan, *Should Kids Be Conceived After a Parent Dies?*, MSNBC, June 27, 2007 (calling for legal limits on posthumous reproduction as the rising death toll in Iraq and Afghanistan is causing American women to be faced with the decision of whether they should have a dead Soldier's child), *available at* http://www.msnbc.msn.com/id/17937817/.

been considered by a handful of States, the unique nature and varied aspects of military service require that these concerns be addressed more broadly and in a more uniformed fashion.

As partial compensation for the unique and inherently dangerous nature of service in the military, servicemembers receive benefits and entitlements not necessarily common in other professions. Moreover, at times many aspects of military life can seem a bit paternalistic. To this extent Servicemembers receive free counseling on personal issues and even free legal advice to a certain extent. These services are provided to ensure that the servicemember and his family are adequately informed and cared for so that the servicemember is free to focus on the military mission. For these reasons, before deploying servicemembers are briefed on a number of topics, to include some degree of estate and family planning. Since it appears that issues concerning posthumous reproduction are of greater concern for servicemembers anticipating deployment, the military could use this opportunity to discuss these issues so that the servicemember can prepare the documentation necessary to ensure his desires are known and expressed in a way that would facilitate his desires being lawfully carried out if there were a need.

Along the same lines, military survivor's benefits were established to ensure that the families of servicemembers who had made the ultimate sacrifice for their country would be cared for in the servicemember's absence. This cannot be accomplished through a system that purports to provide a means of support to a particular group of individuals and then excludes an entire subsection of that group based on factor's that if changed would preclude the very existence of the group. If indeed benefits were established to provide for surviving spouses and children, all such children who are similarly situated should be considered. Accordingly, it is within reason to make a slight administrative accommodation to an already existing rule so that posthumously conceived children may have the same opportunities for support as other children of deceased veterans, which, very well might include their older siblings. This can be achieved by merely broadening the definition of "child" as the term is used in determining eligibility for survivors' benefits.

Although issues concerning posthumous reproduction are still relatively new, it is within the best interest of the military and its servicemembers to address foreseeable concerns and to eliminate any unnecessary government induced impediments. By implementing a few simple practices in its pre-deployment estate and family planning services and making an uncomplicated modification to a regulatory definition, the military would be better prepared to meet the needs of "this new kind of Military family."[257]

[257] Gamerman, *supra* note 7, at 1A.

Been There, Doing That in a Title 32 Status
The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status

Major Christopher R. Brown[*]

The events of September 11th, 2001, required the National Guard to change from a strategic reserve . . . [to] an operational force capable of generating capabilities here at home for homeland defense . . . .[1]

I. Introduction.

Since the first settlers reached the new world, militia members have protected and defended the lives and properties of their fellow community members. The individual states have and will continue to call upon their organized militias[2]—their National Guard[3]—to provide these same protections and defenses prior to, during, and in the wake of various natural and man-made domestic threats and disasters. As the states continued to control and fund their National Guard while performing these historical militia-based domestic *operations*, our Federal Government incrementally funded the *training*[4] of these same National Guard forces to fight the nation's wars.

National Guard members would ultimately perform this federal wartime mission training under Title 32 of the United States Code, in a "Title 32 status."[5] Title 32 status and authority finds its roots in the Constitution;[6] however, the use of federal funding under Title 32 for the National Guard to perform domestic operations to protect citizens' lives and property was, until recently, limited at best. However, since 2001, with the recognition of new national domestic threats coupled with the historic capabilities of the National Guard, Congress has significantly increased the authority for the Federal Government to fund these National Guard domestic operations in Title 32 status.[7]

This article will navigate the historical path the Federal Government has taken in its funding of the National Guard serving in a Title 32 status—initially to *train*, now also to *operate*. Through the examination of our nation's earliest and continuing reliance upon its militia capabilities in the domestic setting, this article will demonstrate how the United States, both individually and collectively, benefit from this recent, expanded operational use of Title 32 status.

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[1] *Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 109th Cong. 10 (2005) (statement of Lieutenant General H. Steven Blum, Chief, National Guard Bureau), *available at* http://www.ngb.army.mil/media/transcripts/hasctranscriptsblumandschultz2feb05.rtf.

[2] The classes of the militia of the United States include "(1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia." 10 U.S.C. § 311 (2000). This article will not discuss the unorganized federal or state militias.

[3] For the remainder of this article, the National Guard consists of the individual National Guards of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

[4] *See infra* Part III, IV.

[5] *See infra* part IVB.

[6] *See infra* Part IIIA.

[7] *See infra* Part V.

II. The Colonial Militias

Native Indians shot arrows at the landing party of the first English settlers as they approached the New World.[8] The settlers withdrew, sailed further south, landed and established the Jamestown Colony in April, 1607.[9] Shortly after establishing the 100-person settlement, the settlers repelled an assault by 200 native Indian braves.[10] Within a week of the braves' assault, drawing from the English militia systems familiar to the settlers, standing orders were issued requiring the constant carrying of weapons, organized Saturday military training,[11] and compulsory militia service.[12]

A few years later in 1620, the Pilgrims reached the New World and established the Plymouth Colony.[13] The Pilgrims also feared native Indian raids and named Captain Miles Standish as their militia commander, who incorporated militia training as an integral part of the colony's social structure.[14] In the next decade, the Puritans established the Massachusetts Bay Colony and between the years of 1630 and 1636, the Puritan militias evolved from captain-commanded companies to colonel-commanded regiments.[15] On 13 December 1636, the Massachusetts government formally established its militia regiments; the date recognized as the birth date of the National Guard in America.[16] A year later, in 1637, the American Minuteman, the historic symbol of the National Guard, was created due to the certainty of further native Indian conflicts.[17] At any one time, one-third of the Massachusetts minutemen had to be "ready at half an hour's warning" to respond to alarms.[18]

By the Revolutionary War, all of the original thirteen colonies, except Pennsylvania, established compulsory militias.[19] Militiamen fired "the shot heard 'round the world"[20] in Concord, Massachusetts, on 19 April 1775, in the beginning of the war that would free the colonies from the British crown.[21] These colonial militias served with the victorious Continental Army; however, the Continental Army Commander, General George Washington, was somewhat critical of the militiamen who served in his Army, calling them "hooping, hallowing, Gentlemen-Soldiers!"[22] Nonetheless, he recognized that "[b]y keeping up in peacetime 'a well regulated, and disciplined Militia,' we shall take the fairest and best method to preserve, for a long time to come, the happiness, dignity, and Independence of our country."[23]

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[8] MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 11 (2003).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 12.

[12] *Id.* at 14 ("All males aged 16–60, except for 'olde planters' and 'newe commmers,' were liable for militia duty . . . .").

[13] *Id.*

[14] The Pilgrims conducted a militia muster and an exercise of arms as part of the first Thanksgiving celebration in 1621. *Id.*

[15] *Id.*

[16] *Id.* at 16; *see also* About the Army National Guard, National Guard, http://www.ngb.army.mil/About/arng.aspx (last visited May 27, 2008).

[17] DOUBLER, *supra* note 8, at 17.

[18] *Id.*

[19] *Id.* at 19 ("William Penn established Pennsylvania in 1681, but the heavy pacifist influence . . . precluded the establishment of a militia until the middle of the following century." (citations omitted)).

[20] "The shot heard 'round the world" comes from the opening stanza of Ralph Waldo Emerson's *Concord Hymn* (1837) referring to the beginning of the American Revolutionary War. It states, "By the rude bridge that arched the flood, Their flag to April's breeze unfurled; Here once the embattled farmers stood; And fired the shot heard 'round the world." The Phrase Finder, http://www.phrases.org.uk/meanings/shot-heard-around-the-world.html (last visited May 27, 2008).

[21] DOUBLER, *supra* note 8, at 33.

[22] JOSEPH J. ELLIS, HIS EXCELLENCY 28 (2004); *see also* Frederick Bernays Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 183 (1940).

[23] *See* DOUBLER, *supra* note 8, at 39 (quoting George Washington, *Sentiments on a Peace Establishment* (1784)).

III. The Federal Government Incrementally Regulates, Disciplines and Funds the State Controlled Militias[24]

A. The U.S. Constitution

Following independence, the Founding Fathers chose to maintain a small standing Army and rely on the militias to provide military support.[25] During the Constitutional Convention in 1787, many convention members favored a strictly federally controlled militia, but others recognized many states would not consent to this proposition.[26] The debates resulted in both federal and state control of the militia through the constitutional "militia clauses."[27] Within the militia clauses, the Federal Government exercised its control in that Congress was "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[28] Congress was also "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ."[29]

While it was clear that Congress was to provide for governing, or controlling the militia while in federal service, the states retained their control in "the Appointment of the Officers, and the Authority of training the militia according to the discipline prescribed by Congress."[30] These provisions serve as the constitutional basis of Title 32—the use of federal funds to "organize," "arm," and "discipline" the militias while the states maintained control of their militias while "training" to federal standards. In 1791, Congress affirmed the necessity of the militias for the nation's future in the Second Amendment to the U.S. Constitution: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[31]

While the U.S. Constitution and the Second Amendment provided authority "to provide" for the militia, they remained silent on the actual funding of the militias' "training" to federal standards while under state control.[32] Moreover, no federal funding was provided for the individual militias performing those state controlled domestic operations ensuring "the security of a free state."[33]

B. 1792—The Uniform Militia Act[34]

Within five years of the Constitutional Convention, Congress increased the nation's ability to rely on the militias for national defense when it exercised its constitutional power to organize the militia by passing the Uniform Militia Act of 1792 (Militia Act).[35] The Act required compulsory militia service,[36] but required no drills or musters. It further established that each state was to have an adjutant general,[37] who would report the condition of his militia once a year to the "commander-in-

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[24] 32 U.S.C. § 102 (2000) ("In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the [National Guard] . . . be maintained and assured at all times.").

[25] GARY HART, THE MINUTEMAN 100 (1998). This was largely due to fear of the misuse of a large standing Army. Individual states also stated the dangerousness of standing armies in their own constitutions. "North Carolina and Pennsylvania included this interdiction in their constitutions: 'As standing armies in time of peace are dangerous to liberty, they ought not be kept.'" *Id.*

[26] The militia provisions were one of the most vulnerable points of attack in the public debate of the Constitution. *See generally* WILLIAM H. RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 15 (1957).

[27] *See, e.g.*, DOUBLER, *supra* note 8, at 65.

[28] U.S. CONST. art. 1, § 8, cl. 15.

[29] *Id.* art. 1, § 8, cl. 16.

[30] *Id.*

[31] *Id.* amend. II.

[32] *Id.* art. 1, § 8, cl. 16.

[33] *Id.* amend. II.

[34] An Act More Effectually to Provide for the National Defence [sic] by Establishing an [sic] Uniform Militia Throughout the United States, 1 Stat. 271 (1792) [hereinafter Act of 1792].

[35] *Id.*; *see also e.g.*, Jeff Bovarnick, Perpich v. United States Department of Defense*: Who's in Charge of the National Guard?*, 26 NEW ENG. L. REV. 453, 459 (1991).

[36] Act of 1792, *supra* note 34, § 1 ("That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . . .").

[37] *Id.* § 6.

chief of the said state,"[38] and the President of the United States.[39] In order to create uniformity, the Militia Act stated that the militias would be similarly organized;[40] however, the Militia Act's intent to similarly organize the militias failed because the Militia Act did not require the states to comply with much of the outlined organizational structure.[41] Because the law did not require compliance, the law was considered unenforceable.[42] Consequently, the Militia Act proved unsuccessful in providing an effectively organized militia as militia performance was unreliable in the War of 1812, and the Civil War.[43]

Militia performance was presumably subpar because throughout our young nation's history, the Federal Government apportioned no funds in exercising its constitutional authority of organizing, arming and disciplining the various state militias. The costs, therefore, fell on the individual states or their individual citizens. For example, Congress required the militia members to equip themselves.[44] More importantly, Congress apportioned no federal funding to "train" the militias for federal service. Little changed in succeeding decades as even through the Civil War period Congress demonstrated scant interest in arming and funding the state militias. Ultimately, however, as the 19th Century progressed and the nation began to heal from the ravages of internal war, Congress became more engaged and began to increase the authority for federal funding of the militias.

