

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

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I. INTRODUCTION

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.¹ 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.”² 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,³ and the backlog was a byproduct of recent battle injuries.⁴

Over 1.7 million U.S. troops were deployed to Afghanistan and Iraq during the recent wars.⁵ 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.⁶ It was later verified that no such arsenal existed.⁷ Professors

¹ Josh Sweigart, *‘Delay in Treatment’ a Factor in More than 100 Deaths at VA Centers*, DAYTON DAILY NEWS (May 18, 2014), <http://www.stripes.com/news/us/delay-in-treatment-a-factor-in-more-than-100-deaths-at-va-centers-1.283701> (“The number of dead veterans could total more than 1,100 from 2001 through the first half of 2013.”); Nelli Black et al., *As VA Wait-List Scandal Grows, Senate and Veterans Will Finally Hear From Shinseki*, CNN (May 23, 2014), <http://www.cnn.com/2014/05/14/politics/va-scandal-eric-shinseki-preview/>.

² Joel Gehrke, *John Boehner and Nancy Pelosi Prepare for Fight About Obama’s Responsibility for Veterans Affairs Scandal*, WASH. EXAMINER (May 29, 2014) (internal quotation marks omitted), <http://washingtonexaminer.com/john-boehner-and-nancy-pelosi-prepare-for-fight-about-obamas-responsibility-for-veterans-affairs-scandal/article/2549063>; see Chelsea J. Carter, *Report: 1,700 Vets Not on Phoenix VA Wait List, at Risk of Being ‘Lost or Forgotten’*, CNN (May 30, 2014) <http://www.cnn.com/2014/05/28/politics/phoenix-va-hospital/>. McCain remarked that “it was ‘about time’ the Justice Department launched its own investigation.” Carter, *supra*.

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/376560/va-hospital-scandal-editors> (noting that the VA was unprepared for the influx of soldiers returning from Iraq and Afghanistan).

⁵ Melissa Pratt, Note, *New Courts on the Block: Specialized Criminal Courts for Veterans in the United States*, 15 APPEAL 39, 39 (2010).

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.”⁸ 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.”⁹

The international community condemned the attack and several years of regularly conducted polls confirmed that approximately 80% of Iraqis opposed continuing occupation.¹⁰ 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.¹¹ 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.¹² President Obama understood the American and

CREIGHTON L. REV. 811, 881 (2011) [hereinafter Bejesky, *Intelligence Information*].

⁸ Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464 (2011); Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 361 (2011) [hereinafter Bejesky, *Weapon Inspections*].

⁹ Press Release, Senate Select Committee on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), <http://intelligence.senate.gov/press/record.cfm?id=298775>; Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 134 (2006) (noting that with respect to the Bush Administration's chief ally in the invasion—Britain—the British public did not find compelling a humanitarian rationale for attacking Iraq). The British attorney general wrote in a pre-war and later released memo: “I know of no reason why [humanitarian intervention] would be an appropriate basis for action in present circumstances.” Goodman, *supra* (internal quotation marks omitted).

¹⁰ See Bejesky, *Weapon Inspections*, *supra* note 8, at 342–44, 348–49; Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 105 (2011) [hereinafter Bejesky, *Politico*]; Dakota S. Rudesill, *Foreign Public Opinion and National Security*, 36 WM. MITCHELL L. REV. 5223, 5232–33 (2010) (arguing that the removal of Saddam Hussein angered and humiliated as many Arabs as it pleased and that the Bush administration left the country in chaos); Adil E. Shamoo, *In Iraq, Occupation by Another Name*, BALT. SUN, Feb. 17, 2012, at 21A (noting that despite the departure of the official U.S. military presence in December 2011, the United States increased the number of CIA and Special Operations forces, and further reporting that “[a]nimosity toward the U.S. is on the rise” and “[n]o Iraqi politicians want to openly be identified as pro-American”).

¹¹ Bejesky, *Intelligence Information*, *supra* note 7, at 816–17.

¹² JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE*

international backlash,¹³ and in the January 2010 *State of the Union Address* he promised to withdraw all combat troops within eight months.¹⁴ U.S. troops were withdrawn by the end of 2011.¹⁵

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.¹⁶ This article revisits questions that were raised over the constitutionality of the Vietnam War,¹⁷ with new

COST OF THE IRAQ CONFLICT *passim* (2008) (estimating even more dire economic costs of \$3 trillion by including derivative expenditures); Bejesky, *Politico*, *supra* note 10, at 84–91 (addressing how the administration avoided discussion of expenses and negative ramifications on the American economy); Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* 1 (Harvard Univ. John F. Kennedy Sch. of Gov't., Working Paper No. RWP13-006, 2013), available at <https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=8956&type=FN&PersonId=177> (“The Iraq and Afghanistan conflicts, taken together, will be the most expensive wars in US history—totaling somewhere between \$4 to \$6 trillion. This includes long-term medical care and disability compensation for service members, veterans and families, military replenishment and social and economic costs. The largest portion of that bill is yet to be paid.”); Dan Froomkin, *How Many U.S. Soldiers Were Wounded in Iraq? Guess Again*, HUFFINGTON POST (Dec. 30, 2011), http://www.huffingtonpost.com/dan-froomkin/iraq-soldiers-wounded_b_1176276.html (noting over 32,000 U.S. troops were injured in Iraq); *CBS Evening News* (CBS television broadcast Mar. 19, 2013).

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>.

¹⁵ Mark Landler, *Last U.S. Soldiers to Exit From Iraq in 2011, Obama Says*, N.Y. TIMES, Oct. 22, 2011, at A1.

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); *DaCosta 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.¹⁸ 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*¹⁹ 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.²⁰

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 TEMP. 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 Fidler 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.

¹⁹ *Massachusetts v. Laird*, 400 U.S. 886 (1970).

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-2002,²¹ 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.²² 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.²³ At the same time, the President released a national security strategy, which proclaimed a right to preemptively attack other countries,²⁴ and lobbied Congress for an authorization to use force against Iraq.²⁵ Republicans proved more willing to back military action and

²¹ Bejesky, *Politico*, *supra* note 10, at 62–70. The White House lobbied members of Congress for an invasion and some top officials maintained that unilateral action would be taken against Iraq by the summer of 2002. SHELDON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ* 37 (2003); *Iraq: Conditions for Military Action*, THE SUNDAY TIMES (June 12, 2005), <http://www.gwu.edu/~nsa/rchiv/NSAEBB/NSAEBB328/II-Doc13.pdf>; Daniel Eisenberg, "We're Taking Him Out": *His War on Iraq May be Delayed, but Bush Still Vows to Remove Saddam. Here's a Look at White House Plans*, TIME, May 13, 2002, at 36, 37; Patrick Wintour, *Short: I Was Briefed on Blair's Secret War Pact*, GUARDIAN (United Kingdom), June 18, 2003, available at 2003 WLNR 18525760.

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.")

²³ *President's Remarks at the United Nations General Assembly*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Sept. 12, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html>.

²⁴ THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 6 (2002), available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

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,²⁶ while Democrats were somewhat more reluctant to commit to an American military action against Iraq.²⁷ 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.”²⁸

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.²⁹ 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.³⁰ An NIE had never been produced that was devoted to

²⁶ Dave Boyer, *Congressmen Get “Troubling” Iraq Briefing Daschle Brings Up Vietnam*, WASH. TIMES, Sept. 6, 2002, at A01; David Postman, *Washington Congressional Democrats Say They’re Wary of Attack on Iraq*, SEATTLE TIMES, Aug. 28, 2002, at A12; *Senator Critical of Slow Debate on Iraq Attack*, CNN (Aug. 18, 2002), http://articles.cnn.com/2002-08-18/politics/iraq.debate_1_weapons-inspectors-iran-iraq-war-iraqi-president-saddam-hussein?_s=PM:ALLPOLITICS; *US Republicans Split Over Iraq Attack*, BBC NEWS (Aug. 16, 2002), http://news.bbc.co.uk/2/hi/middle_east/2197367.stm.

²⁷ Postman, *supra* note 26, at A12. Democrat House Minority Leader Richard Gephardt explained: “After 12 years of Saddam Hussein’s defiance of United Nations resolutions, his regime’s new offer to admit inspectors does not address my concerns about the threat he poses to the United States and the international community.” Todd S. Purdum, *U.S. Hurries; World Waits*, N.Y. TIMES, Sept. 18, 2002, at A1 (internal quotation marks omitted). Senator Lieberman explained that he was “fully supportive of such military action now.” Anne Q. Hoy, *Debate on Presidential Power: Congress Struggles Over Iraq*, NEWSDAY, Sept. 15, 2002, at A21 (internal quotation marks omitted). Senator Levin remarked: “I think the president has made a strong case . . . for U.N. action here to enforce U.N. resolutions. That’s a very different issue from whether or not we should go it alone.” *CNN Late Edition with Wolf Blitzer: Interview with Pervez Musharraf; Interview with Colin Powell: Levin, Warner Assess War on Terrorism*, CNN.COM/TRANSCRIPTS (Sept. 15, 2002), <http://transcripts.cnn.com/TRANSCRIPTS/020915/le.00.html>.

²⁸ Editorial, *The Politics of War*, N.Y. TIMES, Sept. 20, 2002, at A26.

²⁹ See Charles Lewis & Mark Reading-Smith, *False Pretenses*, THE CTR. FOR PUB. INTEGRITY (Jan. 23, 2008), <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses>.

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,³¹ 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.³² The SSCI later indicated that the U.S. Intelligence Community (IC) was devoid of intelligence sources on Iraqi weapons systems after inspections ceased in 1998.³³

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.³⁴ 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.³⁵ 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.³⁶ The SSCI's later investigation determined that the White Paper was "substantively similar to" the NIE,³⁷ 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" ³⁸ 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).

³¹ 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.

³² Bejesky, *Weapon Inspections*, *supra* note 8, at 302-03.

³³ S. REP. NO. 108-301, at 24-25, 258-60, 417; See Bejesky, *Weapon Inspections*, *supra* note 8, at 302-03, 332 n.182.

³⁴ Lewis & Reading-Smith, *supra* note 29.

³⁵ 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.

³⁶ *Id.* at 286, 298 (noting that Senator Durbin asked Tenet to produce an unclassified summary of the NIE for the public).

³⁷ See *id.* at 286, 294.

³⁸ *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)³⁹ and could selectively release classified information while keeping controversial and weak foundations of the claims secret,⁴⁰ placing Congress at an informational disadvantage.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.⁴²

With the biased White Paper, members of Congress debated the alleged danger from prohibited weapons and potential Iraqi connections to al Qaeda.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.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.

³⁹ *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.

⁴⁰ Bejesky, *Intelligence Information*, *supra* note 7, at 877; Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 408 (2012); Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 444–45 (2010).

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.

⁴³ *See* 148 CONG. REC. 19,510–19,511, 19,516–18, 19,521–32, 19,600–06 (2002).

⁴⁴ HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 153–54 (6th ed. 1985); Douglas Rivers & Nancy L. Rose, *Passing the President's Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183, 185–87 (1985).

president, especially just weeks before the November election.”⁴⁵ 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.”⁴⁶ Louis Fisher wrote: “[L]eading Democrats folded, one by one, looking less to constitutional requirements than to their own political calculations.”⁴⁷

The President can escalate conflict and contour public opinion.⁴⁸ 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.⁴⁹ 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.*”⁵⁰ Members of Congress will support the President’s agenda⁵¹ to take advantage of the coattail

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).

