SUPPORT THE TROOPS: RENEWING ANGST OVER
MASSACHUSETTS V. LAIRD AND ENDOWING SERVICE
MEMBERS WITH EFFECTUAL FIRST AND FIFTH
AMENDMENT RIGHTS

Robert Bejesky*

I. INTRODUCTION ................................................................. 448

II. POLITICAL AUTHORITY AND DERIVATIVE DEBATE .............. 452
   A. The Authorization to Use Force ....................................... 452
   B. Competing Positions .................................................. 460
      1. Debates in Congress Over Supporting the Troops ........ 460
      2. Societal Turbulence Over Defining the Meaning of “Support the Troops” ................................................. 468

III. LARGE-SCALE HARM FACED BY TROOPS ............................. 475
   A. Well-Known Risks ..................................................... 475
   B. Limitations on Liability ............................................. 475
   C. Posttraumatic Stress Disorder ................................... 479
   D. Exacerbating Troop Injuries? Depleted Uranium Exposure . 487
   E. Meeting Military Need ................................................ 493
      1. Recruitment .......................................................... 493
      2. Sliding Supply After the Iraq War ................................ 495

IV. RESTRICTIONS ON THE RIGHTS OF U.S. TROOPS ............... 506
   A. Introduction ............................................................. 506
   B. Culture, Hierarchy, and Mandatory Directives ............... 507
   C. The Context of Conscientious Objection ....................... 513

V. CONCLUSION ........................................................................ 518

* M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law (Georgetown). The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami. The author expresses his gratitude to the editorial team at the Albany Law Review for providing an exceptional, professional, and efficient publication process for this article.
In May 2014, scandal raged in Congress over delays in treatment and medical malpractice that may have led to over one hundred deaths of patients in Veteran Administration (VA) facilities, and over the possible existence of “secret lists” and the shredding of documents that sought to hide these failures. Republican John McCain called for a criminal investigation and Speaker of the House John Boehner stated that “[t]he real issue here is that, the president is the one who should be held accountable.”

McCain and Boehner advance credible positions. The shameful and lamentable events unfolded due to a VA system that confronts a several-month-long scheduling backlog for medical treatment, and the backlog was a byproduct of recent battle injuries.

Over 1.7 million U.S. troops were deployed to Afghanistan and Iraq during the recent wars. The war in Afghanistan was not so contentious, but the Iraq War was notably controversial because Congress granted an authorization for the use of military force (AUMF-Iraq) to purge Iraq of an alleged arsenal of prohibited weapons that the Bush Administration avowed existed inside Iraq.

It was later verified that no such arsenal existed. Professors

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3 See Black et al, supra note 1.

4 See The VA Hospital Scandal, NAT'L REVIEW ONLINE (Apr. 25, 2014), http://www.nationalreview.com/article/3765660/va-hospital-scandal-editors (noting that the VA was unprepared for the influx of soldiers returning from Iraq and Afghanistan).


6 H.R.J. Res. 114, 107th Cong. (2002); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (empowering the President to use force against individuals, groups, and states involved with the September 11 attacks and to prevent abettors to the attacks from committing future acts of terrorism); Robert Bejesky, Cognitive Foreign Policy: Linking Al Qaeda and Iraq, 56 HOW. L.J. 1, 12–13 (2012) [hereinafter Bejesky, Cognitive Foreign Policy] (noting that the AUMF was interpreted broadly).

7 See Robert Bejesky, Intelligence Information and Judicial Evidentiary Standards, 44
Ackerman and Hathaway befittingly punctuate that the AUMF-Iraq was a limited authorization to use force conditioned on there being an actual imminent threat, which means that when the Bush White House began offering additional rationalizations after the invasion, particularly of humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.” The humanitarian exigency characterization was baseless and after the Senate Select Committee on Intelligence (SSCI) completed its five-year investigation of the false allegations that led to the Iraq War, the SSCI chair remarked, “the Bush Administration led the nation to war under false pretenses.”

The international community condemned the attack and several years of regularly conducted polls confirmed that approximately 80% of Iraqis opposed continuing occupation. In 2007, ABC News surveyed the congresspersons who had voted for the AUMF-Iraq in October 2002 and discovered that a substantial percentage reversed their positions in hindsight, and therefore, the resolution would have been rejected had there been more accurate information about the alleged threat. The war and occupation resulted in over 32,000 U.S. military injuries, 4488 U.S. military deaths, 134,000 Iraqi civilian deaths, and a $2.2 trillion dollar cost to American taxpayers. President Obama understood the American and
international backlash, and in the January 2010 State of the Union Address he promised to withdraw all combat troops within eight months. U.S. troops were withdrawn by the end of 2011.

This article is devoted to the advocacy of former U.S. troops and their families who faced hardships due to the war and dissented based on their discernment of potentially faulty constitutional war powers. Jurisprudence indicates that U.S. troops lack firm constitutional rights even when there may be defects in the exercise of constitutional powers. This article revisits questions that were raised over the constitutionality of the Vietnam War, with new

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13 See Michael Sevi, Original Intent, Timetables, and Iraq: The Founders’ Views on War Powers, 13 Tex. Rev. L. & Pol. 73, 74 (2008) (reporting that President-elect Obama called the decision to go to war with Iraq carelessly made and promised a pullout within sixteen months); Karl Ritter & Matt Moore, Obama Wins Nobel Peace Prize, HUFFINGTON POST (Oct. 9, 2009), http://www.huffingtonpost.com/2009/10/09/obama-wins-nobel-peace-pr_n_314907.html (“The award appeared to be at least partly a slap at Bush from a committee that harshly criticized [him] for his largely unilateral military action.”). Another position is that Obama should not have received the award until after troops were pulled out of Iraq. See Ritter & Moore, supra.

14 See Remarks by the President in State of the Union Address, WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.


16 The political question doctrine restricts judicial intervention for constitutional challenges, and troops willingly abridge constitutional rights when they sign enlistment contracts with the Department of Defense. See Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973) (refusing to rule on the constitutionality of the Vietnam War based on the political question doctrine); DuCosta v. Laird, 471 F.2d 1146, 1150, 1152 (2d Cir. 1973) (holding that the lawfulness of the President’s directive to mine ports in North Vietnam was a nonjusticiable political question); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971) (“[I]n a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached.”); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (holding a determination of the constitutionality of the Vietnam War was beyond the scope of judicial review); see infra Part IV.C.

17 See Victoria Scharuda, Comment, Congress’ Spending Power and the Deployment of
facts, and asks whether possible constitutional flaws should endow American troops with entrenched rights to voice their opinions under the First Amendment and to not “be deprived of life, liberty, or property, without due process of law” under the Fifth Amendment. Based on the facts of the Iraq War, this article queries whether the majority’s denial of Massachusetts’ challenge (on behalf of conscripts) to the constitutionality of the Vietnam War in *Massachusetts v. Laird* is less compelling on principle than Justice Douglas’ dissent, which emphasized the illogic of valuing property rights in the Fifth Amendment more than the right to “life and liberty” of American troops.

Part II imparts a synopsis of the public and congressional debate prior to and during the Iraq War to emphasize the intensifying controversy over the invasion. Part III tenders a few justifications for elevating the constitutional rights of troops above a decumbent status, including the prospect of exposure to life-threatening injury, the tension lodged on the military disability system, the prevalence of posttraumatic stress syndrome, the controversy surrounding ill-health effects from depleted uranium, and the misfortune that emerged with military recruitment and stop-loss orders. Part IV concerns how dissent to a war premised on controvertible legality and a war that inflicted an enervating toll on American troops can be mired by military rules of general applicability. Part V concludes by questioning whether denying genuine First and Fifth Amendment rights to American troops when they are dictated to endure costs in a war driven by political artifice is immoral and un-American.

*Troops to Saudi Arabia—“The Purse and the Sword” Revisited*, 5 TEMPLE INT’L & COMP. L.J. 343, 348 (1992) (“It took approximately two decades for Congress to end the United States’ involvement in the Vietnam War. With the enactment and subsequent repeal of the Gulf of Tonkin Resolution, the relationship between the President and Congress deteriorated. Congressional leaders felt they had no choice but to use their spending power to stop the Vietnam War.”) In a statement to Congress as the Vietnam War was ending, Senator Fulbright remarked: “Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion, is null and void.” *Lori Fisler Damrosch & Henry L. Moses, War and Uncertainty*, 114 YALE L.J. 1405, 1409 (2005) (internal quotation marks omitted).

18 U.S. CONST. amends. I, V.
20 *Id.* at 899 (Douglas, J., dissenting) (illustrating Douglas’ issue with the fact that elevated rights were granted for private property in the wartime *Prize Cases* and the *Steel Seizure Case*). Justice Douglas wrote: “Here the lives and liberties of Massachusetts citizens are in jeopardy. Certainly the Constitution gives no greater protection to property than to life and liberty [for Americans].” *Id.*
II. POLITICAL AUTHORITY AND DERIVATIVE DEBATE

A. The Authorization to Use Force

The public agenda setting for war with Iraq began with media announcements of war plans and discussions of troop deployments in mid-2002, but the pressure on Congress and the United Nations fully reared during an American President and British Prime Minister news conference on September 7, 2002, and the aggressive rhetoric continued on the next day with Defense Secretary Rumsfeld, Vice President Cheney, National Security Advisor Rice, and Secretary of State Powell circulating the Sunday political talk shows and offering new security threat claims about Iraq. The President addressed the United Nations General Assembly on September 12, 2002, with the allegations about Iraq, such that emotions of indignation and peril over memories and discourse involving September 11 converged with Iraqi weapons claims.

At the same time, the President released a national security strategy, which proclaimed a right to preemptively attack other countries, and lobbied Congress for an authorization to use force against Iraq. Republicans proved more willing to back military action and


22 Bejesky, Weapon Inspections, supra note 8, at 303–10. The chief allegation was that Iraq attempted to procure aluminum tubes that allegedly could be used to enrich uranium for a nuclear weapons program. Id. at 305; Walter Pincus & Dana Priest, Bush, Aides Ignored CIA Caveats on Iraq, WASH. POST, Feb. 7, 2004, at A17 (“[The Bush Administration] made some of their most unequivocal assertions about unconventional weapons before the October 2002 National Intelligence Estimate (NIE) was completed.”).


25 CNN Live Event/Special: Senators Lott, McCain React to Bush Speech on Iraq, CNN.COM/TRANSCRIPTS (Sept. 12, 2002), http://transcripts.cnn.com/TRANSCRIPTS/0209/12/se.06.html. Senator Daschle remarked: “Every time the president continues to speak out . . . he strengthens his case.” Id. Senator Trent Lott stated: “As the president noted in his comments, [there is a serious threat] that has been gathering and growing.” Id.
some were not overly concerned about having evidence of wrongdoing or weapons of mass destruction (WMDs) to justify the use of force, while Democrats were somewhat more reluctant to commit to an American military action against Iraq. Democrats wanted the Security Council to act first, but instead, as a New York Times editorial explained, “[t]he haste” in pressing for an authorization to use force was “clearly motivated by campaign politics” because “Republicans [were] already running attack ads against Democrats on Iraq.”

The intensity of agenda setting was later summarized in a study produced by the Center for Public Integrity, which found that during September 2002, top Bush administration officials made approximately 300% more false statements about threats from Iraq than in the previous month. Observing how the Bush Administration’s threat claims intensified and were being exploited to spur congressional action, SSCI member Dick Durbin addressed a letter to CIA Director George Tenet on September 9, 2002, to “direct the production” of a national intelligence estimate (NIE) for Congress. An NIE had never been produced that was devoted to


30 S. REP. NO. 108-301, at 298 (2004) (internal quotation marks omitted) (“[P]olicymakers in both the executive branch and the Congress will benefit from the production of a coordinated, consensus document produced by all relevant components of the Intelligence Community.”) (internal quotation marks omitted). Several members of Congress objected to authorizing the use of force without having more information and disapproved of the President speaking publicly about dangers without an NIE. Id. at 12, 299; see Louis Fisher, Deciding on War Against Iraq: Institutional Failures, 118 POL. SCI. Q. 389, 396, 398 (2003);
Iraqi weapons of mass destruction programs, and the most recent official determinations had been produced by United Nations weapons inspectors who departed Iraq in 1998 and acknowledged that they lacked evidence of Iraq possessing prohibited weapon programs. The SSCI later indicated that the U.S. Intelligence Community (IC) was devoid of intelligence sources on Iraqi weapons systems after inspections ceased in 1998.

On September 19, 2002, President Bush submitted his draft resolution to Congress to authorize the use of military force, and Congress held hearings on the alleged threat. On October 1, 2002, the IC finished an NIE that took three weeks to complete, when experts presumed that the NIE production process could have required six months to produce such complex estimates. Because NIEs normally remain classified and are only available to select government officials and politicians, the CIA produced a white paper, *Iraq's Weapons of Mass Destruction Programs*, for Congress. The SSCI's later investigation determined that the White Paper was "substantively similar to" the NIE, but because caveats, dissenting opinions, and equivocal language were eliminated, the "White Paper misrepresented [IC] judgments to the public which did not have access to the classified National Intelligence Estimate . . . ." The problem paralleled what led

Pincus & Priest, *supra* note 22, at A17. To the criticism over accentuating threats prior to the production of an NIE, Tenet stated that he sees Bush every morning to deliver the Presidential Daily Briefing and "[h]e gets the intelligence I provide." See S. Rep. No. 108-301, at 299 (internal quotation marks omitted).

S. Rep. No. 108-301, at 298 ("The IC [Intelligence Community] had not produced an in-depth, comprehensive, coordinated IC assessment of Iraq's WMD programs since the production of the December 2000 Intelligence Community . . . Assessment . . . and had never produced an NIE devoted to Iraq’s WMD programs."). The CIA admitted that there was no NIE on Iraq and that it had not thought to prepare one for over two years. See Eric Schmitt & Alison Mitchell, *Baghdad Arsenal: US Lacks Up-to-Date Review of Iraqi Arms*, N.Y. TIMES, Sept. 11, 2002, at A21.

Lewis & Reading-Smith, *supra* note 29.

S. Rep. No. 108-301, at 8–9, 11–13, 299 (reporting that the work on the NIE launched on September 12 at the National Intelligence Office and under the CIA director's guidance). The NIE, "prepared in just three weeks time, was a rushed and sloppy product forwarded to members of Congress mere days before votes would be taken to authorize the use of military force against Iraq." *Id.* at 450.

*Id.* at 286, 298 (noting that Senator Durbin asked Tenet to produce an unclassified summary of the NIE for the public).

See *id.* at 286, 294.

*Id.* at 295. SSCI members Rockefeller, Levin, and Durbin explained that eliminating the caveats and dissenting opinions from its White Paper "misled the public" and that the CIA also "selectively declassified information" favorable to the Bush Administration.* Id.* at
Senator Durbin to request the NIE—top administration officials are provided with classified intelligence information in Presidential Daily Briefs (PDBs)\(^\text{30}\) and could selectively release classified information while keeping controversial and weak foundations of the claims secret,\(^\text{40}\) placing Congress at an informational disadvantage.\(^\text{41}\) Meanwhile, the Bush administration’s high-profile agenda setting preceded the production of the NIE, which could bias the IC, Congress, and the public with mischaracterized intelligence.\(^\text{42}\)

With the biased White Paper, members of Congress debated the alleged danger from prohibited weapons and potential Iraqi connections to al Qaeda.\(^\text{43}\) From historical investigations, Congress tends to be more supportive of the President’s political initiatives when the executive’s public opinion polls are high.\(^\text{44}\) CNN analyzed how the executive’s advocacy elevated political stakes: “He has Democrats in a box . . . . It’s very hard for them to oppose the

\(^{457}\) Id. at 501. In addition to a public white paper, there was a one-page summary of the NIE for the President and eighty other members of the White House. Id. The CIA would not provide a copy, noting “we will not provide any materials written exclusively for the President or for the PDB [President’s Daily Brief] readership.” Id. at 501. The NIE was generated by “layering” previous reports and “primarily using previous judgments without substantial new intelligence reporting.” Id. at 22; see also S. Rep. No. 109-330, at 192 (2006) (asking how the Iraqi National Congress (INC) information was used). Presumably, the President and other top officials attained their information to make the earlier public claims from PDBs or other similar reports.


\(^{41}\) See Bejesky, Intelligence Information, supra note 7, at 877; Jacobs, supra note 40, at 442–45.

\(^{42}\) If the executive’s allegations are supposed to be derived from intelligence information, it would seem unlikely to have an NIE produced that would reject what the President was already stating publicly to the United Nations and Congress. SSCI members later remarked that the Bush administration was “selectively releasing and mischaracterizing intelligence information that supported” threat allegations. S. Rep. No. 108-301, at 463. Senator Graham, who did have access to the intelligence information, “complain[ed] that the administration’s and [the director of the CIA’s] own statements contradicted the classified reports they had read, [but the few Senators with access to the reports] could not say what was actually in those reports” due to secrecy restrictions. Spencer Ackerman & John B. Judis, The Selling of the Iraq War: The First Casualty, THE NEW REPUBLIC, June 30, 2003, at 23.


president, especially just weeks before the November election.”

Professor Jide Nzelibe commented, “Democrats tried to propose postponing the request [for a vote] until after the November 2002 election, but ultimately they relented when Republican members of Congress started accusing them of playing politics with the country’s national security.” Louis Fisher wrote: “[L]eadership Democrats folded, one by one, looking less to constitutional requirements than to their own political calculations.”

The President can escalate conflict and contour public opinion. The public was already primed on the issue of peril from Iraq, and those perceptions likely goaded members of Congress to vote in accordance with constituent perceptions on this highly publicized agenda because a politician’s foremost self-interest is to be reelected. The President also promoted the issue of threats from Iraq while campaigning for Republican candidates. In late September 2002, CNN noted that President Bush had been campaigning for fellow Republicans in an aptly titled article, “Bush Talks Iraq, Stumps for GOP in N.J.” Members of Congress will support the President’s agenda to take advantage of the coattail

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45 Jeffrey A. Botelho, Congressional Responsibility in Controlling the War Machine, 21 ST. THOMAS L. REV. 305, 341 (2009) (stating that the CNN analyst also noted that Democrats were especially conflicted due to the memories of the Gulf of Tonkin resolution).


51 SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 65–66 (2006); Daryl J. Levinson &
effect and cohesion exists inside the parties, such that members exhibit ideological allegiance and often vote along party lines to bestow reciprocal support. Democrat Senator Byrd, the longest-serving Senator in U.S. history, was vocal, but that may have been because he was not in danger of losing his position. Byrd remarked, “I will not give the benefit of the doubt to the President. I will give the benefit of the doubt to the Constitution.” Byrd observed the evidentiary foundation and expounded: “Before we put this great nation on the track to war, I want to see more evidence, hard evidence, not more presidential rhetoric.” Byrd opined that the White Paper was unconvincing, believed that Congress should not “yield to this absurd pressure to act” one month before an election, and sought to precisely confine the authorization. Senator Mark Dayton accentuated that “there appears to be no imminent threat to the United States from Iraq” and opined that the timing was intended for a “political advantage in the upcoming election.”


54 Nzelibe, supra note 46, at 933.


57 Robert C. Byrd, Op-Ed., Congress Must Resist the Rush to War, N.Y. Times, Oct. 10, 2002, at A39 (“I have searched for that single piece of evidence that would convince me that the president must have in his hands, before the month is out, open-ended Congressional authorization to deliver an unprovoked attack on Iraq. I remain unconvinced. . . . We must not yield to this absurd pressure to act now, [twenty-seven] days before an election that will determine the entire membership of the House of Representatives and that of a third of the Senate . . . because while it is Congress that casts the vote, it is the American people who will pay for a war.”).

58 148 Cong. Rec. 19,697 (2002) (statement of Sen. Byrd) (arguing that the AUMF-Iraq should only permit the president to use military force if there was “a clear threat of imminent, sudden, and direct attack upon the United States, its possessions or territories, or the Armed Forces of the United States”).

59 Mark Dayton, Don’t Rush Iraq Question, Farmers Independent, Oct. 9, 2002, at 4A.
evidence, Senator Patrick Leahy said during the debates on the vote:

Many respected and knowledgeable people—former senior military officers and diplomats among them—have expressed strong reservations about this resolution. . . . But they have not seen that evidence, and neither have I.