C. 1887—The Act of February 12[45]

In 1887, Congress first authorized annual federal funding of the militias within the states when $400,000 was apportioned among the several states and territories, under the direction of the Secretary of War,[46] for "the purpose of providing arms, ordnance stores, quartermaster's stores, and camp equipage for issue to the militia."[47] Annually, the governors were to account for that received, "as such arms, ordnance, and quartermaster's stores and camp equipage . . . shall remain the property of the United States."[48]

Nonetheless, even with these federal appropriations for militia equipment, the militia's performance in 1898 during the Spanish-American War was viewed as "undistinguished and ineffective."[49] As a result, as our nation entered the 20th century, Congress held "extensive hearings" to determine what reforms were necessary in the U.S. military.[50] Militia reforms were obviously needed, as since America's independence, Congress had failed to create the "well-regulated militia" envisioned by Washington.[51]

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[38] *Id.* § 10; *see also* JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 53 (1983) (stating all fifteen states of the Union enacted laws making the governor the commander-in-chief of the militia).

[39] Act of 1792, *supra* note 34, § 10.

[40] *Id.* § 31 ("[T]he militia of the respective states shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of each state shall direct; . . . .").

[41] *Id.* § 3 ("That *if the same be convenient*, each brigade shall consist of four regiments; each regiment of two battalions; each battalion of five companies; each company of sixty-four privates.") (emphasis added).

[42] MAHON, *supra* note 38, at 52.

[43] *See* Bovarnick, *supra* note 35, at 453, 458.

[44] Act of 1792, *supra* note 34, § 1 ("That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty-four cartridges, ...").

[45] An Act . . . Making an Annual Appropriation to Provide Arms and Equipments [sic] for the Militia, ch. 129, 24 Stat. 401, 402 (1887).

[46] *Id.* § 2.

[47] *Id.* § 1.

[48] *Id.* § 3. This remains true today as "[a]ll military property issued by the United States to the National Guard remains the property of the United States." 32 U.S.C. § 710(a) (2000).

[49] Bovarnick, *supra* note 35, at 460.

[50] MAHON, *supra* note 38, at 138.

[51] *See* Bovarnick, *supra* note 35, at 458.

D. 1903—The Dick Act[52]

Significant reforms in militia organizational requirements began when President McKinley signed the Dick Act on 21 January 1903. The Dick Act repealed the Uniform Militia Act of 1792 and created the organized militia, now known as the National Guard.[53] It implemented required National Guard training,[54] and required "[t]he organization, armament, and discipline of the organized militia . . . shall be the same as that . . . prescribed for the Regular (Army)."[55] Congress further granted the President authority to call forth the militia "whenever the United States is invaded, or in danger of invasion . . . , or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command, to execute the laws of the Union . . . ."[56] Additionally, when the militias were called into federal service "at the place of company rendezvous,"[57] militia members were to receive the same pay and allowances as provided to Regular Army personnel.[58]

Most significantly, the Act authorized what would eventually serve as the basis for the federally funded, state controlled Title 32 "training status." The Secretary of War was authorized, at the governor's request, to fund "so much of (the militia's) allotment out of the said annual appropriation . . . , as shall be necessary for the payment, subsistence, and transportation of such portion of said organized militia as shall engage in actual field or camp service for instruction . . . ."[59] The militia members engaging in this state controlled "field or camp service" were also entitled "the same pay, subsistence, and transportation or travel allowances . . . (as) men of corresponding grades of the Regular Army."[60]

This increased authority for the Secretary of War to fund the equipment and "field and camp service for (militia) instruction,"[61] authorized the federal funding of the militias' training for their federal missions while under their respective states' control. Meanwhile, the states also continued to control their National Guards while performing their historical, operational missions as local response capabilities for natural and man-made threats and disasters. The states, however, remained solely responsible for funding this necessary domestic operational use of the National Guard in this militia-based status.

E. The National Guard Becomes a Federal Reserve Component

1. 1916—The National Defense Act

In light of the world situation prior to World War I,[62] Congress recognized the likelihood of using National Guard Soldiers to fight abroad.[63] Consequently, it passed the National Defense Act of 1916 (1916 NDAA),[64] requiring enlisted National Guard personnel to sign contracts and oaths to serve as members of both their state National Guard and the "National Guard of the United States."[65] They swore to defend both the constitutions of the United States and their

[52] An Act to Promote the Efficiency of the Militia, and for Other Purposes, ch. 196, 32 Stat. 775 (1903) [hereinafter The Dick Act].

[53] *Id.* § 1.

[54] *Id.* § 18 (requiring the organized militias annually "participate in practice marches or go into camp of instruction at least five consecutive days, and to assemble for drill and instruction . . . or for target practice not less than twenty-four times . . . .").

[55] *Id.* § 3.

[56] *Id.* § 4.

[57] *Id.* § 11.

[58] *Id.* § 10.

[59] *Id.* § 14.

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, Weiner, *supra* note 22, at 199.

[63] Congress had previously amended the Dick Act in 1908, authorizing National Guard members, in the service of the United States, to serve "either within or without the territory of the United States." The Dick Act (amended), ch. 204, § 4, 35 Stat. 399, 400 (1908). This provision was debatable, as the Department of Justice opined that the "President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation." 29 Op. Atty Gen. 322 (1912).

[64] National Defense Act ch. 134, 39 Stat. 166 (1916).

[65] *Id.* § 70 (codified at 32 U.S.C. § 304 (2000)).

individual states, and to obey the orders of the President of the United States and governor of their individual states.[66] National Guard officers, in order to retain their commissions, were also required to take an oath to defend the Constitution of the United States and their individual states as well as obey the orders of both the President and their governors.[67] This dual oath formally recognized the dual federal and state missions and dual control authorities of the National Guard.

The 1916 NDAA also increased the training requirements of the National Guard,[68] and authorized federal funding to pay National Guard members for this required, increased training.[69] The states, nonetheless, retained their constitutional control of their National Guard members while performing this federally funded training for the federal mission. Federal funds, however, were still not authorized for the states' use of their National Guards to perform their historic, domestic operational missions.

2. 1933—The National Defense Act of 1916, Amended

In 1933, Congress amended the 1916 NDAA and formally created the federal status of the National Guard when the National Guard of the United States (NGUS) was deemed a federal reserve component.[70] Therefore, due to the enlistment contracts and oaths as members of their state National Guard and the NGUS required by the 1916 NDAA,[71] National Guard members could now be "ordered" to federal service in their NGUS, reserve component status.[72] Consequently, even today, when National Guard members serve under the command and control of state authorities, they serve in their militia-based state National Guard status. When they instead serve under the command and control of federal authorities under Title 10, U.S. Code, they serve as members of the NGUS, a statutory reserve component.[73]

While the 1916 NDAA formally combined the National Guard members' allegiances, when National Guard members remained under state control, federal funds remained authorized only for federal mission training. The individual states remained responsible for funding their various National Guard militia-based domestic operations. Nonetheless, Congress would soon simplify the distinctions of state service—that is both (1) state funded and controlled State Active Duty (SAD) operational status, and (2) federally funded and state controlled "training" status—when it enacted Title 32 of the United States Code.

IV. The National Guard in State Status—the Birth of Title 32

The U.S. Department of Defense (DOD) recognizes "[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local governments."[74] It further recognizes the "Army and Air National Guard forces, acting under State orders (i.e., not in Federal service), have primary responsibility for providing military assistance to State and local government agencies in civil emergencies."[75] As explained below, while National Guard members may be called into federal service as members of the reserve components in their NGUS status, they otherwise remain under the control of state authorities when in a SAD or Title 32 status.

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[66] *Id.*

[67] *Id.* § 73 (codified at 32 U.S.C. § 312).

[68] *Id.* § 92 (requiring 48 drills and 15 days of "encampments, maneuvers or other exercises").

[69] *Id.* §§ 109, 110.

[70] Act of June 15, 1933, ch. 87, 48 Stat. 153 (codified at 10 U.S.C. § 10,101).

[71] National Defense Act, ch. 134, 39 Stat. 166 (1916).

[72] *See* Bovarnick, *supra* note 35, at 458; *see also* 10 U.S.C. § 12,301 ("In time of war or national emergency declared by Congress . . . for the duration of the war or emergency and for six months thereafter."); § 12,302 ("In time of national emergency declared by the President . . . for not more than 24 consecutive months."); § 12,304 (upon Presidential determination "that it is necessary to augment active forces for any operational mission . . . for not more than 365 days.").

[73] Typically, when a member of the NGUS serves in a federally controlled Title 10 Status, he loses his state controlled National Guard, Title 32 status, and returns to his National Guard, Title 32 status, upon relief from Title 10 duty. 32 U.S.C.S. § 325(a)(1) (LexisNexis 2008); *see also* Perpich v. Dep't of Defense, 496 U.S. 334, 347 (1990). A National Guard officer serving in a Title 10 status, however, can retain his Title 32 status, while serving in command of a National Guard unit, if the President authorizes and his Governor consents to the dual Title 10 and Title 32 status. 32 U.S.C.S. § 325(a)(2). . Consequently, he may have a "dual status" and command both Title 10 and Title 32 personnel.

[74] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) para. 4.1.3 (4 Feb. 1994) [hereinafter DODD 3015.12].

[75] U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 4.4.6.1 (15 Jan. 1993).

A. State Active Duty Status—State Funded, State Controlled

National Guard forces perform their historical, militia-based domestic operational missions when their governors mobilize them in state controlled and funded SAD status.[76] State laws dictate when state authorities may call upon their National Guard to perform SAD,[77] generally providing broad authority for the use of militias to quell domestic disturbances or assist in disaster relief[78] when local and state government civil resources have been exhausted.[79] The states typically pay their National Guard personnel serving in a SAD status at the same rate of pay that the Soldiers or Airmen receive while serving in a federal status.[80] During a SAD response, the states may use the federal equipment[81] provided to the states' National Guard units for training purposes; however, the states must reimburse the Federal Government for the use of certain resources, such as fuel.[82]

Although the states are responsible for funding the response of the National Guard when in a SAD status, the Federal Government may proportionally reimburse the state for certain expenses under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act),[83] which may include SAD associated costs.[84] Nonetheless, while National Guard personnel respond in a SAD status donning U.S. Armed Forces uniforms,[85] the DOD provides neither funding nor reimbursement, nor does the DOD have any control over the National Guard's response or mission assignment in this pure, historical, state controlled militia response. As will be discussed below, however, the DOD funds the National Guard's activities in a Title 32 status, yet remains outside of the chain of command.

B. Title 32 Status—Federally Funded, State Controlled

1. 1956—The National Guard "Trains" in a Title 32 Status

In 1956, Congress revised, codified, and enacted into law, Title 32 of the U.S. Code, entitled "National Guard."[86] It originally consisted of four chapters governing the National Guard: (1) organization; (2) personnel; (3) training; and (4) service, supply and procurement. Title 32 generally serves as a compilation of most federal statutes affecting the National Guard while serving under state control, yet funded through DOD appropriations.[87]

It is in Title 32 status that the National Guard generally "trains" rather than "operates" because "*[t]raining to perform* the dual mission of the Army National Guard is the primary task of Army National Guard units in peacetime."[88] While limited

[76] U.S. DEP'T OF THE ARMY AND THE AIR FORCE, NATIONAL GUARD REG. 500-1/AIR NATIONAL GUARD INSTR. 10-8101, MILITARY SUPPORT TO CIVIL AUTHORITIES para. 1-4a (1 Feb. 1996) [hereinafter NGR 500-1] ("During periods of state active duty, costs will be funded by the state . . . .").

[77] *Id.* paras. 1-4, 4-3b(4).

