The Disposition of Intoxicated Driving Offenses Committed by Soldiers on Military Installations

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I. Introduction

In the early morning of December 7, 2012, John Evans was driving his Chevy Tahoe the wrong way on Interstate 25 when he collided head-on with a Ford Focus driven by college freshman Samantha Smith. She died at the scene. State police say that alcohol was a contributing factor in the crash. Evans, 33, is an Army sergeant at Fort Carson. He has three prior arrests for DWI, the most recent of which occurred at Fort Carson in September. Post officials say that Evans received "nonjudicial punishment" for this incident—a sanction commanders use to punish so-called "minor offenses." Civilians arrested for drunk driving on Fort Carson are routinely prosecuted in federal court. It is unclear why Evans was treated differently.[1]

Every Friday afternoon, leaders across the Army tell Soldiers not to drink and drive at unit safety briefings. However, Soldiers are arrested for driving while intoxicated (DWI)[2] at an alarming rate.[3] While few DWI incidents are as outrageous as the Sergeant Evans example, it raises the question of whether nonjudicial punishment is an appropriate response to an on-post DWI.

Army regulations provide detailed guidance on administrative actions in Soldier DWI cases,[4] but limited guidance concerning punitive actions.[5] As a result, duty station determines disposition.[6] At some installations, Soldiers are treated the same as civilians arrested for DWI—judge advocates appointed as special assistant U.S. attorneys (SAUSAs) prosecute them in federal court.[7] At other installations, Soldiers receive nonjudicial punishment for this offense.[8]

This article examines the merits of each approach and concludes that federal court is the optimal forum for adjudicating on-post Soldier DWIs. Unlike nonjudicial punishment, federal prosecution results in a criminal

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[1] This example is loosely based on a real case involving Army Staff Sergeant Jesse Leon Evans, Jr. *See* Ashley Kelly, *Driver in Fatal CNU Crash Stopped Three Times on DUI Charges*, DAILY PRESS, Dec. 21, 2011, *available at* http://articles.dailypress.com/2011-12-21/news/dp-nws-evans-cnu-bond-hearing-20111221_1_dui-conviction-dui-charges-wrong-way-crash.

[2] States refer to intoxicated driving by various terms, including driving under the influence (DUI), operating under the influence (OUI), operating while intoxicated (OWI), and driving while intoxicated (DWI). *See, e.g.*, ALA. CODE § 32-5A-191 (2012) (DUI); CONN. GEN. STAT. ANN. § 14-227a (West 2012) (OUI); IND. CODE ANN. § 9-30-5-1 (West 2012) (OWI); TEX. PENAL CODE ANN. § 49.04 (West 2012) (DWI). This article uses the term DWI throughout for the sake of consistency.

[3] *See infra* Part II.A.

[4] *See infra* app. A.

[5] *See* U.S. DEP'T ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 4-9 (22 May 2006) [hereinafter AR 190-5] ("Most traffic violations occurring on DoD [Department of Defense] installations (within the United States or its territories) should be referred to the proper U.S. Magistrate."). The advisory guidance in Army Regulation (AR) 190-5 is identical to that found in part 634 of Title 32, Code of Federal Regulations. 32 C.F.R. § 634.32(a) (2012). For reasons unknown, these authorities mandate referral of DWI offenses to the Federal Magistrate for the Navy only. *See id.* § 634.32(c).

[6] *See* 32 C.F.R. § 634.32(c) (2012) ("Installation commanders will establish procedures used for disposing of traffic violation cases through administrative or judicial action consistent with the Uniform Code of Military Justice (UCMJ) and Federal law."); *see also* AR 190-5, *supra* note 5, para. 4-9c (same).

[7] *See* 28 U.S.C. § 543 (2011) (authorizing the appointment of special assistants "to assist United States attorneys when the public interest so requires"); *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-4 (3 Oct. 2011) [hereinafter AR 27-10]; U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS RESOURCE MANUAL § 3-2.000 (2012), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm ("Attorneys employed in other departments or agencies of the federal government may be appointed as Special Assistants to United States Attorneys, without compensation other than that paid by their own agency, to assist in the trial or presentation of cases when their services and assistance are needed.").

[8] Soldiers are also subject to court-martial for DWI pursuant to Article 111, Uniform Code of Military Justice (UCMJ). MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 35 (2012) [hereinafter MCM]. However, few intoxicated driving cases that occur within the United States are referred to court-martial. *See* Major R. Peter Masterton, *The Military's Drunk Driving Statute: Have We Gone Too Far?*, 150 MIL. L. REV. 353, 376 (1995). Another reason for the lack of courts-martial is the complexity and expense of DWI cases, particularly for a misdemeanor-level offense. *See, e.g.*, THE CENTURY COUNCIL, NATIONAL HARDCORE DRUNK DRIVER PROJECT SOURCEBOOK 47 (n.d.) [hereinafter DRUNK DRIVER PROJECT SOURCEBOOK], *available at* http://www.centurycouncil.org/sites/default/files/files/HardcoreDrunkDrivingSourcebook.pdf ("Prosecuting a DWI case may well be one of the most difficult in the criminal law field."). Accordingly, this article does not address the efficacy of courts-martial in adjudicating on-post Soldier DWIs.

conviction and allows state authorities to file enhanced DWI charges if a Soldier reoffends. Federal prosecution better protects society, furthers good order and discipline, and ensures consistency between civilians and Soldiers charged with DWI. Most importantly, it signals to Soldiers and society that the Army will not tolerate intoxicated driving.

This article proceeds in five parts. Part II provides background on the problem of DWI in the Army. Next, it reviews the available punishments in DWI cases adjudicated in civilian courts and under the Uniform Code of Military Justice (UCMJ). This part concludes by surveying the inconsistent treatment of on-post DWI offenses across the Army.

Part III considers the effectiveness of nonjudicial punishment in dealing with on-post Soldier DWIs. It first outlines the contours of nonjudicial punishment and explains its appeal in addressing "minor offenses."[9] This part then examines the drawbacks of Article 15, UCMJ, in DWI cases, including its harmful impact on state repeat offender statutes, license suspension schemes, and federal sentencing. This discussion highlights the central flaw of nonjudicial punishment in DWI cases—its disregard for public safety. Part III argues that commanders have a duty to consider this factor before imposing nonjudicial punishment.

Part IV evaluates the utility of federal prosecution. First, it describes how a Soldier is prosecuted for DWI in federal court under the Assimilative Crimes Act (ACA). Next, it analyzes the pros and cons of this approach. This analysis shows how a federal conviction and probation conditions further the ends of good order and discipline and public safety. Part IV also explains how federal prosecution insulates the Army from public criticism concerning the disparate treatment of civilian DWI offenders.

Part V addresses some of the expected criticisms levied against prosecuting Soldiers in federal court, including the perceived inability of a commander to personally address the misconduct and the impact of pretrial diversion or plea agreements. This part explains why each of these concerns is ultimately misguided. Sentencing disparity is a more valid criticism, but one that Congress could remedy by empowering the Secretary of Defense (SECDEF) to issue a federal regulation criminalizing DWI.

The article concludes with a proposal for an explicit Army-wide policy recommending federal prosecution of on-post Soldier DWIs. Requiring this disposition is impractical since almost every installation deals with a different U.S. Attorney's Office (USAO), some of which may decline prosecution.[10] Nevertheless, the Army should encourage installation commanders to refer Soldier DWI cases to the local U.S. magistrate when possible.

II. Background: The Problem of Intoxicated Driving in the Army

A. Statistics and Preventive Efforts

As one commentator noted over twenty-five years ago, "Drunk driving . . . is a national social problem and, unfortunately, the Army has not been spared this calamity."[11] This observation remains accurate today. According to the U.S. Army Crime Records Center (USACRC),[12] from fiscal years (FY) 2006 through 2011 over 20,000 Soldiers assigned to CONUS installations were arrested for DWI.[13] Although the precise breakdown between on- and off-post arrests is unavailable,[14] DWIs occur at every post and surrounding community.[15] Offenders represent every rank, ethnicity, and gender, but junior enlisted Soldiers account for approximately seventy-five percent of arrests.[16] This result is unsurprising since most of these individuals are eighteen- to twenty-four year-old males—the demographic most likely to drink and drive.[17]

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[9] *See infra* text accompanying note 38.

[10] *See* U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 9-27.140 (2012) [hereinafter DOJ MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (stating that each U.S. Attorney "may modify or depart from the principles [of Federal prosecution] as necessary in the interests of fair and effective law enforcement within the district").

[11] Major Phillip L. Kennerly, *Drunk Driving: The Army's Mandatory Administrative Sanctions*, ARMY LAW., Jan. 1985, at 19, 19.

[12] The U.S. Army Crime Records Center (USACRC) "receives, safeguards, maintains and disseminates information from Army law enforcement records." *Crime Records Center*, U.S. ARMY CRIMINAL INVESTIGATION COMMAND, http://www.cid.army.mil/crc.html (last visited June 3, 2013). *See generally* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 5-1 (15 May 2009) (C1, 6 Sept. 2011).

[13] E-mail from David E. Willis, Criminal Intelligence Analyst, USACRC, U.S. Army Criminal Investigations Command (CID) to author (Nov. 15, 2012, 16:20 EST) [hereinafter Willis E-mail] (on file with author). Despite the continued prevalence of DWI, the situation has improved markedly since the 1980s. For example, 19,000 Soldiers were arrested for DWI in just one twelve-month period from 1983 to 1984. Kennerly, *supra* note 11, at 19.

[14] Although the USACRC tracks the total number of Soldier DWI arrests per installation, it does not distinguish between off- and on-post arrests. Telephone Interview with David E. Willis, Criminal Intelligence Analyst, USACRC, CID, Quantico, Va. (Dec. 3, 2012).

[15] Willis E-mail, *supra* note 13.

[16] *Id.*

[17] *See, e.g.*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), TRAFFIC TECH, TECHNOLOGY TRANSFER SERIES NO. 392, NATIONAL SURVEY OF DRINKING AND DRIVING ATTITUDES AND BEHAVIORS 2 (Aug. 2010), *available at* http://www.nhtsa.gov/staticfiles/traffic_tech/tt392.pdf; LIISA ECOLA ET AL., RAND NAT'L DEF. RESEARCH INST., UNDERSTANDING AND REDUCING OFF-DUTY VEHICLE CRASHES AMONG MILITARY PERSONNEL, TR-820-DCOC, at 15 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR820.pdf ("Young adults have the highest rates of drunk driving and alcohol-related crashes of any age group.").

Army leaders at every echelon have implemented policies and practices to prevent DWI. At the unit level, leaders stress the dangers of DWI at safety briefings and training events. Many units also have designated driver programs.[18] Installations, in turn, discourage intoxicated driving through safety stand-down days, public awareness campaigns,[19] or publication of DWI statistics in the post newspaper.[20] The Department of Defense also devotes substantial attention to DWI prevention.[21] While the deterrent effect of these measures is open to debate,[22] leaders clearly recognize the scope of the problem. Nevertheless, DWI continues to plague the Army just as it plagues society.[23]

B. Disposition and Punishment of DWI Offenses Throughout the Army

In the Army, as in the civilian community, the potential consequences of a DWI arrest are significant. Depending on the location of the offense, a Soldier faces either nonjudicial punishment or prosecution in state, federal, or military court. In addition, a DWI arrest triggers a host of adverse administrative actions.[24] This section first outlines the available punishments for DWI offenses adjudicated in civilian courts and under the UCMJ. It then surveys current practices for addressing on-post Soldier DWIs.