⁴⁶ Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 929 (2007); see also, George Patrick Montgomery, Note, *Law’s Making a Comeback: A Chayesian Analysis of the Bush Administration’s Post-9/11 Interrogation Policy*, 6 GEO. J.L. & PUB. POL’Y 333, 363 (2008) (“[L]aw as organization’ was hamstrung by political affiliation. The Republican majority in Congress demonstrated an allegiance to its party rather than to the constitutional architecture and its particular institution.”). On September 23, 2002, President Bush remarked that Democrats are “more interested in special interests in Washington and not interested in the security of the American people.” Fisher, *supra* note 30, at 398. Richard Gephardt, Democrat House Minority Leader, explained about the vote: “This should not be about politics. We have to do what is right for the security of the nation” *Leadership Agree on Iraq Resolution*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Oct. 2, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/200210027.html>.

⁴⁷ Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1215 (2005).

⁴⁸ Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 890 (1996).

⁴⁹ DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1002 (2006) (noting that rational politicians from both parties will respond to trends in public opinion).

⁵⁰ Julie Hirschfeld Davis, *CIA Report on Iraq Opens Congress Talks*, BALTIMORE SUN, Oct. 9, 2002, at 1A (“I believe we’re going to get a strong resolution, backed by both Republicans and Democrats,” Bush said at a campaign stop in Tennessee.); Suzanne Malveaux, *Bush Talks Iraq, Stumps for GOP in N.J.*, CNN (Sept. 23, 2002), <http://edition.cnn.com/2002/ALLPOLITICS/09/23/elec02.bush.iraq/index.html>.

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 &

effect⁵² and cohesion exists inside the parties, such that members exhibit ideological allegiance and often vote along party lines to bestow reciprocal support.⁵³

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.⁵⁴ 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.”⁵⁵ 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.”⁵⁶ 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,⁵⁷ and sought to precisely confine the authorization.⁵⁸ 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.”⁵⁹ Emphasizing that the White Paper was not convincing and did not present

Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2333, 2337 (2006).

⁵² Members of Congress will defend and support Presidents of the same party because of the coattail effect in which members of the same party will benefit when presidential approval ratings are high. James E. Campbell & Joe A. Sumners, *Presidential Coattails in Senate Elections*, 84 AM. POL. SCI. REV. 513, 517, 518–19 (1990); Jeffery J. Mondak, *Presidential Coattails and Open Seats: The District-Level Impact of Heuristic Processing*, 21 AM. POL. Q. 307, 315 (1993).

⁵³ MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 18–19 (2003); Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1407, 1429 (2010) (“[T]he majority party cartelizes agenda control among senior party members and exercises both negative agenda control—blocking measures that divide the party—and positive agenda control—promoting measures favored by a majority within the party.”); see Gary D. Allison, *The Supremes Spoil the Libertarians’ Party*, 41 TULSA L. REV. 291, 312 (2005).

⁵⁴ Nzelibe, *supra* note 46, at 933.

⁵⁵ 148 CONG. REC. 17,760 (2002) (statement of Sen. Byrd).

⁵⁶ SENATOR ROBERT C. BYRD, *LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY* 233 (2004).

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, *Preempting Democracy: The Bush Administration vs. the World*, 7 BERKELEY J. AFR.-AM. L. & POL'Y 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 459.

⁶² *House Vote on Iraq Resolution*, N.Y. TIMES, Oct. 12, 2002, at A13.

⁶³ *Senate Vote on Iraq Resolution*, N.Y. TIMES, Oct. 12, 2002, at A13.

⁶⁴ Jonathan Mermin, *Free But Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929, 958 (2005).

⁶⁵ *See* Bejesky, *Intelligence Information*, *supra* note 7 at 875–82; Bejesky, *Politico*, *supra* note 10, at 70.

⁶⁶ *See* S. REP. NO. 108-301, at 286 (2004).

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

⁶⁷ John Cochran, *Officials: 9/11 Was Main Reason for War*, ABC NEWS, <http://abcnews.go.com/Nightline/story?id=128467&page=1> (lasted visited Oct. 6, 2014).

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 Administration] ‘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).

⁷⁰ H.R.J. Res. 114, 107th Cong. § 3(b)(1) (2002).

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 . . . [a]nd 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.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."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,⁷⁴ particularly when his own avoidance of the

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).

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

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.⁷⁵ 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.”⁷⁶ 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?

Keith Olbermann, *Countdown with Keith Olbermann: Mr. President, The War Isn't About You—Or Golf*, NBC NEWS (May 14, 2008), <http://www.nbcnews.com/id/24632990/page/2/print/1/displaymode/1098/>.

⁷⁵ 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 Texan 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=uJa35osHNok> (last visited Oct. 6, 2014).

⁷⁶ *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.”⁷⁷ 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.”⁷⁸ 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.”⁷⁹ 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.⁸⁰ A February 2006 Zogby poll found that 72% of U.S. troops favored withdrawal within a year.⁸¹ In March 2006, 68% of Americans believed that troops should be decreased or withdrawn.⁸² In the 2006 congressional election exit polls, 74% of Democrats wanted to withdrawal troops from Iraq, while only 24% of Republicans agreed.⁸³

Republicans had to choose whether to abandon Bush on Iraq.⁸⁴

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-polled-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.”).

⁸⁰ Richard Morin & Dan Balz, *Bush’s Popularity Reaches New Low*, WASH. POST, Nov. 4, 2005, at A1.

⁸¹ Charles Levinson, *In Iraq, Front-Line Patience Wears Thin*, CHRISTIAN SCI. MONITOR, Mar. 30, 2006, at 1 (discussing Zogby poll).

⁸² WORLDPUBLICOPINION.ORG & KNOWLEDGE NETWORKS, *supra* note 78, at 10.

⁸³ *America Votes 2006: Exit Polls*, CNN, <http://www.cnn.com/ELECTION/2006/pages/result/s/states/US/H/00/epolls.0.html>.

⁸⁴ Melinda A. Mueller, *Gender Differences in the 2006 House Elections: The Effect of Gender on Campaign Messages About the Iraq War*, 31 T. JEFFERSON L. REV. 53, 54 (2008).

As experts predicted, Bush's low approval ratings⁸⁵ 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 1994.⁸⁶ There was a high correlation between district-level losses and legislators who voted for the war,⁸⁷ and victories were viewed as partially attributable to voter rejection of the Iraq War.⁸⁸ 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 bill⁸⁹ and Congress failed to override the veto with a two-thirds supermajority.⁹⁰ It may

⁸⁵ *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.").

⁸⁶ Doran, *supra* note 53, at 1367–68; Christian R. Grose & Bruce I. Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Variation in Partisan Swing in the 2006 U.S. House Elections*, 32 LEGIS. STUD. Q. 531, 531–32 (2007).

⁸⁷ 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. Mueller, *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).

⁸⁸ 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.

⁸⁹ 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.

⁹⁰ 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.⁹¹ The President was resolute and won the political showdown and maintained the occupation,⁹² 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."⁹³ 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.⁹⁴ From the executive

<http://www.cbsnews.com/news/house-bid-to-override-bush-veto-fails/>; see *President Bush Discusses Iraq War Supplemental with Bicameral Bipartisan Leadership*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (May 2, 2007), <http://georgewbush-whitehouse.archives.gov/new/s/releases/2007/05/20070502-4.html> (Bush asserting his confidence "that we can reach agreement").

⁹¹ James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 581 (1994).

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/0,13319,135500,00.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/2007/05/22/us-iraq-usa-funding-idUSN2039858620070522>.

⁹³ Robert N. Strassfeld, *Law, Loyalty, and Treason: How Can the Law Regulate Loyalty Without Imperiling It?: "Lose in Vietnam, Bring the Boys Home,"* 82 N.C. L. REV. 1891, 1940 (2004). Nixon "temporarily evaded constraints on expanding the Vietnam War" by using patriotism. Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291, 340 (2006) ("President Nixon used arguments about the need to protect the troops from enemy sanctuaries in Cambodia . . .").

⁹⁴ John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 898–900 (1990).

branch perspective, the assumption was that Americans were mandated to support the war or be viewed as unpatriotic.⁹⁵ 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.”⁹⁶ 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.”⁹⁷

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,⁹⁸ 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.⁹⁹

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

⁹⁵ Mark Rupert, “*Support the Troops*”: *Populist Militarism and the Cultural Reproduction of Imperial Power* 1 (Syracuse Univ. Maxwell Sch. of Citizenship & Pub. Affairs, Working Paper), available at <http://faculty.maxwell.syr.edu/merupert/Populist%20Militarism.pdf> (“[S]upporters of American global military supremacy have invested substantial cultural energy in the re-narration of America’s Vietnam War as a noble cause, nearly won, except for betrayal by disloyal, un-American elements within U.S. society [by] articulating U.S. militarism with the values and identity of the American people, . . . stigmatiz[ing] dissenters, and authoriz[ing] their marginalization or repression as ‘enemies of the people.’”).

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.”).

⁹⁷ *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973).

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.” *Id.*

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.”¹⁰⁰ 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.”¹⁰¹ In March 2008, at a time when over four thousand American soldiers had been killed and tens of thousands injured,¹⁰² Vice President Cheney stated that President Bush bears “the biggest burden” of the war.¹⁰³

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.”¹⁰⁴ 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.¹⁰⁵ Chomsky

¹⁰⁰ Richard Cowan & Susan Cornwell, *US Congress Wrestles with Deadlines to End Iraq War*, REUTERS, Mar. 15, 2007, available at <http://www.reuters.com/article/2007/03/15/idUSN15201098>; see also Mueller, *supra* note 84, at 54–55 (noting that candidates sometimes had to tread carefully to avoid opposition invoking “patriotism” and “support the troops” arguments); Andy Barr, *Cleland Ad Causes Trouble for Chambliss*, POLITICO (Nov. 12, 2008), <http://www.politico.com/news/stories/1108/15561.html> (noting that a Republican painted Senator Max Cleland as a friend of Osama Bin Laden for not supporting Bush’s Department of Homeland Security bill).

¹⁰¹ *President’s Remarks in Greeley, Colorado*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Oct. 25, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/10/20041025-4.html>; see also Michael Slackman, *Schumer Casts Wide Net Beyond His Democratic Base*, N.Y. TIMES, Oct. 19, 2004, at B3 (noting that there was an inner-party rivalry during the 2004 presidential campaign when Senator Chuck Schumer accused Senators Kerry and Edwards of leaving “our soldiers high and dry” after they voted against continual funding).

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

¹⁰³ *Interview of the Vice President by Martha Raddatz, ABC News*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Mar. 24, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080324-8.html>. Many viewed Cheney’s statement with much scorn. Dan Fromkin, *Cheney’s Unforgivable Egotism*, WASH. POST (Mar. 25, 2008), <http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/25/BL2008032501430.html>.

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. Raymond Hernandez & Patrick D. Healy, *The Evolution of Hillary Clinton*, N.Y. TIMES, July 13, 2005, at B4; Slackman, *supra* note 101, at B3; *Senate Won’t Vote on Objection to Troop Buildup*, CNN (Feb. 18, 2007), http://articles.cnn.com/2007-02-17/politics/iraq.senate_1_gop-senators-senate-democrats-vote?_s=PM:POLITICS.

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.

¹⁰⁷ Zogby, *U.S. Troops in Iraq: 72% Say End War in 2006*, INFORMATION CLEARING HOUSE (Feb. 28, 2006), <http://www.informationclearinghouse.info/article12103.htm>.

¹⁰⁸ PETER LANCE, COVER UP: WHAT THE GOVERNMENT IS STILL HIDING ABOUT THE WAR ON TERROR 252 (2004). Democratic House of Representatives member John Murtha sponsored a bill to bring U.S. soldiers home, opining that the war was a "flawed policy wrapped in illusion." Peter Jackson, *Pa. Dem Murtha Remembered as Military Advocate*, SEATTLE TIMES (Feb. 8, 2010), http://seattletimes.nwsourc.com/html/politics/2011015805_apusobitmurtha.html. Senator Kennedy remarked that Bush and Cheney "beg[an] a new campaign of distortion and manipulation" The two men could not find weapons of mass destruction . . . and 'they can't find the truth, either.'" Charles Babington, *Hawkish Democrat Joins Call for Pullout*, WASH. POST, Nov. 18, 2005, at A1.

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”¹¹⁰

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.”¹¹¹ 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.”¹¹² 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.¹¹³ 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.¹¹⁴

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,¹¹⁵ commentators

¹¹⁰ *Id.* (internal quotation marks omitted).

¹¹¹ Daniel R. Williams, *Averting a Legitimation Crisis and the Paradox of the War on Terror*, 17 MICH. ST. J. INT’L L. 493, 538 (2009). Perhaps former UN weapons inspector Scott Ritter’s comment is apropos to McCain’s statement: “I can teach a monkey to wave a flag. . . . I can’t train a monkey to read the Constitution or live the Constitution.” Pepi Leistyna & Bob McCannon, *Study Guide: Hijacking Catastrophe: 9/11, Fear & the Selling of American Empire*, MEDIA EDUC. FOUND., 30, http://www.mediaed.org/assets/products/126/studyguide_126.pdf (last visited Oct. 6, 2014).

¹¹² Elisabeth Bumiller, *Hagel Has Rough Outing Before Ex-Colleagues*, N.Y. TIMES, Feb. 1, 2013, at A1.

¹¹³ *Id.*

¹¹⁴ *CBS Evening News: A Decade After Saddam Hussein’s Statue Falls: A Tale of Two Memories* (CBS television broadcast Apr. 9, 2013); *Poll: 58 Percent Want U.S. Troops Out of Iraq by 2008*, CNN (Mar. 13, 2007), <http://www.cnn.com/2007/US/03/13/iraq.poll/>.

¹¹⁵ Richard Falk, *Responsible Scholarship in “Dark Times,”* 7 UCLA J. ISLAMIC & NEAR E. L. 1, 1–2 (2008) (“Many scholars seem intimidated about any overt engagement in

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,¹¹⁶ Virginia Tech Professor Steven Salaita experienced a firestorm after he expressed that he had grown fatigued of the “ubiquitous ‘support the troops’ meme.”¹¹⁷ 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.¹¹⁸ 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,¹¹⁹ 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;¹²⁰ 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.”)

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-idUSBRE98315S20130906> (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.edn.turner.com/cnn/2013/images/09/09/6a.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).

¹¹⁷ *Va. Tech Professor’s Military Op-Ed Sparks Outcry*, RICHMOND TIMES DISPATCH (Sept. 1, 2013), http://www.timesdispatch.com/news/state-regional/va-tech-professor-s-military-op-ed-sparks-outcry/article_06bb8a26-1197-11e3-b962-0019bb30f31a.html.

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.J. Res. 114, 107th Cong. § 3 (2002); Murphy, *supra* note 72.

against American taxpayers.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.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.”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.”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,¹²⁵ appeared on *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:

[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.¹²⁶

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:¹²⁷

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

¹²¹ *CBS Evening News*, *supra* note 12.

¹²² *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).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Sean Penn Questions U.S. Policy, Visits Iraq*, ABC NEWS, <http://abcnews.go.com/Travel/story?id=118513&page=1> (last visited Oct. 6, 2014).

¹²⁶ *Real Time with Bill Maher* (HBO television broadcast May 4, 2007).

¹²⁷ Frank Morris, *Injured Veteran Keeps Up His Fight, Deciding to Live*, NPR (Dec. 28, 2013), <http://www.npr.org/2013/12/28/257890253/injured-veteran-keeps-up-his-fight-deciding-to-live> (noting that Young no longer wanted to see himself further deteriorate).

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 Americans¹²⁸

Mike Luckovich won a Pulitzer Prize for writing the names of American troops who died into the word “Why?”¹²⁹ 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.”¹³⁰ 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.”¹³¹ 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.¹³² Harper-Brown’s suggestion unfortunately has the impact, even if unintended, of paralleling that of the Bush

¹²⁸ Tomas Young, *The Last Letter: A Message to George W. Bush and Dick Cheney from a Dying Veteran*, TRUTHDIG (Mar. 18, 2013), https://www.truthdig.com/dig/item/the_last_letter_20130318/.

¹²⁹ Clay Calvert, *Support Our [Dead] Troops: Sacrificing Political Expression Rights for Familial Control Over Names and Likenesses*, 16 WM. & MARY BILL RTS. J. 1169, 1186 (2008).

¹³⁰ Colin Sullivan, *The Shirt Heard “Round the World,”* 42 MCGEORGE L. REV. 509, 509 (2011); Calvert, *supra* note 129, at 1169.

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).

¹³⁵ *Frazier v. Boomsma*, CV 07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007), *perm. injunction granted*, 2008 U.S. Dist. LEXIS 63896 (D. Ariz. Aug. 19, 2008).

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

¹³⁹ *Introduction to Part V: The Resisters: "Conscience, Not Cowardice" in IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND* 209, 211 (Jeremy Brecher et al. eds., 2005); David Goodman, *Breaking Ranks*, in *IN THE NAME OF DEMOCRACY*, *supra*, at 213, 215; Elvia R. Arriola, *Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights*, 24 ST. LOUIS U. PUB. L. REV. 149, 149 (2005) ("Protests abound for varied reasons. Older citizens recall the horrors of a nation in an unjust war in Vietnam. A younger generation is divided by ideology as well as by class because it is those who cannot afford training or higher education on their own who will most likely end up as combat soldiers and risk injury or death."); Levinson, *supra* note 81, at 1 ("[Seventy-two percent] of US troops favor withdrawal within the next year."); *see also* Goodman, *supra*, at 213–14 (noting that enlistee Mike Hoffman was told by his superiors that the war was about oil, believed that the reasons for the war were wrong, and that he left the military and founded the group Veterans Against the War). As a mode of countering dissent, "independent" military analysts were hired by the Secretary of Defense to support the Iraq war in the media while being told to act detached from the Pentagon. Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967, 978, 986–87 (2012) [hereinafter Bejesky, *Public Diplomacy*].

¹⁴⁰ SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 125 (1994).

¹⁴¹ Robin Barnes, *Drafting the Priests of Our Democracy to Serve the Diplomatic, Informational, Military & Economic Dimensions of Power*, 27 BUFF. PUB. INT. L.J. 131, 160 (2009). Whether certain individuals and entities had an interest to push for war because it would lead to profits is a serious question, but the fact that many private military firms have publicly traded stocks assures that war leads to pecuniary benefits. *See* Robert Bejesky, *Mercenaries, Myrmidons, and Missionaries*, 37 U. ARK. LITTLE ROCK L. REV. (forthcoming 2014) (manuscript at 22–23) (on file with author).

¹⁴² Paige J. Ormiston, *Book Review: The Limits of Power: The End of American Exceptionalism*, 2009 ARMY LAW 57, 57–58 (2009).

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

¹⁴³ Kathryn Abrams, *Women and Antiwar Protest: Rearticulating Gender and Citizenship*, 87 B.U. L. REV. 849, 858 (2007) (noting that Sheehan invigorated the antiwar movement and gained national prominence when she and hundreds of other soldiers’ families and protestors camped out across from Bush’s ranch in Crawford, Texas, for a month in 2004 and demanded that Bush meet with her and explain the “noble cause” for which her son lost his life); Kimberly Albrecht-Taylor, Note, *Giving Dissenters Back Their Rights: How the White House Presidential Advance Manual Changes the First Amendment and Standing Debates*, 17 WM. & MARY BILL RTS. J. 539, 545 (2008).

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. 343, 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?” David J. Sirota, *The Fox of War*, SALON (Mar. 30, 2004) (internal quotation marks omitted), http://www.salon.com/2004/03/31.fox_news_7/.

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.”¹⁴⁷ 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.¹⁴⁸ 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.”¹⁴⁹ Military troops dispatched into war and combat by

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).

¹⁴⁹ 28 U.S.C. § 2680(j)–(k) (2013); *Freeland v. Williams*, 131 U.S. 405, 417 (1889) (“[Immunity applies to] any act done in the prosecution of a public war.”); *Feres v. United States*, 340 U.S. 135, 146 (1950); *Brooks v. United States*, 337 U.S. 49, 51–54 (1949); (liability

political branch decisions also have no right to bring civil actions for damages against the government for violations of their constitutional rights.¹⁵⁰ Likewise, for noncombat injuries, the *Feres-Stencel* doctrine represents that U.S. military service personnel cannot hold the government responsible for activities “incident to service,”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.¹⁵² Federal courts adopted similar reasoning to preclude service member claims against government contractors for negligence¹⁵³ and for government contractor indemnity actions against the U.S. government.¹⁵⁴ In denying claims, courts often emphasize that imposing liability on the government could set precedent that would undermine military discipline¹⁵⁵ 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.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.

¹⁵⁰ John L. Watts, *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 OKLA. 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.

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.

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).

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).

¹⁵⁴ *Stencel 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. *Id.* at 667. He sued the manufacturer, which cross-claimed against the military. *Id.* at 668.

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).

¹⁵⁶ *Stencel 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.¹⁵⁷

With over sixty-thousand American troops seriously wounded in Iraq and Afghanistan,¹⁵⁸ VA facilities were stretched to the limit¹⁵⁹ and stymied from providing legally required services.¹⁶⁰ Protracted hospital stays with individuals with severed arms and legs and permanent injuries pushed facilities beyond capacity.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.¹⁶² Congressional hearings revealed that Pentagon officials were returning medically unfit and wounded soldiers to Iraq.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

military operations); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 11 (2003) (stating that because of the "federal character of military service and the need for uniformity in the system of compensation," which is provided through the veterans system, there is no independent cause of action against the government for injuries suffered for injuries to U.S. military soldiers); Watts, *supra* note 150, at 696 (explaining the availability of compensation through military and veteran benefits).

¹⁵⁷ *Death Gratuity*, MILITARY.COM, <http://www.military.com/benefits/survivor-benefits/death-gratuity.html> (last visited Oct. 6, 2014).

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).

¹⁵⁹ Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for US Veterans of the Iraq and Afghanistan Wars*, 11 DEPAUL J. HEALTH CARE L. 327, 327–28 (2008) (noting that over 28,000 U.S. military service personnel injured in Afghanistan and Iraq).

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).

¹⁶¹ Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, at A1. One reason for the increase in wounded and disabled soldiers, relative to past conflict, is that medical advances have saved more lives. Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long Term Costs of Providing Veterans Medical Care and Disability Benefits* 2 (Harvard Univ. John F. Kennedy Sch. of Gov't., Working Paper No. RWP07-001, 2007), *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstractid=939657>.

¹⁶² Josh White, *Walter Reed Hearing to Put Spotlight on Kiley's Leadership*, WASH. POST, March 5, 2007, at A9.