[78] *See, e.g.*, ALA. CODE § 31-2-109 (LexisNexis 2008) (authorizing governor to call out militia "to execute the laws, suppress insurrection and repel invasion, or to provide for assistance in cases of disaster").

[79] NGR 500-1, *supra* note 76, para. 2-2.

[80] *See, e.g.*, ALA. CODE § 31-2-88 (providing that National Guard officers, warrant officers, and enlisted personnel shall be paid at the rate authorized by the Department of Defense for members of the regular armed forces of the United States while the National Guard is on active military service for the state).

[81] 32 U.S.C. § 710 (2000).

[82] NGR 500-1, *supra* note 76, para. 3-6a ("When federal property is used by National Guard personnel in a SAD status . . . the state will be liable for reimbursement (or replenishment in kind) to the federal government . . . .").

[83] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.S. §§ 5121–5208 (LexisNexis 2008) [hereinafter Stafford Act].

[84] *Id.* After a disaster, the federal government, in accordance with provisions of the Stafford Act, assists state and local governments with costs associated with response and recovery efforts that exceed a state or locale's capabilities.

[85] *See* U.S. DEP'T OF THE ARMY REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 30-2d (3 Feb. 2005) ("Army National Guard personnel also may wear the Army uniform in the performance of State service . . . .").

[86] Aug. 10, 1956, ch. 1041, 70A Stat. 597.

[87] *See, e.g.*, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119_ Stat. 2680 (2005) (authorizing federal funding for military personnel, operation and maintenance, and procurement for the federal armed forces, reserve components (including the NGUS) and National Guard members performing authorized duties in a Title 32 status.).

[88] U.S. DEP'T OF THE ARMY, NATIONAL GUARD REG. 350-1, ARMY NATIONAL GUARD TRAINING para. 1-6a (3 Jun. 1991) [hereinafter NGR (AR) 350-1] (emphasis added).

authority allows federally funded training[89] to perform the domestic mission,[90] National Guard members instead spend the overwhelming majority of their Title 32 training periods training "[t]o provide units organized, equipped, and trained to fight and win in time of war or national emergency in support of the Army's war plans."[91]

2. 1964—Congress Authorizes "Other Duty" in Title 32 Status

Although the National Guard's primary task is to "train" to perform its dual missions, Congress amended Title 32 in 1964, adding section 502(f), authorizing the National Guard to also perform "other duty" in a Title 32 status.[92] While this "other duty" language authorized duties in addition to the required training under Title 32,[93] it did much more. It opened the door for National Guard personnel to perform operational missions (rather than merely train for operational missions) in what was termed by many as either a Title 32 § 502(f) or "other duty" status. For more than twenty years, however, the use of the Title 32 § 502(f) status was limited to specific, statutorily authorized operational missions performed under state control.

In 1989, federal statutes then authorized National Guard members, serving in a full-time National Guard (FTNG)[94] Title 32, § 502(f) status, to perform counter-drug activities.[95] Later, in 1998, Congress authorized FTNG members to serve in 22-member Weapons of Mass Destruction/Civil Support Teams (WMD CSTs) in a Title 32, § 502(f) status to "[p]repare for or respond to any emergency involving the use of a weapon of mass destruction . . . ."[96] Amendments in 2002 further authorized WMD CSTs to prepare for or respond to "[a] terrorist attack or threatened terrorist attack in the United States that results, or could result, in catastrophic loss of life or property."[97] Nonetheless, these specifically authorized uses of the National Guard in an operational Title 32 status in the nation's war against drugs and in response to WMD events or terrorist attacks remained atypical of Title 32 status duty. Title 32 funding remained primarily for "training" because the DOD continued to recognize the individual States' and local governments' responsibilities to protect the life and property of their own citizens.[98]

As the United States and its citizenry enjoyed more than a century of relative peace on its soil, the states continued to place their National Guard members in the state controlled and funded SAD status when performing domestic operational missions. These militia-based responses continued protecting and defending the lives and properties of the various states' citizens.

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[89] NGR 500-1, *supra* note 76, para. 4-3b(1) ("Units assigned a civil disturbance mission will conduct [Military Assistance for Civil Disturbance] training annually in [Title 32] inactive training status. MACDIS training will be resourced from the units annual allocation of 48 IDT periods."). Training may not exceed one drill weekend without National Guard Bureau approval. *Id.*

[90] NGR (AR) 350-1, *supra* note 88. para. 1-5b ("To provide units organized, equipped, and trained in the protection of life and property and the preservation of peace, order, and public safety, under competent orders of Federal or State authorities.")

[91] *Id*. para. 1-5a.

[92] Act of Oct. 3, 1964, Pub. L. No. 88-621, § 1(1), 78 Stat. 999.

[93] 32 U.S.C. § 502(a) (2000) ("Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, . . . the National Guard . . . shall– (1) assemble for drill and instruction . . . at least 48 times per year; and (2) participate in training . . . at least 15 days each year.).

[94] 32 U.S.C. § 101(19) (LexisNexis 2008) ("'Full-time National Guard duty' means training or other duty, other than inactive duty, performed by a member of the [NGUS] in the member's status as a member of the National Guard . . . for which the member is entitled to pay from the United States . . . ."); § 101(12) ("'Active Duty' . . . does not include full-time National Guard duty.").

[95] *Id.* § 112.

[96] Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 511, 112 Stat. 2006 (1998) (codified at 10 U.S.C. § 12,310(c)(1)(A)). *See also* U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 16 (2006), *available at* http://www.dod.mil/pubs/pdfs/QDR20060203.pdf ("The National Guard is fielding 55 WMD Civil Support Teams (CSTs)– in each state, territory and District of Columbia. These 22-member teams can provide critical communications links, quick assessment of damage from any WMD attack and consequence management support to local, state, and Federal agencies.").

[97] Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 514, 116 Stat. 2458 (2002) (codified at 10 U.S.C. § 12310(c)(1)(B) (LexisNexis 2008)).

[98] DODD 3025.12, *supra* note 74, para. 4.1.3.

V. Title 32 Status Goes Operational[99]

Deeper analysis of the possible, expanded operational use of Title 32 status resulted from the deadly terror attacks on September 11, 2001. As we know, the attacks of September 11 occurred within the geographic boundaries of the sovereign states of New York, Virginia, and Pennsylvania. No one would argue, though, that the September 11 attacks were merely those states' internal domestic emergencies or that the attackers aimed to attack these individual states—they were national emergencies and attacks upon our collective, and United States. Although this was an attack on our nation, to which all of the nation's citizens should arguably bear the cost of response, when it came to the governors calling upon their militias to respond, Title 32 as written in 2001 did not clearly allow for the DOD to fund this state controlled militia response to this national crisis in a Title 32 status.[100]

Shortly after the attacks, the DOD released its required[101] Quadrennial Defense Review (QDR) Report.[102] The QDR stated that "before the attack . . . the senior leaders of the Defense Department set out to establish a new strategy for America's defense . . . [because] America must be safe at home,"[103] and that the "attacks confirm[ed] the strategic direction and planning principles that resulted from [the QDR], particularly its emphasis on homeland defense."[104] Ultimately, the terrorist attacks of September 11 energized the DOD's focus on homeland defense—the National Guard's historic mission. Since that fateful day, the publication of the 2001 QDR, and the nation's recognition of the collective and individual threats the United States' face, Congress has implemented the most significant statutory changes to Title 32 regarding the domestic, operational use of the National Guard since its colonial roots.

A. 2004—Congress Authorizes "Homeland Defense Activities" in Title 32 Status

Recognizing the new threats the country faced, Congress added chapter nine to Title 32 in 2004;[105] the first new chapter since the title's inception in 1956. This chapter symbolized a new period in National Guard history; it authorized the Federal Government to fund, under state control, the National Guard while performing a broad range of "homeland defense activities"[106] while in a Title 32, FTNG, § 502(f) status.[107] The statutory definition of a "homeland defense activity is broad," as it is "an activity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to the national security, from a threat or aggression against the United States."[108] Consequently, this authorization ended centuries of restrictions against federal defense funding of the historically state funded domestic, operational use of the National Guard. Ultimately, Chapter Nine signified a dramatic departure from the historical use and "training" nexus restrictions of Title 32.

While the broad definition of "homeland defense activities" opened the door for the expanded domestic operational use of the National Guard in a Title 32 status, governors met somewhat cumbersome administrative requirements when requesting use of this new authority. [109] Nonetheless, in seemingly "necessary and appropriate"[110] circumstances soon after

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[99] The distinction between a Title 32 "training" or "operational" status is important as units in a "training" status may only "train" to those tasks forming part of their federal wartime mission. The practical effect is that a Public Affairs unit could not "train" in a Title 32 status to perform Military Police unit functions. Moreover, once a National Guard member actually performs the task, rather than "trains" to perform the task, he is arguably "operating." Authorizing National Guard members to serve in a Title 32 "operational" status instead allows those National Guard members to perform operational missions not necessarily tied to their federal wartime mission.

[100] 32 U.S.C.S. §§ 101–716 (2001).

[101] 10 U.S.C. § 118 (2000).

[102] *See* U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT III (2001) (released 30 Sept. 2001), *available at* http://www.defenselink.mil/pubs/pdfs/qdr2001.pdf.

[103] *Id.*

[104] *Id.* at V.

[105] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 512, 118 Stat. 1811 (2004) (codified at 32 U.S.C.S. §§ 901–908).

[106] 32 U.S.C.S. § 901.

[107] § 904(a) ("All duty performed under this chapter shall be considered to be full-time National Guard duty under section 502(f) under this title 502(f).").

[108] § 901(1).

[109] § 906.

> A Governor of a State may request funding assistance for the homeland defense activities of the National Guard of that State from the Secretary of Defense. Any such request shall include the following:

the chapter's inclusion to Title 32, various state governors quickly and affirmatively attempted to use the landmark legislation, apparently to no avail. For example, in July 2005, New York Governor George Pataki requested authorization to use the new Title 32, Chapter Nine authority for New York National Guard members "in support of security at critical rail and mass transit facilities in New York State due to the increase in the national threat level at inner-city rail and subway facilities."[111] The DOD did not approve the request.[112] Also, as National Guard personnel responded in SAD status to assist in the recovery from Hurricane Katrina, Alabama Governor Bob Riley specifically requested authority for his National Guard members to perform hurricane relief duties in a Title 32, Chapter Nine duty status.[113] Ultimately, the DOD authorized "federal funding for use of the National Guard *in a Title 32 U.S. Code status* to support Hurricane Katrina disaster relief efforts";[114] however, it was unclear whether this only authorized a Title 32 "training" status or a Title 32, Chapter Nine "operational" status.[115]

Thus, after events seemingly tailor-made for the use of the new Title 32, Chapter Nine operational status, the states lacked precedence of its authorized use. Further, DOD had not published the required regulations implementing the authority.[116] Consequently, it appeared that despite Chapter Nine's intent and purpose, it would go unused. Fortunately, on the horizon was even broader and less administratively burdensome legislation allowing for the National Guard to perform domestic operations in a Title 32 status.

B. 2006—Congress Simplifies Title 32 Operational Status Authority

While confusion and frustration regarding the apparent nonuse of the Chapter Nine began to resonate within the states, Congress amended 32 U.S.C. § 502(f) in 2006, allowing for Title 32 status to simply include: "Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."[117] This broad authority simply allows the National Guard to perform any operational mission in a Title 32 § 502(f) status that the President or Secretary of Defense requests.

VI. The Benefits of the Operational National Guard

This even broader authority to use the National Guard in an operational, Title 32 status is a continuing departure from the historical use and funding of the National Guard. The September 11 attacks caused the nation's executive and legislative leadership to reevaluate the possible use of the National Guard in the protection and response to the nation's citizens, rather than a specifics state's citizens. The use of the National Guard in a state controlled, federally funded operational status

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(1) The specific intended homeland defense activities of the National Guard of that State.

(2) An explanation of why participation of National Guard units or members, as the case may be, in the homeland defense activities is necessary and appropriate.

(3) A certification that homeland defense activities are to be conducted at a time when the personnel involved are not in Federal service.

Id.

[110] § 902 ("The Secretary of Defense may provide funds to a Governor to employ National Guard units or members to conduct homeland defense activities that the Secretary, determines to be *necessary and appropriate* for participation by the National Guard units or members, as the case may be." (emphasis added)).

[111] Letter from George Pataki, Governor of New York, to The Honorable Donald H. Rumsfeld, Secretary of Defense (July 7, 2005) (on file with author).

[112] Telephone Interview with Lieutenant Colonel John Joseph, Chief, Administrative Law Division, National Guard Bureau, in Arlington, Va. (Mar. 16, 2005) ("Whether this request was disapproved is unknown [to me]. It was apparently never acted upon.").

[113] Letter from Alabama Governor Bob Riley, to Honorable Donald H. Rumsfeld, Secretary of Defense (Sept. 2, 2005) (on file with author) (seeking approval of "military duty in title 32 USC 901 status for [Alabama National Guard] soldiers and airmen serving on state active duty in support of Hurricane Katrina relief efforts. . . . Currently, our soldiers and airmen are engaged in the protection of vital infrastructure . . . .").

[114] Memorandum, Gordon England, Deputy Secretary of Defense, to Secretary of the Army and Acting Secretary of the Air Force, subject; Hurricane Katrina Relief Efforts (7 Sept. 2005) (emphasis added) (on file with author).

[115] *See* Title 32 "training" versus "operational" status discussion, *supra* note 99.

[116] 32 U.S.C.S. § 903 (LexisNexis 2008).

[117] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 525, 120 Stat. 2083 (2006) (codified at 32 U.S.C. S. § 502(f)(2)(A)). Weapons of Mass Destruction Civil Support Teams (WMD CSTs) were also further authorized to respond to "[A] natural or manmade disaster in the United States that results in, or could result in, catastrophic loss of life or property." *Id.* § 527 (codified at 10 U.S.C. 12,310 (c)(1)(D) (LexisNexis 2008)).

greatly benefits the collective and individual United States in a number of ways. While discussed in detail below, benefits include: restrictions on the use of federal military personnel for law enforcement purposes do not apply; the local authorities maintain control of their National Guards responding within their own local communities; the states receive funding to protect their local resources, structures, and citizens, whose destruction could be a national crisis; and the National Guard personnel benefit from additional and equitable legal protections.

A. The Posse Comitatus Act (PCA) Does Not Apply

The PCA states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.[118]

The PCA, therefore, prohibits the use of the U.S. Army or U.S. Air Force to enforce domestic law without a constitutional exception[119] or an authorizing Act of Congress.[120] As further directed by Congress in 1981,[121] the DOD generally extended the PCA to the U.S. Navy and Marine Corps through regulations.[122] Consequently, military personnel commanded by federal military personnel, such as active component and reserve component members when in federal duty status are subject to the PCA.

Alternatively and importantly, Army and Air National Guard members serving in a SAD or Title 32 status are not commanded by federal military personnel, but by state authorities. Consequently, they are not considered part of the U.S. Army or Air Force, so are not bound by the PCA.[123] The non-application of the PCA to National Guard members in a non-federal status then allows for the use of National Guard personnel, if authorized by state law, to enforce the domestic law in both SAD or Title 32 status.[124] The new authority under Title 32 for the operational use of the National Guard ultimately allows for DOD funding of federally trained and uniformed National Guard personnel to enforce domestic law, which would otherwise be precluded by the PCA if they instead served in their federal status.[125]

B. Local Authorities Remain in Control

As previously mentioned, the DOD recognizes "the primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local governments."[126] The states' National

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[118] 18 U.S.C. § 1385 (2000).

[119] U.S. CONST. art. 4, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

[120] 10 U.S.C. §§ 331–335 (2000).

[121] *Id.* § 375.

[122] U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. 2-1(d) (15 Jan. 1986) [hereinafter DODD 5525.5]; *see also e.g.*, United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (affirming that DODD 5525.5 requires the Navy to comply with the restrictions of the Posse Comitatus Act). The Secretary of the Navy or the Secretary of Defense may grant exceptions to the regulatory prohibitions applying the Posse Comitatus Act to the U.S. Navy or Marine Corps on a case-by-case basis. DODD 5525.5, *supra*, para. E4.3.

[123] *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 16–17 (1972) (Douglas, J., dissenting); United States v. Benish, 5 F.3d 20 (3d Cir. 1993).

[124] National Guard members serving in a State status are subject to state laws pertaining to authorized police functions and powers, which vary between the states. *See, e.g.*, ALA. CODE § 31-2-126 (LexisNexis 2008) (granting "commanding officer of troops in active service of the state to incarcerate and detain, until such person can be turned over the civil authorities . . . ."); GA. CODE ANN. § 38-2-307 (LexisNexis 2008) ("Members of the National Guard, may, at the discretion of the Governor, have the same powers of arrest and apprehension as do law enforcement officers when called to active duty to respond to emergencies . . . ."); LA. REV. STAT. ANN. § 29:7.1 (LexisNexis 2008) ("Military police forces of the active Louisiana National Guard, . . . shall have all of the powers and authority of peace officers necessary to perform law enforcement functions related to and in connection with their duties in the active Louisiana National Guard"); W. VA. CODE § 15-1D-1 (LexisNexis 2008) (granting the Governor power "to order the West Virginia national guard, or any part thereof , into the active service of the State, and to cause them to perform such duty as he shall deem proper); MD. CODE ANN., PUBLIC SAFETY § 13-702(c)(1) (LexisNexis 2008) ("To enforce the laws, a member of the militia in State active duty has all the authority of a peace or law enforcement officer"); S.C. CODE ANN. § 25-3-130 (LexisNexis 2008) ("When the South Carolina State Guard is on active service, the commanding officer and his subordinates shall be, and they are hereby, invested with all the authority of, sheriffs and deputy sheriffs in enforcing the laws of this State.").

[125] This is assuming they are not called out under Chapter 15 of Title 10, U.S. Code.

[126] DODD 3025.12, *supra* note 74, para. 4.1.3.

Guards are locally organized, controlled and commanded state assets that can quickly respond at the governors' calls. This remains true when National Guard members serve in a Title 32 status, as the states are able to call upon and command their federally trained, equipped, and uniformed soldiers to respond to emergencies and events within the state with short notice. This significantly aids the states and local governments in performing their recognized responsibilities.

C. The States Receive Federal (DOD) Funding

As the events of September 11 and Hurricanes Katrina and Rita proved, terrorist attacks or natural disasters within a single state or a few states can be a national crisis, costing both the individual states and the nation dearly. Protecting against a potential national crisis, such as a terrorist attack during a nationally significant event, such as a national sporting event or political gathering, can also be very costly. Importantly, the hosting state and its local governments are generally responsible for providing and funding the security. Since September 11, these threats, or recognition of these threats, have multiplied, homeland defense efforts have intensified, and National Special Security Events[127] have been designated by the Department of Homeland Security.

To provide extra security measures for its citizens to counter these threats, many states have or will call upon their National Guard to provide additional support. If the supporting National Guard forces are funded through Title 32 by the DOD, the states benefit from the cost sharing. Furthermore, when its National Guard members serve in a Title 32 rather than a SAD status, the states are not required to reimburse the federal government for the use of federal equipment.[128]

D. Coverage Under the Federal Torts Claim Act

Generally, National Guard members serving in SAD status are protected by state liability laws.[129] In the alternative, state controlled National Guard members serving in a Title 32 status are covered by the provisions and protections of the Federal Tort Claims Act.[130] This provides for much more consistent and reliable protections for National Guardsmen when operating in the domestic environment.

E. National Guard Soldiers and Airmen Receive Federal Benefits

While in a Title 32 status, National Guard members receive federal retirement points,[131] may be protected by the Servicemembers Civil Relief Act,[132] the Uniformed Services Employment and Reemployment Rights Act,[133] and are entitled

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[127] The Secretary of the Department of Homeland Security, after consultation with the Homeland Security Council, is responsible for designating events as National Special Security Events (NSSEs). Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection, 39 WEEKLY COMP. PRES. DOC. 1816 (Dec. 17, 2003). The Secretary and the Homeland Security Council consider a number of factors when designating an NSSE, such as: (1) the anticipated attendance by dignitaries; (2) size of the event; and (3) significance of event. Dep't of Homeland Security, *Fact Sheet: National Special Security Events* (Dec. 28, 2006), http://www.dhs.gov/xnews/releases/pr_1167323822753.shtm. Once an event is designated an NSSE, the U.S. Secret Service (USSS) assumes the role as lead federal agency for the design and implementation of the operational security plan. *Id*. The USSS partners with federal, state, and local law enforcement and public safety officials with the goal of coordinating participating agencies to provide a safe and secure environment for the event and those in attendance. *Id*. Between 1998 and 29 December 2006, the USSS lead federal security operations at twenty-three NSSEs, including the 2005 Presidential Inauguration, the 2004 Republican and Democratic National Conventions, President Ronald Reagan's State Funeral in 2004 and the last three State of the Union addresses. *Id*.

[128] NGR 500-1, *supra* note 76, para. 3-6a ("When federal property is used by National Guard personnel in a SAD status . . . the state will be liable for reimbursement (or replenishment in kind) to the federal government . . . .").

[129] *See, e.g.*, ALA. CODE § 31-2-89 (LexisNexis 2008) (providing protections for officers or enlisted personnel from liability from civil action or criminal prosecution while in military service to the state "for any act done while in the discharge of his military duty, which act was done in the line of duty.").

[130] The Federal Tort Claims Act includes in its definition of an "[e]mployee of the [federal] government" those "members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32." It further defines "[a]cting within the scope of his office or employment" as "in the case of . . . a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty." 28 U.S.C.S. § 2671 (LexisNexis 2008).

[131] 10 U.S.C. § 12,732(a)(2) (2000).

[132] National Guard members are protected by the Servicemembers Civil Relief Act when serving pursuant to a call to active service authorized by the President or the Secretary of Defense for a period of more than thirty consecutive days under 32 U.S.C. 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. 50 U.S.C. app. § 101(2)(A)(ii) (LexisNexis 2008).

[133] 38 U.S.C. § 4303(13) ("'[S]ervice in the uniformed services' . . . includes active duty, active duty for training, . . . inactive duty training, full-time National Guard duty . . . .").

to federal medical and dental care if they incur or aggravate an injury, illness, or disease in the line of duty.[134] Although the states provide comparable protections for their National Guard members when serving a SAD status as state employees, the extent and application of these protections within the various states are inconsistent. Consequently, the application of federal benefits and protections provides a consistent protective umbrella over National Guard personnel responding domestically.

VI. Conclusion

Following the attacks of September 11, the United States recognized it must prepare for the constant threat of large scale attacks on the homeland. Since that fateful day, Congress, recognizing the National Guard's historic and current domestic operational capabilities, has twice made significant amendments to Title 32. These amendments allow for the expanded, domestic operational use of the National Guard in that federally funded, state controlled Title 32 status. The addition of Chapter Nine to Title 32 in 2004 was a significant shift in the history of the funding of the National Guard to perform the domestic operational mission under state control; however, the chapter authorization requirements were somewhat cumbersome and seemingly went unused. In 2006, Congress simplified and broadened the authority mechanisms for the use of National Guard in a Title 32 status to perform the domestic operational mission under state control.

Most importantly, these amendments have changed the way the nation and the states can use the National Guard in an operational Title 32 status. Consequently, Congress has provided even greater ability for the use of the National Guard to serve in its historical status as the first line of defense of America's homeland.

[134] 10 U.S.C. § 1074(a); *see also* U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-2e (15 Apr. 2005).

A View from the Bench:

Apply the Golden Rule, But Don't Argue It

Colonel Grant C. Jaquith
Military Judge, U.S. Army Trial Judiciary

The Golden Rule Argument

Most of us were taught the Golden Rule as children: "Do to others as you would have them do to you."[1] As a precept promoting civility and professionalism in trial practice, the Golden Rule should be embraced by court-martial advocates.[2] In closing argument, however, the Golden Rule generally must rest unsaid.

