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NOTES

Voluntary Warriors: Reserve Force Mobilization in the United States and Canada

Kevin D. Hartzell*

Introduction

International peacekeeping[1] deployments have become more frequent in recent times. More peacekeeping missions will undoubtedly be needed as the collapse of communism and the resurfacing of ethnic rivalries reshape the world.[2] As the number of international peacekeeping deployments increase, the need for peacekeeping troops will also increase. Simultaneously, the end of the Cold War places great fiscal pressure on nations to reduce expenditures on armed forces.[3] One method of maintaining a relatively large and accessible military force is for nations to rely more heavily on reserve augmentation of the active duty military forces.

This Note will review, compare, and contrast the statutory frameworks for reserve force mobilization in the United States and Canada. The Canadian Armed Forces (CF) have a voluntary mobilization system, such that Canadian reservists cannot be deployed internationally without their individual consent. Although considerably more complex than that of Canada,

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1. One definition of peacekeeping is:

> An operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the "enforcement action" of the United Nations under Article 42.

UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING 4-5 (1991).

2. For a detailed discussion of peacekeeping operations, and in particular the legal issues surrounding them, see *id.*; N.D. WHITE, KEEPING THE PEACE (1993); THE EVOLUTION OF UN PEACEKEEPING (William J. Durch ed., 1993).

3. JEFFREY A. JACOBS, THE FUTURE OF THE CITIZEN-SOLDIER FORCE 1 (1994).

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the U.S. reserve mobilization framework is voluntary as well. However, the U.S. system is more conducive to voluntary mobilization because of the greater size of the U.S. reserves and because of statutory rights granted to reservists.

Part I of this Note examines the U.S. reserve component structure, U.S. military reliance on the reserves, and the statutory framework for mobilizing reserve forces. Part II analyzes the statutory framework for U.S. reserve mobilization, a system which, despite its complexity, results in a voluntary system of reserve mobilization except in time of war or national emergency. Part III describes the Canadian Armed Forces reserve structure, the degree of Canadian reliance on reserves, and the statutory framework for the mobilization of Canadian reserves. Part IV compares the U.S. and Canadian reserve mobilization policies and reconciles the apparent differences in the two statutory frameworks. This Note concludes that a statutory framework for the mobilization of reserves which relies upon voluntary mobilization does not handicap deployments in support of multinational missions, such as U.N. peacekeeping.

I. U.S. Reserves

A. U.S. Reserve Component Structure

There are seven individual components in the reserve force structure of the U.S. Armed Forces:[4] Army Reserve, Army National Guard, Navy Reserve, Marine Corps Reserve, Coast Guard Reserve, Air Force Reserve, and Air National Guard.[5] Reserve personnel are divided into three categories: Ready Reserve, Standby Reserve, and Retired Reserve.[6] Members of the

4. SJOUKE DE JONG, NATO'S RESERVE FORCES 104 (1992). Reserve forces augment the numbers and/or capabilities of the standing armed forces with individuals or units. Reserve forces do not train full-time; rather, they consist of individuals who either have prior military service with the standing army or who train part-time with various reserve force units. In either case, reservists generally have full-time civilian employment. With reserves, a standing military force may be significantly increased in size and capability in a relatively short time. The cost of maintaining a modern standing army the size of the reserve-augmented force is significantly greater than the cost of the reserve forces. The expertise required of a modern fighting force generally forbids the conscription of untrained civilians to augment the standing military in a short or moderate time frame. In 1991, available U.S. forces numbered 3.140 million individuals, 1.965 million on active duty and 1.115 million in the Selected Reserve. *See* CONGRESSIONAL BUDGET OFFICE, STRUCTURING U.S. FORCES AFTER THE COLD WAR: COSTS AND EFFECTS OF INCREASED RELIANCE ON THE RESERVES 1-26 (1992) [hereinafter CBO RESERVE STUDY]. In October of 1994, available U.S. forces numbered 2.636 million personnel, 1.608 million on active duty and 1.028 million in the Selected Reserve. Eric Schmitt, *Military Planning Expanded Role for the Reserves*, N.Y. TIMES, Nov. 25, 1994, at A1, A22.

5. DE JONG, *supra* note 4, at 104.

6. The categories of reserve personnel essentially correspond to the order in which reservists would be activated and required to serve on active duty. The Ready Reserve, which generally consists of individuals who train regularly with their assigned units, would be activated first. The Standby Reserve consists of individuals in the reserves and in vital government positions. The Standby Reserve does not regularly train. The Retired Reserve consists of individuals who have retired from the active forces or reserves. They would be activated last. *See* CBO RESERVE STUDY, *supra* note 4, at 2-6; DEJONG, *supra* note 4, at 104-06.

Army National Guard and the Air National Guard are drawn only from the Ready Reserve, while the members of the remaining five reserve components are drawn from all three personnel categories.[7]

The Ready Reserve consists of four elements: Selected Reserve, Individual Ready Reserve, Inactive National Guard, and Training Pipeline.[8] Personnel in the Selected Reserve train periodically for military duty and may be called to active service.[9] This military training obligation is typically about forty days each year and is generally divided into one weekend each month and two consecutive weeks in the summer months.[10] In addition, the Selected Reserve is organized into units of individual reservists, each with an assigned mission.[11]

Approximately 1.2 million personnel serve in the Selected Reserve.[12] Selected reservists comprise the entire Army and Air National Guard, and portions of the reserve forces of the four active services.[13] All other reserve elements and categories are non-drilling, in that their members do not train for military duties and are not organized into units with an assigned mission.[14] Generally, the mission of the units which comprise the Selected Reserve is to augment the active services with operationally-ready units with minimal notice.[15]

B. U.S. Force Structure: Increasing Reliance on the Reserves

In 1970, the Department of Defense (DoD) created the "total force concept" as a result of the failure of the nonmobilization policy in Vietnam and the impending end of military conscription.[16] This concept envisioned reserv-

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7. DEJONG, *supra* note 4, at 104.

8. The Selected Reserve is the largest element and consists of reservists organized into units with assigned missions who train on a regular basis. The Individual Ready Reserve is comprised of individuals who have left active service but still maintain reserve duty obligations. Individual Ready Reservists are not assigned to units and do not train. The Inactive National Guard consists of individuals, usually specialists with essential skills, who report to their assigned unit annually, but do not train with the unit. The Training Pipeline consists of reservists who have not yet completed initial training. *See* DEJONG, *supra* note 4, at 104-05.

9. *Id.*

10. CBO RESERVE STUDY, *supra* note 4, at 3.

11. DE JONG, *supra* note 4, at 105.

12. CBO RESERVE STUDY, *supra* note 4, at 4; Schmitt, *supra* note 4, at A1, A22.

13. CBO RESERVE STUDY, *supra* note 4, at 4. The four active services are the Army, Navy, Marine Corps, and Air Force. Coast Guard reservists fall under the Department of Transportation. *Id.*

14. *Id.* at 4-5. These include the Standby Reserve, composed of personnel in key government positions, DE JONG, *supra* note 4, at 105 (approximately 38,000 personnel), the Individual Ready Reserve and Inactive National Guard, comprised of personnel who have previously served in the active military or National Guard (approximately 600,000 personnel), and the Retired Reserve, composed of retired military personnel receiving pensions (approximately 1.8 million personnel). CBO RESERVE STUDY, *supra* note 4, at 5-6.

15. CBO RESERVE STUDY, *supra* note 4, at 1-4.

16. JACOBS, *supra* note 3, at 46. Of the 3.5 million soldiers who served in Vietnam, only 20,000 were mobilized reservists. Because political leaders were unwilling to take the legal steps (and suffer the consequent political repercussions) of mobilizing large numbers of citizen-soldiers, the military in Vietnam had to rely on conscripted civilians

ists in the role draftees had played in Vietnam—readily available manpower with which to expand the ranks of the active military.[17] Furthermore, the concept envisioned the deployment of reserve units, rather than individual replacements, in order to avoid repeating the failed policy of individual rotation used in Vietnam.[18]

In 1973, DoD implemented a Total Force Policy, based on the total force concept, "which integrate[s] the active duty, National Guard and the other Reserve forces into [a] homogeneous whole."[19] This policy envisioned a much larger role for reserve forces in the operations of the armed forces.[20] Operational use of reserve forces was not to be a last resort; reserve forces were envisioned in the vanguard, fighting alongside active duty units.[21] Under the Total Force Policy, the reserves were to be an integral part of the U.S. Armed Forces; the intended relationship between active and reserve forces was that of equal partners in peacetime and war.[22]

Operational readiness was not the sole reason for the Total Force Policy; reserve units in peacetime cost less than active duty units and, theoretically, demonstrate the same or nearly the same combat capabilities.[23] The

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for manpower. Thus, the war in Vietnam was fought largely by a draftee army. *Id.* This policy of nonmobilization of the reserve forces was arguably unwise from a military perspective. *Compare* BRUCE PALMER, JR., THE 25-YEAR WAR: AMERICA'S MILITARY ROLE IN VIETNAM 175 (1984) ("Th[e] failure to mobilize . . . resulted in a steady deterioration of American forces, not only in Southeast Asia but also in other areas, especially in Europe, where a once magnificent American field army became singularly unready, incapable of fulfilling its NATO mission.") *with* HARRY G. SUMMERS, JR., ON STRATEGY 1 (1982) ("On the battlefield itself, the Army was unbeatable."). One of the political effects of the nonmobilization policy was the loss of support of the American people for the war in Vietnam. *Id.* at 13-16. Generally, the mobilization and deployment of reserve forces was allowed only on approval by elected representatives, arguably answerable to the popular will. Thus, the support of the American people was built into the reserve force structure of the military. *Id.*

17. JACOBS, *supra* note 3, at 46. The "total force concept" also sought to rectify both the perceived and real changes in the reserves as a result of the nonmobilization policy. Resources were diverted to the active Army to support the Vietnam conflict, and the reserves were relegated to third-rate status. The reserves were also not perceived as the fighting force they were intended to be; many draft-age citizens, understanding the nonmobilization policy, enlisted in the reserves merely to avoid service in Vietnam. *Id.* As many as 70 percent of those enlisting in the reserves in the Vietnam era did so to avoid Vietnam. *Id.*

18. *Id.*

19. OFFICE OF THE SECRETARY OF DEFENSE, RESERVE COMPONENT PROGRAMS, FISCAL YEAR 1988: REPORT OF THE RESERVE FORCES POLICY BOARD i (1989) (quoting U.S. President George Bush).

20. JACOBS, *supra* note 3, at 47.

21. *Id.*

22. *Id.* The Total Force Policy was implemented when the threat of major Soviet military action was high. Reserve units were expected to be mobilized in a scenario of near-complete or complete military mobilization to counter such an attack. In this context, reserve brigades (3,000-6,000 personnel) were expected to arrive in the combat theater twenty-nine days after mobilization, and the active Army could not deploy a combat force of more than five or six divisions (80,000-120,000 personnel) without reserve mobilization. *Id.*

23. Kenneth M. Theurer, *Low-Level Conflicts and the Reserves: Presidential Authority Under 10 U.S.C. § 673b*, 62 U. CIN. L. REV. 1135, 1142 (1994).

cost of maintaining a reserve unit may be considerably less than its active duty counterpart.[24] Reserve units manifestly reduce the cost of maintaining the armed forces, while ostensibly providing the same, or nearly so, fighting capabilities.[25] Because of the legacy of cold war mobilization scenarios and fiscal imperatives, the reserve forces continue to contribute significantly to any measure of overall military capability.

The reserves are a significant portion of the numerical and qualitative strength of the U.S. Armed Forces, and the reserves' share of military capabilities is slated for increase. For instance, in 1992, the Air National Guard provided, for various Air Force missions, 26% of the overall force structure, 78% of the continental air defense, and 40% of the tactical air support.[26] The Army Reserve accounted for 68% of combat medical care, 68% of fuel storage and distribution, 54% of ammunition handling, and 32% of truck transportation capability.[27] The 1992 plan proposed by the Clinton Administration will shift significantly more responsibilities to the reserve components by 1997.[28] Currently, some missions, such as full-mobilization training detachments, civil affairs, and port security, are performed

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24. Cost differences between reserve and active duty units in peacetime vary depending on unit type. A "heavy" division (consisting mostly of mechanized vehicles such as tanks and armored personnel carriers) of the Army National Guard costs about 25% as much as a heavy division of the active Army to support and maintain. Similarly, a Marine Reserve division costs about 30% of its active duty counterpart. Naval Reserve vessels cost nearly as much as active duty vessels, but reserve air units in the Navy and Air Force cost approximately 30%-40% less than equivalent active duty units. CBO RESERVE STUDY, *supra* note 4, at 7-9.

25. The question of whether reserve units can or do provide equivalent military capabilities when operationally deployed is hotly debated. Reserve component forces are generally not as "ready" as their active duty counterparts, where "readiness" is a measure of training, personnel, and equipment. Army National Guard "line units" (units assigned to participate in combat) are usually rated 30% or lower in training proficiency levels than comparable active duty line units. JACOBS, *supra* note 3, at 50. A former president of the U.S. Army Training Board stated that "No matter how well we do in peacetime training, the average [r]eserve unit will never be as combat-ready as its active-duty counterpart. Those who imply they will be as combat-ready are making a mistake." Liz Galtney, *The Sad State of Weekend Warriors*, U.S. NEWS & WORLD REP., Aug. 21, 1989, at 28. The Department of Defense (DoD), in recognition of the reduced level of training present in reserve forces, normally assigns most missions needed in peacetime or in the earlier stages of armed conflict to active forces. CBO RESERVE STUDY, *supra* note 4, at 3-4.

The recent Persian Gulf conflict ("Desert Storm") highlighted some of the deficiencies and advantages of the reserve forces. Army National Guard "line" units were least prepared, and ultimately the Army refused to deploy the vast majority of these units to the Persian Gulf due to training and personnel deficiencies. JACOBS, *supra* note 3, at 95-99. Reserve combat support and combat service support units, which support line units with intelligence, communications, and various logistical services and equipment, as well as air combat and transport units, performed well. In some cases, these reserve forces outperformed their active duty counterparts. *See* John T. Correll, *The Force Mix Fight Heats Up*, AIR FORCE MAG., Jan. 1993, at 67, 70; CBO RESERVE STUDY, *supra* note 4, at 1; Theurer, *supra* note 23, at 1143.

26. DE JONG, *supra* note 4, at 108.

27. *Id.* at 109.

28. Clinton Administration Plan

exclusively by reserve components.[29]

While the reserve forces comprise a significant portion of the U.S. Armed Forces in terms of numbers and capabilities,[30] this does not necessarily imply that reserve forces are necessary to augment active forces in a relatively small force deployment, the most likely type of mission under U.N. auspices. However, the present force structure is such that DoD has announced plans to augment active forces with the reserves in order to meet peacetime military obligations, including peacekeeping missions.[31] Additionally, because so much of the logistical support in the U.S. Armed Forces is the responsibility of reserve forces, any extended military deployment or operation will require logistical and other support from the

	1990	1997
Army Divisions		
Active	18	12
Reserve	10	8
Air Force Wings		
Active	24	15
Reserve	13	11
Navy Ships		
Active	515	418
Reserve	50	67
Navy Air Wings		
Active	13	11
Reserve	2	2
Marine Corps Brigades		
Active	9	8
Reserve	3	3

CBO RESERVE STUDY, *supra* note 4, at 40. Planned reductions in both the active and reserve components are continuing:

Reserve Component End Strengths and Projections (numbers rounded to nearest thousand)

	FY93	FY94	FY95
Army National Guard	410	410	400
Army Reserve	276	260	242
Naval Reserve	132	113	101
Marine Reserve	42	42	42
Air National Guard	117	118	116
Air Force Reserve	81	82	79
DOD Total	1,058	1,025	979

National Guard and Reserve Programs: Hearing Before the Subcomm. on Force Requirements and Personnel of the Senate Comm. on Armed Services, 103d Cong., 2d Sess., May 10, 1994, *available in* NEXIS, News Library, CURNWS File (statement of Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs). President Clinton has recently supported proposals to further reduce the number of active Army divisions to ten, but these proposals have met stiff opposition in Congress and are not likely to succeed. Rowan Scarborough, *GOP Will Counter Arms Cuts*, WASH. TIMES, Dec. 27, 1994, at A1.

29. CBO RESERVE STUDY, *supra* note 4, at 4.

30. Percentage of service branch on active duty and Selected Reserve as of Oct. 1, 1994:

	Army	Air Force	Marines	Navy
Active %	55.3	31.8	19.5	80.5
Reserve %	44.7	68.2	80.5	19.5
Personnel	1,211,300	625,500	216,400	582,900

Schmitt, *supra* note 4, at A22.

31. *Id.* at A1, A22.

reserves.[32] Essentially, the partnership goal of the Total Force Policy is a present reality; the reserves are a necessary component of the U.S. military regardless of the size and tempo of the operation.

C. The Statutory Framework for Mobilizing Reserve Forces

1. Introduction

Title 10 and Title 32 of the United States Code provide fourteen different sources of legal authority for calling reservists to active duty.[33] Title 32 is concerned with a state's use of the National Guard.[34] Reservists may not be deployed overseas under its provisions.[35] Title 10 provides authority for calling reservists of all components to active duty.[36] The limitations of Title 10 reserve mobilization depend on the operational nature of the deployment and upon the actions of Congress and the President.[37] Essentially, any deployment of any members of the reserve component of the U.S. Armed Forces for combat or overseas training will be governed by some aspect of Title 10. The present mobilization statutes are a compendium of prior legislation[38] that generally relied upon and codified historical military practice.[39]

If Congress declares war or national emergency, all reservists, from

32. DE JONG, *supra* note 4, at 108.

33. 10 U.S.C. §§ 10147-8 (1994) (call-up of Ready Reserve for training); 10 U.S.C. §§ 331-35 (civil insurrection or disturbance); 10 U.S.C. § 671 (for initial training); 10 U.S.C. § 12301(a) (1994) (war or national emergency declared by Congress); 10 U.S.C. § 12301(b) (1994) (for fifteen days annual training); 10 U.S.C. § 12301(d) (1994) (voluntary active duty); 10 U.S.C. § 12301(g)(1) (1994) (captive status); 10 U.S.C. § 12302(a) (1994) (presidential declaration of national emergency); 10 U.S.C. § 12303(a) (1994) (for nonperformance of duty); 10 U.S.C. § 12304(a) (1994) (presidential authority without declaration of national emergency); 10 U.S.C. § 12306 (1994) (Standby Reserve); 10 U.S.C. § 12307 (1994) (Retired Reserve); 10 U.S.C. § 802 (for judicial action under the Uniform Code of Military Justice); 10 U.S.C. § 6485 (Navy and Fleet Marine Corps Reserve); 32 U.S.C. § 502 (National Guard training). *See* L. Dow Davis, *Reserve Callup Authorities: Time for Recall?*, ARMY LAW., Apr. 1990, at 4.

34. *See* 32 U.S.C. § 109 (1994).

35. *Id.*

36. *See* 10 U.S.C. § 12301 (1994) (mobilization of all reserve components); 10 U.S.C. § 12302-5 (1994) (mobilization of members of the Ready Reserve); 10 U.S.C. § 12303 (1994) (mobilization of members of the Ready Reserve not assigned to units); 10 U.S.C. § 12304 (1994) (mobilization of members of the Selected Reserve).

37. *See* 10 U.S.C. §§ 12301-12304 (1994).

38. *See, e.g.* the National Defense Act of 1916, Ch. 134, 39 Stat. 166 (1916); the Naval Reserve Act of 1925, Ch. 374, 43 Stat. 1080 (1925); the National Defense Act of 1948, Ch. 157, 62 Stat. 87 (1948); the Armed Forces Reserve Act of 1952, Ch. 608, 66 Stat. 481 (1952); the Defense Act of 1956, Ch. 789, 70 Stat. 729 (1956).

39. The nonmobilization of the reserves in support of the Vietnam War eventually led to the implementation of the Total Force Policy in 1973. The Total Force Policy and more recent reserve/active force structure changes do not contemplate that a conflict on the scale of Vietnam could possibly be fought without the use of reserve forces. However, the use of reserves in such a deployment is governed by the limitations of Title 10, which is presently a hodgepodge of forty years of political conflict between the Congress, DoD, Service Branch Reserves, and the National Guard. Reserve mobilization authority and limitations which may have been timely and appropriate some time ago may not have a present military justification. *See* JACOBS, *supra* note 3, at 42-47; Davis, *supra* note 33, at 6.

both the service reserves[40] and the National Guard, may be called-up to active federal service, as units or as individuals if not assigned to units, with or without the individual reservist's consent.[41] The duration of mobilization under section 12301(a) is limited only by the length of the war or congressionally-declared national emergency.[42] Congress last declared war just prior to U.S. entry into World War II.[43] Section 12301(a) is not likely to be the reserve mobilization authority for any military operation short of protracted war.

a. Presidential Authority

In the absence of a congressional declaration, the President may act unilaterally to mobilize reserve forces. Under 10 U.S.C. § 12304, the President may, after his determination that it is necessary to augment the active forces with reserves for an operational mission, order up to 200,000 members of the Selected Reserve to active duty for a period of 270 days.[44] Within twenty-four hours of activating Selected Reserve units and individuals under this "200k" provision, the President must submit a written report to Congress setting forth the circumstances necessitating the action taken and describing the anticipated use of the activated reserve units and members.[45] A mobilization under section 12304 may be terminated by order of

40. Service Reserves refers to the Army Reserve, Air Force Reserve, Naval Reserve, and Marine Corps Reserve. Service Reserves do not include the Army National Guard or the Air National Guard. The Ready Reserve includes the Service Reserves, the Army National Guard, and the Air National Guard.

41. 10 U.S.C. § 12301 (1994). Section 12301(a) states in relevant part:

> In 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 (other than for training) for the duration of the war or emergency and for six months thereafter.

42. *Id.*

43. Since World War II, Congress has not declared war. During the Korean War, President Truman declared a national emergency. *See* Proclamation No. 2914, 1950 U.S.C.C.A.N. 1557 (Dec. 19, 1950). Congress declared a "national exigency" and not a national emergency in the Gulf of Tonkin Resolution in 1964. *See* Southeast Asia Peace & Security Act, Pub. L. No. 88-408, 78 Stat. 384 (1964). Congress passed a resolution authorizing the use of force in the Persian Gulf, but did not declare war or a national emergency. *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 102-1, 105 Stat. 3 (1991).

44. 10 U.S.C. § 12304(a) (1994). Section 12304(a) reads in relevant part:

> (a) Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces for any operational mission, he may authorize the Secretary of Defense and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit, of the Selected Reserve . . . to active duty (other than for training) for not more than 270 days.
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>
> (c) Not more than 200,000 members of the Selected Reserve may be on active duty under this section at any one time.

45. 10 U.S.C. § 12304 (1994).

the President or by law.[46] The President may not authorize an extension of the 270 day limit.[47]

Section 12304 does not require the President to declare a national emergency before reserve mobilization.[48] However, if the President does declare a national emergency,[49] he may order to active duty units and individuals not assigned to units of the Ready Reserve for a period not more than twenty-four consecutive months under section 12302.[50] No more than one million Ready Reservists may be on active duty without their consent under this section.[51] Sections 12301 and 12302 are both unlikely to be used in any scenario which falls short of a complete or nearly complete U.S. mobilization in preparation for war.[52]

b. Training and Gubernatorial Consent

In the past twenty-five years,[53] the authority of section 12301 and its predecessor, section 672, have provided most of the reservists for duty, particularly for the annual two-week training period.[54] Under section 12301(b), DoD may order to active duty any unit or individual not assigned to a unit for active duty, without the member's consent, for a period not in excess of 15 days.[55] In order to be so ordered to active duty, the reserve unit or

46. 10 U.S.C. § 12304(g) (1994).

47. Under 10 U.S.C. § 673B, the predecessor to section 12304, the President could mobilize the reserve forces for 90 days, and authorize a 10 day extension. For 1995, the initial mobilization period was changaed to 270 days, and the provision for extension deleted. *See* Pub. L. 103-337, § 511(a)(2) & 511(a)(1).

48. President Clinton twice ordered reservists to duty under the authority of section 673B or 12304. The first was for the U.S. Military deployment to Haiti. Exec. Order No. 12927, 30 WEEKLY COMP. PRES. DOC. 1778 (Sept. 15, 1994). The second was to support the deployment of U.S. forces to Bosnia. Exec. Order No. 12982, 31 WEEKLY COMP. PRES. DOC. 2153 (Dec. 8, 1995).

49. A Presidential declaration of national emergency is governed by the National Emergencies Act of 1976, 50 U.S.C. §§ 1601-51 (1994). President Bush declared a national emergency to deal with Iraqi aggression in August, 1990. *See* Exec. Order No. 12,722, 5 Fed. Reg. 31,803 (1990). The reserve call-up was not authorized under this declaration, however, and President Bush expanded the national emergency to include the involuntary call-up of reservists under 10 U.S.C. § 673(a) after the outbreak of hostilities on January 17, 1991. *See* Exec. Order No. 12,743, 56 Fed. Reg. 2661 (1991).

50. 10 U.S.C. § 12302 (1994). Section 12302(a) states in relevant part:

> In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve . . . to active duty (other than for training) for not more than 24 consecutive months.

51. 10 U.S.C. § 12302(c) (1994).

52. Sections 12301 and 12302 require, respectively, a congressional declaration of war or national emergency or a presidential declaration of national emergency. These sections allow, respectively, an unlimited number of reservists or a million reservists to be called-up to active duty. Limited deployments are unlikely to require such large numbers of reservists in order to augment the active forces.

53. *See* Davis, *supra* note 33, at 8.

54. *See supra* note 10 and accompanying text.

55. 10 U.S.C. § 12301(b) (1994). Section 12301(b) states:

member must be in an "active" status.[56] There is no explicit requirement in section 12301(b) that the purpose of the active duty be training, although this association is frequently made.[57] Section 12301(d) allows any reserve member to be ordered to active duty for an indefinite period provided the individual member consents to the activation.[58]

The governor of a state must consent to the activation of Air or Army National Guard units or members under section 12301(c) or 12301(d).[59] This consent may not be withheld due to objection to the location, purpose, type, or schedule of active duty.[60] Title 10 also circumscribes the purpose of the reserve mobilization with various terms, such as "active duty," "active duty for training," and "active duty (other than for training)."[61] The absence of such limitation on the purpose of active duty may also lead to some confusion.[62] Reserve mobilization itself does not invoke any provisions of the War Powers Act,[63] although the call-up of reserve forces would most likely be followed, or preceded, by the commitment of U.S. forces to hostilities, in which case the War Powers Act would be

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> At any time, 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, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State (or, in the case of the District of Columbia National Guard, the commanding general of the District of Columbia National Guard).

56. "Active" status, according to 10 U.S.C. § 101(25) (1994), is any member or unit that is not in the inactive or retired reserve. Thus, section 12301(b) includes all Ready Reservists.

57. *See* Davis, *supra* note 33, at 8.

58. 10 U.S.C. § 12301(d) (1994). Section 12301(d) states in relevant part:

> At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.

59. *See supra* notes 54, 57 and accompanying text.

60. 10 U.S.C. § 12301(f)(1994) states that:

> The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

This subsection was added by the Montgomery Amendment of Oct. 30, 1986.

61. Davis, *supra* note 33, at 5.

62. 10 U.S.C. § 12301(a) ("active duty (other than for training)"); 10 U.S.C. § 12301(b) (no purpose of active duty specified); 10 U.S.C. § 12301(d) (no purpose of active duty specified); 10 U.S.C. § 12302(a) ("active duty (other than for training)"); 10 U.S.C § 12304 ("active duty (other than for training)"). However, 10 U.S.C. § 12314 specifies that reservists on "active duty other than for training" may be assigned to any duty authorized by law for the regular components.

63. 50 U.S.C. §§ 1541-1548 (1994). *See* 10 U.S.C. § 12304(h). The War Powers Act is applicable before the President introduces forces to hostilities or near hostilities. 10 U.S.C. § 1542 (1994).

applicable.[64]

2. Legislative Background of the "200k" Provision

The President is not required to declare a national emergency to invoke reserve mobilization under section 12304.[65] However, prior to 1976, reserve units could be involuntarily activated only after a congressional declaration of war or national emergency, or a presidential declaration of national emergency.[66] In 1976, section 673B[67] was adopted by Congress, although the call-up provision was limited to 50,000 reservists.[68] This "50k" provision was limited to ninety days, and the President was authorized to extend the call-up for another ninety days.[69] Congress intended that this provision be used to augment the active forces for an operational mission (hostilities or near-hostilities) and not for purposes of training or to provide assistance during a domestic disturbance.[70] Furthermore, Congress sought to encourage the application of the 1973 Total Force Policy and military reliance on the reserves.[71] Authority to augment the active forces in an operational environment with reserve forces would leave DoD with no reason for withholding important resources from the reserve components.[72] The greater likelihood of operational deployment and supply of more and better resources would also improve morale and motivation within the reserves.[73]

Finally, Congress intended that section 673B would allow the President to activate small numbers of reservists for a limited time with little political backlash.[74] The ability of the President to augment specific operational missions without a declaration of national emergency was essential in order to avoid the potential provocativeness of such a declaration in the international arena as well as potential domestic political fallout.[75] Congress thought it essential that the President be able to respond to a crisis in terms more measured than a declaration of national emergency, which to

64. *See* Davis, *supra* note 33, at 10. The legality and efficacy of the War Powers Act have been widely questioned. *See, e.g.*, Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 90 (1993) ("Under the [War Powers Resolution], presidents methodically avoid formal compliance with the WPR by exploiting its arguably unconstitutional and inartfully drafted provisions.").

65. *See supra* notes 42-46 and accompanying text.

66. The Russell Amendment provisions, used in the 1968-69 Vietnam call-up of reserves, were a limited exception. Pub. L. No. 89-687, 80 Stat. 980 (1966), *reprinted in* 1966 U.S.C.C.A.N. 1161. President Johnson's decision not to mobilize reserve forces was attributed to his reluctance to declare a national emergency. H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1034, 1036.

67. Section 673B was redesignated section 12304 in 1995.

68. Pub. L. No. 94-286, 90 Stat. 517 (1976).

69. *Id.*

70. 1976 U.S.C.C.A.N. 1034, 1039. This distinction, however, is not explicit in this version of section 673B or in subsequent amendments.

71. H.R. Rep. No. 1069, *supra* note 66, at 3-4.

72. *Id.* at 3.

73. *Id.* at 3-4.

74. *Id.* at 3.

75. Davis, *supra* note 33, at 10.

some international observers is tantamount to a declaration of war.[76] Section 673B would also allow the President to activate reserve forces in preparation for, and perhaps preemption of, an impending declaration of national emergency.[77]

Congress increased the call-up limitation from 50,000 to 100,000 personnel in 1980.[78] This increase was made after a series of mobilization exercises revealed that 50,000 reserve personnel were not enough to meet hypothetical operational requirements.[79] The legislative history suggests that the section 673B call-up provision had lost importance as a means for the President to mediate international tensions with action short of a declaration of national emergency. Instead, Congress and DoD saw section 673B as one step in the path of full mobilization in the event of a confrontation with the former Soviet Union.[80] The section 673B call-up provision was increased again in 1986 from 100,000 troops to 200,000.[81] While section 673B in its present form specifies no *minimum* number of reservists which may be involuntarily ordered to active duty, the recent legislative history suggests that Congress envisioned the use of section 673B only in times of large-scale military confrontation,[82] as well as to encourage DoD to increase their reliance upon and support of the reserve components under the Total Force Policy.[83]

In 1995, section 673B was redesignated section 12304, and the maximum authorized period of active duty under this section was changed from ninety days to 270 days.[84]

3. *Use of the Mobilization Provisions*

The involuntary call-up provision of section 12304 was used only once from 1976 to 1993.[85] In response to the Iraqi invasion of Kuwait on

76. Theurer, *supra* note 23, at 1147 n.103 ("[i]t was thought that section 673b authority would minimize international instability by permitting a more measured, less alarming response to developing situations.").

77. *See* S. Rep. No. 1052, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 7007, 7008.

78. Armed Forces Reserve Act Amendments of 1980, Pub. L. No. 96-584 (1980).

79. *See* S. Rep. No. 1052, *supra* note 77, at 7011-12. Large portions of the reserves are activated in a mobilization exercise, in order to test their readiness at a national and unit level, as well as that of the active forces. In one such exercise in 1978, over 25,000 reservists were needed to augment airlift capabilities, and the remaining number of soldiers was insufficient to meet operational needs. *See* Theurer, *supra* note 23, at 1149.

80. *See* S. Rep. No. 1052, *supra* note 77, at 2. Theurer, *supra* note 23, at 1149 n.110 ("The focus on a NATO contingency, and the need for build-up in a deepening East-West crisis, suggest that the primary use of section 673B contemplated by Congress in 1980 was for initial preparation for a full mobilization.").

81. Pub. L. No. 99-661, 100 Stat. 3870 (1986) (codified as amended in the present 10 U.S.C. § 673B).

82. Much of the reasoning behind the increase was the result of exercises based upon various NATO scenarios. Theurer, *supra* note 23, at 1150.

83. *See* Davis, *supra* note 33, at 9.

84. Pub. L. 103-337, § 511, § 1662(c)(2).

85. Prior to 1976, the reserves could be mobilized only upon declaration of war or national emergency. *See supra* text accompanying note 59. President Truman declared a national emergency and involuntarily mobilized reserves during the Korean conflict in

August 2, 1990, President Bush ordered reserve components to active duty under the authority of section 673B.[86] By mid-February 1991, reserve forces in the Persian Gulf exceeded 200,000.[87] In early October of 1990, Congress had expressed concern that the 180-day limit on section 673B deployment was too short.[88] On November 5, 1990, Congress passed a specific amendment to section 673B which extended the period of activation to 360 days, applicable only to the Persian Gulf conflict.[89] Congressional resolve to enforce the time limits of section 673B was never tested, for with the opening of hostilities against Iraq and the presidential declaration of national emergency, the President could deploy one million reservists for twenty-four months under the authority of section 673(a).[90]

Involuntary reserve mobilization under sections 673B and 12304 has been implemented twice since 1993. On September 15, 1994, President Clinton ordered reservists to involuntary active duty under authority of section 673B to support and participate in the deployment of U.S. forces to Haiti.[91] On December 8, 1995, President Clinton again invoked this authority, now under section 12304, to support the deployment of U.S. forces to Bosnia.[92] Previous congressional concerns about the limited duration of a reserve mobilization, expressed with regard to the Persian Gulf conflict, were apparently remedied by the increase of the mobilization duration to 270 days in 1994 by Congress.

The Secretary of Defense may order any reserve component unit or member not assigned to a unit, without consent, to active duty for a period of not more than fifteen days under section 12301(b).[93] This section is the most well-known of the mobilization provisions, because under its authority reservists are authorized and required to participate in an annual two-

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1950. Proclamation No. 2194, *reprinted in* 1950 U.S.C.C.A.N. 1557. During the 1970 postal strike, U.S. President Richard Nixon called over 4,000 National Guard members to active duty without their consent, but the authority for this action was under 10 U.S.C. §§ 3500 & 8500, and not conflict-related. Exec. Order No. 11,519, *reprinted in* 1970 U.S.C.C.A.N. 6235.

86. *See supra* note 48.

87. There were 214,979 reservists on active duty in the Persian Gulf on February 8, 1991. Beth Belton, *War's Financial Toll: Call-Up Means Tough Times on Home Front*, USA TODAY, Feb. 19, 1991, at B1.

88. *See* Jeff Bovarnick, Comment, *Perpich v. United States Department of Defense: Who's in Charge of the National Guard?*, 26 NEW ENG. L. REV. 435, 485 (1991). Section 673B authorizes a ninety day deployment and a ninety day extension. *See supra* note 44, 47 and accompanying text.

89. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-511, tit. VIII § 8132, 104 Stat. 1485, 1908 (1990).

90. Section 673 is now section 12303. *See* 10 U.S.C. § 12303(a). Congressional support of President Bush's actions was explicit. *See* Authorization for Use of Military Forces Against Iraq Resolution, S.J. Res. 2, 102d Cong., 1st Sess., CONG. REC. at 403-04 (daily ed. Jan. 12, 1991), *reprinted in* 30 I.L.M. 296 (1991). Given that Congress had already extended the section 673B time limits, it is unlikely that Congress would have objected to a continued reserve activation period, despite the language of section 673B, unless the political climate became less supportive of the troops in the Persian Gulf.

91. Exec. Order No. 12927, *supra* note 48.

92. Exec. Order No. 12982, *supra* note 48.

93. *See supra* text accompanying note 54.

week training period.[94] In addition, section 12301(b) may also be the most controversial of the mobilization provisions.

There is no explicit requirement in the language of section 12301(b) that reservists must be on active duty for training purposes only, although the legislative history suggests that the intent of section 12301(b) is for training only.[95] In fact, until Desert Storm, there had not been an explicit, involuntary call-up of reserves for twenty years.[96] However, reservists activated under section 672 (now section 12301) have undertaken missions often in support of controversial U.S. foreign policy objectives.[97] This participation, even if voluntary on the part of the reservists, has engendered popular and legal debate.

The gubernatorial consent provisions of section 12301 are the only portions of the reserve mobilization statutes that have been considered by the U.S. Supreme Court.[98] In *Perpich v. Department of Defense*,[99] Governor Rudy Perpich of Minnesota challenged the deployment of Army National Guard members from the state to Honduras for training purposes. U.S. support of insurgency operations against the Nicaraguan Sandanistas was then controversial.[100] At issue was whether the Congress could authorize the President to order members of a state's National Guard to active duty under section 672, for purposes of training, without the consent of the state governor.[101] In particular, Governor Perpich challenged the constitutionality of the Montgomery Amendment, which amended section 672 to provide that "[t]he consent of a Governor . . . may not be withheld (in whole or in part) with regard to active duty outside the United States . . . because of any objection to the location, purpose, type, or schedule of such

94. *See supra* text accompanying notes 52, 53.

95. *See* 1976 U.S.C.C.A.N. 1034, 1039.

96. *See supra* note 85 and accompanying text.

97. Volunteer reservists have participated in every significant military action since 1973: the 1973 Arab-Israeli War, Grenada in 1983, Lebanon in 1986, Libya in 1986, the Persian Gulf 1986-88, Panama in 1990, the Persian Gulf in 1990-94, and various support operations in Haiti, Cuba area, Rwanda, Bosnia, the Persian Gulf, and Somalia. *See* Davis, *supra* note 33, at 4; Schmitt, *supra* note 4, at A1, A22.

98. The statutes with gubernatorial consent provisions are 10 U.S.C. § 12301(b), *supra* note 55; 10 U.S.C. § 12301(d), *supra* note 58; 10 U.S.C. § 12301(f), *supra* note 60.

99. 496 U.S. 334 (1990).

100. At issue was a deployment of 48 National Guard troops to Honduras in January, 1987, under the authority of section 672(b) or 672(d) (section 672 has since been redesignated section 12301). Perpich v. U.S. Department of Defense, 880 F.2d 11, 38 (1989) (Heaney, J., dissenting); Perpich v. U.S. Department of Defense, 666 F. Supp 1319, 1321 (1987). In the same general time period, about 42,000 National Guard members had been deployed to 46 countries for training. *Perpich*, 880 F.2d at 38. National Guard units had traditionally been deployed to Panama for jungle training, ostensibly the same purpose of the Honduran deployment. *Perpich*, 880 F.2d at 37 (citing from statement of Senator John Glenn in hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services). Senator Glenn argued that the only purpose in sending the National Guard troops to Honduras at that particular time was to support an aspect of the Reagan administration foreign policy with which many Americans did not agree. *Id.* Retired military personnel also stated in the Hearings that the Honduran deployment was not a training necessity. *Id.*

101. 496 U.S. at 336.

active duty."[102] Governor Perpich contended that the Montgomery Amendment had prevented him from withholding his consent to the Honduran deployment, and that the amendment violated the Militia Clauses of the Constitution.[103]

The Supreme Court affirmed summary judgment for the Department of Defense,[104] and noted that every member of the Army National Guard is also a member of the "Reserve Corps of the Army," in that each member of a state's National Guard also voluntarily enlisted in or accepted a commission as an officer in the National Guard of the United States.[105] The Minnesota governor did not challenge, nor did the Court question, the existence and validity of this dual enlistment system for the National Guard.[106] Because of this dual enlistment, a National Guard member, when ordered to active federal service, loses any status as a member of the state militia for the period of the federal service.[107]

States do have a basic training obligation to the National Guard, and states are entitled to rely on the National Guard in state emergency situations.[108] Indeed, the Montgomery Amendment does permit a gubernatorial veto when the federal training mission interferes with the state's ability to respond to an emergency situation within the state.[109] Because the Montgomery Amendment does allow the states to veto federal service for training in that event, there is no conflict with the Militia Clauses of the

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102. *Id.* at 337; 10 U.S.C. § 12301(f), *supra* note 60. The Montgomery Amendment was enacted as § 522 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3871 (1986).

103. 496 U.S. at 337, 338. Art. I, § 8 of the Constitution authorizes Congress to provide for (1) calling forth the militia to execute federal law, suppress insurrections, and repel invasions, and (2) organizing, arming, disciplining, and governing such part of the militia as may be employed in the federal service, reserving to the states the appointment of officers and the power to train the militia according to the discipline prescribed by Congress. *Id.*

104. 496 U.S. at 355.

105. *Id.* at 347.

106. *Id.*

> The dual enlistment system requires state National Guard members to simultaneously enroll in the National Guard of the United States (NGUS), a reserve component of the national armed forces. 10 U.S.C. §§ 101(11) and (13), 591(a), 3261, 8261; 32 U.S.C. §§ 101(5) and (7). It is an essential aspect of the traditional military policy of the United States. 32 U.S.C. § 102.

Id.

107. *Id.* at 347-48. Perpich argued that interpreting the Militia clauses to allow such federal control over the militia nullifies an important state power expressly reserved by the Constitution. The Court disagreed and stated it was merely a recognition of the supremacy of federal powers in military affairs. *Id.* at 351.

108. *Id.* at 351.

109. *Id.* Training deployments rarely involve more than several hundred Guard members from a particular state at one time. Minnesota had approximately 13,000 National Guard members; it is unlikely that any active federal service for training purposes will interfere with Minnesota's, or any other state's, ability to respond to a local emergency. Therefore, Perpich's contention that the residual veto allowed by the Montgomery Amendment is of little use, as emergencies cannot be predicted in advance, is specious. *See id.*

Constitution.[110]

Perpich is significant because it affirms the principle that the federal government controls the operational disposition of the National Guard, without significant opportunity for dissent from the state governments. A governor may withhold consent under section 12301 only in very circumscribed scenarios, which amount to the mobilization of significant numbers of the state's National Guard forces during a concurrent state emergency of relatively large scope. Because operational deployments of U.S. forces for U.N. missions are unlikely to involve large forces,[111] the gubernatorial consent provisions of section 12301 will probably not affect the ability of the federal government to activate and deploy Guard forces in support of such missions.

II. Analysis of the U.S. Statutory Framework for Reserve Mobilization

Under the authority of section 12301 and 12304, the President may order reserve forces to active duty, with or without their consent, and without a presidential or congressional declaration of war or national emergency.[112] Any extended deployment of large numbers of U.S. forces abroad will require the support of reserves. With the exception of *Perpich*, there has been no significant legal objection to the use of U.S. reserve forces to advance foreign policy goals of the various administrations. However, if such a challenge were raised, the current mobilization provisions arguably provide a legal basis for limiting the extent of reserve involvement. Absent a declaration of national emergency or war, the mobilization of reservists in the U.S. for conflicts of limited size and protracted length is voluntary on the part of reservists. Although there are proposals and interpretations which resist this *de facto* result, the reality is unlikely to change.

A. *Perpich* Revisited

Ultimately, the Supreme Court in *Perpich* affirmed the supremacy of the federal government in all things military.[113] Congress was under no obligation to create the gubernatorial power in section 12301(b) and 12301(d) and was therefore free to restrict it.[114] Aside from the political issues inherent in the state and federal military relationship, the history and language of section 12301 may provide a basis for future objections by state authorities to the deployment of the National Guard in support of less pop-

110. *Id.* The federal government provides virtually all of the funding, material, and leadership for the State Guard units. *Id.* Furthermore, the states are entitled to maintain, at their own expense, a state defense force which is exempt from any draft into the U.S. Armed Forces. *See* 32 U.S.C. § 109(c) (1994).

111. "Large forces" as used here means a force large enough to require most of the reservists available in any particular state at any time. The Persian Gulf War, which involved over 600,000 servicemen in the combat theatre, did not cross this threshold.

112. *See supra* notes 43-47 & 58-60 and accompanying text.

113. 496 U.S. at 353 ("[T]he constitutional allocation of powers in this realm gave rise to a presumption that federal control over the Armed Forces was exclusive.").

114. *Id.* at 354-55.

ular foreign policy objectives.[115]

One possible argument that governors might use to withhold consent to a section 12301 deployment of National Guard forces from their state[116] is based on the type of units and special skills of the personnel involved, rather than on the number of personnel. The contribution of the reserve component to overall military capabilities has increased and will most likely increase even more in the future.[117] Simultaneously, the overall number of reservists is decreasing.[118] As a result, certain support specialties, such as water supply battalions and heavy helicopter units, are now found entirely, or nearly so, in the reserves.[119]

If one of these units were to be activated and deployed away from their home state under section 12301, a governor might argue that consent must be withheld, for such an activation may seriously impinge upon the state's ability to respond to a disaster.[120] In such a case, the *Perpich* Court agreed that consent may be rightfully withheld.[121] This argument, however, would give the governor of the special unit's state a virtual veto over any activation, as emergencies cannot be predicted in advance. Barring any congressional change in the language of section 12301(f), consent withheld under such circumstances may be valid.[122] The veto would be particularly essential if a state had forewarning of the possibility of a natural disaster, such as a hurricane. The circumstances required for non-consent appear rare and very limited. It is unlikely that a scenario enabling a gubernatorial veto of Guard deployment will occur. It is even less likely that such a veto would have any measurable impact upon U.S. military deployments overseas.

B. Section 12301 and Training Purposes

The language of section 12301(b) and (d) does not make explicit that reserve mobilization must be for training purposes. Legislative history does suggest that a call-up under section 12301(b) be issued only for pur-

115. "[W]e of course do not pass upon the relative virtues of the various political choices that have frequently altered the relationship between the Federal Government and the States in the field of military affairs." *Id.* at 354.

116. The consent provisions of section 12301(b) and (d) are explicitly applicable only to the Army and Air National Guard. *See supra* notes 55, 58.

117. *See* CBO RESERVE STUDY, *supra* note 4.

118. The Clinton Administration plans a 24% reduction from 1990 numbers in the Army National Guard by 1997. *Id.* at 44. This reduction is proceeding apace. *See* Scarborough, *supra* note 28, at A1.

119. As of September, 1992, the Army had five water supply battalions, two in the Army National Guard and three in the Army Reserves. There were three heavy helicopter units in the Army, all in the Army National Guard. JACOBS, *supra* note 3, at 156-57.

120. For instance, a water supply battalion may be instrumental in disaster relief if a calamity were to strike a city's water supply system.

121. "The Governor and the United States agree that if federalization of the Guard would interfere with the State Guard's ability to address a local emergency, that circumstance would be a valid basis for a gubernatorial veto." 468 U.S. at 351 n.24.

122. The gubernatorial veto, along with the former policy of not activating the Guard except in time of war, are traditions and not constitutional mandates. *See id.* at 348-50.

poses of training.[123] Controversy arose in 1986 when DoD sought to use an involuntary call-up under section 12301(b) as an immediate precursor to reserve mobilization under the "200k" provision of section 12304.[124] Definition of the purpose of an involuntary call-up under section 12301(b) is conspicuously absent. Each of the other mobilization provisions specifies that the purpose of a call-up is "active duty (other than for training)."[125] Furthermore, each of those provisions calls for a declaration from either Congress or the President, or consultation with Congress.[126] Within this statutory framework, where mobilization of the reserve forces for the explicit purpose "other than training" must be approved or acknowledged by Congress, it is illogical to assume that Congress intended reserve forces mobilization under section 12301(b) for any purpose except training.

National Guard troops participated in both the 1983 invasion of Grenada and the 1986 raid on Libya.[127] An Air National Guard tanker[128] participated in the Libyan raid by refueling elements of the strike force. The Guard members were assigned to a tanker task force stationed in Europe and were activated under section 12301(d).[129] DoD policy provides that forces activated under section 12301 are on active duty. Active duty means not only "active duty for training," but also that they are available to meet the operational requirements of the Theater Commander.[130] The Total Force Policy, whereby greater reliance is placed on reserve forces, may now conflict with the purposes of the mobilization statutes, preparation for

123. *See* 1976 U.S.C.C.A.N. 1034, 1039.

124. *See* Davis, *supra* note 33, at 8. Reserves mobilized under section 12301(b) may have enabled the military to more efficiently process a larger number of reservists later mobilized under section 12304 as well as delay possible alarm at presidential implementation of 12304, which might have signaled to various observers that a large, and perhaps threatening, reserve mobilization was underway.

125. *See supra* note 60.

126. 10 U.S.C. § 12301(a) (congressional declaration of war or national emergency); 10 U.S.C. § 12302(a) (presidential declaration of national emergency); 10 U.S.C. § 12304 (consultation with Congress).

127. *Perpich*, 880 F.2d at 38. In 1983, U.S. forces invaded Grenada to re-install the democratically-elected government. *See, e.g.*, Ed Magnuson, *D-Day in Grenada*, TIME, Nov. 7, 1983, at 22. In 1986, U.S. aircraft attacked military and political targets in Libya in response to Libya's support of international terrorism. *See, e.g.*, George J. Church, *Hitting the Source*, TIME, Apr. 28, 1986, at 16.

128. A tanker is an aircraft used to refuel other aircraft while in-flight.

129. *Perpich*, 880 F.2d at 38-39.

130. DoD justified the use of reserves in the 1986 raid on Libya stating that:

> The Air National Guard aircraft utilized in support of the Libyan raid were already in Europe as part of routine tanker task force activities. Under long standing practice, Guard and Reserve air refueling aircraft supplement active force refueling aircraft assigned to a tanker task force stationed in Europe. The tanker task force provides day-to-day refueling opportunities to Guard and Reserve crews, and is also available to the theater commander to meet any operational requirement. The guard aircraft was not sent to Europe for the specific purpose of participating in the Libyan raid. Under section 672(d) the crews can be on active duty, including active duty for training.

Id. at 38 (statement of Secretary of the Navy Webb). No Reserve units were used in combat, however.

war.[131] The absence of a specification of the purpose of active duty for reservists activated under section 12301 has been used by DoD to augment their operational requirements as the need arises, and this policy is increasing.[132] Indeed, congressional support for the increased use of reserves is bipartisan and very strong because increased reliance on the reserves equates to more money and resources flowing into congressional districts as more resources are allocated to reserve units.[133]

C. What is a "Unit"?

The mobilization statutes explicitly require that reserve units must be ordered to active service as units, and only reservists not assigned to units organized to serve as such may be activated as individuals.[134] Depending on the definition of "unit," DoD may not be able to activate reservists involuntarily, except on a large scale.[135] If there was no operational need for entire units, DoD would be forced to rely upon volunteers for active duty under section 12301(d). In the past, this has been the case. Where operational needs are relatively modest, DoD has had no difficulty meeting those needs with volunteers.[136] Where, however, the operational needs are greater, volunteers may be insufficient, and DoD may need to deploy reservists without their consent, as units, to meet those requirements.[137]

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131. Secretary Webb explained the problem:

> [w]hat you have is the compression of missions once the Total Force Doctrine came into effect so that you have National Guard units all over the world on any given day under the rubric of 672, which is a problem because you have to go all the way from 672 to a presidential 100-K call-up with very little in between.

Id.

However, the notion that the reserve mobilization statutes serve primarily as preparation and prelude to war is being challenged. For example, in congressional hearings regarding proposed changes to the mobilization statutes, Congressman Greg Laughlin noted, "The goal is to design a less cumbersome procedure that calls the citizen soldiers to active duty to be able to deal with any national problem, whether a military operation, peace-keeping force or natural disaster." *Organization of Reserve Forces: Hearing of the Military Personnel Subcomm. of the House National Security Comm.*, Mar. 21, 1996, at *4, *available in* LEXIS, GenFed File, FNS Library. Furthermore, the goal is to ensure that "[r]eserve component accessibility will be streamlined and the obsolete, patchwork system designed for the Cold War will be replaced by a recall philosophy that will be responsive to future needs." *Id.* at *5.

132. *See* Schmitt, *supra* note 4, at A1. DoD plans to use reserve forces to not only augment, but to replace, active forces in such places as Kuwait and the Sinai. *Id.*

133. *Id.*

134. 10 U.S.C. § 12304(a) ("[a]ny unit, and any member not assigned to a unit organized to serve as a unit . . . ."). An exception is section 12301(d), where individuals may volunteer for active duty. All other mobilization provisions involve involuntary activation.

135. For instance, if "unit" was defined as a battalion or larger, the minimum number of personnel that could be mobilized, a full battalion, would be between 550-825. JACOBS, *supra* note 3, at 154.

136. In Operation Just Cause in Panama in 1989, the Army required Spanish language interpreters. Rather than mobilize entire reserve civil affairs units, each with relatiavely few Spanish translators, the Army solicited volunteers. Theurer, *supra* note 23, at 1156 n.175.

137. One proposal is to consolidate the annual training requirement of approximately forty days into a single block. Such an initiative is expected to encounter some difficulty

Statutory language in sections 12301(b) and 12304 bears out the definition of unit as something more than an individual, but provides no indication of the precise definition of a "unit."[138] No precise clues are provided by the dictionary definition of unit, which is "a single thing, person, or group that is constituent of a whole."[139] The legislative history in the report accompanying the statute reinforces the contextual definition, but does not add to it.[140] However, the greater context of the mobilization statutes within the Total Force Policy suggests that "unit" may be intended to mean organizational units, such as battalions. The intention behind the Total Force Policy was that reserve component units would fight alongside other active units, not be consumed by them.[141] DoD interpretation of "unit" is anything from a two-man detachment or an aircraft crew to a division.[142]

The better interpretation, from the perspective of the operational needs of the active armed forces, is the broad DoD definition.[143] From the perspective of the Total Force Policy, the involuntary activation of reservists in small numbers is to use the reserves as mere gap-fillers in the active forces. However, the definition has not been put to any legal or political challenge. Because there is explicit language in the legislative history assigning no minimum size to "unit," the DoD interpretation would likely prevail in court.[144]

D. Mobilization Timing

If reserve forces were involuntarily activated to augment a protracted operational deployment, the mobilization statutes limit the time of any such activation.[145] One interpretation of these time limits is the "conventional

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because of the requirements of civilian employers and possible retention/recruiting difficulties caused by the lengthy deployment. *See* Schmitt, *supra* note 4, at A22.

138. *See supra* note 55. The word "unit" is followed by reference to individuals not assigned to units. Unit plainly refers to something more than a single person. *See id.*

139. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1291 (1984).

140. S. Rep. No. 562, 94th Cong., 1st Sess. 10 (1975) ("the scope of this special authority is not limited to any unit of minimum size").

141. *See* JACOBS, *supra* note 3, at 47. The Total Force Policy envisions the reserve component as an active and integral part of the armed forces, with its own equipment and personnel, and not merely as a supply of gap-fillers for active duty units. *See* Theurer, *supra* note 23, at 1156.

142. *See id.* at 1154.

143. *See id.* In operational deployments with relatively small numbers of troops, there may be a critical need for certain reserve personnel with particular skills, but no need for large numbers of personnel with those skills. If the need is small, there is no point in activating nearly a thousand reservists where all but a few will have no responsibility or mission once activated, but will nonetheless suffer the disruption to their civilian lives which mobilization may cause.

144. DoD planning for an expanded use of the reserves is based on unit rotation, where the units involved are often battalions or larger units. This is not to say DoD is sensitive to the competing definitions of units, but rather that an elemental ingredient of unit effectiveness is cohesion. As a general rule, units which have trained together are more effective when deployed together. *See* Schmitt, *supra* note 4, at A22.

145. Where there has not been a declaration of national emergency or war, reservists may be involuntarily activated under sections 12301(b) and 12304. Section 12301(b)

clock."[146] Under section 12304, the total time limit for reserve activation is 270 days. Under a "conventional clock," this means that on the first day up to 200,000 reservists could be activated and deployed.[147] On the 270th day, if the President does not declare a national emergency and Congress takes no further action, the activated reservists would have to be deactivated.[148] Reservists not subject to the first activation could not be mobilized on the 270th day and deactivated on the 540th day, nor could they be activated on the 90th day and deactivated on the 360th day. The "conventional clock" places a limit not on the service time of individual reservists, but on the time reservists in the aggregate may be activated and used in a particular operation.

The competing definition is the "rolling clock."[149] Under this definition, sections 12301(b) and 12304 place a time limit on the duration of active service of the reservists mobilized. If the mobilization were under section 12304, reservists activated on day zero would be deactivated on day 270 and be replaced with reserves activated on day 270, whose term of active service would extend to day 540, and so on. Using a "rolling clock," reservists could be deployed indefinitely. This is the interpretation favored by DoD.[150]

The plain language of the statutes favors the "rolling clock" interpretation or, at least, does not exclude it. The relevant language in section 12301(b) is "[a]n authority . . . may . . . order any unit . . . to active duty for not more than 15 days a year."[151] Section 12304(a) states that "[h]e may . . . order any unit . . . to active duty (other than for training) for not more than 270 days."[152] Section 12301(a) places clear limits on the duration of reserve activation, "[a]n authority . . . may . . . order any unit . . . to active duty (other than for training) for the duration of the war or emergency and for six months thereafter."[153] Within the context of the mobilization provisions, the absence of specific limitations on the duration of activation is conspicuous. The reference to "any unit" in sections 12301(b) and 12304 is a singular reference, which could reasonably be replaced with the phrase "any particular unit." Furthermore, section 12301(b) is the authority

limits the activation to not more than fifteen days a year. *See supra* note 55. Section 12304 limits the activation to 270 days. *See supra* note 44, 47.

146. *See* Theurer, *supra* note 23, at 1155.

147. *See supra* note 44, 47.

148. *See* Theurer, *supra* note 23, at 1155-56.

149. *Id.* at 1155.

150. "In other words, the 180 day limitation in the statute is being interpreted as a limitation on the amount of service a reservist is subject to, rather than a limitation on how long the President can use the Selected Reserve without a declaration of national emergency." *Id.* at 1155 n.160, *citing* Memorandum from T.G. Hess, U.S. Marine Corps Judge Advocate General, Manpower and Reserve Affairs: Legal Issues Related to Operation Desert Shield (5800 JAR1 Ser 8808).

151. *See supra* note 55.

152. *See supra* notes 44, 47.

153. *See supra* note 41. Section 12301(a) provides for the mobilization of an unlimited number of reservists following a declaration of war or national emergency by Congress.

under which reservists are activated for their annual training. The annual training for 1.6 million reservists does not, and could not, take place within a single two-week window every year.[154]

At least in the context of an involuntary call-up under section 12304, the legislative history does not support the "rolling clock" interpretation.[155] Congress intended for section 12304 to provide the President with the authority to initiate a substantial military response to perceived global threats without the necessity of declaring a national emergency, as well as to better implement the politically popular Total Force Policy.[156] Congress perceived the possibility of a "rolling clock" interpretation, but not necessarily as a means to extend indefinitely the presence of reservists in an operational theater. Rather, Congress rejected the notion of a "rolling clock" because it would theoretically allow the President to augment the active military beyond the level Congress had authorized.[157] Ideally, section 12304 was meant to allow the President to respond to a situation with appropriate military force levels, possibly conclude it within 270 days, and if necessary, to extend the reserve activation period and personnel limits under section 12302(a) after a presidential declaration of national emergency.[158]

The plain meaning of the time limits on reserve activation under sections 12301(b) and 12304 support the "rolling clock" interpretation, taken both explicitly and implicitly. However, to apply this interpretation is to infer that congressional concerns surrounding the duration of federalization without a presidential or congressional declaration were focused solely on the duration of reservists' active service. Under section 12301(b), this inference is not unreasonable if the section is considered to be solely for purposes of training.[159] However, nothing in the legislative record suggests that Congress had such a parochial concern for reservists' active service time under section 12304. Quite the contrary, Congress was concerned that the President might use section 12304 as a means to exceed congressional limits. In this sense, section 12304 and the 270 day limit on the involuntary activation of reservists is a rung in a hierarchy designed to limit presidential action in response to a perceived military crisis. Thus, while the "rolling clock" is a reasonable interpretation in the context of a fifteen day activation under section 12301(b), it is an unreasonable interpretation of section 12304.

Whereas the United States has a large reserve force and a complex statutory mobilization scheme, Canada has a small reserve force and a

154. The potential effect on the economy of the U.S. if 1.6 million employers and employees were removed annually at the same time is enormous.

155. H.R. Rep. No. 1069, *supra* note 66, at 1-2. Nor does it explain why the plain language of the statute does not exclude the "rolling clock."

156. *Id.*

157. *Id.* at 2 ("[Section 12304 was] not meant to circumvent existing controls on active duty strength through successive, unbroken call-ups of reservists.").

158. *Id. See* 10 U.S.C. § 12302 (1994).

159. This is a logical presumption, as a month on active service might disrupt civilian life to such an extent that reserve recruiting and retention would be seriously hindered.

straightforward statutory framework for reserve mobilization. Both nations, however, share the need for reservists to augment active duty forces in order to effectively deploy military forces.

III. Canadian Forces Reserves

A. Reserve Component Structure

The reserve forces of the Canadian Armed Forces (CF) consist of four components: the Primary Reserve, the Supplementary Reserve, the Cadet Instructors List, and the Canadian Rangers.[160] The Primary Reserve consists of the Army Reserve, the Naval Reserve, the Air Reserve, and the Communication Reserve.[161] Only members of the Primary Reserve participate in annual military training, and the bulk of augmentation forces for the active CF forces come from the Primary Reserve.[162] CF reservists in the other three components are retirees or serve in support and training roles.[163]

There are 29,000 Primary Reservists.[164] The Militia is organized into various combat and support units which are stationed in over 100 locations across Canada.[165] Militia units and individuals are used to augment the Land Forces Command in order to accomplish various peacetime and wartime missions, including U.N. peacekeeping missions.[166] Naval Reserve unit missions include performing and supporting the Maritime Command in coastal defense and mine warfare, as well as supplying units

160. Queen's Regulations and Orders for the Canadian Forces, Vol. I, § 2.034 (1994) [hereinafter Q.R.& O.]. The Supplementary Reserve consists of approximately 27,000 personnel retired from the regular forces, the Primary Reserve, and Officers of the Cadet Instructor List. DE JONG, *supra* note 4, at 8. The Cadet Instructor List consists of approximately 6,000 officers who supervise and train about 60,000 twelve to nineteen year-old cadets of the Sea-Land-or Air Cadet Corps. *Id.* at 10-11. These cadets have no formal affiliation with the CF. *Id.* The Canadian Rangers are comprised of approximately 2,000 volunteers who live in isolated areas, and are responsible for reporting suspicious information and for immediate local defense pending the arrival of other forces. *Id.* None of these three components participate in organized military training on a regular basis. *See* Q.R. & O., *supra.*

161. DE JONG, *supra* note 4, at 9. The CF Army Reserve is traditionally known as the Militia. *Id.*

162. *Id.* The mission of the Primary Reserve is "to enhance the combat readiness of the Canadian Forces, and to support Regular Force activities in peacetime." DIRECTORATE OF RESERVES, THE RESERVIST: TWICE THE CITIZEN 20 (1993).

163. DE JONG, *supra* note 4, at 8.

164. Luke Fisher, *Revamping the Army*, MACLEAN'S, Dec. 12, 1994, at 32.

165. There are 20,200 soldiers in the Militia. April Lindgren, *Canada's Military Reserves*, OTTAWA CITIZEN, Oct. 8, 1994, at B3. Militia units are headquartered at local armories or barracks and each unit draws personnel primarily from the local area. There are 263 Militia units, 24 Naval Reserve units, 37 Air Reserve units, and 24 Communications Reserve units in Canada. *Id.* at B4.

166. TWICE THE CITIZEN, *supra* note 162, at 22. In 1968, Canada unified its army, navy, and air force into a unified command in order to simplify various administrative tasks and training missions. The army became the Land Forces Command, the navy became the Maritime Command, and the air force became the Air Command. *Id.* at 11.

and individuals to integrate with the regular forces.[167] Air Reserve units operate aircraft for light transport missions and in support of peacekeeping missions.[168] The Communications Reserve is equipped with communication equipment and supports CF regular forces on virtually every operation, domestically or abroad.[169]

B. CF Reserves: A Significant Role

CF active personnel number 74,900 and the CF reserves have 29,000 reservists.[170] With the withdrawal of Canadian heavy forces deployed in Europe to support NATO, the primary overseas focus of the CF is the support of U.N. peacekeeping missions.[171] Since 1947, Canada has taken part in every U.N. peacekeeping mission.[172] CF reserves have had a significant role in support of these peacekeeping missions, and the reserve contribution is likely to increase in the future.[173]

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167. DE JONG, *supra* note 4, at 10. There are approximately 4,100 personnel in the Naval Reserve. Lindgren, *supra* note 165, at B3.

168. There are about 1600 personnel in the Air Reserve. *Id.* The Air Reserve is equipped primarily with C-130s (a medium transport aircraft) and light helicopters. TWICE THE CITIZEN, *supra* note 162, at 22.

169. There are about 1600 personnel in the Communications Reserve. Lindgren, *supra* note 165, at B3.

170. *Id.* The Canadian government plans to reduce the number of active duty CF personnel to 60,000 and reservists to 23,000 by 1999. David Pugliese, *Forces Overstocked Despite Cuts*, OTTAWA CITIZEN, Mar. 18, 1996, at A1.

171. Canada's commitment of heavy land forces to NATO defensive missions in Europe ended with the Cold War. Peacekeeping, however, is extremely popular in Canada. The strategic justification for Canada's participation in peacekeeping missions was once based on the notion that the chance of a superpower confrontation was lessened if small conflicts were kept small. Given Canada's geographic location between the U.S. and the former U.S.S.R., such a strategy once made sense. With the demise of the Soviet Union, it is arguable that Canada cannot justify peacekeeping support in terms of domestic security. *See* Peter Saracino, *More Tasks, Fewer Means*, JANE'S DEF. WKLY., Oct. 3, 1992, at 28.

172. Canadian Forces have participated in the following U.N. peacekeeping missions: UNTCOK (Korea, 1947-48), UNMOGIP (Kashmir, 1949-79), UNTSO (former Palestine, 1948-present), ICSC (Southeast Asia, 1965-74), UNEF I (Sinai, 1956-67), UNOGIL (Lebanon, 1958), ONUC (Congo, 1960-64), UNSF (West Irian, 1962-63), UNYOM (Yemen, 1963-64), UNFICYP (Cyprus, 1964-1993), DOMREP (Dominican Republic, 1965-66), UNIPOM (India-Pakistan, 1965-66), UNEF II (Sinai-Suez, 1973-79), ICCS (Vietnam, 1973), UNDOF (Golan Heights, 1974-present), UNIFIL (Lebanon, 1978-present), MFO (Sinai, 1986-present), UNGOMAP (Afghanistan, 1988-90), UNIIMOG (Iran-Iraq, 1988-91), UNTAG (Namibia, 1989-1990), ONUCA (Central America, 1989-92), OSGAP (Afghanistan-Pakistan, 1990-present), ONUVEH (Haiti, 1990-91), UNIKOM (Kuwait, 1991-present), MINURSO (Western Sahara, 1991-present), UNAVEM II (Angola, 1991-present), ECCMY (former Yugoslavia, 1991-present), ONUSAL (El Salvador, 1991-present), UNTAC (Cambodia, 1991), UNPROFOR I & II (former Yugoslavia, 1992-present), UNOSOM (Somalia, 1992-95), ONUMOZ (Western Sahara, 1993-present), UNOMUR (Rwanda, 1993-94). *See* JOSEPH T. JOCKEL, CANADA & INTERNATIONAL PEACEKEEPING 69-77 (1994); SENATE OF CANADA, MEETING NEW CHALLENGES: CANADA'S RESPONSE TO A NEW GENERATION OF PEACEKEEPING 85-90 (1993) [hereinafter MEETING NEW CHALLENGES].

173. Following World War II, Canadian domestic support for peacekeeping was lukewarm. Because peacekeeping missions were seen as merely a drain on military resources, the first CF deployments for peacekeeping were small and composed entirely

1. *A Historical Perspective*

Canadian defense policy in the 1960s and 1970s essentially neglected the reserves in favor of regular forces.[174] This preference was in large measure a result of skepticism about the value of reserve forces in the nuclear age, as well as a political philosophy which emphasized the diplomatic credit active forces could provide.[175] The Canadian government felt that active forces, particularly those stationed in Europe, allowed Canada a voice in international and European policy decisions that it would not otherwise have had with reserve forces.[176] In the mid-1980s, the government of Canadian Prime Minister Brian Mulroney sought to reverse this policy.[177] With insufficient reserves in the event of a European War, the government feared that Canada would be left with inadequate forces for domestic use, would have a limited ability to support troops in the European theater, and would suffer personnel shortages as battle casualties depleted the regular forces.[178]

A modernization program for the reserves in 1987 addressed these concerns. This policy, the "total force concept," called for an expansion and modernization of the reserves, particularly the Militia.[179] In addition to reserve expansion, this policy called for the reorganization of the CF, especially the Land Forces Command, into a structure where reservists and reserve units would take on some regular force missions and be prepared for rapid incorporation into the regular forces.[180] The overall goal of the total force policy was to maintain the general-purpose combat ability of the CF.[181] A subsidiary goal was for the reserve to augment the regular forces in peacetime if the need arose.[182]

2. *Present Use and Status of the CF Reserves*

A need for reserve augmentation of the active forces emerged under the auspices of global peacekeeping. While the CF reserves did not participate in a significant way in peacekeeping missions (except the small initial mis-

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of reservists. This was the case with the 1954 ICSC deployment to Indochina. *See* JOCKEL, *supra* note 172, at 11.

174. During this period Canada was the only NATO country where regular forces outnumbered reservists. *Id.* at 34.

175. *Id.*

176. *Id.*

177. *Id.* at 35.

178. *Id.*

179. *Id.* The similarities between Canada's "total force concept" and the U.S. "total force policy" are significant. The strikingly similar total force concepts may have arisen because they are the most sound military policy. However, a better explanation is that the total force policies are not motivated merely by strategic goals, but also by fiscal ones.

180. *Id.* "For the most part, tasks will be assigned to the Canadian Forces as a whole rather than specifically to Regulars or Reservists. Structures will be adopted to enable the use of a combination of Regulars and Reservists as circumstances dictate . . . ." *Id.*

181. In practice, this results in the CF's three brigade groups being about 40% understrength in peacetime, while some smaller units have only 10% of their wartime strength as regulars in peacetime. *Id.*

182. *Id.* at 36.

sions) through the 1980s, the total force policy has resulted in significant contributions of the reserves to CF overseas deployment.[183] Presently, however, about twenty percent of the forces deployed on peacekeeping missions are reservists.[184]

The total force policy, with a generally increased reserve role in the regular military and particularly in peacekeeping missions, is not without controversy. In hearings before committees of both the Senate and House of Commons in 1992-93, doubts were expressed as to the combat ability of the reservists, although their performance in relatively tranquil peacekeeping operations was viewed favorably.[185] The Senate Standing Committee on Foreign Affairs noted that the total force policy (and the extensive deployment of reservists) was leading to an erosion of the high level of training and readiness which characterized the CF and earned Canada a reputation for providing extremely high-caliber troops for peacekeeping missions.[186]

While the reserves are actively and significantly involved in contemporary peacekeeping operations, the role of reserves in peacekeeping operations in the future is uncertain. Some in Canada have proposed that the military essentially be eliminated.[187] In November 1994, the Liberal Party cabinet approved a policy statement calling for the reduction of CF regular forces from 74,900 to 60,000 by 1999.[188] The Primary Reserve is to be reduced to 23,000, from 29,000, also by 1999.[189] In light of these regular and reserve force reductions, the CF has been considering proposals to substantially change the role of the CF in peacekeeping operations.[190]

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183. Since 1947, over 90,000 Canadian troops have participated in peacekeeping operations. *Playing a Part in Keeping the Peace*, JANE'S DEF. WKLY., Oct. 3, 1992, at 38. Between 1976-1990, only about 1000 reservists served on peacekeeping missions. JOCKEL, *supra* note 172, at 34.

184. *Playing a Part in Keeping the Peace*, *supra* note 183, at 38. Since 1991, almost 3000 reservists have served with the regular forces on peacekeeping missions outside Canada. Lindgren, *supra* note 165, at B3.

185. JOCKEL, *supra* note 172, at 36 (citing testimony of Major General MacKenzie in Canada, House of Commons, Standing Committee on National Defence and Veterans Affairs, *Minutes of Proceedings and Evidence*, Feb. 18, 1993, at 33:6).

186. MEETING NEW CHALLENGES, *supra* note 172, at 77. The report noted that reserve units have been viable only after substantial augmentation by regular force leadership. *Id.* The success of American specialist and logistics reserve units in Desert Storm was also noted, and it was suggested that the CF expand the numbers and use of non-combat reserve units. *Id.* The Standing Committee on National Defence and Veteran Affairs of the House of Commons ultimately recommended that reservist training be increased, and that reserve participation in peacekeeping missions be limited to 25%, unless the operation was more dangerous (such as the former Yugoslavia) where the limit should be 10%. JOCKEL, *supra* note 172, at 36.

187. Bob Bergen, *Forcing the Issue*, CALGARY HERALD, Oct. 4, 1994, at A5. Professor Ivan Head, a law professor, stated that, through peacekeeping, Canada has "influence at the United Nations and in other international institutions far beyond our place in the hierarchy of states." *Id.* Professor Head decries the cost of maintaining the armed forces at the expense of "other things." *Id.*

188. Fisher, *supra* note 164, at 32.

189. *Id.*

190. Two concepts have been proposed. The first is the Vanguard Concept, where CF forces would participate only in the initial phase of a peacekeeping operation, which is

There are several objections, aside from combat efficacy, to any expanded reserve role, or indeed, to much of a reserve role at all. The first is cost. Primary Reserve units cost only about ten percent less than their active duty counterparts in peacetime.[191] This is a considerably smaller differential than between reserve and regular force costs in the United States.[192] CF reservists, with considerably less training than regular forces, do not result in considerable savings.[193] The remaining two objections are statutory: legal service obligations of reservists and statutory protection of civilian employment for reservists serving with the regular forces.[194]

C. The Statutory Framework for Mobilizing CF Reserves

The statutory framework for mobilizing the CF reserve is considerably simpler than its U.S. counterpart.[195] CF reserves may either be involuntarily mobilized in the case of certain emergencies[196] or they may serve voluntarily.[197] Under the present statutory arrangement, the CF reserves cannot be compelled to serve on active duty unless there is an emergency.[198]

1. Mobilizing CF Reserves in the Case of Emergency

Section 31 of the National Defence Act provides that the Governor in Council[199] may place the Canadian Forces, or any element or individual of the Canadian Forces, on active service anywhere in or beyond Canada in the case of an emergency for the defence of Canada or action undertaken by Canada under the terms of an instrument of collective defence.[200] An

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generally regarded as the most critical phase. The second proposal is to form a corps of dedicated peacekeepers from the reserves, or as a separate organization. The Vanguard Concept is not attractive to the U.N. A Reserve Corps is not favored in the CF because of the statutory obligation of Canadian Reservists, and contracting out peacekeeping duties to civilians is not seriously considered. JOCKEL, *supra* note 172, at 36-40.

191. Lindgren, *supra* note 165, at B3.

192. *See supra* text accompanying note 24. Reserve units in the U.S. cost about 30%-40% less than their active duty counterparts.

193. Lindgren, *supra* note 165, at B3. The CF reserves consumed Can$1.028 billion in 1994, out of a total defense budget of Can$11.5 billion. *Id.* To put this number in perspective, the 1994 budget of the U.S. Army National Guard alone was $5.9 billion, which represents only 2.3% of the entire U.S. Department of Defense budget for fiscal year 1994. *National Guard and Reserve Programs: Hearing Before the Subcomm. on Force Requirements and Personnel of the Senate Comm. on Armed Services*, 103d Cong., 1st Sess. 206 (1994) (statement of Major General John R. D'Araujo, Director, Army National Guard) [hereinafter Statement of Maj. Gen. D'Araujo].

194. *See* Lindgren, *supra* note 165, at B3.

195. *See supra* parts I.C. & II.

196. *See* R.S.C. ch. N-5, § 31 (1994) (Can.).

197. *See* Q.R.&O., vol. I, § 9.05 (1994).

198. JOCKEL, *supra* note 172, at 38-39.

199. The term "Governor in Council" means that the government may order such action without prior parliamentary approval. *See* S.M. WADDAMS, INTRODUCTION TO THE STUDY OF LAW 136 (1983).

200. R.S.C. ch. N-5, § 31 (1994) (Can.) states in relevant part that:

> 3. (1) The Governor in Council may place the Canadian Forces or any component, unit or other element thereof or any officer or non-commissioned member

emergency is defined as "war, invasion, riot or insurrection, real or apprehended."[201]

The government, under the authority of section 31(1)(b), may order CF reserves to active service without their consent in action taken by Canada under an instrument of collective defence.[202] While this section would seem to allow involuntary mobilization of the reserves "in consequence of any action undertaken by Canada under the United Nations Charter," this does not authorize the government to mobilize reserves for peacekeeping missions.[203] This is because the section states that such mobilization for active service must be under the auspices of an instrument of collective defense.[204] Peacekeeping missions, while under the auspices of the U.N. Charter, are not a response mandated by the Charter for collective defence.[205]

2. *Mobilizing CF Reserves for Training*

Section 33(2) of the National Defence Act provides authority for the government to order the reserve forces to training and for military duty other than training.[206] However, except in the case of emergency, nothing in this section obligates a reservist to perform military duty of any sort.[207] In the words of the Directorate of Reserves:

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thereof on active service anywhere in or beyond Canada at any time when it appears advisable to do so

(a) by reason of an emergency, for the defence of Canada; or

(b) in consequence of any action undertaken by Canada under the United Nations Charter, the North Atlantic Treaty or any other similar instrument for collective defence that may be entered into by Canada.

201. R.S.C. ch. N-5, § 2 (1994) (Can.).

202. R.S.C. ch. N-5, § 31(1)(b) (1994) (Can.).

203. *Id.*

204. "Reservists are liable for compulsory military service . . . if placed on active service by reason of an emergency for the defense of Canada or as a result of Canadian actions under the terms of a collective defence agreement, such as the North Atlantic Treaty . . . ." TWICE THE CITIZEN, *supra* note 162, at 23.

205. "Peacekeeping is a U.N. intervention. It was not specifically defined in the charter but evolved as a noncoercive instrument of conflict control . . . ." Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter 1992-93, at 89. However, in particular cases, the U.N. Charter is an instrument of collective defense. Article 51 provides for "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ." U.N. CHARTER art. 51.

206. R.S.C. ch. N-5, § 33 (1994) (Can.) provides in relevant part that:

33. (2) The reserve force, all units and other elements thereof and all officers and non-commissioned members thereof

(a) may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council, and

(b) may be called out on service to perform any military duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.

207. Q.R.&O., vol I, § 9.04(3) states that "[i]n an emergency, the Minister may call out on service to perform any military duty other than training, such officers and non-commissioned members of the Reserve Force . . . and such units and other elements thereof as he may consider necessary."

> You should not allow your military service to affect your work or school . . . . On the other hand, a lot of time and effort goes into organizing your training, and it's all wasted if you don't show up. You have an obligation, if only a moral one, to follow through on the commitment you made when you joined.[208]

Except in the case of emergency,[209] CF reservists are not obligated to train or to perform military duties other than training.[210] The federal government may obligate the reservists to perform active service in the case of emergency, but this has not happened since the Second World War.[211]

IV. Comparison Between the U.S. and CF Reserve Mobilization Statutory Framework

Given the statutory restrictions on the involuntary mobilization of CF reserves, many of the issues raised by the U.S. statutory framework are absent. Reservists who volunteer for active duty alongside the regular forces comprise the bulk of CF reserve force augmentation to the active forces.[212] This reliance on voluntary service may ultimately be detrimental to the international deployment of the CF for any mission short of war or insurrection within Canada. However, the statutory restrictions on the involuntary deployment of U.S. reserve forces, in effect, prevent the U.S. government from deploying reserve forces to support an overseas mission of extended length except on a voluntary basis. Given that international operations involving the regular forces of both nations will require reserve augmentation, the United States is in a better position to conduct those operations with necessary reserve support. This is because the U.S. statutory framework encourages voluntary mobilization, and because the United States simply has a larger pool of reservists who may volunteer.

A. Statutory Support for Voluntary Mobilization

Employers of CF reservists are under no obligation to refrain from penalizing, or even firing, CF reservists who are absent from their civilian employment because they are on active service.[213] Rather than adopt legislation protecting the civilian jobs of reservists, the government has sought to persuade employers to adopt policies amenable to reserve service.[214]

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208. TWICE THE CITIZEN, *supra* note 162, at 23.

209. An emergency exists in the case of war, invasion, or insurrection. *See supra* note 200 and accompanying text.

210. "[R]eservists aren't obliged to report for duty when needed. That hasn't been a problem so far, but the auditor general in 1992 said only about one-third of reservists would turn out during an emergency and less than half would show up for combat assignment outside Canada." Lindgren, *supra* note 165, at B3. CF reservists do train, however, usually between 35-40 days annually, even though there is no legal obligation to do so. *Id. See* Q.R.&O., vol. I, § 9.04(2) (1994) (reservists may be ordered to train for up to 15 days continuously and 60 days non-continuously, each year).

211. Lindgren, *supra* note 165, at B3.

212. *See* Q.R.&O., vol. I, § 9.05 (1994) ("Service With Consent").

213. Lindgren, *supra* note 165, at B3.

214. *Id.* Such legislation is resisted because it is felt that employers with reservists would be at a competitive disadvantage with other employers without reservists. There-

Although the Canadian government has expended significant resources to promote employer support of reserve service, the effort has been largely unsuccessful.[215]

Comparatively, the U.S. protects the civilian employment of reservists by operation of statute.[216] Protection is accorded to reservists regardless of whether the active service is voluntary or involuntary.[217] While it is difficult to quantify the precise effect these differing policies have had on the number of reservist volunteers, it is nonetheless substantial.[218] A Canadian reservist facing the loss of civilian employment on return from a limited duration period of active duty has a strong disincentive to volunteer in the first place.[219]

This is not to say that the effective reliance on voluntary mobilization of reservists in the United States will necessarily continue. In addition to interpretive methods of escaping statutory restrictions on U.S. reserve mobilization, such as the definition of "unit" and the "rolling clock," there have been efforts in the U.S. to make reserve deployment less of a voluntary affair.[220] Members of the reserves have asked Congress to reconsider the reliance on volunteer reservists.[221] Congress has modified Section 12304 to allow for 270 day involuntary deployment of reservists instead of ninety days. Another proposal would allow the President to order to active service only 25,000 reservists.[222] President Clinton did mobilize a small number of reservists involuntarily under 10 U.S.C. § 673B in support of the inva-

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fore, reservists themselves would be at a disadvantage in the job market because employers would be less willing to hire them. *Id.*

215. *Id.* The Directorate of Reserves states that:

> In the first place, all companies, through paying taxes, contribute financially to the nation's defence–which means to the Canadian Forces. Since the Reserve is a large, and increasingly important, part of the Forces, those companies that do not support their reservists are not really encouraging the best use of their own tax dollars.

TWICE THE CITIZEN, *supra* note 162, at 70.

216. *See* 38 U.S.C. §§ 4301-16 (1994); Jeffrey S. Klein & Nicholas J. Pappas, *The Return from Uniformed Service*, N.Y.L.J., Dec. 5, 1994, at 3.

217. 38 U.S.C. § 4304(b)(2) (1994).

218. *See* Lindgren, *supra* note 165, at B3.

219. Many CF reservists must choose between active service and their job. Some choose active service, although this is not the norm. Alan Hustak, *Quebec Reservists Begin Their Training for Six-Month Stint in Bosnia-Hercegovina*, OTTAWA CITIZEN, Jan. 24, 1993, at A4. "Until we get laws like that [in the U.S.] protecting us, some people will have to make sacrifices if they want to participate in humanitarian missions . . . ." *Id.*

220. *See supra* part II.D.

221. *Mobilize Reservists Rather than Plan for Volunteers*, U.S. NEWSWIRE, June 5, 1991, *available in* NEXIS, News Library, Wires File. "[F]or the Department of Defense leadership to consistently expect reservists to volunteer in their needed skills and numbers and in a timely manner is a form of abdication of responsibility by the Pentagon." *Id.* (punctuation omitted).

222. This proposal has not yet made it out of committee recommendations, however. *See* S. Rep. No. 103-112, 103d Cong., 1st Sess. (1993); H.R. Rep. 103-449, 103d Cong., 2d Sess. (1994).

sion of Haiti in 1994[223] and again in 1995 to support operations in Bosnia.[224]

B. Voluntary Reserve Mobilization and the Implications for Peacekeeping

Canada, with a small military establishment and a voluntary reserve policy, has contributed significantly to peacekeeping missions since the reserve's inception.[225] The U.S., with a very large military and a *de facto* voluntary reserve policy, has contributed relatively few military personnel to

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223. Exec. Order No. 12927, 30 WEEKLY COMP. PRES. DOC. 1778 (1994); *See* Peter Mackler, *Clinton Lobbies Skeptical Americans on Haiti Invasion*, AGENCE FRANCE PRESSE, Sep. 15, 1994, *available in* NEXIS, News library, Arcnws File.

224. *See supra* note 48.

225. Canadian participation in peacekeeping missions:

Mission	Location	Year	Personnel	Type
UNTCOK	Korea	47-48	2	Observers
UNMOGIP	Kashmir	49-79	27	Observers, Air Lift
UNTSO	former Palestine	54-	22	Observers
ICSC	Southeast Asia	54-72	133	Observers
UNEF I	Sinai	56-67	1007	Armored Cavalry, Support and Logistics, Air Lift
UNOGIL	Lebanon	58	77	Observers
ONUC	Congo	60-64	421	Communications, Air Lift
UNTEA	West Irian	62-63	13	Air Lift
UNYOM	Yemen	63-64	36	Observers, Air Lift
UNFICYP	Cyprus	64-93	1126	Armored Cavalry, Infantry, Communications, Military Police
DOMREP	Dom. Rep.	65-66	1	Observer
UNIPOM	India-Pakistan	65-66	112	Observers
UNEF I	Sinai	56-67	1007	Armored Cavalry, Engineers, Logistics, Communications, Air Lift
UNEF II	Sinai-Suez	73-79	1145	Communications, Logistics, Military Police, Air Lift
ICCS	Vietnam	73	248	Observers
UNDOF	Golan Hgts	74-	230	Communications, Logistics
UNIFIL	Lebanon	78-	117	Communications, Military Police
MFO	Sinai	86-	140	Air Lift, Staff
UNGOMAP	Afghanistan	88-91	5	Observers
UNIIMOG	Iran-Iraq	88-91	525	Communications, Observers
UNTAG	Namibia	89-90	301	Logistics, Air Lift
ONUCA	Central America	89-92	175	Observers, Air Lift
OSGAP	Afghanistan	90-	6	Military Advisor
ONUVEH	Haiti	90-91	11	Observers
UNIKOM	Kuwait	91-	301	Observers, Engineers
MINURSO	Western Sahara	91-	33	Observers
UNAVEM II	Angola	91-	15	Observers
ECMMY	former Yugoslavia	91-	12	Monitors
ONUSALEl	Salvador	91-	11	Staff
UNTAC	Canbodia	91	213	Observers, Staff, Engineers, Transportation

peacekeeping operations.[226] As domestic fiscal imperatives require nations to place greater military reliance on reserves, the statutory framework for reserve mobilization becomes more important. The Canadian peacekeeping experience has demonstrated that a reserve statutory framework based on voluntary mobilization can succeed.

The United States, with much greater military and fiscal resources, is planning and allocating a larger role to voluntary reservists. The Operational Integration Program has been developed by DoD specifically to enhance U.S. peacekeeping ability.[227] This program will provide composite units, comprised of regular soldiers and volunteers from the Army National Guard and Army Reserve.[228] The unit will undergo training and then be deployed for six month rotations in multinational observer and peacekeeping missions.[229] The first composite unit has already deployed to the Sinai.[230] U.S. reserve forces will also be deployed on a voluntary basis for forty-five day international relief missions under the Operational Unit Program.[231] These Army National Guard units, selected because of their experience in providing support in domestic disaster relief assistance, are prepared to deploy on seventy-two hours notice.[232] Other reserve units

UNPROFOR I & II	former Yugoslavia	92-	2300	Infantry, Engineers, Military Police, Staff
UNOSOM	Somalia	92-95	1300	Infantry, Air Support, Staff, Logistics
ONUMOZ	Western Sahara	93-	15	Observers
UNOMUR	Rwanda	93-94	1	Command

See JOCKEL, *supra* note 172, at 69-77; MEETING NEW CHALLENGES, *supra* note 172, at 85-90.

226. U.S. participation in U.N. peacekeeping missions was practically non-existent before 1993, with the exception of Korea. *See* UNITED NATIONS, THE BLUE HELMETS (2d ed. 1990). In 1993, there were twenty-four peacekeeping missions underway across the globe, involving 75,000 troops, 5,600 of them American. Barry R. McCaffrey, *U.S. Military Support for Peacekeeping Operations, in* PEACE SUPPORT OPERATIONS AND THE U.S. MILITARY 4 (Dennis J. Quinn ed., 1994). The cost of these operations was about $4 billion, and the U.S. paid approximately one-third of this cost. *Id.* In 1994, 63,138 troops were involved in peacekeeping and as observers; 817 were American. Carla Anne Robbins, *GOP Bid to Downgrade U.N. Peacekeeping Role Is Likely to Gain Steam in House Vote Today*, WALL ST. J., Feb. 16, 1995, at A16. The cost of these missions to the U.N. was $3.5 billion, of which $1.1 billion was assessed to the U.S. *Id.* The U.S. House of Representatives passed a bill in February, 1995, which would dramatically limit presidential authority to commit forces to U.N. peacekeeping missions. *See* National Security Revitalization Act, H.R. 7, 104th Cong., 1st Sess. (1995). The Senate has not yet voted on the bill. The National Security Revitalization Act would significantly reduce U.S. funding for U.N. peacekeeping operations, and it would require the President to consult with Congress prior to the deployment of U.S. forces on U.N. missions. *See, e.g.*, David Hess, *House OKs Limiting U.N. Ties*, DAYTON DAILY NEWS, Feb. 17, 1993, at 12A.

227. Statement of Maj. Gen. D'Araujo, *supra* note 193, at 206.

228. 75% of the soldiers are volunteers from the Army National Guard. *Id.* This program is unique because it would collect reservist volunteers from many different units, organize and train them as a new unit, and deploy the "hybrid" unit. *See id.*

229. *Id.*

230. Bradley Graham, *Reserve Troops Get Their Shot at Active Duty*, WASH. POST, Dec. 12, 1994, at A1.

231. Statement of Maj. Gen. D'Araujo, *supra* note 193, at 205-06.

232. *Id.*

will deploy on a follow-on basis, also for forty-five days, to replace previously deployed units.[233] These units are not composites of volunteers, but units in existence.[234]

If there are sufficient personnel and resources, deployment as units, even as composite units of volunteers from various reserve units, is arguably preferable to a policy of individual replacement.[235] CF reserves are deployed as individuals, and this policy has magnified reserve training inadequacies and hindered the formation of unit cohesion.[236] The capability to deploy reserve units on a voluntary basis is at least partially a function of the statutory requirement of reserve civilian employment rights.[237] It is possible, as Canada has demonstrated, to deploy effective military forces on peacekeeping missions from a small regular force augmented by a small pool of voluntary reservists. The U.S., with far greater resources, can also effectively deploy forces on multinational missions with voluntary reserve augmentation. In addition, the U.S. has implemented programs, such as the Operational Unit and the Operational Integration Programs, designed to use voluntary reservists in ways unavailable to, but arguably more effective than, the Canadian experience. While the statutory framework for reserve mobilization in the U.S. may not be satisfactory to critics who seek a framework less oriented to voluntary mobilization, the CF have demonstrated that such a framework does work.

Conclusion

The United States has both large regular and reserve forces. Congress has created an intricate web of statutory controls which limits the ability of the President to mobilize reserve forces in times short of war or national emergency. While there are arguments which would allow the statutory framework to be read in a light permitting small-scale involuntary mobilization of the U.S. reserves, these arguments are not supported by legislative history. The better interpretation of the statutory framework, and one supported by the past use of the authority granted by the mobilization statutes, is that U.S. reservists cannot be involuntarily mobilized to support the regular forces when involved in an operation of limited scope.

Canada has a significantly smaller regular military and reserve force than the United States. The reserves of the Canadian Forces cannot be mobilized involuntarily, except in the case of war, by operation of statute and policy. Despite this limitation, Canadian reservists routinely augment

233. *Id.*

234. These units are not composed of a collection of volunteers from various units, but will be deployed as the same unit in which they train. *See id.*

235. *See supra* notes 16-17 for a discussion of the inefficacy of the individual replacement policy of the U.S. military in Vietnam.

236. Volunteer reservists who train on a limited, part-time basis are put in units alongside regular force troops with considerably more experience and training. In some cases, the reservist may be more of a liability than an asset to the unit. *See* David Pugliese, *Is Total Force a 'total farce'?*, TORONTO STAR, Mar. 13, 1993, at D5.

237. Perhaps to a greater extent it is also a function of the number of available reservists. The U.S. has a reserve pool approximately thirty-five times larger than Canada.

regular Canadian forces which operate throughout the world in support of U.N. peacekeeping missions. Like the United States, the Canadian reservists who augment regular forces do so on a purely voluntary basis. In addition, the United States has additional statutory protections, not available to Canadian reservists, which generally provide incentives to reservists to volunteer.

In spite of these statutory differences, the Canadian Forces have participated significantly in U.N. peacekeeping missions since 1947, while U.S. forces have not. Given that fiscal imperatives require that both nations rely more heavily on reserve forces, a legal framework which allows for the use of those reserves provides significant force utilization advantages. Canadian experience indicates that express reliance on a completely voluntary reserve mobilization system can, and does, work. As the United States contemplates the future role of its military in U.N. missions, as well as the complex legal structure which has evolved to regulate reserve mobilization, the simple and effective Canadian example should not be overlooked.