¹⁶³ 153 CONG. REC. 6184 (2007) (statement of Sen. Murray); *see also* Akram Y. Razzouk, M.D. & Kelly L. Razzouk, *Charting a New Course Home for U.S. Soldiers Returning from Iraq: PTSD and Mild Traumatic Brain Injury—Applications and Solutions*, 11 DEPAUL J. HEALTH CARE L. 345, 352 (2008) (discussing the redeployment of medically unfit service members).

been cut when fiscal challenges arise.¹⁶⁴ 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*.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ The claimant process is required to be nonadversarial, with doubts resolved in the veteran's favor,¹⁶⁸ but only a fraction of those requesting disability payments realize benefits.¹⁶⁹ In recent years, the Veterans Board accepted 24% of the claims, remanded 37%, and denied 36%.¹⁷⁰ Decisions take an average of 183 days and those who pursue claims through appeals and to a final decision could wait for five years.¹⁷¹ Among the hurdles that service members must navigate are that veterans'

¹⁶⁴ Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1203 (2011) ("As of September 30 2010, 3.2 million veterans received disability compensation."); Milaninia, *supra* note 159, at 327.

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).

¹⁶⁶ Marilynn Marchione, *U.S. Vets' Disability Filings Reach Historic Rate*, USA TODAY (May 28, 2012), <http://usatoday30.usatoday.com/news/health/story/2012-05-28/veteran-disability/55250092/1>.

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

¹⁶⁸ Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155, 155 (2009).

¹⁶⁹ J.C. Van Lierop III, Note, *Post-9/11 Army Disability Decisions: Reinforcing Administrative Law Principles in Fitness and Disability Rating Determinations*, 61 FLA. L. REV. 639, 641 (2009) (stating that 3.6% to 10.5% of those referred were awarded benefits between 2001 and 2005).

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,¹⁷² the military disability compensation system can be complicated¹⁷³ and beget inconsistent and inequitable results,¹⁷⁴ and there have historically been significant limitations to attaining legal assistance.¹⁷⁵

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.¹⁷⁶ Names historically employed that are equivalent to today's medical classification of PTSD have included "operational fatigue," "combat exhaustion," and "traumatic war neurosis."¹⁷⁷ PTSD is caused by being constantly endangered¹⁷⁸ and experiencing a traumatic event related to military combat, which materializes

¹⁷² Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1115 (2010).

¹⁷³ Linda Robinson, *Insult to Injury*, U.S. NEWS & WORLD REP., Apr. 16, 2007, at 45, 46.

¹⁷⁴ Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 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. *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. *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).

¹⁷⁵ Gugliuzza, *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. *Id.* See generally Reed, *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).

¹⁷⁶ Brett T. Litz & William E. Schlenger, *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).

¹⁷⁷ Jeffrey S. Yarvis, *Posttraumatic Stress Disorder (PTSD) in Veterans*, in HANDBOOK OF MILITARY SOCIAL WORK 81, 86 (Allen Rubin et al. eds., 2013); see also Matthew J. Friedman et al., *Post-Traumatic Stress Disorder in the Military Veteran*, 17 PSYCHIATRIC CLINICS OF N. AM. 265, 265 (1994).

¹⁷⁸ See Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 99–100, 105 (2010) (stating that stress is elevated by an inability to distinguish between friend and foe).

into an intense emotional and reoccurring fear, nightmares, flashbacks, or mental symptoms that impair normal life functions.¹⁷⁹ Records document that soldiers experienced PTSD symptoms during the American Civil War,¹⁸⁰ World War I,¹⁸¹ and the Vietnam and Korean wars,¹⁸² 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.¹⁸³

Military leaders historically treated troops with combat-related psychiatric symptoms as cowardly instead of with dignity as an injured person,¹⁸⁴ but there was an improved understanding of the illness, implementation of preventive measures, and administration of additional assistance after the Vietnam War.¹⁸⁵ The common experiences among Vietnam War veterans¹⁸⁶ led the American Psychiatric Association to recognize PTSD as a mental disorder in 1980,¹⁸⁷ and it has become the most prevalent category of veteran

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.”).

¹⁸⁰ Christopher Weiser, Note, *Guaranteeing Health Benefits for America’s Wounded Soldier: Closing the Pre-Existing Personality Disorder Loophole*, 20 FED. CIR. B.J. 101, 106–07 (2010) (noting that troops experienced fatigue, heart palpitations, chest pains, and dizziness); see also Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora’s Box?*, 17 NEW ENG. L. REV. 91, 92–93 (1981) (describing symptoms resembling PTSD during the American Revolutionary War).

¹⁸¹ David Ackerly, *Special Considerations When Representing Military Veteran Clients*, 43 CLEARINGHOUSE REV. 249, 254 (2009) (stating that troops were shell-shocked during WWI); C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 314–17 (1983) (stating that soldiers had symptoms of PTSD during WWI, WWII, Korea, and Vietnam).

¹⁸² Alison Atwater, Comment, *When Is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243, 243, 249 (2009).

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).

¹⁸⁴ Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 6 (2010).

¹⁸⁵ *Id.* at 7.

¹⁸⁶ Reed, *supra* note 174, at 68–69.

¹⁸⁷ NAT’L INST. OF HEALTH, FACT SHEET: POST-TRAUMATIC STRESS DISORDER (PTSD) 1 (2010), available at [http://report.nih.gov/NIHfactsheets/Pdfs/PostTraumaticStressDisorder\(NI](http://report.nih.gov/NIHfactsheets/Pdfs/PostTraumaticStressDisorder(NI)

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 PTSD¹⁸⁹ 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 health¹⁹¹ and the Pentagon spent \$120 million in preventive psychology programs to assist

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¹⁸⁸ Kenneth C. Goldberg, *The Epidemiology of Health Problems in Returning Operation Iraqi Freedom and Operation Enduring Freedom Veterans*, 69 N.C. MED. J. 31, 31–32 (2008). See generally Editorial, *Frustratingly Slow: Wounded Veterans are Still Getting the Run Around From Their Government*, WASH. POST, Oct. 21, 2007, at B6 (explaining the widespread difficulties faced by disabled veterans seeking to receive aid from the government). Just three years into the Iraq war, 223,000 veterans of American wars had already received between \$115 to \$2500 per month in benefits for PTSD. Gugliuzza, *supra* note 164, at 1232 (stating that PTSD has become the subject of a “major regulatory development in veterans law”); see Pratt, *supra* note 5, at 43 (stating that PTSD places tremendous costs on soldiers and society); Scott Simonson, Note, *Back from War—A Battle for Benefits: Reforming VA’s Disability Ratings System for Veterans with Post-Traumatic Stress Disorder*, 50 ARIZ. L. REV. 1177, 1178 (2008) (stating that the number of recipients with PTSD grew by 125% from 1999 to 2006).

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, 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 Bennouna, *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 Association 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).

¹⁹⁰ 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 recovery¹⁹² because PTSD can debilitate healthy emotional behavior for years after a war¹⁹³ and require lifelong treatment.¹⁹⁴

Veterans have reportedly had difficulty attaining disability compensation for PTSD¹⁹⁵ because of the apprehension that PTSD symptoms can be exaggerated or falsified.¹⁹⁶ The process mandates the claimant-veteran to sustain the burden of proving the existence of a combat-related stressor event during military service¹⁹⁷ and an emotional behavioral change after the event.¹⁹⁸ For some veterans, evidentiary problems have arisen over whether they were involved in the stressor event of combat.¹⁹⁹ However, if the veteran is

¹⁹² See Belleruth Naparstek, *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.

¹⁹³ Daniel J. DeNoon, *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).

¹⁹⁴ Adam Caine, Comment, *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).

¹⁹⁵ Schingle, *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”).

¹⁹⁶ WILLIAM J. KOCH ET AL., *PSYCHOLOGICAL INJURIES: FORENSIC ASSESSMENT, TREATMENT, AND LAW* 80 (2006) (“Researchers have demonstrated convincingly that naïve healthy subjects can easily and accurately falsify symptoms of PTSD, sufficient to meet diagnostic criteria, when given a symptoms checklist.”); Chapman, *supra* note 184, at 10–11 (“[Some] 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., *Compensation and PTSD: Consequences for Symptoms and Treatment*, PTSD RES. Q. 1, 1 (2007))).

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, *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, *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).

¹⁹⁸ Erin M. Gover, Comment, *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, *supra* note 180, at 103–06. The onset of the illness may occur six months to a year after the stressor event. Chapman, *supra* note 184, at 12.

¹⁹⁹ Peyton Cooke, *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, *supra* note 182, at 244; Madeline McGrane, Note, *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, *supra*

successful in proving a PTSD disability that diminishes the capacity to engage in gainful employment or social functions,²⁰⁰ the degree of disability payment is determined by the extent of impairment²⁰¹ and compensation is set at 10%, 30%, 50%, 70%, or 100% of full disability.²⁰²

Updates of the swelling epidemic aggregated concomitant with the burgeoning efforts of Americans and Congress to withdrawal troops from Iraq.²⁰³ Over the first six years of the Iraq War, the Military Health System determined that there were 39,365 cases of PTSD,²⁰⁴ but others opined that the illness was so common²⁰⁵ that between 100,000 and 500,000 troops should have been receiving compensation.²⁰⁶ 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.

²⁰⁰ See 38 U.S.C. § 1155 (2013); 38 C.F.R. § 4.126(a)–(b).

²⁰¹ 38 C.F.R. § 4.126(b); *Amberman v. Shinseki*, 570 F.3d 1377, 1380–81 (Fed. Cir. 2009).

²⁰² 38 C.F.R. § 4.130; 38 U.S.C. § 1155; Van Lierop, *supra* note 169, at 648.

²⁰³ See *supra* Part II.B.

²⁰⁴ McGrane, *supra* note 199, at 186.

²⁰⁵ One soldier remarked: "Post-traumatic stress disorder? It's not a disorder. It's a natural reaction of culture shock, of being in a combat zone, and the realities and expectations of fighting, and being expected to kill people." MATTHEW GUTMANN & CATHERINE LUTZ, *BREAKING RANKS: IRAQ VETERANS SPEAK OUT AGAINST THE WAR* 152 (2010) (internal quotation marks omitted). A former Vietnam veteran remarked: "The more tours you do, the more amplified your behaviors are going to become." Melody Finmore, *Firestorm on the Horizon*, 70 OR. ST. B. BULL. 19, 23 (2010) (internal quotation marks omitted). Scientific studies have proven that U.S. troops experiencing more combat and stress in war zones are significantly more likely to exhibit symptoms of PTSD. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 N. ENG. J. MED. 13, 16–17 (2004) (reporting on a study of U.S. troops who were deployed to Iraq that found that when comparing troops who experienced the most combat to those who did not face much combat and the ratio of PTSD was two-to-one); Amanda Ruggeri, *New Courts Give Troubled Veterans a Second Chance*, U.S. NEWS & WORLD REP., Apr. 3, 2009, 2009 WLNR 8532935 (noting that 25% of those soldiers deployed two or more times to combat zones developed PTSD compared to 12% of those who were deployed to one combat zone).

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.²⁰⁷ Of the estimated number of veterans who returned from war with a mental health problem, only about 40% sought medical care,²⁰⁸ which may signify that the lengthy process of asserting claims and appealing adverse decisions can deter veterans²⁰⁹ 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.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.²¹¹ Approximately 75% of veterans with PTSD have also had substance abuse problems²¹² and a higher percentage of

²⁰⁷ Contessa M. Wilson, Note: *Saving Money, Not Lives: Why the VA's Claims Adjudication System Denies Due Process to Veterans with Post-Traumatic Stress Disorder and How the VA Can Avoid Judicial Intervention*, 7 IND. HEALTH L. REV. 157, 158 (2010) (“[There is] a variety of statutory and regulatory impediments to a veteran’s ability to collect PTSD compensation, [including] the inability to obtain discovery, the absence of subpoena power for documents and witnesses, and the inability to hire a lawyer to help out at the regional office level.”); *Veterans for Common Sense v. Peake*, 563 F. Supp.2d 1049, 1055–56 (N.D. Cal. 2008).

²⁰⁸ Hoge et al., *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., *supra* note 189, at 1031.

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, *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.

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, *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).

²¹¹ Logsdon & Keogh, *supra* note 206, at 16, 18; Hafemeister & Stockey, *supra* note 178, at 94, 97; Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 942 (2008).

²¹² Benjamin R. Karney et al., *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 INVISIBLE WOUNDS OF WAR,

suicides are found among PTSD sufferers.²¹³ Several thousand veterans attempt suicide each year²¹⁴ 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.²¹⁵ PTSD can be an insanity defense in criminal proceedings and a mitigating circumstance in sentencing proceedings.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.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.”²¹⁸ The statistics are stunning because only one-half of 1% of the American population served in the military over the last decade.²¹⁹ If a high percentage of veterans committed crimes and they would not have

supra note 189, at 134.

²¹³ McGrane, *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).

²¹⁴ Veterans for Common Sense v. Peake, 563 F. Supp.2d 1049, 1063 (N.D. Cal. 2008); Logsdon & Keogh, *supra* note 206, at 18 (“[T]he Army reported that in January 2009, 24 soldiers committed suicide in that one month alone.”).

²¹⁵ Karney et al., *supra* note 212, at 128–29.

²¹⁶ Porter v. McCollum, 558 U.S. 30, 42–44 (2009) (considering exculpatory evidence of war trauma in a capital offense case); Caine, *supra* note 194, at 221–23; Finnemore, *supra* note 205, at 19–20 (noting that jurors found soldier 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, *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., *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).

²¹⁷ Hafemeister & Stockey, *supra* note 178, at 102.

²¹⁸ *Id.* at 101–02; McGrane, *supra* note 199, at 190 (noting that the *New York Times* reported that 121 returning veterans from recent wars committed murder and the overwhelming majority had no criminal history).

²¹⁹ Donna Miles, *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, *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

²²⁰ *Answers to Parent's Questions About the Military*, MILITARY.COM, <http://www.military.com/join-armed-forces/military-parents-questions.html> (last visited Oct. 6, 2014).

²²¹ See Jennifer Grasz, *Nearly Two-Third of Employers Would Hire Military Veterans Over Other Equally Qualified Candidates*, *CareerBuilder Study Finds*, CAREERBUILDER (Nov. 9, 2012), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=11/8/2012&id=pr724&ed=12/31/2012>.

²²² Military Benefit Association, *Study Shows Vets Struggle to Translate Experience*, MILITARY.COM (Nov. 21, 2013), <http://www.military.com/veteran-jobs/career-advice/2013/11/21/study-shows-vets-struggle-to-translate-experience.html?comp=1198882867951&rank=1>.

²²³ U.S. DEP'T OF LABOR, *THE VETERAN LABOR FORCE IN THE RECOVERY 1* (2011), available at http://www.dol.gov/_sec/media/reports/VeteransLaborForce/VeteransLaborForce.pdf. Sixty-nine percent of surveyed veterans found “finding a job” was the “greatest challenge in transitioning to civilian life.” Press Release, Iraq and Afghanistan Veterans of America, *New Survey: Veterans Cite Finding a Job Greatest Challenge When Returning to Civilian Life* (Aug. 15, 2012), <http://iava.org/press-room/press-releases/new-survey-veterans-cite-finding-job-greatest-challenge-when-returning-civ>.

²²⁴ See Andrew Tilghman, *Report Urges More Combat Pay for Junior Troops*, MILITARYTIMES.COM (June 21, 2012), <http://www.militarytimes.com/article/20120621/BENEFITS/206210306/Report-urges-more-combat-pay-junior-troops>.

²²⁵ Brian O'Keefe, *Battle-Tested: How a Decade of War Has Created a New Generation of Elite Business Leaders*, FORTUNE, Mar. 22, 2010, at 108–09. The “undergraduate cadets at U.S. military service academies [are] college students, warriors, and leaders in training . . .” Wm. C. Peters, *On Laus, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 411 (2006). Not all may agree that war produces business leaders; graduates of the military academies would be well-qualified for business positions irrespective of war.

American taxpayers an average of \$400,000 per graduate.²²⁶ 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 separated²²⁷ and can be used to manufacture artillery shells with increased firing range and explosive power and to fortify armor in tanks.²²⁸ 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,²²⁹ which might even be viewed as small nuclear weapons.²³⁰ 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.²³¹ The Pentagon has never confronted an enemy that has used DU and largely denies that

²²⁶ Bruce Fleming, *The Few, the Proud, the Infantilized*, CHRON. REV., Oct. 12, 2012, at B11.

²²⁷ Symposium, *The International Responses to the Environmental Impacts of War*, 17 GEO. INT'L ENVTL. L. REV. 616, 630 (2005).

²²⁸ Lesley Wexler, *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 U.C. DAVIS L. REV. 459, 468 (2006).

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).

²³¹ Craig Considine, *U.S. Depleted Uranium as Malicious as Syrian Chemical Weapons*, HUFFINGTON POST (Aug. 29, 2013), http://www.huffingtonpost.com/craig-considine/us-depleted-uranium-as-ma_b_3812888.html.

there are health risks to troops.²³²

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,²³³ which was after the 1991 Gulf War and the first large-scale use of DU on the battlefield.²³⁴ Those who emphasize ill-health effects from DU maintain that there is no safe limit of DU exposure.²³⁵ DU poses toxic and radioactive environmental and human health risks when particles absorb into the groundwater and earth,²³⁶ are airborne and can be inhaled,²³⁷ and circulate and endanger troops in tanks.²³⁸ Studies maintain that radiation-exposed civilians and American

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.

²³⁴ U.S. ENVTL. PROTECTION AGENCY, EPA 402-F-07-047, DEPLETED URANIUM PROJECTILES (2008).

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 ZIERDT-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 86 (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.²³⁹ Health symptoms suffered by troops following the 1991 Persian Gulf War have been called “Gulf War Syndrome,”²⁴⁰ and have included lupus-like symptoms,²⁴¹ chronic fatigue, fibromyalgia, eczema, dyspepsia, joint pain, respiratory symptoms, and headaches.²⁴²

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.²⁴³ There was an apparent commonality of illnesses, but troops did not require proof of exposure to DU to be treated.²⁴⁴ If DU-laced, high-technology weapons are more devastating, they may have been a foremost reason the 1991 Gulf War ended so quickly²⁴⁵ and could be a leading

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.

²⁴² THE ROYAL SOC’Y, *THE HEALTH HAZARDS OF DEPLETED URANIUM MUNITIONS: PART I*, at 5, (2001), available at http://royalsociety.org/uploadedFiles/Royal_Society_Content/policy/publications/2001/10023.pdf (assessing likely health risks based on three levels that relate to duration and intensity of exposure); Milaninia, *supra* note 159, at 340–41.

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 SOC’Y, *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.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ 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.”²⁴⁹ As many as 130,000 U.S. troops may suffer from Gulf War Syndrome symptoms.²⁵⁰ 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.²⁵¹ One can assuredly maintain that exposure to other contaminants during the Gulf War caused the illnesses,²⁵² but other data suggest that this contention requires further evidence.²⁵³

Veterans from Afghanistan and the 2003 Iraq War were diagnosed with symptoms similar to Gulf War Syndrome.²⁵⁴ Studies revealed that there was an extremely high incidence of childhood cancers and deformities where the United States dropped

²⁴⁶ U.S. DEPT OF VETERANS AFFAIRS, RESEARCH ADVISORY COMMITTEE ON GULF WAR VETERANS' ILLNESSES, DECEMBER 12–13, 2005 COMMITTEE MEETING MINUTES 13–16 (2005), available at http://www.va.gov/RAC-GWVI/docs/Minutes_and_Agendas/Minutes_Dec2005_Text.pdf (opening topic of DU hazards from weapon use in armed combat up for debate).

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).

²⁵³ See U.S. DEPT OF VETERANS AFFAIRS, *supra* note 246, at 11–13.

²⁵⁴ Milaninia, *supra* note 159, at 337.

bombs in Iraq, which was not necessarily where targets with lethal substances were supposedly held.²⁵⁵ Yugoslavia did not have stores of biological or chemical weapons or the same regional characteristics as Iraq,²⁵⁶ but DU weapons were dropped and fired in the former Yugoslavia²⁵⁷ and scientists called ill-health effects Balkan Syndrome.²⁵⁸ The Pentagon dismissed Dr. Rokke after he criticized NATO for not adequately protecting troops from DU during the 1999 bombing in Kosovo.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.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 use²⁶¹ 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.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.²⁶³ U.S. environmental laws prohibit the use

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.”).

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).

²⁵⁷ Wexler, *supra* note 228, at 469; Alexander, *supra* note 256, at 471–72.

²⁵⁸ Matthew D. Sztajnkrzyer & Edward J. Otten, *Chemical and Radiological Toxicology of Depleted Uranium*, 169 MIL. MED. 212, 212 (2004).

²⁵⁹ JOHNSON, *supra* note 145, at 100.

²⁶⁰ Wexler, *supra* note 228, at 493 (citing European Parliament Resolution on the Consequences of Using Depleted Uranium Munitions, 2001 O.J. (C 262) 167, 167–68; European Parliament Resolution on the Harmful Effects of Unexploded Ordnance (Landmines and Cluster Submunitions) and Depleted Uranium Ammunition, 2003 O.J. (C 43) 361, 362).

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

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).

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 viability²⁶⁷ can pose hurdles to a troop's legal claims for harm to their health.

Down, US Military Cleans Up Hazardous Waste, THE CHRISTIAN SCIENCE MONITOR, July 22, 2010, at 11 (noting that investigations accused the U.S. military of dumping millions of pounds of hazardous waste, but the military was reportedly cleaning it up). The so-called "clean up" seems to be quite a myth. Sean Dobbin, *Military Burn Pit Claims in Limbo*, USA TODAY (Oct. 20, 2013), <http://www.usatoday.com/story/news/nation/2013/10/20/troops-civilians-in-limbo-over-military-burn-pits/3087659/> ("Thousands of returning veterans and civilians are now attributing myriad symptoms—respiratory problems, neurological disorders, cancers and ALS [Lou Gehrig's disease]—to exposure to the burn pits . . .").

²⁶⁴ Kurera, *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] without 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.

²⁶⁵ *Id.* at 299–300.

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, *KBR Seeks Combat Immunity in Soldier Toxic-Exposure Suit*, 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, *As Iraq, Afghan Wars End, Private Security Firms Adapt*, REUTERS, Oct. 21, 2012, *available at* <http://www.reuters.com/article/2012/10/21/us-usa-arms-contractors-idUSBRE89K02B20121021> (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.²⁶⁸ 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,²⁶⁹ and co-sponsored marketing²⁷⁰ have been essential to maintaining military force supply because recruitment standards have been dropping.²⁷¹ The military employs patriotism to urge

²⁶⁸ Kurera, *supra* note 263, at 301.