The "Golden Rule argument" asks court-martial members to reach a verdict by imagining themselves as either the accused or the victim.[3] The argument is based on the notion that members will be more lenient if they think of the result they would want if they were in the accused's place, but would convict more readily or impose a greater sentence if they stood in the shoes of the victim. Such arguments are "improper and impermissible in the military justice system,"[4] and cannot be made to members or military judges.[5]

Rule for Court-Martial 919

Rule for Courts-Martial (RCM) 919 sets the bounds for closing argument on findings on the merits.[6] Counsel may make "reasonable comment on the evidence in the case, including inferences to be drawn therefrom."[7] Counsel may address the "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence," and "may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses."[8] Expressions of personal opinion,[9]

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[1] *Luke* 6:31 (New Revised Standard 1989); *see also Matthew* 7:12 ("In everything do to others as you would have them do to you; for this is the law and the prophets."). Some variation of the Golden Rule is part of most religions. *See* HUSTON SMITH, THE RELIGIONS OF MAN 351 (Perennial Library 1965) (1958); Susan Ryder, *Bound Together by the Golden Rule* (2005), http://ezinearticles.com/?Bound-Together-by-the-Golden-Rule&id=116042.

[2] "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.5 cmt. (1 May 1992) [hereinafter AR 27-26]. Our system of justice depends on fair competition in the parties' efforts to marshal the evidence for fact-finders. *Id.* R. 3.4 cmt. Reciprocal obligations sometimes are imposed, as in discovery. *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2008) [hereinafter MCM].

[3] *See* BLACK'S LAW DICTIONARY 700 (7th ed. 1999).

[4] United States v. Baer, 53 M.J. 235, 238 (2000). Golden Rule arguments are "universally condemned." United States v. Palma, 473 F.3d 899, 902 (8th Cir. 2007) (quoting Lovett *ex rel.* Lovett v. Union Pac. R.R. Co., 201 F.3d 1074, 1083 (8th Cir. 2000)). *See generally* Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. FED. 333 (1984). Golden rule arguments have been characterized as errors of intermediate seriousness, sometimes warranting reversal. J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 93–94 (1986).

[5] *See* United States v. Nellums, 21 M.J. 700, 701 (A.C.M.R. 1985) (sentencing argument asking the military judge whether he would like the accused to walk the streets in his community or neighborhood held improper). Counsel addressing arguments to a military judge are not relieved of the obligation to conduct themselves "with the same high standards as [they] would before court members, notwithstanding the presumption that a military judge exercises discretion in distinguishing between proper and improper argument." *Id.*

[6] MCM, *supra* note 2, R.C.M. 919.

[7] *Id.* R.C.M. 919(b).

[8] *Id.* R.C.M. 919(b) discussion.

[9] United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128, 129–30 (C.M.A. 1977); United States v. Tanksley, 7 M.J. 573, 577 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980); *see* United States v. Zehrbach, 47 F.3d 1252, 1265–66, 1265 n.11 (3rd. Cir. 1995) ("Although counsel may state his views of what the evidence shows and the inferences and conclusions that the evidence supports, it is clearly improper to introduce information based upon personal belief or knowledge."). Prefacing assertions with "the Government contends" or "the Government submits" is preferable to "I think" or other uses of the personal pronoun "I." *Tanksley*, 7 M.J. at 579; *cf.* United States v. Freisinger, 937 F.2d 383, 385–87 (8th Cir. 1991) (noting that the use of the personal pronoun "I" is not necessarily improper, but conveying a personal belief as to a witness's credibility is, and no less so when the preface is "I suggest that" or "I submit that."). It is acceptable to argue "'you are free to conclude,' 'you may perceive that,' 'it is submitted that,' or 'a conclusion on your part may be drawn.'" United States v. Fletcher, 62 M.J. 175, 180 (2005) (quoting United States v. Washington, 263 F. Supp.

vouching for the credibility of witnesses,[10] comments calculated to inflame passions or prejudices,[11] and statements not supported by evidence[12] are among the arguments not permitted.[13] These rules for closing argument apply equally to defense and trial counsel.[14] Though RCM 1001(g),[15] which governs sentencing arguments, does not repeat or refer to the standards spelled out in the discussion of RCM 919(b), that discussion sets forth general principles that may be applied to sentencing arguments.[16]

Pursuit of a Perspective of Personal Interest

Golden Rule arguments are impermissible because urging court members to put themselves in the place of a victim, a near relative of a victim, or a potential victim, invites the members "to cast aside the objective impartiality demanded of [members] and judge the issue from the perspective of personal interest."[17] If a court member had such an interest in the case, the member would be disqualified.[18] Asking members to picture themselves or their families as crime victims, and thus to feel personal interest in the case, is also foreclosed as "'calculated to inflame the passions or prejudices'" of the members.[19]

2d 413, 431 (D. Conn. 2003)). The most appropriate and persuasive preface is "the evidence shows," without characterizing the contention as a personal opinion or belief. *Cf.* Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 269 (5th Cir. 1994) ("remarks of counsel should more appropriately have been phrased 'the evidence shows' rather than 'I believe'"); United States v. Thiederman, Nos. 91-30308, 30324, and 30327, 972 F.2d 1347, tbl. (9th Cir. 1992) (prosecutor should have prefaced argument with "as the evidence shows").

[10] *E.g.*, *Fletcher*, 62 M.J. at 179–80.

[11] *E.g.*, United States v. Clifton, 15 M.J. 26, 30 (C.M.A. 1983) ("[I]t is improper for counsel to seek unduly to inflame the passions or prejudices of court members.").

[12] *Id.* at 29–30. There is an exception to this general prohibition that permits comment on matters of common knowledge. *Fletcher*, 62 M.J. at 183.

[13] MCM, *supra* note 2, R.C.M. 919(b) discussion. There are additional limitations on arguments by trial counsel, who may not comment on the accused's exercise of the right against self-incrimination or the right to counsel, the failure of the defense to call witnesses, or the probable effect of findings on relations between the military and civilian communities. *Id.*

[14] *See* United States v. Young, 470 U.S. 1, 8–9 (1985) ("It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds."). The American Bar Association Standards for Criminal Justice prescribe the same standards for arguments to the jury by prosecutors and defense counsel. For prosecutors, Standard 3-5.8 provides:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-5.8, 106 (3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/pfunc_blk.html#5.8. The standard for jury argument by the defense, 4-7.7, substitutes "defense counsel" for "the prosecutor," but otherwise uses exactly the same language. *Id.* Standard 4-7.7. As Judge Learned Hand declared in *United States v. Wexler*, "Courts . . . recognize . . . that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction." 79 F.2d 526, 530 (2d Cir. 1935). There are few reported cases addressing improper defense arguments, because an acquittal is not subject to review and a conviction will not be reversed for an improper comment by defense counsel not amounting to constitutionally ineffective assistance. *See Young*, 470 U.S. at 9 n.6; United States v. Fisher, 17 M.J. 768, 772 (A.F.C.M.R. 1983), *rev'd on other grounds*, 24 M.J. 358 (C.M.A. 1987); Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1315 (1996).

[15] MCM, *supra* note 2, R.C.M. 1001(g).

[16] *See* United States v. Ferger, No. 97 00301, 1997 WL 766471, at *1 n.2 (N-M. Ct. Crim. App. Oct. 30, 1997).

[17] United States v. Wood, 40 C.M.R. 3, 8 (C.M.A. 1969).

[18] *Id.*; *see* MCM, *supra* note 2, R.C.M. 912(f)(1) discussion.

[19] *See* United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1977) (quoting the *American Bar Association's Standards for Criminal Justice, The Prosecution Function* §§ 5.8(c), (d) (1971)); United States v. Moore, 6 M.J. 661, 664 (A.F.C.M.R. 1978) (asking members to picture their families as crime victims was inflammatory). Inflammatory arguments are prohibited by RCM 919(b). MCM, *supra* note 2, R.C.M. 919(b) discussion.

Examples of Golden Rule sentencing arguments concerning victims declared improper by military courts include asking the members:

- How they would feel if their father or brother had been slain as the victim was (by weapons fire in response to a false alarm);[20]
- If they would want the accused, a scoutmaster convicted of taking indecent liberties with three boys in his Boy Scout troop, to have access to other young boys, the members' sons, or their friends' sons;[21]
- To put themselves in the position of a Soldier who was pinned to the ground and helpless as the accused and two other men took turns raping his wife;[22]
- How many of them go home at night hoping that none of their subordinates or family members meet with someone like the accused who has drugs ready for sale;[23]
- If the victim was their son, would they let him say he did not want to go to the doctor or force him to get medical care;[24] and
- To imagine being the murder victim, who was lured into the home of another Marine, beaten to unconsciousness by three Marines who used fists, shod feet, a baseball bat, and a stun gun, then bound, taken to a remote area, and executed with a single pistol shot to the head.[25]

Asking members to put themselves in the place of the accused also improperly seeks judgment colored by personal interest.[26] In *United States v. Roman*, the district court granted a government motion *in limine* to preclude the defendant from making a golden rule appeal to the jury.[27] The defendant was a police officer charged with filing fraudulent tax returns that excluded additional money he earned working part-time providing security at a "gentlemen's club."[28] He wanted to ask the jury to put themselves in his shoes and think, "There but for the grace of God go I."[29] The court of appeals affirmed and held the argument to have been correctly foreclosed.[30]

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[20] United States v. Begley, 38 C.M.R. 488, 495 (A.B.R. 1967).

[21] *Wood*, 40 C.M.R. at 8; *see also* United States v. Cabrera-Frattini, 65 M.J. 950, 955 (N-M. Ct. Crim. App. 2008) (holding trial counsel's sentencing argument in a case involving carnal knowledge and indecent acts with a child—that the members' children were not safe on base with the accused around—to be improper, but not plain error).

[22] *Shamberger*, 1 M.J. at 379.

[23] *Moore*, 6 M.J. at 663–64.

[24] United States v. Robertson, 37 M.J. 432, 439 (C.M.A. 1993) (Gierke, J., concurring).

[25] United States v. Baer, 53 M.J. 235, 236–37 (2000). Unpublished military cases illustrating this type of improper argument include *United States v. Lanz*, No. 96 01460, 1998 WL 35491, at * 1 (N-M. Ct. Crim. App. Jan. 13,1998) (finding no plain error in admittedly improper argument of trial counsel who asked members in case of indecent acts involving children: "What if these were your children?"); United States v. Harris, No. 94 01947, 1996 WL 927867, at *1–2 (N-M. Ct. Crim. App. Jan. 23, 1996) (sentence set aside because trial counsel asked members to put themselves in the place of sodomy and indecent assault victims); United States v. Aiple, No. 28642, 1990 WL 149843, at *1 (A.F.C.M.R. Sept. 7, 1990) (sentence reassessed based on sentencing argument upon conviction of a fire fighter of using drugs; assistant trial counsel asked members, "Would you want [the accused] on duty if you had to report a fire at your house?").

[26] *See* United States v. Roman, 492 F.3d 803, 805–06 (7th Cir. 2007); United States v. Teslim, 869 F.2d 316, 327–28 (7th Cir. 1989) (in commenting on the evidence that police officers told the defendant that he could stay with his luggage while a drug detection dog was brought to check it, the prosecutor improperly began to ask jurors, "if it happened to you and you had nothing to hide—"); Jackson v. Roper, No. 4:05CV1090 JCH, 2006 WL 3694635, at *3 (E.D. Mo. Dec. 14, 2006) ("At least three times, [defense] counsel improperly asked the jury to place themselves at the crime scene and consider what they would do in [defendant's] place.").

[27] *Roman*, 492 F.3d at 805.

[28] *Id.* at 803–04.

[29] *Id.* at 805.

[30] *Id.* at 806.

