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# Military Law: Time to Mandate Best Interests of the Child to Restrict Deployments of Parents that Affect Preschool Children

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**MILITARY LAW: TIME TO MANDATE BEST INTERESTS OF THE CHILD TO RESTRICT DEPLOYMENTS OF PARENTS THAT AFFECT PRESCHOOL CHILDREN**

**John A. Lynch, Jr.\***

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INTRODUCTION

As America viewed the first massive deployment of its all-volunteer force at the beginning of the first Persian Gulf War, one journalist commented:

When this war is over, Americans need to do some serious thinking about the all-volunteer armed forces, the one legacy of the Vietnam War with which the nation seemed comfortable. Among other things, we have to decide

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whether a single parent, and, in many cases, both parents, should be deployed in war zones.

Is the nation's reliance on an army of volunteers worth the emotional grief that comes from ripping military parents away from their children? Do the children of American servicemen and women have to be the first casualties of war?<sup>1</sup>

The composition of the United States force that deployed to the Persian Gulf at that time confronted the American people with a specter that many found agonizing—a significant number of children, sometimes very young children, were left at home without a parent.<sup>2</sup> Although military deployment of soldiers has always entailed emotional disruption of families,<sup>3</sup> in past wars, the American military was made up mostly of unmarried young males.<sup>4</sup> Thus, military deployment was not nearly as likely to leave large numbers of children at home without a parent. This Article addresses the new harsh, adverse consequences of foreign deployment of military forces for military personnel, and especially for some of their younger children. Part II addresses these consequences and how they were brought about by changes in the population of the armed services. Part III addresses adverse consequences of depriving very young children entirely of the presence of their parents. Part IV concludes with a proposal that Congress restrict the power of the military to deploy both parents or a single parent of preschool children.

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1. Phil Gailey, *When Parents Are Sent to War, Remember the Children*, ST. PETERSBURG TIMES, Feb. 12, 1991, at 5D.

2. The Department of Defense estimated that children were separated from their parents in 18,400 families, including 1,200 dual-military families. Rich Shaughnessy, *Children Bear Burden of War; Call-up of Moms, Dads Left Kids Without Parents*, SAN DIEGO UNION TRIB., Mar. 9, 1991, at A1 [hereinafter Shaughnessy].

3. See Sondra Albano, *Military Recognition of Family Concerns: Revolutionary War to 1993*, 20 ARMED FORCES & SOC. 283 (1994) [hereinafter *Military Recognition of Family Concerns*].

4. CHIEF OF STAFF, U.S. ARMY, *THE ARMY FAMILY 2* (1983), available at [http://www.whs.mil/library/Dig/AR-M620U\\_20080911.pdf](http://www.whs.mil/library/Dig/AR-M620U_20080911.pdf).

I. A DISTRESSING NEW CONSEQUENCE OF FOREIGN  
DEPLOYMENT OF MILITARY PERSONNEL

A. *The Reaction of Congress*

In the midst of Desert Storm, the press detailed many heart-rending scenes, which brought attention to this issue. For example, an Army private threatened to report for deployment with her four-month-old child after her husband was also deployed to Saudi Arabia,<sup>5</sup> and another pair of deployed parents were forced to leave their four-month-old twin children with their grandmother.<sup>6</sup> Such spectacles created an outcry among child advocacy groups and in Congress.<sup>7</sup> Senator John Heinz of Pennsylvania introduced legislation to prohibit the military from assigning a single parent or both parents of the same minor child “to duty in the Persian Gulf theatre of operations,”<sup>8</sup> but the bill was not passed.<sup>9</sup> The Senate instead adopted a substituted amendment by Senator John Glenn of Ohio which included language commending the Department of Defense for “the efforts it has made to be sensitive to the family needs of members of the Armed Forces consistent with military requirements,” and emphasizing that “military readiness and the interests of national security require that the Department of Defense have maximum flexibility in the assignment and deployment of military personnel . . . .”<sup>10</sup> Then Representative Barbara Boxer of California introduced legislation similar to that introduced by Senator Heinz, which fared no better in

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5. Dana Priest, *Military Reluctant to Alter its Rules; Advocates Seek Exemption From Combat for at Least One Parent*, WASH. POST, Feb. 9, 1991, at A14 [hereinafter Priest].

6. A.L. Sanders & R. Chavira, *When Dad and Mom Go To War*, TIME, Feb. 18, 1991, at 69.

7. See Adam Clymer, *In Capital, Debate on Parents in Gulf*, NEW YORK TIMES, Feb. 16, 1991, at 10 [hereinafter Clymer]; Bettyjane Levine, *What Befalls Kids When Parents Go Off to War*, L.A. TIMES, Feb. 22, 1991, at E1.

8. S. 325, 102d Cong. § 1 (1991).

9. William Matthews, *Senate Votes Down Wider Combat Exemptions*, AIR FORCE TIMES, Mar. 4, 1991, at 16.

10. 137 CONG. REC. 3760 (1991). Sen. Heinz also offered his bill as an amendment to S. 320, which was voted down. See 137 CONG. REC. 3771–72 (daily ed. Feb. 20, 1991) (statement of Sen. Heinz). Sen. Glenn offered the amendment to Sen. Heinz proposal and it was adopted unanimously by the Senate. *Id.* at 3771.

the House of Representatives.<sup>11</sup> Both Senator Heinz and Representative Boxer said that the objective of their proposed legislation was to prevent the creation of orphans.<sup>12</sup> Notwithstanding public distaste for that prospect, Congress was swayed by reluctance to interfere with the military during the deployment.<sup>13</sup>

Concern about these new issues resulted in hearings by a House of Representatives subcommittee, but ultimately failed to lead to reform.<sup>14</sup> The subcommittee heard testimony for

11. H.R. 537, 102d Cong. section 1 (1991) of which provided:

- (a) BOTH PARENTS IN ARMED FORCES- If a husband and wife who have a minor child are both members of the armed forces on active duty and are both assigned to perform duty in a region designated by the Secretary of Defense as a hostile fire or imminent danger region, the Secretary at the request of the members shall relieve one of the members from the obligation of performing such duty. The Secretary may select which of the two members is to be relieved.
- (b) SINGLE PARENT- If a single parent who has a minor child is a member of the Armed Forces on active duty and is assigned to perform duty in a region designated by the Secretary of Defense as a hostile fire or imminent danger region, the Secretary at the request of the member shall relieve the member from the obligation of performing such duty.
- (c) EFFECT OF OPERATION OF SECTION-
  - (1) REASSIGNMENT TO OTHER DUTY - If a member of the Armed Forces is relieved under this section from an obligation to perform certain duty, the Secretary of Defense shall endeavor to assign the member to perform other duty that does not require the separation of the member from a child.
  - (2) DELAY OF DISCHARGE OR RETIREMENT FROM ARMED FORCES - If a member of the Armed Forces is relieved from an obligation to perform certain duty, the Secretary of Defense may delay the date of the discharge or retirement of the member by the lesser of—
    - (A) the period of the duty assignment from which the member is relieved;
    - (B) and such period as the Secretary may determine.

This bill died in subcommittee.

12. Editorial, *Should Mothers Go to War?*, WASH. POST, Feb. 14, 1991, at 22 (as to Sen. Heinz); Shaughnessy, *supra* note 2, at A1 (as to Rep. Boxer).

13. Clymer, *supra* note 7; Priest, *supra* note 5.

14. *Parenting Issues of Operation Desert Storm: Hearings Before the Military Personnel and Compensation Subcomm. of the H. Comm. on Armed Servs.*, 102d Cong. (1991) [hereinafter 1991 Hearings]. In 2010 this same subcommittee conducted a much more limited hearing into the issue of deployment on military children. See *Recent Studies on the Effects of Deployment on Military Children: Hearing Before the Military Personnel Subcomm. of the H. Comm. on Armed Servs.*, 111st Cong. (2010) [hereinafter 2010 Hearing].

and against legislation intended to allow single parents or one member of dual-military couples to defer deployment. Much of the opposition to such legislation focused on the unfairness of allowing exemption from deployment based on parenthood.<sup>15</sup> Another concern expressed was that such legislation would set back the career prospects of women in the armed forces.<sup>16</sup> This latter concern was apparently based on an assumption that most military single parents were female, which is not the case.<sup>17</sup>

Fortunately, the First Gulf War was short, as was its disruption of impacted military families' lives, but the consequences resurfaced a decade later. Notwithstanding legislation directing the military to study and evaluate uniform standards for deployment of the parents of young children,<sup>18</sup> the U.S. military's policies had not changed when operations began in Afghanistan in 2001 and Iraq in 2003.