²⁶⁹ The military uses high-tech strategies and marketing to appeal to future soldiers. Lila A. Hollman, Note, *Pritikin Prize: Children's Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT'L L. & POL'Y 217, 244 (2007). It has been said: "For military personnel, precepts such as 'duty, honor, and country,' and values such as 'courage, selfless service, and integrity' are more than mere aphorisms – they constitute a way of life." Richard D. Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. & PUB. POL'Y 113, 121, 127–28 (2007). Marketing slogans are popular: "The Marines, The Few. The Proud" and "There's Strong, and then There's Army Strong." McGrane, *supra* note 199, at 191. Another slogan is "America's Navy: A Global Force for Good." AMERICA'S NAVY, BECOMING A NAVY SAILOR, *passim* (2014), available at <http://www.navy.com/dms/navy/downloads/pdf/enlisted/enlisted-brochure.pdf>.

²⁷⁰ Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 387–88 (2005). The joint marketing between the Ultimate Fighting Championship (UFC) and the military is clear. Katie Drummond, *The Military's UFC Feud: Union, Vets Want Sponsorship Axed [Updated]*, FORBES (July 18, 2012), <http://www.forbes.com/sites/katiedrummond/2012/07/18/ufc-marines/> (noting the military spends approximately \$2 million in U.S. taxpayers' money for sponsoring commercials during UFC fights, there is a "joint UFC-Marines website," and the UFC furnishes the Army with a platform to get its "name into the minds of millions of young Americans").

²⁷¹ LORENA OROPEZA, ¡RAZA SI! ¡GUERRA NO! CHICANO PROTEST AND PATRIOTISM DURING THE VIET NAM 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.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.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.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.²⁷⁵ Critics contended that these initiatives force support for a political position and compel speech,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 disenchanting 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.²⁸⁰ Military families and soldiers were requesting help at unprecedented levels to exit the service, with 5000 to 6000 soldiers being declared “absent without leave.”²⁸¹ 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.²⁸² 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.”²⁸³

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.²⁸⁴ 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.²⁸⁵ While international law seeks to prohibit any form of child soldiers,²⁸⁶ the U.S. military openly targets children for early inculcation²⁸⁷ and permits minors

²⁸⁰ Dave Moniz, *Military Offering More, and Bigger, Bonuses*, USA TODAY, Feb. 21, 2005, at 2A; Thomas E. Ricks, *Survey: Troop Morale a Growing Worry*, CIN. POST, Mar. 26, 2004, at A12.

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).

²⁸³ Andrew Geoghegan, *US Deserter Waits for Decision on Refugee Status*, ABC (Dec. 9, 2004), <http://www.abc.net.au/worldtoday/content/2004/s1261672.htm>.

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).

²⁸⁵ Hollman, *supra* note 269, at 218–19, 224, 241–42.

²⁸⁶ See Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, ¶ 13, U.N. Doc. CRC/C/OPAC/USA/1 (May 10, 2007). “[T]he United States generally supported an age 17 standard for participation in hostilities,” but after the January 2000 negotiations on the Protocol the U.S. implemented “all ‘feasible measures’ to ensure that persons under the age of 18 would not take ‘a direct part in hostilities.’” *Id.*

²⁸⁷ AM. CIVIL LIBERTIES UNION, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY

and their parents to sign enlistment contracts.²⁸⁸ 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.²⁸⁹ Counter-recruiters must be offered adequate access to the schools, which are limited public forums and cannot be discriminated against based on viewpoint.²⁹⁰

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.²⁹¹ There were involuntary drafts during the Civil War,

RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS 13, 15 (2008), *available at* <https://www.aclu.org/print/human-rights/soldiers-misfortune-abusive-us-military-recruitment-and-failure-protect-child-soldiers> (explaining that the Middle School Cadet Corp permits eleven to fourteen-year-old children to wear uniforms and engage in drills with wooden rifles and the Junior Reserve Officer Training Corps permits children as young as fourteen to enroll, wear military uniforms, handle rifles, and conduct military drills, and the stated goals are to “enhance[] children’s perceptions of a career in the military and enhance[] military recruitment efforts”). These are not obligations to later enlist, but there is the Delayed Entry Program in which a seventeen year old joins the military’s inactive reserves and commits to later military service. *Id.* at 21. There have been cases where students change their minds and were threatened by recruiters with jail time and dishonorable discharge. *Id.* at 22.

²⁸⁸ 10 U.S.C. § 505(a) (2013) (“[N]o person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian . . .”). AM. CIVIL LIBERTIES UNION, *supra* note 287, at 2; Hollman, *supra* note 269, at 236.

²⁸⁹ Zacarias, *supra* note 284, at 296–300; Rick Hampson, “Counter-recruiters” *Shadowing the Military*, USA TODAY, Mar. 8, 2005, at 13A (emphasizing that there was a growing number of “counter-recruiters” who “want to compete with military recruiters for the hearts and minds of young people” because of their opposition to the Iraq war); *Army Recruiters Accused of Misleading Students to Get Them to Enlist*, ABC NEWS (Nov. 3, 2006), <http://abcnews.go.com/GMA/story?id=2626032> (“An ABC News undercover investigation showed Army recruiters telling students that the war in Iraq was over, in an effort to get them to enlist.”). There were also concerns about preventing recruiters from engaging in criminal misconduct during the recruitment processes. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-846, MILITARY RECRUITING: DOD AND SERVICES NEED BETTER DATA TO ENHANCE VISIBILITY OVER RECRUITER IRREGULARITIES 4 (2006) (reporting almost seventy cases of criminal misconduct); Amy Clark, *Sexual Abuse by Military Recruiters*, CBS NEWS (Aug. 19, 2006), <http://www.cbsnews.com/news/sexual-abuse-by-military-recruiters/> (“More than 100 young women who expressed interest in joining the military in the past year were preyed upon sexually by their recruiters. . . . [An] investigation found that more than 80 military recruiters were disciplined last year for sexual misconduct with potential enlistees.”).

²⁹⁰ *Searcey v. Crim*, 815 F.2d 1389, 1391 (11th Cir. 1987) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)); *San Diego Comm. Against Registration & Draft v. Governing Bd. of Grossmont Union High School Dist.*, 790 F.2d 1471, 1476 (9th Cir. 1986); *Clergy & Laity Concerned v. Chicago Bd. of Educ.*, 586 F. Supp. 1408, 1411 (N.D. Ill. 1984).

²⁹¹ Michael Ferber, *Resisting War Crimes: Vietnam and Iraq*, in IN THE NAME OF DEMOCRACY, *supra* note 139, at 275, 278; Christian Davenport, *After 30 Years, Draft Fears Rise*, WASH. POST, June 2, 2005, at B1 (reporting that shortly after the Iraq War began,

World War I, World War II, the Korean War and the Vietnam War,²⁹² and despite that the draft for every war (except World War II) was markedly unpopular²⁹³ and the constitutionality of drafts was challenged in each war, challenges were unsuccessful.²⁹⁴ 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.²⁹⁵ 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 war²⁹⁶ and activated over 400,000 National Guard and reserves for deployment to Iraq and Afghanistan.²⁹⁷ 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.²⁹⁸ The original intention behind

citizens developed angst of a draft and that the Selective Service System's mission is to "keep[] the draft machinery ready, without sparking fear that it's coming back").

²⁹² Timothy J. Perri, *The Economics of US Civil War Conscription*, 10 AM L. & ECON. REV. 424, 425 (2008).

²⁹³ In 1863, there were the New York City Draft Riots in which the working class opposed the draft and attacked draft offices, and armed soldiers attacked the opposition. Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 WASHBURN L.J. 29, 31 n.13 (2005). There was tremendous opposition during WWI, which was met by laws to suppress speech and dissent and many of the same groups were targeted after the war during Red Scare I. See Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. 1, 12 (2012). Ten million Americans were drafted for World War II and 1.8 million were drafted for the Vietnam War. Davenport, *supra* note 291, at B1. For the Korean War, 1.7 million soldiers were drafted. THE MILITARY DRAFT HANDBOOK: A BRIEF HISTORY AND PRACTICAL ADVICE FOR THE CURIOUS AND CONCERNED 29 (James Tracy ed., 2006). The Vietnam War draft was also largely opposed in peaceful and nonpeaceful movements across the country. Bejesky, *supra*, at 25–30.

²⁹⁴ Jason Britt, Note, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*, 4 NW. J. L. & SOC. POL'Y 400, 402–09 (2009).

²⁹⁵ See, e.g., 151 CONG. REC. 13469, 13470 (2005) (statement of Rep. 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.")

²⁹⁶ 8 U.S.C. § 1439 (2013); Nina Bernstein, *Fighting for U.S., and for Citizenship*, N.Y. TIMES, Jan. 15, 2005, at B1; *Army, Navy, Offer Fast-Track US Citizenship*, RT (Apr. 23, 2011), <http://rt.com/usa/army-navy-us-citizenship-military/> (stating that rules were further loosened to grant citizenship while in boot camp).

²⁹⁷ MICHAEL WATERHOUSE & JOANNE O'BRYANT, CONGRESSIONAL RESEARCH SERVICE, RS22451, NATIONAL GUARD PERSONNEL AND DEPLOYMENTS: FACT SHEET 5 fig.3 (2008).

²⁹⁸ Dan Froomkin, *Bush's Financial Katrina*, WASHINGTON POST (Mar. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/18/BL2008031801445.html>

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 contracts³⁰³ 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.

²⁹⁹ 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).

³⁰⁰ Borger, *supra* note 75; Yardley, *supra* note 75, at A16.

³⁰¹ See Pear, *supra* note 298, at A10.

³⁰² *Id.*

³⁰³ 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 REFRADs of officers and enlisted soldiers . . . [were being] suspended.” *Doe v. Rumsfeld*, 435 F.3d 980, 984–85 (9th Cir. 2006).

³⁰⁴ Tom Squitieri, *Army Expanding ‘Stop Loss’ Order to Keep Soldiers from Leaving*, USA TODAY (Jan. 5, 2004), http://usatoday30.usatoday.com/news/nation/2004-01-05-army-troops_x.htm.

³⁰⁵ *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.”³⁰⁶

Over 58,000 soldiers had been affected by stop-loss orders during the Bush Administration,³⁰⁷ with an average of 7000 troops being required to remain beyond enlistment agreements at any given time.³⁰⁸ 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.³⁰⁹ 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.³¹⁰

Troops contended that stop-loss orders caused emotional and personal difficulties,³¹¹ and several plaintiffs sued Secretary of Defense Rumsfeld for having their enlistment contracts unilaterally extended against their will.³¹² Plaintiffs challenged the orders as a breach of contract and misrepresentation, but the courts followed precedent³¹³ and disagreed with the plaintiffs.³¹⁴ Plaintiffs also failed on constitutional challenges that maintained the statute was an arbitrarily-broad, rather than a narrowly-tailored infringement on soldier liberty interest.³¹⁵ 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.

³⁰⁷ Michelle Tan, *Stuck on Stop-Loss*, ARMY TIMES, May 5, 2008, at 8.

³⁰⁸ Davey, *supra* note 303, at A15.

³⁰⁹ *Kerry Says U.S. Now Has “Backdoor Draft,”* NBC News (June 3, 2004), <http://www.msnbc.msn.com/id/5129079/>.

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

³¹¹ Exum, *supra* note 303, at A19; Eric Schmitt, *Army Extending Service for G.I.’s Due in War Zones*, N.Y. TIMES, June 3, 2004, at A1.

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).