An appeal to the pecuniary interests of members is another inappropriate invocation of personal interest.[31] A trial counsel could not properly argue that a larceny from the post exchange, commissary, or any military community organization or fund was a theft from the members themselves, *i.e.*, "when the accused stole that money, he stole it from you," for that would constitute an appeal to the members' personal financial interests.[32]

This issue may arise via victim impact testimony, too. When the father of a rape victim was asked to relate his reaction when his daughter called to advise him that she had been raped, he said, "I pray right now that all of you that sit here don't ever have to get a call like that."[33] The court concluded the statement was a spontaneous emotional response that did not constitute an attempt by counsel to ask the court members to put themselves in the position of the victim's father.[34] In contrast, the following direct appeal by the mother of another victim was considered asking the members to put themselves in the place of the parents and held impermissibly inflammatory:

> I don't know how many of you are parents. I'm sure some of you are. I hope that you put that person away for as long as possible so that you or others don't have to live through the nightmare we have because . . . he will do it again, and I hope it's not your family or someone you love or care about. Please, for your own families and for others.[35]

Keeping the Trial Golden

Opposing counsel must be vigilant during closing arguments, for any objections to improper argument not made before the military judge begins to instruct the members are waived.[36] Without a timely objection during trial, appellate review is only for plain error—obvious error resulting "in material prejudice to a substantial right of the accused."[37] In assessing prejudice, the court balances: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[38] A defense counsel's failure to object to improper argument may constitute ineffective assistance.[39]

Improper argument thus does not always constitute reversible error, but may have other consequences. An objection by opposing counsel disrupts a closing argument and, if sustained, may adversely affect how the entire argument is received by the members. If the aborted argument was a discomforting effort to get the members to put themselves in the place of the

[31] *See* United States v. Ortega, No. 30776, 1995 WL 132055, at *1 (A.F. Ct. Crim. App. Mar. 17, 1995) (finding it improper to argue that accused, "in effect, stole from the court members when he shoplifted from the base exchange"); United States v. Palma, 473 F.3d 899, 902 (8th Cir. 2007) (improper to invoke jurors' status as taxpayers in case of Social Security fraud by arguing that the defendant lied and got money from the jurors) (collecting cases); *see also* Judy E. Zelin, Annotation, *Prosecutor's Appeal in Criminal Case to Self-Interest or Prejudice of Jurors as Taxpayers as Ground for Reversal, New Trial, or Mistrial*, 60 A.L.R. 4TH 1063 (1988).

[32] *See Ortega*, No. 30776, 1995 WL 132055, at *1.

[33] United States v. Moses, No. 32039, 1996 WL 685835, at *3 (A.F. Ct. Crim. App. Nov. 27, 1996).

[34] *Id.*

[35] United States v. Martinez, No. 96 01990, 1998 WL 351513, at * 1–2 (N-M. Ct. Crim. App. June 23, 1998).

[36] MCM, *supra* note 2, R.C.M. 919(c), R.C.M. 1001(g). Military judges likewise "should be alert to improper argument and take corrective action when necessary." *Id.* R.C.M. 919(c) discussion. *See* United States v. Erickson, 65 M.J. 221, 223–25 (2007). In a judge alone trial, the military judge is presumed to know and follow the law distinguishing between proper and improper arguments absent clear evidence to the contrary. *Id.*

[37] United States v. Fletcher, 62 M.J. 175, 179 (2005).

[38] *Id.* at 184.

[39] *See, e.g.*, Girts v. Yanai, 501 F.3d 743, 756–58 (6th Cir. 2007) (failure to object to comment on defendant's failure to testify); Burns v. Gammon, 260 F.3d 892, 896–98 (8th Cir. 2001) (failure to object to argument that jury should consider defendant's exercise of his right to trial); Newlon v. Armentrout, 693 F. Supp. 799, 810–11 (W.D. Mo. 1988) (failure to object to prosecutor's argument that expressed personal belief, compared defendant to mass-murderers, and questioned whether jury would kill the defendant if he was going to harm their children), *aff'd*, 885 F.2d 1328 (8th Cir. 1989).

accused or the victim, members may ask themselves, "What was this lawyer trying to pull?" The argument may open the door to an otherwise impermissible response by opposing counsel.[40] Improper argument may also violate ethical rules.[41]

An improper argument is not redeemed or saved by counsel's good intentions.[42] As the Court of Appeals for the Armed Forces admonished in *United States v. Baer*:

> What the trial counsel may or may not have calculated in making an improper argument is not as important as the actual direction, tone, theme, and presentation of the argument as it is delivered. Trial counsel must therefore actively take responsibility upon themselves to avoid all improper argument, rather than to rely on their own noble intentions as a defense against the potential consequences of such arguments. The best and safest advocacy will stay well clear of the "gray zone."[43]

Permissible Personalizing

Not every effort to personalize a case in closing argument has been prohibited. Courts have allowed counsel to ask jury members to put themselves in the place of a witness.[44] In *United States v. Kirvan*, the court concluded that "golden rule" cases were inapplicable to a prosecution request that the jury put itself in the place of an eyewitness and held that "the invitation [was] not an improper appeal to the jury to base its decision on sympathy for the victim but rather a means of asking the jury to reconstruct the situation in order to decide whether a witness' testimony is plausible."[45]

Prosecutors also have been allowed to ask the jury to put themselves in the place of the victim or the defendant if the purpose is not to inflame the passions of the jury or to urge a decision based on sympathy, but is merely to facilitate the evaluation of the evidence. In *Brown v. State*, asking the jury to put themselves in the victim's place in judging the believability of her testimony concerning the defendant's attack was considered proper.[46] In *State v. Bell*, the prosecutor sought to discredit the defendant, who had offered an innocent explanation of his actions on the night he was accused of shooting a police officer.[47] In rebuttal argument, the prosecutor asked the jurors to put themselves in the defendant's position that night and consider what they would have done and said if they were innocent.[48] The court held that the prosecutor was asking the jurors to draw inferences from the evidence based upon their judgment of how a reasonable person would act under the circumstances, including inferring consciousness of guilt from the defendant's deception, and thus was within bounds.[49] In *United States v. Moreno*, asking the jurors to put themselves in the place of the defendant was deemed an

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[40] United States v. Doctor, 21 C.M.R. 252, 260 (C.M.A. 1956) ("There are numerous authorities to the effect that a prosecutor's reply to arguments of defense may become proper, even though, had the argument not been made, the subject of the reply would have been objectionable."); United States v. Haney, 64 M.J. 101, 113–16 (2006) (Crawford, J., concurring in part); *see* United States v. Robinson, 485 U.S. 25 (1988) (defense argument that government had unfairly denied defendant the opportunity to explain his actions invited prosecution response that defendant could have taken the stand); United States v. Young, 470 U.S. 1, 4–14 (1985) (though invited response may not be prejudicial error, this doctrine should not encourage inappropriate responses in kind; the better remedy is for the judge "to deal with the improper argument by the defense counsel promptly and thus blunt the need for the prosecutor to respond").

[41] *See* AR 27-26, *supra* note 2, R. 3.4(e) ("A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."); *see also Young*, 470 U.S. at 14 (closing arguments by both prosecutor and defense counsel that included personal opinions and inflammatory attacks on opposing counsel "crossed the line of permissible conduct established by the ethical rules of the legal profession").

[42] United States v. Baer, 53 M.J. 235, 239 (2000).

[43] *Id.*

[44] *See* United States v. Kirvan, 997 F.2d 963, 964 (1st Cir. 1993); State v. Bell, 931 A.2d 198, 212–15 (Conn. 2007); Commonwealth v. Stafford, 749 A.2d 489, 498–99 (Pa. Super. Ct. 2000).

[45] *Kirvan*, 997 F.2d at 964.

[46] 839 So.2d 597, 601 (Miss. App. 2003).

[47] *Bell*, 931 A. 2d at 212–13.

[48] *Id.*

[49] *Id.* at 214–15.

acceptable attempt to get them to focus on the evidence in deciding whether the defendant was unaware of her co-defendant boyfriend's drug trafficking, as she claimed, notwithstanding the evidence that she repeatedly "gift-wrapped" cocaine for delivery to his customers.[50] In *United States v. Abreu*, the prosecutor addressed whether a defendant made substantial income from cocaine distribution by asking jurors: "When you left your house this morning, did you leave $23,000 on the bed? Did you leave $2,500 in the headboard of your bed? Did you leave $500 in the kitchen drawer? Did you leave $26,000 in your apartment when you left this morning?"[51] The court declared this argument merely a call for the jury to employ common sense in evaluating and drawing reasonable inferences from the evidence.[52]

Personalized arguments aimed at relevant sentencing factors have also been allowed. A sentencing "argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence."[53] Asking the members to imagine the victim's circumstances "is conceptually different from asking them to put themselves in the victim's place."[54] Asking whether the members would want an accused found guilty of wrongful appropriation of money from a patients' trust fund to be the bookkeeper of a fund over which they were responsible – and urging a punitive discharge if the answer was "no"—was held a fair comment on the risk of recidivism in *United States v. Berry*.[55] In *United States v. Williams*, the following words were deemed an acceptable rhetorical question regarding the specific deterrence theory of sentencing and the appropriate duration of confinement for the accused: "you must determine how long it will be until you all, representing society, want this rapist walking among your daughters. . . . How many days do you want to go by before you let this man out among your daughters—our daughters."[56] Asking the jury to "imagine [being] in your own living room not bothering a soul on a Saturday afternoon . . . [when] a total stranger, because you got in his way, destroys you," was upheld, in *Kennedy v. Dugger*, as permissible comment on future dangerousness.[57]

Personalizing the victim or the accused is perilous, however. Counsel not adequately mindful of the distinction between what is permitted and what is not may slide across the line in the heat of the argument[58] That line may be hard to pinpoint. Courts consider arguments in their entirety, viewed in the context of the whole court-martial.[59] An argument deemed on the permissible side of the line in the context of one case may be declared out of bounds when the circumstances are slightly different.[60]

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[50] 947 F.2d 7, 8 (1st Cir. 1991).

[51] 952 F.2d 1458, 1470 (1st Cir. 1992).

[52] *Id.* at 1471 (conducting plain error review in the absence of a contemporaneous objection).

[53] United States v. Baer, 53 M.J. 235, 238 (2000); *see* United States v. Edmonds, 36 M.J. 791, 792–93 (A.C.M.R. 1993) (asking members to imagine the fear of a robbery victim is permissible); Basile v. Bowersox, 125 F. Supp. 2d 930, 951 (E.D. Mo. 1999) (prosecutor asking jury to imagine the terror when the victim was aware of the defendant behind her, grabbing her and then shooting her twice in the back of the head constituted reasonable inferences from the evidence, not improper personalization); State v. Jones, 595 S.E.2d 124, 141 (N.C. 2004) (proper to ask the jury to imagine what the victims were thinking); *see also* Grossman v. McDonough, 466 F.3d 1325, 1348 (11th Cir. 2006) (permissible for prosecutor to tell jury that victim endured terrorizing blows to the head and there was "terror and pain" in the victim's voice). *Compare* Merck v. State, 975 So. 2d 1054, 1062–65 (Fla. 2007) (finding prosecutors sentencing comment that "[o]ne has to wonder . . . how kind [the victim] felt when the Defendant jabbed this [knife] into his throat and twisted it" and question regarding how many thoughts went through jurors heads in a time equivalent to the victim's last moments constituted permissible descriptions of the victim's injuries and suffering based on facts in evidence and common sense inferences from those facts), *with* Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) ("inviting the jury to imagine the victim's final pain, terror, and defenselessness" has long been prohibited in Florida).

[54] *Baer*, 53 M.J. at 238; *accord* United States v. Melbourne, 58 M.J. 682, 690 (N-M. Ct. Crim. App. 2003); *Edmonds*, 36 M.J. at 793.

[55] 37 C.M.R. 638, 640 (A.B.R. 1967) (also finding waiver for failure to object).