1. Punitive Consequences of DWI

The punitive consequences of a DWI arrest depend on the location of the offense and local installation policy. First, Soldiers prosecuted by civilian authorities following an off-post arrest are subject to the punishments provided for under the relevant state statute.[25] These punishments also apply when a Soldier is prosecuted for an on-post DWI in federal district court pursuant to the ACA.[26] Both state and federal prosecution can result in a criminal conviction and accompanying collateral consequences.[27] Next, for offenses resolved under Article 15, the possible penalties include reduction in rank, forfeiture of one-half of one month's pay for two months, restriction for sixty days, extra duty for forty-five days, and thirty days correctional custody.[28]

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[18] Unfortunately, at least in the author's experience, these programs frequently involve the improper use of a government vehicle. *See generally* 31 U.S.C. § 1344 (2011); U.S. DEP'T OF DEF., DIR. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. C2.5 (16 Mar. 2007); U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. 2-4 (10 Aug. 2004).

[19] For example, several installations hosted the "Save a Life Tour" in 2012, an interactive training experience that educates Soldiers about the dangers of drinking and driving. *See, e.g.*, Kenneth A. Foss, *Save a Life Tour*, WWW.ARMY.MIL (Apr. 12, 2012), http://www.army.mil/media/242644/ (last visited Mar. 6, 2013).

[20] *See, e.g.*, *Fiscal 2013 DWIs by Brigade/Unit*, FORT BLISS MONITOR, Nov. 29, 2012, at 5A, *available at* http://fbmonitor.com/2012/11november/112912/pdf/112912part1a.pdf (last visited Mar. 6, 2013).

[21] *See generally* U.S. DEP'T OF DEF., DIR. 6055.04, DOD TRAFFIC SAFETY PROGRAM app. 1 to encl. 3 (20 Apr. 2009) [hereinafter DODD 6055.04] (establishing policy and assigning responsibilities for the DoD Impaired Driving Prevention Program).

[22] From fiscal years (FY) 2006 through 2011, the number of total DWI arrests remained fairly constant (approximately 3,100 arrests in FY 2006; 3,400 in FY 2007; 3,250 in FY 2008; 3,800 in FY 2009; 3,500 in FY 2010; and 3,300 in FY 2011). Willis E-mail, *supra* note 13.

[23] According to the NHTSA, in 2010, more than 10,000 people were killed "in crashes involving a driver with a BAC of .08 or higher—31 percent of total traffic fatalities for the year." NHTSA, U.S. DEP'T OF TRANSP., DOT HS 811 606, TRAFFIC SAFETY FACTS: 2010 DATA, ALCOHOL IMPAIRED DRIVING 1 (Apr. 2012), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811606.pdf. The financial cost of alcohol-related crashes is equally damaging, estimated at $37 billion per year. *Driving Safety, Impaired Driving*, NHTSA, U.S. DEP'T OF TRANSP., http://www.nhtsa.gov/Impaired (last visited June 3, 2013). What these remarkable statistics do not convey, of course, is the pain that drunk drivers inflict on the families of their victims.

[24] Appendix A outlines the Army's administrative framework for DWI, which provides for both mandatory and discretionary adverse administrative actions.

[25] *See, e.g.*, GA. CODE ANN. § 40-6-391 (West 2012); N.C. GEN. STAT. ANN. § 20-138.1 (West 2012). Additionally, portions of certain installations, such as Joint Base Elmendorf–Richardson and Fort Lee, are subject to concurrent jurisdiction between state and federal authorities. Telephone Interview with Captain (CPT) Joseph Eros, Special Assistant U.S. Attorney (SAUSA), Joint Base Elmendorf–Richardson, Alaska (Mar. 1, 2013) [hereinafter Eros Interview]; Telephone Interview with CPT Katharine Adams, SAUSA, Fort Lee, Va. (Mar. 4, 2013) [hereinafter Adams Interview]. Under this scheme, "both sovereigns retain the right to legislate, giving the United States the advantages of state enforcement while reserving to it the power to prosecute whenever the state fails to do so." Captain John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 12, 14. *See generally* Lieutenant Colonel William K. Suter, *Juvenile Delinquency on Military Installations*, ARMY LAW., July 1975, at 3, 9 (describing the four possible types of jurisdiction—exclusive, concurrent, partial, and proprietorial—and explaining that "[o]n any one military installation, the type of jurisdiction can vary, depending on the particular parcel of land involved and how and when it was acquired. Thus, some installations might include lands where all four types of jurisdiction apply."). Thus, state authorities could prosecute DWI offenders arrested on portions of installations subject to concurrent jurisdiction. However, traffic enforcement by state authorities on military installations is rare. Eros Interview, *supra*; Adams Interview, *supra*.

[26] 18 U.S.C. § 13 (2011). *See generally* William G. Phelps, *Assimilation, Under Assimilative Crimes Act (18 U.S.C.A. § 13), of State Statutes Relating to Driving While Intoxicated or Under Influence of Alcohol*, 175 A.L.R. FED. 293 (2002) (collecting and analyzing federal DWI cases involving the ACA).

[27] *See infra* text accompanying note 54.

[28] *See* MCM, *supra* note 8, pt. V, ¶ 5b. The maximum punishments vary based on the Soldier's rank and service regulations. *Id*. pt. V, ¶ 5a. Additionally, as one commentator has noted, "The specific forms of punishment available to a commanding officer are merely the short-term consequences of NJP [(nonjudicial punishment)]." Captain Shane Reeves, *The Burden of Proof in NJP: Why Beyond A Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28, 34. Possible long-term consequences include diminished "social standing within the military hierarchy" and limited prospects for promotion. *Id.* Simply put, a Soldier who received an Article 15 may suffer career consequences, but not criminal ones.

Finally, although courts-martial for DWI are rare,[29] the maximum punishments under Article 111, UCMJ, are significant: six months confinement, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge.[30]

2. Disposition of On-Post DWIs

The Army has no mandatory policy regarding the punitive disposition of on-post Soldier DWIs.[31] Installation commanders set their own policies;[32] however, two general approaches prevail: federal prosecution and nonjudicial punishment.

The majority of CONUS installations refer on-post Soldier DWI cases to the local USAO for prosecution in federal court.[33] Judge advocates and civilian attorneys appointed as SAUSAs generally prosecute these cases under the supervision of an assistant U.S. attorney.[34] Some installation policies are set forth formally in local regulations.[35] Other installations have informal arrangements with the local USAO.[36] A minority of CONUS installations—Fort Carson, Fort Gordon, Fort Stewart, Fort Wainwright, Joint Base Elmendorf-Richardson, and Fort Riley—adjudicate all on-post Soldier DWI offenses chiefly under Article 15.[37] As explained in Parts III and IV *infra*, the forum choice has far-reaching implications in a DWI case.

III. Evaluating the Effectiveness of Nonjudicial Punishment in Soldier DWI Cases

A. Overview of Nonjudicial Punishment

Article 15 allows commanders to address "minor offenses"[38] in their units without resorting to trial by court-

[29] *See* Masterton, *supra* note 8, at 376.

[30] MCM, *supra* note 8, pt. IV, ¶ 36e(2). If the crime involved personal injury, the maximum punishment increases to confinement for 18 months and a dishonorable discharge. *Id.* pt. IV, ¶ 36e(1). Additionally, an officer found guilty of violating Article 111 at a general court-martial is subject to a dismissal, not a punitive discharge. *Id.* R.C.M. 1003(b)(8)(A)).

[31] *See* AR 27-10, *supra* note 7, para. 4-9a.

[32] *See id.* para. 4-9c; *see also* U.S. DEP'T ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 11-30 (30 Mar. 2007) [hereinafter AR 190-45] ("Installation commanders should establish policies on how to refer Army personnel to the U.S. Magistrate for disposition when the violator's conduct constitutes a misdemeanor within the magistrate's jurisdiction and is also a violation of the UCMJ.").

[33] E-mail from CPT Megan Mueller, SAUSA, Fort Rucker, Ala., to author (19 Feb. 2013, 13:31 EST) (on file with author); E-mail from Major (MAJ) Yolanda Schillinger, SAUSA, Fort Huachuca, Ariz., to author (Mar. 4, 2013, 4:24 EST) (on file with author); E-mail from CPT Robert Aghassi, SAUSA, Fort Irwin, Cal., to author (Feb. 19, 2013, 10:40 EST) (on file with author); Telephone Interview with CPT Robert Pruitt, SAUSA, Presidio of Monterey, Cal. (Feb. 19, 2013); E-mail from CPT Natalie West, SAUSA, Fort Benning, Ga., to author (Feb. 26, 2013, 9:46 EST) (on file with author); Telephone Interview with CPT Alec Rice, SAUSA, Schofield Barracks, Haw. (Mar. 4, 2013); Telephone Interview with CPT Joshua Mickelson, SAUSA, Fort Leavenworth, Kan. (Mar. 1, 2013); Telephone Interview with CPT Katherine Griffis, SAUSA, Fort Campbell, Ky. (Feb. 22, 2013); U.S. ARMY CADET COMMAND & FORT KNOX, REG. 27-10, MILITARY JUSTICE para. 2-1b (17 May 2012) [hereinafter FORT KNOX REG. 27-10], *available at* http://www.knox.army.mil/garrison/dhr/asd/regs/R27-10.pdf; *Magistrate Court*, STAFF JUDGE ADVOCATE, JRTC & FORT POLK, http://www.jrtc-polk.army.mil/SJA/Mag_Court.html (last updated May 9, 2013) ("The only cases for which Soldiers are prosecuted in Magistrate Court are DWI. . . ."); Telephone Interview with CPT John Caulwell, SAUSA, Fort Leonard Wood, Mo. (Feb. 22, 2013); E-mail from CPT Emily Roman, SAUSA, While Sands Missile Range, N.M., to author (Feb. 25, 2013, 9:45 EST) (on file with author); Telephone Interview with CPT Justin Talley, SAUSA, Fort Drum, N.Y. (Mar. 6, 2013) [hereinafter Talley Interview]; E-mail from MAJ Yolanda McCray-Jones, Chief, Fed. Litig., Fort Bragg, N.C., to author (Mar. 8, 2013, 12:43 EST) (on file with author) [hereinafter McCray-Jones E-mail]; U.S. ARMY FIRES CTR. OF EXCELLENCE & FORT SILL, SUPP. 1 TO AR 27-10, para. 3-2d (1 Dec. 2011), *available at* http://sillwww.army.mil/USAG/DHR/publications/Suppls/FSSuppl1toAR_27-10.pdf [hereinafter FORT SILL SUPPLEMENT]; E-mail from CPT Adam Wolrich, SAUSA, Fort Jackson, S.C., to author (Mar. 11, 2013, 13:05 EST) (on file with author); E-mail from Stephanie Lewis, SAUSA, Fort Bliss, Tex., to author (Feb. 21, 2013, 10:37 EST) [hereinafter Lewis E-mail] (on file with author) ; III CORPS & FORT HOOD, REG. 27-10, MILITARY JUSTICE, para. 4-11 (10 Nov. 2008) [[hereinafter FORT HOOD REG. 27-10], *available at* http://www.hood.army.mil/dhr/pubs/fhr27-10.pdf; E-mail from CPT May Sena, SAUSA, Fort Belvoir, Va., to author (Mar. 11, 2013, 13:13 EST) (on file with author); Adams Interview, *supra* note 25; Telephone Interview with Amanda O'Neil, SAUSA, Joint Base Myer–Henderson Hall, Va. (Mar. 4, 2013); Telephone Interview with Robert Chilton, SAUSA, Joint Base Langley–Eustis, Va. (Mar. 4, 2013); Telephone Interview with MAJ Margaret Kurz, Chief, Fed. Litig., Joint Base Lewis–McChord, Wash. (Mar. 5, 2013). The Fort Hood policy captures the common rationale for federal prosecution: "An adjudication of guilt by . . . the Federal Magistrate triggers enhanced penalties for multiple DUI and DWI offenses under Texas law, whereas NJP under Article 15, UCMJ and administrative sanctions do not." FORT HOOD REG. 27-10, *supra*, para. 4-11c.