³¹³ George Bush Sr. enacted stop-loss orders in 1990. Exec. Order No. 12,728, 55 Fed. Reg. 35,029, 35,029 (Aug. 22, 1990). In 1991, Sergeant Craig Sherman’s contract was extended beyond the 1990 termination date while he was deployed to Saudi Arabia and the court held that to permit terminating the contract during a time of war would “bring chaos to orderly military planning.” *Sherman v. United States*, 755 F. Supp. 385, 386, 388 (M.D. Ga. 1991).

³¹⁴ *Santiago*, 425 F.3d at 559 (9th Cir. 2005); *Qualls*, 357 F. Supp. 2d at 285; *Sherman*, 755 F. Supp. at 388. *See generally* Hannah Dyer, Comment, *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, 34 PEPP. L. REV. 791, 805, 810–12, 816 (2007) (noting that the courts refused to reverse the stop-loss extensions of Sherman, Qualls, and Santiago).

³¹⁵ *Doe*, 435 F.3d at 985–86.

statute in relation to each particular enlistment contract³¹⁶ and ascertained that agreements included flexible terms open to military³¹⁷ and presidential discretion.³¹⁸ The judiciary did not want to become involved in granting relief that might undermine military resources.³¹⁹ 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,³²⁰ but challenges to stop-loss orders can be distinguished from those circumstances in which a false representation could nullify a reenlistment contract³²¹ 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.³²² 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

³¹⁶ See *Santiago*, 425 F.3d at 554–56; see also Armed Forces of the United States, Enlistment/Reenlistment Document, DD Form 4/1, at 2 (Oct. 2007) [hereinafter DD Form 4/1] available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf> (stating that “enlistment . . . is more than an employment agreement” and emphasizing obligations related to “stop-loss” orders).

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.”).

³¹⁸ In *Doe*, appellant argued that the President had technically never “exercise[d] his authority under section 12305,” Brief of Appellant at 7–8, *Doe*, 435 F.3d 980 (May 19, 2006) (No. 05-15680), an argument ultimately rejected by the court, *Doe*, 435 F.3d at 988. The Department of Defense issued orders affecting Doe’s stop-loss order. *Doe*, 435 F.3d at 985. On September 14, 2001, the President did “suspend certain laws relating to promotion, involuntary retirement, and separation of commissioned officers.” Exec. Order No. 13,223, 3 C.F.R. 785, 785 (2002). The order continued from 2001 until 2011. Thom Shanker, *Gates to Phase Out Practice That Delays Exits From Military*, N.Y. TIMES, Mar. 19, 2009, at A20.

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.

³²¹ *Shelton v. Brunson*, 465 F.2d 144, 147 (5th Cir. 1972).

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.”³²³ This was the stimulus behind the Pentagon instituting a program to frontload additional compensation to entice soldiers to reenlist.³²⁴ 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.³²⁵

Fourth, the number of private contractors in Iraq kept growing³²⁶ to more than 180,000 in mid-2007, at the same time there were 160,000 U.S. troops.³²⁷ The number of PMCs in Iraq grew to 190,000 PMCs in 2008,³²⁸ and some U.S. government officials claimed that over 300,000 would still be insufficient.³²⁹

³²³ DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 59 (2009); *Private Warriors: Frequently Asked Questions*, FRONTLINE (June 21, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> (last visited Oct. 6, 2014).

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.

³²⁶ For the progression by date, see Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E1 (reporting one contractor for every ten military soldiers); David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1 (reporting about 20,000 private contractors); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 327, 327 n.100 (2006) (stating that June 2004 estimates were 25,000); Mary Pat Flaherty & Dana Priest, *More Limits Sought for Private Security Teams*, WASH. POST, Apr. 13, 2004, at A15; (estimating 20,000 private military contractors in Iraq); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 512 (2005) (estimating between 20,000 and 30,000 PMC personnel in 2003 and 2004); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1 (counting 100,000 contractors in census); John M. Broder & James Risen, *Death Toll for Contractors Reaches New High in Iraq*, N.Y. TIMES, May 19, 2007, at A1 (reporting 126,000 contractors).

³²⁷ T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1; see also JENNIFER K. ELSEA & NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE, RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS AND OTHER ISSUES 3 (2007) (reporting 127,000 contractors); Jeffrey F. Addicott, *The Political Question Doctrine and Civil Liability for Contracting Companies on the “Battlefield,”* 28 REV. LITIG. 343, 344 n.3 (2008) (noting that a January 2008 estimate placed the number of civilian contractors at 133,196); *Iraqi Parliament Approves Status-of-Forces Agreement Setting Timetable for U.S. Withdrawal*, 103 AM. J. INT'L L.J. 132, 134 (2009) (noting that there were more than 170,000 contractors); Joshua S. Press, Note, *Crying Havoc Over the Outsourcing of Soldiers and Democracy’s Slipping Grip on the Dogs of War*, 103 NW. U. L. REV. COLLOQUY 109, 111 (2008) (estimating the number of contractors to be 180,000 in 2008).

³²⁸ U.S. CONG. BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 8 (2008), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/96xx/doc9688/08-12-iraqcontractors.pdf>; George R. Lucas, Jr., *“This Is Not Your Father’s War,”—Confronting the Moral Challenges of “Unconventional” War*, 3 J. NAT’L SECURITY L. & POL’Y 329, 331 (2009) (noting that there were an estimated 190,000 to 210,000 military contractors from over 900 private firms).

³²⁹ Miller, *supra* note 327, at A1.

There was an overreliance on military contractors,³³⁰ 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.³³¹ *The Economist* referred to this as “the first privatized war.”³³² Of the nationalities working for private contractors, less than 30% were Americans.³³³ 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.³³⁴

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.³³⁵ Contractors may earn three or four times

³³⁰ Katherine Jackson, Note, *Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N L. JUD. 255, 260 (2007).

³³¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-865T, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS 5 (2006) (listing the gamut of security services, which by definition means wielding weapons). Tens of thousands performed security roles with weapons. Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 753 (2009).

³³² *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 55, 56. Recent estimates of private contractors in Afghanistan were believed to outnumber official military troops by a two to one ratio. See Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 855 (2010).

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 departed 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. 989, 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 (“[Contractors 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.³³⁶ A PMC employee can earn \$1000 per day and enlisted soldiers earn between \$1193 and \$5054 per month.³³⁷ 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.³³⁸ It costs additional public expenditures to properly monitor contract performance,³³⁹ and Pentagon oversight of PMCs was admittedly not adequate.³⁴⁰ Contractors were to blame for “billions of dollars in waste, fraud, and abuse,”³⁴¹ and several dozen people were indicted in federal court on Iraq war-contract crimes.³⁴² 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 Finkelman, *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).

³³⁷ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 601(b), 117 Stat. 1392, 1495–98 (2003) (providing official military pay grades); Carney, *supra* note 326, at 327–28.

³³⁸ U.S. CONG. BUDGET OFFICE, *supra* note 328, at 2; James Risen, *Use of Contractors in Iraq Costs Billions, Report Says*, N.Y. TIMES, Aug. 12, 2008, at A11.

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

³⁴⁰ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF DEF., D-2004-057, ACQUISITION: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON 24 (2004) (estimating that over half of the Iraq contracts were not adequately monitored). Speaking about the general trend in privatization, “[t]he number of private contractors doing the work of government has accelerated, while the number of federal employees needed to supervise them has eroded.” Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 399 (2006).

³⁴¹ Michael Thibault & Grant Green, *Lessons from the Inspectors General: Improving Wartime Contracting*, COMMISSION ON WARTIME CONTRACTING IRAQ & AFGHANISTAN (Feb. 2, 2009), http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Joint_Statement_MichaelThibault_GrantGreen.pdf. KBR was plagued with charges of war profiteering and fraud. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 26 (2007).

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.³⁴³ 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.³⁴⁴

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,³⁴⁵ the Bush Administration employed many methods to increase supply of forces.³⁴⁶ 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,³⁴⁷ and in this case, U.S. military troops had a high exit rate from the service.³⁴⁸

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.³⁴⁹ But if the voice option of mobilizing public opinion is precluded, the exit option, pursuant to contractual obligations,

2008, at 1 (noting thirty-six indictments to date).

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]rivatizers 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.³⁵⁰ 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.”³⁵¹ 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,³⁵² and troops are mandated to follow military orders without objection.³⁵³ If objection mounts within the American populace and Congress, and the executive favors adherence to the mission while the Pentagon hierarchy follows executive orders,³⁵⁴ 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.³⁵⁵ 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.³⁵⁶ Perhaps new enlistees and re-enlistees, after those falsities became commonly known, either did not care that the allegations were false or

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 *supra* 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).

³⁵⁴ There can be cultural divisions over policy with civilian-military relations. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS passim* (1964).

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.³⁵⁷

B. Culture, Hierarchy, and Mandatory Directives

Even though American military enlistees do not relinquish constitutional rights when entering the military,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.³⁵⁹ Restrictions found in the *Uniform Code of Military Justice* (UCMJ), the *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.³⁶⁰ The

³⁵⁷ Watts, *supra* note 150, at 694–95.

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.”).

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))).

³⁶⁰ Shannon Gilreath, *Sexually Speaking: “Don’t Ask, Don’t Tell” and the First Amendment after Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 953, 963 (2007). The military can restrict constitutional rights of its members. *Parker*, 417 U.S. at 743–44; *United States v. Priest*, 45 C.M.R. 338, 343–44 (C.M.A. 1972); Barney F. Bilello, Note, *Judicial Review and Soldiers’ Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 467–68 (1989); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 857 (1987). In addition to restrictions discussed in this section, other constitutional right abridgements are clear. Fourth Amendment rights are weak. Rather than going to a court, military officials can issue a search warrant and there is no probable cause requirement. *See United States v. Stringer*, 37 M.J. 120, 126 (C.M.A. 1993). The Sixth Amendment requires an “impartial jury.” U.S. CONST. amend. VI. “Impartial jury” means a random selection of the public with voir dire, but under military law, the military commander handpicks jurors. 10 U.S.C. § 892 (2013); Sangeeta Shah, *The Human Rights Committee and Military Trials of Civilians: Madani v. Algeria*, 8 HUM. RTS. L. REV. 139, 148 (2008) (“[T]he assumption that the trial of civilians by a military court is undesirable only because such trials will not ‘ensure the equitable, impartial and independent administration of justice.’” (quoting Human Rights Comm., *General Comment 13, Article 14 (Twenty-First Session, 1984)*, ¶ 4 in *Compilation of General*

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.³⁶¹

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.”³⁶² The UCMJ proscribes engaging in conduct and speech that is not reasonable for military personnel or places the service in disrepute,³⁶³ participating in “[c]onduct unbecoming an officer and a gentleman,”³⁶⁴ and expressing “contempt toward officials,”³⁶⁵ which has been broadly construed as prohibiting on and off-duty speech that criticizes the president and other political officials³⁶⁶ and attendance of protest movements that oppose the incumbent administration.³⁶⁷ Military directives prohibit soldiers from dissenting over, discussing political issues, and participating in political causes.³⁶⁸ Precedent from the Vietnam War affirmed that speech of service members in opposition to the war could be criminalized,³⁶⁹ and the Secretary of Defense reaffirmed this

Comments and Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/REV.1 at 14 (July 29, 1994)).

³⁶¹ *Parker*, 417 U.S. at 743 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

³⁶² *Id.* at 759 (quoting *Priest*, 45 C.M.A. at 344).

³⁶³ MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 80 (1999).

³⁶⁴ 10 U.S.C. § 933 (2013).

³⁶⁵ *Id.* § 888.

³⁶⁶ 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).

³⁶⁷ 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).

³⁶⁸ *Id.*

³⁶⁹ *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

mandate of adherence to military duties and the mission the year after the invasion of Iraq,³⁷⁰ even as it became known that the conditions underlying the use of the force were false.³⁷¹

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.³⁷² Restrictions fortify the mandates of top officials that subordinates must execute.³⁷³ The military justice system also insulates the higher echelon in the military chain of command to ensure obedience at lower levels.³⁷⁴ 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.³⁷⁵ 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 "the Government is entitled to protect itself in advance against a calculated call for revolution." *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. Wilcox*, 66 M.J. 442, 444 (C.A.A.F. 2008).

³⁷⁰ U.S. DEP'T OF DEF. DIRECTIVE NO. 1344.10, *supra* note 367, at E3.2–3.3.

³⁷¹ This would also directly assume legality of the mission despite war powers and international law questions.

³⁷² 10 U.S.C. § 815 (2013); JOHN M. LINDLEY, "A SOLDIER IS ALSO A CITIZEN": THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920, at 165–66 (1990) (stating that commanders can also subject soldiers to nonjudicial forms of punishment).

³⁷³ Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 558–59 (2008).

³⁷⁴ 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).

³⁷⁵ *Dynes v. Hoover*, 61 U.S. 65, 82 (1858) (refraining from reviewing a challenge to a court-martial decision); *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991). See generally Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and "Civil Rights and Supervision" over the Armed Forces*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 405, 405–27 (Richard H. Kohn ed., 1991) (providing an historical background for the relationship between military authority and federal courts).

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

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

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 (1995) (“[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. Bailliet, *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).

³⁷⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16.c(1)(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.

³⁷⁸ *Solorio v. United States*, 483 U.S. 435, 438–39 (1987) (citing 10 U.S.C. §§ 802, 817) (noting that courts-martial proceedings can “try servicemen for the crimes proscribed by the U.C.M.J.”). Courts-martial can impose a maximum three month penalty for negligent dereliction of duty and a six month confinement for willful dereliction of duty. MANUAL FOR COURTS-MARTIAL, *supra* note 377, at app. A23-6. The MILITARY MANUAL FOR COURTS-MARTIAL highlights the times in which the military is able to exercise jurisdiction, which includes under a military government, martial law, the laws of war, and military law. Mybda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. Rev. 1, 11 (2005).

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.”).

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”).

³⁸¹ DanaMarie Pannella, Note, *Animals are Property: The Violation of Soldiers’ Rights to*

psychology, hierarchies, and particularly military hierarchies,³⁸² are a breeding ground for conformity.³⁸³ Respect for the organization and conformity may make otherwise questionable orders obligatory³⁸⁴ and officer associations may protect superiors at the expense of subordinates.³⁸⁵ Rules and culture ensure conformity and obedience to command,³⁸⁶ making military members hesitant to express differences in opinion and chilling speech.³⁸⁷

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,³⁸⁸ and military officials issue orders for troops to execute.³⁸⁹ The orders are presumed to be legal and must be followed because troops can face criminal punishment for disobeying orders.³⁹⁰ This presumption of legality of orders protects troops as an explicit defense to allegations of wrongdoing,³⁹¹ which further induces troops to favor obedience to command rather than assume risks inherent in refusing to execute

Strays in Iraq, 43 CASE W. RES. J. INT'L L. 513, 519, 525 (2010).

³⁸² Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 208–09 (2005).

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”).

³⁹⁰ 10 U.S.C. §§ 815, 890–92 (2013).

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.³⁹² 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 command³⁹³ and can impose criminal liability on superiors for the failure to adequately prevent subordinate wrongs.³⁹⁴ 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 Leeb (High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG 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 th[e] 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 (“[Under 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.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (“[He] 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 70–77, 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.”³⁹⁵ Thus, while the principle of command responsibility can impute liability across the chain of command for acts during wartime under U.S. law,³⁹⁶ including by ascribing liability on the chain of command for engaging in “wars of aggression,”³⁹⁷ no U.S. commander has ever been criminally prosecuted on a clear command responsibility theory.³⁹⁸ 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,³⁹⁹ internally justifying and expressing patriotism for the mission, opposing an overly-romanticized portrayal of war,⁴⁰⁰ or conveying utmost patriotic devotion to American veterans irrespective of debate over

³⁹⁵ MANUAL FOR COURTS-MARTIAL, *supra* note 377, at pt. IV, ¶ 16.c(3)(a).

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.

³⁹⁷ Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; G.A. Res. 25/2625 (XXV), U.N. Doc. A/RES/25/2625, at 122 (Oct. 24, 1970) (the General Assembly reaffirming the illegality of a war of aggression).

³⁹⁸ Melissa Epstein Mills, Note, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25, 25 (2010); *see* Martin N. White, *Charging War Crimes: A Primer for the Practitioner*, 2006 ARMY LAW 1, 11 (2006) (“Prosecuting U.S. servicemembers for war crimes committed under violations of treaties is uncharted territory. In My Lai, perhaps the most publicized American war crime, American Soldiers killed between 150 and 400 noncombatants, however, there was only one conviction, that of Lieutenant Calley.” (quoting Smidt, *supra* note 396, at 191)); M. Cherif Bassiouni, *Torture and the War on Terror: The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 408 (2006) (noting that Calley was pardoned by President Nixon).

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.⁴⁰³

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

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. Brahm 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.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,”⁴⁰⁶ with the third element perhaps being the most essential.⁴⁰⁷ Some dissenting troops expressed that there was a gulf between what their officers and politicians affirmed and what they witnessed in Iraq,⁴⁰⁸ which might have reduced their moral conviction to conducting operations that were frequently placing their lives and Iraqi civilian lives in danger.⁴⁰⁹ Troops began to openly oppose the war and some refused

Council of Europe Member States, Recommendation 1518 (2001) (setting forth rights of conscientious objection in European members states); U.S. DEPT OF ARMY, AR 600-43, CONSCIENTIOUS OBJECTION 1, 2 (Aug. 21, 2006) (setting forth military policy on conscientious objection and noting that the traditional case of conscientious objection is that the objector opposes wars on moral grounds); GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 109–12 (3d ed. 2007) (addressing political objection bases); see Bailliet, *supra* note 376, at 341–42, 348–49 (referencing a list of U.N. Human Rights Commission resolutions from 1987 to 2002 relating to conscientious objection).

⁴⁰⁵ Jose de Sousa e Brito, *Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law*, 1999 B.Y.U. L. REV. 607, 611–12.

⁴⁰⁶ U.S. DEPT OF DEF. 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).

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).

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, *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).

⁴⁰⁹ *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, *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,⁴¹⁰ leading to a dramatic rise in the number of military personnel seeking discharge from the military on conscientious objection grounds.⁴¹¹

Many Americans deserted and risked losing U.S. citizenship by fleeing the country to Canada, as occurred during the Vietnam War.⁴¹² 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.⁴¹³ 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.”⁴¹⁴ 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. . . . I have a duty to refuse to participate in this War because it is illegal.”⁴¹⁵ Paredes was convicted in a court-martial proceeding and was sentenced to three months hard labor.⁴¹⁶ 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,⁴¹⁷ 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.

⁴¹⁰ JAMES CARROLL, *CRUSADE: CHRONICLES OF AN UNJUST WAR* 215 (2004); *Introduction to Part V, supra* note 139, at 209–10; *Split Decision on Marine Objector Reservist: Innocent of Desertion, Will Do Time for Absence*, S.F. CHRON., Sept. 7, 2003, at A27 (noting that a Marine asserted a conscientious objection, but faced court-martial).

⁴¹¹ Alexander Drylewski, Note, *When Fighting is Impossible: A Contractual Approach to the Military’s Conscientious Objection Rules*, 74 BROOK. L. REV. 1445, 1446 (2009).

⁴¹² 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*, CHI. SUN-TIMES, July 31, 2005, at 5. See generally David Estlund, *On Following Orders in an Unjust War*, 15 J. POL. PHIL. 213 (2007) (contending that combatants should have some responsibility to assess whether a war was lawful).

⁴¹³ Tracey Tyler, *U.S. Deserter Fears for His Life*, TORONTO STAR, July 8, 2004, at A02.

⁴¹⁴ *Introduction to IN THE NAME OF DEMOCRACY, supra* note 139, at 1.

⁴¹⁵ *Id.* at 12.

⁴¹⁶ *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.

⁴¹⁷ 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.”⁴¹⁸ The military spent three years attempting to prosecute Watada, but gave up in 2009 and permitted him to resign.⁴¹⁹ In 2008, U.S. Army Sergeant Matthis 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.⁴²⁰ 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).⁴²¹ Courts have held that complaints of the immorality or illegality of a war is not a defense to avoiding military obligations,⁴²² and that rejection of presidential orders is a nonjusticiable political question.⁴²³ Moreover, the military places a clause in enlistment contracts which states that an enlistee has no conscientious objection to war,⁴²⁴ which apparently denotes that enlistees have signed away these rights and make the post-enlistment conscientious objector claim unavailing.⁴²⁵ 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,⁴²⁶ but conscientious objection

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.

⁴²⁰ Karin Zeitvogel, *US Soldier Refuses to Serve in 'Illegal Iraq War'*, MIDDLE EAST ONLINE (May 16, 2008), <http://www.middle-east-online.com/english/?id=25951>.

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).

⁴²² See *Gillette v. United States*, 401 U.S. 437, 443 (1971); *United States v. Owens*, 415 F.2d 1308, 1313–14 (6th Cir. 1969); *United States v. Huet-Vaughn*, 39 M.J. 545, 548 (C.M.R. 1994), *rev'd on other grounds*, 43 M.J. 105, 114 (C.A.A.F. 1995).

⁴²³ See *Ange v. Bush*, 752 F. Supp. 509, 512–14 (D.D.C. 1990) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); *Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)); *United States v. Rockwood*, 48 M.J. 501, 507 (Army Ct. Crim. App. 1998).

⁴²⁴ See *Alhassan v. Hagee*, 424 F.3d 518, 520, 525 (7th Cir. 2005); see also *Roby v. U.S. Dep't 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.⁴²⁷

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.”⁴²⁸ Before the war, the Bush Administration made hundreds of false statements over a two year period about security threats from Iraq,⁴²⁹ 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.”⁴³⁰ The Bush Administration’s use of propaganda after the invasion shifted issues away from what many called an illegal war,⁴³¹ 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.⁴³²

U.S. troops must execute orders to ensure effective military performance. Dissenting to superior orders in the military can result in criminal punishment.⁴³³ Yet, at the time of enlistment, suppose an American made a rational choice to join the military for

⁴²⁷ 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 LAW. 31, 31 (discussing the conscientious objection exemption).

⁴²⁸ Cochran, *supra* note 67.

⁴²⁹ Lewis & Reading-Smith, *supra* note 29.

⁴³⁰ 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).

⁴³¹ 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)).

⁴³² See *supra* Part III.

⁴³³ 10 U.S.C. § 892 (2013).

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.⁴³⁴ Despite the fact that terminology in military enlistment contracts is notably thorough in divesting rights to object to military deployments and assignments,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.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.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.⁴³⁸ The American public should have the

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.*

⁴³⁵ DD Form 4/1, *supra* note 316, at 2.

⁴³⁶ 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.

⁴³⁷ *See supra* Part III.

⁴³⁸ *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.⁴³⁹ 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.⁴⁴⁰ 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.⁴⁴¹ 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.