[56] 23 M.J. 776, 779, 786–87 (A.C.M.R. 1987); *see also* United States v. Sipp, No. 94 01475, 1995 WL 934969, at *1 (N-M. Ct. Crim. App. Sept. 15, 1995).

[57] 933 F.2d 905, 913 (11th Cir. 1991).

[58] *Baer*, 53 M.J. at 238.

[59] *Id.*; *see* United States v. Robinson, 485 U.S. 25, 33 (1988) (holding that "prosecutorial comment must be examined in context").

[60] The difficulty in predicting whether a particular argument will be deemed an improper request for the members to put themselves in the place of the victim is illustrated by comparing the argument held impermissible in *Baer*, 53 M.J. at 237–38, with the argument allowed in *Dugger*, 933 F.2d at 913.

The Orator Is Well Prepared

A closing argument is as good as the evidence and preparation on which it is based, for which theatrics are no substitute.[61] The cornerstones of effective trial preparation include a thorough investigation of the facts, comprehension of the elements of the offense, analysis of how each element can be proven by admissible evidence, and consideration of how the case will be presented to the fact-finder in closing argument.[62] In crafting a case presentation, counsel must consider how the members or the judge will view the accused and any victim of the charged crime. Trial counsel may want the members to identify with a victim, a witness, or the command, while defense counsel seeks an understanding of the accused's perspective that will yield a not guilty verdict or minimize the sentence. The prohibition of Golden Rule arguments should pose little problem in this quest for empathy. Counsel remain free "to comment earnestly and forcefully on the evidence" and reasonable inferences that may be drawn from it,[63] using "blunt and emphatic language."[64] Arguments that evoke strong emotions or tend to be inflammatory may be appropriate if grounded in evidence in the record and legitimate merits or sentencing concerns.[65]

The difference between what is permitted and what is not is more than pedantic. The lawyer's tools are words carefully chosen based on knowledge of the facts and applicable law. Ignorance of the rules or clumsy word choices may result in an improper argument, but a little thought and recasting can convert an idea for an impermissible argument into an effective one. Would a description of the circumstances of the gang rape charged in *United States v. Shamberger*,[66] including the proximity and restraint of the victim's husband, be less powerful without asking the members to put themselves in the husband's position? Not in the hands of an effective advocate who told the story with every detail found in, or reasonably inferred from, the evidence.

Conclusion

You can move the members to walk a mile in the shoes[67] of the accused or feel the pain of a crime victim without an express invitation (that might derail your effort, immediately or on appeal), by focusing on the details from the outset, gathering and presenting the evidence upon which your arguments will be based, and then telling the members what the evidence shows in vivid language appropriate to the circumstances. The Golden Rule for advocates is: prepare—and treat others the way you want to be treated.

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[61] *See* Joseph F. Anderson, Jr., *The Lost Art: An Advocate's Guide to Effective Closing Argument*, 48 U.S. ATTY'S BULL. 3, 19 (Sept. 2006).

[62] "Whether prosecutor or defender, the advocate should be thinking about the closing argument from the time that involvement in the case begins." *Planning Closing Argument*, 2 CRIM. PRAC. MANUAL § 57:2 (West 2007).

[63] United States v. Doctor, 21 C.M.R. 252, 259 (C.M.A. 1956).

[64] United States v. Edmonds, 36 M.J. 791, 792 (A.C.M.R. 1993); United States v. Williams, 23 M.J. 776, 779 (A.C.M.R. 1987).

[65] *See Doctor*, 21 C.M.R. at 259; *Edmonds*, 36 M.J. at 792; *Williams*, 23 M.J. at 779.

[66] 1 M.J. 377, 379 (C.M.A. 1976).

[67] JOE SOUTH, *Walk a Mile in My Shoes*, *on* THE GAMES PEOPLE PLAY (Lowery Music Co. 1969).

THE NUCLEAR SPHINX OF TEHRAN[1]

REVIEWED BY MAJOR TOM F. JASPER JR.[2]

Soon the newly elected president declared his goal was to "establish an advanced, powerful, and exemplary society, so that it becomes a blueprint for the people of the world and thus ultimately serves as a platform for the reappearance of the Mahdi." Ahmadinejad doesn't want to wait for the Mahdi—he wants to hasten his arrival.[3]

I. Introduction

The Nuclear Sphinx of Tehran provides an academic account of Mahmoud Ahmadinejad's rise to President of Iran,[4] his subordinate role to Iran's Ayatollah,[5] and the paramount role Islamic religion plays regarding Iranian nuclear policy.[6] Author Yossi Melman is an Israeli expert on Israeli intelligence who has written numerous books on terrorism and covert diplomacy.[7] Co-author Meir Javedanfar is an Iranian-born political analyst.[8] The authors attribute most of the book's facts and findings to anonymous intelligence officials and nuclear specialists due to the material's sensitive nature.[9] Despite this concern, the authors' investigative reputations, balanced perspectives, and unique insights bring credibility to this book.[10]

At first glance, the book's title and jacket give the strong impression that this volume will focus exclusively on Mahmoud Ahmadinejad and his pursuit of nuclear weapons.[11] However, this is a misleading assumption. *The Nuclear Sphinx of Tehran* actually offers a much deeper account of the often misunderstood political underpinnings of Iranian policies while also suggesting a rationale for Iran's relentless pursuits to acquire nuclear capability. Specifically, this book artfully scrutinizes Iran's recent nuclear shenanigans with the international community, covers their suspected terrorist involvements, and provides ways for the international community to deal with Iran's nuclear program. Most importantly, the book's thesis enlightens the reader on the paramount role the Shia Islamic religion plays over all Iranian foreign affairs and nuclear policies. At a time when Iran is constantly in the headlines due to their suspicious nuclear activities, coupled with speculation over what makes Iran tick, this book could not be more relevant to a military audience.

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[1] YOSSI MELMAN & MEIR JAVEDANFAR, THE NUCLEAR SPHINX OF TEHRAN (2007).

[2] U.S. Marine Corps. Written as partial completion of an LL.M., 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va.

[3] MELMAN & JAVEDANFAR, *supra* note 1, at 46.

[4] *Id.* at 21–41.

[5] *Id.* at 145.

[6] *Id.* at 41–57.

[7] Langtons International Agency, *Nonfiction Authors*, http://www.langtonsinternational.com/nonfiction.html (last visited May 29, 2008.). Yossi Melman is an Israeli writer and journalist. *Id.* Receiving his B.A. from Hebrew University in Jerusalem, he was also a Nieman Fellow at Harvard. *Id.* Melman is currently an intelligence correspondent with *Haaretz* and considers himself a left-wing Israeli. The Center for Public Integrity, *ICIJ Member Biographies*, http://www.icij.org/icij/bios.aspx?act=bios (last visited May 29, 2008).

[8] Meir Javedanfar, *Nukes Trouble in Paradise*, Oct. 15, 2005, http://www.iranian.com/Opinion /2005 /October/Syria/index.html. Meir Javedanfar is an Iranian born and Iranian and British educated Middle East analyst based in Tel Aviv. Meepas.com, *The Middle East Analyzed*, http://www.meepas.com/aboutmeepas.htm (last visited May 29, 2008). Javedanfar has extensive experience in the analysis of Middle Eastern economic and political issues. *Id.* He is the Director of the Middle East Economic and Political Analysis Company. *Id.*

[9] MELMAN & JAVEDANFAR, *supra* note 1, at ix. Very few sources agreed to be named and most demanded anonymity. *Id.* These sources were Iranian professionals from both inside and outside Iran. *Id.*

[10] Meepas.com, *The Middle East Analyzed*, http://www.meepas.com/meepasandmedia.htm (last visited May 29, 2008).

[11] MELMAN & JAVEDANFAR, *supra* note 1, at front cover.

II. Analysis

The first three chapters are entirely dedicated to describing President Ahmadinejad's modest beginnings, educational background, and ambitious professional and political careers.[12] It is compelling to learn that President Ahmadinejad was raised in a poor, rural area and that his family made numerous sacrifices to educate him, which allowed him to earn a PhD in engineer traffic planning (traffic is a huge problem in Tehran).[13] The authors successfully develop President Ahmadinejad's ambitious personality in these beginning chapters, which sets a captivating tone for the remainder of the book. The authors provide detailed facts on how he was elected to president largely on a promise to attack Iranian poverty and eliminate governmental corruption.[14] It becomes abundantly clear why the authors dedicated so much of the book to President Ahmadinejad's religious influence during his rise to Iranian President. Ostensibly, the authors present President Ahmadinejad's personal background to show that he is a man who has always succeeded, overcoming great odds in his life, because of one primary personality trait: self-determination. This is critically important to understand because it describes how President Ahmadinejad views Iran relative to the outside international community. In reality, he views Iran like he views himself, an overwhelming underdog that can overcome significant challenges when faced against insurmountable odds. The authors present President Ahmadinejad as a man who is a proven winner and credible threat. Accordingly, he should be taken very seriously by the international community.

The book's thesis begins to really develop in chapter two when reading about President Ahmadinejad's religious training and deep spiritual convictions that stem from the riveting religious story of a Shiite Messiah named Mahdi.[15] The book's thesis is that Iran's leadership is devoted to expediting Mahdi's resurrection by becoming an advanced and powerful society; Iran's nuclear proliferation is the means to that end. Specifically, Melman and Javedanfar imply that President Ahmadinejad's regime is obsessed with making Iran a strong country, which would accelerate Mahdi's return and ultimately establish an Islamic dominated world republic.[16] The more daunting proposition implied by the authors is President Ahmadinejad's fervor to cause an international crisis, sacrifice his own life for spiritual perfection, and thereby become a religious martyr in exchange for an ultimate Islamic world empire.[17] To support their thesis, the authors expertly describe how President Ahmadinejad becomes closely associated with the Hojjatieh society and its messianic movement, which is inspired by Mahdi.[18] Melman and Javedanfar further detail that President Ahmadinejad makes few decisions without his closest advisor, Mojtaba Samare Hashemi, who also subscribes to the same religious principle.[19] Both President Ahmadinejad and Hashemi strictly adhere to the religious teachings of a messianic Shia cleric named Mesbah Yazdi, who maintains that Muslims can not compel Mahdi's return and the end of the world; they can only "strive to hasten it" by becoming the model society for humankind.[20] In essence, Yazdi maintains that Iran should cultivate nuclear production to become a powerful country and thus induce Mahdi's presence and ultimate apocalypse.

The notion of President Ahmadinejad's martyrdom is also grounded in his religious view that the natural world is at the absolute bottom of existence, which is illustrated by the martyrdom story of Imam Hussein.[21] President Ahmadinejad's regime admires the holy story of Imam Hussein since Hussein fought courageously to death for his Islamic cause with a small army of seventy-two against an army of four thousand.[22] Imam Hussein's bravery inspires Iran's religious leadership by exemplifying that an underdog like Iran must battle to death against a much larger infidel international community to uphold

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[12] *Id.* at 1–6 (discussing his family background and society status), 4–9, 28–57 (discussing the importance of the Islamic Shiite religion in President Ahmadinejad's life), 9–10 (generally discussing President Ahmadinejad's early success as a traffic engineer and career as Mayor of Tehran).

[13] *Id.* at 3–5.

[14] *Id.* at 24, 37.

[15] *Id.* at 42–57. The advent of Mahdi is not a universally accepted concept in Islam. Looklex.com, *Muhammad al Mahdi*, http://lexicorient.com/e.o/12thimam.htm (last visited May 29, 2008). There are basic differences among different sects of Muslims about the timing and nature of his advent and guidance. *Id.* Most Muslims believe that the Mahdi will change the world into a perfect and just Islamic society alongside Jesus. *Id.*

[16] MELMAN & JAVEDANFAR, *supra* note 1, at 46.

[17] *Id.* at 51.

[18] *Id.* at 45.

[19] *Id.* at 47.

[20] *Id.* at 45.

[21] *Id.* at 51–52.

[22] *Id.*

Islamic religious convictions. By providing these two straight-forward religious accounts, the authors skillfully manage to reinforce their theme that Iran is currently led and driven by the Islamic Shiite religion.

Just as it seems the book is going down the one-lane President Ahmadinejad religion inspired track, it quickly shifts gears by giving a historical framework on Iran's past and present nuclear programs.[23] One criticism of the book is that the first third is exclusively dedicated to President Ahmadinejad's life and belief system, and without notice or smooth transition, it suddenly shifts into political gamesmanship between Iran and the international community over Iran's nuclear programs and the Ayatollah's supreme authority in Iran. Even with these twists and turns, the reader quickly catches on and resumes interest. The unexpected topic shift to Iran's nuclear program and the Ayatollah's surprising superior influence quickly becomes relevant when learning that President Ahmadinejad is not working alone to achieve nuclear prowess.

Ironically, Iran's leadership possessed a tight grip on the reigns of Iranian nuclear ambition long before President Ahmadinejad came to power.[24] Melman and Javedanfar underscore that Iran's efforts to develop nuclear weapons are anchored in its history, beginning when the United States loyally supported the Shah of Iran's nuclear efforts nearly forty years ago.[25] Notably, the book impresses that President Ahmadinejad neither possesses the power to single-handedly order military attacks or principally control Iran's nuclear program.[26] Rather, the Supreme Leader, Ayatollah Seyyed Ali Khamenei, calls the shots concerning Iran's nuclear pursuits.[27] Interestingly, the authors assert that Ayatollah Khamenei is much more pragmatic since he does not desire to acquire nuclear arms nor start an international crisis.[28] However, the book's thesis that Shiite Islamic ideology dominates Iran's nuclear policy is supported again when analyzing Ayatollah Khamenei's Fatwa (religious decree) against nuclear weapons provided to the International Atomic Energy Agency (IAEA) in 2005.[29] At first, Ayatollah Khamenei's declaration appears legitimate and comforting. Whether intended or not, the authors quickly dispel this peaceful posture by educating the reader on the Shiite concept of *taghiye*, which condones lying for self-preservation.[30] By using such religious deceit, justified by Islamic ideology, the logical conclusion offered is that Ayatollah Khamenei is appeasing the international community, creating confusion, and stalling for more time to acquire nuclear weaponry so Iran can expedite Mahdi's return to establish an Islamic world republic.

The remainder of the book focuses on the trials and tribulations of the Iranian nuclear saga and its numerous Treaty on the Non-Proliferation of Nuclear Weapons violations; specifically, Iran's failures to report plutonium experiments and hidden nuclear sites that were discovered by IAEA investigators and Israeli and United States intelligence agencies.[31] To their credit, the authors provide detailed accounts into both Israel and the United States' dealings with Iran's nuclear efforts over the past twenty-five years and offer several logical proposals as to how the international community may cope with Iran's nuclear production.[32] Melman and Javedanfar give a well-developed, compelling account of how Iran artfully engages in deceit and concealment of their hidden network of nuclear installations beyond the reach of the IAEA as well.[33] Again, the authors' thesis is reinforced in these chapters. It is illogical to conclude that Ayatollah Khamenei can deny his desire of nuclear production on religious grounds and then allow his country to engage in evasive tactics with international nuclear inspectors. In fact, the authors firmly establish that Ayatollah Khamenei is a hypocrite for allowing President Ahmadinejad to espouse Iran's inherent right to nuclear capability while he consistently rejects nuclear proliferation efforts to the outside world.[34] Perhaps, the real "Sphinx of Tehran" is not President Ahmadinejad, but rather Ayatollah Khamenei himself. He is

[23] *Id.* at 73–87.

[24] *Id.* at 131–45.

[25] *Id.* at 83–85.

[26] *Id.* at 145.

[27] *Id.*

[28] *Id.* at 98.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 111, 126–27. *See* 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (May 2–27, 2005), http://www.un.org/events/npt2005/npttreaty.html (international treaty to limit the spread of nuclear weapons, opened for signature on July 1, 1968.). There are currently 189 states party to the treaty, five of which have nuclear weapons: the United States, the United Kingdom, France, Russia, and China. *Id.*

[32] MELMAN & JAVEDANFAR, *supra* note 1, at 190–200.

[33] *Id.*

[34] *Id.* at 98.

the one who appears responsible for deceitfully denouncing Iran's nuclear ambition while simultaneously turning a blind eye to his countries nuclear progress. Or, is he complicit with Iran's nuclear program ambitions? Either way, the authors demonstrate that Ayatollah Khamenei is keeping the international world guessing about his true nuclear desires. Hence, the riddle of the sphinx remains largely unsolved in this context.[35]

Although much of the book's information concerning Iran's nuclear program is not new and has been largely covered in other recent novels, this book, far better than others, entices the reader to think more critically and raise questions about the challenges a nuclear Iran presents.[36] *The Nuclear Sphinx of Tehran* would especially stimulate a military audience to consider and deliberate on many international and operational issues such as: What right does the United States and Israel have to repress Iranian nuclear progression? Should the West entertain negotiation requests from Iran? Would imposing economic sanctions or striking key Iranian nuclear sites backfire and serve as a rallying cry for Iran?[37] Can the U.S. and Israel afford to wait for Iran's regime to implode? How does the United States deal with Russia, China, and Pakistan for supplying Iran with uranium enrichment products?[38] With the current challenges faced in Iraq, is the United States even capable of hindering Iranian nuclear progress? Does international law support a U.S. military strike based on anticipatory defense in accordance with the Article 51 of the United Nations Charter?[39] And most importantly, is Iran pursuing nuclear capability as a means of achieving Islamic world domination via Mahdi? The book is masterful at raising these dilemmas while impressing the necessity for more immediate world attention to the real Iranian nuclear threat. Despite raising more questions than answers, *The Nuclear Sphinx of Tehran* provokes serious thought of these relevant issues.

III. Criticisms

It is somewhat disconcerting that such a well-researched book could contain numerous spelling and punctuation errors; although, this is mitigated when factoring in the book's overall value and that neither author is a native English speaker. Another frustration is the book's lack of photos. The reader would significantly benefit by viewing pictures of some key Iranian leaders since the English reader is challenged by having to comprehend page after page of Iranian personnel with unfamiliar Arabic and Persian names. Some key pictures would ease this strain and facilitate the reader's immediate understanding. The biggest criticism of the book, however, is that the reader is left pondering how these two authors could disclose so many intricate details about President Ahmadinejad's upbringing and religious persuasion and then offer so little factually about his 1979 Iranian revolution and the Iran-Iraq War involvement. Likewise, the authors fail to describe whether Ayatollah Khamenei authorizes President Ahmadinejad to make inflammatory statements such as eradicating Israel off the planet and denying the existence of the Holocaust.[40] The reader is left speculating on whether Ayatollah Khamenei supports such controversial clamor or whether it is by design to hasten Mahdi's return and eventual establishment of an Islamic world republic. Finally, this raises the question as to whether the authors were themselves misled to some extent during their research; similar to Iran's cat-and-mouse games that deceived the United Nations and the IAEA.[41] Even with these shortcomings, the authors successfully reinforce the book's primary purpose of planting the seed that Shia Islamic religion currently drives Iran's obsession to gain nuclear capability as a means to become powerful and achieve Islamic world superiority.

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[35] PITTSBURGH PUBLIC THEATER, UNRAVELING THE RIDDLE OF OEDIPUS: STUDY GUIDE 11 (2006), *available at* http://www.ppt.org/documents/SG3201OedipusTheKing1.pdf ("In Greek legend, the Sphinx devoured all travelers who could not answer the riddle she posed: 'What is the creature that walks on four legs in the morning, two legs at noon and three in the evening?' The hero Oedipus gave the answer, 'Man,' causing the Sphinx's death."),

[36] *See, e.g.*, SHAHRAM H. CHUBIN, IRAN'S NUCLEAR AMBITIONS (2005); ALIREZA JAFARZADEDEH, THE IRAN THREAT: AHMADINEJAD AND THE COMING NUCLEAR CRISIS (2006).

[37] MELMAN & JAVEDANFAR, *supra* note 1, at 185.

[38] *Id.* at 157–58.

[39] U.N. Charter art. 51 (United States' view of "inherent right" to self-defense under customary international law encompasses anticipatory self-defense).

[40] *Id.* at 200.

[41] *Id.* at 123–27.

IV. Conclusion

The Nuclear Sphinx of Tehran could not be timelier as it is a tremendous guide to Iran's nuclear past, perilous present, and unpredictable future. Anyone concerned with world security or the spread of nuclear technology should read this book. From misconceptions of Mahmoud Ahmadinejad's true influences and power to the rising Iranian nuclear threat, Melman and Javedanfar give unique and insightful perspectives to Iran's current nuclear landscape. Not only is the book educationally relevant to military servicemembers, it also keeps the reader's attention cover to cover. The authors educate its readers on both the religious mindset and hierarchy of Iran's leadership. For instance, it is enlightening to discover that the true Iranian Supreme Leader is Ayatollah Kahmeini, not President Ahmadinejad as Iran projects to the outside world.[42]

Additionally, *The Nuclear Sphinx of Tehran* compels the reading audience to reflect on the current challenges faced by the United States in the Middle East in addition to the Global War on Terror in Iraq and Aphghanistan. Unequivocally, the reader is educated on the core principle that Iran is as equally determined as the United States to spread its form of government in the Middle East and other parts of the world. The authors successfully instill the harsh reality that Iran's leadership is completely driven by their plight to achieve Islamic world supremacy. To that end, the critical lesson learned from *The Nuclear Sphinx of Tehran* is Iran's international political motivations are firmly rooted in their desire to become a world superpower, accomplished by nuclear proliferation, so they can accelerate Mahdi's presence. Religion makes Iran tick.

After reading this book, it is blatantly obvious that Iran is determined to achieve nuclear capability. Because this book provides so much insight on Iran's leadership and the religious principles that inspire them, it is a must read for all U.S. servicemembers, especially if the United States draws closer to a potential military conflict with Iran. This book cleverly prompts serious debate on whether Iran's nuclear efforts should be dealt with now or later, either diplomatically or militarily. For these reasons, *The Nuclear Sphinx of Tehran* should be placed on the essential reading list for U.S. military servicemembers and should be read with an open, inquisitive mind.

[42] *Id*. at 145.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
GENERAL		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08

512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08

WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
CRIMINAL LAW		
5F-F31	14th Military Justice Manager's Course	25 – 29 Aug 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (030) BOLT (030)	4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (020)	28 Jul – 8 Aug 08
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (050) Senior Officer (060) Senior Officer (070)	21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (020)	15 – 19 Sep 08
748K	USMC Trial Advocacy Training (040)	15 – 19 Sep 08 (San Diego)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
03RF	Legalman Accession Course (030)	9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010)	18 – 22 Aug 08
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
627S	Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (060) Legal Officer Course (070)	2 – 20 Jun 08 7 – 25 Jul 08

	Legal Officer Course (080)	8 – 26 Sep 08
	Legal Clerk Course (060) Legal Clerk Course (070)	7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (080)	25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Legal Assistance Course 3 (Family Law), Class 08-C (Montgomery, AL)	7 – 11 Jul 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Legal Assistance 4 (Family Law), Class 08-D (Dayton, OH)	21 – 25 Jul 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662

ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095

NDAA	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course opened for registration on 4 April 2008.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

1. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other

personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. t is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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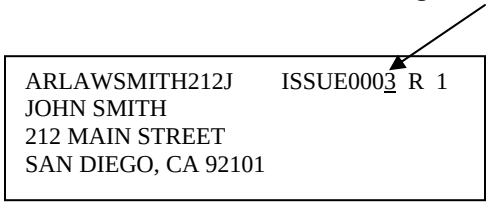

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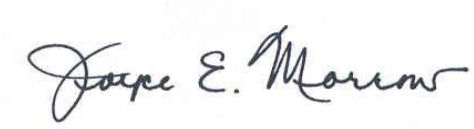

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