We have heard a lot of bellicose rhetoric, but what are the facts? I am not asking for 100 percent proof, but the administration is asking Congress to make a decision to go to war based on conflicting statements, angry assertions, and assumption based on speculation.60

The White House extensively lobbied to pass the resolution.61 Almost all Republican members of Congress voted in favor of the authorization. In the House of Representatives, 215 Republicans and eighty-one Democrats voted in favor.62 In the Senate, forty-eight Republicans and twenty-nine Democrats voted for it.63 Professor Mermin wrote: “Democratic support for a Republican military intervention is not compelling evidence that the policy advances American interests, or even that a broad spectrum of elected officials believe that it does,” but may mean “that reelection-seeking Democrats have made a strategic decision not to criticize an American war.”64 After the invasion, the SSCI inspected the intelligence reports and concluded that estimates were not supported by the existing intelligence.65 Congress voted based on an unclassified version of a hastily produced NIE with substantively false allegations.66

One month after the war began, ABC News provided an apropos representation of the transformed rationale for war when it reported, “some [Bush Administration] officials now privately

60 148 CONG. REC. 19,682 (2002) (statement of Sen. Leahy). See generally Barbara Lee, Preampting Democracy: The Bush Administration vs. the World, 7 BERKELEY J. AFR.-AM. L. & POLY 29, 35–36 (2005) (remarking that the Bush Administration made unequivocal and repeated allegations of threats from Iraqi weapons but that she and other members of Congress were not convinced). Congresswoman Lee and “132 other members of Congress who voted against authorizing the use of force against Iraq” were not convinced, and she and seventy-one members of Congress sought to “rule[] out the use of military force while strengthening the inspections process and our commitment to the UN.” Lee, supra, at 35–36.
61 Ackerman & Hathaway, supra note 8, at 458.
65 See Bejesky, Intelligence Information, supra note 7 at 875–82; Bejesky, Politico, supra note 10, at 70.
acknowledge the White House had another reason for war—a global show of American power and democracy.”67 “[A] global show of American power and democracy” is not a legal basis for action, and it was not what Americans, Congress, the United Nations Security Council, or foreigners were told.68 ABC News also conveyed that White House officials insisted that they did not lie, but that “the administration emphasized the danger of Saddam’s weapons to gain the legal justification for war from the United Nations and to stress the danger at home to Americans.”69

“Emphasizing” accusations that are false to “gain the legal justification for war” when possession of prohibited weapons was the only discussed and legal basis for using military force is lying. The AUMF-Iraq stated that the use of military force required that Iraq be a national security threat to the United States or that force be necessary to enforce U.N. Security Council resolutions.70 When the authorization was adopted, members of Congress expressed that it was intended to leverage resolute diplomacy through the United Nations and was not per se endorsing war.71 The President understood that the terms were conditions because he reiterated the AUMF-Iraq language verbatim, he stated that the terms were met in a letter to Congress two days before the attack to comply with the 48-hour requirement in section two, and he assuredly was not

68 See id.
69 Id.; Bejesky, Weapon Inspections, supra note 8, at 360–62; see also Goodman, supra note 9, at 133 (“[F]ormer Deputy Secretary of Defense Wolfowitz admitted that the [Bush A]dministration ‘settled on the one issue that everyone could agree on which was weapons of mass destruction as the core reason’—rather than ‘the criminal treatment of the Iraqi people,’ which he believed was by itself ‘not a reason to put American kids’ lives at risk.’”). The Bush Administration did place American lives at risk with its bogus reasons for war. Perhaps Tocqueville provides insight on the purpose of the falsities when he wrote of the excessive difficulty of “excit[ing] the enthusiasm of a democratic nation for any theory which does not have a visible, direct, and immediate bearing on the occupations of their daily lives.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 642 (J. P. Mayer ed., 1969).
71 H.R. REP. No. 107-721, at 4, 5 (2001) (stating the House Committee on International Relations’ impression was that the authorization was intended as a means of avoiding the use of military force by persuading Iraq to meet its international obligations); 148 CONG. REC. 20,436 (2002) (statement of Sen. Clinton) (“A vote for [AUMF-Iraq] is not a vote to rush to war . . . and we say to [President Bush]: Use these powers wisely and as a last resort.”); see also 148 CONG. REC. 20,436 (statement of Sen. Biden) (“[A] strong vote in Congress . . . increases the prospect for a tough, new U.N. resolution . . . [and] decreases the prospects of war.”); JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH 155 (2004) (noting the bait and switch reasons for war); Fisher, supra note 47, at 1212. Many in Congress had pushed for an even narrower resolution, authorizing the use of force only with the explicit approval of the United Nations” and an actual imminent threat. Ackerman & Hathaway, supra note 8, at 462–63.
forthright when he affirmed the conditions were met.\textsuperscript{72}

B. Competing Positions

1. Debates in Congress Over Supporting the Troops

To evaluate the discordant political perceptions regarding the rights and obligations of troops, as derived from the constitutional process that conferred war powers authority, assume that there are two opposing sides to the execution of the war and that those two positions justify their opinions from factors such as political inclinations, interpretations of the President’s war powers, and the status of troops’ interests based on the legitimacy of the conflict. War advocates may punctuate an obligation to unite behind executive discretion in interpreting the AUMF-Iraq, irrespective of the political process leading to war. Alternatively, war opponents would likely underscore defects in the AUMF-Iraq authority, including that Congress required security threats and did not sanction invasion to actualize “a global show of American power and democracy.”\textsuperscript{73} With respect to the derivative troop status, the first position would ostensibly reckon that patriotism means countenancing the commander in chief’s directives so that the U.S. military achieves victory in battle by subjugating the foe with the fewest casualties, while the second opinion would seemingly equate patriotism with protecting the lives of troops by not deploying them into battle without a justified and democratically-endorsed reason.

The first view was ardently championed by the President. Many criticized the President for having a callous disregard for the consequence for war,\textsuperscript{74} particularly when his own avoidance of the

\textsuperscript{72} Jarrett Murphy, President’s Letter to Congress, CBS NEWS (March 18, 2003), http://www.cbsnews.com/stories/2003/03/19/iraq/main544604.shtml; see also Ackerman & Hathaway, supra note 8, at 464 (noting that the additional rationalizations, particularly of humanitarian intervention, “was blatantly inconsistent” with the actual text of the 2002 resolution).

\textsuperscript{73} Cochran, supra note 67; Ackerman & Hathaway, supra note 8, at 464 (emphasizing the lack of substantiation in the post facto war rationales).

\textsuperscript{74} See Harold P. Southerland, The Case for American History in the Law-School Curriculum, 29 W. NEW ENG. L. REV. 661, 689–90 (2007). After Bush remarked that he had given up golf in recent years because he did not want grieving families to see him playing golf, MSNBC’s Keith Olbermann stated:

Golf, sir? Golf sends the wrong signal to the grieving families of our men and women butchered in Iraq? Do you think these families, Mr. Bush, their lives blighted forever, care about you playing golf? Do you think, sir, they care about you? You, Mr. Bush, let their sons and daughters be killed. Sir, to show your solidarity with them you gave up golf. Sir, to show your solidarity with them you didn’t give up your pursuit of this
Vietnam War draft was filled with inconsistencies and discrepancies. Three months after the invasion, Bush remarked, “There are some who feel like that, you know, the conditions are such that they can attack us there. My answer is bring them on. We got the force necessary to deal with the security situation.”

When the New York Times reported on this quote shortly thereafter it was placed into the context of Bush defending the troops: “[A]nybody who wants to harm American troops will be fought and

insurance-scam, profiteering, morally and financially bankrupting war. Sir, to show your solidarity with them you didn’t even give up talking about Iraq, a subject about which you have incessantly proved without pause or backwards glance, that you may literally be the least informed person in the world?”


There was a charge that threatened George W. Bush’s presidential campaign in 1999. In a written statement under oath, Ben Barnes, former speaker of the Texas state legislature, stated that in 1968 he asked Texas Air National Guard General James Rose to give Bush a priority slot in the Texan Air National Guard, which would effectively excuse him from the Vietnam War draft. Julian Borger, Draft-Dodge Tale Threatens Bush’s Run for Presidency, Guardian (United Kingdom), Sept. 29, 1999, available at 1999 WLNR 8586857; Jim Yardley, Former Texas Lawmaker Says He Helped Bush Get Into Guard, N.Y. Times, Sept. 27, 1999, at A16 (noting that Barnes made the request on behalf of a wealthy Houston oilman who was a friend of Mr. Bush’s father). Gerald A. Lechliter, a retired Army colonel, wrote a report on Bush’s performance, based on the military records, and found that the pay record indicated that Bush received “fraudulent, payments for inactive duty training,” that it was questionable whether he met the statutory participation requirement, and that “Bush’s superiors in the Texas Air National Guard failed to take required regulatory actions when Bush missed required training.” Gerald A. Lechliter, President George W. Bush’s Military Service: A Critical Analysis, N.Y. Times 1 (2004), http://www.nytimes.com/packages/pdf/opinion/lechliter_.pdf. CBS later faced scandal after four documents relating to Bush’s service in the National Guard were placed in question. Jarrett Murphy, CBS: Bush Memo Story a Mistake, CBS News (Sept. 21, 2004), http://www.cbsnews.com/stories/2004/09/21/politics/main644719.shtml. As the story recognizes, it is not clear how the lack of verification of these four documents does not disprove the story, but critics immediately seized on the errors in these memos. Id. This chronology likely made Bush appear as wrongfully-persecuted. Despite debates over the details, Bush’s entry into and time spent in the Air National Guard were filled with discrepancies and inconsistencies. Josh Levin & Timothy Noah, Yeoman of the Guard, Slate (Feb. 12, 2004), http://www.slate.com/articles/news_and_politics/chatterbox/2004/02/yeoman_of_the_guard.html. See generally Greg Palast, Bush Family Fortunes: The Best Democracy Money Can Buy, YouTube, http://www.youtube.com/watch?v=uDj35osHNoK (last visited Oct. 6, 2014).

Text of Bush’s Wednesday Comments, USA Today (July 2, 2003), http://usatoday30.usatoday.com/news/washington/2003-07-02-bush-speech-text_x.htm. Similarly, amid strong demands from members of Congress that troops be withdrawn from Iraq, Speaker of the House Dennis Hastert remarked that withdrawal was a policy that is equivalent to “the United States surrender[ing] to terrorists who would harm innocent Americans.” Eric Schmitt, Fast Withdrawal of G.I.’s Is Urged by Key Democrat, N.Y. Times, Nov. 18, 2005, at A1; see also 151 Cong. Rec. 27,428 (2005) (statement of Rep. Schmidt) (dissenting to a bill that demanded withdrawal of troops). Republican House Representative Jean Schmidt explained that she had attended a “funeral of a young Marine from [her] district. He believed what we are doing is the right thing, and had the courage to lay his life on the line to do it.” 151 Cong. Rec. 27,428 (statement of Rep. Schmidt).
brought to justice.” The second view that began to oppose the war strengthened as U.S. troop deaths mounted and the mission was uncertain.

In an October 2003 Harris poll, taken six months after the invasion, the U.S. public was split on support for the war, but in June 2004 the Harris poll found that 56% of Americans favored “bringing most of our troops home in the next year.” Even as the Bush Administration sought to maintain high support for the war, by the end of 2005, opinion polls revealed that a majority of Americans “oppose[d] the decision to attack Iraq” and that “[a] majority also want[ed] troops brought home.” In a Washington Post-ABC poll in November 2005, Bush’s approval ratings dropped to 39%, and 58% of Americans had doubts about the President’s honesty. A February 2006 Zogby poll found that 72% of U.S. troops favored withdrawal within a year. In March 2006, 68% of Americans believed that troops should be decreased or withdrawn.

In the 2006 congressional election exit polls, 74% of Democrats wanted to withdraw troops from Iraq, while only 24% of Republicans agreed. Republicans had to choose whether to abandon Bush on Iraq.

77 Text of Bush’s Wednesday Comments, supra note 76.

78 Unlike 9/11 Commission, Large Majority of Public Polled Recently Still Believed Saddam Hussein Was Supporting Al Qaeda, PR NEWSWIRE, June 17, 2004, available at http://www.prnewswire.com/news-releases/unlike-911-commission-large-majority-of-public-pollled-recently-still-believed-saddam-hussein-was-supporting-al-qaeda-75052517.html (internal quotation marks omitted) (reporting that the public was split on this issue in October 2003). When asked: “Do you favor keeping a large number of U.S. troops in Iraq until there is a stable government there OR bringing most of our troops home in the next year?” only 39% did not favor “bringing most of our troops home in the next year.” Id.; see also, WorldPublicOpinion.org & Knowledge Networks, Americans on Iraq: Three Years On 12–13 (Mar. 15, 2006), available at http://www.worldpublicopinion.org/pipa/pdf/mar06/US_Iraq_Mar06_rpt.pdf (finding that 41% of Americans believed that either the number of troops in Iraq should be decreased or withdrawn).

79 ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 96 (Metro. Books 2007) (2006); see also 151 CONG. REC. 13,470 (2005) (statement of Cong. Woolsey) (“Nearly 60 percent of Americans believe that the United States should bring home some or all of our troops from Iraq. Just as revealing, the Gallup poll showed that only 36 percent of Americans support maintaining our current troop levels in Iraq.”).


82 WorldPublicOpinion.org & Knowledge Networks, supra note 78, at 10.


As experts predicted, Bush’s low approval ratings translated into landslide victories for Democrats in the 2006 congressional elections, giving Democrats control of both the House of Representatives and Senate for the first time since 1994. There was a high correlation between district-level losses and legislators who voted for the war, and victories were viewed as partially attributable to voter rejection of the Iraq War. After Democrats acquired control of both Houses of Congress, Congress approved a $124 billion Iraq War funding bill and attached a troop withdrawal timeline, but on May 1, 2007, Bush vetoed the bill and Congress failed to override the veto with a two-thirds supermajority. It may

65 Bush’s Approval Ratings Slide to New Low, CNN (Apr. 24, 2006), http://www.cnn.com/2006/POLITICS/04/24/bush.poll/ (stating that Bush’s new low approval ratings could provide dividends to Democrats); Marc Sandalow, Campaign 2006: Democratic Congress No Longer a Long Shot, S.F. CHRON. (Sept. 3, 2006), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/03/MNG4FKUMR51.DTL (“Democrats are poised to make their biggest gains since the post-Watergate elections . . . [due to d]iscontent over the war in Iraq . . . and President Bush’s sinking popularity.”).


67 Grose & Oppenheimer, supra note 86, at 531. One would anticipate these results from the theoretical literature on past elections. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 267–71 (1990); Jane Mansbridge, Rethinking Representation, 97 AM. POL. SCI. REV. 515, 516 (2003); see John R. Hibbing & John R. Alford, The Electoral Impact of Economic Conditions: Who is Held Responsible?, 25 AM. J. POL. SCI. 423, 428–32 (1981). A record number of women retained or won seats and women from the Democratic Party more heartily supported an exit strategy position. Muellner, supra note 84, at 63–65, 75 (calculating that 38% of Democrat Women, 67% of Democrat Men, 3% of Republican Women, and 4% of Republican Men supported “Need exit strategy” for Iraq; and that only 1% of Democrat Women and 0% of Democrat Men represented a “Stay the Course’ on the war” position); Memorandum from Lake Research Partners to Interested Parties (Nov. 17, 2006), http://www.lspa.com/polls/pdf/Women%20in%20the%202006%20Elections%20-%20Lake%20Research.pdf (noting that Iraq was perceived as the most important issue facing Congress, that women led the way for change in the 2006 election, and that these representatives will be “directing the agenda for the new Congress on Iraq, health care and retirement security”). There is also a significantly higher percentage of women who are Democrats in Congress. Women Representatives and Senators by Congress, 1917–Present, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress/ (last visited Oct. 6, 2014) (showing statistics representing that of those women holding a congressional office in 2007, of which 69 were Democrats and 26 were Republicans).

68 Rudesill, supra note 10, at 5236 (“[Republicans] lost control of Congress in 2006—in significant measure because of domestic displeasure with the course of the Iraq war . . . .”); Alan Cowell, Reactions From Abroad Set Conciliatory Tone, Seeing Vote as a Protest to Iraq Policy, N.Y. TIMES, Nov. 9, 2006, at A29.

69 Charles Tiefer, Can Congress Make a President Step Up a War?, 71 LA. L. REV. 391, 415–16, 441–42 (2011) (noting that Congress intended to reduce the number of troops in Iraq and eventually end the occupation); President Bush Vetoes Iraq War Funding Bill, PBS NEWSHOUR (May 1, 2007), http://www.pbs.org/newshour/bb/politics/jan-june07/veto_05-01.html.

70 Joel Roberts, House Bid to Override Bush Veto Fails, CBS NEWS (May 2, 2007),
not be in a president’s self-interest to withdraw from a war if doing so could mean that he/she loses credibility, experiences negative populace reactions and further erosion of ratings for starting the war in the first place, weakens the commander in chief power, or smirches a legacy for being forced to exit a U.S. initiated war. The President was resolute and won the political showdown and maintained the occupation, perhaps because of the perception management that developed over what it meant to support the troops.

Tactics paralleled exploits during the Vietnam War. Both the Johnson and Nixon Administrations linked support for the troops with “loyalty to the government and its policy in Southeast Asia, and... impugned the loyalty of their critics.” Members of Congress resented the rhetorical strategy of “do not turn your back on the troops” during the Vietnam War, but the rhetoric still impelled Congress to continue funding. From the executive


92 See Douglas Kriner, Can Enhanced Oversight Repair “The Broken Branch?”, 89 B.U. L. REV. 765, 771–80 (2009). After the political showdown was finished, Bush was able to send more troops to Iraq. Lolita C. Baldor, Pentagon Tells 35,000: Prepare to Deploy, WASH. POST (May 8, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/08/AR2007050800705.html. In a proposal that had been openly discussed for several months, Bush was able to deploy 21,500 additional troops to Iraq to quell discontent and maintain control over the country. Lolita Baldor, Pentagon Deploys More Troops to Baghdad, WASH. POST (Mar. 8, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/07/AR2007030701716_pf.html; Commander in Diyala Wants More Troops, MILITARY.COM (May 11, 2007), http://www.military.com/NewsContent/0,13519,135560,00.html?ESRC=topstories.RSS. During congressional hearings, many members of Congress opposed proposals to send more troops. See Kriner, supra, at 779; Carl Hulse & Jeff Zeleny, Senate Rejects Iraq Troop Withdrawal but Vows to Find Compromise, N.Y. TIMES, May 17, 2007, at A16 (Senators opposing withdrawal of forces prevailed by a 67 to 29 vote in the Senate). The President obtained another $100 billion to fund the war with no pullout date. Richard Cowan & Susan Cornwell, Democrats to Fund Iraq War with No Pullout Date, REUTERS, May 22, 2007, available at http://www.reuters.com/article/20070522/us-iraq-usa-funding-idUSN203985620070522.


branch perspective, the assumption was that Americans were mandated to support the war or be viewed as unpatriotic. Ultimately, none of the allotments for operations were “actually intended to promote troop safety, but in reality advanced the same policies of conducting a wider war that the public and Congress had rejected.”

The court in *Mitchell v. Laird* stated that “[a] Congressman wholly opposed to the [Vietnam War’s] commencement and continuation might vote for the military appropriations and . . . [even] draft measures because he was unwilling to abandon without support men already fighting.”

Amid Congressional dissent over deploying more troops to Iraq, Vice President Cheney, who was also subject to questions about how he avoided serving in the Vietnam War, asserted:

> When members of Congress pursue an antiwar strategy . . . they are not supporting the troops, they are undermining them . . . [a]nyone can say they support the troops and we should take them at their word, but the proof will come when it’s time to provide the money.

To defend the “troop surge” proposal, Bush retorted, “I believe the members of Congress are sincere when they say they support the

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96 Tiefer, supra note 93, at 340; see also ANTHONY PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 240 (Holt Paperbacks 2002) (1992) (“With each commitment [of more troops and new proposals during the Vietnam War] and then failure, U.S. objectives would change and grow increasingly ill defined and vague as those involved in the . . . decision sought to rationalize and justify their previous actions.”).


98 Katharine Q. Seelye, *Cheney’s Five Draft Deferments During the Vietnam Era Emerge as a Campaign Issue*, N.Y. TIMES, May 1, 2004, at A12 (noting that from 1963 to 1967 Cheney received five deferments for the draft). When asked about his draft deferments during the 2004 election campaign, he affirmed, “I had other priorities in the 60’s than military service.”

99 Sheryl Gay Stolberg, *Opposition Undercuts Troops, Cheney Says of Spending Bill*, N.Y. TIMES, Mar. 13, 2007, at A10 (internal quotation marks omitted). Secretary of State Rice remarked: “I think the president is going to, as commander in chief, need to do what the country needs done. . . . I can’t imagine a circumstance in which it’s a good thing that [commanders’] flexibility is constrained by people sitting here in Washington, sitting in the Congress, trying to micromanage this war.” *Transcript: Condoleezza Rice on ‘Fox News Sunday,’* FOXNEWS.COM (Feb. 25, 2007), http://www.foxnews.com/story/0,2933,254502,00.html.
troops, and now is the time for them to show that support.”

Bush exerted the same stratagem during the 2004 presidential campaign after Democratic candidate Kerry voted to reject funding: “[Senator Kerry] said the whole matter about the $87 billion is a complicated matter. There’s nothing complicated about supporting our troops in combat.”

In March 2008, at a time when over four thousand American soldiers had been killed and tens of thousands injured, Vice President Cheney stated that President Bush bears “the biggest burden” of the war.

Professors Lobel and Loewenstein explained that the “immediate appeal of the ‘support our troops’ argument usually outweighs any rational consideration of the merits of voting for or against funding.”

Massachusetts Institute of Technology Emeritus Linguistics Professor Noam Chomsky identifies this situation as a typical propaganda stratagem that dismisses conditions that occasion war and the previously stated mission by focusing on dialogue that rallies the populace with patriotism.

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102 Froomkin, supra note 12 (noting that 4487 soldiers died and 32,226 troops were injured during the Iraq War).


104 Jules Lobel & George Loewenstein, Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law, 80 CHI.-KENT L. REV. 1045, 1065 (2005); see also Byrd, supra note 56, at 64–65 (“Take Military spending. Wrapped in ‘patriotism’ and platitudes, a Rumsfeldian arrogance driven by a White House dominated by superhawks virtually sneers at the legislative branch.”). While many Democrats, such as Hillary Clinton and Chuck Schumer later opposed the conduct of the war, they maintained funding.

105 DOUGLAS RUSHKOFF, Coercion: Why We Listen to What “They” Say 144 (1999)
emphasizes how critical substantive inquiries can be dismissed by shifting attention:

Support our troops. Who can be against that?

... The issue was, Do you support our policy? But you don’t want people to think about that issue. That’s the whole point of good propaganda. You want to create a slogan that nobody’s going to be against, and everybody’s going to be for. Nobody knows what it means because it doesn’t mean anything... So you have people arguing about support for the troops? “Of course I don’t not support them.” Then you’ve won.106

Does “support the troops” mean that Americans should continue to finance a war and leave American troops in dangerous conditions longer? A Zogby poll in February 2006 seemingly connoted that American troops might disagree because the poll found that 72% of U.S. troops in Iraq favored withdrawal within a year.107 Senator Rockefeller reported that members of Congress would not have “sent so many U.S. troops into harms way” had they known that the intelligence allegations were false.108 Republican Senator Gordon Smith, on the floor of the Senate, expressed, “I, for one, am at the end of my rope when it comes to supporting a policy that has our soldiers patrolling the same streets in the same way, being blown up by the same bombs day after day... That is absurd. It may even be criminal.”109 Senator Campbell remarked, “we were leaned on pretty heavily by the administration... if you didn’t support the president you weren’t a good soldier... [s]o we got stampeded into

(citing NOAM CHOMSKY, MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA 6–7 (1991)).

106 CHOMSKY, supra note 105, at 6–7.
109 Jake Tapper, Senate Regrets the Vote to Enter Iraq, ABC NEWS (Jan. 5, 2007) (internal quotation marks omitted), http://abcnews.go.com/GMA/Politics/story?id=2771519&page=1. American Enterprise Institute scholar Norman Ornstein construed: “This is very significant... What this tells me is that Gordon Smith’s very stunning speech was in some ways the tip of the iceberg.” Id. (internal quotation marks omitted).
doing something...”

The AUMF-Iraq remained a divisive issue. During the 2008 presidential campaign, Senator John McCain conveyed an absolutely “shameless assertion that Barack Obama would rather win an election than win the War.” If Obama was representing a position to end a war that would appease American voters, he was upholding the Constitution by observing American democratic will; whereas, demonstrating pigheaded devotion to “winning” a war with no relation to the underlying conditions specified in the AUMF-Iraq might not. Nonetheless, the agitation abided. After President Obama won his second term, he appointed Republican Senator Chuck Hagel who opposed the 2007 Iraq War “surge” and Senator McCain stated, “I think history has already made a judgment about the surge, sir, and you’re on the wrong side of it.” Hagel argued that 1200 American troops died in the buildup and that foreign policy decisions made in Washington should calculate the sacrifices of American troops. Indeed, CBS’s reflective poll in 2007 affirmed that congresspersons would have voted against the AUMF-Iraq had they known that all of the allegations about prohibited weapons were false, the American people and Congress wanted a withdrawal in 2007, and a 2013 poll found that a majority of Americans still regretted the invasion of Iraq.

2. Societal Turbulence Over Defining the Meaning of “Support the Troops”

Despite that academics and the general public are customarily hesitant to voice sentiments that will defy predominant heuristics if defiance might expose the protester to disrepute, commentators...
did tender challenges to defining the “support the troops” theme. For example, in the midst of the recently proposed military action against Syria that was overwhelmingly opposed by the American public and Congress, Virginia Tech Professor Steven Salaita experienced a firestorm after he expressed that he had grown fatigued of the “ubiquitous ‘support the troops’ meme.” Salaita expressed that his meaning was contorted because he does believe that more should be provided to assist injured troops but that the Orwellian exploitation of the phrase “support the troops” functions as a “barrier to questioning American foreign policy,” a method of executing belligerent military acts, a vehicle for privileged corporate interests to prosper from war, and a mode of exploiting troops who do not realistically benefit from the military action. In essence, once the dominant patriotic discourse imbues society and merges the executive’s military mission with the sincere concern for American service that exist across society, as articulated by Professor Chomsky, an executive could twist the public’s loyalty to the troops into belligerence that could endanger the lives of additional American military personnel. To more fully appreciate the reverberations of the persuasive artifice, it behooves to read the terms of the AUMF-Iraq; the President’s verbatim iteration of the conditions; and acknowledge the 4488 U.S. military deaths, disabilities to tens of thousands of injured veterans, the 134,000 Iraqi civilian deaths, and the $2.2 trillion dollars that were assessed

controversial politics, fearing quite reasonably a negative impact upon their reputation and influence within their immediate scholarly community.

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116 Matt Spetalnick et al., Obama Rejects G20 Pressure to Abandon Syria Air Strike Plan, REUTERS, Sept. 6, 2013, available at http://www.reuters.com/article/2013/09/06/us-russia-g-idUSBRE9831SS20130906 (noting that nine of the twenty G20 countries were willing to sign a statement in support of a strong international response as a condemnation of the use of chemical weapons, but these countries could not be persuaded to accept the use of military strikes); CNN/ORC Poll 8, CNN/ORC, 2–3 (Sept. 9, 2013), http://i2.cdn.turner.com/cnn/2013/images/09/09/0a.poll.syria.pdf (reporting that 55% of Americans opposed air strikes even if Congress passed a resolution in support and 72% of Americans believed that air strikes would not achieve significant U.S. goals).


118 Id. Salaita explained: "Numerous veterans have returned home to inadequate medical coverage, psychological afflictions, unemployment and increased risk of cancer. The free market and corporate magnanimity are supposed to address these matters, but neither has ever been a viable substitute for the dynamic practices of communal policymaking . . . ." Id. (quoting Steven Salaita, No, Thanks: Stop Saying “Support the Troops,” SALON (Aug. 25, 2013), http://www.salon.com/2013/08/25/no_thanks_i_wont_support_the_troops/) (internal quotation marks omitted).

119 RUSHKOFF, supra note 105, at 144.

120 H.R. Res. 114, 107th Cong. § 3 (2002); Murphy, supra note 72.
against American taxpayers.\textsuperscript{121}

Many Americans and groups forecasted what might befall very early into the war. One year after the invasion of Iraq, military families and antiwar activists with over half a million supporters sought to censure President Bush over the false allegations that led to the Iraq War.\textsuperscript{122} Sue Niederer, a mother of a soldier who was killed in Iraq, stated, “The best way that the United States Congress can honor those brave men and women in uniform who have served in Iraq, and who continue to serve in Iraq, is to honor the truth.”\textsuperscript{123} Niederer continued by stating that Congress can honor members of the military “by holding accountable those who deceived and manipulated the American people to justify the . . . occupation of Iraq, starting with President Bush.”\textsuperscript{124} Two-time Academy Award winner Actor Sean Penn, who was a vocal critic of the war and was involved in humanitarian work in Iraq,\textsuperscript{125} appeared on \textit{Real Time with Bill Maher} shortly after Bush vetoed the bill to withdrawal troops in May 2007 and received a deafening applause when he expressed umbrage:

\begin{quote}
[W]hen you have a precedent set like that and you have somebody like George Tenet acknowledging in his book that he knew that the administration was deceiving the American people into a situation that is murdering young men and women from this country and others, that George Tenet and Dick Cheney and Condoleezza Rice and George Bush, et al., should be in fucking jail.\textsuperscript{126}
\end{quote}

Similarly, Tomas Young, an Iraq War veteran who was paralyzed in a battle with insurgents in Sadr City, Iraq, published a letter that he believed would have been his final words if he chose to give up his struggle and refuse his feeding tube:\textsuperscript{127}

\begin{quote}
I write this letter on behalf of husbands and wives who have lost spouses, on behalf of children who have lost a parent, on behalf of the fathers and mothers who have lost
\end{quote}

\textsuperscript{121} \textit{CBS Evening News}, supra note 12.
\textsuperscript{122} \textit{Campaign Opens for Censure of Bush}, L.A. TIMES, Mar. 18, 2004, at 22 (noting that the group Win Without War attained 560,340 signatures to support a censure resolution).
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{126} \textit{Real Time with Bill Maher} (HBO television broadcast May 4, 2007).
sons and daughters and on behalf of those who care for the many thousands of my fellow veterans who have brain injuries. . . . Mr. Bush and Mr. Cheney. I write not because I think you grasp the terrible human and moral consequences of your lies, manipulation . . . I want to make it clear that I, and hundreds of thousands of my fellow veterans, along with millions of my fellow citizens, along with hundreds of millions more in Iraq and the Middle East, know fully who you are and what you have done. You may evade justice but in our eyes you are each guilty of egregious war crimes, of plunder and, finally, of murder, including the murder of thousands of young Americans . . . .

Mike Luckovich won a Pulitzer Prize for writing the names of American troops who died into the word “Why?” Dan Frazier sold bumper stickers and T-shirts that included the names of thousands of fallen troops in a micro font to form the message “BUSH LIED” and “THEY DIED.” In 2007, Linda Harper-Brown, a Texas House of Representatives member, remarked: “It just doesn’t seem right to profit on the death of a soldier who put his life on the line for us and our freedom.” A compelling argument can be made that every American troop enlisting today symbolically represents American freedom and that American troops serving in the two world wars did make tremendous sacrifices that may have ensured American security, but a phrase such as “put his life on the line for us and our freedom” is an ostensible linguistic contrivance that supplants Frazier’s political message by using the memory of those who did perish in the Iraq War. Americans are not free because the United States went to war with Iraq and it is also highly probable that had there been no war, those thousands of American troops would still be alive. That was Frazier’s apparent political message.

131 Calvert, supra note 129, at 1169 (citing Aman Batheja, A Father’s Fight: Slain Son’s Name on Anti-War T-Shirt Prompts Irving Man to Seek State Law to Stop Sales, FORT WORTH STAR-TELEGRAM, Jan. 4, 2007, at A1).
132 Calvert, supra note 129, at 1185-86. Frazier emphasized the intent for the message: “A lot of those soldiers died thinking they were fighting for American values . . . .” Id.
Administration, which is, don’t pay any attention to what we guaranteed in hundreds of statements about security threats or the language of the AUMF-Iraq. Just support the war, which is supporting the troops.133

Despite the significance of the underlying political debate, five states passed laws to prevent the sale of Frazier’s shirts.134 Frazier challenged the Arizona law and in Frazier v. Boomsma,135 Judge Wake issued a permanent injunction against the state of Arizona from enforcing the law against Frazier because the law was unconstitutional on application, and wrote that “the names of the individual soldiers are printed on the t-shirts in a font that cannot be read beyond arm’s length.”136 Judge Wake continued: “The identity of any particular soldier is not the point of the t-shirts; it is the combined effect of all the names of the 3461 deceased soldiers” that constitutes the political message.137 The court was placed in an unenviable position because it is important to respect the perspective of parents of fallen soldiers who might favor the application of a law that restricts private entities from profiting by using the name of a deceased troop,138 but it is also important to honor other parents who lost sons and daughters in the Iraq War and who believed that “support the troops” should mean that troops should only be deployed into war for a justifiable and sanctioned mission, particularly when that position became prominent among veterans’ groups.

133 See Lewis & Reading-Smith, supra note 29 (“President George W. Bush and seven of his administration’s top officials, including Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld, made at least 935 false statements in the two years following September 11, 2001, about the national security threat posed by Saddam Hussein’s Iraq. . . . On at least 532 separate occasions (in speeches, briefings, interviews, testimony, and the like), Bush and these three key officials, along with Secretary of State Colin Powell, Deputy Defense Secretary Paul Wolfowitz, and White House press secretaries Ari Fleischer and Scott McClellan, stated unequivocally that Iraq had weapons of mass destruction (or was trying to produce or obtain them), links to Al Qaeda, or both.”); see also id. (providing a chronological chart of false statements made by the Bush Administration).

134 ARIZ. REV. STAT. ANN § 13-3726, § 12-761 (2014); FLA. STAT. ANN. § 540.08 (LexisNexis 2013); LA. REV. STAT. ANN. § 14:102.21 (2013); OKLA STAT. ANN. tit. 21, § 839.1A (West 2014); TEX. BUS. & COM. CODE ANN. § 721.002 (West 2013).


136 Id. at *46; see also Frazier, 2008 U.S. Dist. LEXIS 63896, at *4 (noting that the law was unconstitutional on application as political speech subject to strict scrutiny).

137 Frazier, 2007 U.S. Dist. LEXIS 72427, at *46; Calvert, supra note 129, at 1202.

138 As Judy Vincent, whose son was killed in Iraq, stated: “I don’t care what he [Frazier] thinks about the war. I do care that he’s making money off my son’s death.” Calvert, supra note 129, at 1189 (alteration in original).
Veterans formed anti-war groups, such as Iraq Veterans Against the War, Operation Truth, and Military Families Speak Out, and these groups united with World War II, Vietnam War, and Korean War veterans to constitute umbrella organizations, such as Veterans for Peace.139 Similar to the approach employed during the Vietnam War, protestors used symbolism, speech, and national pride to communicate that the optimal way to support troops is to bring them home, rather than to assume that troop interest is derived from obediently championing the president’s supplanted justification for war.140 Local Veterans Chapters formed to oppose the Iraq War and opined that troops suffer when they are sent to war based on lies and to serve political and corporate profit.141 Professor Andrew Bacevich, a former Army officer and veteran of the 1991 Gulf War and the Vietnam War, whose son was killed during the Iraq War, vehemently opposed the Iraq War and harshly criticized the neoconservatives who used “American military force as a diplomatic tool and [were] willing to engage in deficit spending to pay for it.”142 Cindy Sheehan, a mother of a soldier killed in Iraq, was arrested for being in the Capitol building and wearing a t-shirt
that said “2,245 Dead. How Many More?”143

The membership of peace groups expanded rapidly during the Iraq War, but they faced considerable obstacles, were denounced by war supporters,144 and were not adequately heard by a mainstream media that generally favored the administration’s discretion during war.145

It is not evident that the American media generally paid adequate attention to dissent on issues related to the required conditions of the AUMF-Iraq before or after the war.146 Referencing the effective restrictions on free speech rights, Professor Elvia Arriola noted: “What is of interest to me is the irony of those who went to war to defend freedom globally at the very moment that


144 See Gregory P. Magarian, The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate, 73 GEO. WASH. L. REV. 101, 102–03, 121, 123, 126 (2004); Kate Zernike & Dean Murphy, Antiwar Effort Emphasizes Civility Over Confrontation, N.Y. TIMES, Mar. 29, 2003, at B1.

145 Chalmers Johnson, The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic 114 (2004) (noting that the media has portrayed the military in a favorable light and that the Pentagon still uses taxpayer dollars for advertising to persuade American perceptions); Robert Bejesky, Press Clause Aspirations and the Iraq War, 48 WILLAMETTE L. REV. 349, 348–52, 359–63 (2012) [hereinafter Bejesky, Press Clause] (explaining how the media favored the administration’s position in invading Iraq, drove a societal conformity to accept the alleged threat, substantially ignored dissent, and disregarded the original justification for going to war after it was proven false); Mohammad-Mahmoud Ould Mohamedou, Responsibility, Injustice and the American Dilemma, 11 BUFF. HUM. RTS. L. REV. 3, 12 (2005) (“Any dissenting views were denounced as unpatriotic and treasonous, not merely by the likes of Bill O’Reilly of the Fox News network but also by respected national commentators.”). For example, at a time when a majority of Americans believed that the Bush administration lied to go to war and a majority believed that the United States should exit Iraq, Fox’s Bill O’Reilly believed that troops who objected to deployment orders for Iraq were “insulting to America, and especially to those American soldiers who have lost their lives fighting terrorists.” Bill O’Reilly, Desertion Circus Is Insulting To America, SUN SENTINEL, May 15, 2004, at 17A. Shortly thereafter, a poll revealed that almost 60% of Americans did not believe the Iraq War was worth fighting and over 40% believed it was analogous to Vietnam. Dana Milbank & Claudia Deane, Poll Finds Dimmer View of Iraq War, WASH. POST, June 8, 2005, at A1. A similar scenario unfolded shortly before the invasion when O’Reilly remarked on Good Morning America that “[i]f the Americans go in and overthrow Saddam Hussein and it’s clean, he has nothing i.e. no prohibited weapons, I will apologize to the nation, and I will not trust the Bush Administration again, all right?”


146 See generally Bejesky, Press Clause, supra note 145, at 363–64 (discussing the media’s unwillingness to cover positions at odds with those of the Bush Administration); Bejesky, Public Diplomacy, supra note 139, at 971–73 (discussing the media’s attention to creating a patriotic view of the Iraq War, rather than focusing on the questionable legality of the war).
efforts were being made domestically to constitutionalize the very opposite of freedom.”

Politics set missions for the American military, and the next part addresses how troops bear the cost.

III. LARGE-SCALE HARM FACED BY TROOPS

A. Well-Known Risks

When a decision is made to deploy American forces into war, politicians should appreciate that military operations will intrinsically entail life-threatening risks to troops and continued funding from taxpayers, which should encourage policymakers to confirm that the underlying reasons for hostilities are verified, that the use of force is acceptable to the domestic democratic polity, and is justified to the international community.

While the ultimate sacrifice of American servicepersons was inherent in the political debates already discussed, this part addresses four additional harms to American troops that politicians should have appreciated prior to committing Americans to intense combat and prolonged occupation operations: (1) the burden placed on troops and taxpayers when the military disability system is overwhelmed, (2) the high probability that servicepersons could suffer from posttraumatic stress syndrome, (3) the possibility that U.S. troops could experience health risks from exposure to depleted uranium, and (4) the strain placed on troop supply as the military seeks to meet enlistment and reenlistment quotas, uses private military contractors (PMCs), and issues stop-loss orders.

B. Limitations on Liability

Any injured troop confronts impediments to remedial relief. Under the Federal Tort Claims Act (FTCA), members of the U.S. military cannot sue the U.S. government for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” or for claims “arising in a foreign country.”

Military troops dispatched into war and combat by

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147 Arriola, supra note 139, at 166.
148 Rudesill, supra note 10, at 5228, 5244 (stating that the United States can only meet security needs with the support of allies and that the U.S. policy community needs to understand and accept foreign public opinion as a legitimate national security consideration).
political branch decisions also have no right to bring civil actions for damages against the government for violations of their constitutional rights.\textsuperscript{150} Likewise, for noncombat injuries, the \textit{Feres-Stencel} doctrine represents that U.S. military service personnel cannot hold the government responsible for activities “incident to service,”\textsuperscript{151} which is such an encompassing bar to liability that a serviceman was denied a cause of action when he suffered psychologically as a result of being involuntarily subjected to the military’s LSD testing.\textsuperscript{152} Federal courts adopted similar reasoning to preclude service member claims against government contractors for negligence\textsuperscript{153} and for government contractor indemnity actions against the U.S. government.\textsuperscript{154} In denying claims, courts often emphasize that imposing liability on the government could set precedent that would undermine military discipline\textsuperscript{155} and would be unessential because U.S. troops have standardized, but capped, compensation awards via federal statutes and the Veteran’s system, which are remedies that are awarded irrespective of the location of military operations and cause of injury.\textsuperscript{156} For example, the

cannot be extended for injuries that are incident to service obligations). The U.S. government might be liable for injuries suffered by soldiers arising out of activities not incident to their service obligations.

\textsuperscript{150} John L. Watts, \textit{Differences Without Distinctions: Boyle’s Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement}, 60 O\textsc{R}KLA. L. REV. 647, 694–95 (2007). See infra Part IV for a discussion on the denial of military troops’ constitutional rights to change policy while deployed to dangerous regions of the globe.

\textsuperscript{151} Feres, 340 U.S. at 146; Dreier v. United States, 106 F.3d 844, 848 (9th Cir. 1996); Watts, supra note 150, at 648.

\textsuperscript{152} United States v. Stanley, 483 U.S. 669, 671–72, 686 (1987) (denying a civil action to Master Sergeant Stanley, who was involuntarily subjected to the Army’s LSD testing, and experienced radical emotional and personality changes, memory loss, and hallucinations, and had trauma in his family life).

\textsuperscript{153} Watts, supra note 150, at 658–61. If there are private contractors that are closely connected to the military, then challenging the contractor would involve criticizing the military for the same reason. Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986).

\textsuperscript{154} Stencil Aero Eng’g Corp. v. United States, 431 U.S. 673–74 (1977) (denying liability and arguing that there were similar military discipline concerns with a private contractor because suits would require having military officials and officers testify and provide evidence). This case involved a military pilot, who was seriously injured while operating his plane. \textit{Id.} at 667. He sued the manufacturer, which cross-claimed against the military. \textit{Id.} at 668.

\textsuperscript{155} Stanley, 483 U.S. at 683–84; United States v. Johnson, 481 U.S. 681, 683, 691–92 (1987) (holding that in a case where the wife of a deceased Coast Guard officer brought an action for her husband’s death during a service mission, imposing liability against the government could set precedent that undermines military discipline procedures).

\textsuperscript{156} Stencil Aero Eng’g Corp., 431 U.S. at 673; Feres, 340 U.S. at 143–44 (holding that federal statutes already provide “simple, certain, and uniform compensation for injuries or death” for those in the armed services, which forms an upper threshold on military liability and that the military’s federal nature required uniform rules irrespective of the location of
standardized award for the 4488 troops who were killed in Iraq is the $100,000 that is paid to each decedent’s family.\textsuperscript{157}

With over sixty-thousand American troops seriously wounded in Iraq and Afghanistan,\textsuperscript{158} VA facilities were stretched to the limit\textsuperscript{159} and stymied from providing legally required services.\textsuperscript{160} Protracted hospital stays with individuals with severed arms and legs and permanent injuries pushed facilities beyond capacity.\textsuperscript{161} Scandal erupted when Army Surgeon General Lieutenant General Kevin Kiley was forced to retire after congressional criticism about the poor treatment of wounded American troops.\textsuperscript{162} Congressional hearings revealed that Pentagon officials were returning medically unfit and wounded soldiers to Iraq.\textsuperscript{163} Americans have traditionally insisted on ensuring that veterans injured in combat zones receive exceptional care and it is one social service that generally has not

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\item \textsuperscript{158} HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, UNITED STATES MILITARY CASUALTY STATISTICS: OPERATION IRAQI FREEDOM AND OPERATION ENDURING FREEDOM 1, 4 (2009) (noting that over 31,102 were injured but that there were also 36,106 nonhostile medical air transports).
\item \textsuperscript{160} U.S. GEN. ACCOUNTING OFFICE, GAO-03-487, VA LONG TERM CARE: SERVICE GAPS AND FACILITY RESTRICTIONS LIMITED VETERANS’ ACCESS TO NONINSTITUTIONAL CARE 3–4 (2003), see also Milaninia, supra note 159, at 337 (discussing the VA’s difficulty treating veterans for underlying disorders, such as the Gulf War Syndrome).
\item \textsuperscript{162} Josh White, Walter Reed Hearing to Put Spotlight on Kiley’s Leadership, WASH. POST, March 5, 2007, at A9.
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been cut when fiscal challenges arise. In this case, Nobel Laureate Joseph Stiglitz and Harvard Professor Linda Bilmes forewarned of dire economic consequences in their book, *The Three Trillion Dollar War.* Economic crises manifested and injured veterans have confronted hardship.

On Veterans Day 2012, 45% of 1.6 million veterans of the wars in Afghanistan and Iraq were seeking disability compensation, which provides a compensation payment ranging from $127 a month for a 10% disability to $2769 per month for a 100% disability. To receive compensation through the Department of Veterans Affairs, the injured military member must have a present disability caused by an injury or disease that manifested or was aggravated during military service. The claimant process is required to be nonadversarial, with doubts resolved in the veteran’s favor, but only a fraction of those requesting disability payments realize benefits. In recent years, the Veterans Board accepted 24% of the claims, remanded 37%, and denied 36%. Decisions take an average of 183 days and those who pursue claims through appeals and to a final decision could wait for five years. Among the hurdles that service members must navigate are that veterans’

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165 See generally STIGLITZ & BILMES, supra note 12, at 7 (discussing the troubling economic circumstances in the United States as a result of the wars).


167 Gugliuzza, supra note 164, at 1203–04.


170 Gugliuzza, supra note 164, at 1207–08.

171 Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008), aff’d in part, rev’d in part sub. nom. Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011) (stating that in 2007, the VA received 225,173 new and 612,968 “reopened” claims to obtain disability benefits); Gugliuzza, supra note 164, at 1210 (noting that final decisions from the Veterans Court can be appealed to the Federal Court); Jacob B. Natwick, Note, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans’ Mental-Health Benefits Appeals,* 95 IOWA L. REV. 723, 738 (2010); Bilmes, supra note 161, at 17 (reporting that there was a backlog of between 400,000 and 600,000 claims).
programs are poorly administrated and inadequately funded,\textsuperscript{172} the military disability compensation system can be complicated\textsuperscript{173} and beget inconsistent and inequitable results,\textsuperscript{174} and there have historically been significant limitations to attaining legal assistance.\textsuperscript{175}

\textbf{C. Posttraumatic Stress Disorder}

Being deployed into a combat zone for a prolonged duration subjects American troops to the risk of developing traumatic stress-related injuries.\textsuperscript{176} Names historically employed that are equivalent to today’s medical classification of PTSD have included “operational fatigue,” “combat exhaustion,” and “traumatic war neurosis.”\textsuperscript{177} PTSD is caused by being constantly endangered\textsuperscript{178} and experiencing a traumatic event related to military combat, which materializes

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\item \textsuperscript{172} Michael Waterstone, \textit{Returning Veterans and Disability Law}, 85 \textit{Notre Dame L. Rev.} 1081, 1115 (2010).
\item \textsuperscript{174} Thomas J. Reed, \textit{Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure}, 19 \textit{Widener L.J.} 57, 58–60 (2009). For over a hundred years, injured U.S. soldiers have been required to navigate two systems of compensation—the military disability retirement system and (after discharge) the U.S. Department of Veterans Affairs system—which could lead to denial under one system and approval under the other. \textit{Id}. One of the systems is premised on whether a soldier is fit for duty and the other is based on the service connection, but sometimes the two systems render inconsistent and logically incomprehensible results. \textit{Id}. at 116; see Chambers v. United States, 417 F.3d 1218, 1221–22 (Fed. Cir. 2005) (involving a plaintiff who was an Army crew member in Vietnam, had been hospitalized and diagnosed with posttraumatic stress disorder (PTSD), and started receiving 100% compensation, but when he filed an application for disability retirement pay, the Army Board for Correction of Military Records determined that he was fit for duty and denied his claim).
\item \textsuperscript{175} Gugliuzza, \textit{supra} note 164, at 1206–07. Veterans cannot hire an attorney until after claims are denied and he or she appeals, and there is hostility between the VA and veterans. \textit{Id}. See generally Reed, \textit{supra} note 174, at 59–62 (explaining that both systems for disabled veterans are difficult to navigate and often result in unpredictable decisions). Interestingly, limitations in the process included an 1864 statute that prohibited attorneys from charging more than ten dollars for legal services in relation to obtaining veterans benefits. Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 307 (1985) (citing 38 U.S.C. § 3404 (1982)). The law was upheld as constitutional and was not changed until December 2006. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109–461, § 101, 120 Stat. 3403, 3405–09; Walters, 473 U.S. at 307; Hines v. Lowrey, 305 U.S. 85, 91 (1938).
\item \textsuperscript{176} Brett T. Litz & William E. Schlenger, \textit{PTSD in Service Members and New Veterans of the Iraq and Afghanistan Wars: A Bibliography and Critique}, 20 PTSD Res. Q. 1, 1, 3 (2009).
\item \textsuperscript{177} Jeffrey S. Yarvis, \textit{Posttraumatic Stress Disorder (PTSD) in Veterans}, in \textit{HANDBOOK OF MILITARY SOCIAL WORK} 81, 86 (Allen Rubin et al. eds., 2013); see also Matthew J. Friedman et al., \textit{Post-Traumatic Stress Disorder in the Military Veteran}, 17 \textit{Psychiatric CLINICS OF N. AM.} 265, 265 (1994).
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into an intense emotional and reoccurring fear, nightmares, flashbacks, or mental symptoms that impair normal life functions. Records document that soldiers experienced PTSD symptoms during the American Civil War, World War I, and the Vietnam and Korean wars, and estimates have maintained that between 37% and 70% of American troops deployed into World War I, World War II, the Vietnam War, and the Korean War may have had PTSD or similar psychological conditions.

Military leaders historically treated troops with combat-related psychiatric symptoms as cowardly instead of with dignity as an injured person, but there was an improved understanding of the illness, implementation of preventive measures, and administration of additional assistance after the Vietnam War. The common experiences among Vietnam War veterans led the American Psychiatric Association to recognize PTSD as a mental disorder in 1980, and it has become the most prevalent category of veteran illness, implementation of preventive measures, and administration of additional assistance after the Vietnam War.

179 AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (5th ed. 2013); see Razzouk & Razzouk, supra note 163, at 349, 357 ("[Psychiatrist Charles] Hogue’s study of 2006 concluded that the majority of symptoms we might expect to be caused by concussion are actually due to PTSD and depression.").


183 Ann Hubbard, A Military-Civilian Coalition for Disability Rights, 75 Miss. L.J. 975, 982 (2006) (noting that 200,000 WWI vets were left with disabilities); Michael J. Davidson, Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War, 29 Wm. & Mary L. Rev. 415, 415 (1988) (noting that perhaps 70% of soldiers deployed to Vietnam may have had symptoms of PTSD by the late-1980s); Steve Bentley, A Short History of PTSD: From Thermopylae to Hue, Soldiers Have Always Had a Disturbing Reaction to War, The VVA Veteran (Jan. 1991), http://www.vva.org/archive/TheVeteran/2005_03/feature_HistoryPTSD.htm (discussing emotional toll on soldiers during WWI, WWII, the Korean War, and the Vietnam War, and reporting that approximately 37.5% out of 800,000 combat soldiers were discharged during WWII for psychiatric problems).


185 Id. at 7.

186 Reed, supra note 174, at 68–69.

injury and frequent reason for attrition from the military.\[^{188}\]

An estimated 20% of Iraq War veterans and 11% of troops deployed to Afghanistan experienced PTSD\[^{189}\] and Dr. Roye-Byrne of the University of Washington explained that “[n]europsychiatric symptoms in soldiers deployed in Iraq constitute[d] a looming public health threat.”\[^{190}\] To confront psychological consequences of combat and mental stress of combat, the VA hired hundreds of additional physicians who specialize in mental health\[^{191}\] and the Pentagon spent $120 million in preventive psychology programs to assist

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\[^{189}\] Post-Traumatic Stress Disorder, PSYCHOL. TODAY, http://www.psychologytoday.com/conditions/post-traumatic-stress-disorder (last visited Oct. 6, 2014). Other studies have estimated that over three hundred thousand soldiers, approximately 20% of those who had been deployed to Afghanistan and Iraq, suffered from PTSD, depression, or psychological problems, but there is a wide assortment of estimates on the depth of the disease. Charles W. Hoge et al., Mental Health Problems, Use of Mental Health Services, and Attrition From Military Service After Returning From Deployment to Iraq or Afghanistan, 295 J. AM. MED. ASS’N 1023, 1027, 1030 (2006); Hubbard, supra note 183, at 986; Milaninia, supra note 159, at 338–39 (listing common symptoms); Rajeev Ramchand et al., Prevalence of PTSD, Depression, and TBI Among Returning Servicemembers, in INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 35, 43–46, 80 (Terri Tanielian & Lisa H. Jaycox eds., 2008); Jennifer J. Vasterling et al., Neuropsychological Outcomes of Army Personnel Following Deployment to the Iraq War, 296 J. AM. MED. ASS’N 519, 525 (2006); see Karima Bennoune, Toward a Human Rights Approach to Armed Conflict: Iraq 2003, 11 U.C. DAVIS J. INT’L L. & POL’Y 171, 194 (2004); Razzouk & Razzouk, supra note 163, at 346–47. RAND Corporation estimated that over 300,000 veterans were suffering from PTSD, a brain injury, or depression since 2001. Pratt, supra note 5, at 42. Another study published in the Journal of the American Medical Associations stated that 11.3% of soldiers returning from Afghanistan and 19.1% of soldiers returning from Iraq will experience PTSD. Hoge et al., supra, at 1027; Hafemeister & Stockey, supra note 178, at 88–89 (stating that one in five soldiers returning from Iraq may have PTSD).

\[^{189}\] See Razzouk & Razzouk, supra note 163, at 351 (quoting Peter Roy-Byrne, PTSD Post-Deployment: Effects of Traumatic Brain Injury and Combat Exposure, NEJM JOURNAL WATCH (Jan. 30, 2008), http://www.jwatch.org/jp200801300000001/2008/01/30/ptsd-post-deployment-effects-traumatic-brain). Doctor Roy-Byrne further explained that there were “increased rates of mental disorders including post-traumatic stress disorder in returning troops.” Razzouk & Razzouk, supra note 163, at 352 (quoting Peter Roy-Byrne, supra).

\[^{191}\] Milaninia, supra note 159, at 328.
troops with emotional recovery\textsuperscript{192} because PTSD can debilitate healthy emotional behavior for years after a war\textsuperscript{193} and require lifelong treatment.\textsuperscript{194}

Veterans have reportedly had difficulty attaining disability compensation for PTSD\textsuperscript{195} because of the apprehension that PTSD symptoms can be exaggerated or falsified.\textsuperscript{196} The process mandates the claimant-veteran to sustain the burden of proving the existence of a combat-related stressor event during military service\textsuperscript{197} and an emotional behavioral change after the event.\textsuperscript{198} For some veterans, evidentiary problems have arisen over whether they were involved in the stressor event of combat.\textsuperscript{199} However, if the veteran is

\footnotesize{\textsuperscript{192} See Belleruth Naparstek, \textit{More Troops, More Rotations, More PTSD: Will Positive Psychology Save Our Soldiers?}, HUFFINGTON POST (Dec. 1, 2009), http://www.huffingtonpost.com/belleruth-naparstek/more-troops-more-rotation_b_375068.html.\textsuperscript{193} Daniel J. DeNoon, \textit{Fewer Vietnam Vets Suffer from PTSD}, CBS NEWS (Aug. 17, 2006), http://www.cbsnews.com/news/fewer-vietnam-vets-suffer-from-ptsd/ (reporting that up to 10\% may experience PTSD for over ten years after the war). A diagnosis might occur twenty years after the event. See Cohen v. Brown, 10 Vet. App. 128, 131–32, 144 (Vet. App. 1997).\textsuperscript{194} Adam Caine, Comment, \textit{Fallen From Grace: Why Treatment Should be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder}, 78 UMKC L. REV. 215, 230 (2009).\textsuperscript{195} Schingle, \textit{supra} note 168, at 155–56 (noting that the claimant process for PTSD through the U.S. Department of Veterans Affairs has been called “adversarial” to veterans).\textsuperscript{196} WILLIAM J. KOCH ET AL., \textit{PSYCHOLOGICAL INJURIES: FORENSIC ASSESSMENT, TREATMENT, AND LAW} 80 (2006) (“Researchers have demonstrated convincingly that naive healthy subjects can easily and accurately falsify symptoms of PTSD, sufficient to meet diagnostic criteria, when given a symptoms checklist.”); Chapman, \textit{supra} note 184, at 10–11 (“[S]ome studies indicate that PTSD-afflicted veterans exaggerate symptoms to ‘establish a basis for their claims or to maximize payments.’” (quoting Nina A. Sayer et al., \textit{Compensation and PTSD: Consequences for Symptoms and Treatment}, PTSD RES. Q. 1, 1 (2007))).\textsuperscript{197} 38 C.F.R. § 3.303(a) (2013) (“[The] injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein.”); see also id. §§ 3.306–3.309 (2013) (listing diseases and disabilities); Craig Kabatchnick, \textit{After the Battles: The Veterans’ Battle with the VA}, 35 HUM. RTS. 13, 16 (2008) (“The burden of proof is always on the veteran to somehow prove that his or her claim for service-connected benefits is meritorious and worthy of a grant of service-connected benefits.”); Schingle, \textit{supra} note 168, at 158 (noting that in some circumstances independent evidence beyond the veteran’s testimony is necessary, as a matter of law, to prove the combat stressor).\textsuperscript{198} Erin M. Gover, Comment, \textit{Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans}, 28 PACE L. REV. 561, 568 (2008) (stating that the soldier must prove with records of the event, military commander testimony, and accounts of behavior before and after the event). There are attempts to screen for disorders prior to enlistment. Weiser, \textit{supra} note 180, at 103–06. The onset of the illness may occur six months to a year after the stressor event. Chapman, \textit{supra} note 184, at 12.\textsuperscript{199} Peyton Cooke, \textit{Post-Traumatic Stress Disorder & The Military Justice System}, 79 MISS. L.J. 485, 489 (2010) (“[S]pecific combat experiences worsen both the prevalence and severity of PTSD.”); Atwater, \textit{supra} note 182, at 244; Madeline McGrane, Note, \textit{Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom}, 24 J.L. & HEALTH 183, 193–94 (2011). A stressor event, more generally, could include witnessing a violent death, loss of a relative, or a threat of death or serious injury. AM. PSYCHIATRIC ASS’N, \textit{supra}}
successful in proving a PTSD disability that diminishes the capacity to engage in gainful employment or social functions, the degree of disability payment is determined by the extent of impairment and compensation is set at 10%, 30%, 50%, 70%, or 100% of full disability.

Updates of the swelling epidemic aggregated concomitant with the burgeoning efforts of Americans and Congress to withdrawal troops from Iraq. Over the first six years of the Iraq War, the Military Health System determined that there were 39,365 cases of PTSD, but others opined that the illness was so common that between 100,000 and 500,000 troops should have been receiving compensation. Veterans for Common Sense and Veterans United for Truth filed a lawsuit against the Department of Veterans' Affairs and alleged that there was a “widespread breakdown of the [VA's] adjudication and health care systems for veterans experiencing PSTD [sic],” “prolonged administrative delays in processing PTSD claims,” and impediments to the legal process and

note 179, § 309.81.
201 38 C.F.R. § 4.126(b); Amberman v. Shinseki, 570 F.3d 1377, 1380–81 (Fed. Cir. 2009).
203 See supra Part II.B.
204 McGrane, supra note 199, at 186.
206 Terry L. Schell & Grant N. Marshall, Survey of Individuals Previously Deployed for OEF/OIF, in INVISIBLE WOUNDS OF WAR, supra note 189, at 87, 101, 103 (noting that 53% had sought help and that merely 30% “received any type of minimally adequate treatment”); Craig Logsdon & Michelle Keogh, Uncommon Criminals: Why Veterans Need Their Own Court, ARIZ. ATT’y, Nov. 2010, at 14, 18 (estimating that there were between 200,000 and 400,000 brain injury sufferers); Scott Shane, Data Suggests Vast Costs Loom in Disability Claims, N.Y. TIMES, Oct. 11, 2006, at A18 (citing one estimate that placed the number of soldiers able to claim benefits for PTSD at roughly one-third of the 1.5 million soldiers involved in Afghanistan and Iraq).
delays in obtaining relief.\textsuperscript{207} Of the estimated number of veterans who returned from war with a mental health problem, only about 40\% sought medical care,\textsuperscript{208} which may signify that the lengthy process of asserting claims and appealing adverse decisions can deter veterans\textsuperscript{209} or that veterans do not seek medical care because of the fear of stigmas associated with being labeled a PTSD sufferer or encountering negative repercussions in personal and professional life.\textsuperscript{210}

Perhaps at least partially attributable to PTSD, there have been lasting psychological consequences for veterans, including psychiatric disorders, memory impairment, emotional outbursts, criminal and impulsive behavior, alcoholism, resort to illegal drugs, abuse of prescriptions drugs, and propensity for aggression and violence.\textsuperscript{211} Approximately 75\% of veterans with PTSD have also had substance abuse problems\textsuperscript{212} and a higher percentage of


\textsuperscript{208} Hoge et al., \textit{supra} note 205, at 16. A survey noted that “more than 60\% of veterans of the Iraq war who screened positive for PTSD, generalized anxiety, or depression did not seek treatment.” Hoge et al., \textit{supra} note 189, at 1031.

\textsuperscript{209} If a veteran does not receive a favorable ruling and wants to challenge the decision, he or she can file a Notice of Disagreement and perhaps file a Substantive Appeal. 38 C.F.R. §§ 3.103(f), 20.202 (2013). Based on substantial precedent that was ultimately rejected by the district court, the plaintiffs contended that the waiting period for responses and appeals were “so lengthy as to constitute an unconstitutional deprivation of property under the Due Process Clause.” Wilson, \textit{supra} note 207, at 173, 179 n.141. The Board of Veterans Appeals receives around 50,000 appeals every year. Steven L. Keller, U.S. Dept of Veterans Affairs, Board of Veterans’ Appeals: Report of the Chairman Fiscal Year 2012, 17 (2012), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf.

\textsuperscript{210} Invisible Casualties: The Incidence and Treatment of Mental Health Problems by the U.S. Military, Hearing Before the H. Comm. on Oversight and Gov’t Reform, 110th Cong. 41 (2007) (statement of Rep. Henry A. Waxman, Chairman, Comm. on Oversight and Gov. Reform) (noting troops discussing the “stigma” of PTSD). The Defense Department’s Mental Health Task Force acknowledged that “current efforts fall significantly short in treating mental health problems, and the military system does not have enough resources or fully trained people . . . .” Id. (internal quotation marks omitted); see also Chol Daniel Kim, \textit{Traumatic Brain Injury Screening for the Armed Forces}, 40 McGeorge L. Rev. 449, 452 (2009) (explaining that veterans are often unwilling to seek medical help due to the stigma attached to being a sufferer of PTSD).


\textsuperscript{212} Benjamin R. Karney et al., \textit{Predicting the Immediate and Long-Term Consequences of Post-Traumatic Stress Disorder, Depression, and Traumatic Brain Injury in Veterans of Operation Enduring Freedom and Operation Iraqi Freedom}, in \textit{Invisible Wounds of War},
suicides are found among PTSD sufferers. \textsuperscript{213} Several thousand veterans attempt suicide each year\textsuperscript{214} and in one year following the Iraq War, two-thirds of the ninety-seven Army soldiers who actually did commit suicide had been deployed to Afghanistan or Iraq. \textsuperscript{215} PTSD can be an insanity defense in criminal proceedings and a mitigating circumstance in sentencing proceedings. \textsuperscript{216} The fact that PTSD should be a defense in criminal proceedings seems to be well-substantiated by statistics.

Half of the 480,000 returning Vietnam veterans suffering from PTSD had been jailed at least once and 35\% had been incarcerated more than once.\textsuperscript{217} Even though the Vietnam War had ended nearly two decades earlier and the Gulf War had occurred one year prior, in 1992, the Federal Bureau of Prisons held 71,000 inmates and 10,000 were military service veterans, while at the state level, there were 127,500 veterans incarcerated in 2004, which “account[ed] for approximately 10\% of the entire prison population.”\textsuperscript{218} The statistics are stunning because only one-half of 1\% of the American population served in the military over the last decade.\textsuperscript{219} If a high percentage of veterans committed crimes and they would not have

\textit{supra} note 189, at 134.
\textsuperscript{213} McGrane, \textit{supra} note 199, at 189–90, 199 (noting the series of acts that were passed to specifically require veterans to be screened for suicide risk).
\textsuperscript{214} Veterans for Common Sense v. Peake, 563 F. Supp.2d 1049, 1063 (N.D. Cal. 2008); Logsdon & Keogh, \textit{supra} note 206, at 18 (“T[he Army reported that in January 2009, 24 soldiers committed suicide in that one month alone.”).
\textsuperscript{215} Karney et al., \textit{supra} note 212, at 128–29.
\textsuperscript{216} Porter v. McCollum, 558 U.S. 30, 42–44 (2009) (considering exculpatory evidence of war trauma in a capital offense case); Caine, \textit{supra} note 194, at 221–23; Finnemore, \textit{supra} note 205, at 19–20 (noting that jurors found solider Jessie Bratcher guilty of murder but he was considered insane because of PTSD, and author further remarking that criminal defense attorneys are using the PTSD defense more frequently); see also Adam Liptak, \textit{Justices Say Capital Cases Must Weigh War Trauma}, N.Y. TIMES, Dec. 1, 2009, at A16 (detailing a Supreme Court decision ruling that if a client is facing the death penalty a lawyer must enter into evidence any signs of PTSD from prior military service). See generally Omri Berger et al., \textit{PTSD as a Criminal Defense: A Review of Case Law}, 40 J. AM. ACAD. PSYCHIATRY L. 509 (2012) (detailing the usage of PTSD as an insanity defense in criminal trials).
\textsuperscript{217} Hafemeister & Stockey, \textit{supra} note 178, at 102.
\textsuperscript{218} Id. at 101–02; McGrane, \textit{supra} note 199, at 190 (noting that the \textit{New York Times} reported that 121 returning veterans from recent wars committed murder and the overwhelming majority had no criminal history).
\textsuperscript{219} Donna Miles, \textit{Survey Shows Growing Gap Between Civilians, Military, AM. FORCES PRESS SERVICE} (Nov. 28, 2011), http://www.defense.gov/News/NewsArticle.aspx?ID=66253. In fact, the pool of those veterans perpetrating crimes relative to the general population is even more inconceivable because the Pentagon recently explained that the military is very select in recruiting new enlistees; three-fourths of Americans would purportedly be disqualified from serving in the military for reasons such as drug abuse, obesity, being medically unfit, not graduating from high school, or having a criminal record. Jessica Rinaldi, \textit{Only One-in-Four Americans Fit to Serve in the Military}, RT (May 17, 2013), http://rt.com/usa/military-service-fit-american-449/.
perpetrated crimes without having PTSD or some other emotional or physical impairment after enlistment, the situation begs for explanation and policy improvements.

The military promotes the perspective that military service forges leadership skills, personal responsibility traits favored by the private sector, and the translatability of military careers into private sector positions.220 Recent surveys reveal that employers certainly want to hire veterans,221 but over 70% of hiring managers found it challenging to translate military experience into the foundational skills that would be well-suited for business.222 In 2010, the U.S. Department of Labor reported that 11.8 million veterans, or 7.7% of the labor force, were unemployed and seeking work.223 There is a distinction between commanders and officers who hold elevated positions in the military hierarchy and combat troops who may be more apt to assume dangerous risks by executing military directives.224 It may be the former category, rather than the high-percentage of unemployed, that Fortune magazine referred to in a cover story entitled: “Battle Tested: How a Decade of War has Created a New Generation of Elite Business Leaders.”225 A high percentage of these leaders may have the pedigree of graduating from military service academies, which cost


American taxpayers an average of $400,000 per graduate. Meanwhile, the troops who are very likely to be risking their lives in combat may not have the same educational background.

D. Exacerbating Troop Injuries? Depleted Uranium Exposure

If there are ill-health effects from exposure to depleted uranium (DU), American troops may have suffered as a result of the Pentagon’s weapons. DU is a byproduct of enriched uranium; highly radioactive isotopes are formulated to generate nuclear power (or perhaps produce bombs). The less radioactive DU is separated and can be used to manufacture artillery shells with increased firing range and explosive power and to fortify armor in tanks. If there are adverse health effects from exposure to DU, it is even more unfortunate that so much emphasis was situated on needing to initiate war to impede peril from nuclear enrichment programs allegedly possessed by a foe, when there was insufficient scrutiny affixed to the harm caused to both friend and foe from DU-laced missiles and bombs, which might even be viewed as small nuclear weapons. Similarly, a commentator recently opined that if one calculates the possible long-term and widespread health deterioration from DU exposure, Syrian President Assad’s recent abominable use of chemical weapons may not have been as fatal as the United States’ use of DU in Iraq. The Pentagon has never confronted an enemy that has used DU and largely denies that

229 Neil Mackay, U.S. Forces’ Use of Depleted Uranium Weapons is “Illegal,” in IN THE NAME OF DEMOCRACY, supra note 139, at 43, 43–44 (noting that Dr. Rokke maintained that the use of DU during the Iraq War is hypocritical and a “war crime”). The Bush Administration advocated for the 2003 war for reasons that included Saddam Hussein attempting to procure raw uranium from Niger, which was a transaction that never occurred; that Hussein’s regime was a peril to the United States because Iraq could have a nuclear weapon program, which also was not true; and that Iraq had menacing missile programs and endangered the U.S., which also was not true. Bejesky, Intelligence Information, supra note 7, at 820–21, 827, 833–36.
230 See Christopher Bollyn, Depleted Uranium—The Real Dirty Bombs, RENSE.COM (Aug. 27, 2004), http://rense.com/general56/dep.htm (explaining that DU, which is a byproduct of the nuclear enrichment process and nuclear weapons, can be used to make missiles and bombs).
there are health risks to troops.  

The U.S. experimentation with DU began in the 1970s and the U.S. military and many scientists maintained that exposure to DU is safe, but scientists began to undertake research of health and environmental harm from DU in the mid-1990s, which was after the 1991 Gulf War and the first large-scale use of DU on the battlefield. Those who emphasize ill-health effects from DU maintain that there is no safe limit of DU exposure. DU poses toxic and radioactive environmental and human health risks when particles absorb into the groundwater and earth, are airborne and can be inhaled, and circulate and endanger troops in tanks. Studies maintain that radiation-exposed civilians and American

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232 Matthew L. Wald, Danger from Depleted Uranium is Found Low in Pentagon Study, N.Y. TIMES (Oct. 18, 2004), http://www.nytimes.com/2004/10/19/politics/19uranium.html?_r=0 (“A Pentagon-sponsored study of weapons made from depleted uranium . . . has concluded that it is neither toxic enough nor radioactive enough to be a health threat.”). The D.C. Circuit Court of Appeals ruled against a veteran who claimed ill-health effects from radiation exposure, which is a set-back for tens of thousands of former military personnel who were exposed over previous wars and during military service. Knight Ridder, Vets Exposed to Radiation Lose Ruling, MILITARY.COM (Aug. 29, 2006), http://www.military.com/NewsContent/0,13319,111575,00.html. Perhaps DU denial is similar to the long-term denial of claims for compensation due to Agent Orange use in Vietnam. See 38 U.S.C. § 1116 (2012) (“Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for veterans who served in the Republic of Vietnam.”); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 16 (E.D.N.Y. 2005).

233 Wexler, supra note 228, at 471, 473.


235 Wexler, supra note 228, at 472.

236 Id. at 501. When a uranium-laced bomb devastates its target, a percentage of the depleted uranium, which has a half-life of 4.5 billion years, contaminates the ground and air and becomes part of the food chain. JOHN MONGILLO & LINDA ZIERDITZ-WARSHAW, ENCYCLOPEDIA OF ENVIRONMENTAL SCIENCE 298 (2000) (stating that Uranium-238 “nuclei undergo radioactive decay over approximately 4.5 billion years before forming a stable isotope of lead” and that the radium and radon gas can cause cancer and other diseases); see also ACTIONAID INTERNATIONAL ASIA, NATURAL RESOURCE MANAGEMENT IN SOUTH ASIA 96 (2011) (emphasizing that the use of depleted uranium by the Western occupation in Afghanistan has “poisoned the soil, water bodies and all living things in Afghanistan”). It is possible to at least partially remove depleted uranium from the site of contamination. Rob Edwards, Iraq’s Depleted Uranium Clean-Up to Cost $30M as Contamination Spreads, THE GUARDIAN (Mar. 6, 2013), http://www.theguardian.com/environment/2013/mar/06/iraq-depleted-uranium-clean-up-contamination-spreads (“More than 400 [tons] of DU ammunition are estimated to have been fired by jets and tanks in the two Iraq wars in 1991 and 2003 . . . each site could cost between $100,000–$150,000 to decontaminate, [costing] a total of between $30[ million] and $45[ million].”).

237 A. Bleise et al., Properties, Use and Health Effects of Depleted Uranium (DU): A General Overview, 64 J. ENVTL. RADIOACTIVITY 93, 99–100 (2003); The International Responses to the Environmental Impacts of War, supra note 227, at 630 (“When a DU weapon strikes a hard target anywhere from 40 to 50 percent of the weapon aerosolizes into small particles which can then be inhaled.”).

238 Bleise et al., supra note 237, at 103–04.
troops have a high risk of experiencing lung disease, cancers, kidney disease, leukemia, lymphoma, bone and breast cancer, and neurological disabilities; exposed parents may also have children with birth defects. Health symptoms suffered by troops following the 1991 Persian Gulf War have been called “Gulf War Syndrome,” and have included lupus-like symptoms, chronic fatigue, fibromyalgia, eczema, dyspepsia, joint pain, respiratory symptoms, and headaches.

Dr. Doug Rokke, former U.S. army colonel and director of the Pentagon’s DU project, undertook extensive studies and maintained that there were potentially life-threatening health effects from DU exposure and that military doctors provided unsatisfactory screening and documentation of the effects. There was an apparent commonality of illnesses, but troops did not require proof of exposure to DU to be treated. If DU-laced, high-technology weapons are more devastating, they may have been a foremost reason the 1991 Gulf War ended so quickly and could be a leading

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239 Veterans Health and Safety Act of 2006, § 2(b), 2006 Cal. Stat. ch. 686 (codified as amended at CAL. MIL. & VET. CODE § 399 (West 2007)) (“[DU] may cause kidney and lung damage, may cause cancer when inhaled or ingested, and may cause genetic mutations that are carried to future generations.”); see also Mackay, supra note 229, at 43–44 (stating that DU, similarly to napalm, contaminates land and causes cancers as well as birth defects); Andrew Buncombe, U.S. Admits It Used Napalm Bombs in Iraq, in IN THE NAME OF DEMOCRACY, supra note 139, at 45, 45; Saby Ghoshray, When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws Against Contemporary Human Rights Discourse, 41 CREIGHTON L. REV. 679, 701 (2008); Hubbard, supra note 183, at 1001–03.

240 JOHNSON, supra note 145, at 100; Ghoshray, supra note 239, at 701; Wexler, supra note 228, at 473–74.

241 Reed, supra note 174, at 70.


243 Doug Rokke, Depleted Uranium: Uses and Hazards (Jan. 21, 2001), http://www.ratical.org/radiation/DU/DUuse+hazard.pdf (updating a paper submitted to the British House of Commons in London, England on December 16, 1999). Charles Sheehan-Miles, the Executive Director of Veterans for Common Sense, explained that from his experiences with DU exposure during the 1991 Gulf War, there was a high percentage of veterans who became sick, but the official investigations discounted the connection between DU exposure and illnesses. The International Responses to the Environmental Impacts of War, supra note 227, at 629–30, 634; Milaninia, supra note 159, at 341 (reporting that the Secretary of Veterans Affairs claimed that there is no basis to presume that symptoms suffered are connected to exposure to any of the listed possible causes and the VA does not recognize “Gulf War Syndrome” as a specific compensable disability).

244 THE ROYAL SOCY, supra note 242, at 22 (“Veterans who have become ill since returning from the Gulf War naturally reflect on whether their disease is associated with exposure to DU on the battlefield.”); Milaninia, supra note 159, at 340–41.

245 Wexler, supra note 228, at 468–69.
reason for U.S. military supremacy, but American soldiers may suffer as a result of military prowess. Over 944,000 DU rounds were fired in Iraq and Kuwait, and the Pentagon admitted that at least 320 metric tons of DU would have been left in the region.

As of May 2002, the VA found that of the veterans serving in the first Gulf War, 8306 had died and 159,705 were injured due to exposures during the war. The VA indicated that 206,861 veterans filed claims for compensation and medical care because of injuries and illnesses sustained during the 1991 Gulf War and 168,011 applicants were classified as “disabled veterans.” As many as 130,000 U.S. troops may suffer from Gulf War Syndrome symptoms. In just over a decade, 30.8% of U.S. troops sent to the Gulf War had either died or were partially disabled when the average age at the time of deployment was only twenty-four. One can assuredly maintain that exposure to other contaminants during the Gulf War caused the illnesses, but other data suggest that this contention requires further evidence.

Veterans from Afghanistan and the 2003 Iraq War were diagnosed with symptoms similar to Gulf War Syndrome. Studies revealed that there was an extremely high incidence of childhood cancers and deformities where the United States dropped

247 JOHNSON, supra note 145, at 101.
248 Id. at 100.
249 Id.
250 Wexler, supra note 228, at 509.
251 Doug Rokke, Gulf War Casualties, RENSE.COM (2002), http://www.rense.com/general29/gulf.htm. Dr. Rokke, who was in charge of the military’s environmental cleanup following the 1991 Gulf War, concluded that the number of those suffering were much higher because thousands of U.S. troops remained in Kuwait and were exposed to DU for longer periods, likely causing 10,617 deaths and 262,586 “disabled veteran” injuries through May 2002. Id.; see also JOHNSON, supra note 145, at 100–01 (discussing Doug Rokke’s findings).
252 JOHNSON, supra note 145, at 101 (referencing various Pentagon-sponsored studies maintaining that soldier injuries and deaths during the 1991 Gulf War came from blowing up Saddam Hussein’s biological and chemical weapons factories and/or that the unexpected combination of DU with the destruction of these factories formed a lethal “cocktail” of hazardous particles); Milaninia, supra note 159, at 340 (stating that the Research Advisory Committee on Gulf War Veterans concluded that adverse health effects could be due to DU, infectious diseases from parasites, anthrax vaccine, the use of chemical weapons, smoke from oil fires, and bites from sand fleas, or some combination thereof; and that insect repellants and pyridostigmine bromide might intensify the problem); Wexler, supra note 228, at 473 (stating that the RAND Institute produced a report that focused, not on DU, but on “studies and data about natural uranium” for its authoritative source on the safeness of DU).
254 Milaninia, supra note 159, at 337.
bombs in Iraq, which was not necessarily where targets with lethal substances were supposedly held.\textsuperscript{255} Yugoslavia did not have stores of biological or chemical weapons or the same regional characteristics as Iraq,\textsuperscript{256} but DU weapons were dropped and fired in the former Yugoslavia\textsuperscript{257} and scientists called ill-health effects Balkan Syndrome.\textsuperscript{258} The Pentagon dismissed Dr. Rokke after he criticized NATO for not adequately protecting troops from DU during the 1999 bombing in Kosovo.\textsuperscript{259} In 2001 and 2003, the European Parliament passed Resolutions to prevent the use of DU weapons because it was believed that DU could cause long-term environmental destruction and inflict peacekeeping forces with adverse health effects, including cancer.\textsuperscript{260} The BBC revealed that top British military officials specifically ordered their press briefers to not comment on DU during the war against Iraq in 2003, but other foreign news sources did report on DU use\textsuperscript{261} and ARD TV in Germany won an Emmy for its documentary on DU exposure in Iraq and even supported its studies with on camera scientific testing.\textsuperscript{262}

The alleged danger with DU is that it could have a large-scale impact on any person exposed, but there are other examples of airborne contaminants that pose a danger to the health of troops. For example, the U.S. military operated twenty-two burn pits in Iraq and 250 in Afghanistan, with one pit burning an estimated 240 tons of waste per day.\textsuperscript{263} U.S. environmental laws prohibit the use

\textsuperscript{255} JOHNSON, supra note 145, at 101; Wexler, supra note 228, at 470–71 ("Children who play near discarded war materials may experience both inhalation and ingestion exposure.").

\textsuperscript{256} However, in Yugoslavia, the United States did bomb industrial and fuel factories, which caused massive environmental destruction and released over two thousand tons of ethylene dichloride and two hundred kilograms of metallic mercury into the water and soil. Nicholas G. Alexander, Note, Airstrikes and Environmental Damage: Can the United States Be Held Liable for Operation Allied Force?, 11 COLO. J. INT’L ENVTL. L & POL’Y 471, 471–72 (2000).

\textsuperscript{257} Wexler, supra note 228, at 469; Alexander, supra note 256, at 471–72.

\textsuperscript{258} Matthew D. Sztainkrycer & Edward J. Otten, Chemical and Radiological Toxicology of Depleted Uranium, 169 MIL. MED. 212, 212 (2004).

\textsuperscript{259} JOHNSON, supra note 145, at 100.


\textsuperscript{261} WMD: WEAPONS OF MASS DECEPTION (Cinema Libre Studio & Globalvision 2004).

\textsuperscript{262} Id. (referencing the ARD TV documentary); see also POISON DUST (Peoples Video Network 2005) (referencing the testing of a destroyed tank and discussing scientific facts related to DU exposure).

\textsuperscript{263} Kate Donovan Kurera, Comment, Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation, 28 PACE ENVTL. L. REV. 288, 291 (2010) (noting estimates at Joint Base Balad in Iraq); Scott Peterson, As Iraq War Winds
of burn pits inside the United States and it is commonly understood that burn pits release toxic gas, but federal law did not have extraterritorial application in occupied countries and the Pentagon hired private contractors to operate burn pits.\(^{264}\) Department of Defense studies verified high levels of toxic contaminants in the air near burn pits, but causation, uncertainty over the applicable laws,\(^{265}\) contractor defenses,\(^{266}\) and future viability\(^{267}\) can pose hurdles to a troop’s legal claims for harm to their health.

\(^{264}\) Kureras, supra note 263, at 296–97 (noting that the military’s use of burn pits is highly restricted and should only be used in emergency situations). Air Force Lieutenant Colonel Darrin Curtis, who was a bioenvironmental flight commander at Joint Base Balad, stated that the local burn pit was an “acute health hazard for individuals,” and that it was “operat[ing] with restrictions over the past few years without significant engineering controls.” Id. at 291. Dr. Anthony Szema, Chief of the Allergy Section of Veterans Affairs Medical Center, stated that the small size of particulate matter is dangerous because “the smaller the particulate matter [that is inhaled], the deeper the particles are able to travel into the lungs” and cause diseases such as bronchitis, asthma, emphysema, and even death. Id. at 292–93.

\(^{266}\) Soldiers did bring suit for symptoms of lung pain, respiratory pain and infections, loss of consciousness, headaches, and burning eyes, against KBR, one of the private contractors that burned Styrofoam, petroleum-oil lubricating products, medical waste, biohazard materials, lithium batteries, latrine waste, pesticides, animal carcasses, hydraulic fluid, and other garbage, in massive trenches. Complaint for Plaintiff at ¶¶ 1, 12–13, Brister v. KRB, Inc., No. 09-CV-00097, 2009 WL 1499260 (D. Alaska May 15, 2009). The case was dismissed based on lack of personal jurisdiction. Docket, Brister v. KRB, Inc., No. 8:09-CV-02740 (D. Md. Feb. 27, 2013), ECF No. 44 (dismissing consolidated cases and entering judgment in favor of defendants); see also McManaway v. KBR, Inc., 695 F. Supp. 2d 883, 896 (S.D. Ind. 2010) (dismissing a complaint by forty-seven members of the Indiana National Guard against KBR and others based on a lack of personal jurisdiction). If a suit did go forward, perhaps the usual defenses available to private contractors in relations with the Pentagon would be available to prevent liability from being assessed. Laura Brubaker Calkins & Margaret Cronin Fisk, \textit{KBR Seeks Combat Immunity in Soldier Toxic-Exposure Suit}, \textit{Bloomberg} (Sept. 3, 2013), http://www.bloomberg.com/news/2013-09-03/kbr-seeks-combat-immunity-in-soldier-toxic-exposure-suit.html (“From 2006 through [2013], judges largely agreed with KBR’s interpretation of the law and threw out death and injury cases involving dozens of works and soldiers [at burn pits].”).

\(^{267}\) Peter Apps, \textit{As Iraq, Afghan Wars End, Private Security Firms Adapt}, \textit{Reuters}, Oct. 21, 2012, available at http://www.reuters.com/article/2012/10/21/us-usa-arms-contractors-idUSBREW9K02B20121021 (reporting that an industry executive “expected an era of mergers and even bankruptcies” due to the contracting work drying up). The Pentagon might avoid more significant political and moral responsibility by hiring contractors to burn trash and if future harm does inflict soldiers, private firms may not (formed for specific objectives in Afghanistan and Iraq) remain viable.
If troops ultimately experience disabilities, harm may be compensable in the VA system, but there is a cap on liability that does not depend on causation. Compensation might be allocated, but without express determinations of causation and consequent liability, there may not be a sufficient deterrent to induce the Pentagon’s leadership to exhibit more reasonable care in the use of burn pits or DU-laced weapons.

From the perspective of enlistee choices, the risks that troops may encounter in war can impose significant costs that should be adequately appreciated in relation to Pentagon recruitment efforts. In addition to the controversy that materialized over legislative initiatives to promote military recruitment even before the invasion of Iraq, after the American public more significantly questioned the Iraq War there was even more agitation in society over the issue of whether potential enlistees were adequately informed while choosing to join the military.

E. Meeting Military Need

1. Recruitment

Effective military recruitment strategies, high-tech marketing and slogans, and co-sponsored marketing have been essential to maintaining military force supply because recruitment standards have been dropping. The military employs patriotism to urge

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268 Kurera, supra note 263, at 301.
271 LORENA OROPEZA, ¡RAZA SI! ¡GUERRA NO! CHICANO PROTEST AND PATRIOTISM DURING THE VIETNAM WAR ERA 68 (2005) (noting that recruiters have targeted traditionally
enlistment, but frequently only meets 60% to three-fourths of recruitment targets, and one-fourth of enlistees do not finish three years in their unit.\textsuperscript{272} Perhaps due to these trends, the right to more direct solicitation was enshrined in legislation.

In 1996, congressional Republicans prodded through the Solomon Amendment which could have denied hundreds of millions of dollars in federal funding to universities that did not support military recruitment practices.\textsuperscript{273} Similarly, during the 2000 presidential campaign, George W. Bush emphasized the “no child left behind” proposals as a policy platform to improve scholastic achievement.\textsuperscript{274} After the election, President Bush, with Republican held congressional support, included a provision in the No Child Left Behind Act of 2001 that required “Armed Forces recruiter access to students and student recruiting information” to intensify the rights of military recruitment on high school campuses amid the penalty of school districts losing federal funding.\textsuperscript{275} Critics contended that these initiatives force support for a political position and compel speech,\textsuperscript{276} and supporters defended that it is unfair to deny the disenfranchised segments of the population for several decades); Joseph B. Keillor, Note, Veterans at the Gates: Exploring the New GI Bill and its Transformative Possibilities, 87 WASH. U. L. REV. 175, 192 (2009) (reporting that during the 1950s, approximately half of the graduates from Harvard and Princeton joined the military, but now less than 1% join, and there is an anti-military university culture at elite institutions); Lizette Alvarez, Army Giving More Waivers in Recruiting, N.Y. TIMES, Feb. 14, 2007, at A1 [hereinafter Army Giving More Waivers in Recruiting]. Approximately 89% of Marines and 82% of Army personnel have a high school diploma or less. Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1070 (N.D.C.A. 2008), aff’d in part, rev’d in part sub nom. Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012). In 2008, a House Committee found that the Marine Corps and Army had a higher percentage of felons enlisted. Lizette Alvarez, Army and Marine Corps Grant More Felony Waivers, N.Y. Times, Apr. 22, 2008, at A21. 272 Jamie Wilson, US Lowers Standards in Army Numbers Crisis, GUARDIAN (United Kingdom), June 4, 2005, available at 2005 WLNR 27532484. 273 10 U.S.C. § 983 (2013); see Clay Calvert & Robert D. Richards, Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus, 13 WM. & MARY BILL RTS. J. 205, 209–10, 212–14 (2004). 274 Joy Resmovits, George W. Bush’s Education Law, No Child Left Behind, Abandoned by Texas, HUFFINGTON POST (Sept. 30, 2013), http://www.huffingtonpost.com/2013/09/30/bush-education-law-texas_n_4018971.html (reporting that Bush’s “baby” initiative expired in 2007 and Texas became the forty-second state to ditch the education law). 275 20 U.S.C. § 7908 (2013). 276 Forum for Acad. & Institutional Rts. v. Rumsfeld, 291 F. Supp. 2d. 269, 297 (D.N.J. 2003) (“Congress cannot command law schools even to admit the military to campus to ‘disseminate its recruiting message so long as that message is anathema to their mission and undermines their expressive goals.’); Brief for Appellants at 19-20, 33, Forum for Acad. & Institutional Rts., Inc. v. Rumsfeld, No. 03-4433 (3d Cir. 2004), 2004 U.S. 3rd Cir. Briefs LEXIS 373 (“The Solomon Amendment [and military advocacy generally are] . . . directed at forcing schools to disseminate or post the military’s literature and give military recruiters access to a recruiting forum.”); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 434.
opportunity to students to be exposed to opportunities of military service if university and school administrators choose not to sufficiently assist the Pentagon’s recruitment efforts.277

2. Sliding Supply After the Iraq War

Americans elect to enlist in the Armed Forces for many reasons, including a general sense of honor and obligation, a calling based on a perceived current urgency, financial interests and perks,278 or a fusion of motives. Some troops may allot resolute trust in political leaders and the efficacy of American democratic institutions to adopt honorable, reliable, and ineffective policy decisions. However, if a growing percentage of troops become disenchanted or experience a sense of frustration because they believe their enlistment decisions were misinformed, such as in the case of young men and women sensing a patriotic calling because the president insisted the country was under threat from Iraqi weapons of mass destruction, perhaps enlisting Americans should be able to reasonably rely on the factual basis asserted by the President at the time they rationally calculate risks, costs, and sacrifices that they are willing to assume when joining the military. With the American public, troops, and members of Congress opposing the war,279 neither the dropping enlistment and reenlistment rates nor the reduction in the supply of troops necessary to execute the policy should have been unexpected.

As early as 2004, military enlistment and morale were

277 147 CONG. REC. 8994–95 (2001) (statement of Rep. Vitter (R-LA) and Rep. Sessions (R-TX)) (explaining the humanitarian rationale by noting that the provision in the No Child Left Behind Act was designed to give the opportunity to high school students to join the military because they might not have that wonderful experience if a school principal is opposed to military recruitment); Scott D. Gerber, Allow Military Recruitment, Nat’l L.J., Dec. 15, 2003, at 34 (noting that the lawsuit against the Solomon Amendment was driven by “a left-wing political agenda” and that “the vast majority” of those in legal academia “are on the far left of the political spectrum”). If this were true, one would think that there would have been unrelenting demands for George Bush to be criminally indicted for executing an illegal war of aggression. “The U.S. Government, it would seem, has a moral obligation to punish criminals.” K. Elizabeth Waits, Note, Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals, 23 ARIZ. J. INT’L & COMP. L. 493, 513 (2006).

278 Keillor, supra note 271, at 183–86, 188 (reporting that the new G.I. Bill passed in 2008 is substantially more generous than the previous version and could result in $50,000 per year in tuition, stipends and additional benefits, is an entitlement with no spending cap, and was estimated to increase spending by $61 billion over ten years). The G.I. Bill is a recruitment tool that is funded by American taxpayers. See id. at 185.

279 Zogby, supra note 107 (“[Seventy-two percent] of American troops serving in Iraq think the U.S. should exit the country within the next year.”); see supra Part II.B.1.
dropping. Military families and soldiers were requesting help at unprecedented levels to exit the service, with 5000 to 6000 soldiers being declared “absent without leave.” In October 2004, the GI Rights Hotline, a counseling service run by antiwar groups, received 3000 to 4000 calls per month from soldiers trying to get out of the military. Jeremy Hinzman objected to the U.S. invasion of Iraq and stated: “I left the army to avoid participating in the war and occupation in Iraq, because I don’t feel that it was legal according to international standards, and I thought that if I participated I would be complicit in a criminal enterprise.”

Military recruitment goals reached a three-decade low, large numbers of military families and Iraq War veterans dissented outright, and many high schools and universities drove military recruiters off campus. Stories abounded of on-campus recruiters trying to meet quotas by wearing Rolex watches, driving BMWs, and seeking to persuade underage high school students that they could experience a similar lifestyle. While international law seeks to prohibit any form of child soldiers, the U.S. military openly targets children for early inculcation and permits minors

281 ARNOVE, supra note 79, at 94–95; Monica Davey, Un-Volunteering: Troops Improvise to Find Way Out, N.Y. TIMES, Mar. 18, 2005, at A18 (stating that troops were trying to get out of the military, and providing examples including by simply leaving to Canada, intentionally taking drugs in the hope of failing drug tests, and getting shot with a gun or pregnant at the last minute to be declared nondeployable); Fred Kaplan, Challenging the Generals, N.Y. TIMES MAG., Aug. 26, 2007, at 36–37 (stating that the percentage of West Point graduates who left the military at the end of their five-year obligation rose to 44%, which was the largest percentage in thirty years).
282 Goodman, supra note 139, at 217. See generally GUTMANN & LUTZ, supra note 205 (offering accounts of service members who served in Iraq and explaining how their experiences turned them against the war).
284 ARNOVE, supra note 79, at 92-93; See also Marela Zacarias, Counterrecruitment: Cutting off the Cannon Fodder, in IN THE NAME OF DEMOCRACY, supra note 139, at 296, 296–300 (describing the tactics used by a counter-recruitment organization); Eric Schmitt, Marines Miss January Goal for Recruits, N.Y. TIMES, Feb. 3, 2005, at A12 (quoting Brigadier General Walter E. Gaskin as stating that Iraq had an impact on the drop in recruitment).
286 AM. CIVIL LIBERTIES UNION, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY
and their parents to sign enlistment contracts. Counter-recruitment groups formed to provide high school students with more comprehensive knowledge about military service so that students could make more informed decisions before signing enlistment contracts based on questionable promises and tactics. Counter-recruiters must be offered adequate access to the schools, which are limited public forums and cannot be discriminated against based on viewpoint.

The Bush Administration may have forecasted the dwindling support for the Iraq War. Several months after the Iraq War began, the Selective Service System issued a request for volunteers to serve on draft boards and Congress allocated $28 million for that program. There were involuntary drafts during the Civil War,
World War I, World War II, the Korean War and the Vietnam War, and despite that the draft for every war (except World War II) was markedly unpopular and the constitutionality of drafts was challenged in each war, challenges were unsuccessful. Precedent suggests that courts might have upheld the constitutionality of an Iraq War draft, but the questionable facts and mission underlying the Iraq War in a multiple-source mass media society, may have resulted in an engulfing dissent that no administration could successfully navigate. Consequently, alternative methods were employed to meet military needs.

First, the Bush administration established a fast track to U.S. citizenship for 32,000 noncitizens serving in the U.S. military during war and activated over 400,000 National Guard and reserves for deployment to Iraq and Afghanistan. The latter initiative led to complaints that National Guard responses to Hurricane Katrina, the Kansas tornadoes, and other natural disasters and emergencies were inadequate because personnel and equipment were deployed to Iraq. The original intention behind
the “National Guard” was to have personnel to guard borders and serve in domestic crises, and not to send Guard troops to foreign wars. 299 Indeed, George W. Bush enlisted in the Texas National Guard and avoided the Vietnam War draft. 300 Nonetheless, when Americans sign agreements to serve in the National Guard, they are obligated to adhere to orders calling them to active duty if the President requires, 301 including if members did not anticipate deployment to war when enrolling. Despite that, all fifty governors signed a letter to the White House opposing any cuts in the domestic availability of National Guard troops. 302

Second, starting in November 2003, there was widespread disregard of the terms of enlistment contracts 303 due to “stop-loss” orders that prohibited U.S. troops from leaving the military when their commitments expired. 304 The orders were primarily directed at extending contracts for the convenience of the Pentagon’s overseas deployment orders. 305 Stop-loss orders are defined as “Presidential authority under Title 10, United States Code, Section 12305, to suspend laws relating to promotion, retirement, or

(noting how the wars, natural disasters, and devastated economy led to a succession of scandal for the president); Robert Pear, Bush Policies Are Weakening National Guard, Governors Say, N.Y. TIMES, Feb. 27, 2006, at A10 (“Governors of both parties said . . . that Bush administration policies were stripping the National Guard of equipment and personnel needed to respond to hurricanes, floods, tornadoes, forest fires and other emergencies.”); John Yaukey, Katrina Raises Questions About Domestic Use of Troops, USA TODAY (Sept. 13, 2005), http://usatoday30.usatoday.com/news/washington/2005-09-13-gns-troops_x.htm.

Erin Chapman, The National Guard’s Evolving Mission, PBS (Feb. 25, 2011), http://www.pbs.org/wnet/need-to-know/the-daily-need/the-national-guards-evolving-mission/7623/ (noting that during the Cold War, the National Guard could be available if war broke out with the Soviet Union, but that the Guard was viewed as a way of avoiding foreign war).

Borger, supra note 75; Yardley, supra note 75, at A16.

See Pear, supra note 298, at A10.

Id.

See Memorandum in Support of Application for Order to Show Cause at 8–10, Doe v. Rumsfeld, No. 04-cv-03361-SBA (N.D. Cal. Aug. 17, 2004); see also Andrew Exum, Op-Ed., For Some Soldiers the War Never Ends, N.Y. TIMES, June 2, 2004, at A19 (noting that soldiers were forced to serve even after their military contracts had expired); Monica Davey, Eight Soldiers Plan to Sue Over Army Tours of Duty, N.Y. TIMES, Dec. 6, 2004, at A15 (discussing the United States’ policy whereby soldiers cannot return home, even if their enlistment term ends, if their unit is still in Iraq or Afghanistan). For one example of an order, on November 21, 2002, the military issued MILPER Message No. 03-040, stating that “regulations governing voluntary retirements, separations, and REFRAIDs of officers and enlisted soldiers . . . [were being] suspended.” Doe v. Rumsfeld, 435 F.3d 980, 984–85 (9th Cir. 2006).


Id. (noting that orders were primarily aimed at troops deployed in Iraq and Afghanistan, who could be required to remain in the military until overseas deployments ended and for an additional 90 days after returning to the United States).
separation of any member of the Armed Forces determined essential to the national security of the United States.”

Over 58,000 soldiers had been affected by stop-loss orders during the Bush Administration, with an average of 7,000 troops being required to remain beyond enlistment agreements at any given time. Stop-loss orders could be viewed as a deceitful mode of extending a war effort that is not sufficiently supported with an all-volunteer force or as a “backdoor draft,” which was the label employed by Senator John Kerry during the 2004 Presidential campaign. Indeed, if tens of thousands of individuals have four-year enlistment periods lengthened by six months, this is equivalent to enlisting 12.5% more troops.

Troops contended that stop-loss orders caused emotional and personal difficulties, and several plaintiffs sued Secretary of Defense Rumsfeld for having their enlistment contracts unilaterally extended against their will. Plaintiffs challenged the orders as a breach of contract and misrepresentation, but the courts followed precedent and disagreed with the plaintiffs. Plaintiffs also failed on constitutional challenges that maintained the statute was an arbitrarily-broad, rather than a narrowly-tailored infringement on soldier liberty interest. Judges consistently interpreted the

306 DEPT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 242 (2014); see 10 U.S.C. § 12305(a) (2013). National emergency may be declared by the President or Congress or if the President assesses that there is a temporary necessity "other than during war or national emergency." 10 U.S.C. 12304; accord 10 U.S.C. § 12301–02. How "national emergency" is defined is an "interpretation and construction of federal statute[,]" Doe, 435 F.3d at 984.


308 Davey, supra note 303, at A15.


310 WATROUSH & O’BRYANT, supra note 297, at 5.


312 *See, e.g.*, Santiago v. Rumsfeld, 425 F.3d 549, 559 (9th Cir. 2005); Doe v. Rumsfeld, 435 F.3d 980, 983 (9th Cir. 2006); Qualls v. Rumsfeld, 357 F. Supp. 2d 274, 278 (D.D.C. 2005).


315 Doe, 435 F.3d at 985–86.
statute in relation to each particular enlistment contract and ascertained that agreements included flexible terms open to military and presidential discretion. The judiciary did not want to become involved in granting relief that might undermine military resources. Thus, plaintiff contentions that military officials made fraudulent claims or misrepresentations by later extending a contract under a stop-loss order were unlikely to succeed, but challenges to stop-loss orders can be distinguished from those circumstances in which a false representation could nullify a reenlistment contract and might also be differentiated from a court assessing the lawfulness or constitutionality of an invasion as an underlying justification for troop dissent.

Third, when the Army expected to fall short of recruitment goals by 12,000 troops in mid-2005, it began offering up to $150,000 reenlistment bonuses. The British American Security Information Counsel stated that because highly trained members of the military can receive two to four times more pay working for private contractors in Iraq, “exhausted American and British special forces personnel [were] resigning in record numbers and taking highly paid jobs as private security guards in Iraq and


317 See e.g. DD Form 4/1, supra note 316, at 2 (“Laws and regulations that govern military personnel may change without notice . . . . Such changes may affect . . . status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document.”).


319 Qualls, 357 F. Supp.2d at 286–87.

320 Santiago, 425 F.3d at 555–59; Qualls, 357 F. Supp.2d at 284–85.


322 David Moniz, Soldiers Re-enlist Beyond U.S. Goal, USA TODAY, July 18, 2005, at 1A; See Army Giving More Waivers in Recruiting, supra note 271, at A1 (stating that the government also gave enlistment bonuses); see OCCUPATION: DREAMLAND (GreenHouse Pictures & Subdivision Productions 2005) (reporting questionable psychological tactics used to retain troops in the military).
Afghanistan. This was the stimulus behind the Pentagon instituting a program to frontload additional compensation to entice soldiers to reenlist. The ad hoc incentives were a mode of increasing supply of troops to overcome the high costs and risks inherent in the policies without contravening existing pay grades, but this approach was not enough.

Fourth, the number of private contractors in Iraq kept growing to more than 180,000 in mid-2007, at the same time there were 160,000 U.S. troops. The number of PMCs in Iraq grew to 190,000 PMCs in 2008, and some U.S. government officials claimed that over 300,000 would still be insufficient.

324 ISENBERG, supra note 323 at 59; Private Warriors: Frequently Asked Questions, supra note 323.
325 See ISENBERG, supra note 323 at 59; Private Warriors: Frequently Asked Questions, supra note 323.
329 Miller, supra note 327, at A1.
There was an overreliance on military contractors, with the Government Accountability Office pronouncing that the Iraq War was the first time that private contractors were being used as almost a direct replacement for American troops, including by engaging in hostilities. The Economist referred to this as “the first privatized war.” Of the nationalities working for private contractors, less than 30% were Americans. An even larger percentage of PMC personnel were from third-world countries, where the average per capita GDP was much lower than the United States.

It is generally assumed that the private sector is more efficient and cheaper than the public sector, but this is not the case with outsourcing to PMCs. Contractors may earn three or four times

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333 David Isenberg, Contractors in War Zones: Not Exactly “Contracting,” TIME (Oct. 9, 2012), http://nation.time.com/2012/10/09/contractors-in-war-zones-not-exactly-contracting/(noting that U.S. Central Command numbers estimate that of the 137,000 contractors working in the region, 40,110 were American citizens, 50,560 were from the counties in the region, and 46,231 were not from the United States or local regions). Of Americans employed by PMCs, many were retired or returned from the service after their enlistment contracts expired and were, on average, fourteen years older than deployed troops. Jon D. Michaels, Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War, 82 WASH. U. L. Q. 1001, 1020 n.46, 1020–22 (2004); Sullivan, supra note 332, at 876. The incident of early retirement to work for a private contractor for higher pay has been called a “brain drain” from the military. Schmitt, supra note 326, at 515. Troops deployed abroad are on average twenty-six years of age, and PMC employees are on average forty years of age. Sullivan, supra note 332, at 876.

334 Some percentage of the employees working for contractors issue subcontracts to nationals of other countries, such as citizens of Bangladesh and the Philippines. Martha Minow, Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 B.C. L. REV. 998, 993 (2005). Reports surfaced indicating that roughly 35,000 of the 48,000 contractors working for KBR in Iraq were from third-world countries and that they had been recruited through deceptive practices. Amy Kathryn Brown, Note, Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq, 60 RUTGERS L. REV. 737, 737–39 (2008); Cam Simpson, Iraq War Contractors Ordered to End Abuses, CHI. TRIB., Apr. 24, 2006, at 1 (“[C]ontractors were charged with] deceptive hiring practices, excessive fees charged by overseas job brokers who lure workers into Iraq, substandard living conditions once laborers arrive, violations of Iraqi immigration laws and a lack of mandatory ‘awareness training’ on U.S. bases concerning human trafficking.”).

335 P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY
more than enlisted military personnel. A PMC employee can earn $1000 per day and enlisted soldiers earn between $1193 and $5054 per month. Department of the Army Pamphlet 27-50-428 reported that the United States spent over $100 billion on contractors during the first five years of the Iraq war. It costs additional public expenditures to properly monitor contract performance, and Pentagon oversight of PMCs was admittedly not adequate. Contractors were to blame for “billions of dollars in waste, fraud, and abuse,” and several dozen people were indicted in federal court on Iraq war-contract crimes. Both Pentagon

157 (2003) [hereinafter CORPORATE WARRIORS] (referencing RAND study); Jon Cadieux, Comment, Regulating the United States Private Army: Militarizing Security Contractors, 39 CAL. W. INT’L L.J. 197, 202 (2008) (noting that the pay differential is so extreme that it is unlikely that money is actually saved); P.W. Singer, The Contract the Military Needs to Break, WASH. POST, Sept. 12, 2004, at B3 [hereinafter The Contract the Military Needs to Break] (“Hiring private employees in Iraq at pay rates several times more than what soldiers make… has never been about saving money. It’s more about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war.”); Carney, supra note 326, at 323–24 (stating that there is “no proof” that PMCs are more efficient or cost effective).

336 U.S. CONG. BUDGET OFFICE, supra note 328, at 14 (acknowledging numbers confirming that private contractors can make nearly ten times more than U.S. troops but then rationalizing that these numbers represent the PMC’s billing rate for each personnel, as opposed to the individual PMC employee salary); Andrew Finkelstein, Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors, 34 BROOK. J. INT’L L. 395, 442–43, 443 n.258 (2009); Jackson, supra note 330, at 288 (“Contractors are paid nearly five-to-ten times what a soldier makes doing the same job.”); Schmitt, supra note 326, at 515 (“Senior [private security companies] personnel regularly earn in the $20,000 a month range, sometimes more.”); P.W. Singer, Outsourcing War, 84 FOREIGN AFF. 119, 129 (2005) (noting that private contractors earn two to ten times more than military soldiers).


339 CORPORATE WARRIORS, supra note 335, at 152–53.


342 David Jackson & Jason Grotto, Inside the World of War Profiteers, CHI. TRIB., Feb. 21,
troops and private contractors are employed by U.S. taxpayer dollars, and the private contractors are paid much more than Pentagon personnel. Peter Singer, the author of Corporate Warriors, explained:

[H]iring private employees in Iraq at pay rates several times more than what soldiers make, plus paying the overhead at the private firms, has never been about saving money. It’s more about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war.

With reduced American eagerness to fill necessary military enlistment requirements and polls evidencing that the American public and members of Congress favored a withdrawal from Iraq, the Bush Administration employed many methods to increase supply of forces. This may signify that the executive’s intention was to prosecute the war effort by all means, including if that entailed rejecting American will and depending on capitalist principles to raise the pecuniary compensation of combat and security forces to a level that was necessary to entice adequate labor supply. Private contractors may not embody the same devotion as U.S. GIs, and in this case, U.S. military troops had a high exit rate from the service.

As Professor Albert Hirschman formulated in his innovative work, Exit, Voice, and Loyalty, any political or private organizational system is capable of pursuing less than virtuous behavior, which can lead members to voice dissent and improve the organization or exit the entity to extract oneself from the conditions causing grief. But if the voice option of mobilizing public opinion is precluded, the exit option, pursuant to contractual obligations,

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343 JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY 24 (2007) (stating that a private contractor may make several times more than a U.S. soldier); see Richard Morgan, Professional Military Firms under International Law, 9 Chi. J. Int’l L. 213, 223 (2008) (comparing the salaries received by American contractors, third-country nationals, and American army officers). According to Secretary of Defense Robert Gates, the pay “lures some of our soldiers out of the service to go to work for them.” SCAHILL, supra, at 24.

344 The Contract the Military Needs to Break, supra note 335, at B3.

345 See supra Parts II.B.1, III.E.2.

346 See supra Parts III.E.1–2.

347 Michaels, supra note 333, at 1096 (“[P]rivateers may never have internalized the ethos of honor and dignity that is inculcated in American GIs.”).

348 See supra Part III.E.2.

349 ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 30 (1970)
may be all that is available. With troops being required to remain silent and dutiful to executive directives, constitutional battles over withdrawal in 2007 involved the Bush Administration rejecting congressional pursuits to end the occupation in favor of “supporting the troops.” However, it is the troops who place their lives at risk and do so amid profound formal and informal restrictions that preclude military personnel from freely expressing their sentiments.

IV. RESTRICTIONS ON THE RIGHTS OF U.S. TROOPS

A. Introduction

Politicians make decisions involving war, the military establishment devises missions to execute Congressional parameters and executive directives under constitutional war powers, and troops are mandated to follow military orders without objection. If objection mounts within the American populace and Congress, and the executive favors adherence to the mission while the Pentagon hierarchy follows executive orders, troops who risk their lives—a Fifth Amendment right—are still required to abide by orders without political dissent—a First Amendment right in civilian life. However, there were different stages of the war and occupation of Iraq. The troops participating in early stages after the invasion and occupation may have enlisted for a four-year contract duration based on perceptions of national need, accordant with the Bush Administration’s allegations of security threats and the conditions in the AUMF-Iraq, but over time it became known that these allegations were false. Perhaps new enlistees and re-enlistees, after those falsities became commonly known, either did not care that the allegations were false or

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350 See id. at 17 (1970) (noting in the political realm that “exit” can be association with desertion). With respect to exiting the military, the legal route of exit ostensibly requires fulfilling the terms of the existing contract.
351 See infra Part II.B.
352 Robert Bejesky, Dubitable Security Threats and Low Intensity Interventions as the Achilles’ Heel of War Powers, 32 Miss. C. L. Rev. 9, 18–20, 22–24 (2013) (discussing the wartime powers and responsibilities of Congress and the President).
353 Watts, supra note 150, 693–694 (2007) (comparing the ability of civilian workers to voice dissent with that of U.S. service members).
355 See Watts, supra note 150, at 693–95.
356 See supra Part II.A.
presumably joined the military for other reasons.

The last part emphasized that shortfalls in troop supply, perhaps due to the military labor market correcting itself through exit and reduced enlistment based on the shifting mission, were offset with other strategies. This part emphasizes how informal and formal restrictions on military members mandate adherence to the political decision without voicing dissent for the duration of military service contracts, including impeding activities that would otherwise be violations of constitutional rights in civilian life.\textsuperscript{357}

\textit{B. Culture, Hierarchy, and Mandatory Directives}

Even though American military enlistees do not relinquish constitutional rights when entering the military,\textsuperscript{358} the Supreme Court has underscored that the U.S. Constitution is not applicable to military society in the same manner that it governs civilian life.\textsuperscript{359} Restrictions found in the \textit{Uniform Code of Military Justice} (UCMJ), the \textit{Manual for Courts-Martial}, and military directives could be unconstitutional in civilian life, but elevated constraints on personal liberty are permissible in the military due to the need to ensure uniform compliance within the chain of command.\textsuperscript{360}

\begin{footnotesize}
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\item\footnotesize\textsuperscript{357} Watts, supra note 150, at 694–95.
\item\footnotesize\textsuperscript{358} Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980) ("[O]ne does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces.").
\item\footnotesize\textsuperscript{359} Parker v. Levy, 417 U.S. 733, 744 (1974) ("Just as military society has been a society apart from civilian society, so ‘military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.’" (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953))).
\end{enumerate}
\end{footnotesize}
Supreme Court affirmed that chain of command orders must be observed because “the military is, by necessity, a specialized society separate from civilian society” with a “primary business” of fighting or preparing to engage in conflict if the need arises.\footnote{Parker, 417 U.S. at 743 (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).}

The UCMJ restricts speech and action rights of members of the military. Justice Rehnquist addressed the reasoning: “The armed forces depend on a command structure that . . . ultimately involve[s] the security of the Nation itself. Speech that is protected in the civil population may . . . undermine the effectiveness of response to command.”\footnote{Id. at 759 (quoting Priest, 45 C.M.A. at 344).} The UCMJ proscribes engaging in conduct and speech that is not reasonable for military personnel or places the service in disrepute,\footnote{Michael J. Davidson, A Guide to Military Criminal Law 80 (1999).} participating in “[c]onduct unbecoming an officer and a gentleman,”\footnote{10 U.S.C. § 933 (2013).} and expressing “contempt toward officials,”\footnote{Id. § 888.} which has been broadly construed as prohibiting on and off-duty speech that criticizes the president and other political officials\footnote{John G. Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 HARV. L. REV. 1697, 1698–99, 1718, (1968); Rosen, supra note 269, at 126 (“[T]he UCMJ punishes a number of crimes . . . such as disrespect toward superior commissioned and noncommissioned officers; contempt toward certain public officials, including the President, Vice President, and Congress.”); Richard W. Aldrich, Comment, Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?, 33 UCLA L. REV. 1189, 1204–08, (1986) (highlighting how Article 88 is apt to be unconstitutional if the language is applied to civilians).} and attendance of protest movements that oppose the incumbent administration.\footnote{U.S. DEP’T OF DEF. DIRECTIVE NO. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY, E3.2–3.3 (2004).} Military directives prohibit soldiers from dissenting over, discussing political issues, and participating in political causes.\footnote{Id.}

Precedent from the Vietnam War affirmed that speech of service members in opposition to the war could be criminalized,\footnote{Parker v. Levy, 417 U.S. 733, 738 (1974) (upholding the criminal conviction of Howard Levy, an Army doctor, who made statements in opposition to the Vietnam War and violated Article 134, which prohibits making statements “with design to promote disloyalty and disaffection among the troops”); United States v. Daniels, 42 C.M.R. 131, 137 (C.M.A. 1970) (convicting Daniels because, by opposing the Vietnam War and urging others not to go to Vietnam, Daniels’ statements caused an “impairment of the loyalty and obedience”); United States v. Howe, 37 C.M.R. 429, 432 (C.M.A. 1967) (holding that the military could restrict Lieutenant Howe’s right to free speech under UCMJ Article 88 when Howe attended a protest.} and the Secretary of Defense reaffirmed this
mandate of adherence to military duties and the mission the year after the invasion of Iraq, even as it became known that the conditions underlying the use of the force were false. Military regulations are dogmatic because they dictate member compliance without contention throughout the hierarchical chain of command under threat of criminal and nonjudicial forms of punishment. Restrictions fortify the mandates of top officials that subordinates must execute. The military justice system also insulates the higher echelon in the military chain of command to ensure obedience at lower levels. This general control and disciplinary structure is presumed to be a legitimate means of maintaining order and discipline and is free from military and federal court challenges. Subordinates must execute combat and

and held a sign that read “Let’s Have More Than a Choice Between Petty Ignorant Fascists in 1968” and “End Johnson’s Fascist Aggression in Viet Nam”). In 1969, serviceman Roger Priest distributed 800 copies of a newsletter that urged readers to not comply with the Vietnam War draft and the military court convicted him because his “conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces” when he made antigovernment and racist comments online. United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972). A service member was convicted because his “conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces” when he made antigovernment and racist comments online. United States v. Priest, 66 M.J. 442, 444 (C.A.A.F. 2008).

This would also directly assume legality of the mission despite war powers and international law questions.


Court-martial is much more likely to be imposed on low-level military personnel. Id. at 549 (stating that high-level military officials are not likely to be subject to courts-martial, but could be subject to demotion, reprimand, and other nonjudicial punishments). The lowest level soldiers are much more likely to be subject to courts-martial and punished. Id. at 550, 564; see Victor Hansen, Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution, 16 TUL. J. INT’L & COMP. L. 419, 423 (2008). Major General Enoch H. Crowder emphasized that “the real purpose of the court-martial is to enable commanders to insure discipline in their forces.” Emily Reuter, Note, Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protection for America’s Military Personnel, 16 WM. & MARY BILL RTS. J. 315, 318–19 (2007).

noncombat directives,\textsuperscript{376} which are assumed to be legal (even if they are in fact illegal).\textsuperscript{377} Failure to execute orders can lead to courts-martial proceedings for dereliction of duty.\textsuperscript{378}

Other obligations further promote hierarchical conformity. Disorderly conduct restrictions are ostensibly indefinite,\textsuperscript{379} there are prohibitions on fraternizing with those of a lower rank,\textsuperscript{380} and there is control of off-duty conduct that is justified on paramount obligations to the military mission.\textsuperscript{381} As verified by studies in

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\item \textsuperscript{376} Soldiers are required to follow military orders. 10 U.S.C. § 892 (“Failure to obey order or regulation.”). See generally JAMES H. TONER, TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS at front matter (1985) (“Enlistees must obey the orders of the President of the United States and the orders of the officers appointed over [them].” (internal quotation marks omitted)); Cecilia M. Bailleit, Assessing Jus Ad Bellum and Jus in Bello Within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum, 20 GEO. IMMIGR. L.J. 337, 339, 370 (2006) (noting that most orders are presumed to be lawful, and that soldiers must obey lawful orders and may only disobey “manifestly illegal orders.”); Hansen, supra note 374, at 423 (“Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands.”); Reuter, supra note 374, at 322 (explaining that servicemen may not knowingly violate a directive from a superior officer).
\item \textsuperscript{377} MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16.c(i)(c) (2012) (“A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it.”). All orders are presumed to be legal, including if they are in fact illegal. Id. at pt. IV, ¶ 14.c(2)(a)(i) (“An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.”). See generally DAVIDSON, supra note 363, at 67–68 (emphasizing that unless an order is facially illegal, it should be followed); Robert Bejesky, Deterring Jus in Bello Violations of Superiors as a Foundation for Military-Justice Reform, 60 WAYNE L. REV. (forthcoming 2014) (manuscript at 8, 10) (on file with author) (noting that the FCA does not grant compensation for combat-related duties). This suggests that military orders can be assumed to be legal and troops must execute the orders, but if they are in fact illegal, there is no clear mechanism for reconciliation between discretion and possible punishment.
\item \textsuperscript{379} 10 U.S.C. § 934 (“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”).
\item \textsuperscript{380} See John M. Hackel, Planning for the “Strategic Case”: A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine, 57 NAVAL L. REV. 239, 248 (2009) (discussing categories of recognized military-specific crimes, including “fraternization offenses”).
\item \textsuperscript{381} DanaMarie Pannella, Note, Animals are Property: The Violation of Soldiers’ Rights to
\end{itemize}
psychology, hierarchies, and particularly military hierarchies, are a breeding ground for conformity. Respect for the organization and conformity may make otherwise questionable orders obligatory and officer associations may protect superiors at the expense of subordinates. Rules and culture ensure conformity and obedience to command, making military members hesitant to express differences in opinion and chilling speech.

In terms of a war powers action and execution of directives throughout the chain of command, Congress defines the scope of military confrontation, the President has superior authority under the Constitution to direct and control the armed conflict with general autonomy within congressional parameters, and military officials issue orders for troops to execute. The orders are presumed to be legal and must be followed because troops can face criminal punishment for disobeying orders. This presumption of legality of orders protects troops as an explicit defense to allegations of wrongdoing, which further induces troops to favor obedience to command rather than assume risks inherent in refusing to execute

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383 Bejesky, Politico, supra note 10, at 74–76. If top official orders are followed by subordinates and midlevel officers have aspirations for promotion, which is dependent on appeasing superior officers, there is likely to be conformity throughout a hierarchical command structure.
384 Robert Bejesky, The Utilitarian Rational Choice of Interrogation from a Historical Perspective, 58 WAYNE L. REV. 327, 359–63 (2012); Michael Volkin, What a Tangled Web We Weave—Decoding the Mystery that is HOOAH, MILITARY.COM, http://www.military.com/Recruiting/Content/0,13898,090105_Web,,00.html (last visited Oct. 6, 2014) (noting that the acronym “HOOAH” becomes a virtual mantra during basic training, that the Department of Military Science and Leadership at the University of Tennessee maintains the word refers to “anything except no,” and that it expresses “high morale, confidence, motivation and spirit”).
385 Amy J. Sepinwall, Failures to Punish: Command Responsibility in Domestic and International Law, 30 MICH. J. INT’L L. 251, 253–254 (2009) (noting that the West Point Protective and Benevolent Association is an overt mechanism that protects military superiors while casting responsibility at lower levels of the military).
386 Dickinson, supra note 382, at 208–09.
387 Reuter, supra note 374, at 320–22.
388 See Sevi, supra note 13, at 102; see also HUNTINGTON, supra note 354, at 456–66 (discussing civilian-military relations).
389 LAWRENCE P. CROCKER, ARMY OFFICER’S GUIDE 17 (46th ed. 1993) (noting that the military officers’ oath promises to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and “faithfully discharge the duties of the office”).
391 MANUAL FOR COURTS-MARTIAL, supra note 377, pt. II, r. 916(d) (“It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”).
a questionable order. Yet one might envision that troops could conceivably face competing obligations because international law mandates adherence to the laws of war throughout the chain of command and can impose criminal liability on superiors for the failure to adequately prevent subordinate wrongs. Also, the Manual for Courts-Martial states that a commander’s authority and

392 United States v. Calley, 48 C.M.R. 19, 26–27 (C.M.A. 1973) (“A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders.”).

393 See United States v. Wilhelm von Lee (High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 512, 543 (1950) (“Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. . . . Criminality does not attach to every individual in the chain of command . . . . There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.”); Sepinwall, supra note 385, at 266 (“[U]nder ICTY proceedings “superiors are individually responsible for a war crime or crime against humanity committed by a subordinate.” (internal quotations and citations omitted)).

394 Sepinwall, supra note 385, at 255 (“[W]here a commander’s failure to punish an atrocity of his troops can be read as an expression of his support for his subordinates’ act or the message it conveyed, his failure comes to constitute part of the injury. As such, he may be held criminally liable for the atrocity. . . .”). Failure to punish should be seen as a dereliction of duty or should render criminal liability for the atrocity. Id. at 255–56. Commanding military officers have obligations to seek out information regarding war crimes of subordinates, may not remain willfully ignorant, and must take action when faced with violations; otherwise liability can be assessed against the commanding officer. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 86–87, adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 383 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icrty.org/x/cases/munic/jug/en/981116_judg_en.pdf (“[H]e had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”); see also 4 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34-35 (1948) (stating that a commander will be held criminally liable for certain unlawful actions of his troops); 8 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 70–71 (1949) (claiming that a military commander will be held responsible for events that occur as a result of his orders or directives); 12 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 92–95 (1948) (stating that a superior officer will be held responsible if a penal law is violated by his subordinates). The ICC Statute also states that a “military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.” Rome Statute of the International Criminal Court pt. 3, art. 28(a)(ii), July 17, 1998, 2187 U.N.T.S. 3; see also 10 U.S.C. § 950q(3) (incorporating a negligence standard for superiors by making them responsible when they knew “or should have known” that a subordinate would commit a crime and failed to prevent it).
obligations can come from a “treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.”

Thus, while the principle of command responsibility can impute liability across the chain of command for acts during wartime under U.S. law, including by ascribing liability on the chain of command for engaging in “wars of aggression,” no U.S. commander has ever been criminally prosecuted on a clear command responsibility theory. This lack of prosecution ostensibly connotes that every order ever issued by the President and U.S. military commanders that was carried out by subordinates was lawful. Nonetheless, there were troops who formed personal views and dissented to the Iraq War.

C. The Context of Conscientious Objection

The opinions of war veterans should be respected, whether that means being excited about the prospect of war, internally justifying and expressing patriotism for the mission, opposing an overly-romanticized portrayal of war, or conveying utmost patriotic devotion to American veterans irrespective of debate over

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396 Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (“The principle of ‘command responsibility’ that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law in connection with acts committed in wartime . . . .” (citing In re Yamashita, 327 U.S. 1, 14–16 (1946))). Lieutenant Calley testified to following the orders of his commander Captain Ernest Medina, but because the UCMJ did not have a command responsibility crime, Medina was charged as a principle. Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 MIL. L. REV. 155, 192–95 (2000). The problem is that the U.S. military did establish the rules for the Nuremberg Tribunal and it is set forth in the Geneva Convention. See id. at 174.


399 In the context of military deployment, one soldier stated: “Well, I’d sure hate for a fight to be goin[g] on and me not be in it.” 21 DAYS TO BAGHDAD (National Geographic 2003).

400 See THE UNITED STATES MARINE CORPS, WARFIGHTING 14 (1989). Former Commandant of the Marine Corps writing: “War is among the greatest horrors known to mankind; it should never be romanticized.” Id.
the mission. The extant quagmire is whether there is latitude to accommodate the opinions and desires of enlisted troops who develop new perceptions on the reasons for war. Americans should be admired for enlisting in the U.S. Armed Forces with the intention of defending American security, but if a troop was deployed to Iraq and began to perceive that the decision to enlist was not made with full knowledge at the time the enlistment contract was signed, perhaps that enlistee could have experienced feelings of deception, frustration, or anger.401 From the military perspective, the cost of loyalty of soldiers is often very high and studies exhibit varying levels of acceptance of mission and willingness to desert, producing a high cost of raising the military.402 However, even if the constitutionality of the authorized mission, contained in the AUMF-Iraq, was not validated and troops have difficulty rationally justifying the personal risks being taken or morally justifying engaging in hostilities against the adversary, troops may still be deterred from exercising free speech or questioning missions premised on false pretenses if there is the possibility of facing punishment or receiving a dishonorable discharge.

The general principle of conscientious objection on moral, ethical, and freedom of thought grounds is supported in several international law sources,404 and much of the world has the right to

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401 Various interviews with American Iraq War veterans indicated a common story of being angered about 9/11, wanting revenge and choosing to serve the country to defend the values that established the country, but emphasizing that what many soldiers found in Iraq were clear contradictions in their own fundamental convictions and values that initially led them to enlist in the military. See, e.g., Introduction to Part V, supra note 139, at 209; Goodman, supra note 139, at 213; Jeremy Hinzman, “I Refuse to be a Pawn,” in IN THE NAME OF DEMOCRACY, supra note 139, at 223; Nancy Lessin, Military Families Speak Out, in IN THE NAME OF DEMOCRACY, supra note 139, at 225; Michael Hoffman, Civilians We Killed, in IN THE NAME OF DEMOCRACY, supra note 139, at 228; Daniel Ellsberg, Truths Worth Telling, in IN THE NAME OF DEMOCRACY, supra note 139, at 230; Joseph C. Wilson IV, What I Didn’t Find in Africa, in IN THE NAME OF DEMOCRACY, supra note 139, at 234; David M. Brahms et. al, An Open Letter to the Senate Judiciary Committee, in IN THE NAME OF DEMOCRACY, supra note 139, at 239; see also Kevin Benderman, A Matter of Conscience, ANTIWAR.COM (Jan. 18, 2005), http://www.antiwar.com/orig/benderman.php?articleid=4455 (“[W]ar is the destroyer of everything that is good in the world.”).

402 Richard H. Pildes, The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium, 89 Mich. L. Rev. 936, 943–46 (1991) (describing the history behind the military’s various methods in increasing enlistment); see also Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931, 948 (1985) (discussing the type of enlistees a volunteer only military would attract).

403 See Weiser, supra note 180, at 111–12 (discussing dishonorable discharge); see also Reuter, supra note 374, at 319–24 (discussing various military policies that punish military members for exercising free speech).

404 Eur. Parl.. Ass., Exercise of the Right of Conscientious Objection to Military Service in
conscientious objector status protected under domestic law.\textsuperscript{405} U.S. law permits discharge from the service for those who can establish by “clear and convincing evidence” that he or she is (1) “conscientiously opposed to participation in war in any form; (2) [w]hose opposition is founded on religious training and beliefs; and (3) [w]hose position is sincere and deeply held,”\textsuperscript{406} with the third element perhaps being the most essential.\textsuperscript{407} Some dissenting troops expressed that there was a gulf between what their officers and politicians affirmed and what they witnessed in Iraq,\textsuperscript{408} which might have reduced their moral conviction to conducting operations that were frequently placing their lives and Iraqi civilian lives in danger.\textsuperscript{409} Troops began to openly oppose the war and some refused


\textsuperscript{406} U.S. DEP’T OF DEF, \textit{INSTRUCTION NO. 1300.06, CONSCIENTIOUS OBJECTORS,} §§ 5.1, 5.3 (2007); see also 32 C.F.R. §§ 75.5(a), (d) (2002) (providing guidance for conscientious objectors); 72 Fed. Reg. 33,677 (removing § 75 in Title 32 of the Code of Federal Regulations, reasoning that this information “has no impact on the public”); Welsh v. United States, 398 U.S. 333, 342–43 (1970) (exempting the plaintiff from military service based on religious grounds); Witmer v. United States, 348 U.S. 375, 381 (1955) (stating that a conscientious objector must base his objection on the sincerity of his religious beliefs); Roby v. U.S. Dep’t Navy, 76 F.3d 1052, 1057 (9th Cir. 1996) (noting that beliefs cannot be transient).

\textsuperscript{407} The Court of Appeals for the First and Eighth Circuits have considered the third element the clearly important inquiry to meet a conscientious objection status. Hager v. Sec’y Air Force, 938 F.2d 1449, 1459 (1st Cir. 1991); Kemp v. Bradley, 457 F.2d 627, 629 (8th Cir. 1972).

\textsuperscript{408} ARNOVE, supra note 79, at 95 (noting that even under the supplanting liberation mission, troops expressed that they were not sent to Iraq to “liberate” Iraqis but to “pacify” them). Some troops present in Iraq questioned the mission of remaining in occupation, particularly when polls apparently revealed that most Iraqis did not want them there. See GUTMANN & LUTZ, supra note 205, at 111 (discussing how U.S. troops, like the U.S. public at large, ignored public surveys about U.S. occupation in Iraq); Christina J. Sheetz & Matthew T. Simpson, \textit{Rethinking the Future: The Next Five Years in Iraq}, 24 AM. U. INT’L L. REV. 181, 183–84 (2009) (explaining the conditions in Iraq); Shamo, supra note 10 (noting how most Iraqis did not want the United States to remain in Iraq).

\textsuperscript{409} \textit{Introduction to Part V,} supra note 139, at 209. JE McNeil, director of the Center on Conscience and War, explained that soldiers were leaving the military because they were simply realizing “what war really is . . . . A lot of people are naïve . . . . the military was portraying itself as being a peace mission.” Goodman, supra note 139, at 217; David Goodman, \textit{Breaking Ranks,} MOTHER JONES, Nov.–Dec. 2004, at 48, 48–49 (“More and more U.S. soldiers are speaking out against the war in Iraq—and some are refusing to fight.”). Iraq War veterans have publicly expressed their frustrations that there were no good reasons for remaining in Iraq and being shot at or shooting at Iraqis. ARNOVE, supra note 79, at 94. U.S.
to go to Iraq, leading to a dramatic rise in the number of military personnel seeking discharge from the military on conscientious objection grounds. Many Americans deserted and risked losing U.S. citizenship by fleeing the country to Canada, as occurred during the Vietnam War. For example, Jeremy Hinzman deserted from the military stating that he would not participate in criminal acts, and he sought refuge in Canada rather than face possible criminal charges in the U.S. Sergeant Brandon Hughey deserted from the Army and went to Canada and stated: “You can’t go along with a criminal activity just because others are doing it.” In December 2004, Pablo Paredes’s defense was that: “I have a higher duty to my conscience and to the supreme Law of the land. In 2006, Lieutenant Ehren Watada opined that the Iraq War was illegal, rejected deployment orders because he claimed he would be following illegal orders and committing war crimes, was willing to be deployed instead to Afghanistan, and believed that it was “the duty, the obligation of every soldier, and specifically the officers, to evaluate the legality, soldiers also seemed to express ambivalent emotions and frustration with Iraqis with respect to insurgent attacks, but most troops did not view Iraqis generally in a negative light. Introduction to Part V, supra note 139, at 222. Alexander Drylewski, Note, When Fighting is Impossible: A Contractual Approach to the Military’s Conscientious Objection Rules, 74 BROOK. L. REV. 1445, 1446 (2009). ARNOVE, supra note 79, at 94; see Joe Garofoli, Anti-War Sailor Lifts Foes of Iraq Policy: Sentence for Defying Deployment Orders Less Than Expected, S.F. CHRON., May 28, 2005, at B1; Paolo Pontoniere, Deserters Speak Out: Three U.S. Servicemen Who Fled To Canada Tell Why They Refused to Return to Iraq, CH. SUN-TIMES, July 31, 2005, at 5. See generally David Easlund, On Following Orders in an Unjust War, 15 J. POL. PHILOS. 213 (2007) (contending that combatants should have some responsibility to assess whether a war was lawful). Tracey Tyler, U.S. Deserter Fears for His Life, TORONTO STAR, July 8, 2004, at A02. Introduction to In the Name of Democracy, supra note 139, at 1. Id. at 12. War Resister Pablo Paredes Wins Surprise Victory: Military Judges Orders No Jail Time for Refusing Deployment Orders, DEMOCRACY NOW (May 13, 2005), http://www.democracynow.org/2005/5/13/war_resister_pablo_paredes_wins_surprise. Jeremy Brecher & Brendan Smith, Ehren Watada: Free at Last, THE NATION (Oct. 26, 2009), http://www.thenation.com/article/ehren-watada-free-last. See generally Sarah N. Rosen, Comment, Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations, 12 U. PA. J. CONST. L. 875, 886–87 (2010) (discussing the effect of military speech regulations on the ability of servicemen and women to express political dissent).
the truth behind every order—including the order to go to war.”

The military spent three years attempting to prosecute Watada, but gave up in 2009 and permitted him to resign. In 2008, U.S. Army Sergeant Matthias Chiroux, who served for five years and was deployed to Afghanistan, called the Iraq war illegal and stated that he had an obligation to reject his deployment orders. Perhaps the interpretation of many service members was that if a war is illegal, attention should be placed on those who directed the war instead of subordinates who refuse to comply with the orders to participate.

The problem is that the UCMJ includes a number of offenses for refusing to follow orders and departing from the military (including desertion). Courts have held that complaints of the immorality or illegality of a war is not a defense to avoiding military obligations, and that rejection of presidential orders is a nonjusticiable political question. Moreover, the military places a clause in enlistment contracts which states that an enlistee has no conscientious objection to war, which apparently denotes that enlistees have signed away these rights and make the post-enlistment conscientious objector claim unavailing. There was an indication that conscientious objection specific to questions of legality of the Iraq War would be a reasonable justification to permit foreign military troops to avoid deployment, but conscientious objection

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418 Hal Bernton, Officer at Fort Lewis Calls Iraq War Illegal, Refuses Order to Go, SEATTLE TIMES, June 7, 2006, at A1 (internal quotation marks omitted).
419 Brecher & Smith, supra note 417.
421 10 U.S.C. §§ 885–887 (2013); In re Grimley, 137 U.S. 147, 153, 156–57 (1890) (holding that over-age enlistee who lied about his age to join the military, and avoided his enlistment contract could still be convicted of desertion by court-martial).
424 See Alhassan v. Hagee, 424 F.3d 518, 520, 525 (7th Cir. 2005); see also Roby v. U.S. Dept of Navy, 76 F.3d 1052, 1054 (9th Cir. 1996) (discussing conflicting interests when a soldier has a conscientious objection to war after entering into a contractual agreement with the government).
425 See Alhassan, 424 F.3d at 521.
426 In June 2005, in Germany v. N., Germany’s Federal Administrative Court (Bundesverwaltungsgericht) upheld a German soldier’s conscientious objection claim and permitted the soldier to avoid service in the war because he argued that the Iraq war was illegal. Ilja Baudisch, Germany v. N: German Federal Administrative Court Decision on a Soldier’s Right to Refuse to Obey Military Orders for Conscientious Reasons, 100 AM. J. INT’L L. 911, 911–12 (2006). German soldiers had the lawful right to disobey orders to participate in the war under “the Basic Law’s protection of freedom of conscience.” Id. at 912.
does not seem to accommodate U.S. troops questioning the motives of the commander in chief or the chain of command directives that the President put in motion.\footnote{The first two categories of opinions are orthodox and will not be punished, the third invokes a morality inherent with just war, and the fourth raises the most consternation because the context is not a typical case of conscientious objection that would likely permit repudiating the decision to enlist, but is instead questioning superior political agendas and military directives inherent in those orders. See generally Joseph B. Mackey, Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection, 2008 ARMY L. AW. 31, 31 (discussing the conscientious objection exemption).}

\section*{V. Conclusion}

The AUMF-Iraq contained conditions that required Iraq to have prohibited weapons, but one month after the invasion, the Bush Administration stated that officials did not lie and that the invasion was also intended to be a show of “American power and democracy.”\footnote{Cochran, supra note 67.} Before the war, the Bush Administration made hundreds of false statements over a two year period about security threats from Iraq,\footnote{Lewis & Reading-Smith, supra note 29.} but the SSCI’s five-year investigation found that none of the threat allegations were true, and the chair of the congressional committee stated that the Bush Administration “led the nation into war under false pretenses.”\footnote{Press Release, Senate Select Committee on Intelligence, supra note 9 (quoting SSCI Chairman John D. Rockefeller); Bejesky, Intelligence Information, supra note 7, at 812, 875–82. False allegations led to war. Bejesky, Cognitive Foreign Policy, supra note 6, at 6; Bejesky, Intelligence Information, supra note 7, at 875–82; see also Bejesky, Politico, supra note 10, at 102–07 (discussing the Bush Administration’s underlying desire to show American power and democracy).} The Bush Administration’s use of propaganda after the invasion shifted issues away from what many called an illegal war,\footnote{See Bejesky, Public Diplomacy, supra note 139, at 978–80 (discussing propaganda being “dressed as independent military analysis” (quoting David Barstow, Behind TV Analysts, Pentagon’s Hidden Hand: Courting Ex-Officers Tied to Military Contractors, N.Y. TIMES, Apr. 20, 2008, at A1) (internal quotation marks omitted)).} but the falsities that led to the invasion became so controversial that the debate played itself out in Congress, among veteran groups, and through societal advocacy.\footnote{See supra Part III.} U.S. troops must execute orders to ensure effective military performance. Dissenting to superior orders in the military can result in criminal punishment.\footnote{10 U.S.C. § 892 (2013).} Yet, at the time of enlistment, suppose an American made a rational choice to join the military for
many reasons and weighed costs and benefits of personal and national interest and sacrifice. If that rational choice equation evolves, current law ostensibly does not accommodate dissent, even when that opposition derives from potential challenges to the constitutionality of a war powers action or the legality of a war.\textsuperscript{434} Despite the fact that terminology in military enlistment contracts is notably thorough in divesting rights to object to military deployments and assignments,\textsuperscript{435} others may claim that there are infractions of doctrines regarding informed consent and the accuracy of the underlying bases of contractual representations that have existed for centuries. Granted, at some point enlisting and reenlisting troops probably should have known that the Iraq War was based on false pretenses, which might further warrant imputing assumption of risk at the point of enlistment, but this stage could be very deep into the war and occupation.\textsuperscript{436}

Men and women who serve in the U.S. Armed Forces should be regarded with respect, and they should be respected enough to be told the truth. If enlistees are not told the truth, perhaps they should be granted sufficient respect to have their voices adequately heard without fear of punishment. It is American troops who must confront life-threatening risks, not an executive with majority support from his own party in both houses of Congress. Because of the Iraq war, 4488 troops were killed, the military disability system was racked, tens of thousands of troops suffer from posttraumatic stress syndrome and other disabilities, and the impact of depleted uranium on U.S. troops and Iraqis are concerns that still beg for answers.\textsuperscript{437} These costs should be appreciated by politicians at the time that justifications for war are presented.

Not only were the terms of the AUMF-Iraq ignored in order to invade, but the President employed the “support the troops” slogan as a means of continuing an occupation without sufficient support from the American people.\textsuperscript{438} The American public should have the

\textsuperscript{434} Massachusetts v. Laird, 400 U.S. 886, 900 (1970) (Douglas, J., dissenting). In disagreeing with the majority when it rejected such a challenge, Justice Douglas wrote that “[t]he question of an unconstitutional war is neither academic nor ‘political.’” Id.  
\textsuperscript{435} For example, Lieutenant Ehren Watada enlisted out of national devotion to his country in 2001 and faithfully served for five years and several deployment orders, but Watada adamantly refused to be deployed to Iraq in 2006. Bernton, supra note 418, at A1. Or, if a military service obligation continues for eight years, as is currently written in enlistment contracts (which can include a Reserve component), DD Form 4/1, supra note 316, at 2, the point of imputing knowledge of the falsities might never have been reached for some troops.  
\textsuperscript{436} See supra Part III.  
\textsuperscript{437} See supra Part II.B.
democratic right to choose their own interpretation of what it means to “support the troops” and feel free to equate that interpretation with their own attitudes toward patriotism. Perhaps many Americans view a patriotic support of the troops as doing what removes them from danger and rebuking an interpretation of patriotism that assumes there is a national duty to rally around an executive who flaunted American constitutional processes, the United Nations, and by polls, the troops and the American public. American taxpayers have already paid $2.2 trillion to finance the military’s mission, for the employment of private contractors, and for other expenses for the Iraq War, and the medical expenditures for injuries to U.S. troops and spending for ongoing disability insurance continue to grow. Had there been an historical instance in which the executive was held accountable for marketing war actions without a viable basis, there might have been a deterrent to dissuade what recently unfolded, but instead it appears that the lesson is that there is an impunity that requires troops and Americans in general to bear the cost.

439 See Brent T. White, Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools, 43 GA. L. REV. 447, 464 (2009) (quoting the late historian Howard Zinn who remarked that patriotism is an “expression of commitment to a set of basic democratic ideals, which typically include liberty, justice, and (sometimes) equality”); see also IMMANUEL KANT, Perpetual Peace: A Philosophical Sketch, in KANT POLITICAL WRITINGS 93, 100 (Hans Reiss, ed., 2d ed. 1991) (“If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have a great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take it upon themselves a burden of debt[s] . . . .”).

440 See generally Bejesky, Weapon Inspections, supra note 8, at 350–58 (discussing the Bush Administration’s faulty perceptions); see supra Part II.

441 Bilmes, supra note 12, at 1; CBS Evening News, supra note 12.