15. This was put stridently by Rep. Arthur Ravenel, Jr.:  
[Soldiers] are in the same unit and they ceaselessly train, and they are friends. All of a sudden, an emergency develops, and we have to deploy to fight—or possibly fight. The guy who is a single parent can say ‘Oh no, I’ve got an option here in the law, and I can request not to be deployed,’ and he is not deployed . . . I know I would resent it very much if I had to fight but he didn’t because he has a child back home, possibly living with a grandmother or something like that.

*Id.* at 33.

16. Assistant Secretary of Defense for Force Management and Personnel Christopher Jehn testified: Finally, I want to make sure that everyone understands that this is a woman’s issue. This legislation threatens to turn back to the time when marriage or motherhood was cause for discharge or discrimination in assignment. *Id.* at 39–40. DACOWITS, the Defense Advisory Committee on Women in the Service, through its chair, Becky M. Costantino, picked up on Mr. Jehn’s concern about the effect of such a proposal on women in the military. While noting that “[h]umanitarian provisions” allowed the armed forces to allow exceptions to deployment on a case by case basis, *id.* at 94, she stated: “[O]ur primary concern and focus is equal treatment for military women in assuring that any advances that they have made in the last several years are not reversed.” *Id.* at 93. As noted *infra* notes 121, 122 and accompanying text, DACOWITS would change its position in the midst of the conflicts in Afghanistan and Iraq.

17. In 2012 there were 48,463 male single parents in the active force and 24,008 females, U.S. DEP’T OF DEFENSE, 2012 DEMOGRAPHIC PROFILE OF THE MILITARY COMMUNITY 130 (2012) [hereinafter 2012 DEMOGRAPHICS]. However, female single parents are disproportionately represented because the active forces are 14.6% female. *Id.* at 19. In the reserves there are 53,556 male single parents and 25,758 females. *Id.* at 153.

18. Persian Gulf Conflict Supplemental Authorization Act and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 315, 105 Stat. 86 (1991).

And so the country revisited the spectacle of children of deployed soldiers left with grandparents, friends of their parents, or even their older siblings.<sup>19</sup> Some parents risked military discipline by refusing to deploy,<sup>20</sup> and one mother was able to avoid leaving her children on their own through the intervention of a United States Senator.<sup>21</sup>

To address such problems, Senator Judd Gregg of New Hampshire introduced two bills in June of 2007 that would have limited simultaneous deployment to combat zones of dual-military couples with minor children<sup>22</sup> and required the Secretary of Defense to conduct a study on the effects on “children, infants and toddlers” of deployed reservist parents.<sup>23</sup> Neither bill passed. Instead, Congress enacted a

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19. For example, a grandmother moved to a Colorado military facility from her home and husband in Akron, Ohio to care for her daughter’s six children and stepchildren, aged six to twelve. “I volunteered, but I never thought it would happen,” she said. See Richard Jerome, Jason Bane, Cathy Free & Jane Sims Podesta, *2 Soldiers 6 Kids 1 Exhausted Grandmother*, PEOPLE, Sept. 8, 2003, at 59.

20. See Joe Gould, *Charge or Discharge? Single Mom Jailed for Refusing to Deploy*, ARMY TIMES, Nov. 30, 2009, at 16, available at <http://www.armytimes.com/article/20091128/NEWS/911280306/Single-mother-detained-refusing-deploy>.

21. A Navy medical corps member’s orders to deploy were cancelled after she contacted the office of Senator Gordon Smith of Oregon. Teri Figueroa, *Active-duty spouses struggle with deployment policy*, SAN DIEGO UNION-TRIB., Sept. 2, 2007, <http://www.utsandiego.com/news/2007/sep/02/active-duty-spouses-struggle-with-deployment/>.

22. S. 1659, 110th Cong. (2007).

23. S. 1660, 110th Cong. (2007). Section 1(a)(2) of this bill would have required the Secretary of Defense to consider the need:

- (A) to develop materials for parents and other caretakers of children of members of the National Guard and Reserve who are deployed to assist such parents and caretakers in responding to the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children, including the role such parents and caretakers can play in addressing and mitigating such implication;
- (B) to develop programs and activities to increase awareness throughout the military and civilian communities of the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children and their families and to increase collaboration within such communities to address and mitigate such implications;
- (C) to develop training for early child care and education, mental health, health care, and family support professionals to enhance the awareness of such professionals of their role in assisting families in addressing and mitigating the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children; and

requirement that the Department of Defense adopt policies and plans for military family readiness.<sup>24</sup> However, this legislation did not specifically address the concern in Senator Gregg's bill regarding "psychological and emotional resilience" of children coping with deployment.<sup>25</sup> Thus, the issue of whether children ought to be left without their parents arose during both of the massive foreign deployments following creation of the all-volunteer force but remained unaddressed. In both instances legislators sought to restrict the military's power to deploy single parents and dual military parents to a combat area but failed to enact such restrictions into law.

Congress' inaction left the armed services to decide whether young children could be left without parents. In response, all services developed procedures to defer deployment in cases of insurmountable hardship based on humanitarian considerations.<sup>26</sup>

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(D) to conduct research on best practices for building psychological and emotional resiliency in such children in coping with the deployment of such members.

*Id.*

24. Title 10 U.S.C. § 1781b provides that the purposes of such policy and plans are:

To ensure that the military family readiness programs and activities of the Department of Defense are comprehensive, effective, and properly supported.

To ensure that support is continuously available to military families in peacetime and in war, as well as during periods of force structure change and relocation of military units.

To ensure that the military family readiness programs and activities of the Department of Defense are available to all military families, including military families of members of the regular components and military families of members of the reserve components.

To make military family readiness an explicit element of applicable Department of Defense plans, programs and budgeting activities, and that achievement of military family readiness is expressed through Department-wide goals that are identifiable and measurable.

To ensure that the military family readiness programs and activities of the Department of Defense undergo continuous evaluation in order to ensure that resources are allocated and expended for such programs and activities to achieve Department-wide family readiness goals.

25. S. 1660, 110th Cong. (2007).

26. Army Regulations Provide for Compassionate Actions. *See* DEPT OF ARMY, REG. 614-200, 5-14, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT (Feb. 29, 2009), *available at* [http://armypubs.army.mil/epubs/pdf/r614\\_200.pdf](http://armypubs.army.mil/epubs/pdf/r614_200.pdf) (last visited Jan. 14, 2014). The Navy provides for Reassignments for Humanitarian Reasons. *See* DEPT OF



Maintaining combat capability and unit cohesion in the armed forces are unquestionably paramount considerations during national emergencies,<sup>27</sup> but these vital interests can be tempered by humanitarian concerns. For example, a sole surviving child, whose parent or sibling is killed, captured, or missing in action, or is permanently and totally disabled, may request not to be assigned to duty involving actual combat with the enemy.<sup>28</sup> Unlike other requests for humanitarian deferment, this exemption automatically applies upon request of the soldier or his or her parents or spouse. This exemption shows that balancing national interests with humanitarian concerns is not only possible, but practicable.

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NAVY, OPNAVINST 1754.2B, 1300-500, ch. 16, REASSIGNMENTS FOR HUMANITARIAN REASONS (Aug. 23, 2006), available at <http://www.public.navy.mil/bupers-npc/reference/milpersman/100/1300Assignment/Documents/1300-500.pdf> (last visited Jan. 10, 2014). The Marine Corps permits transfers and revocation of orders based on humanitarian reasons. DEP'T OF NAVY, MARINE CORPS ORDER 1000.6, ch. 1, § 3.2 (July 3, 2013), available at <http://www.marines.mil/Portals/59/MCO%201000.6.pdf> (last visited Jan. 21, 2014). The Air Force as well permits Humanitarian Reassignment. See DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION 36-2110, Attachment 24 (Sept. 22, 2009), available at [http://static.e-publishing.af.mil/production/1/af\\_a1/publication/afi36-2110/afi36-2110.pdf](http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2110/afi36-2110.pdf) (last visited Jan. 21, 2014). If the basis for seeking relief from deployment is that the service member is a single parent, both Army and Navy regulations generally prohibit relief. ARMY REG. 614-200 at 5-14.d.(5); OPNAVINST 1754, 1300-500 at 6(i). The pertinent Air Force Instruction also essentially eliminates single parenthood as a consideration as well as “[p]roblems associated with child care arrangements” generally. AIR FORCE INSTRUCTION 36-2110, Attachment 24 at 24.7.2. MARINE CORPS ORDER 1000.6, §§ 3, 2d(1) provides, concerning such transfers, that: “The situation must be of such enormity as to present a personal problem more severe than those normally encountered by Marines and their families in the course of military service.”

27. Those were the concerns of then Defense Secretary Richard Cheney and Army Chief of Staff Gen. Colin Powell in resisting legislation that would have restricted limitations on deployment of dual-military or single parents during Operation Desert Storm. See Rick Maze, *Pentagon Balks at Change in Parent Assignment Policy*, NAVY TIMES, Feb. 25, 1991, at 3 [hereinafter Maze].

28. DEP'T OF ARMY, REG. 614-200, ch. 5-12 (Feb. 26, 2009), available at [http://www.apd.army.mil/pdffiles/r614\\_200.pdf](http://www.apd.army.mil/pdffiles/r614_200.pdf) (last visited Feb. 4, 2014). Under a Department of Defense policy any service member in such circumstances is entitled to request separation from the service. DEP'T OF DEFENSE, DEP'T OF DEFENSE INSTRUCTION 1315.15 (Aug. 5, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/131515p.pdf> (last visited Feb. 4, 2014). In the Hubbard Act, Pub. L. No. 110-317, 122 Stat. 3526, Congress has mandated benefits for persons separated from the services under such circumstances. The Military Selective Service Act, 50 U.S.C. App. section 456(o) (2006) also contains a similar exemption from induction into the armed forces.

While today's military has no comprehensive rules for deciding whether to excuse a parent's deployment, children are not always left without their parents. The military has allowed discharges to parents whose children would otherwise be left in an unsatisfactory arrangement for their care.<sup>29</sup> But the military services are subject to no constraining legislative direction in deciding whether to leave military children solely in the custody of persons other than their parents. In the absence of such statutory constraints, the military decides such matters based upon its judgment, which is significantly influenced by the premise that a soldier, sailor, airman, or Marine voluntarily undertakes his or her obligation to serve in the armed forces.<sup>30</sup> In other words, service members make a conscious choice to subject themselves to the needs of the all-volunteer military.

But service members' *children* do not volunteer for service, and indeed *cannot* sign on to any obligation that may deprive them of parental care and attention<sup>31</sup> regardless of any rewards they might enjoy as a result of their parents' decision to join the military.<sup>32</sup> Unquestionably, life or death

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29. In the first few months of the first Persian Gulf War, for example, the Navy allowed the discharge of forty-four reservists on account of child care problems. Maze, *supra* note 27, at 3. The military asserted this capacity to make exceptions in cases of "extreme hardship" in resisting Heinz-Boxer proposed legislation. Statement of Assistant Secretary of Defense Stephen Duncan in 1991 Hearings, *supra* note 14, at 54.

30. See Opening Statement of Rep. Beverly Byron in 1991 Hearings, *supra* note 14, at 1.

31. See Francie Smith, Behind the Lines: Lives of Loss, 4 FOR A JUST AND CARING EDUC. 253, 265 (1998) (addressing the effects on children of parents deployed to Bosnia in the 1990s).

32. For example, active duty and reserve soldiers are eligible for retirement after twenty years of service and are eligible for health care for life. See *Army 20-Year Retirement Benefits*, E-HOW.COM, [http://www.ehow.com/info\\_7761703\\_army-20year-retirement-benefits.html](http://www.ehow.com/info_7761703_army-20year-retirement-benefits.html) (last visited Dec. 29, 2013). Probably the best listing of the benefits of military life is in an army recruiting website, Today's Military. It lists education support, insurance and retirement benefits, discounts at base exchanges and perks such as sports leagues and on-base entertainment, vacation travel on military aircraft and military housing. Perhaps somewhat disputing the premise of this Article, the opening paragraph of the posting states: "It may surprise you, but the Military offers a great balance between work and personal life." See *Living Overview*, TODAY'S MILITARY, <http://todaysmilitary.com/living> (last visited Oct. 6, 2014). A similar website touts advantages after separation from the service: "The valuable military training and experience one receives during their time of service often makes finding a job after the Army considerably easier. See *Benefits*, U.S. ARMY, <http://www.goarmy.com/benefits/after-the-army.html> (last

issues entailed in armed conflict—for members of the armed forces, their families and for the country—require extraordinary legislative and public deference to the military’s judgment in matters pertaining to military personnel deployment. But leaving a very young child without his or her parents for the length of a wartime deployment poses a risk of psychological harm to such a child.<sup>33</sup> What may seem to be a fair reconciliation between the national interest and the interests of a member of the armed forces who has *volunteered* for military service may not, as a matter of public policy, be satisfactory for the service member’s child. As recognized in child custody disputes, competing interests motivate the parties to protect their *own* interests, and not necessarily the interests of the child. And so, the states have universally adopted the best interest of the child approach in determining child custody and other matters concerning children.<sup>34</sup>

While there is no standard definition of “best interests of the child,” it is generally understood to mean “the deliberation that courts undertake when deciding what type of services, actions and orders will best serve a child, as well as who is best suited to take care of a child.”<sup>35</sup> The classical understanding of the philosophy entailed in this doctrine was most famously stated by then Judge Cardozo:

The chancellor in exercising his jurisdiction . . . does not proceed on the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae*, to do what is best for the interest of the child . . . . He is not determining rights “as between a parent and a child” or as between one parent and another . . . .<sup>36</sup>

In an inquiry with respect to the child’s best interests, even the rights of parents must yield in appropriate cases.<sup>37</sup>

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visited Oct. 6, 2014).

33. See *infra* notes 87–116 and accompanying text.

34. JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4.2 (2d ed. 2006). See also CHILDREN’S BUREAU U.S. DEP’T OF HEALTH & HUMAN SERV., DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf) [hereinafter DETERMINING THE BEST INTERESTS OF THE CHILD].

35. DETERMINING THE BEST INTERESTS OF THE CHILD, *supra* note 34, at 2.

36. *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (citations omitted).

37. DONALD T. KRAMER, I THE LEGAL RIGHTS OF CHILDREN 48 (2d rev. ed.

One factor the court considers in making a custody determination is the child's mental health.<sup>38</sup>

The combat deployment of parents of very young children may entail a "competition" similar to child custody proceedings in a divorce, but with the parent's physical presence at issue rather than the child's. In deployment, both the military and parenthood demand the parent's presence.

Military exigencies and national security require that the armed forces have the authority to compel military personnel to take the risks and suffer the hardship of combat deployment when the national interest requires. That power of government was recognized long before the era of the all-volunteer force.<sup>39</sup> In today's military, all service members may be said to have "signed on" to all that follows until the completion of their contractual obligations. But since service members today, unlike those in the past,<sup>40</sup> are more likely to have families and children,<sup>41</sup> the well-being of those children must be given new prominence as a matter of national interest. This should include questioning whether service members' children "signed on" to the consequences of government action that may harm their emotional well-being.<sup>42</sup>

As noted, the military now determines whether deployment may deprive very young children *entirely* of their parents' care and attention without congressionally-imposed standards. This Article sets out a legislative proposal which

2005).

38. DETERMINING THE BEST INTERESTS OF THE CHILD, *supra* note 34, at 3.

39. Selective Law Draft Cases, 245 U.S. 366 (1918).

40. *Military Recognition of Family Concerns*, *supra* note 3, at 289.

41. For example, in 2012, 43.9% of active service members, 2012 DEMOGRAPHICS, *supra* note 17, at 128, and 43% of reservists, *id.* at 149, have children.

42. In an editorial Sen. Heinz commented ironically on the notion that military personnel volunteer for adverse consequences of deployment to their children:

It is also questionable whether an eighteen-year-old tantalized by offers of tuition money has any inkling of what he or she is giving up by "volunteering" to leave children yet to be born behind. Our righteous insistence that "a deal is a deal" is disturbingly reminiscent of the story of Rumpelstiltskin, the dwarf in German folklore who exacts a terrible price for helping a desperate young woman—her first-born child.

John Heinz, *Accommodations Must be Made*, WASH. POST, Feb. 19, 1991, at A17.

better addresses the interests of these children. First, however, Part II addresses how the present policy governing combat deployment of parents has developed and how the military has responded to children's needs during the first Persian Gulf War and more recent conflicts in Afghanistan and Iraq. Part III then addresses the psychological and other effects of depriving the young entirely of the presence of their parents. Finally, Part IV proposes a legislative limitation on deployment of both members of dual-military parents and single parents of preschool children and addresses the appropriateness of such a policy in light of national defense and other national priorities.

## II. HOW THE MILITARY GOT INTO THE POSITION OF LEAVING CHILDREN WITHOUT THEIR PARENTS THROUGH FOREIGN DEPLOYMENT

In the face of unprecedented need to deploy parents of minor children, it is neither surprising nor objectionable that the military leadership would preserve military readiness by holding service members to their obligations.<sup>43</sup> It is also not surprising that during national emergencies in the First Gulf War, Afghanistan, and Iraq conflicts that Congress rejected proposals to protect children from being left without their parents. The military's response to the plight of young children alone at home was *not* heartless and inflexible.<sup>44</sup>

And, in truth, the unhappy predicament of leaving children without their parents was the culmination of changes visited upon the military by overriding forces in society. Deployment of both of a young child's parents or the

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43. Gen. Evelyn P. Foote stated the reason for this insistence:

The press and the public must understand, however, that military leaders cannot safeguard one category of service members—the parents—to the detriment of others who serve. Each military man and woman serves on a team and had a job to do. These teams train together and take care of one another. They depend on each other deeply. Common sense says that the moment of deployment is not the time to break up such teams. Cohesion of the unit would be wrecked when it is most needed. And lives depend on such cohesion.

Evelyn P. Foote, *War is no Time to Make Changes*, WASH. POST, Feb. 19, 1991, at A17.

44. Stephen Duncan, Assistant Secretary of Defense for Reserve Affairs, testified that the service secretaries had authority to approve a delay in deployment in exceptional cases or to process parents for separation from the service. 1991 Hearings, *supra* note 14, at 54.

single parent of a young child was not as likely in the military that existed until the end of the Vietnam War, when the military was mostly composed of young, unmarried males.<sup>45</sup> Even before the end of that conflict, public opposition to the military draft prompted President Nixon to create a commission chaired by former Defense Secretary Thomas S. Gates, which in 1970 proposed elimination of conscription.<sup>46</sup> When conscription authority ended June 30, 1973,<sup>47</sup> the military moved to an all-volunteer force.<sup>48</sup> Without the high-turnover pool of young male draftees that directly or indirectly provided much of the manpower, military recruitment became more likely to affect the well-being of children by redirecting toward enlistment of career military and female personnel.<sup>49</sup> Long-term military personnel are more likely to be or become married and to have children.<sup>50</sup> At the end of the military draft era, fewer than 2% of soldiers in the Army were women.<sup>51</sup> This percentage has increased significantly.<sup>52</sup> And, in all of the services, nearly half or more

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45. Valerie LaJetta Reynolds, *Issues Surrounding the Deployability of Single and Dual-Service Parents in the Navy* (unpublished master's thesis, Naval Postgraduate School) (June, 1991) (distributed by Defense Technical Information Center, Cameron Station, Alexandria, Virginia) (on file with author), available at [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA245969](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA245969).

46. John T. Correll, *When the Draft Calls Ended*, AIR FORCE MAG., Apr. 2008, at 71.

47. David E. Rosenbaum, *Senate Approves Draft Bill, 55-30; President to Sign: Action in Congress Finished After Cloture is Invoked by One-Vote Margin; A TWO-YEAR EXTENSION, First Inductions Since June May Begin in 2 Weeks—Pay Issue in Doubt; Early Inductions Foresee*, N.Y. TIMES, Sept. 21, 1971, at 1, 34. See Pub. L. No. 92-129, § 105, 85 Stat. 355. On January 27, 1973, Secretary of Defense Melvin R. Laird announced an end to conscription in the wake of the Paris Peace Accords ending the Vietnam War. MELVIN R. LAIRD, U.S. DEPT OF DEFENSE, 10TH SECRETARY OF DEFENSE, available at [http://www.defense.gov/specials/secdef\\_histories/SecDef\\_10.aspx](http://www.defense.gov/specials/secdef_histories/SecDef_10.aspx).

48. JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 246 (1982).

49. MADY WECHSLER SEGAL AND JESSE J. HARRIS, U.S. ARMY RESEARCH INST. FOR BEHAVIORAL AND SOCIAL SCIENCES, *WHAT WE KNOW ABOUT ARMY FAMILIES* 9 (Sept. 1993), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a271989.pdf> [hereinafter Segal and Harris].

50. SEGAL AND HARRIS, *supra* note 49, at 7.

51. *Id.* at 9.

52. For example, in 2012, there were 202,876 female active duty service members, 2012 DEMOGRAPHICS, *supra* note 17, at 19, and 154,364 female members of the reserves. *Id.* at 65.

of all personnel are married.<sup>53</sup> The large numbers of female and married military personnel mark significant departures from the military of the past.<sup>54</sup> The military has not accepted all of these changes willingly.<sup>55</sup>

The military has reacted to the potentially disruptive effect of deployment on parenthood, and vice versa, by preventing single parent enlistment.<sup>56</sup> The Army justifies its parallel policy by the following rationale:

[T]he Army's mission and unit readiness are not consistent with being a single parent. Persons who are sole parents would be placed in positions, as any other soldier, where they are required at times to work long or unusual hours, to be available for worldwide assignment, and to be prepared for worldwide assignment, and to be prepared for mobilization, all of which would create conflicting duties between children and military

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53. In 2012, 56.1% of active duty personnel, *id.* at 43, and 47% of reservists were married. *Id.* at 93.

54. Enlisted personnel in the Army were not permitted to marry until 1925 and until World War II, they could be discharged if they married without permission. ROSEMARY SKAINE, *WOMEN AT WAR: GENDER ISSUES OF AMERICANS IN COMBAT* 213 (1999). Until 1967, there was a two percent limit on women in the military, see Linda Strite Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 *DUKE J. OF GENDER L. & POL.'Y* 1061, 1066–69 (2007); 1951 Executive Order 10,240 excluded pregnant women from the armed services. Exec. Order No. 10,240, available at <http://www.trumanlibrary.org/executiveorders/index.php?pid=152&st=&st1=>.

55. The Executive Order excluding pregnant women was rescinded by the Defense Department only in the face of litigation. PHILLIPA STRUM, *WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS* 115 (2004). See also *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *vacated*, 409 U.S. 1071 (1972). Although the removal of this automatic pregnancy exclusion, applicable only to women, eliminated a significant career impediment, women were treated differently in an important respect going to the heart of the military mission—they were excluded from combat. That, of course, is to change as a result of former Defense Secretary Panetta's rescinding of the ban on women military personnel in combat on January 24, 2013, to be implemented by January 1, 2016. News Release, Dep't of Defense, *Defense Department Rescinds Direct Combat Exclusion Rule: Services to Expand Introduction of Women into Previously Restricted Occupations and Units* (Jan. 24, 2013), <http://www.defense.gov/Releases/Release.aspx?ReleaseD=15784> (last visited Jan. 7, 2014).

56. See DEP'T OF DEF. INSTRUCTION NO. 1304.26, *QUALIFICATION STANDARDS FOR ENLISTMENT APPOINTMENT AND INDUCTION*, Enclosure 2, E2.2.6.2 (Sept. 20, 2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/130426p.pdf> (last visited Jan. 21, 2014). This instruction permits the Secretary of Defense to grant a waiver for particularly promising entrants.

requirements for the sole parent.<sup>57</sup>

Of course, preventing single parent enlistment does not prevent the armed forces from having large numbers of such parents in the ranks.<sup>58</sup> The significant number of single parents and dual-military couples<sup>59</sup> raises the same deployment readiness issues that caused the military to bar single custodial parents from enlistment.

The armed services have responded by requiring dual-military couples and service members who *become* single custodial parents after enlistment to maintain family care plans. A Department of Defense Instruction applicable to all branches of the military requires a family care plan of all single member parents with custody of children and military couples with dependents.<sup>60</sup> Such a plan may be required after the birth or adoption of a child, loss or enlistment of a spouse in the military, assumption of sole care for an elderly or disabled family member or the absence of a spouse on account of job commitments.<sup>61</sup> An active-duty military member must notify his or her commanding officer of any such change in circumstances within thirty days and a reservist must do so within sixty days.<sup>62</sup>

Most importantly, a family care plan must specify a caregiver for the service member's dependent children.<sup>63</sup> The guidelines such caregiver to be not a member of the armed

57. ARMY REG. 601-210, 2-10, *available at* [http://www.apd.army.mil/pdf/files/r601\\_210.pdf](http://www.apd.army.mil/pdf/files/r601_210.pdf) (last visited Jan. 7, 2014).

58. For example, 7.8% of the members of the United States military services are single parents. *See What About the Children?*, ABOUT.COM., <http://usmilitary.about.com/cs/genfamily/a/familycare.htm> (last visited Jan. 7, 2014).

59. The military's 2009 Demographic Report indicates that 2.8% of the active duty component and 1.4% of the reserve component are dual-military couples. *See* U.S. DEP'T OF DEF., REPORT ON THE IMPACT OF DEPLOYMENT OF MEMBERS OF THE ARMED FORCES ON THEIR DEPENDENT CHILDREN 11 (Oct. 2010), *available at* <http://www.militaryonesource.mil/12038/MOS/Reports/Report-to-Congress-on-Impact-of-Deployment-on-Military-Children.pdf> [hereinafter REPORT ON THE IMPACT OF DEPLOYMENT].

60. *See* DEP'T OF DEFENSE, INSTRUCTION NO. 1342.19, Enclosure 3, 1a. (1) (May 7, 2010), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/134219.pdf> (last visited Jan. 7, 2014).

61. *Id.* at d.

62. *Id.* at e2.

63. *Id.* at b.



services, at least twenty-one years old, capable of caring for him or herself and dependent family members, and who agrees, preferably in writing, to care for one or more family members during a service member's absence for indefinite periods to ensure that the service member is available for worldwide duties.<sup>64</sup> The plan must also include necessary arrangements to relocate the caregiver or family members,<sup>65</sup> and arrangements for the financial well-being of family members covered by the plan and a power of attorney.<sup>66</sup> The guidelines require service members to certify the family care plan annually with their commander.<sup>67</sup> The individual services also require single parents and dual-military couples with dependent children to maintain family care plans.<sup>68</sup> The Army Regulation provides that soldiers who are required to maintain a family care plan but fail to do so "should be considered for separation from the service."<sup>69</sup>

Unless the person designated in a single-parent service member's family care plan is the other, noncustodial parent, deployment requires child placement in the care of a non-parent, or even a non-relative. For reasons discussed at the beginning of this Article, and below in Part III, this is sometimes not *really* what a service member hopes will ever happen or what is good for the child's emotional development. But agreeing to leave one's child with "someone else," while

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64. *Id.* at Definitions.

65. *Id.* at c1(d).

66. *Id.* at c1(c).

67. *Id.* at a1(d).

68. See DEP'T OF ARMY, REG. 600-20, 5-5, ARMY COMMAND POLICY (Mar. 18, 2008), available at [http://www.apd.army.mil/pdffiles/r600\\_20.pdf](http://www.apd.army.mil/pdffiles/r600_20.pdf) (last visited Jan. 8, 2014); DEP'T OF NAVY, OPNAVINST 1740.4D, U.S. NAVY FAMILY CARE (Oct. 27, 2009) available at <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1740.4D.pdf> (last visited Jan. 8, 2014); DEP'T OF NAVY, MARINE CORPS ORDER 1740.13B, FAMILY CARE PLANS (Mar. 28, 2012), available at [http://www.marines.mil/Portals/59/Publications/MCO%201740\\_13B.pdf](http://www.marines.mil/Portals/59/Publications/MCO%201740_13B.pdf) (last visited Jan. 8, 2014); U.S. DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION 36-2908, FAMILY CARE PLANS (Sept. 8, 2011), available at <http://www.jber.af.mil/shared/media/document/AFD-120613-064.pdf> (last visited Jan. 8, 2014).

69. Army Reg. 600-20, *supra* note 68, at 5-5g(12). MARINE CORPS ORDER 1740-13B, *supra* note 68, at 4a(2)(d), provides a similar sanction for failure to maintain a family care plan.

gambling that it will never happen, allows the service member with dependents to attain the benefits of military life. Requiring service members to execute family care plans reconciles parental responsibilities with the military's legitimate concern that its service members "be able to satisfactorily perform their duties and remain available for worldwide deployment at all times."<sup>70</sup> Nevertheless, unexpected deployment may leave young children in circumstances that their parents would not have otherwise accepted.

Military deployments, while not the only circumstances that may separate parents from their children, are a unique interference with family life. Such deployments are singularly troublesome because the *government* causes the separation, albeit on the basis of military necessity and the national interest. The military is aware of, and sympathetic to, the adverse impact of deployment on military families<sup>71</sup> and all of the services can make exceptions in the face of compelling hardship.<sup>72</sup> However, addressing such hardships is exclusively the purview of the military.

There are times, of course, when almost any other competing consideration should yield to military necessity. For example, if the United States was confronted with physical invasion on multiple fronts, as were the Israelis during the "Yom Kippur War" in 1973, perhaps all personal considerations of military personnel and their families would be subordinated to military exigency.<sup>73</sup> Fortunately, the nature of modern warfare and world geography likely preclude such an exigency for the United States. But excusing a single parent of a preschooler from foreign deployment as a fuel truck driver leaves his or her unit one

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70. DEP'T OF DEFENSE INSTRUCTION 1342.19, *supra* note 60, at 2(d).

71. REPORT ON THE IMPACT OF DEPLOYMENT OF MEMBERS OF THE ARMED FORCES ON THEIR DEPENDENT CHILDREN, *supra* note 59, at 15.

72. *See supra* text accompanying note 27.

73. *See* ABRAHAM RABINOVICH, THE YOM KIPPUR WAR 269 (describing desperate measures contemplated in the face of the Syrian advance in Israel's north). And yet, remarkably, under the Israeli Defense Service Law of 1986, section 39, available at <http://www.jewishvirtuallibrary.org/jsource/Politics/defenselaw.html>, women who are married or have children are exempt from otherwise compulsory military service.

fuel truck driver short.<sup>74</sup> There is no question that the all-volunteer force has been strained by unprecedented foreign combat demands since 2001.<sup>75</sup> That strain is likely to be exacerbated in the future, for the army intends to reduce its active component to 490,000 soldiers by the end of 2015.<sup>76</sup>

In deciding whether to accommodate the hardship of deployed single parents and dual-military couples, the military must balance such personal exigencies with its own needs in light of available resources. As noted earlier,<sup>77</sup> Congress has so far refused to impose any limitation on the military in deploying a young child's parents. For the reasons addressed in the next section, this Article contends that such a limitation should be imposed by Congress *in the best interest of such children*. In essence, Congress is in the best position to protect the psychological well-being of military children while ensuring that the military has the resources necessary to accommodate imposed restrictions.

### III. THE HARMFUL EFFECTS OF REMOVING PARENTS FROM YOUNG CHILDREN'S LIVES THROUGH DEPLOYMENT

The effect of parental separation from children during wartime is not novel,<sup>78</sup> but changing military demographics

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74. There is a source of replacement personnel in such circumstances. Pursuant to Title 10 U.S.C. § 10,144 (2012), the military maintains an Individual Ready Reserve of personnel who have had military service and have remaining military obligations available to fill manpower needs. See DEP'T OF DEFENSE, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS, RESERVE COMPONENTS OF THE ARMED FORCES 16 (June 1999) [hereinafter RESERVE COMPONENTS OF THE ARMED FORCE], available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a315871.pdf>. See also DEP'T OF ARMY, ARMY REG. 140-10, ASSIGNMENTS, ATTACHMENTS, DETAILS, AND TRANSFERS, ch. 4 (Sept. 15, 2005), available at [http://www.apd.army.mil/pdffiles/r140\\_10.pdf](http://www.apd.army.mil/pdffiles/r140_10.pdf) (last visited Jan. 24, 2014).

75. See Ann Scott Tyson, *Number of U.S. Troops in Afghanistan Overlooks Thousands of Support Troops*, WASH. POST, Oct. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/12/AR2009101203142.html>.

76. ANDREW M. FEICKERT, CONG. RESEARCH SERV., ARMY DRAWDOWN AND RESTRUCTURING: BACKGROUND AND ISSUES FOR CONGRESS 14 (Oct. 25, 2013), available at <https://www.fas.org/sgp/crs/natsec/R42493.pdf>. As of September 2012, the strength of the active Army was 546,057 soldiers. 2012 DEMOGRAPHICS, *supra* note 17, at 15.

77. See *supra* notes 9–26 and accompanying text.

78. See, e.g., Diane Foster, Stephen Davies & Howard Steele, *The*

require renewed examination. Past discussion has focused on paternal absence.<sup>79</sup> The number of women,<sup>80</sup> single parents,<sup>81</sup> and dual-military couples with children<sup>82</sup> has raised more issues concerning separation of children from parents than ever before.

Such issues came to the fore particularly with the First Gulf War in the context of legislative proposals and hearings discussed earlier.<sup>83</sup> The most dramatic witness testifying in favor of limiting the military's power to leave children without either parent was Dr. Bryant Welch, who was then Executive Director, Practice Directorate of the American Psychological Association. Dr. Welch testified that prolonged separation from both parents during a time of war "is a very significant psychological hazard."<sup>84</sup>

Dr. Welch emphasized children's predisposition at birth to create attachment relationships, usually with parents.<sup>85</sup> According to Dr. Welch, "a warm, sensitive, continuous relationship with at least one attachment figure lays the groundwork for most future psychological development."<sup>86</sup> Dr.

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*Evacuation of British Children during World War II: A preliminary investigation into long-term psychological effects*, 7 AGING & MENTAL HEALTH 398, 402 (2003) [hereinafter *Evacuation of British Children during World War II*] (finding that 43.2% of children evacuated in wartime Britain believed that their lives changed for the worse after evacuation).

79. See, e.g., Thomas M. Grant, *Impact of Father Absence on Psychopathology* (Jun. 2, 1989) (unpublished Ph.D. dissertation, United States International University), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a208606.pdf> (containing an extensive review of the literature).

80. In 2012, females made up 14.6% of members of the active military. 2012 DEMOGRAPHICS, *supra* note 17, at 19, and 18.2% of members of the reserves. *Id.* at 65.

81. In 2012, there were 72,471 single parents in the active military. *Id.* at 130.

82. In 2012, there were 50,766 active duty and reserve service members in dual military marriages with children. *Id.* at 112.

83. See *supra* notes 9–15 and accompanying text.

84. 1991 Hearings, *supra* note 14, at 133. In his testimony, Dr. Welch invoked the work of Anna Freud, who studied the effects of evacuation of British children to the country from areas bombed by the Nazis during World War II. ANNA FREUD & DOROTHY BURLINGHAM, *WAR AND CHILDREN* (1943) [hereinafter *WAR AND CHILDREN*]. Dr. Freud contended that those children evacuated from the bombing, but away from the care of their parents, were more upset than those who remained to face the hazards of the bombing. *Id.* at 37.

85. 1991 Hearings, *supra* note 14, at 133.

86. 1991 Hearings, *supra* note 14, at 134.

Welch described both short-term and long-term effects of disruption of this bond by the removal from the child of attachment figures.<sup>87</sup> in the short term, children experience an increase in anxiety,<sup>88</sup> while in the long term, children may experience difficulties “in areas of intuitive self-esteem, moral development and social skills.”<sup>89</sup>

Dr. Welch also discussed the effects of parental absence on children of different ages. Noting that while children aged six years old and over can deal with separations from parents of days or weeks, he stated that such separations disrupted attachment relationships for children aged one to three.<sup>90</sup> Dr. Welch concluded that “the younger the child, the more disruptive a separation of equal length will be.”<sup>91</sup> It must be noted that Dr. Welch stated that a person other than a parent may function like a parent for this purpose,<sup>92</sup> and that there may be dramatic individual differences between children in their responses to separation from parents.<sup>93</sup>

Dr. Welch’s discussion of the attachment relationships of military children with their parents evokes the scholarship of Dr. John Bowlby. Dr. Bowlby, a British psychiatrist and psychologist, developed theories which partly originated in his studies of British children separated from their parents because of German bombing during World War II.<sup>94</sup> Between

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87. Although Dr. Welch’s testimony is nearly a quarter century old, and is largely based on research that had its beginnings in wartime Britain, the importance of attachment formation was acknowledged in a recent report of the Department of Defense. See REPORT ON THE IMPACT OF DEPLOYMENT, *supra* note 59, at 19–20.

88. 1991 Hearings, *supra* note 14, at 134.

89. *Id.*

90. *Id.* at 134–35. REPORT OF THE IMPACT OF DEPLOYMENT, *supra* note 59, makes a similar distinction: “The earlier literature on military deployment-related family separation indicated that young children are more vulnerable to the effects of family separation due to deployment than older children. . . . Recent studies supported these findings from previous studies.”

91. 1991 Hearings, *supra* note 14, at 135.

92. *Id.*

93. *Id.* at 136. For example one study stated that boys and younger children appear to be at greater risk for such harm. Stephen J. Cozza, Ryo S. Chen & James A. Pols, *Military Families and Children During Operation Iraqi Freedom*, 76 PSYCHIATRIC QUARTERLY 371, 373 (2005). Another study suggests that girls are more likely to report depressive symptoms in the face of maternal separation. Penny F. Pierce, Amiram D. Vinokur & Catherine L. Buck, *Effects of War-Induced Maternal Separation on Children’s Adjustment During the Gulf War and Two Years Later*, 28 J. OF APPLIED SOC. PSYCHOL. 1286, 1287 (1998).

94. JEAN MERCER, UNDERSTANDING ATTACHMENT: PARENTING, CHILD CARE

his early observations and his death in 1993, he articulated attachment theory as a developmental explanation of human behavior.<sup>95</sup>

From infancy, children exhibit attachment behavior which Bowlby describes as “various forms of behavior that a child commonly engages in to attain or maintain a desired proximity [to the attachment figure].”<sup>96</sup> The quality of attachment behavior is a function of the child’s relationship with the attachment figure: “[h]uman infants . . . like infants of other species, are preprogrammed to develop in a socially cooperative way; whether they do so or not turns in high degree on how they are treated.”<sup>97</sup>

Most of Bowlby’s work focused on behavior observed in interaction, or lack thereof, between infants and their mothers.<sup>98</sup> But in assessing the consequences of attachment figure proximity to young children, or lack thereof, Bowlby focused on the conduct of both parents,<sup>99</sup> and others in certain instances.<sup>100</sup> The infant’s need for reassurance of the attachment figure’s availability takes different manifestations,<sup>101</sup> and eventually diminishes in urgency.<sup>102</sup> But despite decreasing intensity, Bowlby posits, the infant-attachment figure interplay has lasting effects on the child’s

AND EMOTIONAL DEVELOPMENT 31 (2006).

95. Bowlby’s theories were developed in several books, including 1 JOHN BOWLBY, ATTACHMENT AND LOSS (2d ed. 1982) [hereinafter ATTACHMENT]; 2 JOHN BOWLBY, ATTACHMENT AND LOSS (2d ed. 1980) [hereinafter SEPARATION: ANXIETY AND ANGER]; 3 JOHN BOWLBY, ATTACHMENT AND LOSS (2d ed. 1980) [hereinafter LOSS]; and JOHN BOWLBY, A SECURE BASE (1988) [hereinafter A SECURE BASE].

96. ATTACHMENT, *supra* note 95, at 371.

97. A SECURE BASE, *supra* note 95, at 9.

98. This has led to the accusation that Bowlby and his disciples’ work “rests on a set of essentialist, biologically determinist, and fundamentally gendered assumptions” that operate effectively to “keep women in their place.” Sharon Hays, *Fallacious Assumptions and Unrealistic Presumptions of Attachment Theory*, 60 J. MARRIAGE & FAMILY 782, 783–84 (1998). But Bowlby has been defended on the basis that he employed the term mother as one who mothers a child rather than to the biological mother. Sonia G. Austrian & Toni Mendelbaum, *Attachment Theory*, in DEVELOPMENTAL THEORIES THROUGH THE LIFE CYCLE 366 (Sonia G. Amsterdam ed. 2008).

99. A SECURE BASE, *supra* note 95, at 136.

100. He noted, for example, that good foster care may have mitigating effects when parents are not available. LOSS, *supra* note 95, at 438.

101. At eight months an infant seeks to elicit the parent’s attention and is not content until she obtains it. ATTACHMENT, *supra* note 95, at 247.

102. This occurs by the age of three. *Id.* at 261.

behavior.<sup>103</sup>

The success or failure of this relationship affects children in many ways, according to attachment theory.<sup>104</sup> For example, a child secure in her relationship with her parents at this stage is likely to be more confident and competent.<sup>105</sup> Further, the capacity to make bonds with parents is important to a child's mental health.<sup>106</sup>

Bowlby's attachment theory of development is not without critics.<sup>107</sup> As some argue, mental well-being is influenced by post-infancy experiences.<sup>108</sup> Nevertheless, it is difficult to dispute an essential tenet of his thesis, which is that "attachment of a child to parents is the primary relationship through which we learn to become social beings."<sup>109</sup>

At the outset of his career Bowlby noted that war and military service disrupts the relationship between parents and children.<sup>110</sup> As noted earlier, this disruption is inevitable in an all-volunteer military force, but current parental military obligations may potentially deprive children of the care and proximity of *any* parent.

So what effect does depriving young children of their attachment figures during a critical time have on such

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103. *Id.* at 207.

104. *Id.* See also Julia K. Vormbrock, *Attachment Theory as Applied to Wartime and Job-Related Marital Separation*, 114 PSYCHOL. BULL. 122, 127 (1993):

[A]ny separation from an attachment figure brings with it the threat of losing the person and of being unprotected for the moment and perhaps abandoned in the long run. This threat exists especially for young children, who do not react to mere verbal assurances that there is no reason for alarm.

105. A SECURE BASE, *supra* note 95, at 10.

106. *Id.* at 121.

107. For example, see Everett Waters, Nancy S. Weinfeld & Claire E. Hamilton, *The Stability of Attachment Security from Infancy to Adolescence and Early Adulthood: General Discussion*, 71 CHILD DEV. 703, 704 (2000), suggesting that Bowlby may have overstated the risks of separation from parents, but also that gross failures of early care may have long-term effects on social development.

108. See Everett Waters, Susan Merrick, Dominique Treboux, Judith Crowell & Leah Albersheim, *Attachment Security in Infancy and Early Adulthood*, 71 CHILD DEV. 684, 686 (2000).

109. Peter Marris, *Attachment and Social Policy*, in ATTACHMENT AND HUMAN SURVIVAL 74 (Marci Green, Marc Scholes eds., 2011).

110. Evacuation of British Children During World War II, *supra* note 78, at 399.

children? The American Psychological Association's report on this question makes evident the paucity of research on the effects of military deployments on the mental health and well-being of children of military families.<sup>111</sup> A study published in the journal of the American Academy of Pediatrics noted that, overall, the study's sample of children with deployed parents experienced greater emotional and behavioral difficulties than their civilian counterparts.<sup>112</sup> This is consistent with studies of military children's experiences during the Bosnian and first Gulf War conflicts, which involved volunteer armed forces composed increasingly of female and married personnel,<sup>113</sup> and children affected by parental deployments in Iraq and Afghanistan.<sup>114</sup> Emotional

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111. AM. PSYCHOL. ASS'N, THE PSYCHOLOGICAL NEEDS OF U.S. MILITARY MEMBERS AND THEIR FAMILIES: A PRELIMINARY REPORT 5 (2007). The APA is not alone in contending that research on the effects of deployment on young children is inadequate. See Jay D. Oshofsky & Molinda M. Chartrand, *Military Children from Birth to Five Years*, 23 THE FUTURE OF CHILDREN 61, 72 (2013); Anita Chandra, Rachel M. Burns, Terri Tanielian, Lisa H. Jaycox & Molly M. Scott, *Understanding the Impact of Deployment on Children and Families* 6 (Rand Center for Military Health Policy Research, Working Paper No. WR-566, 2008). A recent study viewed the need for such research as an obligation to the members of the armed force:

As a nation of individuals, families, communities, and systems of care, we share a responsibility to support military children and families by investing in research, services, and policies that honor their service and sacrifice. The best way to show our national gratitude is to respond effectively to their needs. Clinicians, researchers, and community members must work together to understand the challenges that military-connected children face, and to tackle the long-term implications for public health.

Patricia Lester & Eric Flake, *How Wartime Military Service Affects Children and Families*, 23 THE FUTURE OF CHILDREN 121, 134 (2013).

112. Anita Chandra, Sandaluz Lara-Cinisomo, Lisa H. Jaycox, Terri Tanielian, Rachel M. Burns, Teague Ruder & Bing Han, *Children on the Homefront: The Experience of Military Families*, 125 PEDIATRICS 13, 24 (2009).

113. For example, see Francie Smith, *Behind the Lines: Lives of Loss*, 4 J. FOR A JUST AND CARING EDUC. 253, 267 (1998) (describing separation anxiety and poor school performance of children when both parents were deployed to Bosnia); see also Peter Jensen, David Martin & Henry Watanabe, *Children's Response to Parental Separation During Operation Desert Storm*, 35 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 433, 436 (1996) (modestly higher levels of child depression in deployed families).

114. See, e.g., Rozlyn Engel, Luke Gallagher & David S. Lyle (working draft as of Dec. 20, 2006), available at [http://aeaweb.org/annual\\_mtg\\_papers/2007/0105\\_1430\\_1602.pdf](http://aeaweb.org/annual_mtg_papers/2007/0105_1430_1602.pdf) (last visited Jan. 14, 2014) (children of deployed parents suffer a small but persistent academic penalty when their parents deploy).



disruption of children is greater when both parents are deployed.<sup>115</sup>

Although disputed to some degree, these conclusions have influenced military policy. Not all experts agree that separation entailed in deployment causes lasting harm to children.<sup>116</sup> And some who defend the current discretion that the military enjoys in such matters suggest that children left behind and their parents are somehow compensated by the parents' job security and other economic benefits available in the armed services.<sup>117</sup> Nevertheless, the military's current ban on enlistment by single parents who have sole custody of minor children<sup>118</sup> appears, at least in part, an implicit acknowledgement that separating parents from their children on account of military operations is not good for children.

Contemporaneously with the First Gulf War's unprecedented scale of deployed female parents, a presidential commission charged with evaluating assignment of women in the armed services noted public dissatisfaction with such deployment's effects: "[D]uring and after U.S. intervention in the Gulf War, the American public and military community expressed extreme disapproval of the deployment of single mothers/fathers due to possible effects on children left behind."<sup>119</sup>

The commission's recommendations clearly intended to prevent complete deployment-related separation of parents from their children.<sup>120</sup> Similarly, the 2004 Report of the

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115. Peter S. Jensen & John A. Shaw, *The Effects of War and Parental Deployment Upon Children and Adolescents*, in *EMOTIONAL AFTERMATH OF THE PERSIAN GULF WAR 90-91* (Robert J. Ursano & Ann E. Norwood, eds., 1996).

116. See B. Wayne Blount & Amos Curry, Jr., *Family Separations in the Military*, 157 MIL. MED. 76, 77 (1992). See also 1991 Hearings, *supra* note 14, at 129 (statement of John M. Plewes, M.D., Acting Consultant in Psychiatry, Office of the Surgeon General of the Army).

117. George L. Bowen, Dennis K. Orthner & Laura L. Zimmerman, *Family Adaptation of Single Parents in the United States Army: An Empirical Analysis in Work Stressors and Adaptive Resources*, 42 FAM. REL. 293 (1993).

118. See *supra* note 56 and accompanying text.

119. PRESIDENTIAL COMM'N ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, *WOMEN IN COMBAT: A REPORT TO THE PRESIDENT* 15 (1992).

120. The commission's recommendations included the following:

DoD should adopt a waivable policy that single parents with custodial care of children up to two years of age must be assigned to a nondeployable position, if available, or be discharged from the Service with the opportunity to re-enter the Service without loss of rank or position. For those single parents who have children older than two

Defense Department Advisory Committee on Women in the Services (DACOWITS) also recommended that “the Services should be encouraged not to deploy both parents of minor children simultaneously” and that single custodial parents and one member of dual military couples, “with the approval of their commander [should be exempt] from stop loss restrictions if their family situation is incompatible with continued military service.”<sup>121</sup> This represented a turnaround from the position taken by DACOWITS’s chair in the 1991 congressional hearings concerning parent issues related to Desert Storm.<sup>122</sup>

The military has devoted resources and programs to protect the well-being of military children.<sup>123</sup> But such resources are not as available to the families of reservists, many of whose families do not live on or near military installations.<sup>124</sup> The National Guard and Reserves have recently represented 40% of activated military personnel.<sup>125</sup>

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years and those parents who have been out for two years, they must have an approved and reliable child care package to re-enter the Service. In dual-service families, only one parent should be allowed to serve in a deployable position. Single parents with custody of children under school age should not be allowed to deploy. Single parents should not be permitted to join the Armed Forces (current situation). Spouses of military parents should not be allowed to enter the Service. One parent in a dual-service couple should be forced to separate from the Service.

*Id.*

121. DEFENSE DEP. ADVISORY COMM. ON WOMEN IN THE SERS., ANNUAL REPORT 76 (2004). Stop loss restrictions permit the services to prevent retirement or separation from the service prior to deployment. See Jeff Schogol, *Gates wants military to minimize stop loss programs*, STARS AND STRIPES, Jan. 27, 2007, available at <http://Stripes.com/news/gates-wants-military-to-minimize-stop-loss-program-1.59569>.

122. 1991 Hearings, *supra* note 14, at 94 (statement of Becky Constantino). Ms. Constantino opined that a legislatively-created exemption from deployment for parents “would prevent each service member’s opportunity to be a dedicated, full and equal partner in defense.” *Id.*

123. See generally Latosha Floyd & Deborah A. Phillips, *Child Care and Other Support Programs*, 23 THE FUTURE OF CHILDREN 79 (2013).

124. See Ruth M. Lemmon & Elisabeth M. Stafford, *Recognizing and Responding to Child and Adolescent Stress: The Critical Role of the Pediatrician*, 36 PEDIATRIC ANNALS 225 (2007). See also Eric M. Flake, Beth Ellen Davis, Patti L. Johnson & Laura S. Middleton, *The Psychosocial Effects of Deployment on Military Children*, 30 J. OF DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS 271, 276 (2009).

125. Melinda M. Chartrand & Benjamin Siegel, *At War in Iraq: Children in U.S. Military Families*, 7 AMBULATORY PEDIATRICS 1 (2007).

Whatever the state of knowledge about the behavioral consequences of depriving preschool children of their parents' care and attention, it is nearly impossible to contend, as a matter of good sense, that it is *ever* a good thing. As previously discussed in Part I, Congress has resisted creating a parental right to defer deployment while caring for children. Congress has not done so lightly, and the importance of the military's mission generally requires great deference. But the importance of that mission also requires great consideration for the soldiers, sailors, and airmen who carry it out. No persons, other than those who have been incarcerated, or who, because of egregious misconduct have been deprived of visitation rights, may be compelled to deprive their children of parental care and attention. As the all-volunteer military has become reliant upon longer-term commitments, the notion that service members "sign on" for potential deployment in exchange for college tuition, early retirement and cheap groceries at the PX, is outmoded. So too, is the notion that providing proper attention for very young children is abandoning one's duty.<sup>126</sup> Parents with young children are not as much a novelty as they were at the time of Desert Storm. The military services should be required to take a new look at adapting to the needs of such parents and their youngest children. The cost of not doing so during wartime was articulated long ago by Anna Freud,<sup>127</sup> and Congress has

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126. This sentiment was encapsulated in questioning by Rep. G.V. Montgomery concerning Rep. Boxer's proposed legislation in 1991:

In your legislation [Rep. Boxer] you can come to the national training center out at Fort Irwin [as a reservist], but when you have been in for 3 months, then, all of a sudden you decide that you want to get out; you don't want to go to the Middle East. The problem I see with that is, the service has trained this individual as a tank commander, the service really needs him, but under your bill he could get out. It wouldn't necessarily be a female here in this situation but a single parent, and he or she could get out. It would seem to me that you are letting out a qualified person who has had the training. In effect, that would weaken our defense, and I am concerned about that.

1991 Hearings, *supra* note 14, at 31.

127. In assessing harm done to children separated from their parents in wartime Britain, she stated:

It has already been generally recognized, and provision has been made accordingly, that the lack of essential foods, vitamins, etc., in early childhood will cause lasting bodily malformation in later years, even if harmful consequences are not immediately apparent. It is not generally recognized that the same is true for mental development of

failed to address this cost for too long.

The next section of this Article presents a proposal that prevents separation of preschool children from both parents of dual-military couples or from single parents. This proposal is intended to reconcile the military's needs with the psychological needs of military children.

#### IV. A PROPOSAL FOR CHANGE

Presently, the military services have sole discretion to deploy both parents of a dual-military couple or single parents of preschool children. This system should be replaced by legislation allowing single parents, or one parent of a dual-military couple, with a child under five years old at the time of proposed deployment to defer deployment until after their children reach the age of five.<sup>128</sup>

Why draw the line at five? As studies noted above<sup>129</sup> the state of knowledge in this area is rudimentary. In his dramatic testimony in 1991 hearings, Dr. Bryant Welch suggested that children aged six and over can deal with longer separations from parents.<sup>130</sup> With free education offered to children at age five in most states, there is bound to be more time away from parents during the day at that age.<sup>131</sup> Age five is proposed as compromise of the important interests

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the child. Whenever certain essential needs are not fulfilled, lasting psychological malformations will be the consequence. These essential elements are: the need for personal attachment, for emotional stability, and for permanency of educational influence.

WAR AND CHILDREN, *supra* note 84, at 11.

128. This proposal is adapted from one proposed by Major Merideth A. Bucher in an academic research report. MAJOR MERIDETH A. BUCHER, AIR COMMAND AND STAFF COLLEGE, AIR UNIVERSITY, THE IMPACT OF PREGNANCY ON U.S. ARMY READINESS 18–19 (1999), *available at* <http://www.au.af.mil/au/awc/awcgate/acsc/99-016.pdf> (when visited Jan. 16, 2014 site was temporarily unavailable; copy on file with author). Major Bucher's proposal provided for leave for pregnant service personnel. *Id.* The proposal herein would apply to parents of both sexes and the length of deferment of deployment would be related to the age of young children rather than the pregnancy's duration and outcome.

129. For example, the 2007 report of the American Psychological Association and other studies noted in note 111.

130. 1991 Hearings, *supra* note 14, at 134–35.

131. Compulsory school attendance laws, minimum and maximum age limits for required free education, by state: 2013, National Center for Educational Statistics. *See* [http://nces.ed.gov/programs/statereform/tab5\\_1.asp](http://nces.ed.gov/programs/statereform/tab5_1.asp) (last visited Oct. 6, 2014).

of both children and the military, not as a line firmly supported by behavioral science.

The military would be permitted to select which parent of a dual-military couple would be deployed. Dual-military parents not selected for deployment and single parents who elect not to be deployed on the basis of having a child under the age of five would be permitted to separate from the service, transfer to reserve status,<sup>132</sup> or complete military duty in a region that would not require separation from his or her child until the child attained the age of five. If a parent chose not to serve, parental leave would not count for purposes of pay, retirement, or time in grade or service. If the non-deploying parent did not separate from the service he or she could make an enlistment agreement that would commence upon the child reaching five years old or the end of the need to deploy the parent. Upon his or her return to service, the non-deploying service member's service obligation and career would resume its status from when parental leave began.

The first advantage of effecting this change through legislation is giving Congress an opportunity to make an informed and disinterested assessment of the best interests of preschool children of military personnel. Adopting this proposal would not amount to a perfect solution for the military or for all children. The nature of the military's mission inevitably entails disruption of the family lives of service members. Such disruption is probably *never* a good thing for *any* family members, and it is most unlikely that the state of psychological knowledge, remarkably rudimentary today,<sup>133</sup> will ever reach consensus on the precise age range in which separation of a child from parental care causes the most harm. By providing for the deferral of deployment only for parents of preschoolers, the proposal herein focuses only on what seems to have been the most disconcerting disruptions of the bond between parents and children when the country has confronted the need for massive foreign deployment in the era of the all-volunteer force.

Secondly, even though the drawdown of United States

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132. For instance, to the Standby Reserve. See RESERVE COMPONENTS TO THE ARMED FORCES, *supra* note 74, at 17.

133. See *supra* note 111.

forces in Afghanistan<sup>134</sup> may perhaps lessen the military's burden to fulfill its global responsibilities, such a respite may not be eternal.<sup>135</sup> Filling the gaps left by parents exempted from deployment under this proposal may at some point require a larger military. Congress' taking ownership of the psychological well-being of very young children would entail acknowledgement of personnel costs and explicit assumption of responsibility for such costs.<sup>136</sup> Congress, of course, has twice failed to interfere with the military's judgment in this way. But the effects of deployment on children undermine the morale of some service members, particularly women.<sup>137</sup> In light of the dangers of serving in the military in the last two and a half decades, perhaps Congress may see the need to defer to a greater degree to the personal interests of the members of the military and their youngest children.

#### CONCLUSION

The American people expect a great deal from their service members. Their political representatives have a corresponding responsibility to protect the well-being of military families, especially the most vulnerable members of such families. Both of the large mobilizations occurring after the military became an all-volunteer force brought attention to the vulnerability of very young children but both times, in the heat of battle, Congress declined to limit separation of

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134. Jake Tapper, Obama announces 34,000 troops to come home, CNN.COM (Feb. 13, 2013), <http://www.cnn.com/2013/02/12/politics/obama-sotu-afghanistan-troops/>.

135. This is underscored by the suggestion by Speaker of the House of Representatives John Boehner in September of 2014 that perhaps American "boots" might be needed to combat the Islamic State. See Jaime Fuller, *John Boehner on combating the Islamic State: 'Somebody's boots have to be there,'* WASH. POST, Sept. 28, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/28/john-boehner-on-combating-the-islamic-state-somebodys-boots-have-to-be-there/>.

136. Some in Congress have acknowledged the importance of doing so, as stated by Rep. Joe Wilson of South Carolina:

I would like to know how . . . we can help these incredible children who so often have to be strong beyond their years, while their military parent is away. We owe it to this nation to ensure this generation of military children is able to transition to adulthood with the skills and emotional strength to successfully lead us in the future.

2010 Hearing, *supra* note 14, at 2.

137. Penny F. Pierce, *Retention of Air Force Women Serving During Desert Shield and Desert Storm*, 10 MIL. PSYCHOL. 195, 210 (1998).

such children from their deployed parents. But the failure to consider the potential harm to very young children of service members imposes a cost on such children that the children cannot, and their parents *should not*, have to bear. When it comes to the well-being of the children of its service members, the nation must err on the side of caution. Congress must impose a requirement that makes paramount the best interests of the most vulnerable military children by limiting the military's ability to deploy service members in a manner that may cause lasting psychological injury to such children. And if such limitation would involve additional costs, they are costs that should be shared by *all* Americans, and not disproportionately imposed upon the military families themselves.