
THE BROKEN PROMISES OF AN ALL-VOLUNTEER MILITARY

Matthew Ivey*

“God and the soldier all men adore[.] In time of trouble—and no more, For when war is over, and all things righted, God is neglected—and the old soldier slighted.”¹

“Only when the privileged classes perform military service does the country define the cause as worth young people’s blood. Only when elite youth are on the firing line do war losses become more acceptable.”²

“*Non sibi sed patriae*”³

INTRODUCTION

In the predawn hours of March 11, 2012, Staff Sergeant Robert Bales snuck out of his American military post in Kandahar, Afghanistan, and allegedly murdered seventeen civilians and injured six others in two nearby villages in Panjwai district.⁴ After Bales purportedly shot or stabbed his victims, he piled their bodies and burned them.⁵ Bales pleaded guilty to these crimes in June 2013, which spared him the death penalty, and he was sentenced to life in prison without parole.⁶ How did this former high school football star, model soldier, and once-admired husband and father come to commit some of the most atrocious war crimes in United States history?⁷ Although there are many likely explanations for Bales’s alleged behavior, one cannot help but to

* The author is a Lieutenant Commander in the United States Navy. This Article does not necessarily represent the views of the Department of Defense, the United States Navy, or any of its components. The author would like to thank Michael Adams, Jane Bestor, Thomas Brown, John Gordon, Benjamin Hernandez-Stern, Brent Johnson, Michael Klarman, Heidi Matthews, Valentina Montoya Robledo, Haley Park, and Gregory Saybolt for their helpful comments and insight on previous drafts. The author would also like to thank the staff of the *Temple Law Review* for their outstanding editorial support and assistance.

1. John F. Kennedy, Remarks at West Point to the Graduating Class of the U.S. Military Academy (June 6, 1962), in PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1962, at 455.

2. Charles Moskos, *Grave Decision When Americans Feel More at Ease Accepting the Casualties of War*, CHI. TRIB., Dec. 12, 1995, at 25.

3. Latin inscription over the chapel doors at the U.S. Naval Academy, meaning “Not for self, but for country.” JOSHUA WELLE ET AL., IN THE SHADOW OF GREATNESS 1 (2012).

4. Matthew Rosenberg & William Yardley, *Word Comes from Kabul that U.S. Sergeant Is Charged with 17 Murders*, N.Y. TIMES, Mar. 24, 2012, at A9.

5. Jack Healy, *Apology, but No Explanation, for Massacre of Afghans*, N.Y. TIMES, Aug. 23, 2013, at A16 [hereinafter Healy, *Apology*]; Jack Healy, *In 2 Cases of Mass Murder, Military Juries Render Heavy Judgments: Life Without Parole for Killing 16 Afghans*, N.Y. TIMES, Aug. 24, 2013, at A10.

6. Healy, *Apology*, *supra* note 5, at A16.

7. James Dao, *At Home, Asking How ‘Our Bobby’ Became War Crime Suspect*, N.Y. TIMES, Mar. 19, 2012, at A1.

make a connection between the awful rampage of March 11, 2012, and the impact of almost thirteen years of war on the all-volunteer military.

The day of Bales's alleged rampage marked his 1,195th day in a combat zone in the past eight years.⁸ Before his most recent deployment to Afghanistan, Bales's life began to unravel. His finances were in ruins.⁹ He began drinking heavily and fighting with his wife.¹⁰ During his past deployments to Iraq, Bales was wounded on two occasions, even losing part of his foot.¹¹ After returning home, he suffered from symptoms of post-traumatic stress disorder (PTSD), including nightmares, flashbacks to war scenes, and chronic headaches.¹² While Bales was never diagnosed with PTSD, military officials confirmed that he was treated for a mild traumatic brain injury.¹³ Nevertheless, he was cleared for duty and ordered to return to Afghanistan for his fourth and final deployment.¹⁴

Staff Sergeant Bales represents one of the worst manifestations of the excessive burdens suffered by the military during this time in United States history. This Article seeks to examine these burdens, explore how these burdens came to be, and offer possible ways to lessen these burdens in the future. More specifically, it examines the promised benefits of the all-volunteer service and critically assesses whether these promises have endured the stress tests of thirteen years of war.

Since the founding of the United States, the country has wrestled with different approaches to provide adequate personnel (both in quality and quantity) for our armed forces. Throughout our history, at least until recently, with each armed conflict or potential conflict, politicians, the judiciary, the media, and the American people at large have debated the best way to provide sufficient military staffing. The executive, legislative, and judicial branches have struggled—and often failed—to promote systems that comport with the often-competing values of fairness and liberty. Historically, the demands of the American people—at the polls, on the picket lines, or through other mechanisms of an active democracy—have worked to tip the balance of interests attached to the task of building a military force.

By the second decade of the twenty-first century, the United States had been at war for over a decade. The discussion of how to provide adequate staffing for our nation's armed commitments abroad, however, has become muted or even

8. Lawrence J. Korb, Op-Ed., *A Draft Would Force Us To Face Reality*, N.Y. TIMES (Mar. 21, 2013, 10:22 PM), <http://www.nytimes.com/roomfordebate/2012/03/20/would-a-draft-reduce-the-number-of-post-traumatic-stress-cases/a-draft-would-force-us-to-face-reality>.

9. *Afghanistan Shooting Suspect Robert Bales Faced Financial Troubles, Records Show*, NBCNEWS (Mar. 17, 2012, 5:42 PM), http://usnews.nbcnews.com/_news/2012/03/17/10737370-afghanistan-shooting-suspect-robert-bales-faced-financial-troubles-records-show?lite.

10. Kim Murphy, *Suspect Soldier Down on His Luck*, L.A. TIMES, Mar. 18, 2012, at A9; Elizabeth Weise & Gary Strauss, *Soldier Guilty of Afghan Massacre: Judge Accepts His Plea in Killings of 16 Civilians*, USA TODAY, June 6, 2013, at A3.

11. Joby Warrick et al., *Accused Soldier Faced Pressures of Deployments*, WASH. POST, Mar. 18, 2012, at A1.

12. Nadja Popovich, *Can Robert Bales Use PTSD as His Legal Defense?*, THE ATLANTIC (Apr. 10, 2012, 3:00 PM), <http://www.theatlantic.com/health/archive/2012/04/can-robert-bales-use-ptsd-as-his-legal-defense/255649/>.

13. *Id.*

14. *Id.*

extinguished. Meanwhile, over 7,000 miles away, a few Americans wage war on behalf of their country. Their sacrifices are largely removed from most of their fellow Americans.¹⁵ Somehow Americans have become a people that are “at peace with being at war”¹⁶ and are content to allow a very few from American society to do their bidding overseas.¹⁷ During the 2012 presidential election, for the first time in sixty-eight years, neither presidential candidate had served in the military in any capacity.¹⁸ The number of military veterans in Congress has also steadily declined since the disestablishment of the draft. The war in Afghanistan and other national security matters often seemed peripheral to the 2012 political campaign discourse.¹⁹ All this reflects a widening gap between the military and the society it protects.

Many scholars, policymakers, and military leaders have traced this gap to the dissolution of the military draft and the establishment of an all-volunteer force. The Vietnam War demonstrated the darkest consequences of a drafted military. Drafted soldiers and those who took advantage of student deferments seemed to fall into predictable socioeconomic and racial categories.²⁰ As the war waged on, public opposition toward the draft reached unprecedented heights.²¹ President Nixon believed an all-volunteer military would alleviate some of the public pressure placed on the military during the Vietnam War, and, accordingly, shortly after his inauguration, he appointed a blue ribbon panel, the President’s Commission on an All-Volunteer Armed Forces (the Gates Commission), to explore the transition from a draft to an all-volunteer force.²²

Quite predictably, the Gates Commission recommended terminating the draft, generally promising that the all-volunteer force would not suffer the problems that

15. See Peter Baker, *Iraq War’s 10th Anniversary Is Barely Noted in Washington*, N.Y. TIMES, Mar. 20, 2013, at A10 (“A decade after the night that American bombs first rained down on Baghdad, the president joked about wearing a green tie for a belated St. Patrick’s Day celebration. Congress noisily focused on whether spending cuts would force the cancellation of the White House Easter egg roll. Cable news debated whether a show about young women has too much sex in it.”); Bryan Bender, *The Longest War Barely Echoes at Home*, BOSTON GLOBE, Aug. 17, 2012, at A1 (discussing the limited attention Americans give to the war in Afghanistan).

16. David Carr, *The Wars We Choose To Ignore*, N.Y. TIMES, May 26, 2008, at C1. The article noted that, “[a]ccording to the Project for Excellence in Journalism’s News Coverage Index, coverage of the wars in Iraq and Afghanistan has slipped to 3 percent of all American print and broadcast news” as of May 2008. *Id.*

17. See *id.* (explaining that U.S. armed forces serving in Iraq and Afghanistan received increasingly scarce attention or thought from the American public).

18. Ken Dilanian, *Ryan Pick Cements Lack of Military Service in Presidential Race*, L.A. TIMES (Aug. 11, 2012), <http://articles.latimes.com/2012/aug/11/news/la-pn-ryan-pick-cements-lack-of-military-service-in-presidential-campaign-20120811>.

19. See Bender, *supra* note 15, at A1 (attributing a relative silence regarding the war in Afghanistan in the 2012 campaign dialogue to the small number of differences between the two candidates’ views on the subject).

20. See, e.g., DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENT AND IDEAS* 164 (2008) (noting that because the wealthy and well connected could obtain deferments, the burdens of conscription fell disproportionately on the poor and working class).

21. See *id.* (“Conscription was never popular in the USA, but the Vietnam War sparked the largest wave of public opposition to the draft since the Civil War.”).

22. William A. Kamens, Comment, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U. L. REV. 703, 731–32 (2003).

plagued the drafted military.²³ As a result, since 1973, the United States has relied on a military comprised solely of volunteers.²⁴ In 1980, President Carter unsuccessfully attempted to reinstate the draft.²⁵ Since that time, there has been only limited political or public appetite to change the way the military is built.

Since the attacks of September 11, 2001, the country continues to face threats to national security at home²⁶ and has committed troops around the globe, most significantly in Iraq and Afghanistan. To meet the increasing demand, the military has lowered enlistment standards, involuntarily retained some service members on active duty past the end date of their enlistment contracts, and used private military companies at unprecedented levels. Elected and appointed leaders have ordered service members into multiple war zones, with some individual service members deploying on multiple occasions for over a year at a time.²⁷ These stresses have costs. While empirical causation is not proven, it is beyond coincidence that after thirteen years of war, military service members have suffered from rates of unemployment, homelessness, and suicide at noticeably higher occurrences than the civilian population. Yet despite the disproportionate burdens suffered by the current all-volunteer military, very few Americans have called for a change to the current way of staffing the military.²⁸

Over the past decade, less than one-half of one percent of the United States population has actively served in the military.²⁹ Undoubtedly, Vietnam-era conscription practices revealed troubling flaws that ultimately led to the draft's demise. The calls for an all-volunteer military were anchored in assertions of the immorality of conscripted

23. THOMAS GATES ET AL., THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE 140–41 (1970) [hereinafter GATES COMMISSION REPORT].

24. Michael J. Carden, *Defense Department Celebrates 35 Years of All-Volunteer Force*, U.S. DEPARTMENT OF DEFENSE (June 25, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=50310>.

25. Proclamation No. 4771, 3 C.F.R. 82 (1980).

26. See, e.g., Mark Arsenault, *Second Marathon Bombing Suspect Captured After All-Day Hunt That Brought Boston Area to Standstill; Alleged Accomplice Dead*, BOSTON GLOBE, Apr. 20, 2013, at A1 (describing the chaos that ensued during police's search for Dzhokhar and Tamerlan Tsarnaev following the Boston Marathon bombing). According to the Heritage Foundation, fifty terrorist attacks against the United States have been thwarted since 2001. JAMES JAY CARAFANO ET AL., FIFTY TERROR PLOTS FOILED SINCE 9/11: THE HOMEGROWN THREAT AND THE LONG WAR ON TERRORISM 1 (2012), available at <http://www.heritage.org/research/reports/2012/04/fifty-terror-plots-foiled-since-9-11-the-homegrown-threat-and-the-long-war-on-terrorism>.

27. See Anna Mulrine, *Sgt. Robert Bales and Multiple Tours of Duty: How Many Is Too Many?*, CHRISTIAN SCI. MONITOR (Mar. 23, 2012), <http://www.csmonitor.com/USA/Military/2012/0323/Sgt.-Robert-Bales-and-multiple-tours-of-duty-How-many-is-too-many> ("Some 107,000 Army soldiers have been deployed to war three or more times since 2001, or some 20 percent of the active-duty force. More than 50,000 of those currently in uniform have completed four or more combat tours, Army figures indicate.").

28. See, e.g., Thomas E. Ricks, *Let's Draft Our Kids*, N.Y. TIMES, July 10, 2012, at A21 (mentioning how infrequently military officials voice doubt in the adequacy of an all-volunteer military); Josh Rogin, *McChrystal: Time To Bring Back the Draft*, FOREIGN POLICY: THE CABLE (July 3, 2012, 11:08 AM), http://thecable.foreignpolicy.com/posts/2012/07/03/mcchrystal_time_to_bring_back_the_draft (quoting General McChrystal as stating, "I think if a nation goes to war, every town, every city needs to be at risk. You make that decision and everybody has skin in the game."); Charles B. Rangel, *Bring Back the Draft*, N.Y. TIMES, Dec. 31, 2002, at A19 (calling for a return to the draft as a means for meeting the military obligations associated with the war in Iraq).

29. PEW RESEARCH CTR., THE MILITARY-CIVILIAN GAP: WAR AND SACRIFICE IN THE POST-9/11 ERA 2 (2011), available at <http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf>.

service. Today's military, however, in which so few serve for the benefit of so many, also seems tinged with immorality. The debate over the all-volunteer military versus conscription is rooted in the context of civil-military relations; both sides have striven to determine which system of military staffing best provides a professional force while also promoting the civilian control of the military envisioned by the Constitution and by principles of democracy.³⁰ Although this Article may touch upon some of these themes, its focus is on some of the seemingly more obvious consequences that have resulted from the burdens borne by the military after almost thirteen years of war. This Article does not necessarily call for a return to the draft; rather it invites a principled reexamination of the promises of an all-volunteer military.

Section I of this Article examines the history of military staffing in the United States, briefly describing the general policies in place during each major military conflict and outlining the rise and fall of the draft. Section II analyzes the rationale for the movement away from conscription to an all-volunteer force as articulated by the Gates Commission. It then extracts some of the main assurances provided by the Gates Commission, which this Article terms the "four promises" of an all-volunteer military. Next, Section III argues that the "four promises" of an all-volunteer military have been broken during the past thirteen years of U.S. military engagements. Finally, in an attempt to balance the ideals of liberty and fairness, Section IV offers a model of

30. Civilian control of the military is a foundational norm of the U.S. form of government. The classic debate on the civil-military gap occurs between proponents of the theories of Samuel Huntington (a political scientist) and Morris Janowitz (a sociologist). Huntington believed that a professional officer corps subject to objective civilian control struck the right balance in civil-military relations in light of a military culture that has grown separate from the rest of society. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 80–97 (1964) (discussing barriers to and ways to maximize objective civilian control and a professional officer corps). Janowitz, on the other hand, believed that military culture should adjust to changes in civilian society in order to achieve effective civilian control. See MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* 347–69 (1960) (discussing trends in civilian control over the military throughout U.S. history). The last thirteen years of war have reinvigorated the debate that Huntington and Janowitz began over fifty years ago. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43–64 (2010) (describing the institutional realities that have evolved since Huntington published *The Soldier and the State*); PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 16–53 (2003) (refuting Huntington's theory on civil-military relations during the Cold War); DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 53–91 (2010) (discussing the Supreme Court's influence over military affairs); SOLDIERS AND CIVILIANS: *THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 1–8 (Peter D. Feaver & Richard H. Kohn eds., 2001) (describing the evolution of arguments concerning the military-civilian gap); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 625–29 (2009) (noting differences between the author's perception and various other views on civil-military relations under a constitutional structure); Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR C. REV. 8, 15–19 (2002) (describing the decrease in civilian control and increase in military control over the military); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1410–14 (2008) (describing the various mechanisms for enacting civilian control over the military); Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 805–25 (2012) (evaluating various models of civilian control over the military); Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1824–31 (2007) (describing past methods for analyzing civilian control over the military and presenting a new principal-agent model).

military staffing that endeavors to restore the promises of the Gates Commission while also considering the lessons learned from the draft era. These elements include implementing universal service, offering a choice in how people serve (including nonmilitary options), implementing measures designed to better ensure that those who choose to serve are making an informed choice, providing appropriate incentives for service, and ensuring that those who are harmed in any way in service to their country receive adequate care for the rest of their lives.

I. A BRIEF HISTORY OF U.S. DRAFT LAW AND POLICY

*“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”*³¹

*“It may be laid down as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal services to the defense of it”*³²

Since the Constitution went into effect in 1789, the United States has implemented an official military draft for a total of only thirty-five years.³³ These years coincided with five conflicts: the Civil War, World War I, World War II, the Korean War, and the Vietnam War.³⁴ While these three and a half decades are of obvious importance in tracing the path to the all-volunteer military, the periods in U.S. history when a military draft did *not* exist can provide some context to military staffing decisions. This Section explores the history of military draft laws and policies in the United States, focusing on major U.S. military involvements from the Revolutionary War to Operation Desert Storm. This history shows how the American tradition of collective security slowly gave way to the American tradition of individual liberty.

A. *Early America: Militias and Local Conscription*

The Constitution provides Congress with the power to “raise and support Armies,” “provide and maintain a Navy,” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”³⁵ Many scholars have maintained that the Framers neither envisioned nor desired a large standing army³⁶ and, in fact, feared a

31. U.S. CONST. pmbl. (emphasis added).

32. WALTER MILLIS, *ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY* 44 (1986) (quoting George Washington).

33. RICHARD V.L. COOPER, *MILITARY MANPOWER AND THE ALL-VOLUNTEER FORCE* 46 (1977).

34. BERNARD ROSTKER, *I WANT YOU!: THE EVOLUTION OF THE ALL-VOLUNTEER FORCE* 23–32 (2006).

35. U.S. CONST. art. I, § 8, cls. 12–14.

36. See William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 26 (1992) (“The resentment against the standing army was expressed at the onset of the Revolution in the First Continental Congress’s Declaration of Resolves of 1774 and in the Declaration of Independence of 1776.”) (footnote omitted).

big military.³⁷ Instead, the Framers envisioned a society in which the civilian population, collectively and entirely, would raise arms against common enemies when called to do so.³⁸ At the conclusion of a conflict, the members of the civilian population would lay down their arms and return to their civilian lives.³⁹

Prior to the Revolutionary War, each colony required all able-bodied males from sixteen to sixty to serve in the militia. The state militias participated in small-scale, local conflicts and were not designed for large-scale engagements.⁴⁰ During the Revolutionary War, the nascent American government relied largely upon these state militias, coupled with a very small professional military, to make up General George Washington's Continental Army.⁴¹ In the years following the American Revolution, the U.S. military was comprised of a small cadre of volunteers used to guard the frontiers and engage Native American tribes.⁴²

The size of the volunteer military quickly proved insufficient for national security needs. During the War of 1812 and the Mexican-American War, the government used monetary incentives to attract additional volunteers, but the force still fell short of the required end strength.⁴³ In 1814, then-Secretary of War James Monroe proposed a national draft in response to the staffing failures during the War of 1812.⁴⁴ Congress never passed the proposed law, and, during the period between the War of 1812 and the

37. See William G. Carleton, *Raising Armies Before the Civil War*, in *THE MILITARY DRAFT* 67, 74 (Martin Anderson ed., 1982) ("The Americans inherited the British distrust of a large professional standing army. They regarded such an army as a threat to their liberties."); Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1507 (1969) (describing the existence of a standing army during peacetime as widely condemned as a threat to liberties). Professor Friedman also offers a more nuanced view of early American approaches to the draft after the Revolutionary War. While most political leaders continued to oppose a standing army, George Washington expressed the need for a federal, professional army financed by the central government. *Id.* at 1510. Most states opposed this view and wanted to maintain control over their militias. *Id.* Professor Friedman notes that "[t]he idea of a direct draft by a central government acting upon every citizen without the intervening authority of the state governments was firmly and totally rejected even at the darkest moments of the Revolution." *Id.*

38. See Samuel P. Huntington, *Civilian Control and the Constitution*, 50 AM. POL. SCI. REV. 676, 677 (1956) ("Neither officers nor enlisted men were divorced from society; their military duties were simply one aspect of their role as free men in a free society."); *A Letter from Samuel Adams*, in *THE MILITARY IN AMERICA: FROM THE COLONIAL ERA TO THE PRESENT* 59, 60 (Peter Karsten ed., 1986) ("It is dangerous to civil society, when the military conceives of it self as an independent body, detach'd from the rest of the society, and subject to no controul[.]").

39. See Carleton, *supra* note 37, at 71–72 (discussing the sharp decline in the number of militiamen and volunteers when fighting near home ceased and a commonly held sentiment among these groups that they should be relieved from service at the end of their term).

40. *Id.* at 68.

41. *Id.*

42. *Id.* at 69.

43. Jason Britt, Comment, *Unwilling Warriors: An Examination of the Power To Conscript in Peacetime*, 4 NW. J. L. & SOC. POL'Y 400, 402 (2009).

44. See Michael J. Malbin, *Conscription, the Constitution, and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805, 820–21 (1972) (describing Monroe's desire to use conscription to improve the state of the army after the War of 1812). In a speech before the U.S. House of Representatives on December 9, 1814, Daniel Webster vehemently argued against Monroe's proposal, maintaining that the Constitution did not provide the authority to conscript. Daniel Webster, *An Unpublished Speech*, in *THE MILITARY DRAFT*, *supra* note 37, at 633–45.

Civil War, the American public resoundingly rejected national conscription.⁴⁵ Additionally, compulsory service in state militias discontinued, ultimately decreasing the size of state militias considerably.⁴⁶

B. The Civil War: The First Federal Draft

The first official military draft in America was enacted by the Confederacy in the midst of the Civil War.⁴⁷ When the supply of soldiers who volunteered at the outset of the war became depleted, the Confederate Army was forced to resort to conscription.⁴⁸ The Confederate Conscription Act imposed three-year eligibility for service in the Confederate Army on all white males between the ages of eighteen and thirty-five.⁴⁹ Although between seventy-five and eighty-five percent of white Confederate military-aged males served during the war,⁵⁰ the Confederate draft allowed numerous exemptions. Many of these exemptions seemed to favor the wealthy, including exemptions for men who owned at least twenty slaves, or for people who were able to pay a fee, which was as much as \$6,000 at the height of the war, for a substitute.⁵¹ This gave rise to a feeling in the South that the Civil War was “a rich man’s war” and “a poor man’s fight.”⁵² As the war waged on, both sides suffered tremendous casualties; the Confederacy underwent a military staffing crisis and expanded the scope of the draft to men up to age fifty.⁵³ While the Confederacy likely would have fallen sooner without a draft, the conscription system was wrought with abuse and inefficiency, providing a focal point for antiwar sentiment in the South.⁵⁴

Almost a year after the Confederacy instituted the draft, the Union followed suit. As a result of the drawdown following the Mexican-American War, the disestablishment of state militias, and the loss of both half of its officer corps and many enlisted men to the Confederate Army, the United States suffered from its own staffing crisis.⁵⁵ In response, it enacted the first federal draft in 1863 at the height of the war.⁵⁶

45. Margaret Levi, *The Institution of Conscription*, 20 SOC. SCI. HIST. 133, 144 (1996).

46. *Id.*

47. DOROTHY DENNEEN VOLO & JAMES M. VOLO, *DAILY LIFE IN CIVIL WAR AMERICA* 132 (2d ed. 2009).

48. William L. Shaw, *The Confederate Conscription and Exemption Acts*, 6 AM. J. LEGAL HIST. 368, 372–74 (1962).

49. *Id.* at 374.

50. STEPHANIE MCCURRY, *CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH* 152 (2010).

51. 1 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* 463 (2012); Shaw, *supra* note 48, at 381.

52. DAVID WILLIAMS, *A PEOPLE’S HISTORY OF THE CIVIL WAR: STRUGGLES FOR THE MEANING OF FREEDOM* 459 (2005).

53. The Confederate Congress amended the first Conscription Act in 1862, expanding the age range of eligible draftees to forty-five. Shaw, *supra* note 48, at 376. In 1864, this age was increased to fifty. *Id.*

54. See JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 430–32 (1988) (noting that conscription was the Confederate government’s most unpopular act, resulting in significant political resistance and defections among draftees); ALBERT BURTON MOORE, *CONSCRIPTION AND CONFLICT IN THE CONFEDERACY* 354–59 (1996) (arguing that while conscription initially helped the Confederacy, it ultimately led to the South’s demise).

55. Levi, *supra* note 45, at 145.

The Enrollment Act required every man between the ages of twenty and forty-five to register for the draft.⁵⁷ The law provided some exemptions,⁵⁸ notably allowing any man who paid \$300 or supplied a substitute to be exempt from the draft.⁵⁹ In response to this perceived class privilege, rioting ensued in the streets of New York City,⁶⁰ resulting in the death of almost 1,000 people.⁶¹ In order to quell the rioting, Secretary of War Edward Stanton deployed army regiments from Gettysburg.⁶² For the duration of the draft, all told, over 160,000 men paid the \$300 or provided a substitute.⁶³

General disapprobation with the draft led to legal challenges. In the case of *Kneedler v. Lane*,⁶⁴ three Pennsylvania men challenged the Union's Conscription Act in the Pennsylvania Supreme Court. They argued that a military draft abrogated the state's constitutional right to raise a militia.⁶⁵ The court initially held the Conscription Act unconstitutional and issued a temporary injunction,⁶⁶ but it overturned this decision nine weeks later.⁶⁷ Although many (including President Abraham Lincoln) expected the issues in *Kneedler* to reach the U.S. Supreme Court, they never did.⁶⁸ Nevertheless, Chief Justice Robert B. Taney, in anticipation of hearing the merits of the case, prepared an opinion that he never had the occasion to deliver.⁶⁹ In his draft opinion, Chief Justice Taney found that the Conscription Act was unconstitutional because it allowed the federal government to impinge on Pennsylvania's powers to raise a militia.⁷⁰

56. *Id.*

57. Enrollment Act of 1863, ch. 75, 12 Stat. 731.

58. The most common exemptions involved physical disability. Peter Levine, *Draft Evasion in the North During the Civil War, 1863–1865*, 67 J. AM. HIST. 816, 816 (1981).

59. Enrollment Act § 13. Notably, future President of the United States Grover Cleveland took advantage of this exemption. See Michael T. Meier, *Civil War Draft Records: Exemptions and Enrollments*, PROLOGUE MAGAZINE, Winter 1994, available at <http://www.archives.gov/publications/prologue/1994/winter/civil-war-draft-records.html> ("Grover Cleveland, urbane, sometimes wise, and a future President of the United States, never served in the military during the Civil War. He was healthy, of the appropriate age, and educated. His Buffalo, New York, law practice provided him a comfortable living.").

60. See JEAN CARPER, BITTER GREETINGS: THE SCANDAL OF THE MILITARY DRAFT 12 (1967) ("Men carried lead pipes, pick handles, knives, iron bars and stolen guns, and they used them. Women pulled officers off their horses and stoned them to death. Soldiers charged the mob with bayonets; and policemen rushed in with locust sticks, clubbing hundreds of men and women to death. Soldiers riding up Second Avenue at dusk on the second day of the riots saw the gutters filled with blood and the cobblestones littered with the dead and dying . . .").

61. *Id.* at 13.

62. *Id.*

63. Levine, *supra* note 58, at 819.

64. 45 Pa. 238 (1863).

65. *Kneedler*, 45 Pa. at 239.

66. *Id.* at 251–52.

67. *Kneedler v. Lane*, 3 Grant 523, 523 (Pa. 1863).

68. Britt, *supra* note 43, at 404.

69. Roger B. Taney, *Thoughts on the Conscription Law of the United States*, in THE MILITARY DRAFT, *supra* note 37, at 207, 207–218.

70. *Id.* at 217–18.

C. *World Wars I and II: Public Support for the Draft*

Despite some initial resistance, the United States joined the British in the fight against Germany in 1918. After the Civil War, volunteers had entirely staffed the military. The realities of U.S. armed involvement overseas required additional troops that President Woodrow Wilson believed only conscription could provide.⁷¹ Anticipating resistance similar to that experienced during the Civil War, President Wilson created a process that was intended to provide some “color of volunteering.”⁷² Rather than implementing a system in which army officers would go house to house to collect draftees, eligible individuals would instead have to register with local civilian offices, similar to going “to the polls to vote.”⁷³ In 1917, Congress passed the Draft Act, which authorized President Wilson to institute a military draft in preparation for U.S. involvement in World War I.⁷⁴ The Act subjected “all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency.”⁷⁵ The Act required eligible individuals to register with local officials under the framework proposed by President Wilson.⁷⁶

Similar to the response to the Enrollment Act, the Draft Act engendered legal challenges as well. In the *Selective Draft Law Cases*,⁷⁷ several potential draftees failed to register with local draft officials and were prosecuted in state courts.⁷⁸ Appealing to the U.S. Supreme Court, the appellees argued that the Constitution did not grant Congress “the power to compel military service by a selective draft.”⁷⁹ The Court unanimously disagreed, holding that the capacity to institute a draft to “raise and support armies” derived from the “necessary and proper” clause of the Constitution.⁸⁰ The Court indicated that the government could not fulfill its duty to provide security for the people without having the power to draft: “As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.”⁸¹ The Court also rejected an argument that the draft violated the Thirteenth Amendment’s prohibition against forced servitude, holding that,

[A]s we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the

71. Mark Sullivan, *Conscription*, in *THE MILITARY DRAFT*, *supra* note 37, at 25, 26–27.

72. *Id.* at 27.

73. *Id.*

74. Selective Service Act of 1917, Pub. L. No. 12, 40 Stat. 76.

75. *Selective Draft Law Cases*, 245 U.S. 366, 375 (1918).

76. 40 Stat. at 80. The Act exempted certain federal and state officials, those already in the military, and those morally opposed to war. *Selective Draft Law Cases*, 245 U.S. at 376.

77. 245 U.S. 366 (1918).

78. *Selective Draft Law Cases*, 245 U.S. at 376.

79. *Id.*

80. *Id.* at 377 (quoting U.S. CONST. art. I, § 8).

81. *Id.*

conclusion that the contention to that effect is refuted by its mere statement.⁸²

After the war, Congress briefly entertained implementing universal military training.⁸³ In 1920, however, with the enactment of the National Defense Act, the United States reverted to a peacetime volunteer military that remained in place for almost two decades.⁸⁴ But as U.S. involvement in World War II grew inevitable, Congress passed the Selective Training and Service Act in 1940, which reinstated a draft.⁸⁵ Realizing that certain industries propelled the war effort, the Act exempted certain workers.⁸⁶ The Act also established the Selective Service System, which served as the basis for the draft registration system in place today.⁸⁷ Initially relying on an expansive system of 6,500 local administrative boards to identify and screen men for military service, in 1942, the Selective Service System substituted administrative boards with a lottery system.⁸⁸ Ultimately, 10.1 million men would be drafted under this Act, comprising approximately two-thirds of the armed forces during the war.⁸⁹ Again, draftees challenged the power of the government to compel military service in the courts. In *Billings v. Truesdell*,⁹⁰ the Supreme Court reaffirmed the *Selective Draft Law Cases* decision from World War I and once again affirmed the congressional power to raise armies by both voluntary enlistment and conscription.⁹¹

D. Korean and Vietnam Wars: The Cold War Drafts

Despite some opposition to the draft and challenges in the courts, the overwhelming majority of the U.S. population supported both World War II and the implementation of conscription in support of the war effort.⁹² Nevertheless, once victory in World War II was certain, Congress and the Truman administration faced

82. *Id.*

83. See Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289, 312–14 (2000) (describing efforts to institute Universal Military Training by the National Security League after World War I).

84. National Defense Act of 1920, ch. 227, 41 Stat. 759.

85. Selective Training and Service Act of 1940, ch. 720, § 3(a), 54 Stat. 885, 885–86 (expired 1947).

86. See *id.* § 5(e) (authorizing the President by regulation to provide for the deferment of “those men whose employment in industry, agriculture, or other occupations or employment, or whose activity in other endeavors, is found . . . to be necessary to the maintenance of the national health, safety, or interest”).

87. See Selective Service Act of 1948, ch. 625, § 3, § 4(a), 62 Stat. 604, 605–06 (codified as amended at 50 U.S.C. §§ 451–73) (requiring males aged eighteen to twenty-six to register for military service and for those registered to “be liable for training and service in the armed forces of the United States”); Selective Service and Training Act of 1940, 54 Stat. at 885 (authorizing the enactment of the Selective Service System); Selective Service System, 32 C.F.R. §§ 1602–99 (2007) (detailing the registration requirements under the Selective Service System).

88. LEE KENNETT, G.I.: THE AMERICAN SOLDIER IN WORLD WAR II 9 (1987).

89. HEIDI GOLDING & ADEBAYO ADEDEJI, CONGRESSIONAL BUDGET OFFICE, THE ALL-VOLUNTEER MILITARY: ISSUES AND PERFORMANCE 3 (2007).

90. 321 U.S. 542 (1944).

91. *Billings*, 321 U.S. at 556.

92. WILLIAM H. YOUNG & NANCY K. YOUNG, WORLD WAR II AND THE POSTWAR YEARS IN AMERICA 618 (2010) (noting that public support for conscription increased even before the attacks at Pearl Harbor).

considerable pressure from a war-fatigued American people to end the draft.⁹³

But with looming fears of war with the Soviet Union, President Harry S. Truman requested that Congress reinstate the draft and institute universal military training.⁹⁴ Although Congress declined to enact universal military training, it resurrected the draft by enacting the Selective Service Act of 1948. The newly enacted law required “every male citizen” and male resident aliens between the ages of eighteen and twenty-six to register for conscription.⁹⁵ Significantly fewer draftees were conscripted during the Korean War than during the two World Wars. Over 1.5 million troops were drafted during the Korean War, comprising less than fifty percent of military accessions.⁹⁶ After the conclusion of major U.S. involvement in Korea, the draft remained in place, but the number of draft calls reduced significantly, down to 82,060 by 1962.⁹⁷

The Korean War experience sparked the beginning of increasing opposition to modern conscription, marking the introduction of a draft system with a potential class bias, reminiscent of the Civil War-era draft. Military service was selective rather than universal.⁹⁸ Once the basis for selecting individuals for service was mostly left to administrative decisions, the process became open to abuse.⁹⁹ Scientists and engineers lobbied President Truman to issue an executive order allowing deferments to students who achieved a minimum score on an intelligence test.¹⁰⁰ Many claimed the policy unfairly favored the educated elite; in response, several protesting draft board members resigned.¹⁰¹

These concerns of fairness only intensified during the Vietnam War. Between 1964 and 1973, approximately two million men were drafted into the military.¹⁰² While this accounted for only twenty-three percent of the entire armed forces during that time, by 1969, draftees comprised almost eighty-eight percent of infantry riflemen.¹⁰³ As fighting in Vietnam escalated and the number of men who were drafted increased, opposition to the war and the draft reached a fever pitch.¹⁰⁴ Concerns about who was

93. GEORGE Q. FLYNN, *THE DRAFT, 1940–1973*, at 89 (1993); ROSTKER, *supra* note 34, at 26.

94. ELIZABETH EDWARDS SPALDING, *THE FIRST COLD WARRIOR: HARRY TRUMAN, CONTAINMENT, AND THE REMAKING OF LIBERAL INTERNATIONALISM* 138–39 (2006).

95. Selective Service Act of 1948, ch. 625, § 3, 62 Stat. 604, 605.

96. GOLDING & ADEDEJI, *supra* note 89, at 2–3.

97. *History & Records: Induction Statistics*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/induct.htm>.

98. Michael Useem, *Conscription and Class*, 18 SOC. SCI. & MOD. SOC’Y 28, 29 (1981).

99. *See id.* (indicating that a disproportionate amount of those conscripted were from working-class families and very few of the inductees were from upper-class families).

100. *See* Nicholas Lemann, *The Great Sorting*, ATLANTIC MONTHLY, Sept. 1995, at 84, 92 (asserting that advisory committees to the Selective Service System argued that “[t]o subject all college students to the draft ‘would virtually stop the production of superior scientific, professional and specialized personnel’”).

101. Richard K. Kolb, *Korea’s “Invisible Veterans” Return to an Ambivalent America*, VETERANS OF FOREIGN WARS, Nov. 1997, available at http://www.koreanwar-educator.org/topics/vfw/p_koreas_invisible_veterans.htm.

102. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 883–84 (1997).

103. *Id.*

104. *See, e.g.*, JAMES E. WESTHEIDER, *THE VIETNAM WAR* 32 (2007) (noting that there was little American opposition to conscription until America became directly involved in the Vietnam War and the number of men who were drafted increased); Ted Finman & Stewart Macaulay, *Freedom to Dissent: The*

called to serve and about the fairness of deferments and exemptions increased. Antiwar activists protested the draft for “sending minorities and underprivileged youth to die in the jungles of Southeast Asia.”¹⁰⁵

Potential draftees took increased advantage of deferments that appeared to predominantly favor white, middle- and upper-class students. More than ever, deferments were allowed for those seeking higher education, including graduate education.¹⁰⁶ Due to the various exemptions granted to students pursuing college, graduate, and professional degrees, high school dropouts or those who graduated high school but did not go on to college were twice as likely to be drafted as college students or graduates.¹⁰⁷ Because higher education was less accessible to minorities and the poor, there was a widespread perception of class- and race-based bias.¹⁰⁸ Eventually, amendments to the draft laws eliminated most student deferments.¹⁰⁹

Conscientious objectors also avoided military service. The draft law exempted from all military service potential draftees “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”¹¹⁰ More than 162,000 people were granted conscientious objector status between 1964 and 1973.¹¹¹ Many others who did not wish to serve simply declined to register or failed to report for duty. In all, almost 210,000 men were charged with draft evasion.¹¹² Many others were never charged, and still others obtained the benefits of questionable deferments.¹¹³ In 1974,

Vietnam Protests and the Words of Public Officials, 1966 WIS. L. REV. 632, 641 (1966) (pointing out that “[a]t various times during the war in Vietnam, some Americans have opposed or criticized our government’s policies there”); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 78 (1990) (indicating that “[i]llegal anti-Vietnam War protests, including draft resistance, were quite widespread from 1965–1972”); Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839, 847 (1994) (asserting that as the United States began increasing the number of troops in Vietnam, public opposition began to stir).

105. GEORGE Q. FLYNN, CONSCRIPTION AND DEMOCRACY: THE DRAFT IN FRANCE, GREAT BRITAIN, AND THE UNITED STATES 236 (2002).

106. At the height of the Vietnam conflict, draft laws deferred a college student “until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs.” Military Selective Service Act of 1967, Pub. L. No. 90-40, sec. 6, § 6(h)(1), 81 Stat. 100, 102. Before 1967, deferments were also generally available for continued graduate study. See Universal Military Training and Service Act, Pub. L. No. 82-51, sec. n, § 6(d)(3), 65 Stat. 75, 84 (1951) (permitting “deferment from [military] training and service of any category or categories of students for such periods of time as [the President] may deem appropriate”).

107. MAURICE ISSERMAN, VIETNAM WAR 68 (John S. Bowman ed., 2003).

108. Scott E. Dunn, *The Military Selective Service Act’s Exemption of Women: It Is Time To End It*, 2009 ARMY LAW. 1, 7 (2009). The Military Selective Service was amended in 1969 to permit a draft lottery. *Id.* This was viewed as a political attempt to eliminate the draft as a reason for protest. *Id.*

109. See Military Selective Service Act, Pub. L. No. 92-129, secs. 101(a)(17)–(18), (20), 85 Stat. 348, 350 (1971) (repealing the Vietnam-era student deferment).

110. See *Welsh v. United States*, 398 U.S. 333, 344 (1970) (explaining section 6(j) of the Military Service Act).

111. 1 SCOTT A. MERRIMAN, RELIGION AND THE LAW IN AMERICA: AN ENCYCLOPEDIA OF PERSONAL BELIEF AND PUBLIC POLICY 78 (2007).

112. ARNOLD R. ISAACS, VIETNAM SHADOWS: THE WAR, ITS GHOSTS, AND ITS LEGACY 46 (1997).

113. See *id.* (indicating that nearly ninety percent of draft evasion cases were never prosecuted);

President Gerald R. Ford offered amnesty to draft evaders and military deserters who reaffirmed their allegiance to the United States and who served two years working in public service.¹¹⁴

Vietnam-era draftees challenged various aspects of the draft in federal court, further demonstrating the perceived unfairness of conscription during that time.¹¹⁵ Although the Supreme Court had occasion to speak on many of these cases, it declined to do so.¹¹⁶ For example, in *United States v. Holmes*,¹¹⁷ a conscientious objector argued to the Seventh Circuit that drafted military service was involuntary servitude in violation of the Thirteenth Amendment.¹¹⁸ The Seventh Circuit disagreed, holding that the Thirteenth Amendment did not prohibit a civilian labor draft in peacetime as an alternative to compulsory military service.¹¹⁹ Although the Supreme Court ultimately denied certiorari in this case and all others concerning the lawfulness of the draft during that time, Justice William Douglas would have heard the appeal in *Holmes*. While Justice Douglas agreed that the government had the authority to employ conscription in wartime, he believed the Supreme Court should address the constitutionality of a draft in the absence of a declaration of war.¹²⁰ The Court, however, never entertained this question.

E. *The End of the Draft and Post-Draft Challenges*

Presidential action, rather than the courts, ultimately ended the draft. During the 1968 presidential campaign, Richard Nixon promised to end the military draft.¹²¹ Shortly after his inauguration, President Nixon formed the Gates Commission and charged the Commission with “develop[ing] a comprehensive plan for eliminating

WESTHEIDER, *supra* note 104, at 35 (discussing the efforts of some potential draftees to avoid service by stringing deferments or finding a sympathetic doctor to “discover” a disqualifying medical condition).

114. Marjorie Hunter, *A “Re-Entry” Plan: Goodell Named Head of Clemency Unit—Hesburgh Included*, N.Y. TIMES, Sept. 17, 1974, at 1.

115. See Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1994), for a very comprehensive review of Vietnam-era draft cases.

116. See *id.* at 275 (indicating that although every federal court considered the constitutionality of the Vietnam War, the Supreme Court never reviewed a case presenting the question); Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 108 (1998) (noting that the Warren Court never even heard a case involving a challenge to the legality of the Vietnam War).

117. 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968).

118. *Holmes*, 387 F.2d at 784.

119. *Id.*

120. See *Holmes v. United States*, 391 U.S. 936, 949 (1968) (Douglas, J., dissenting) (“[T]he question whether there can be conscription when there has not been a declaration of war, has never been decided by this Court. It is an important question. It is a recurring question. It is coming to us in various forms in many cases as a result of the conflict in Vietnam. I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question.”).

121. See GUS C. LEE & GEOFFREY Y. PARKER, *ENDING THE DRAFT—THE STORY OF THE ALL-VOLUNTEER FORCE* 29 (1977) (indicating that “[i]n October of that year [1968], the Republican candidate for president, Richard Nixon, declared his intention to move toward ending the draft when the war in Vietnam was over”).

conscription and moving toward an all-volunteer armed force.”¹²² Bolstered by the efforts of a young Donald Rumsfeld, then in the House of Representatives, Congress ultimately adopted the recommendation of the Commission to terminate the draft.¹²³ The authorizing legislation for conscription expired in 1973;¹²⁴ since then volunteers have entirely staffed the U.S. military.

In December 1979, Soviet Union armed forces invaded Afghanistan.¹²⁵ In response to this crisis, in early 1980, President Carter endeavored to reinstitute draft registration “as a necessary step to preserving or enhancing [United States] national security interests.”¹²⁶ President Carter also recommended that Congress amend the Military Selective Service Act to permit the registration of women.¹²⁷ Through a Joint Resolution, Congress allocated the funds necessary to reactivate the draft registration process, but it declined to amend the Military Selective Service Act to allow for the registration of women.¹²⁸

In 1981, almost eight years into the era of the all-volunteer military, in *Rostker v. Goldberg*,¹²⁹ the Supreme Court had cause to address the constitutionality of the draft. In *Rostker*, several men who were compelled to register for the draft challenged the Military Selective Service Act.¹³⁰ They claimed that because the government refused to draft women, the Act espoused gender-based discrimination in violation of the Due Process Clause of the Fifth Amendment.¹³¹ The Supreme Court dismissed the claim, finding that Congress acted within its authority to “raise and regulate armies and navies” when it declined to authorize the registration of women.¹³² In a 6-3 decision, the Court held that Congress should receive great deference in the area of military affairs and national defense.¹³³ Because of combat restrictions on women, the Court found that men and women were not “similarly situated” for draft registration purposes

122. GATES COMMISSION REPORT, *supra* note 23, at vii.

123. See Military Selective Service Act, Pub. L. No. 92-129, sec. 101(a)(35), 85 Stat. 348, 353 (1971) (providing that the Vietnam-era authority to draft for military service would end on July 1, 1973); BRADLEY GRAHAM, BY HIS OWN RULES: THE AMBITIONS, SUCCESSES, AND ULTIMATE FAILURES OF DONALD RUMSFELD 68–69 (2009) (describing Rumsfeld’s role in ending the draft).

124. 85 Stat. at 353.

125. Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT’L SEC. J. 385, 399 (2013).

126. *Rostker v. Goldberg*, 453 U.S. 57, 60 (1981) (quoting Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 before the Senate Committee on Armed Services, 96th Cong., 2d Sess., 1805 (1980)).

127. See State of the Union Address, 16 WEEKLY COMP. PRES. DOC. 194, 198 (Jan. 23, 1980) (announcing the renewal of the draft in the State of the Union Address); Selective Service Revitalization, 16 WEEKLY COMP. PRES. DOC. 289, 290 (Feb. 8, 1980) (explaining the decision to require women to register for the draft); Marjorie Hunter, *Wife Hints Carter Backs Female Draft*, N.Y. TIMES, Jan. 26, 1980, at 9 (stating that President Carter’s wife supports the enlistment of women).

128. 126 CONG. REC. 14,308 (1980). On July 2, 1980, President Carter issued Proclamation 4771, reauthorizing the selective service system for males only. Proclamation No. 4771, 3 C.F.R. 82 (1980).

129. 453 U.S. 57 (1981).

130. *Rostker*, 453 U.S. at 61–62.

131. *Id.*

132. *Id.* at 65 (citing *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)).

133. *Id.* at 64.

and, thus, the Military Selective Service Act did not offend the Due Process Clause.¹³⁴

The Court found that deference to Congress in this particular case was apt because Congress carefully considered its decision to exempt women from the military draft.¹³⁵ Based on the testimony of military officers and civilian officials from the Department of Defense, Congress determined there was no military necessity for registering females.¹³⁶ Further, Congress found that women in noncombat positions would impede military flexibility; unlike women, men fulfilling noncombat roles could be shifted to the front line if needed.¹³⁷ The military could meet additional noncombat needs by drafting men or accepting volunteer women.¹³⁸ Since its decision in *Rostker v. Golberg*, the Supreme Court has remained silent on matters pertaining to the military draft.

In 1990, 100,000 soldiers from the Iraqi army, led by hundreds of tanks, invaded Kuwait.¹³⁹ Shortly thereafter, the Iraqi government declared Kuwait annexed and established a provisional government.¹⁴⁰ Boasting the world's fourth largest military at the time, Saddam Hussein vowed to turn Kuwait into a "graveyard" if any other country dared to intervene.¹⁴¹ After the issuance of United Nations sanctions and Hussein's adamant refusal to withdraw from Kuwait, U.S. forces prepared to repel the Iraqi army from Kuwait by force.¹⁴² Operation Desert Storm marked the first large-scale test of the all-volunteer military.¹⁴³ With stunning efficiency, the U.S. military evicted the Iraqi army from Kuwait in forty-eight days while suffering only 148 battlefield casualties.¹⁴⁴ The decisiveness of the U.S. military victory in Iraq, coupled with the fall of the Soviet Union, seemingly validated the success of the all-volunteer military and effectively silenced any serious proponents of a return to the draft.

134. *Id.* at 78–79.

135. *Id.* at 64–65.

136. *Id.* at 79–80.

137. *Id.* at 81–82.

138. *Id.*

139. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1.

140. Kim Murphy, *Iraq Tightens Grip on Kuwait, Sets Up Interim Government*, L.A. TIMES, Aug. 3, 1990, at A1.

141. *Id.*

142. United Nations Resolution 660 demanded that "Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990." S.C. Res. 660, para. 2, U.N. Doc. S/RES/660 (Aug. 2, 1990). After several additional resolutions, Resolution 678 authorized member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area" if the Iraqi army did not withdraw from Kuwait by January 15, 1991. S.C. Res. 678, para. 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

143. JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM 374 (2010).

144. See RODNEY P. CARLISLE, PERSIAN GULF WAR 109 (2003) (noting that U.S. forces suffered 148 casualties and that thirty-five of these casualties were the result of friendly fire); Bradley Graham, *Resistance Endures Amid the Rubble*, WASH. POST, Mar. 26, 2003, at A19 (noting that the 1991 Persian Gulf War lasted forty-three days).

II. THE PROMISES OF AN ALL-VOLUNTEER FORCE

The draft laws in place from World War II through Vietnam proclaimed that “in a free society the obligations and privileges of military training and service should be shared.”¹⁴⁵ But these obligations and privileges were never shared equitably. Resistance to the military draft in the Vietnam era marked the culmination of growing American disenchantment with compulsory armed service, a dissatisfaction that perhaps started as early as the Revolutionary War. The resistance brought enough political pressure to bear to begin the dismantling of the draft in 1969.¹⁴⁶ That year, President Nixon appointed former Defense Secretary Thomas Gates to chair the Gates Commission.¹⁴⁷ Along with Secretary Gates, the Commission consisted of fifteen members,¹⁴⁸ some of whom appeared to be specifically chosen for the skills or perspective they might bring in helping to design a system that would overcome many of the harms suffered because of the draft. Among its ranks, the Commission included leaders from the civil rights movement, economists, and several antidraft activists.¹⁴⁹

The Commission arrived at an anticipated conclusion: “We unanimously believe that the nation’s interests will be better served by an all-volunteer force . . . than by a mixed force of volunteers and conscripts”¹⁵⁰ Additionally, the Commission recommended increasing military pay and improving the conditions of military service in order to recruit better volunteers.¹⁵¹ Acting on the Gates Commission’s recommendations, Congress authorized the abandonment of the draft at the end of U.S. involvement in Vietnam and updated the military pay scale.¹⁵²

The Gates Commission Report marked the culmination of ten months of extensive research and discussion by the members of the Commission, its staff, and consulting organizations.¹⁵³ The Commission completed numerous studies on economics (including those focused on staffing supply and demand, military pay, conscription as a “tax,” and recruiting and retention), the history of volunteerism and the draft in the United States, and the constitutionality of the draft.¹⁵⁴ The Report has been widely praised for its comprehensiveness, careful weighing of the issues, and analytical quality.¹⁵⁵

145. Selective Training and Service Act of 1940, ch. 720, § 1(b), 54 Stat. 885, 885.

146. CYNTHIA A. WATSON, *U.S. MILITARY SERVICE: A REFERENCE HANDBOOK* 125 (2007).

147. GATES COMMISSION REPORT, *supra* note 23, at vii.

148. *Id.* at viii–ix.

149. *Id.* The commission included economists Alan Greenspan, Milton Friedman, and W. Allen Wallis, as well as civil rights activists Theodore Hesburgh, chairman of the U.S. Commission on Civil Rights, Jeanne Nobel, vice president of the National Council of Negro Women, and Roy Wilkins, executive director of the NAACP. *Id.*

150. *Id.* at 5–6.

151. *Id.* at 7; *see also* Kamens, *supra* note 22, at 732 (noting that the Gates Commission also recommended reconsidering the importance of reserve forces, reforming pay to increase recruitment, and maintaining a registration for a standby draft).

152. Military Selective Service Act, Pub. L. No. 92-129, sec. 201, 85 Stat. 348, 355–57 (1971).

153. David R. Henderson, *The Role of Economists in Ending the Draft*, 2 *ECON. J. WATCH* 362, 369 (2005).

154. *Id.*

155. *See id.* (“After more than 30 years of having read dozens of government reports and the studies

The Gates Commission Report clearly identified numerous obvious and not-so-obvious harms associated with military conscription. The Report held that the draft was “costly, inequitable, and divisive” and “imposed heavy burdens on a small minority of young men while easing slightly the tax burden on the rest of us.”¹⁵⁶ The Report concluded that the costs of conscription were too high, especially “when there is an alternative consistent with our basic national values.”¹⁵⁷ While the Gates Commission assured that the all-volunteer force would cure many of the harms of the draft, this Section focuses on four specific “promises,” which it calls the promise of individual freedom, the fairness promise, the pragmatic promise, and the economic promise.

A. *The Promise of Individual Freedom*

The promise of individual freedom holds that a volunteer military will better comport with notions of morality and freedom of choice in a liberal society. The Gates Commission Report maintained that the “draft undermines respect for government by forcing an individual to serve when and in the manner the government decides, regardless of his own values and talents.”¹⁵⁸ Implicit in this argument is the promise that the volunteer military will better comport with notions of morality and freedom of choice. This concept has been relied on since as a foundational argument for maintaining an all-volunteer military.

In his *Two Treatises of Government*, John Locke maintained that a free society is the only moral, and the most practical, form of government.¹⁵⁹ During the Vietnam era, Ayn Rand, whose work influenced at least some members of the Gates Commission,¹⁶⁰ modernized (and perhaps sensationalized) Locke’s conception of a free society, remarking that,

of all the statist violations of individual rights in a mixed economy, the military draft is the worst. It is an abrogation of rights. It negates man’s fundamental right—the right to life—and establishes the fundamental principle of statism: that a man’s life belongs to the state, and the state may claim it by compelling him to sacrifice it in battle.¹⁶¹

behind them, I can safely say that the quality of these studies is about the highest I’ve seen. That’s a tribute both to the economists and others who did the studies and to the four economists who supervised them.”).

156. GATES COMMISSION REPORT, *supra* note 23, at 9.

157. *Id.* at 10.

158. *Id.* at 14.

159. See generally JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1821); see also David J. Dawson, *John Locke, the Draft, and the Divine Right of Kings*, PERSUASION 1–20 (May 1968) (arguing that Locke would view any form of compulsory service as incompatible with free society).

160. Alan Greenspan has been called a “friend and follower” of Ayn Rand. GARY WEISS, AYN RAND NATION: THE HIDDEN STRUGGLE FOR AMERICA’S SOUL 219 (2012). Walter Oi has said that members of the Gates Commission were influenced by Rand’s Ford Hall Forum lecture, “The Wreckage of the Consensus.” Laurie Rice, *The Persuasion of Nixon*, THE NEW INDIVIDUALIST, <http://www.atlassociety.org/tni/persuasion-nixon>.

161. AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 256 (1962). Rand continued:

If the state may force a man to risk death or hideous maiming and crippling, in a war declared at the state’s discretion, for a cause he may neither approve of nor even understand, if his consent is not required to send him into unspeakable martyrdom—then, in principle, *all* rights are negated in that state, and its government is not man’s protector any longer. What else is there left to protect?

And while Lockean ideas might demand some submission to the state in exchange for security, compulsory service—where one may be required to give one’s life—goes too far, according to Rand.¹⁶² The Gates Commission borrowed these ideas and interpreted them to mean that any form of compulsory service is incompatible with a truly free society.

These ideas have continued to influence opposition to the draft. At the height of the Cold War, President Ronald Reagan quickly dismissed any notion of returning to the draft, stating that the most “fundamental objection” to draft registration is moral because “draft registration destroys the very values that our society is committed to defending.”¹⁶³ Decades later, former Representative Ron Paul (R-TX) continued to invoke the promise of individual freedom, arguing that conscription constituted a form of slavery—“a trait of totalitarian government . . . not characteristic of a nation that champions individual freedom.”¹⁶⁴ The promise of individual freedom and the view that the all-volunteer military better comports with morality and notions of freedom of choice in a liberal society continues to prevail to this day.

B. *The Fairness Promise*

The promise of fairness holds that an all-volunteer military will better comport with notions of equality and fairness, as it will not cause a greater disparate impact on socially and economically disadvantaged people. The Gates Commission made no explicit promise that the all-volunteer force would be more representative of the American people. Instead, the Commission promised that, as compared to the draft, the all-volunteer military would be no worse for African-Americans or those most economically disadvantaged.¹⁶⁵ Years later, after Operation Desert Storm, proponents of the all-volunteer military expanded the initial promise of the Gates Commission and vowed that the all-volunteer military would more perfectly reflect American demographics.

Presumably, the Gates Commission’s conclusions focused on the racial inequities African-Americans suffered because data obtained during the height of fighting in Vietnam revealed that African-Americans were drafted in higher numbers than white Americans.¹⁶⁶ In 1964, 18.8% of eligible white Americans were drafted compared to 30.2% of eligible African-Americans.¹⁶⁷ As the conflict waged on, the gap widened between the percentage of eligible African-Americans and white Americans being drafted. By 1967, 31% of eligible white Americans were drafted, compared to more

Id.

162. *Id.*

163. Doug Bandow, *Draft Registration: It’s Time To Repeal Carter’s Final Legacy*, THE CATO INSTITUTE, Policy Analysis No. 86 (May 7, 1987), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa086.pdf> (quoting Letter from Ronald Reagan to Sen. Mark O. Hatfield, May 5, 1980).

164. RON PAUL, FREEDOM UNDER SIEGE: THE U.S. CONSTITUTION AFTER 200 YEARS 63 (2007).

165. GATES COMMISSION REPORT, *supra* note 23, at 15–16.

166. MICHAEL LEE LANNING, THE AFRICAN-AMERICAN SOLDIER: FROM CRISPUS ATTUCKS TO COLIN POWELL 259 (1997).

167. *Id.*

than twice that percentage of eligible African-Americans.¹⁶⁸ According to some sources, African-Americans were also more likely to be sent to units on the front line, and, thus, more likely to die in combat.¹⁶⁹ Racial disparities also extended to the selective service boards, which were used to decide who would serve. In 1966, only 1.3% of draft board members across the United States were African-Americans.¹⁷⁰

The United States' divisive experience with the draft provided another basis for the Gates Commission's focus on socioeconomically disadvantaged people. As previously discussed, during the Civil War, a draftee could pay \$300, roughly \$7,000 in today's dollars, to escape service.¹⁷¹ Those without sufficient means had no choice but to serve; those with means, of course, could escape conscription. During Vietnam, those with access to higher education could take advantage of deferments, effectively removing themselves from the pool of potential draftees for a period of years.¹⁷² One could further postpone service by taking advantage of medical deferments. Military physicians were usually too busy to carefully examine each potential draftee and would often defer to the professional opinion of a civilian doctor.¹⁷³

A volunteer military promised to prevent, or at least mitigate, this unfairness. According to the Commission, "The frequently heard claim that a volunteer force will be all black or all this or all that, simply has no basis in fact. Our research indicates that the composition of the armed forces will not be fundamentally changed by ending conscription."¹⁷⁴ Similarly, the Gates Commission maintained that a volunteer force would not result in disproportionate representation of people from disadvantaged economic backgrounds because the increase in military pay required by the all-volunteer force would "increase the attractiveness of military service more to those who have higher civilian earnings potential."¹⁷⁵ And even if the burdens of service fell disproportionately upon socioeconomically disadvantaged people, this could be viewed positively because the military would provide such people with a path out of "entrenched poverty, institutional racism, and systemic disadvantage."¹⁷⁶ Within the first year of the all-volunteer military's implementation, African-Americans joined the military at unprecedented numbers, leading to further disproportionate representation.¹⁷⁷ Over time, however, the representativeness of the military

168. *Id.*

169. *Id.* But see THOMAS C. THAYER, WAR WITHOUT FRONTS: THE AMERICAN EXPERIENCE IN VIETNAM 114 (1985) (refuting the contention that African-American service members suffered a disproportionately high percentage of deaths in the Vietnam War).

170. JAMES E. WESTHEIDER, THE AFRICAN AMERICAN EXPERIENCE IN VIETNAM: BROTHERS IN ARMS 27 (2008).

171. See *supra* notes 58–59 and accompanying text for a discussion of this exemption.

172. See *supra* notes 106–09 and accompanying text for a discussion of draft deferments by college students during the Vietnam War.

173. WESTHEIDER, *supra* note 104, at 35.

174. GATES COMMISSION REPORT, *supra* note 23, at 15.

175. *Id.* at 16–17.

176. Ronald R. Krebs, Myths of the All-Volunteer Force: Rethinking Military Recruitment and the Fate of the Citizen-Soldier 4 (2006) (paper presented at 2006 conference on "Citizenship, the Soldier, and the State" at Syracuse University), available at [http://www.polisci.umn.edu/~ronkrebs/Publications/Myths%20of%20the%20AVF%20\(complete\).pdf](http://www.polisci.umn.edu/~ronkrebs/Publications/Myths%20of%20the%20AVF%20(complete).pdf).

177. LANNING, *supra* note 166, at 277–79.

supposedly balanced out, and after twenty-five years of the volunteer military, the Pentagon proclaimed that the all-volunteer force “provided a military ‘that is experienced, smart, disciplined and *representative of America*.’”¹⁷⁸

C. *The Pragmatic Promise*

The pragmatic promise holds that a volunteer military will sufficiently meet staffing needs and be better prepared and more professional than a conscripted military. The Gates Commission promised that the all-volunteer military would be able to meet staffing needs sufficiently and provide not a only “a high quality force but also . . . one that is more experienced, better motivated, and has higher morale.”¹⁷⁹ According to a Commission staffer, the changing demands on the armed forces and the increased need for highly skilled personnel necessitated a better-compensated and smaller all-volunteer force.¹⁸⁰ A military force made up solely of volunteers may be considered better trained and more qualified to fight wars.¹⁸¹ Numerous policymakers have asserted that an all-volunteer force is far more professional, stable, and reflective of America.¹⁸²

The belief that an all-volunteer military provides an adequately staffed and more professional force persists. In response to fleeting calls for a draft after the attacks of September 11, 2001, and the initial invasions in Iraq and Afghanistan, the Department of Defense released a report that declared that a return to conscription would threaten the all-volunteer military’s “hard-won achievements” in readiness and professionalism.¹⁸³ Secretary of Defense Donald Rumsfeld, one of the first proponents of the all-volunteer military in the 1960s, emphatically dismissed calls for a return to the draft, noting, “We don’t need compulsion to attract and retain the people we need to serve our country. . . . And the all-volunteer force will win the global war on terror.”¹⁸⁴

D. *The Economic Promise*

The economic promise holds that a volunteer military will more fully consider the cost of service. Professor Walter Oi, a director of research for the Gates Commission, was among the first of many economists to study military draft policy.¹⁸⁵ Professor Oi concluded that while the country could assemble a drafted military with a lower

178. Jarrett Murphy, *Draft Unlikely To Be Reinstated*, CBSNEWS (Dec. 31, 2002, 10:00 AM), http://www.cbsnews.com/2100-250_162-534836.html (emphasis added) (quoting Department of Defense statement).

179. GATES COMMISSION REPORT, *supra* note 23, at 19.

180. Walter Y. Oi, *Historical Perspectives on the All-Volunteer Force: The Rochester Connection*, in PROFESSIONALS ON THE FRONT LINE: TWO DECADES OF THE ALL-VOLUNTEER FORCE 37, 48 (J. Eric Fredland et al. eds., 1996).

181. Kamens, *supra* note 22, at 730.

182. See, e.g., Steven A. Holmes, *Is This Really an All-Volunteer Army?*, N.Y. TIMES, Apr. 6, 2003, at D1 (stating that supporters of the volunteer force say the military is more professional and better motivated).

183. DEP’T OF DEF., OFFICE OF THE UNDER SEC’Y OF DEF. (PERSONNEL & READINESS), CONSCRIPTION THREATENS HARD-WON ACHIEVEMENTS AND MILITARY READINESS 1 (2003), available at <http://www.defenselink.mil/news/Jan2003/d20030114avf.pdf>.

184. Donald H. Rumsfeld, Op-Ed., *There Is No “Secret Plan” To Reinstate a Military Draft*, SEATTLE TIMES (Oct. 27, 2004), http://seattletimes.com/html/opinion/2002073541_rumsfeld27.html.

185. See generally, e.g., Walter Y. Oi, *The Economic Cost of the Draft*, 57 AMER. ECON. REV. 39 (1967).

budgetary cost than a volunteer military, the savings from a drafted military did not take into account the personal costs imposed on draftees.¹⁸⁶ The Gates Commission included prominent economists Milton Friedman and Alan Greenspan among its ranks, providing the Gates Commission Report with a noticeable economic bent and a natural inclination to adopt Professor Oi's findings.¹⁸⁷

According to the Commission, "conscription is a form of taxation."¹⁸⁸ The Commission maintained that past comparisons of conscription and an all-volunteer force had failed to account for hidden costs when concluding that conscription was more economical.¹⁸⁹ Among the broader costs considered by the Commission were various economic costs tied to drafting young men, such as preventing them from contributing to the economy, disrupting careers, or forcing career and life choices to avoid conscription.¹⁹⁰ By fully considering these additional costs, the Commission promised the volunteer military would be more cost conscientious and cost effective. In 2007, after six years of war in Afghanistan and four years of war in Iraq, Professor Oi reprised his examination of the economic costs of military staffing and affirmed his conclusions from 1967: because of the hidden taxes placed on draftees, the all-volunteer military was more economical.¹⁹¹

To summarize, the all-volunteer military promised to better promote individual freedom, to better promote notions of fairness, to be more pragmatic, and to be more economical. In short, and above all, an all-volunteer military promised to be *better* for the nation. Those willing to serve were deemed the best suited to serve. This narrative resonated with military leadership, policymakers, and the American public. The Gates Commission incorporated these promises into its Report, which policymakers essentially adopted whole cloth. Congress moved to abandon the draft and increase military compensation. Although over the years, a rogue commentator, politician, scholar, or military leader may call for a return to the draft; references to the Gates Commission's four promises quickly neutralize such criticism.¹⁹² Most recently, the Office of the Secretary of Defense reaffirmed the findings of the Gates Commission in "pointing out the unfairness of conscription, establishing the feasibility of a volunteer force on economic grounds, and suggesting that a volunteer force could be more effective than a conscripted force."¹⁹³ And so, with the promised virtues of an all-

186. Walter Y. Oi, *The Costs and Implications of an All-Volunteer Force*, in *THE DRAFT: A HANDBOOK OF FACTS AND ALTERNATIVES* 221, 242-43 (1967). Professor Oi noted three hidden costs as a result of the draft: (1) some are drafted "because of the high turnover of draftees and reluctant volunteers"; (2) some are drafted "without being compensated for their aversion to service life"; and (3) enlistees "are denied the higher pay that would have prevailed in an all-volunteer force." *Id.*

187. See Henderson, *supra* note 153, at 363-64 (asserting that economists' extensive work documenting the drawbacks of the draft contributed to its quick end).

188. GATES COMMISSION REPORT, *supra* note 23, at 122.

189. *Id.* at 30-33.

190. *Id.*

191. See Walter Y. Oi, *Should We Bring Back the Draft?*, 30 REGULATION 8, 12 (2007) ("Military pay was raised to be competitive with wages in the civilian labor market. It was the right thing to do, to eliminate the hidden tax that had been placed on draftees.").

192. See, e.g., PAUL, *supra* note 164, at 63; Oi, *supra* note 191, at 8; Murphy, *supra* note 178; Rumsfeld, *supra* note 184.

193. DEP'T OF DEF., *supra* note 183, at 7.

volunteer military, the United States has relied on an all-volunteer military until present day.

III. THE BROKEN PROMISES OF AN ALL-VOLUNTEER MILITARY

“We love the troops, and you know why we love the troops? . . . Because we don’t have to be the troops.”¹⁹⁴

“Never in the field of human conflict was so much owed by so many to so few.”¹⁹⁵

The attacks of September 11, 2001, and subsequent military action in Afghanistan and Iraq brought a few, brief calls for reinstatement of the draft. The vast majority of political actors and the American public largely disregarded these appeals. Perhaps the Bush administration and Congress did not appreciate the depth of commitment that military intervention in these two countries and elsewhere would entail.¹⁹⁶ Perhaps, however, they recognized that the American people would resoundingly oppose a draft. Whatever the case may have been, in order to wage a prolonged multifront war overseas, the Bush administration and Congress were quickly forced to look at new ways to meet military staffing needs without reinstituting the draft.

As previously discussed, the Gates Commission’s recommendations were based on sound, thorough, and thoughtful research. The fidelity of the Gates Commission’s promises remained intact for over thirty years. Nevertheless, these promises could not withstand the assault caused by the longest continuous period of fighting in U.S. history. At the height of the U.S. military involvement in Iraq, according to General George Casey, the Chief of Staff of the United States Army, “The demand for our forces exceed[ed] the sustainable supply.”¹⁹⁷ In 2004, the Pentagon released a report stating the United States had an inadequate number of troops to sustain the current scope of operations into the future.¹⁹⁸ Early in the U.S. involvement in Iraq and Afghanistan, policymakers recognized that the military was overworked and overcommitted.¹⁹⁹ Yet government officials refused to entertain a return to the draft,

194. Mark Thompson, *The Other 1%*, TIME, Nov. 21, 2011, available at <http://www.time.com/time/magazine/article/0,9171,2099152,00.html> (quoting Jack Jacobs, a retired U.S. Army Colonel).

195. Winston S. Churchill, *The War Situation I*, in BLOOD, SWEAT, AND TEARS 341, 348 (1941).

196. See Michael R. Gordon, *The Strategy To Secure Iraq Did Not Foresee a 2nd War*, N.Y. TIMES, Oct. 19, 2004, at A1 (noting that there were not enough American troops to sustain the scope of overseas commitments).

197. 153 CONG. REC. S24,846 (daily ed. Sept. 19, 2007) (statement of Sen. Levin, quoting General Casey).

198. E.g., Paul Krugman, Editorial, *Feeling the Draft*, N.Y. TIMES, Oct. 19, 2004, at A27.

199. See Mary H. Cooper, *Private Affair: New Reliance on America’s Other Army*, 62 CONG. Q. WKLY. REP. 2186, 2194 (2004) (depicting the increase of the military’s use of private military contractors in war zones due to the short supply of military personnel); David M. Halbfinger, *Kerry Attacks on Economy and a Draft*, N.Y. TIMES, Oct. 16, 2004, at A11 (reporting on the warning given by then-presidential candidate John Kerry regarding the inevitable reimplementation of the draft if the American course on pursuing warfare did not change); Thom Shanker & Brian Knowlton, *Troop Number Too Low, Military Poll Says*, N.Y. TIMES, Oct. 17, 2004, at N21 (reporting poll results among military personnel and their families showing that sixty-two

implementing instead other measures to overcome troop shortages.²⁰⁰ These measures began to demonstrate the unraveling of the promises of an all-volunteer military.

A. *The Promise of Individual Freedom Broken: "Stop-Loss"*

The promise of individual freedom—that the volunteer military would promote greater freedom of choice for those who chose to serve—was impaired in many ways even at the outset of the wars. As one example, the armed services pulled reservists from their civilian lives and deployed them overseas for lengths of time beyond reasonable expectations. Many described such reliance on the reserves as creating a “back-door draft.”²⁰¹ But perhaps no other policy better exemplifies the broken promise of individual freedom than “Stop-Loss.” Federal law allows the President to suspend any provision of law relating to the promotion, retirement, or separation of any member of the armed forces if he determines that service member is essential to national security.²⁰² Colloquially known as “Stop-Loss,” the Secretaries of each branch of the armed forces use this policy as a force management tool that permits the retention of enlisted service members past the end of active obligated service (EAOS) as initially agreed upon in their enlistment contracts.²⁰³

Although the Stop-Loss policy is not purely an invention of recent conflicts, the last decade marks the first time the military has used the policy so broadly.²⁰⁴ By 2008, the Army retained 58,300 soldiers in the service past enlistment contract expiration dates under the Stop-Loss policy.²⁰⁵ A year later, that number ballooned to 120,000.²⁰⁶ Despite public outcry and complaints from soldiers and their families, the Army maintained that the Stop-Loss policy was necessary in order to sustain a ready fighting force.²⁰⁷

A handful of soldiers have challenged the Stop-Loss policy in the courts with no success. In *Qualls v. Rumsfeld*,²⁰⁸ an active duty service member challenged the Stop-Loss policy on several bases, including fraudulent misrepresentation, after his contract was involuntarily extended to support Operation Iraqi Freedom.²⁰⁹ The plaintiff had

percent believed that the Bush administration underestimated the number of troops needed in Iraq).

200. James Dao, *The Option Nobody's Pushing. Yet.*, N.Y. TIMES, Oct. 3, 2004, at WK1.

201. Elizabeth Cameron Hernandez, *The United States Army Reserve: Welcome to the Hotel California We Are All Just Prisoners Here*, 12 ROGER WILLIAMS U. L. REV. 904, 923 (2007).

202. 10 U.S.C. § 12305 (2012).

203. Josh White, *Soldiers Facing Extended Tours; Critics of Army Policy Liken It to a Draft*, WASH. POST, June 3, 2004, at A1. The enlistment contracts inform recruits of the possibility of extension past EAOS. Tim Donahue, Note, *The Constitutionality of Stop-Loss and Why It Is Better for the Country than the Draft*, 44 NEW ENG. L. REV. 71, 84–85 (2009).

204. Stop-Loss was used minimally in the Gulf War, Kosovo, and Bosnia. CHARLES A. HENNING, CONG. RESEARCH SERV., R40121, U.S. MILITARY STOP LOSS PROGRAM: KEY QUESTIONS AND ANSWERS 4 (2009).

205. Tom Vanden Brook, *DOD Data: More Forced To Stay in Army*, USA TODAY (Apr. 23, 2008, 11:34 AM), http://www.usatoday.com/news/military/2008-04-21-stoploss_N.htm.

206. Thom Shanker, *Gates To Phase Out Practice That Delays Exits from Military*, N.Y. TIMES, Mar. 19, 2009, at A20.

207. HENNING, *supra* note 204, at 1.

208. 412 F. Supp. 2d 40 (D.D.C. 2006).

209. *Qualls*, 412 F. Supp. 2d at 44–45.

enlisted in the Army under the “Try One” program, a recruitment method that obligates enlistees to only one year of service.²¹⁰ Although his enlistment contract alerted the plaintiff to the possibility of involuntary extension, he claimed that his recruiter did not adequately explain the policy.²¹¹ The District Court for the District of Columbia found that military recruiters had no affirmative obligation to explain possible eventualities that might arise during an enlistment period.²¹² The court concluded, therefore, that “the Army’s proper exercise of statutory and regulatory authority to extend [the plaintiff’s] enlistment is not fraudulent.”²¹³

The courts have found that Stop-Loss applies to National Guardsmen and reservists, as well as active duty service members. In *Santiago v. Rumsfeld*,²¹⁴ for example, the plaintiff argued that Stop-Loss should not apply to reservists or National Guardsmen.²¹⁵ The Ninth Circuit disagreed. Applying traditional principles of contract law, the court held that the plain language of the Stop-Loss statute allowed the President to suspend any provision of law applicable to “any member of the armed forces.”²¹⁶ No less fruitless was the case of *Doe v. Rumsfeld*,²¹⁷ in which the plaintiff challenged the President’s Stop-Loss authority on due process grounds.²¹⁸ The Ninth Circuit held that, because the soldier had received adequate notice, the Army could extend his service beyond the initial enlistment period under the President’s Stop-Loss authority.²¹⁹ Thus, the court held that the plaintiff was not denied due process, even though the Army’s “Try One” program was advertised under the guise that veterans could enlist for one year before making a further commitment.²²⁰

In 2007, then–Secretary of Defense Robert Gates ordered all military department Secretaries to issue plans to reduce the use of the Stop-Loss policy.²²¹ In 2009, Secretary Gates announced that he would end Stop-Loss by 2011.²²² Secretary Gates kept his promise.²²³ In June 2011, he testified before the Senate that there were no longer Stop-Loss soldiers in the military.²²⁴ Nevertheless, the pervasive use of Stop-Loss throughout the most trying times of the wars in Iraq and Afghanistan shows that the promise of individual freedom was broken.

210. *Id.* at 44.

211. *Id.* at 44–45.

212. *Id.* at 45.

213. *Id.*

214. 407 F.3d 1018 (9th Cir. 2005).

215. *Santiago*, 407 F.3d at 1020.

216. *Id.* at 1025 (emphasis added).

217. 435 F.3d 980 (9th Cir. 2006).

218. *Doe*, 435 F.3d at 985.

219. *Id.* at 988–89.

220. *Id.* at 983–85.

221. Memorandum from Robert M. Gates, Sec’y of Def., to the Military Dep’t Sec’ys, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense 2 (Jan. 19, 2007) (on file with author).

222. Ann Scott Tyson, *Army To Phase Out “Stop-Loss” Practice*, WASH. POST, Mar. 19, 2009, at A2.

223. Larry Shaughnessy, *Gates Makes Good on Promise To End Controversial ‘Stop Loss’ Policy*, CNN (June 15, 2011, 2:46 PM), <http://www.cnn.com/2011/US/06/15/army.stop.loss/>.

224. *Id.*

B. The Pragmatic Promise Broken: Lowering Standards

Even the implementation of Stop-Loss did not prove sufficient to staff the Army adequately during thirteen years of war. The pragmatic promise indicated that a professional and capable military could be assembled solely by volunteers. But as U.S. involvement in Afghanistan and Iraq continued, the Army suffered from increasingly significant recruiting challenges.²²⁵ According to one recruiter, “We’re enlisting more dropouts, people with more law violations, lower test scores, more moral issues We’re really scraping the bottom of the barrel trying to get people to join.”²²⁶ By 2007, Army recruits without a high school degree reached twenty-nine percent, the highest level in almost twenty-five years.²²⁷ Additionally, the Army issued increased numbers of “moral waiver[s]” for past criminal behavior.²²⁸ In other words, previous minimum academic and moral standards for enlistment were now being waived in order to make up for the recruiting shortfall. Along with reduced recruiting and retention standards, the military offered unprecedented enlistment bonuses to lure people into the military on compressed time frames.²²⁹

Such measures have an impact on the quality of the military force.²³⁰ According to one independent study, “Even if the recent negative trends in recruitment and retention were to be completely reversed over the next few years, it would likely be years, and perhaps a decade or two, before the Army fully recovers.”²³¹ Some military leaders have even attributed the abuses at Abu Ghraib to a lack of properly trained

225. See, e.g., DAN REITER, PREVENTIVE WAR AND ITS ALTERNATIVES: THE LESSONS OF HISTORY 9 (2006) (“In the fiscal year ending September 30, 2005, the Army missed its recruiting goals, achieving only 84 percent of the enlistment goal for the Reserve, 80 percent for the National Guard, and 92 percent for the active-duty force.”); Bryan Bender, *Stepped-Up Army Recruiting Enlists Many with Problems*, BOSTON GLOBE, Nov. 27, 2007, at A1 (listing quality concerns among new recruits and noting that the Army “accept[ed] a higher percentage of enlistees with criminal records, drug or alcohol problems, or health conditions”); Eric Schmitt, *Army Recruiting More High School Dropouts To Meet Goals*, N.Y. TIMES, June 11, 2005, at A11 (reporting that the percentage of recruits without a high school diploma rose to ten percent from eight percent the following year).

226. Paul von Zielbauer, *Army, Intent on Sending a Message, Cracks Down on Deserters*, N.Y. TIMES, Apr. 9, 2007, at A10.

227. David Isenberg, *Recruiting the Bottom of the Barrel*, ASIA TIMES (Apr. 26, 2008), http://www.atimes.com/atimes/Middle_East/JD26Ak01.html.

228. *Id.*

229. See, e.g., Sara Wood, *Army Boosts Enlistment Bonuses*, U.S. DEP’T OF DEF. (Aug. 2, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=46917> (reporting that newly enlisted soldiers could receive a payment of up to \$20,000 in exchange for enlisting for two years and going to basic training within thirty days).

230. See, e.g., Fred Kaplan, *GI Schmo: How Low Can Army Recruiters Go?*, SLATE (Jan. 9, 2006, 5:06 PM), http://www.slate.com/articles/news_and_politics/war_stories/2006/01/gi_schmo.html (explaining how the loosening of aptitude requirements in military enrollment has decreased the effectiveness and efficiency of military forces); Eric Schmitt, *General Warns of a Looming Shortage of Specialists*, N.Y. TIMES, Sept. 17, 2004, at A16 (reporting that some military officials believe that the Army could run out of specialists in the Reserves); Eric Schmitt, *Its Recruitment Goals Pressing, the Army Will Ease Some Standards*, N.Y. TIMES, Oct. 1, 2004, at A24 (reporting that the Army relaxed some recruiting standards in order to reach recruitment goals).

231. STEVEN M. KOSIAK, STRATEGY FOR THE LONG HAUL: MILITARY MANPOWER FOR THE LONG HAUL x (2008).

personnel.²³² Although this Article uses the lowering of standards to demonstrate the breaking of the pragmatic promise, there are also indications of the breaking of the promise of individual freedom. By recruiting those who are least educated and inducing service members to remain in the military for relatively small sums of money, there is a sense that recruiters actively targeted those with fewer opportunities, and, thus, perhaps less freedom of choice.

C. *The Pragmatic Promise Broken: The Rise of Private Military Companies*

The pervasive use of private military companies (PMCs) in combat zones also demonstrates that the pragmatic promise has been broken. In the waning days of the draft, critics of the all-volunteer force feared that only the use of mercenaries could meet the nation's military needs.²³³ In his memoirs, Milton Friedman recounts his response to General William Westmoreland, the commander of U.S. forces in Vietnam, after General Westmoreland remarked that he did not wish to lead an army of mercenaries:

I stopped him and said, "General, would you rather command an army of slaves?" He drew himself up and said, "I don't like to hear our patriotic draftees referred to as slaves." I replied, "I don't like to hear our patriotic volunteers referred to as mercenaries." But I went on to say, "If they are mercenaries, then I, sir, am a mercenary professor, and you, sir, are a mercenary general; we are served by mercenary physicians, we use a mercenary lawyer, and we get our meat from a mercenary butcher." That was the last that we heard from the general about mercenaries.²³⁴

Professor Friedman's statement suggests that there is an equivalence between paying for all services, whether health care or national defense. According to Friedman's argument, there is little consequence to employing PMCs to perform the work traditionally done by the military. But recent experiences with PMCs may challenge this assumption. Since September 11, 2001, the U.S. government has increasingly turned to PMCs to fulfill staffing shortfalls caused by the increased demands of the armed forces overseas.²³⁵ Although the United States has employed PMCs throughout history, reliance on their use ballooned during the reconstruction efforts in Afghanistan and Iraq.²³⁶ But unlike the support roles that contractors

232. John Hendren & Mark Mazzetti, *Army Implicates 28 U.S. Troops in Deaths of 2 Afghan Detainees*, L.A. TIMES, Oct. 15, 2004, at A13.

233. E.g., GATES COMMISSION REPORT, *supra* note 23, at 16–17.

234. MILTON FRIEDMAN & ROSE D. FRIEDMAN, TWO LUCKY PEOPLE: MEMOIRS 380 (1998). This exchange from Friedman's memoirs, which he co-authored with his wife, Rose, has been cited frequently in academic literature. E.g., Henderson, *supra* note 153, at 370; Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J.L. & HUMAN. 101, 160–61 (2009).

235. Several other reasons have been offered for the government's penchant for using PMCs. Some of these reasons are practical and obvious. PMCs have promised to offer some services with greater competency and at a lower cost than the military. David Isenberg, *Are Private Contractors Really Cheaper?*, TIME (July 23, 2013), <http://nation.time.com/2013/07/23/are-private-contractors-really-cheaper/>. Other reasons are political and less obvious. Unlike the number of members of the armed services, the number of military contractors in war zones does not count toward the troop levels or casualty rates that are published by the Department of Defense. Rod Nordland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1.

236. COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., AT WHAT RISK?: CORRECTING

traditionally filled, the roles of PMCs involved tasks that could have impacted tactical outcomes during battles.²³⁷ In 2007, the number of PMCs in Iraq was estimated at between 20,000 and 30,000.²³⁸ By 2007, approximately 180,000 civilians were working under U.S. contracts.²³⁹ By October 2012, there were a total of 113,376 Department of Defense contractors in Afghanistan.²⁴⁰ This figure alone *exceeds the number of U.S. service members in Afghanistan* and does not even account for additional State Department contractors.²⁴¹

Commentators have criticized the pervasive use of contractors in recent wartime environments for many reasons.²⁴² First, privatization reduces “accountability.” Low accountability has taken many forms, including difficulty establishing criminal jurisdiction over contractors who committed criminal acts, lack of contract oversight, and the ability of contractors to refuse orders from military commanders without criminal consequence.²⁴³ Second, replacing members of the armed forces with contractors threatens fundamental democratic values.²⁴⁴ Many assert that using contractors allows the government to employ force without requiring widespread

OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 6 (2011).

237. See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 3 (2001) (noting that there has never “been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement” (quoting Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?*, 23 A.F. J. LOG. 9, 10 (1999))).

238. JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 2 (2007).

239. T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1.

240. David Isenberg, *Contractors in War Zones: Not Exactly “Contracting,”* TIME (Oct. 9, 2012), <http://nation.time.com/2012/10/09/contractors-in-war-zones-not-exactly-contracting/>.

241. *Id.*

242. See generally LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* (2011); DAVID ISENBERG, *SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ* (2009); T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* (2006); P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549 (2005); Taussig-Rubbo, *supra* note 234.

243. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-1087, *MILITARY OPERATIONS: DOD NEEDS TO ADDRESS CONTRACT OVERSIGHT AND QUALITY ASSURANCE ISSUES FOR CONTRACTS USED TO SUPPORT CONTINGENCY OPERATIONS* 4 (2008) (noting that DOD contract oversight was inadequate due to “a shortage of qualified oversight and contract administration personnel” and “because it did not maintain some contract files in accordance with applicable policy and guidance”); Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 498 (2008) (introducing the problem of a “disciplinary gap” related to civilian-augmentee misconduct”); Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1461–65 (2009) (discussing the potential use of the Alien Tort Statute, in place of criminal liability, to establish jurisdiction over private military contractors).

244. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1022–23 (2005) (stating that reliance on private contractors risks war profiteering and a corrupting influence on foreign policy, as well as nullifying democratic checks on military power).

personal sacrifice from the citizenry.²⁴⁵ Contractor deaths in war zones do not count toward Department of Defense casualty numbers.²⁴⁶ Thus, PMCs allow the government to obscure American casualties and make decisions to commit U.S. forces without getting as much buy-in from the public as would be needed with more widespread public participation in the military.²⁴⁷ Finally, privatizing the military damages the reputation and reduces public esteem for the armed forces.²⁴⁸ PMC employees have been accused of numerous war crimes and other criminal acts, including torture and rape at Abu Ghraib.²⁴⁹ These acts serve to diminish the reputation of the military in countries where the military is deployed, often impacting mission accomplishment.

D. *The Economic Promise Broken: The Unaccounted Human Costs of War*

The Gates Commission promised that the all-volunteer military would take into consideration a fuller sense of the costs of service.²⁵⁰ The Commission, however, could not possibly have anticipated the costs of thirteen years of war. Social ailments have plagued veterans and service members at rates that exceed those found in the nonveteran population, among them: unemployment, homelessness, and suicide.²⁵¹

1. Unemployment

Since the financial crisis began in 2008, a soft job market has beleaguered the American people. The market has been particularly cruel to military veterans. In 2005, the Bureau of Labor Statistics compared unemployment of eighteen to twenty-four year old Gulf War-era veterans and nonveterans, finding an 18.7% rate of unemployment

245. *Id.*

246. See Rod Nordland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1 (noting that in 2011, 430 American contractors were killed in Afghanistan compared to 418 American soldiers).

247. *Id.*

248. See Minow, *supra* note 244, at 995–96 (discussing private contractors' lack of accountability in the face of "growing demands for compliance with human rights").

249. See GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–48 (2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> (indicating that "[s]everal of the alleged perpetrators of the abuse of detainees were employees of government contractors"); HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 1-3 (2008), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf> (providing in-depth analysis of contractor abuses, including at Abu Ghraib and Nisoor Square); Josh Meyer, *Guards Defied Orders*, U.S. SAYS, L.A. TIMES, Dec. 9, 2008, at 1 (describing accusations of private security guards using automatic weapons and rocket-propelled grenades against unarmed civilians); Charlie Savage, *Charges Voided for Contractors in Iraq Killings*, N.Y. TIMES, Jan. 1, 2010, at A1 (discussing a federal judge overturning an indictment of five security guards charged with manslaughter and firearm offenses for firing on unarmed civilians in Iraq, leading to the death of seventeen Iraqis and injuring twenty).

250. GATES COMMISSION REPORT, *supra* note 23, at 30–33.

251. While this Article focuses on these three ailments, veterans have also suffered from substance abuse problems, domestic abuse problems, divorce, depression, and incarceration at rates that exceed the civilian population. Ron J. Hammond & Paul Cheney, *Chapter 21: Sociology of the Military Veteran's and the Criminal Justice System*, INTRO. TO SOCIOLOGY (2009), <http://freebooks.uvu.edu/SOC1010/index.php/ch21-military-a-criminal.html>.

for veterans compared with a rate of 9.9% for nonveterans.²⁵² In 2009, joblessness spiked for veterans returning from deployments in Iraq and Afghanistan.²⁵³ There are many possible reasons for this disparity. Some veterans who return to civilian life with battlefield-related physical and psychological injuries simply cannot find employment that can accommodate their medical needs.²⁵⁴ Other veterans have found that the skills they have acquired in the military are not marketable in the civilian workforce.²⁵⁵ Possibly, employers who neglected to serve do not understand the utility of skills acquired in the military (skills such as leadership, management, and the ability to act decisively under pressure) and how these skills translate into the civilian sector. Lacking opportunity in the civilian workforce, in the last two years, veterans have reenlisted at such high rates that all branches of the armed services have experienced little difficulty meeting recruitment and retention goals, despite ongoing war.²⁵⁶

2. Homelessness

Veterans also suffer disproportionately from homelessness. The government has offered former service members housing assistance since the end of the Civil War.²⁵⁷ Over time, however, these programs proved ineffective.²⁵⁸ Today, government housing programs fail to meet the needs of most veterans. According to the National Coalition for Homeless Veterans, “Conservatively, one out of every four homeless males who is sleeping in a doorway, alley, or box in our cities and rural communities has put on a uniform and served our country.”²⁵⁹ According to recent statistics from the Department of Housing and Urban Development, “[o]n a single night in January 2012, 62,619 veterans were homeless.”²⁶⁰ While this marks a decline from 2009, veterans’ advocacy groups have noted an “alarming rise” in homelessness among younger veterans who

252. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT SITUATION OF VETERANS: AUGUST 2005, at 2 (2006).

253. Lucia Mutikani, *War Is Hell on Veterans’ Job Prospects: Fed Paper*, REUTERS (Feb. 25, 2013, 1:11 PM), <http://www.reuters.com/article/2013/02/25/us-usa-unemployment-veterans-idUSBRE91O0WN20130225>.

254. See, e.g., David Zucchino, *Vets Struggle To Go from War to Work; Civilian Employers Are Reluctant To Hire Them, They Say*, L.A. TIMES, April 26, 2012, at A1 (reporting that despite veterans’ qualifications for employment, many experience PTSD and traumatic brain injury that appears mysterious and threatening to employers).

255. See Tiffany Hsu, *Vets Face Grim Job Prospects; Many Find Their Duty Didn’t Prepare Them for the Kind of Work They Hoped It Would*, L.A. TIMES, March 28, 2008, at C1 (describing returning veterans’ job prospects as limited to “unstable, entry-level positions”).

256. See Gregg Zoroya, *Jobless Rate Hits 11.2% for Veterans*, USA TODAY, March 20, 2009, at A1 (describing rising joblessness among veterans, while noting that the Army achieved 152% of its re-enlistment goals for the year).

257. See Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States’ Housing Programs for Veterans and the “Public Scandal” of Veterans’ Homelessness*, 38 IND. L. REV. 103, 112–46 (2005) (providing the history of U.S. housing programs for veterans since the Civil War).

258. *Id.* at 105.

259. *Id.* at 103 (citation omitted).

260. Press Release, U.S. Dep’t of Hous. and Urban Dev., HUD Reports Slight Decline in Homelessness in 2012 (Dec. 10, 2012), available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-191.

have served in Iraq and Afghanistan.²⁶¹

Although the government has implemented several initiatives to reverse the trend of homelessness among veterans, these initiatives have not been entirely effective. For example, in 2011, veterans' advocates sued the Department of Veterans Affairs for its failure to provide adequate housing and mental health services for homeless veterans in Los Angeles, the city with the highest population of homeless veterans.²⁶² One of the named plaintiffs, Greg Valentini, a veteran of heavy combat in Iraq and Afghanistan, descended into "post-combat hell" after leaving the service, falling victim to drug addiction, suicidal fantasies, and eating out of trash cans.²⁶³ Valentini and other veterans literally slept on the street outside the walls of the Los Angeles Veterans Affairs campus.²⁶⁴ Until recently, the campus was used to provide permanent housing to disabled veterans.²⁶⁵ In 1888, the land was deeded to the government for precisely this purpose.²⁶⁶ Over time, the campus—"one of the most valuable parcels of real estate in the western United States"—became used for other purposes, many of which were commercial and unrelated to housing or caring for veterans.²⁶⁷ The Justice Department argued that the Department of Veterans Affairs had no obligation to provide veterans such housing and services and moved to have the suit dismissed.²⁶⁸ The district court judge assigned to the case agreed and dismissed some of the charges from the case.²⁶⁹ Eventually, the Department of Veterans Affairs capitulated and finally agreed to provide housing for homeless veterans in Los Angeles, "[m]aybe sometime in 2014."²⁷⁰

3. Suicide

Dr. Peter Linnerooth, U.S. Army Captain and trained psychologist, was known as "the Wizard" by his friends and colleagues for his unique ability to help soldiers cope

261. Bill Briggs, *Fewer Homeless Vets This Year, but Advocacy Group Sees "Alarming" Rise in Younger Ex-Service Members*, NBC NEWS (Dec. 10, 2012, 3:14 AM), http://usnews.nbcnews.com/_news/2012/12/10/15761391-fewer-homeless-vets-this-year-but-advocacy-group-sees-alarming-rise-in-younger-ex-service-members?lite.

262. Adam Nagourney, *Homeless Veterans Sue Over Neglected Campus*, N.Y. TIMES, June 9, 2011, at A16.

263. Steve Lopez, *Suit Is Step in Vet's Recovery; He Hopes ACLU Case Will Help Others Who Ended Up Homeless*, L.A. TIMES, June 9, 2011, at A2.

264. Am. Civil Liberties Union, *VA Facility in West Los Angeles Abandons Homeless Veterans—Lawsuit Challenges VA's Misuse of Land Given To House Injured Vets*, ACLU OF SOUTHERN CALIFORNIA (June 8, 2011), <http://www.aclusocal.org/va-facility-in-west-los-angeles-abandons-homeless-veterans-lawsuit-challenges-vas-misuse-of-land-given-to-house-injured-vets/>.

265. Valentini v. Shinseki, 860 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012).

266. *Id.* at 1085.

267. Complaint at ¶ 16, Valentini v. Shinseki, No. CV-11-04846 (C.D. Cal. June 8, 2011), 2011 WL 11552611 (quoting WEST L.A. VA MEDICAL CENTER, VETERANS PROGRAM ENHANCEMENT ACT OF 1998 (VPEA) DRAFT MASTER PLAN 8 (Jan. 2011), available at www.scribd.com/doc/48127448/WLA-VA-Draft-Master-Plan).

268. Bobby Shriver, Opinion, *How To House Homeless Vets*, L.A. TIMES, May 28, 2012, at A15.

269. Valentini, 860 F. Supp. 2d at 1117.

270. Editorial, *Veterans in Los Angeles, Still in the Cold*, N.Y. TIMES, Sept. 21, 2012, at A28.

with the horrors of war.²⁷¹ Serving in Iraq during some of the most intense fighting there, he sometimes met with soldiers sixty to seventy hours a week.²⁷² Dr. Linnerooth helped thousands of soldiers with the full range of demons that haunt combat veterans: guilt, fear, depression, rage, insomnia, nightmares, PTSD, and suicidal thoughts and ideations.²⁷³ In an article in the journal, *Professional Psychology*, Dr. Linnerooth described the personal impact of treating so many people on such troubling topics: “Despite the resilience that may result from training and experience, it is reasonable to assume that professional burnout occurs at a relatively high rate among the vulnerable and overstretched population of clinical military psychologists.”²⁷⁴ Dr. Linnerooth’s writings would prove gruesomely prophetic. He left the military in 2008 and found himself fighting with PTSD, depression, anger, and drug dependency.²⁷⁵ He divorced his wife and, shortly thereafter, remarried.²⁷⁶ Finally, in the early morning hours of January 2, 2013, Dr. Linnerooth took his own life.²⁷⁷ According to one of Dr. Linnerooth’s closest friends, “For the record, Pete Linnerooth did not want to die He just wanted the pain to end. Big difference.”²⁷⁸

Dr. Linnerooth is emblematic of the volunteer military’s failure to account for the unanticipated human costs of war. Military and veteran mental health service providers were not prepared or equipped for thirteen years of war.²⁷⁹ Suicide is epidemic among service members and veterans. Historically, the suicide rate among members of the military has been considerably lower than rates among the civilian population.²⁸⁰ After thirteen years of war, however, the trend has reversed. Suicides in the military are now an almost daily occurrence. In 2012, 325 Army soldiers took their lives.²⁸¹ Disturbingly, this number exceeds the total combat deaths in Afghanistan during that year.²⁸² The risk of suicide seems to only increase for military veterans after they leave the service. A 2012 report by the Department of Veterans Affairs revealed that an estimated twenty-two military veterans take their lives daily.²⁸³

271. Mark Thompson, *Dr. Peter J. N. Linnerooth, 1970–2013*, TIME (Jan. 11, 2013), <http://nation.time.com/2013/01/11/dr-peter-j-n-linnerooth-1970-2013/#ixzz2OhaFvaf>.

272. Sharon Cohen, *Vet Who Saved Many in Iraq Couldn’t Escape Demons*, ASSOCIATED PRESS (Mar. 16, 2013, 3:00 PM), <http://bigstory.ap.org/article/vet-who-saved-many-iraq-couldnt-escape-demons-0>.

273. *Id.*

274. Thompson, *supra* note 271 (quoting Peter J. Linnerooth, *Professional Burnout in Clinical Military Psychologists*, 42 PROF. PSYCHOL. 87–93 (2011)).

275. Cohen, *supra* note 272.

276. *Id.*

277. *Id.*

278. *Id.*

279. And perhaps human beings are not made to endure so much anguish in the first place.

280. *Suicide in the Military*, CENTER FOR DEPLOYMENT PSYCHOLOGY, <http://deploymentpsych.org/disorders/suicide-main> (last visited Aug. 15, 2014).

281. Tom Watkins & Maggie Schneider, *325 Army Suicides in 2012 a Record*, CNN (Feb. 2, 2013, 12:16 PM), <http://www.cnn.com/2013/02/02/us/army-suicides/index.html>.

282. DEF. CASUALTY ANALYSIS SYS., U.S. MILITARY CASUALTIES - OPERATION ENDURING FREEDOM (OEF) CASUALTY SUMMARY BY MONTH, https://www.dmdc.osd.mil/dcass/pages/report_oef_month.xhtml.

283. JANET KEMP & ROBERT BOSSARTE, DEP’T OF VETERANS AFFAIRS, SUICIDE DATA REPORT, 2012, at 15 (2012), available at <http://www.va.gov/opa/docs/Suicide-Data-Report-2012-final.pdf>.

E. *The Fairness, Freedom of Choice, and Pragmatic Promises Broken: Underrepresentation in the Military*

Despite the implied promise of the Gates Commission that the all-volunteer military would bring about greater representativeness, this has not necessarily borne out. The Gates Commission only focused on African-American and white racial composition and ignored most other social diversity characteristics.²⁸⁴ When expanded to incorporate other factors, several disturbing trends have emerged.²⁸⁵

Underrepresentation and the lack of diversity in the military first illustrate that the Commission's promise of fairness has been broken. Despite the explicit and implicit promises that the all-volunteer military would be more representative of society than a drafted military, the armed forces today remain unrepresentative of civilian society. A recent Pew Survey revealed that only one-half of one percent of Americans served in the military at any given time during the past decade.²⁸⁶ Service members are disproportionately drawn from a "military cluster." Military families are much more likely to produce additional service members than is the public generally.²⁸⁷ A disproportionate number of service members hail from southern states.²⁸⁸ Citizens from northeastern states only serve in scant numbers.²⁸⁹ Minorities remain overrepresented.²⁹⁰ Underrepresentation also indicates that the promise of individual freedom has been broken in some ways. The Gates Commission found that "[d]raftees and draft-induced volunteers are paid less" than what would induce them to

284. Karen De Angelis & David R. Segal, *Minorities in the Military*, in OXFORD HANDBOOK OF MILITARY PSYCHOLOGY 325, 327 (Janice H. Laurence & Michael D. Matthews eds., 2012).

285. See David R. Segal & Mady Wechsler Segal, *America's Military Population*, 59 POP. BULL. 1, 37 (2004) (concluding that African-Americans have been integrated among enlisted personnel but have made only "small gains among officers" and noting that "women are still restricted from many military jobs").

286. PEW RESEARCH CTR., *supra* note 29, at 2. This compares with nine percent of Americans who served during World War II. Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap Is Found Between Civilians and Military*, N.Y. TIMES, Nov. 25 2011, at A22.

287. Roughly seventy-nine percent of military veterans have an immediate family member who served in the military compared with sixty-one percent of the general public. KIM PARKER, PEW RESEARCH CTR., THE MILITARY-CIVILIAN GAP: FEWER FAMILY CONNECTIONS 2 (2011), available at http://www.stripes.com/polopoly_fs/1.161474!/menu/standard/file/pew_research_family_ties_EMBARGOED.PDF. Seventy percent of veterans have an aunt or uncle in the military compared to sixty-two percent of the public. *Id.* Fifty percent of veterans have a parent who served compared to forty-one percent of the general public. *Id.* Forty-three percent of veterans have a sibling who served in the military compared with twenty-seven percent of the general public. *Id.*

288. MAZUR, *supra* note 30, at 87.

289. *Id.*

290. Although African-Americans are overrepresented in a strict sense, there are some particular nuances to the demographic analysis. See David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working-Class America*, N.Y. TIMES, March 30, 2003, at A1 ("While whites account for three of five soldiers, the military has become a powerful magnet for blacks, and black women in particular, who now outnumber white women in the Army. But if the military has become the most successfully integrated institution in society, there is also a kind of voluntary segregation: while whites and blacks seek out careers in communications, intelligence, the medical corps and other specialties in roughly equal numbers, blacks are two and a half times as likely to fill support or administrative roles, while whites are 50 percent more likely to serve in the infantry, gun crews or their naval equivalent.").

volunteer.²⁹¹ In response to this finding, Congress set military salaries at the minimum required to get would-be draftees to leave the civilian workforce and enter the military.²⁹² But this arrangement ultimately created an economic environment in which lower-income individuals were the most likely to enlist. Although many advocates of the volunteer military argue that a volunteer system best provides for freedom of exchange, the exchange remains most seductive to those who may not have better prospects in the civilian workforce. A 2005 study in the *Journal of Conflict Resolution* suggests that labor-market-driven volunteer militaries contribute to higher casualties because government leaders will more freely place more troops in harm's way when only a small percentage of the public participates in the military.²⁹³ Accordingly, the volunteer military "risks . . . the lives of those possessing little property for the defense of those persons possessing greater quantities of property."²⁹⁴ This arrangement raises obvious concerns of equality, social justice, and morality.

Robert K. Fullinwider argued that "for black youth[, who] faced a higher unemployment rate than white youth, . . . military pay was increasingly attractive . . . , [and] many young blacks turned to the service as a refuge from unemployment."²⁹⁵ According to former Congressman John Cavanaugh, the all-volunteer force is not as voluntary as it first appears. Instead, the volunteer military is a "system in which those who have the least in our society are offered the opportunity to be trained to risk all in exchange for the very thing they have been denied by the society they are asked to defend, a job."²⁹⁶ It seems, therefore, that many of the most underprivileged people in the United States "choose" military service because they simply do not have the same options as their more advantaged counterparts.

Dr. John Hillen argues that the real gap between civilian and military cultures is "shared experience, understanding, and appreciation, especially among elite segments of American society and the military."²⁹⁷ While not all politicians, scholars, and military leaders support the conclusion that the all-volunteer military exploits the least economically advantaged, most appear to agree that political and economic elites are, nevertheless, underrepresented in the military.²⁹⁸ As a result, those who have a disproportionate voice in government and, ultimately, those who are vested with the

291. GATES COMMISSION REPORT, *supra* note 23, at 13.

292. See *supra* note 152 and accompanying text for the congressional response to the Gates Commission's recommendations in part by updating the military pay scale.

293. Joseph Paul Vasquez III, *Shouldering the Soldiering: Democracy, Conscription, and Military Casualties*, 49 J. CONFLICT RESOL. 849, 870–71 (2005).

294. Walt Schubert, *The Draft, the Volunteer Military, and Peace Defense: A Contention*, 4 J. POST KEYNESIAN ECON. 266, 268 (1982).

295. