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Operation Rewarding Sacrifice: A Proposal to Amend the Definition of “Veteran” in Title 5 to Fully Effectuate the Purposes of Veterans’ Preference

Brian Torresi*

*Veterans’ preference is but a partial recognition of the great debt of gratitude that the country owes to those who have served in the Armed Forces.*¹

-President Ronald Reagan

I. Introduction

The armed forces of the United States consist of approximately 1,398,833 total active duty servicemen and servicewomen.² Since October 31, 1992, the total active duty force size of the military has decreased by almost 400,000 troops.³ As a result of the decrease in military strength, National Guard and Reserve members have been called to active duty at increased rates in support of current worldwide operations.⁴

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1. Proclamation No. 5217, 49 Fed. Reg. 27,919 (July 5, 1984) (declaring June 1984 Veterans’ Preference Month); *see also* S.J. Res. 297, 98th Cong., 98 Stat. 281 (1984).

2. Department of Defense, *Active Duty Military Personnel by Rank/Grade* (Mar. 31, 2005), <http://web1.whs.osd.mil/mmid/military/rg0503.pdf> (last visited July 27, 2005).

3. Department of Defense, *Total Active Duty Military Personnel by Service, Fiscal Year 1993*, <http://www.dior.whs.mil/mmid/m01/sms21r93.htm> (last visited July 27, 2005).

4. David Moniz, *Guard, Reserves to be 37% of U.S. Force in Iraq in ‘04; It’s Largest Combat Mission for Part-time Troops in 30 Years*, USA TODAY, Nov. 7, 2003, at 1, 2003 WLNR 6079632. As of May 11, 2005, the Army National Guard and Army

Rewarding the sacrifices of veterans under the concept of “service earned through service” has been a fundamental principle throughout the history of the United States.⁵ Providing veterans with preferential treatment for government jobs as a reward for such sacrifice and service dates back to the Revolutionary War period.⁶ This preferential treatment, otherwise known as veterans’ preference, has changed throughout the years, with the last major piece of federal legislation concerning veterans’ preference being the Veterans’ Preference Act of 1944 (“the Veterans’ Preference Act”).⁷ The structure of our armed forces and the way war is fought and will be fought in the twenty-first century has changed significantly over the years and will likely continue to change. In light of these changes, and in order to effectuate the traditional and historic purposes of veterans’ preference laws generally, the current law must be amended.

The purpose of this Comment is to provide an overview of the preference that veterans receive in regard to civil service employment with the federal government and to propose changes to current veterans’ preference law. Specifically, this Comment will propose that the federal government should change the definition of “veteran” in Title 5 of the United States Code⁸ to Pennsylvania’s recently amended definition of “soldier” in the Pennsylvania Military and Veterans Code.⁹ Adopting Pennsylvania’s definition of “soldier” would further the traditional and historic purposes of veterans’ preference laws in light of modern worldwide military operations.

Part II of this Comment discusses the history of veterans’ preference

Reserve have mobilized 149,581 troops, the Navy Reserve has mobilized 3,653 troops, the Air National Guard and Air Force Reserve have mobilized 9,361 troops, the Marine Corps Reserve has mobilized 11,299 troops, and the Coast Guard Reserve has mobilized 581 troops. Department of Defense, *National Guard and Reserve Units Called to Active Duty* (May 11, 2005), <http://www.defenselink.mil/news/May2005/d20050511ngr.pdf> (last visited July 27, 2005).

5. Office of Facilities Management, *A Brief History of the VA*, http://www.va.gov/facmgt/historic/Brief_VA_History.asp (last visited July 27, 2005) [hereinafter *VA History*]. Providing assistance to veterans can be traced back to 1636 when the Pilgrims of Plymouth Colony were at war with the Pequot Indians. The Pilgrims felt that the entire colony should be responsible for supporting soldiers who became disabled from the conflict. *Id.* A 1736 colonial law read, “If any man shall be sent forth as a soldier and shall return maimed, he shall be maintained competently by the colony during his life.” *Id.*

6. See generally Office of Personnel Management, *VetGuide* (Apr. 2003), <http://www.opm.gov/veterans/ref.asp> (last visited July 27, 2005) [hereinafter *VetGuide*].

7. Veterans’ Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified as amended in scattered sections of 5 U.S.C.) [hereinafter *Veterans’ Preference Act*].

8. 5 U.S.C. § 2108(1) (2000).

9. 2004 Pa. Laws 195 [hereinafter *Act 195*]; 51 PA. CONS. STAT. ANN. § 7101 (West 1976).

for civil service employment with the federal government. Part III discusses the current definition of “veteran” in Title 5 and explains how this definition is an obstacle to the full effectuation of the purposes of veterans’ preference. Part IV compares the preference afforded to veterans by the federal government with the preference provided by Pennsylvania and explains why Pennsylvania’s definition of “soldier” is the proper means to the end of rewarding former members of the armed forces for their sacrifices. Finally, Part V concludes by proposing that in order to fully effectuate the historic purposes of veterans’ preference, the preference must be provided to all veterans, regardless of whether they served in wartime or peacetime.

II. Background

A. *The History of Veterans’ Preference*

Although not codified or enacted, preference for veterans in civil service employment with the federal government dates back to the Revolutionary War.¹⁰ The first legislation that provided preference for veterans was enacted in 1865 and provided that honorably discharged veterans who were discharged as the result of a disability incurred in the line of duty (“service-connected disability”) were given preference for appointments to civil offices.¹¹ The legislation required that the veteran possess the minimum qualifications necessary to perform the duties of the employment position.¹² Although this legislation provided preference for civil service positions only to veterans who had a service-connected disability, the legislation “respectfully recommended” to bankers, merchants, manufacturers, mechanics, farmers, and other business owners to prefer veterans for employment positions “in grateful recognition of the[ir] services, sacrifices, and sufferings. . . .”¹³

Veterans’ preference laws underwent considerable changes from this first legislation until the Veterans’ Preference Act. For example, an 1876 statute applied veterans’ preference to reductions in force by requiring the heads of executive departments to retain honorably discharged veterans over other employees when making such

10. *VetGuide*, *supra* note 6, at 58 (stating that, although used primarily for former commissioned officers, appointments to federal jobs as a reward for serving in the military became a popular practice during the days of the spoils system).

11. A Resolution to Encourage the Employment of Disabled and Discharged Soldiers, Res. 27, 38th Cong., 13 Stat. 571 (1865).

12. *Id.* Specifically, the statute stated that the veteran must “possess the business capacity necessary for the proper discharge of the duties of such offices.” *Id.*

13. *Id.* § 2.

reductions.¹⁴ This mandatory retention also applied to the widows and orphans of deceased veterans.¹⁵

Shortly thereafter, veterans were given preference in reinstatements in addition to the appointment and retention preference.¹⁶ This preference allowed honorably discharged veterans, who were also former civil service workers, to be reinstated to civil service positions without having to wait a certain amount of time.¹⁷ This preference also applied to the widows and orphans of deceased veterans.¹⁸

In 1919, the appointment preference was amended to provide preference for positions within the executive department and independent governmental establishments for honorably discharged soldiers, sailors, marines, and their widows who were qualified to hold the position for which they were applying.¹⁹ That same year, the preference was extended to include the wives of disabled veterans under the condition that the wives themselves be qualified for the position.²⁰

The 1919 appointment legislation was significant for a few reasons. Most importantly, unlike prior legislation concerning appointments, this legislation made no reference to whether a veteran's service had to be during a time of war.²¹ This legislation was also the first to make no distinction between disabled and non-disabled veterans and was the first legislation that gave an appointment preference to spouses of veterans.²²

In addition to being afforded preference in appointments, all veterans were given additional points on their civil service examination scores.²³ Disabled veterans were given additional points on their examinations and an "absolute preference" after the examinations were scored.²⁴

14. 19 Stat. 143, 169 (1876).

15. *Id.*

16. *VetGuide*, *supra* note 6, at 59.

17. *Id.*

18. *Id.* (stating that the reinstatement preference was extended to the widows and orphans of veterans in 1892).

19. 40 Stat. 1291, 1293 (1919).

20. *VetGuide*, *supra* note 6, at 59-60.

21. Compare 40 Stat. 1291, 1293, with 13 Stat. 571.

22. *VetGuide*, *supra* note 6, at 60. The original 1865 appointment legislation gave preference to "persons honorably discharged . . . by reason of disability . . . incurred in the line of duty." 13 Stat. 571. The subsequent legislations that afforded preference in reductions in force and reinstatements made no distinction between disabled and non-disabled veterans. See *supra* notes 14-18 and accompanying text.

23. *VetGuide*, *supra* note 6, at 60 (stating that ten points were added to the examination scores of disabled veterans and five points were added to the examination scores of non-disabled veterans).

24. *Id.* at 59-60 (stating that "absolute preference" meant that disabled veterans could pass civil service examinations with a score of sixty-five instead of needing a score of seventy, which non-veterans needed to score in order to pass and that these veterans

B. *The Veterans' Preference Act of 1944*

The Veterans' Preference Act, which consolidated the previous and then existing veterans' preference laws, was intended to strengthen and give legislative sanction to such laws.²⁵ The Veterans' Preference Act provided preference for four categories of veterans and their family members ("preference eligibles"). The first category of preference eligibles consisted of honorably discharged veterans who served on active duty in any branch of the armed forces and who either had a service-connected disability or who were receiving compensation, pension, or disability retirement benefits from the Veterans Administration, War Department, or Navy Department.²⁶ The second category of preference eligibles consisted of the wives of veterans who had a service-connected disability, but only if the disabled veteran could not himself qualify for the civil service position.²⁷

The third category of preference eligibles consisted of the unmarried widows of honorably discharged deceased veterans if the veteran served on active duty in any branch of the armed forces during any war or in any campaign or expedition for which a campaign medal was authorized.²⁸ The final category of preference eligibles consisted of honorably discharged veterans who served on active duty in any branch of the armed forces during any war or in any campaign or expedition for which a campaign medal was authorized.²⁹

Preference for the categories of persons enumerated in the Veterans' Preference Act was to be applied in appointments, reinstatements, reemployments, and retentions.³⁰ The preferences applied to all positions in the federal government, regardless of whether the position was temporary or permanent or whether the position was a classified or

would be placed at the top of employment lists).

25. *Brannan v. Elder*, 341 U.S. 277, 284 (1951); Proclamation No. 5217, 49 Fed. Reg. 27,919 (July 5, 1984) (stating that the Veterans Preference Act "brought together, for the first time, laws, Executive orders, and regulations extending back to the Civil War which granted preference in Federal employment to veterans").

26. *Veterans' Preference Act*, *supra* note 7, § 2. The Veterans Administration, now known as the United States Department of Veterans Affairs, is one of the largest federal agencies, second only to the Department of Defense. *VA History*, *supra* note 5. The department was created in 1930 to coordinate governmental activities that affect war veterans and was made a cabinet level department in 1988. *Id.*; Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988). When speaking of the newly created cabinet level department, President George H. Bush exclaimed, "There is only one place for the veterans of America . . . at the table with the President of the United States of America." *VA History*, *supra* note 5.

27. *Veterans' Preference Act*, *supra* note 7, § 2.

28. *Id.*

29. *Id.*

30. *Id.*

unclassified civil service position.³¹

The Veterans' Preference Act incorporated and extended the practice of adding points to civil service examination scores by providing persons in the first three categories with an additional ten points and the persons in category four with an additional five points.³² Also incorporated within the Veterans' Preference Act was the absolute preference that placed preference eligibles who received a ten point score augmentation on the top of employment lists.³³ Preference eligibles who received an additional five points were to be placed ahead of all other applicants with similar scores on examinations.³⁴

Besides incorporating the addition of points to examination scores and the higher placement on employment lists, the Veterans' Preference Act added benefits that had not previously been afforded.³⁵ Agencies were now required to appoint one of the top three applicants on an employment list ("the Rule of Three").³⁶ If a preference eligible veteran was one of the top three candidates for a position and the agency decided to pass over that veteran to hire a non-veteran who did not receive preference, the agency had to file a written explanation of the decision with the Civil Service Commission.³⁷ Essentially, this meant that if a veteran was one of the top three candidates on an employment list, the agency was forced to hire that veteran unless it had a sufficient reason not to hire the veteran.³⁸

The Veterans' Preference Act also provided that governmental agencies were required to credit a veterans' time in the military as actual time in employment.³⁹ Military service time was credited if the veterans'

31. *Id.* The Veterans' Preference Act provided that the "positions of guards, elevator operators, messengers, and custodians . . . shall be restricted to persons entitled to preference. . . ." *Id.* § 3.

32. *Veterans' Preference Act*, *supra* note 7, § 3; *see also supra* notes 23-24 and accompanying text.

33. *Veterans' Preference Act*, *supra* note 7, § 7. This "absolute preference" was discontinued when veterans first began receiving additional points in 1923 and subsequently restored in 1929 for veterans who had a service-connected disability. *VetGuide*, *supra* note 6, at 60; *see also supra* note 24 and accompanying text.

34. *Veterans' Preference Act*, *supra* note 7, § 7.

35. *See infra* notes 36-42 and accompanying text.

36. *Veterans' Preference Act*, *supra* note 7, § 8.

37. *Id.* The Civil Service Commission was renamed the Office of Personnel Management in 1978. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.). The Office of Personnel Management was created to implement and oversee an honest, competent, and productive federal workforce free from prohibited personnel actions and consistent with merit principles. *Id.*

38. *Veterans' Preference Act*, *supra* note 7, § 8 (stating that "the Civil Service Commission is directed to determine the sufficiency of such submitted reasons").

39. *Id.* § 4.

employment was interrupted by military service, the position the veteran was applying for was of a similar vocation, and experience was a necessary requirement for the position.⁴⁰ For every other position, all of a veteran's "valuable experience" had to be credited and applied to meet job-related qualifications.⁴¹ In addition, agencies were required to waive age, height, and weight requirements for veteran applicants unless such requirements were essential to perform the functions of the employment position.⁴²

While the Veterans Preference Act was intended to extend and give force to existing veterans' preference laws,⁴³ it actually limited the number of "veterans" who could receive preference. In order to receive preference, a veteran had to have had a service-connected disability, had to have served on active duty during a war, or had to have served in a campaign or expedition for which a campaign medal was authorized.⁴⁴ This shift back to requiring wartime service was in contrast with the 1919 appointment legislation that afforded the preference to all servicemen and servicewomen without regard to whether their service was during wartime or peacetime.⁴⁵

III. Title 5: You're A Veteran, But Are You A "Veteran"?

A. *The Definition of "Veteran" in Title 5*

Current veterans' preference legislation takes the form of numerous scattered sections throughout Title 5 of the United States Code.⁴⁶ To receive preference, a person must be a "preference eligible."⁴⁷ Included

40. *Id.*

41. *Id.* (stating that some examples of "valuable experience" include "experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefore").

42. *Id.* § 5.

43. *Brannan v. Elder*, 341 U.S. 277, 284 (1951); *see also supra* note 25 and accompanying text.

44. *Veterans' Preference Act*, *supra* note 7, § 2; *see also supra* notes 26-29 and accompanying text. The implication of distinguishing between veterans who served during a war and veterans who served during peacetime may not have been evident when the Veterans' Preference Act was enacted because it was enacted towards the end of World War II, thus making every military member at the time of enactment a "veteran" by virtue of serving during a war. *VetGuide*, *supra* note 6, at 41 (stating that the inclusive dates for World War II are from December 7, 1941, to April 28, 1952).

45. *See supra* note 21 and accompanying text.

46. The Veterans' Preference Act, as amended, was originally codified in 5 U.S.C. §§ 851-69, and is now scattered throughout Title 5 as 5 U.S.C. §§ 1302, 2108, 3305, 3308-18, 3320, 3351, 3363, 3501-04, 7512, 7701.

47. 5 U.S.C. § 2108(3) (2000).

within the definition of “preference eligible” are disabled veterans,⁴⁸ certain family members of disabled veterans,⁴⁹ former military members whose service meets the stringent criteria of who is defined as a “veteran,”⁵⁰ and certain family members of those who are considered “veterans.”⁵¹ Any former military member whose service does not fit within either the definition of “veteran” or “disabled veteran” is not eligible for preference.⁵²

Although the veterans’ preference legislation is no longer codified *seriatim*,⁵³ the legislation has maintained most of the benefits afforded by the Veterans’ Preference Act.⁵⁴ Such benefits include preference in the form of additional points being added to passing civil service examination scores,⁵⁵ preference in appointments,⁵⁶ transfers,⁵⁷ promotions,⁵⁸ retentions,⁵⁹ reinstatements,⁶⁰ and higher placement on

48. *Id.* § 2108(3)(C). The term “disabled veteran” is defined as “an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department.”

Id. § 2108(2).

49. *Id.* §§ 2108(3)(E), (G).

50. *Id.* §§ 2108(3)(A)-(B).

51. *Id.* §§ 2108(3)(D), (F).

52. *See, e.g.,* *Perez v. Merit Sys. Prot. Bd.*, 85 F.3d 591, 594 (Fed. Cir. 1996) (holding that former military member whose service did not fall within the ambit of the definition of “veteran” in 5 U.S.C. § 2108(1), is not a “preference eligible” under 5 U.S.C. § 2108(3)).

53. *See supra* note 46 and accompanying text.

54. *See infra* notes 55-61 and accompanying text.

55. 5 U.S.C. § 3309 (2000) (adding ten points to the passing examination score of a preference eligible as defined in sections 2108(3)(C)-(G) and five points to the passing examination score of a preference eligible as defined in sections 2108(3)(A)-(B)).

56. *Id.* §§ 3311-12 (crediting experience interrupted by military service and experience material to the functions of the applied for position and waiving age, height, weight, and other physical requirements for preference eligibles that are not essential for the performance of the duties of the position being appointed or reinstated to).

57. *Id.* § 3351 (waiving age, height, weight, and other physical requirements for preference eligibles that are not essential for the performance of the duties of the position being transferred to).

58. *Id.* § 3363 (waiving age, height, weight, and other physical requirements for preference eligibles that are not essential for the performance of the duties of the position being promoted to).

59. *Id.* §§ 3502, 3504 (placing preference eligibles above other employees in determining order of retention during reductions in force and waiving age, height, weight, and other physical requirements for preference eligibles that are not essential for the performance of the duties of the position being retained in).

60. 5 U.S.C. §§ 3314-16 (entitling preference eligibles who have resigned, separated, or furloughed to have their names placed on employment lists for positions that they may qualify to hold and providing that a preference eligible may be appointed to

employment lists of eligible candidates.⁶¹ Although maintaining many of the benefits afforded by the Veterans' Preference Act, the definition of who is a "veteran," and thus who is a "preference eligible" has changed significantly.

There are currently several different ways for a former military member to qualify as a "veteran." Specifically, a "veteran" is one who has served on active duty in the armed forces during a war,⁶² during the period from April 28, 1952, to July 1, 1955, or in a campaign or expedition for which a campaign medal has been authorized.⁶³ A "veteran" is also considered one who served on active duty⁶⁴ for more than 180 consecutive days after January 31, 1955, and before October 15, 1976,⁶⁵ or who served on active duty with no time requirement during the period from August 2, 1990, until January 2, 1992.⁶⁶ All three possible definitions of veteran are qualified in that all persons who meet the service requirement must have been separated from the armed forces

a position for which he or she is eligible).

61. *Id.* § 3313 (providing that for non-scientific and non-professional positions, veterans who receive ten points added to their passing examination score will be placed above all others on lists of eligibles, and veterans who receive five points added to their passing examination score will be placed ahead of all others who have the same ratings).

62. The requirement of active duty service during a "war" has always been interpreted by the Office of Personnel Management to mean only wars declared by Congress. *VetGuide*, *supra* note 6, at 2.

63. 5 U.S.C. § 2108(1)(A) (2000).

64. Sections 2108(1)(B) and (1)(C) require active duty service different to the service required in § 2108(1)(A). Specifically, they qualify that the service must conform to the definition of "active duty," as defined in Title 38, which defines "active duty" as essentially all full-time service not incurred for training purposes only, if and only if the service meets the other requirements enumerated in §§ 2108(1)(B) and (1)(C). 38 U.S.C. § 101(21) (2000).

65. 5 U.S.C. § 2108(1)(B). Section 2108(1)(A) defines a "veteran" as anyone who served during the period from April 28, 1952, through July 1, 1955. *Id.* § 2108(1)(A). Section 2108(1)(B) requires 180 consecutive days of active duty service after January 31, 1955, and before October 15, 1976. *Id.* § 2108(1)(B). The two sections overlap each other because anyone who served from January 31, 1955, through July 1, 1955, could have qualifying service under both sections. *Id.* Section 2108(1)(A) would grant such person "veteran" status, but § 2108(1)(B) would require that person to serve the 180 consecutive days of active duty. *Id.* How such a conflict would be resolved is unknown and will most likely remain unknown unless a veteran who served during that time period is now seeking civil service employment.

66. *Id.* § 2108(1)(C). On May 5, 2005, the National Defense Authorization Act for Fiscal Year 2006 was introduced in Congress. H.R. 1815, 109th Cong. (1st Sess.2005). The Act proposes that the definition of "veteran" be amended to include active duty service, other than service for training purposes only, if the service was after September 11, 2001, and prior to or on the last date of Operation Iraqi Freedom, which date has not yet been determined. *Id.* at § 1108 (this new subsection, if passed, would be cited as 5 U.S.C. § 2108(1)(D)). Similar to 5 U.S.C. § 2108(1)(B), this service would only qualify a military member as a "veteran" if the member served 180 consecutive days of active duty during the stated time period. *Id.*

under honorable conditions.⁶⁷

Besides actual former military members whose service meets the requirements of the definition of “veteran” or “disabled veteran,” the definition of “preference eligible” includes certain family members of such veterans.⁶⁸ Specifically, like the Veterans’ Preference Act, preference is given to the unmarried widows of veterans whose service met the requirements as stated in § 2108(1)(A),⁶⁹ and the spouses of disabled veterans if the veterans are unable to qualify for a civil service position as the result of a disability.⁷⁰

Unlike the Veterans’ Preference Act, Title 5 provides preference to the mothers of deceased veterans whose service met the requirements as stated in § 2108(1)(A),⁷¹ and the mothers of disabled veterans who are permanently and totally disabled.⁷²

Some retired members of the armed forces who are entitled to retirement pay may not receive preference even if their service qualifies them as a “veteran” under Title 5.⁷³ Such members can only receive preference if they meet the definition of “disabled veteran” or if they retired below the rank of Major or its branch equivalent.⁷⁴

B. *The Purposes of Veterans’ Preference*

The long history and evolution of veterans’ preference law solidifies the argument that the preference is something that Congress has thought necessary for over 150 years.⁷⁵ Veterans’ preference laws have been challenged so many times that the rationale for continuing to give

67. 5 U.S.C. § 2108(1).

68. *See supra* notes 49, 51 and accompanying text.

69. *Id.* § 2108(3)(D); *see also supra* note 28 and accompanying text.

70. 5 U.S.C. § 2108(3)(E); *see also supra* note 27 and accompanying text.

71. 5 U.S.C. §§ 2108(3)(F)(i)-(iii) (stating that for the mother of a deceased veteran whose service meets the requirements of § 2108(1)(A) to be considered a preference eligible, she has to either not be currently married, or if she is currently married, her husband must be permanently and totally disabled). The conditions of being unmarried or being married to a totally disabled person are only applicable “when preference is claimed.” *Id.* Thus, the mother of a deceased veteran can claim the preference to attain an employment position, and then get remarried with no consequences. *Id.*

72. *Id.* §§ 2108(3)(G)(i)-(iii) (stating that in order for the mother of a permanently and totally disabled veteran to be considered a preference eligible, she must meet all of the requirements set forth in sections 2108(3)(F)(i)-(iii), and the veteran must have a service-connected disability); *see also supra* note 71 and accompanying text.

73. 5 U.S.C. §§ 2108(4)-(5).

74. *Id.* § 2108(4). In the Army, Air Force, and the Marine Corps, the rank of Major is designated as O-4. Department of Defense, *The United States Military Officer Rank Insignia*, <http://www.defenselink.mil/specials/insignias/officers.html> (last visited July 27, 2005). The title of the branch equivalent of the rank of Major in the Navy and the Coast Guard is Lieutenant Commander. *Id.*

75. *See supra* notes 10-45 and accompanying text.

preference has become standardized.⁷⁶ In fact, veterans' preference laws are so fundamental that they are precluded from being challenged under Title VII of the Civil Rights Act of 1964.⁷⁷

Hiring preference for veterans has traditionally been justified as a reward for veterans for their sacrifice for military service,⁷⁸ to ease their transition from life in the military back to civilian life,⁷⁹ to encourage patriotic service,⁸⁰ and to attract well-disciplined people to civil service employment.⁸¹

Despite these long-standing, traditional justifications, current federal veterans' preference laws limit preference to only veterans with a service-connected disability,⁸² veterans who served on active duty during the specific dates as identified by statute,⁸³ veterans who served during a war,⁸⁴ and veterans who served in a campaign or expedition for which a campaign medal has been authorized.⁸⁵ Thus, current veterans' preference law excludes from its ambit every former military member not meeting the stringent criteria of who is a "veteran" under Title 5.

The limitations imposed by Title 5 do not coincide with the traditional justifications for providing veterans with preference.⁸⁶ Essentially, Title 5 says that only veterans whose service fits neatly into the specified categories should be rewarded for their sacrifices, that only veterans who meet the Title 5 definition of "veteran" need to be eased from military life to civilian life, that only veterans who meet the Title 5 definition of "veteran" possess the discipline level sought after by civil service organizations, and that limiting the preference to only those veterans whose service meets the Title 5 definition of "veteran" encourages patriotic service. The purposes of veterans' preference are

76. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 266 n.12 (1979), *aff'd*, 445 U.S. 901 (1980). In *Feeney*, the United States Supreme Court addressed the constitutionality of a Massachusetts veterans' preference statute. *Id.* at 259. Although the constitutionality attack was against a Massachusetts statute and not against federal veterans' preference law, the Court stated that the federal government and virtually every state gives some form of preference to veterans. *Id.* at 261. Thus, the *Feeney* justifications are for veterans' preference in general and not Massachusetts specifically. *Id.* at 261-262, 265.

77. 42 U.S.C. § 2000e-11 (2000) (stating that nothing contained in the Civil Rights Act "shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans").

78. *Feeney*, 442 U.S. at 265.

79. *Id.*

80. *Id.*

81. *Id.*

82. 5 U.S.C. § 2108(2).

83. *Id.* §§ 2108(1)(A)-(C).

84. *Id.* § 2108(1)(A).

85. *Id.*

86. *See supra* notes 78-85 and accompanying text.

arguably not fully furthered by limiting the preference to those who are “veterans” under Title 5.

C. *Title 5: Injustice in Action*

The harsh results created by the narrow definition of “veteran” are evidenced by numerous cases involving appeals of personnel actions to the Merit Systems Protection Board (“the Board”).⁸⁷ In *Perez v. Merit Systems Protection Board*,⁸⁸ a letter carrier who was removed⁸⁹ from the United States Postal Service appealed his removal to the Board.⁹⁰ After being removed from his position, Perez was no longer an employee, nor was he an applicant for employment. In order to establish that the Board had jurisdiction over his appeal, Perez argued that he fell within the definition of “employee”⁹¹ by way of his being a “veteran” and therefore a preference eligible under Title 5.⁹²

Executive Order 12,754 established the Southwest Asia Service Medal for military members who served in Southwest Asia, the surrounding waters, or air space.⁹³ A review of Perez’s submitted Department of Defense Form 214⁹⁴ showed that he served on active duty in the armed forces from February 2, 1991, to May 2, 1991, during Operations Desert Shield and Desert Storm.⁹⁵ Perez did not receive the Southwest Asia Service Medal because he served his active duty time in Germany in support of the operations and not in the Persian Gulf region.⁹⁶ The court in *Perez* interpreted the definition of “veteran” in

87. The Merit Systems Protection Board was created to hear appeals of adverse personnel actions that are brought by employees or applicants for employment. 5 U.S.C. § 7701 (2000).

88. 85 F.3d 591 (Fed. Cir. 1996).

89. Allowing a “veteran” to appeal a removal from a civil service position likely does not further the purpose of easing the transition from military to civilian life, but these cases stand for the premise that the subjects of the cases should have been considered “veterans” based on their service and sacrifices to the country.

90. *Perez*, 85 F.3d at 592.

91. 5 U.S.C. § 7511(a)(1)(B)(ii) (2000) (defining “employee” as a preference eligible who has completed one year of continuous service in the United States Postal Service). In *Perez*, it was undisputed that Perez had completed the time requirements for appealing his removal and that being removed from his position was an adverse personnel action. *Perez*, 83 F.3d at 592-93.

92. *Perez*, 83 F.3d at 593.

93. Exec. Order No. 12,754; 56 Fed. Reg. 11,055 (Mar. 12, 1991); 1991 WL 11253645.

94. Section 12 of a Department of Defense Form 214 lists the date entered and separated from active duty as well as all other relevant dates concerning a military member’s active duty service. Department of Defense Form 214, *Certificate of Release or Discharge from Active Duty*, http://www.dtic.mil/whs/directives/corres/pdf/i13361wch3_010689/i13361p.pdf (last visited July 27, 2005).

95. *Perez*, 83 F.3d at 593.

96. *Id.* at 593.

Title 5 to exclude Perez because he did not receive the campaign medal and because he never served “in” the designated geographic area.⁹⁷ The court thus determined that the Board lacked jurisdiction to hear Perez’s appeal because Perez was not a “preference eligible” and not a “veteran” in accordance with Title 5.⁹⁸ Although Perez served in the armed forces Reserves for twenty-two years and on active duty for three months in support of Operations Desert Shield and Desert Storm, his service did not make him eligible for preference because it did not meet the requirements of Title 5.⁹⁹

The National Defense Authorization Act of 1998,¹⁰⁰ although it came a few years too late for Perez, added the period from August 2, 1990, to January 2, 1992, to the time periods for which active duty service would result in a member being considered a “veteran” under Title 5.¹⁰¹ Thus, Perez would be considered a “veteran” and a “preference eligible” under the current definition.

Former military members who served on active duty during Operations Desert Shield and Desert Storm that did not receive a campaign medal were afforded “veteran” status in 1998 through the National Defense Authorization Act,¹⁰² but amending Title 5 by adding the seventeen month period from August 1990 to January 1992 to the definition of “veteran” is only a small step in the direction of fully effectuating the purposes of veterans’ preference law.¹⁰³

In *Shaddi v. Merit Systems Protection Board*,¹⁰⁴ the court determined that even if Shaddi had submitted his Department of Defense Form 214 to the Board, his service still would not have given him “veteran” status.¹⁰⁵ Shaddi served on active duty from July 1979 to July 1984.¹⁰⁶ Similar to *Perez*, because his service was not during a war, in a campaign or expedition for which a campaign medal was authorized, or during a certain time period as specified by statute,¹⁰⁷ Shaddi’s five years of active duty service to the country did not qualify him as a “veteran” under Title 5.¹⁰⁸ It is extremely unlikely that Congress will amend Title 5 to include service from 1979 to 1984 as qualifying service.

97. *Id.* at 594.

98. *Id.* at 594-95.

99. *Id.* at 594.

100. H.R. CONF. REP. NO. 105-340 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2251 [hereinafter *National Defense Authorization Act*].

101. 5 U.S.C. § 2108(1)(C).

102. *National Defense Authorization Act*, *supra* note 100, at 304.

103. *See supra* notes 78-81 and accompanying text.

104. 102 Fed.Appx. 698 (Fed. Cir. 2004).

105. *Id.* at 699.

106. *Id.*

107. *Perez*, 85 F.3d at 594; 5 U.S.C. § 2108(1)(A)-(C).

108. *Shaddi*, 102 Fed.Appx. at 699.

Evaluating Perez's and Shaddi's military service in light of Title 5 and the long-standing, traditional justifications for veterans' preference as stated in *Feeney*,¹⁰⁹ one can conclude that their service was not a sacrifice for which they should be rewarded and that civil service organizations would prefer more disciplined individuals than Perez and Shaddi.

D. *The Proposed Changes*

This Comment is not intended to place veterans who did not serve in combat and who do not have a service-connected disability on equal-footing with veterans whose service does include such characteristics. What is proposed is that Title 5 should be amended to recognize that all veterans, regardless of the dichotomy between whether the service was during wartime or peacetime, must be afforded the preference in order to fully effectuate the historical purposes of veterans' preference.

As evidenced by *Perez* and *Shaddi*, Title 5 denies preference to veterans who voluntarily enlist in the armed forces to defend our freedom unless they find themselves in combat or with a disability.¹¹⁰ When a person volunteers to serve in the armed forces he or she swears to "support and defend the Constitution of the United States against all enemies, foreign and domestic."¹¹¹ At any time throughout their enlistment, military members may be sent into combat, or in the case of National Guard and Reserve members, activated and sent into combat.¹¹² Military personnel thus support and defend our Constitution twenty-four hours a day, seven days a week, 365 days a year, without regard to whether our country is at war.

Military members have no influence over whether our country goes to war, but if such a member is ordered to deploy in response to hostilities, the member has no option of declining such an order.¹¹³ Such

109. *See supra* notes 78-81 and accompanying text.

110. *See supra* notes 99, 108 and accompanying text.

111. 10 U.S.C. § 502 (2000).

112. *Id.* § 12301. The statute provides that "[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter."

Id.

113. *Id.* § 892 (providing that any military member subject to the jurisdiction of the Uniform Code of Military Justice is derelict in the performance of his or her duties by failing to obey a lawful order).

a declination would most likely result in a court-martial.¹¹⁴

Title 5's "all or nothing" approach to providing preference is beyond the control of service members because those who join the armed forces can in no way guarantee that their service will afford them "veteran" status under Title 5.¹¹⁵ Not knowing whether or not one will attain "veteran" status most likely does not encourage patriotic service.¹¹⁶

In recognition that all members of the armed forces make sacrifices for our freedom, the definition of "veteran" in Title 5 should be amended to include all servicemen and servicewomen who honorably served in the armed forces. Making this change is the only way to fully effectuate the historical and traditional purposes of veterans' preference as stated in *Feeney*.¹¹⁷

If such amendment is made, Title 5's additional point provision would need to be amended as well.¹¹⁸ Disabled veterans and preference eligibles who are afforded preference as the result of being the spouse or mother of a deceased or disabled veteran should continue to receive ten points added to their passing civil service examination scores.¹¹⁹ All other veterans whose service meets the current Title 5 definition of "veteran" by virtue of service during war, in a campaign for which a campaign medal was authorized, or during the dates identified, should receive ten additional points on their passing examination scores instead of five points.¹²⁰ Finally, five points should be added to the passing civil service examination scores of any other veteran who would have been otherwise precluded from receiving preference under the current definition. These changes would provide preference for all veterans, while still recognizing the increased sacrifices made by disabled veterans and veterans who served in war or combat.

IV. Pennsylvania's "Soldier": A Step in the Right Direction

A. *Pennsylvania Preference v. Title 5*

Pennsylvania's veterans' preference laws, like the federal veterans' preference laws, were enacted after the Civil War.¹²¹ Although the

114. *Id.*

115. *See supra* note 113 and accompanying text.

116. *See supra* note 80 and accompanying text.

117. *See supra* notes 78-81 and accompanying text.

118. 5 U.S.C. § 3309 (2000).

119. *Id.* §§ 2108(3)(C)-(G), 3309(1).

120. *Id.* § 2108(1). Currently, these veterans are only provided with five additional points on their passing civil service examinations scores. *Id.* § 3309(2).

121. *See Preferential Treatment of War Veterans, No. 2*, 38 Pa. D. & C. 129, 131 (1940) (stating that the Act of May 19, 1887, provided preference in appointments for

preference is located within the Commonwealth's Military and Veterans Code¹²² and not the Civil Service Act,¹²³ the Pennsylvania State Civil Service Commission ("the Commission") is the agency responsible for administering and implementing the preference for the agencies under the Commission's jurisdiction.¹²⁴

Similar to Title 5, the Pennsylvania veterans' preference laws provide for additional points to be added to a veteran's passing civil service examination score,¹²⁵ preference in appointment,¹²⁶ and limited preference in certain furlough and reduction in force cases.¹²⁷

Unlike Title 5, Pennsylvania adds ten points to all veterans' passing examination scores and does not distinguish between disabled and non-disabled veterans.¹²⁸ The preference does not mandate the placement of

honorably discharged Union veterans of the Civil War in all departments of the Commonwealth as long as the veteran was qualified for the employment position); *see also supra* note 9 and accompanying text.

122. 51 PA. CONS. STAT. ANN. §§ 101 *et seq.* Specifically, the veterans' preference provisions are located in Part V of Title 51 and titled Employment Preferences and Pensions. *Id.* §§ 7101-09.

123. 71 PA. CONS. STAT. ANN. § 741.1 *et seq.* (West 1990).

124. *Hous. Auth. of the County of Chester v. Pennsylvania State Civil Serv. Comm'n*, 730 A.2d 935, 943 (Pa. 1999). The Civil Service Act charges the Pennsylvania State Civil Service Commission with establishing conditions that attract qualified persons of "character" and "ability" to civil service employment. 71 PA. CONS. STAT. ANN. § 741.2. Through promulgation of Management Directive 580.21, which applies the preference afforded to veterans in the Military and Veterans Code to the civil service examination process, the Commission furthered the intent of the legislature in providing veterans with preference because of the belief that military experience is unique and should thus be taken into account when determining an applicant's "character" and "ability." *County of Chester*, 730 A.2d at 943; Commonwealth of Pennsylvania Governor's Office, *Management Directive 580.21—Veterans' Preference on Classified Service Employment Lists* (June 5, 1997), <http://www.oa.state.pa.us/oac/cwp/view.asp?A=12&Q=130672> (last visited July 27, 2005) [hereinafter *Management Directive*]. The Management Directive has not yet been amended to reflect the changes set forth in Act 195.

125. 51 PA. CONS. STAT. ANN. § 7103.

126. *Id.* § 7104.

127. *Id.* § 7107.

128. *Id.* § 7103(a). The Military and Veterans Code applies to all Commonwealth agencies and all political subdivisions, including all municipal civil service positions. *Id.* § 7109. The "point" provision that applies to examinations for municipal employment positions differs from the way the provision is applied to examinations administered by the Commission for Commonwealth employment positions. *Id.* § 7103(b). For example, on municipal examinations, instead of ten points being added to a veteran's passing examination score, a veteran's exam is graded 15% perfect. *Id.* Although the Military and Veterans Code states that a veteran's examination "shall be marked or graded 15% perfect *before* the quality or contents of the examination shall be considered," this was held unconstitutional. *Id.* (emphasis added); *Commw. ex rel. Graham v. Schmid*, 3 A.2d 701 (Pa. 1939). It is first required for the veteran to actually pass the examination in order to receive the 15% perfect point augmentation. *Veterans' Preference in Public Employment-Hiring-Promotions*, 1976 Op. Att'y Gen. No. 76-17, 56 (Jun. 15, 1976). Hypothetically, this means that if a veteran receives a score of 100 out of a total possible score of 100, the veteran would have a final grade or classification of 115.

veterans at the top of employment lists of eligible candidates, but if a veteran is one of the top three candidates, then the veteran must be appointed to the position.¹²⁹ Besides mandating that an agency hire a veteran that is ranked in the top three, agencies are allowed to disregard the Rule of Three to appoint a lower-ranked applicant if the applicant is also a veteran.¹³⁰ This means that an agency can hire *any* veteran that has a passing examination score from an employment list regardless of whether the veteran is the lowest-ranked person on the list.¹³¹

In addition, unlike Title 5, Pennsylvania does not provide veterans with a mandatory preference in promotions.¹³² In *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission*,¹³³ the Pennsylvania Supreme Court distinguished between the preference in appointments and the preference in promotions, explaining why preference in the promotional context was violative of the Pennsylvania Constitution.¹³⁴ The court explained that when candidates for promotion compete with one another for a position, they are on equal footing because they each have had the opportunity to develop their skills in the same environment.¹³⁵ Thus, if one candidate is less skilled than his or her counterpart, former military service should not account for this shortcoming;¹³⁶ however, when candidates seek appointment to a position for which neither have experience, the candidate with military experience rationally can be viewed as the superior candidate.¹³⁷

The addition of ten points to a veteran's passing examination score and the absolute hiring preference when a veteran is one of the top three eligible candidates makes Pennsylvania's veterans' preference law one of the most generous in the country.¹³⁸

129. 51 PA. CONS. STAT. ANN. § 7104(b); *Management Directive*, *supra* note 124, at § (a)(2). Like the federal Rule of Three, Commonwealth agencies must hire one of the three top-ranked candidates. 71 PA. CONS. STAT. ANN. § 741.601.

130. 51 PA. CONS. STAT. ANN. § 7104(c). An agency can only disregard the Rule of Three to hire a lower-ranked veteran if the veteran passed the examination and possesses the requisite qualifications. *Id.*

131. *Id.*

132. Commonwealth *ex rel.* Maurer v. O'Neill, 83 A.2d 382 (Pa. 1951) (holding that providing preference to veterans on promotional examinations was unconstitutional); *see also* Hoffman v. Township of Whitehall, 677 A.2d 1200, 1203 (Pa. 1996) (holding that, although the provisions of the Pennsylvania Constitution that had previously been relied upon in *O'Neill* had been revised, such revisions did not make *O'Neill* invalid, thus preference in the promotional context was still unconstitutional).

133. 730 A.2d 935 (Pa. 1999).

134. *Id.* at 949.

135. *Id.*

136. *Id.*

137. *Id.*

138. Commonwealth of Pa. Legislative Budget and Finance Comm., *Review of the Effectiveness of the Civil Service System in County Government Pursuant to Senate*

B. Who is a "Soldier"?

In order for a veteran of the armed forces to receive preference in Pennsylvania, the veteran's service must meet the requirements set forth in the definition of "soldier" in the Military and Veterans Code.¹³⁹ Until recently, "soldier" was defined as any person who was honorably discharged¹⁴⁰ from the armed forces of the United States after serving during any war or armed conflict, or who served or hereafter serves since July 27, 1953.¹⁴¹ Service prior to July 27, 1953, must have been during specified periods of time for the service to qualify a veteran as a "soldier" and thus eligible for preference.¹⁴² Thus, unlike Title 5, the Pennsylvania definition of "soldier" affords preference to all veterans who served since July 27, 1953, regardless of whether the service was during war or in a campaign or expedition.¹⁴³

Another distinction between the definition of "veteran" in Title 5 and Pennsylvania's definition of "soldier" is the absence of the phrase "served on active duty" in Pennsylvania's "soldier" definition.¹⁴⁴ Instead, the definition of "soldier" includes the phrase "served or hereafter serves in the armed forces."¹⁴⁵ This is significant because Pennsylvania affords veterans' preference to National Guard and Reserve members who would otherwise not receive such preference under federal law because of the "served on active duty" language.¹⁴⁶ Thus,

Resolution 171, at S-7 (Sep. 2004); Commonwealth of Pa. Legislative Budget and Finance Comm., *Study on Civil Service Reform Pursuant to Senate Resolution 1997-14*, at S-8 (Apr. 1998).

139. 51 PA. CONS. STAT. ANN. § 7101.

140. *Id.* The Department of Defense Form 214 does not have to specifically identify a veteran's discharge as "honorable" in order to be classified as a "soldier," but the discharge must be under "honorable conditions" which includes, but is not limited to, a "general discharge, good discharge, satisfactory discharge, indifferent discharge or special order discharge." Veterans' Preference—Honorable Discharge as Condition Precedent to—Analysis of Types of Discharge, 1957 Op. Att'y Gen. No. 35, 159 (Dec. 2, 1957). A veteran whose Department of Defense Form 214 characterizes his or her discharge as a "dishonorable discharge, bad conduct discharge, undesirable discharge, a dismissal, or any other type of separation certificate given under conditions other than honorable" is not classified as a "soldier" under Pennsylvania's preference law. *Id.* Although this opinion, like all opinions of the Attorney General, is not binding on any court, courts customarily afford such opinions great weight and deference. *McDowell v. Good Chevrolet-Cadillac, Inc.*, 154 A.2d 497, 501 (Pa. 1959).

141. 51 PA. CONS. STAT. ANN. § 7101 (West 1976).

142. *Management Directive*, *supra* note 124, at 2 (stating that the qualifying periods of time are from April 6, 1917, through July 2, 1921, from December 7, 1941, through September 2, 1945, and from June 25, 1950, through July 27, 1953).

143. 51 PA. CONS. STAT. ANN. § 7101.

144. *Compare* 51 PA. CONS. STAT. ANN. § 7101 (West 1976), *with* 5 U.S.C. § 2108(1) (2000).

145. 51 PA. CONS. STAT. ANN. § 7101.

146. *Herskovitz v. State Civil Serv. Comm'n*, 534 A.2d 160, 162-63 (Pa. Commw. Ct.

Pennsylvania provides National Guard and Reserve members with preference even if they are never called to serve in an active duty capacity.

Applying Pennsylvania's definition of "soldier" instead of "veteran" to the service of the veterans in *Perez* and *Shaddi* would result in curing those injustices. Although the veteran in *Perez* served only three months of active duty during Operations Desert Shield and Desert Storm, he had also served in the armed forces Reserves for twenty-two years.¹⁴⁷ The veteran in *Shaddi* served on active duty for five consecutive years, but his service was not during a war or in a campaign or expedition for which a medal was authorized.¹⁴⁸ Both of these veterans would be considered a "soldier" if they applied for a civil service position in Pennsylvania.¹⁴⁹

C. *The New "Soldier": Act 195 of 2004*

Pennsylvania currently has 7,569 Army National Guard and Reserve members activated or deployed in support of current worldwide military operations.¹⁵⁰ This number ranks third in the nation behind California and Texas.¹⁵¹ Recognizing the need for a change in current veterans' preference law to correct the deficiencies created by the old definition of "soldier," the Pennsylvania legislature amended the definition of "soldier" on November 30, 2004, by enacting Act 195 of 2004 ("Act 195").¹⁵²

In *Herskovitz v. State Civil Service Commission*, the Commonwealth Court of Pennsylvania interpreted the definition of

1987) (stating that the Military and Veterans Code does not have to conform with and be interpreted as part of federal veterans' preference law). Under Title 5, National Guard and Reserve members are afforded "veteran" status only if they are called to active duty, other than for training, during a war or armed conflict for which a medal has been authorized, or during the specified dates as identified by Congress. 5 U.S.C. § 2108(1). However, a National Guard or Reserve member had to have been activated for a minimum of 180 consecutive days if the service was from January 31, 1955, to October 15, 1976. *Id.*

147. *Perez*, 83 F.3d at 594-95; *see also supra* note 94 and accompanying text.

148. *Shaddi*, 102 Fed.Appx. at 698; *see also supra* notes 101-103 and accompanying text.

149. 51 PA. CONS. STAT. ANN. § 7101. Both *Perez* and *Shaddi* would be considered a "soldier" because both were honorably discharged from the armed forces and served since July 27, 1953. *Id.*

150. *See* Department of Defense, *National Guard and Reserve Units Called to Active Duty* (Jan. 5, 2005), <http://www.defenselink.mil/news/May2005/d20050511ngr.pdf> (last visited July 27, 2005).

151. *Id.* (California currently has 9,590 Army National Guard and Reserve members activated or deployed in support of current worldwide military operations, and Texas currently has 9,451).

152. *Act 195, supra* note 9.

“soldier” to include National Guard and Reserve members.¹⁵³ However, in *Sicuro v. City of Pittsburgh*,¹⁵⁴ the court limited the preference as it applied to National Guard and Reserve members by requiring that such members complete their initial service commitment in order to receive veterans’ preference.¹⁵⁵ The court reasoned that extending *Herskovitz* by interpreting the definition of “soldier” to qualify a National Guard or Reserve member for preference after only completion of initial training would diminish the opportunities for veterans who have actually completed their full service to the military.¹⁵⁶

Act 195 now does what the *Sicuro* court declined to do, that is, expand *Herskovitz*.¹⁵⁷ Under the new law, National Guard and Reserve members who are called to active duty and subsequently released back to their National Guard or Reserve units are eligible for preference although such members may not have completed their total commitment to the military.¹⁵⁸ Thus, National Guard and Reserve members who are never activated must still complete their initial commitment to the military in order to be considered a “soldier” and receive preference.¹⁵⁹

D. Act 195’s Application

Act 195 “corrects the inequity in interpretation of the current law” by recognizing that many National Guard and Reserve members return

153. 534 A.2d at 163.

154. 684 A.2d 232 (Pa. Commw. Ct. 1996). See generally John W. Lasky, *Military Affairs—Veterans’ Preference Act—Statutory Construction—The Commonwealth Court Of Pennsylvania Held That Honorably Discharged Veterans Of The United States Reserves Or National Guard Are Eligible For Employment Preference In Public Positions Only When They Fulfill Their Complete Military Obligations*, 36 DUQ. L. REV. 671 (1998) (discussing the *Sicuro* holding and its effect on then existing veterans’ preference law).

155. *Sicuro*, 684 A.2d at 237.

156. *Id.*

157. See *supra* notes 153-55 and accompanying text.

158. Act 195, *supra* note 9. The language that a “soldier” is a person “who was released from active duty under honorable conditions” is meant to apply specifically to National Guard and Reserve members because only they are “released” from active duty. *Id.* (emphasis added).

159. *Id.* The Commonwealth Court of Pennsylvania has recently held that the *Sicuro* language requiring the completion of a military service commitment before receiving preference was only dictum. *Soberick v. Salisbury Township Civil Serv. Comm’n*, 874 A.2d 155 (Pa. Commw. Ct. 2005). The court held that a Reservist who served over eleven months of active duty after September 11, 2001, was a “soldier” and eligible for preference. *Id.* at 158-59. However, the court cited the Act 195 definition of “soldier” to reach this result, instead of the pre-amendment definition, even though the preference was denied in 2003, prior to the amendment. *Id.* at 158. Under Act 195, the Reservist in *Soberick* is a “soldier” without having to reference *Sicuro*. Thus, even after *Soberick* and Act 195, *Sicuro* still should remain applicable to National Guard and Reserve members who are never required to serve on active duty.

from overseas combat zones and remain in the National Guard and Reserves.¹⁶⁰ Since such members are released from active duty and not discharged from their units, they would not have been eligible for preference under the old “soldier” definition.¹⁶¹

The Pennsylvania Department of Military and Veterans Affairs, responsible for designating qualifying periods of service for purposes of Act 195, has selected August 2, 1990, as the beginning date of the qualifying period.¹⁶² This date was selected as a practical matter in order to encompass every National Guard and Reserve member who could have been released from active duty since the Gulf War, since such members may still be serving their commitments.¹⁶³

The sacrifices of many Pennsylvania National Guard and Reserve members who are deployed or activated to defend our country will only be rewarded by Pennsylvania, and not by the federal government.¹⁶⁴ Although some members may be in a geographic location designated as a campaign or an expedition for which they may receive a medal, thus qualifying them as a “veteran,” there will be a large proportion of them that might not fall within the Title 5 definition. Unless Congress passes legislation similar to the National Defense Authorization Act,¹⁶⁵ a military member currently deployed in Germany in a support role may not receive any preference.¹⁶⁶ Additionally, an active duty military member who was not deployed, but remained stateside, may not receive any preference when he or she leaves the military.¹⁶⁷ These are not hypothetical scenarios, but actual injustices, as evidenced by *Perez* and *Shaddi*.¹⁶⁸

160. Memorandum from Jessica L. Wright, Major General, Adjutant General of Pennsylvania, to Ronald K. Rowe, Executive Director, Pennsylvania State Civil Service Commission (Dec. 29, 2004) (on file with author) [hereinafter *General's Memo*].

161. *Id.*; see also *supra* note 158 and accompanying text.

162. *General's Memo*, *supra* note 160, at 2.

163. *Id.*

164. This is subject to the passage of the National Defense Authorization Act for Fiscal Year 2006 that proposed an amendment to the definition of “veteran” in Title 5 which would essentially afford preference to all current active duty members. See *supra* note 66 and accompanying text. However, this amendment would not cover the service of anyone currently deployed who does not serve the required 180 consecutive days of active duty prior to the last date of Operation Iraqi Freedom, or anyone who serves after such date. Although the proposed amendment is a step in the right direction, it still does not fully effectuate the purposes of veterans’ preference.

165. *National Defense Authorization Act*, *supra* note 100.

166. See, e.g., *Perez v. Merit Sys. Prot. Bd.*, 85 F.3d 591, 594 (Fed. Cir. 1996).

167. See, e.g., *Shaddi v. Merit Systems Protection Board*, 102 Fed.Appx. 698 (Fed. Cir. 2004).

168. See *supra* notes 87-109 and accompanying text.

E. Rewarding Sacrifice!

Unlike Congress, the Pennsylvania legislature actually codified its reasoning for providing veterans with preference in civil service employment. Specifically, the Military and Veterans Code provides that veterans are given preference because of the discipline and experience attained from military training¹⁶⁹ and for the “loyalty and public spirit” that servicemen and servicewomen exhibit and demonstrate by serving their country.¹⁷⁰

The Pennsylvania courts have also recognized the historical purposes of veterans’ preference by noting that the preference is a reward for service to the country.¹⁷¹ More importantly, the courts have recognized that *any* person who serves in the armed forces exhibits loyalty and public spirit and attains discipline and experience.¹⁷² Such is true for military members who served during peacetime as much as it is true for those who served during war or conflict.¹⁷³ This is in contrast to Title 5 which affords the preference to only veterans who served during war or conflict unless that service happened to have fallen within a certain time period.

In *Soberick*, the Commonwealth Court of Pennsylvania summed up the importance of veterans’ preference by stating:

The preference . . . is not only a reward to an individual. It is also a formal recognition of the value of intangible qualities developed during significant military service. By the preference our General Assembly attracts the valuable qualities of discipline, experience, loyalty and public spirit to civil public service. Thus, awarding the preference . . . benefits the public.¹⁷⁴

If the Pennsylvania legislature recognizes and rewards the unique sacrifices of our National Guard and Reserve members, then Congress can too. Both Pennsylvania and the federal government have historically offered preference to veterans as a reward for their sacrifices and because of the discipline attained from military service.¹⁷⁵ However, the federal government falls short of fully effectuating those purposes by limiting preference to only veterans who meet specified service requirements as currently set forth in Title 5.

169. 51 PA. CONS. STAT. ANN. § 7102(a) (West 1976).

170. *Id.*

171. *Sicuro v. City of Pittsburgh*, 684 A.2d 232, 236 (Pa. Commw. Ct. 1996).

172. *Pontious v. Rippy*, 589 A.2d 1188, 1190 (Pa. Commw. Ct. 1991).

173. *Id.*

174. 874 A.2d 155 (Pa. Commw. Ct. 2005).

175. *See supra* notes 78-81, 169-74 and accompanying text.

V. Conclusion

Providing veterans with preference in civil service employment has historically been a way to reward members of the armed forces for their sacrifices in defense of our nation.¹⁷⁶ Besides rewarding veterans for their military service, the preference has been recognized as a way to ease the transition back to civilian life,¹⁷⁷ to encourage military service,¹⁷⁸ and to attract well-disciplined people to civil service employment.¹⁷⁹ Notwithstanding these historic purposes, the current definition of “veteran” in Title 5 does not recognize the sacrifices of all servicemen and servicewomen. Instead, Title 5 rewards only those military members whose service meets its stringent criteria, while ignoring those that do not.¹⁸⁰ To fully effectuate the purposes of veterans’ preference, the sacrifices of all military members must be recognized.

In light of the increased use of National Guard and Reserve members for worldwide military operations,¹⁸¹ the federal government should take notice of Pennsylvania’s veterans’ preference system and the recently amended definition of “soldier.” Forcing National Guard and Reserve members who may have served an extensive period of time on active duty as the result of a military call-up to wait until they have completed their initial service commitment before they can receive preference is unreasonable. The federal government should afford preference to such members who are released from active duty service but who have not yet completed their military service commitment.

Veterans’ preference is a concept that has been so pervasive in American society that the justifications for affording it have become standardized.¹⁸² With the increased need for military personnel and the unpredictable nature of current and future worldwide conflicts, this long-standing tradition must not falter at a time when it appears we need it most.

176. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979), *aff’d*, 445 U.S. 901 (1980).

177. *Id.*

178. *Id.*

179. *Id.*

180. 5 U.S.C. § 2108(1).

181. *See supra* note 4 and accompanying text.

182. *Feeney*, 442 U.S. at 265; *see also supra* note 76 and accompanying text.