[34] *See* AR 27-10, *supra* note 7, para. 23-4.

[35] *See, e.g.*, FORT HOOD REG. 27-10, *supra* note 33, para. 4-11; FORT KNOX REG. 27-10, *supra* note 33, para. 2-1b; FORT SILL SUPPLEMENT, *supra* note 33, para. 3-2d. These policies usually permit lower-level commanders to request an exception to policy through the general court-martial convening authority on a case-by-case basis. *See, e.g.*, FORT HOOD REG. 27-10, *supra* note 33, para. 4-11a ("In exceptional cases where disposition of DUI and DWI driving offenses under the UCMJ is deemed essential to good order and discipline, commanders may seek to retain jurisdiction over such offenses. . . . In these cases, the Soldier's brigade level commander will request, in writing, authority to exercise UCMJ to the Commander, III Corps and Fort Hood through the OSJA."); FORT KNOX REG. 27-10, *supra* note 33, para. 2-1c.

[36] *See, e.g.*, Lewis E-mail, *supra* note 33 (Fort Bliss, Tex.).

[37] E-mail from CPT Joshua Krupa, SAUSA, Fort Carson, Colo., to author (Feb. 22, 2013, 9:47 EST) (on file with author); E-mail from CPT Colin Nisbet, SAUSA, Fort Gordon, Ga., to author (Feb. 22, 2013, 2:39 EST) (on file with author); Eros Interview, *supra* note 25 (Joint Base Elmendorf–Richardson, Alaska); E-mail from CPT Florence Cornish-Mitchell, SAUSA, Fort Wainwright, Alaska, to author (Feb. 22, 2013, 9:47 EST) (on file with author); Telephone Interview with CPT Rob Mactaggart, SAUSA, Fort Stewart, Ga. (Mar. 1, 2013); Telephone Interview with CPT Anne-Marie Vazquez, SAUSA, Fort Riley, Kan. (Mar. 6, 2013) [hereinafter Vazquez Interview].

[38] The *MCM* does not explicitly define "minor offenses." Rather, it states:

> Whether an offense is minor depends on several factors: the nature of the offense and the

martial.[39] As the *Manual for Courts-Martial* explains, Article 15 "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction."[40] In other words, Article 15 is intended as both a disciplinary and a rehabilitative tool,[41] and it often succeeds in achieving these goals.

Nonjudicial punishment is mutually appealing to Soldiers and commanders. By accepting an Article 15,[42] a Soldier reduces his punitive exposure and, more importantly, avoids a conviction. For commanders, nonjudicial punishment is a quick, inexpensive way to deal with minor misconduct. Article 15 proceedings also benefit the Army as a whole by reducing the number of courts-martial.

The appeal of nonjudicial punishment in DWI cases is understandable. Commanders rightfully perceive DWI as an affront to unit discipline, so they want to address the misconduct swiftly and personally. As explained below, however, using Article 15 to dispose of DWI cases is detrimental to public safety.

B. Drawbacks of Resolving On-Post Soldier DWIs through Nonjudicial Punishment

Air Force Major Marshall Wilde has cogently described what he calls the "unintended consequences" of nonjudicial punishment in DWI and other types of cases, stating:

> The decision to dispose of misconduct through nonjudicial punishment has greater practical effects in certain categories of cases. Few people would argue that society suffers greatly from resolving chronic lateness or an AWOL incident through nonjudicial punishment, nor is a rational commander likely to attempt to dispose of a rape or murder case through nonjudicial punishment. However, in . . . driving while intoxicated . . . cases, nonjudicial punishment results in significantly different outcomes for victims, society and the Treasury than civilian prosecution or court-martial.[43]

A number of factors militate against the use of nonjudicial punishment in DWI cases. Wilde's article discusses two of these factors: the failure to trigger state recidivism laws and license suspension schemes.[44] This section revisits those topics, but adds to Wilde's analysis by tailoring it to the Army. It also explains how nonjudicial punishment undermines sentencing in federal criminal cases and disregards public safety.

1. Impact on Repeat Offender Statutes

Most states have enhanced punishment laws for DWI recidivists.[45] Unfortunately, the use of nonjudicial punishment in DWI cases undermines these laws. Since an Article 15 is not a conviction,[46] "local District Attorneys

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> circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is 'minor' is a matter of discretion for the commander imposing nonjudicial punishment.

MCM, *supra* note 8, pt. V, ¶ 1e. Likewise, neither the Supreme Court nor the Court of Appeals for the Armed Forces (CAAF) has provided concrete guidance on what constitutes a "minor offense." *See, e.g.*, Parker v. Levy, 417 U.S. 733, 750 (1974) (failing to define the term); United States v. Gammons, 51 M.J. 169, 182 (C.A.A.F. 1999) ("there is no precise formula, however, for determining whether an offense is "minor"). Army Regulation 27-10 is more helpful in this regard. It states:

> Generally, the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court martial (SCM). It does not include misconduct of a type that, if tried by GCM, could be punished by dishonorable discharge or confinement for more than 1 year (see para 1e, part V, MCM, 2008). This is not a hard and fast rule; the circumstances of the offense might indicate that action under UCMJ, Art. 15 would be appropriate even in a case falling outside these categories.

AR 27-10, *supra* note 7, para. 3-9.

[39] 10 U.S.C. § 815(b) (2011). Nonjudicial punishment is a long-standing cornerstone of military justice, having had "statutory sanction" since 1916. *See* Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 37 (1965). However, commanders had limited NJP authority until Congress amended Article 15 in 1962. *See* Captain Burress M. Carnahan, *Comment—Article 15 Punishments*, 13 A.F. L. REV. 270, 271 (1971).

[40] MCM, *supra* note 8, pt. IV, ¶ 1c.

[41] *See, e.g.*, AR 27-10, *supra* note 7, para. 3-2a ("Nonjudicial punishment may be imposed to—Correct, educate, and reform offenders").

[42] A servicemember facing a nonjudicial punishment always has the right to demand trial by court-martial in the Army. *See* 10 U.S.C. § 815(a) (2011).

[43] Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military NJP*, 60 A.F. L. REV. 115, 121–22 (2007).

[44] *Id.* at 132–36.

[45] For example, forty-five states have enacted felony DWI statutes for offenders with prior convictions. *See, e.g.*, Overview from Mothers Against Drunk Driving (MADD) on DUI Felony Laws (Aug. 2011), *available at* http://www.madd.org/laws/law-overview/DUI_Felony_Overview.pdf. These laws vary, but generally require two or more prior DWIs within a given time. *Id.*

(DAs) who prosecute soldiers for [subsequent] drunk driving offenses occurring off post will be unaware of the existence of any prior offenses."[47] Accordingly, they cannot file enhanced charges for Soldiers who reoffend.

To illustrate, assume that Private (PVT) Smith receives an Article 15 for DWI at Fort Carson in 2008. He then is assigned to Fort Bliss in 2011 and receives another Article 15 for driving under the influence on the installation. In 2012, PVT Smith is arrested again for DWI, this time off-post in El Paso. An offender with two prior DWI convictions would face a third-degree felony and two to ten years in prison under Texas state law.[48] However, the local DA must prosecute PVT Smith as a first-time offender,[49] since his prior Article 15s are not convictions. The outcome of this case would be the same in every jurisdiction.

The upshot of this scenario is that a commander who imposes nonjudicial punishment for DWI may unwittingly insulate a habitual offender from felony, or enhanced misdemeanor, prosecution. Enhanced penalties for repeat DWI offenders exist to protect society.[50] Given the high recidivism rate for this offense,[51] addressing DWI through nonjudicial punishment is irresponsible.

2. License Sanctions and Off-Post Driving Privileges

Another drawback of resolving DWIs through Article 15 proceedings involves the failure to curtail a Soldier's off-post driving privileges. Restriction of driving privileges is not an authorized penalty under Article 15. While on-post privileges are administratively revoked for one year following an on-post DWI,[52] off-post driving privileges remain intact. As Major Wilde fittingly observed, "on-base drunk drivers may have no off-base sanctions."[53] Soldiers and civilians prosecuted for DWI in state court are not so fortunate.

A civilian DWI conviction is accompanied by collateral consequences, including administrative license suspension or revocation.[54] Forty-one states impose these sanctions pre-conviction if a driver fails or refuses to take a breath alcohol test. [55] In almost every state, judges can also suspend or revoke licenses post-conviction.[56] These measures are designed to further public safety,[57] and studies have validated their effectiveness in reducing recidivism and alcohol-related fatalities.[58]

License suspension is unavailable when a Soldier receives an Article 15 for an on-post DWI. Although federal and Army regulations both provide for notification of the Soldier's state driver's license agency following a DWI,[59] it is unclear whether this notification occurs, and, if so, whether the state ever acts on the information. Considering the administrative burdens involved, common sense suggests that states rarely impose license sanctions following an Article 15. As a result, Soldiers with a proven disregard for the safety of others drive freely outside the installation.

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[46] Federal, state, and military courts almost uniformly hold that an Article 15 is not a criminal conviction. *See, e.g.*, United States v. Trogden, 476 F. Supp. 2d 564, 568–69 (E.D. Va. 2007); State v. Myers, 58 P.3d 643, 644–47 (Haw. 2002); United States v. Gammons, 51 M.J. 169, 173–74 (C.A.A.F. 1999) (collecting cases). *Cf.* Middendorf v. Henry, 425 U.S. 25, 31–32 (1976) ("Article 15 punishment . . . is an administrative method of dealing with the most minor offenses."). *But cf.* State v. Ivie, 961 P.2d 941 (Wash. 1998) (treating NJP as a criminal prosecution for purposes of state law).

[47] Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 9.

[48] TEX. PENAL CODE ANN. §§ 12.34(a), 49.09(b) (Vernon 2012).

[49] A first-time offender in Texas faces a class B misdemeanor. Upon conviction, the offender receives a mandatory minimum sentence of 72 hours confinement and faces a maximum punishment of 180 days imprisonment. *Id.* § 49.04(b). A second DWI offense carries a mandatory 30-day term of confinement. *Id.* § 49.09(a).

[50] *See, e.g.*, Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Regulations to Protect New Yorkers from Dangerous Drivers (Sept. 25, 2012), http://www.governor.ny.gov/press/09252012dwiregulations (last visited June 3, 2013).

[51] *See* NHTSA, U.S. DEP'T OF TRANSP., DOT HS 810 879, REPEAT INTOXICATED DRIVER LAWS 1 (Jan. 2008) (stating that one-third of annual DWI arrests involve offenders with prior DWI convictions).

[52] *See infra* app. A (discussing the available administrative sanctions for DWI in the Army).

[53] Wilde, *supra* note 43, at 135.

[54] The terms "license suspension" and "license revocation" are often used interchangeably, since both actions prevent an offender from driving for a given time period. The difference is that "suspended licenses are automatically reinstated at the termination of the suspension, whereas revoked licenses must be replaced through renewed applications after the revocation period has expired." DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 64. Individuals convicted of DWI also face other collateral consequences, often financial, that are beyond the scope of this article. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1199 (McKinney 2012) (levying a $250 "Driver Responsibility Assessment" on persons convicted of DWI in the past three years); TEX. TRANSP. CODE ANN. § 708.102 (West 2012) (levying a $1,000 driver's license surcharge on persons convicted of DWI in the past three years).

[55] Fact Sheet, Nat'l Highway Traffic Safety Admin., DOT HS 810 878, Administrative License Revocation (Jan. 2008), *available at* http://www.nhtsa.gov/Laws+&+Regulations/Traffic+Safety+Legislative+Fact+Sheets.

[56] *See* James L. Nichols & H. Laurence Ross, *The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers*, *in* U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S WORKSHOP ON DRUNK DRIVING: BACKGROUND PAPERS 93, 95 (1989), *available at* http://profiles.nlm.nih.gov/nn/b/c/y/b/_/nnbcyb.pdf.

[57] *See* DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 64.

[58] *See, e.g.*, NICHOLS & ROSS, *supra* note 56, at 102–07 (summarizing studies).

[59] *See* 32 C.F.R. § 634.8(c) (2012); AR 190-5, *supra* note 5, app. B, para. B-1.

Considering the high rate of recidivism for DWI offenders, this risk is unacceptable.[60]

3. Impact on Federal Sentencing

A less obvious drawback of imposing nonjudicial punishment for DWI involves its effect on sentencing in subsequent federal criminal cases. Although the U.S. Sentencing Guidelines (Guidelines) are advisory following the Supreme Court's landmark decision in *United States v. Booker*,[61] federal courts must still consider the guideline range and policy statements in fashioning an appropriate sentence.[62] A defendant's criminal history is an integral part of this calculus. However, if a Soldier with an Article 15 for DWI is later prosecuted in federal court for an unrelated offense, his criminal history will not reflect the prior DWI. Before discussing how nonjudicial punishment adversely impacts federal sentencing, it is necessary to explain briefly how the Guidelines operate.

a. Summary of the Federal Sentencing Guidelines

The Guidelines are promulgated by the U.S. Sentencing Commission, an independent entity that establishes "sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes."[63] Application of the Guidelines is notoriously complex,[64] but the process generally works as follows. Before sentencing, a probation officer prepares a presentence investigation report for the court, which includes information about the defendant's background, criminal history, and a calculation of the Guidelines sentencing range.[65] In determining this advisory range "[t]he guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record."[66] While courts are no longer bound to sentence a defendant within this advisory range, the Guidelines remain influential,[67] and judges impose Guidelines' sentences more often than not.[68]

b. Article 15s Do Not Affect Criminal History Under the Guidelines

The 2012 *U.S. Sentencing Commission Guidelines Manual* clarified that prior convictions for DWI always count toward the defendant's criminal history score, regardless of how the offense is classified.[69]

The Sentencing Commission explained that "convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant's criminal history score."[70] Thus, if a Soldier with a misdemeanor DWI conviction is later prosecuted in federal court for an unrelated offense, the guideline range will include additional points for the DWI. [71] More importantly, the court will have a better picture of "the history and characteristics of the defendant," a key factor in determining a sentence.[72]

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[60] To remedy this problem, Major Wilde proposes that "a commander can and should prohibit a member who commits DWI from driving off base as well." Wilde, *supra* note 43, at 152–53. This article does not explore the dubious legality of such an order. *See, e.g.*, MCM, *supra* note 8, pt. IV, ¶ 14(c)(2)(a)(iv) (a lawful order "must relate to military duty. . . . The order may not, without such a valid military purpose, interfere with private rights or personal affairs."). Instead, it argues that federal prosecution provides a simpler alternative for restricting a Soldier's off-post driving privileges through probation conditions. *See infra* Part B.2.

[61] 543 U.S. 220 (2005).

[62] *Id.* at 259–60 (requiring judges to consider these factors along with the factors set forth in 18 U.S.C. § 3553(a): the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities and provide restitution).

[63] *See* U.S. Sent'g Comm'n, An Overview of the United States Sentencing Commission, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited May 21, 2013) [hereinafter USSC Overview]; 28 U.S.C. § 991 (2011).

[64] As one commentator wryly remarked, "Computation of the Sentencing Guidelines could be a thesis in itself." Major Tyesha E. Lowery, *One "Get Out of Jail Free" Card: Should Probation Be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 175 n.43 (2008).

[65] 18 U.S.C. § 3552(a) (2011); FED. R. CRIM. P. 32(c)–(d).

[66] USSC Overview, *supra* note 63, at 2. The Guidelines are arranged in a sentencing table. The vertical axis represents the severity of the offense and lists 43 "Offense Levels"; the horizontal axis represents the defendant's criminal history and lists six "Criminal History Categories." The guideline range is listed at the intersection of the Offense Level and Criminal History Category. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL ch. 5, pt. A (2012) [hereinafter SENTENCING GUIDELINES]; *see also id.* ch. 5, pt. A, cmt. n.1.

[67] The Supreme Court has stated that "the Guidelines should be the starting point and initial benchmark" at sentencing. Gall v. United States, 552 U.S. 38, 49 (2007).

[68] *See, e.g.*, U.S. SENT'G COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2012) [hereinafter SENTENCING STATISTICS] (showing that 52.4 percent of sentences imposed in FY 2012 were within the advisory guideline range), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf.

[69] *See* SENTENCING GUIDELINES, *supra* note 66, § 4A1.2, cmt. n.5. This amendment resolved a circuit split regarding whether misdemeanor or petty DWI offenses always count toward the criminal history score. The Sentencing Commission sided with the majority view. *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 35–36 (Apr. 30, 2012), *available at* http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf.

[70] *Id.*

[71] *See, e.g.*, SENTENCING GUIDELINES, *supra* note 66, § 4A1.1.

[72] 18 U.S.C. § 3553(a)(1) (2011).

Imposing nonjudicial punishment in DWI cases frustrates this scheme. If a Soldier with an Article 15 for DWI is prosecuted in federal court for an unconnected offense, his guideline range will not reflect the Article 15.[73] The sentencing court will have little, if any, awareness of the prior offense. Nonjudicial punishment therefore undermines the federal sentencing process by effectively erasing part of the defendant's criminal past.

C. The Commander's Obligation to Consider Public Safety

The *Manual for Courts-Martial* directs commanders to consider a host of factors in deciding whether to offer nonjudicial punishment, but public safety is not one of them.[74] Even so, commanders arguably have a moral obligation to consider society's interest,[75] especially in DWI cases. As one commentator contends, "the military justice system exists to enhance discipline within the armed forces, as well as to protect society—a dual focus."[76] Disposing of DWI cases through nonjudicial punishment fails to protect society. Army Regulation (AR) 27-10 instructs that "[i]f it is clear that will not be sufficient to meet the ends of justice, more stringent measures must be taken."[77] As explained below, federal court is a preferable forum for adjudicating Soldier DWIs that occur on the installation.

IV. Prosecuting On-Post Soldier DWIs in Federal Court

In order to properly assess the merits of the federal forum in Soldier DWI cases, it is necessary to understand the salient characteristics of a federal DWI prosecution.

A. The Framework for Prosecuting a Soldier in Federal Court

1. Memorandum of Understanding Between the Departments of Justice and Defense

When a Soldier commits an offense that violates both the UCMJ and Title 18 of the U.S. Code, prosecution is proper either in the federal district courts or at courts-martial.[78] As a result, in order "[t]o avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding (MOU) relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction."[79] Under this policy agreement, crimes committed by servicemembers on military reservations, such as DWI, are normally resolved through military justice channels.[80] However, the MOU sensibly "permits civil investigation and prosecution in Federal district court in any case when circumstances render such action more appropriate."[81] Army Regulation 27-10

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[73] An Article 15 does not count towards a defendant's criminal history score. *Id.* § 4A1.2(g). Incidentally, twenty-one states also have sentencing guideline systems. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf. In at least one state, Article 15s are not counted towards a defendant's "Prior Record Score." *See* 204 PA. CODE § 303.8(f)(2) (2012).

[74] MCM, *supra* note 8, pt. V, ¶ 1e.

[75] *See* Wilde, *supra* note 43, at 154.

[76] Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 103 (1986).

[77] AR 27-10, *supra* note 7, para. 3-2. Similarly, the Preamble to the MCM states in part, "the purpose of military law is to promote justice . . ." MCM, *supra* note 8, pt. I, ¶ 3.

[78] *See* United States v. Duncan, 34 M.J. 1232, 1240 (A.C.M.R. 1992). The *Duncan* court explained the jurisdictional relationship between the federal courts and courts-martial as follows:

> Congress has created two separate criminal justice systems, one civilian and one military. Federal district courts have original jurisdiction over offenses against the laws of the United States, but have no jurisdiction over offenses prescribed by the [UCMJ]. Court-martial jurisdiction is limited to those offenses prescribed by the [UCMJ]. . . . While the subject-matter jurisdiction of federal district courts and courts-martial is not concurrent in the technical sense, crimes committed by servicemembers are often susceptible to prosecution either in federal district courts and at courts-martial because the substantive provisions of the [UCMJ] closely parallel the codified offenses against the laws of the United States.

Id. (internal citations and quotation marks omitted); *see also* DOJ MANUAL, *supra* note 10, § 667, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00667.htm.

[79] DOJ MANUAL, *supra* note 10, § 9-20.115; *see also* U.S. DEP'T OF DEF., DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985). The MOU is incorporated in the *Manual for Courts-Martial*. *See* MCM, *supra* note 8, app. 3.

[80] *See* MCM, *supra* note 8, at A3-2. A servicemember does not have a right to demand court-martial in lieu of federal prosecution. *See* United States v. Verch, 307 F. App'x 327, 329 (11th Cir. 2009) (unpublished). The MOU provides that it "is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals. . . ." *See* MCM, *supra* note 8, at A3-2. As the First Circuit has stated, the guidelines in the MOU "were promulgated for administrative convenience, and defendants cannot rely on them to deprive [a] district court of jurisdiction." United States v. Mariea, 795 F.2d 1094, 1102 n.22 (1st Cir. 1986).

[81] DOJ MANUAL, *supra* note 10, § 9-20.115; *see also* MCM, *supra* note 8, at A3-2. For example, the DOJ often prosecutes Soldiers for child pornography and procurement fraud offenses. *See, e.g.*, United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) (Soldier convicted of receipt and possession of child pornography); Press Release, U.S. Attorney Robert Pitman, W. Dist. Tex., U.S Army Major Sentenced to Federal Prison for Accepting Gratuities (June 6, 2012), http://www.justice.gov/usao/txw/press_releases/2012/Bradley%20_EP_SIGIR_sen.pdf (last visited June 3, 2013).

empowers general court-martial convening authorities to coordinate issues relating to the MOU with the local USAO.[82] Under this authority, most installations have arranged for federal prosecution of on-post Soldier DWI offenses.[83]

2. Prosecuting On-Post DWI Offenses Under the Assimilative Crimes Act

a. Overview of the ACA

Federal Magistrate Judge Brian Owsley has neatly summarized the mechanism by which DWI offenders are prosecuted in federal court:

> On federal land, such as a military base, there are often no specific regulations addressing how some crimes are charged and penalized for civilian defendants. For example, there is no specific offense charging driving while intoxicated on a military base as a crime. Instead, Congress has assimilated state laws criminalizing driving while intoxicated to cover similar offenses on military bases through the Assimilative Crimes Act.[84]

The ACA thus serves as a gap-filler for offenses occurring within a federal enclave but "not made punishable by any enactment of Congress."[85] It adopts both the "crimes and corresponding punishments of the state surrounding a particular enclave, and applies them to supplement the federal criminal code."[86] Simply put, the ACA "gives U.S. Attorneys the ability to federalize state criminal law."[87]

b. Assimilation of State Criminal Punishments

The ACA provides that an individual who commits an assimilated state crime on a federal enclave "shall be guilty of a like offense and *subject to a like punishment*."[88] This latter provision generally means that "the sentence imposed [in an ACA prosecution] may not exceed any maximum sentence and may not fall below any mandatory minimum sentence that is required under the law of the state in which the crimes occur."[89] The assimilation of other available state penalties is more problematic.[90] As a general rule, however, federal judges will adopt state penalty provisions unless they conflict with federal sentencing law or policy.[91] To the extent that a conflict exists between the federal probation provisions at 18 U.S.C. §§ 3561–3566 and the applicable state law, federal law prevails.[92]

c. Applicability of the ACA to Servicemembers

Several active duty military defendants have unsuccessfully challenged application of the ACA in DWI cases. For example, in *United States v. Mariea*, two Sailors argued that they could not be prosecuted under the ACA for DWI offenses that occurred at Naval Air Station Brunswick (Maine).[93] The defendants contended that the ACA did not apply since DWI was already made punishable by an

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[82] *See* AR 27-10, *supra* note 7, para. 2-2.

[83] *See supra* note 33.

[84] Hon. Brian L. Owsley, *Issues Concerning Charges for Driving While Intoxicated in Texas Federal Courts*, 42 ST. MARY'S L.J. 411, 421 (2011).

[85] 18 U.S.C. § 13 (2011); *see also* United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) ("[T]he purpose of the Assimilative Crimes Act is to afford the federal government an opportunity to adopt state penal laws to meet federal ends; the prosecution of various crimes on federal enclaves."). Federal prosecutors charge a wide range of offenses under the ACA. *See, e.g.*, Nikhil Bhagat, Note, *Filling the Gap? Non-Abrogation Provisions and the Assimilative Crimes Act*, 111 COLUM. L. REV. 77, 89 n.63 (2011) (listing recent federal cases assimilating state offenses for DWI, trespass, telephone harassment, speeding, cockfighting, threats against a public servant, attempted petit larceny, illegal taking of fish, use of profane language inciting breach of the peace, and parking a motor home without valid permit).

[86] Garver, *supra* note 25, at 12. Captain Garver observes that "[t]he 'law,' as applied on federal lands, thus varies between an Army post in North Carolina, for example, and a Navy submarine base in the State of Washington." *Id.* This statement is accurate with respect to the elements of the assimilated state crime. However, "[p]rosecution under the ACA is not for enforcement of state law but for enforcement of federal law assimilating a state statute." United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979). As a result, federal rules of evidence and procedure govern ACA cases. *See* United States v. Garner, 874 F.2d 1510, 1512 (11th Cir. 1989); FED. R. CRIM. P. 1(a)(1) ("These rules apply to all criminal proceedings in the United States District Courts . . . .").

[87] Bhagat, *supra* note 85, at 83.

[88] 18 U.S.C. § 13(a) (2011) (emphasis added).

[89] United States v. Garcia, 893 F.2d 250, 251–52 (10th Cir. 1989). In fashioning a sentence within the state range, federal judges are bound by the Sentencing Reform Act (SRA) and the advisory Sentencing Guidelines. *See, e.g.*, United States v. Reyes, 48 F.3d 435, 437 (9th Cir. 1995) (describing a 1990 amendment to 18 U.S.C. § 3551 in which Congress "made explicit the applicability of the Sentencing Guidelines to ACA offenses"). However, most DWI offenses committed on military installations are federal "petty offenses" (i.e., Class B misdemeanors in which the maximum term of imprisonment is six months or less but more than thirty days), so the Guidelines do not apply. *See* SENTENCING GUIDELINES, *supra* note 66, § 1B1.9. Petty offenses are defined as "a Class B misdemeanor, a Class C misdemeanor, or an infraction." 18 U.S.C. § 19 (2006). The nine classes of federal crimes are classified by punishment range in 18 U.S.C. § 3559(a).

[90] *See generally* Phelps, *supra* note 26, §§ 24–35 (cataloguing cases involving the assimilation of state penalty provisions).

[91] *See, e.g.*, United States v. Pierce, 75 F.3d 173, 176–77 (4th Cir. 1996); United States v. Smith, 574 F.2d 988, 992–93 (9th Cir. 1978); United States v. Kendrick, 636 F. Supp. 189, 191 (E.D.N.C. 1986).

[92] *See* United States v. Gaskell, 134 F.3d 1039, 1042–45 (11th Cir.) (five-year maximum term of probation under federal law trumps maximum state term of one year); United States v. Duncan, 724 F. Supp. 286, 287–88 (D. Dela. 1989) (same). *But see* United States v. Peck, 762 F. Supp. 315, 318–20 (D. Utah 1991) (maximum term of probation under state law controlled).

[93] 795 F.2d 1094 (1st Cir. 1986),

enactment of Congress, specifically, Article 111, UCMJ. The court disagreed, holding that the phrase "'any enactment of Congress' in the ACA refers to penal enactments of general applicability, not to the UCMJ."[94] Other federal courts have reached the same result.[95]

Thus, ample precedent exists for prosecuting on-post Soldier DWI offenses under the ACA.[96] The forum choice rests with each installation and its local USAO, not with the Soldier-defendant.

B. Advantages of Prosecuting On-Post Soldier DWIs in Federal District Court

1. Establishing a Criminal Record

The most compelling reason for prosecuting on-post Soldier DWI cases in federal court is the possibility of securing a conviction. State prosecutors can use prior federal DWI convictions to charge an enhanced offense if a defendant reoffends.[97] Therefore, federal prosecution furthers the public safety and punishment objectives of state repeat offender laws. The high recidivism rate among DWI offenders[98] underscores the necessity of establishing a criminal record.[99] Unlike nonjudicial punishment, federal prosecution achieves this goal.

2. Preserving Good Order and Discipline Through Federal Probation

Although federal judges rarely grant probation,[100] it is a common sanction for DWI offenders in certain federal districts.[101] This part discusses how probation confers a significant benefit on good order and discipline.

a. Types of Probation Conditions in DWI Cases

Probation is a versatile disciplinary tool, as federal magistrates have wide latitude to impose a range of onerous conditions. [102] A non-exhaustive list of discretionary conditions appears at 18 U.S.C. § 3563(b), including orders to support dependents, maintain employment, refrain from drinking alcohol, report to a probation officer, perform community service, reside in a specified place, and "refrain[] from frequenting specified kinds of places or from associating unnecessarily with specified persons."[103] The statute also contains a catch-all provision authorizing the court to impose "such other conditions"[104] as it sees fit.

[94] *Id.* at 1094–02. The court noted that "the history of the ACA strongly suggests that the present phrase 'any enactment of Congress' means only those criminal laws of general applicability, and not a specialized, internal disciplinary code like the UCMJ which covers only military personnel." *Id.* at 1098.

[95] *See* United States v. Debevoise, 799 F.2d 1401, 1403 (9th Cir. 1986); United States v. Walker, 552 F.2d 568 n.3 (4th Cir. 1977). *Cf.* United States v. Thunder Hawk, 127 F.3d 705 (8th Cir. 1997) (holding that the Indian Country Crimes Act did not preclude application of the ACA in DWI case). Unlike UCMJ offenses, "[f]ederal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law." DOJ MANUAL, *supra* note 10, § 9-20.115 (citing United States v. Adams, 502 F. Supp. 21 (S.D. Fla. 1980) (carrying concealed weapon in federal courthouse) and United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978) (DWI on national park land)).

[96] Appendix B describes the basic progression of a federal DWI case.

[97] *See* Bell v. State, 201 S.W.3d 708, 711 (Tex. Crim. App. 2006). In the same way, federal courts can also use prior state DWI convictions to charge enhanced offenses under the ACA. *See, e.g.*, United States v. Finley, 531 F.3d 288, 289–90 (4th Cir. 2008) (assimilating Virginia DWI enhancement for a third offense).

[98] *See supra* text accompanying note 51.

[99] *Cf.* Hargis, *supra* note 47, at 3–4 ("Because of the high rate of recidivism, criminal history information is critical so that the criminal justice system can make appropriate decisions regarding these repeat offenders.").

[100] *See* SENTENCING STATISTICS, *supra* note 68, fig.D (showing that in FY 2012, straight probation was imposed in just 7.1 percent of federal cases), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_ Reports_ and_Sourcebooks/2012/FigureD.pdf. There is no statutory definition of probation; however, it is essentially "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." BLACK'S LAW DICTIONARY 1220 (7th ed. 1999). In the federal system, probation is unavailable in the following circumstances: (1) for Class A or Class B felonies; (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a) (2011).

[101] For instance, first-time DWI offenders in the Western District Texas, El Paso Division, routinely enter into plea agreements pursuant to *Fed. R. Crim. P.* 11(c)(1)(B), in which the prosecutor agrees to recommend a defendant's request for a sentence of twelve months probation and a $250 fine. The court is not obligated to follow the parties' recommendation. *See* FED. R. CRIM. P. 11(c)(3)(B). However, magistrate judges in the Western District of Texas almost always followed the recommended sentence. This information is based on the author's personal experience as the SAUSA for Fort Bliss, Texas, from 2011–2012. Federal probation is also a common sentence for on-post DWI offenders at Fort Lee, Fort Irwin, Fort Benning, and Fort Bragg. Adams Interview, *supra* note 25; E-mail from CPT Robert Aghassi, SAUSA, Fort Irwin, Cal., to author (4 Mar. 2013, 14:32 EST) (on file with author) [hereinafter Aghassi E-mail]; McCray-Jones E-mail, *supra* note 33 (Fort Bragg); E-mail from CPT Natalie West, SAUSA, Fort Benning, Ga., to author (Mar. 4, 2013, 14:32 EST) (on file with author) [hereinafter West E-mail].

[102] *See* Lowery, *supra* note 64, at 178 ("Federal judges now have almost unfettered discretion in sentencing a defendant to probation.").

[103] 18 U.S.C. § 3563(b) (2011). In addition to discretionary conditions, certain conditions are mandatory in any case where a judge grants probation, such as an order to obey the law, possess no controlled substances, submit to drug testing, and pay any adjudged fines. *See id.* § 3563(a); SENTENCING GUIDELINES, *supra* note 66, § 5B1.3.

[104] 18 U.S.C. § 3563(b)(22); *see also* SENTENCING GUIDELINES, *supra* note 66, § 5B1.3(b).

Appellate courts are deferential in scrutinizing these court-created conditions so long as they are "reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the goals of sentencing."[105]

Unlike nonjudicial punishment, a host of special probation conditions are available "that impinge on a defendant's driving privileges."[106] For example, although magistrates cannot suspend or revoke a defendant's state-issued driver's license,[107] they can restrict a defendant's driving privileges as long as the condition is reasonably related to the offense, promotes the purposes of federal sentencing, and "involve[s] only those deprivations of liberty or property that are reasonably necessary for purposes of the sentence.[108] Thus, the court in *United States v. Martinez* upheld a probation condition allowing the defendant "to drive during the course of his employment as required by his job, and to drive to and from the court, the probation office, and the alcohol education program."[109]

Judges can also restrict driving privileges as they relate to alcohol consumption. For instance, U.S. Magistrate Judge Norbert Garney imposes a standard probation condition prohibiting the defendant from driving if he has consumed any amount of alcohol.[110] Similarly, a court could require DWI offenders to install an ignition interlock device in their vehicle as a condition of probation.[111] In sum, the realm of possible probation conditions in a DWI case is limited only by the judge's imagination.

Another powerful aspect of federal probation is the potential duration of the probationary term. A federal judge can impose probation conditions for up to five years for misdemeanor offenses.[112] Although a term of this length would be unusual in a DWI case, some federal judges sentence first-time DWI offenders to probation for at least one year.[113]

b. The Consequences of Violating Federal Probation

The array of available probation conditions is complemented by a robust supervisory and enforcement scheme. Each DWI offender sentenced to a term of probation is supervised by a federal probation officer.[114] The probation officer has several duties,[115] but essentially serves as the "eyes and ears" [116] of the court and ensures that the defendant complies with his or her conditions. Congress has vested probation officers with considerable authority. They are permitted to "use all suitable methods, not inconsistent with the conditions specified by the court to aid a probationer . . . , and to bring about improvements in his conduct and condition."[117] If a probationer violates a condition, the officer must immediately notify the court.[118] A probationer who "violates a condition of probation at any time prior to expiration . . . of the term of probation" may

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[105] *Probation*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 784, 791 (2011). *See, e.g.*, United States v. Allen, 312 F.3d 512, 515 (1st Cir. 2002) (condition prohibiting defendant convicted of tax evasion from possessing alcohol or visiting establishments serving it not overbroad); United States v. Ofchinick, 937 F.2d 892, 898 (3d Cir. 1991) (condition requiring defendant to pay restitution, making his monthly church donation unaffordable, was reasonable). *But see, e.g.*, United States v. Bello, 310 F.3d 56, 61–63 (2d Cir. 2006) (condition prohibiting defendant from watching television to promote self-reflection overbroad).

[106] Owsley, *supra* note 84, at 451.

[107] No federal law or regulation permits suspension or revocation of state-issued drivers' licenses for persons convicted of an assimilated DWI offense in federal court. *See id.* at 446. Thus, several appellate courts have held that federal judges lack the power to impose this sanction under the ACA. *See id.* at 446–50 (collecting cases); *see also* United States v. Snyder, 852 F.2d 471 (9th Cir. 1988). *But see* United States v. Webster, 2009 WL 2366292, at *6 (D. Md. July 30, 2009) (upholding a condition of probation ordering in which the defendant was ordered to forfeit her state-issued driver's license and refrain for driving for five years). The ACA does, however, provide for suspension of driving privileges on federal enclaves. *See* 18 U.S.C. § 13(b).

[108] United States v. Martinez, 988 F. Supp. 975, 979 (E.D. Va. 1998).

[109] *Id.* at 977 n.3; *see also* United States v. Crawford, 166 F.3d 335, No. 98-4135, 1998 WL 879036, at *1 (4th Cir. July 31, 1998) (unpublished) (upholding a condition of probation ordering the defendant to refrain from driving for three years).

[110] The author tried several DWI cases before Judge Garney while assigned as the Fort Bliss SAUSA.

[111] *See generally* Jay M. Zitter, *Validity, Construction, and Application of Ignition Interlock Laws*, 15 A.L.R. 6th 375 (2006). Although the use of these devices is controversial, "studies have shown that ignition interlocks reduce recidivism from 50 to 90 percent while installed on vehicles." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 811 246, IGNITION INTERLOCKS–WHAT YOU NEED TO KNOW: A TOOLKIT FOR POLICYMAKERS, HIGHWAY SAFETY PROFESSIONALS, AND ADVOCATES 3 (Nov. 2009), *available at* www.nhtsa.gov/staticfiles/nti/impaired_driving /pdf/811246.pdf. Installation of an ignition interlock system is a frequent condition of probation for DWI offenders at Fort Lee, Virginia. Adams Interview, *supra* note 25.

[112] 18 U.S.C. § 3561(c)(2).

[113] *See, e.g.*, United States v. Pierce, 75 F.3d 173, 176 (4th Cir. 1996) (defendant sentenced to a one-year term of probation for DWI on Fort Bragg); Adams Interview, *supra* note 25); McCray Jones E-mail, *supra* note 33; West E-mail, *supra* note 101.

[114] *See* 18 U.S.C. § 3601. *See generally Probation and Pretrial Services-Mission*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/ ProbationPretrialServices/Mission.aspx [hereinafter PROBATION AND PRETRIAL] (last visited Jan. 5, 2013).

[115] *See* 18 U.S.C. § 3603 (outlining the duties of a probation officer).

[116] PROBATION AND PRETRIAL, *supra* note 114.

[117] 18 U.S.C. § 3603(3). Additionally, 18 U.S.C. § 3606 allows a probation officer to conduct a warrantless arrest if "there is probable cause to believe that a probationer . . . has violated a condition of his probation . . . ." *Id.*

[118] *See id.* § 3603(8)(B); *see also* SENTENCING GUIDELINES, *supra* note 66, § 7B1.2.

have the probation revoked and be resentenced.[119] A post-violation sentence could include imprisonment.[120]

The specter of revocation, and potential confinement, therefore provides a strong incentive for compliance. When a Soldier is prosecuted in federal court for DWI and sentenced to a term of probation, his commander directly benefits from a good order and discipline standpoint. For the term of probation, at least, the Soldier is more likely to obey the law and keep out of trouble.

Although nonjudicial punishment can be an effective tool for enforcing good order and discipline in DWI cases, it pales in comparison to federal probation.[121] To illustrate, assume that a junior enlisted Soldier accepts a field grade Article 15 for DWI and receives forty-five days extra duty as part of his punishment. If the Soldier habitually arrives late to extra duty and tests positive for marijuana, the commander cannot revoke the Article 15 punishment and resentence the Soldier. The commander can, of course, impose nonjudicial punishment for the new offenses, or even place the Soldier in pretrial confinement[122] and prefer charges. However, most commanders would probably impose additional conditions on liberty[123] and administratively separate[124] the Soldier instead. In contrast, if a Soldier-probationer regularly fails to report to his federal probation officer, the magistrate can revoke probation and resentence him, to confinement if necessary. If the Soldier tests positive for a controlled substance, revocation is mandatory.[125] Thus, it stands to reason that Soldiers-probationers have more incentive to obey the law—during the term of their probation at least—than Soldiers who receive nonjudicial punishment for the same offense.

c. The Downside: Federal Probation is Rarely Imposed at Certain Installations

Despite the benefits of imposing federal probation in DWI cases, magistrate judges at some installations rarely, if ever, impose this versatile sanction.[126] For example, the typical sentence for a first-time DWI offender at Fort Leonard Wood, Missouri, is a $250 fine. Probation is never imposed, mainly because the nearest federal court is located over 90 miles away in Springfield, Missouri.[127] Other remote installations, such as Fort Drum, New York, face the same problem.[128] Even where probation is unavailable, however, DWI offenders still receive a conviction—the principal advantage of federal prosecution.[129]

3. Insulation from Public Criticism of Lenient and Disparate Treatment

Federal prosecution of on-post Soldier DWIs has the added benefit of insulating the Army from public criticism. Unlike Soldiers at certain installations, civilians arrested for DWI on military installations are prosecuted in federal court and receive a conviction.[130] Although the Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society" with "laws and traditions of its own,"[131] DWI is arguably an offense for which Soldiers should be treated the same as civilians. As explained in Part IV.B.1. *supra*, establishing a criminal history in these cases is imperative given the deadly nature of the offense and the high rate of recidivism.

[119] 18 U.S.C. § 3565(a); *see also id.* § 3564(e). A full explanation of the probation revocation process is beyond the scope of this article. The process is governed by FED. R. CRIM. P. 32.1. In general, the probationer is entitled to notice of the violation and a limited hearing before a court can revoke probation. The standard of proof is not specified by statute, but a court need only be "reasonably satisfied that the probation conditions have been violated." United States v. Gordon, 961 F.2d 426, 429 (3d Cir. 1992). Few constitutional protections apply to revocation hearings. *Probation*, *supra* note 105, at 803. Moreover, the standard of appellate review for probation revocation decisions is abuse of discretion. *See* Burns v. United States, 287 U.S. 216, 222 (1932).

[120] *See, e.g.*, United States v. Moulden, 478 F.3d 652, 658 (4th Cir. 2007); United States v. Locke, 482 F.3d 764, 768–69 (5th Cir. 2007).

[121] Federal probation also should not burden the probationer's unit or interfere with its mission. In the author's experience as the SAUSA at Fort Bliss, Texas, U.S. probation officers are flexible in accommodating Soldier-probationers' training schedules. Additionally, if a Soldier receives orders to PCS during his term of probation, the court can transfer jurisdiction to the district court in which the new installation is located. *See* 18 U.S.C. § 3605.

[122] *See generally* MCM, *supra* note 8, R.C.M. 305.

[123] *Id.* R.C.M. 304(a)(1) ("Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.").

[124] *See generally* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 14-12b (6 June 2005) (C1, 6 Sept. 2011) [hereinafter AR 635-200].

[125] *See* 18 U.S.C. § 3565(b).

[126] E-mail from CPT Katherine Griffis, SAUSA, Fort Campbell, Ky., to author (Mar. 4, 2013, 13:20 EST) (on file with author); Talley Interview, *supra* note 33.

[127] E-mail from CPT John Caulwell, SAUSA, Fort Leonard Wood, Mo., to author (Mar. 4, 2013, 13:02 EST) (on file with author).

[128] Talley Interview, *supra* note 33. *But see* Aghassi E-mail, *supra* note 101 (probation regularly imposed at Fort Irwin, Cal., despite significant distance from nearest federal court).

[129] *See supra* notes 97–99 and accompanying text.

[130] *See, e.g.*, Press Release, U.S. Attorney Robert Pitman, W. Dist. Tex., El Paso Police Detective Charged Federally with Driving While Intoxicated on Fort Bliss (Nov. 18, 2011), http://www.justice.gov/usao/txw/press_releases/2011/Flores_DWI_FtBliss_information.pdf (last visited Jan. 22, 2013).

[131] Parker v. Levy, 417 U.S. 733, 743 (1974).

While the majority of the public is probably unaware of the Army's disparate treatment of DWI offenders, a single high-profile incident could ignite a controversy. For example, if a Soldier with a prior Article 15 for DWI reoffends and kills someone—and the disposition of his prior offense comes to light—the public would be outraged.

4. Deterrence: Sending the Message that the Army Takes DWI Seriously

Finally, federal prosecution of on-post DWIs court signals to society, and to Soldiers, that the Army will not tolerate intoxicated driving on its installations. As explained in Part II.A above, commanders expend considerable effort combating DWI, yet it remains one of the most prevalent types of Soldier misconduct. Prevention is necessary, but so is meaningful punishment. Article 15 falls short in this regard. The optimal solution for deterring DWI is to prosecute offenders in federal court and pursue more aggressive administrative actions.[132]

V. Criticisms of Prosecuting Soldier DWIs in Federal Court

A. The Commander's Perceived Inability to Address the Misconduct

Battalion and company commanders are the most likely critics of federal prosecution, since it arguably removes their ability to personally enforce good order and discipline through nonjudicial punishment. As one commentator observes: "Many commanders today believe, just as Honorable John Kenney, the Under Secretary of the Navy stated in 1949, that '[t]o subtract from the commanding officer's powers of discipline . . . can only result in a diminution of his effectiveness as a commander.'"[133] For this reason, "[t]he military has jealously guarded the distinctive aspects of its system of justice,"[134] such as a commander's authority under Article 15. Outsourcing a commander's responsibility for maintaining good order and discipline is a valid concern.[135] With respect to DWI, however, commanders are not powerless to address the misconduct when a case is prosecuted in federal or state court.

Commanders have an arsenal of administrative actions at their disposal, ranging from administrative reduction to administrative separation.[136] These actions are not considered punishment,"[137] but they can be effective tools for promoting good order and discipline. A more rigorous application of administrative sanctions in DWI cases, especially administrative separation, [138] would send a strong message that DWI will not be tolerated.

B. The Impact of Pretrial Diversion and Plea Agreements

Critics may also argue that federal prosecution will rarely result in the desired DWI conviction, since many defendants will negotiate a plea deal for a lesser offense, or receive pretrial diversion.[139] While these outcomes are possible, they are unlikely in most cases.

First, with respect to plea bargaining, defense counsel know that "[a]lthough many prosecutors and courts claim to have 'uniform' policies in drunk driving cases, plea bargaining is almost always a viable possibility."[140] Indeed, depending on the strength of the evidence, a prosecutor may agree to reduce a DWI charge to a lesser offense, such as reckless driving[141] or exhibition of speed,[142] which "will not count as a prior conviction if the client is subsequently convicted of drunk driving."[143]

In the author's experience as the SAUSA at Fort Bliss, Texas, federal DWI defendants rarely receive this type of deal. The DOJ's plea agreement policy requires that a defendant "plead to a charge . . . [t]hat is the most serious readily provable charge consistent with the nature and extent

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[132] *See infra* app. A.

[133] Lowery, *supra* note 64, at 197.

[134] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 3 (1970).

[135] *See, e.g.*, Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 946–47 (2010) ("As the commander of a unit, he has a strong incentive to use the military justice system to maintain order and discipline within his unit so that it maintains peak effectiveness; indeed, the need for the commander to maintain discipline is the justification for granting him great discretion over charging.").

[136] *See infra* app. A.

[137] AR 27-10, *supra* note 7, para. 3-3a.

[138] Increased administrative separation of Soldier DWI offenders would also help reduce the Army's end strength. *See, e.g.*, Jim Tice, *Army to Cut Nearly 50,000 Soldiers Over 5 Years*, ARMY TIMES, Sept. 25, 2011, http://www.armytimes.com/news/2011/09/army-to-cut-nearly-50000-soldiers-over-5-years-092511/ (last visited Jan. 24, 2013) (describing the Army's "five-year, nearly 50,000-soldier drawdown, using a combination of accession cuts and voluntary and involuntary separations").

[139] *See* DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 43 ("[P]lea-bargaining and pre-trial diversion programs can result in a conviction on a reduced charge, which in turn, avoids a drunk driving conviction on the driver's record.").

[140] LAWRENCE TAYLOR & ROBERT TAYAC, CALIFORNIA DRUNK DRIVING § 6:11 (4th ed. 2008).

[141] *See, e.g.*, NEV. REV. STAT. ANN. § 484B.653 (West 2012); S.C. CODE ANN. § 56-5-2920 (West 2012).

[142] *See, e.g.*, CAL. VEH. CODE § 23109 (2012).

[143] TAYLOR & TAYAC, *supra* note 140, § 6:11. It should be noted that in some states, a prior reckless driving conviction does count as a prior conviction for purposes of charging an enhanced offense. *See e.g.*, CAL. VEH. CODE §23103.5(c) (2012); WASH. REV. CODE ANN. § 46.61.5055(14)(a)(v) (West 2012).

of his/her criminal conduct."[144] In the vast majority of on-post DWI arrests the evidence against the defendant is strong,[145] so the government has little incentive to reduce the charge.[146]

Next, it is possible, but exceedingly rare,[147] for a federal defendant to have his case resolved through the DOJ Pretrial Diversion (PTD) Program. The DOJ describes this program as:

> an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. . . . Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.[148]

Like nonjudicial punishment, PTD precludes application of an enhanced penalty if the defendant commits a subsequent offense. However, the requirements of the program are stringent[149] and the consequences of breaching a PTD agreement are potentially severe.[150] Therefore, a divertee is similar to a probationer, since both individuals have incentive to stay out of trouble.[151]

In sum, DOJ policy and practice restrict the availability of plea bargaining and PTD. Concerns that Soldier DWI cases will be bargained away or expunged are largely overblown.

C. Disparity in Sentencing

The most legitimate criticism against prosecuting on-post Soldier DWIs in federal district court involves the inconsistent sentences imposed at different installations for the same offense.[152] This inconsistency stems from the fact that magistrate judges apply a unique assimilated DWI statute in every state.[153]

As one commentator explains, "[u]nwarranted sentence disparity exists when individuals convicted of similar crimes receive unequal sentences."[154] While sentence uniformity is a goal of most criminal justice systems,[155] it remains elusive.[156] To address this concern in the federal DWI context, Congress should authorize the SECDEF to issue regulations criminalizing DWI on military installations.[157] Alternatively, Congress could pass a federal DWI statute to replace the current state law assimilation structure.

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[144] *See* DOJ MANUAL, *supra* note 10, § 9-27.430(a)(1), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

[145] The sequence of events usually looks like this: a Soldier pulls up to an installation access control point and shows his ID card to a security guard; the guard detects signs of intoxication (e.g., slurred speech, bloodshot eyes, an odor of an unknown alcoholic beverage), instructs the suspect to turn off his vehicle, and notifies the military police; an officer arrives and administers field sobriety tests, which the suspect fails; the suspect is placed under arrest and transported to the station; finally, the suspect consents to submit breath samples, which register well above the legal limit of 0.08.

[146] Despite the DOJ's plea agreement policy, SAUSAs at some installations occasionally allow defendants to plead to a lesser offense. For instance, at Fort Drum, New York, first-time DWI offenders often plead down to Driving While Ability Impaired (DWAI) from the greater offense of DWI. Talley Interview, *supra* note 33; *see also* N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 2012) (DWAI); *id.* § 1192(2) (DWI).

[147] *See, e.g.*, Joseph M. Zlatic et al., *Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice*, FED. PROBATION, June 2010, at 28 ("Of the 98,244 pretrial services cases activated nationwide in FY 2008, 1,426 were PTD [Pretrial Diversion] cases."); Susannah Nesmith, *Iraq Veteran Offered Deal in Passport Violation Case*, N.Y. TIMES, June 28, 2011, http://www.nytimes.com/2011/06/http://www.nytimes.com/2011/06/29/us/29veteran.html?_r=0 (noting that U.S. Federal District Judge Cecilia Altonaga had "seen the government use the pretrial diversion program only twice before in her eight years on the bench"). Interestingly, first-time civilian DWI offenders at Fort Riley, Kan., routinely receive PTD (Fort Riley adjudicates on-post Soldier DWIs via Article 15). Vazquez Interview, *supra* note 37.

[148] *See* DOJ MANUAL, *supra* note 10, § 9-22.000, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm (last visited June 3, 2013). Many states have similar diversion, or deferred prosecution, programs. *See, e.g.*, KAN. STAT. ANN. § 22-2907 (West 2012); WASH. REV. CODE ANN. § 10.05.010 (West 2012); OR. REV. STAT. ANN. § 813.200 (West 2012). However, entrance requirements for these programs are usually stringent. *See, e.g.*, OR. REV. STAT. ANN. § 813.215 (West 2012).

[149] *See* Zlatic et al., *supra* note 147, at 30.

[150] *See* DOJ MANUAL, *supra* note 10, § 9-22.200.

[151] *See* discussion *supra* Part IV.B.2.b.

[152] *Compare supra* note 113, *with supra* notes 127–28.

[153] *See supra* notes 84–87 and accompanying text. Additionally, judges often struggle to resolve issues involving the assimilation of state DWI penalties. *See generally* Phelps, *supra* note 26, §§ 24–34 (collecting cases).

[154] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 160 (2000).

[155] *Id.* at 231 (noting that "the federal system and a majority of the states seek sentence uniformity. . ."). The military justice system addresses sentencing uniformity more indirectly. *See id.* at 172–73 ("While sentence uniformity is no longer a sentencing goal addressed in the [*MCM*], sentence uniformity is a matter subject to review by the Court of Criminal Appeals. Congress has tasked the Court of Criminal Appeals with maintaining 'relative' sentence uniformity.") (internal citations omitted).

[156] *See, e.g.*, Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES, Mar. 5, 2012, http://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html?pagewanted=all&_r=0. The military justice system is also plagued by sentence disparities. *See* Immel, *supra* note 154, at 186–94 (analyzing the pervasive sentence disparity in the military justice system); *see also* Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform" to the Uniform Code of Military Justice*, 25 QUINNIPIAC L. REV. 401, 407–09 (2006).

[157] Appendix C briefly explores the contours of this proposal.

VI. Conclusion

> *If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken.*[158]

Drinking and driving is one of the most prevalent and deadly types of Soldier misconduct.[159] While the Army's preventive response to this problem is robust, its punitive response is disjointed. Commanders at some installations continue to resolve on-post DWIs through nonjudicial punishment—undoubtedly with good intentions. However, the negative consequences of this approach far outweigh the benefits. When a Soldier receives an Article 15 for DWI and later reoffends, civilian courts must treat him as a first-time offender. Enhanced penalties for DWI offenders exist to protect society. Resolving on-post Soldier DWI cases through nonjudicial punishment undermines these important laws.

Federal prosecution is a better forum for adjudicating these cases, not only because it results in a conviction, but also because it furthers "the interest of the military command in preserving good order and discipline,"[160] ensures consistent treatment of Soldier and civilian offenders, and sends a forceful message that the Army will not tolerate intoxicated driving.

To that end, this article proposes a more explicit Army-wide policy recommending federal prosecution of on-post Soldier DWIs at all CONUS installations.[161] Chapter Two of AR 27-10 sets forth policy regarding investigation and prosecution of crimes with concurrent jurisdiction between military and federal authorities.[162] This chapter empowers installation commanders to coordinate these matters with local federal authorities.[163] To encourage federal prosecution of on-post Soldier DWIs, a paragraph should be added to the end of the chapter that reads: "Whenever possible, a person subject to the UCMJ who commits an intoxicated driving offense within a military installation will be prosecuted in Federal court by a Special Assistant U.S. Attorney."[164] Mandating federal prosecution is impractical, since almost every installation deals with a different USAO, some of which may decline prosecution in Soldier DWI cases.[165] Thus, installation commanders should be encouraged, but not required, to maximize federal prosecution of Soldier DWI offenders.

In conclusion, an old Army regulation once proclaimed that "[i]ntoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, and readiness, and is a serious threat to the health and welfare of the Army Community. . . ."[166] This timeless observation underscores the need to address on-post Soldier DWI cases in the most effective way possible—through federal prosecution.

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[158] AR 27-10, *supra* note 7, para. 3-2.

[159] *See* discussion *supra* Part II.A.

[160] Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6.

[161] Similar policy guidance already appears in AR 190-5, Motor Vehicle Traffic Supervision. *See* AR 190-5, *supra* note 5 ("Most traffic violations occurring on DoD installations (within the United States or its territories) should be referred to the proper U.S. Magistrate."). However, this language should explicitly state that "traffic violations" includes DWI. Additionally, the proponent of AR 190-5 is the Provost Marshal General, so judge advocates may not be familiar with this provision. For this reason, AR 27-10 should be amended to clarify this policy. *See infra* text accompanying note 164.

[162] *See generally* AR 27-10, *supra* note 7, ch. 2.

[163] *See id.* para 2-2; *see also* AR 190-45, *supra* note 32, para. 11-30.

[164] Army Regulation 27-10 implicitly acknowledges the suitability of the federal forum for prosecuting DWI cases. AR 27-10, *supra* note 7, para. 23-5 ("The magistrate system is particularly well-adapted to dispose of *traffic* cases.") (emphasis added). It also appears to suggest that Soldier DWIs will be prosecuted in magistrate court, stating: "Routine traffic violations, whether the offender is military or civilian, are referred to the local U.S. Magistrate Division." *Id.* para. 23-1b. This provision should be amended to clarify that "routine traffic violations" includes intoxicated driving offenses.

[165] *See supra* note 10.

[166] *See* Kennerly, *supra* note 11, at 20 n.4.

Appendix A

Administrative Consequences of DWI

In addition to the punitive consequences of DWI, Soldiers are subject to a host of adverse administrative actions. Army Regulation 190-5, *Motor Vehicle Traffic Supervision*, provides for both mandatory and discretionary adverse administrative actions in DWI cases. Commanders may impose these actions regardless of whether the Soldier is prosecuted by civilian authorities or receives UCMJ action. Mandatory administrative actions include the following: (1) suspension of post driving privileges pending resolution of DWI charges; (2) withdrawal of on-post driving privileges upon conviction, imposition of nonjudicial punishment, or refusal to submit to a lawfully requested blood, breath, or urine sample; and (3) a general officer letter of reprimand.[167] Discretionary actions for DWI include administrative reduction, bar to reenlistment, and administrative separation.[168]

Although robust on its face, this administrative framework is often weak in its implementation. For instance, commanders routinely harp on the seriousness of DWI, but they rarely initiate administrative separation, or actually separate, first-time offenders.[169] Moreover, while commanders separate repeat DWI offenders more often, they are not required to do so. Army policy only mandates initiation of administrative separation following a second DWI conviction.[170] As such, this requirement does not apply to a repeat offender who receives nonjudicial punishment, since an Article 15 is not a conviction.[171] In sum, the administrative sanctions for DWI are powerful in theory but weak in practice.

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[167] AR 190-5, *supra* note 5, para. 2-7a. For an excellent overview of these provisions, including their historical development, *see* Kennerly, *supra* note 11, at 19. With respect to the general officer letter of reprimand, the filing determination is governed by U.S. DEP'T ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986).

[168] AR 190-5, *supra* note 5, para. 2-7b. The Department of the Army created this administrative framework nearly thirty years ago following publication of U.S. DEP'T OF DEF., DIR. 1010.7, DRUNK AND DRUGGED DRIVING BY DOD PERSONNEL, (10 Aug. 1983) [hereinafter DODD 1010.7]. This directive established policy regarding intoxicated driving and required the military departments to "establish procedures for mandatory suspension of driving privileges on military installations" in DWI cases. *Id.* para. 5.2. Although DODD 1010.7 is no longer in effect, its policy on intoxicated driving remains instructive:

> Intoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, DOD personnel reliability, and readiness of military units and supporting activities. It is DOD policy to reduce significantly the incidence of intoxicated driving within the Department of Defense through a coordinated program of education, identification, law enforcement, and treatment. . . . Persons who engage in intoxicating driving, regardless of the geographic location of the incident have demonstrated a serious disregard for the safety of themselves and others.

Id. para. 4.1.

[169] A commander can administratively separate a Soldier for a single DWI, since this offense constitutes "commission of a serious offense." *See* AR 635-200, *supra* note 124, para. 14-12c. Of course, the Soldier may be entitled to an administrative separation board. *See id.* para. 9-1a. The lenient treatment of first-time offenders is a relatively recent phenomenon. *See, e.g.*, Masterton, *supra* note 8, at 378 ("As a practical matter, a drunk driving conviction usually results in the termination of a service member's career.").

[170] *See* U.S. DEP'T OF ARMY, DIR. 2012-07, ADMINISTRATIVE PROCESSING FOR SEPARATION OF SOLDIERS FOR ALCOHOL OR OTHER DRUG ABUSE para. 3.5(5) (13 Mar. 2012), *available at* http://www.apd.army.mil/pdffiles/ad2012_07.pdf. This recently-issued policy weakens the preexisting guidance regarding separation of Soldiers with two DWI convictions. *See* U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM para. 1-7c(7) (2 Feb. 2009) (C1, 2 Dec. 2009) ("[W]hen a Soldier . . . is convicted of driving while intoxicated/driving under the influence a second time during his/her career, the separation authority *shall* administratively separate the Soldier unless the Soldier is recommended for retention by an administrative separation board or show cause board . . ."). The policy also requires initiation of administrative separation when a Soldier is "[i]nvolved in two serious incidents of alcohol-related misconduct within a 12-month period." *Id.* para. 3.5(1). A "serious incident of alcohol-related misconduct" is defined as any offense punishable under the UCMJ by confinement in excess of one year. *Id.* Thus, a Soldier would have to commit two felony-level DWI offenses in a twelve-month period to satisfy this criterion. Under Article 111, only DWI offenses resulting in personal injury meet this definition. Likewise, state DWI felonies generally involve death, bodily injury, or commission of a third offense. *See, e.g.*, TEX. PENAL CODE § 49.04 (West 2012). It is difficult, to envision a scenario in which a Soldier commits two felony DWIs within a twelve-month period.

[171] *See supra* note 46.

Appendix B

Steps in a Federal Misdemeanor DWI Prosecution

Most on-post DWI cases prosecuted under the ACA are classified as federal petty offenses.[172] As such, they fall within the jurisdiction of U.S. Magistrate Judges.[173] The life of a DWI case in federal magistrate court generally proceeds as follows. After an on-post DWI incident, the Military Police furnish a copy of the police report and other evidence to the post SAUSA. If the case warrants prosecution, the SAUSA files an information[174] alleging a violation of an assimilated state DWI statute. The defendant then receives a summons to appear before a magistrate judge at a designated time and place.[175] Judge Owsley sums up the remaining steps in a DWI prosecution:

> All defendants have an initial appearance during which they are advised of the charge against them, their right to remain silent, their right to an attorney, and their right to a bench trial. Moreover, during the pendency of the criminal action, each defendant typically receives a bond, has an arraignment, has either a trial or enters a plea of guilt, and is informed of the right to appeal (first to the district judge and then to the [circuit court of appeal]).[176]

A defendant is only entitled to a jury trial if the charged offense is a Class A misdemeanor or higher.[177] However, a magistrate judge has discretion to order a jury trial in petty offense cases upon a defendant's request.[178] As with most federal crimes, however, trials are exceedingly rare in DWI cases.[179]

Several variables affect the length of a federal DWI case, including the diligence of law enforcement officers and federal prosecutors, the complexity of the case, and the size of the local federal docket. While federal DWI cases cannot be resolved as quickly as Article 15 proceedings, in the author's experience, they usually conclude within a few months.

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[172] *See supra* note 89 and accompanying text.

[173] *See* 18 U.S.C. § 3401 (2011); FED. R. CRIM. P. 58 (2012). *See generally* Honorable Jacob Hagopian, *United States Magistrate Judges and Their Role in Federal Litigation*, ARMY LAW., Oct. 1999, at 19. A second DWI offense under the ACA qualifies as a Class A misdemeanor, so the magistrate judge will not have jurisdiction unless the defendant consents. *See* 18 U.S.C. § 3401(b). Felony DWI charges must be tried before a U.S. district judge. United States v. Teran, 98 F.3d 831, 834 (5th Cir. 1996).

[174] FED. R. CRIM. P. 7.

[175] *Id.* 4(c)(3)(B).

[176] Owsley, *supra* note 84, at 438.

[177] *See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (right to jury trial exists only when the defendant faces more than six months imprisonment).

[178] Owsley, *supra* note 84, at 438.

[179] Statistics on guilty plea rates in federal DWI cases are unavailable. However, the overall rate for felony and Class A misdemeanor offenses was 96.9 percent in 2011—the most recent year for which statistics are available. *See, e.g.*, SENTENCING STATISTICS, *supra* note 68, fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.htm. In the author's experience, this rate is comparable in petty offense DWI cases.

Appendix C

Authorizing the SECDEF to Promulgate DWI Regulations

Precedent exists for congressional authorization of federal agency DWI regulations. For example, Congress granted the Secretary of the Interior power to issue regulations "necessary or proper for the use and management of the parks . . . under the jurisdiction of the National Park Service."[180] This authorization resulted in the following regulation criminalizing DWI on National Parks:

> Operating or being in actual physical control of a motor vehicle is prohibited while:
>
> (1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or
>
> (2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.[181]

The maximum punishment for this offense is six months confinement,[182] a $5,000 fine,[183] and a $10 special assessment.[184] In addition, a defendant may be sentenced to probation for a term of up to five years.[185] Prosecutions under this regulation are routinely upheld by federal appellate courts.[186] Congress has granted similar rulemaking authority to the U.S. Postal Service (USPS) and the Department of Veterans Affairs (VA),[187] and both organizations have issued federal regulations prohibiting DWI.[188]

Considering the staggering amount of federal property administered by the DoD[189] and the frequency of DWI on military installations,[190] it is perplexing that Congress has not authorized the SECDEF broader rulemaking authority. Prosecuting

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[180] 16 U.S.C. §3 (2011).

[181] 36 C.F.R. § 4.23(a) (2012). Prosecutions under this regulation are routinely upheld by federal appellate courts. *See, e.g.*, United States v. Smith, 701 F.3d 1002, 1004 (4th Cir. 2012); United States v. French, 468 F. App'x 737, 738 (9th Cir. 2012) (unpublished); United States v. Jackson, 273 F. App'x 372, 374 (5th Cir. 2008) (unpublished).

[182] 36 C.F.R. § 1.3(a) (2012); *see also* 18 U.S.C. § 3551(b) (2011) (stating that federal defendants may be sentenced to a term of probation, to pay a fine, or to receive a term of imprisonment).

[183] Federal offenses with a maximum penalty of six months or less are classified as Class B misdemeanors. 18 U.S.C. §§ 3559(a)(7), 3581(b)(7). A Class B misdemeanor not resulting in death carries a maximum fine of $5,000. *Id.* § 3571(b)(6); *accord* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (per curiam) ("[T]he federal [driving under the influence] offense carries a maximum fine of $5,000.").

[184] 18 U.S.C. § 3013(a)(1)(A)(ii).

[185] *Id.* §3561(c)(2).

[186] *See, e.g.*, *Smith*, 701 F.3d at 1004; *French*, 468 F. App'x at 738; *Jackson*, 273 F. App'x at 374.

[187] 39 U.S.C. § 401(2) (2011) (granting the U.S. Postal Service (USPS) the authority "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title."); 38 U.S.C. § 901(a)(1) (2011) ("The Secretary [of Veterans Affairs] shall prescribe regulations to provide for the maintenance of law and order and the protection of persons and property on Department property.").

[188] 39 C.F.R. § 232.1(g)(1) (2012) (USPS) ("A person under the influence of an alcoholic beverage . . . may not . . . operate a motor vehicle on postal property."); 38 C.F.R. § 1.218(b)(7) (2012) (Department of Veterans Affairs). The maximum punishment for DWI on property administered by the USPS is up to one month confinement, a $5,000 fine, a $10 special assessment, and five years probation. 39 C.F.R. §232.1(g)(1) ("Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to fine of not more than [that allowed under Title 18 of the United States Code] or imprisonment of not more than 30 days, or both."); *see also* 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2), 3571(b)(6) (2006) (special assessment, probation, and fine, respectively). Defendants convicted of violating the Veterans Affairs DWI regulation face up to six months confinement, a $500 fine, a $10 special assessment, and five years probation. 38 C.F.R. §1.218(b)(15) (confinement and fine); *see also* 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2) (special assessment and probation, respectively).

[189] The DoD administers over nineteen million acres at 4,127 separate military bases and training ranges within the fifty states. *See* ROSS W. GORTE ET AL., CONG. RES. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 11–13 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42346.pdf.

DWIs in federal court pursuant to the ACA results in sentencing disparities,[191] and judges struggle to apply consistently the various state DWI statutes.[192] Authorizing the SECDEF to promulgate DWI regulations for military installations would simplify the prosecution and appellate review of these cases. The Department of Interior's DWI regulation could provide a useful template. Alternatively, Congress could pass a federal DWI statute that applies to all areas within the special maritime and territorial jurisdiction of the United States.[193]

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[190] *See supra* note 13 and accompanying text.

[191] *See supra* notes 151–52 and accompanying text.

[192] *See generally* Phelps, *supra* note 26, §§ 24–35 (cataloguing cases involving the assimilation of state penalty provisions).

[193] *See* 18 U.S.C. § 7 (2011).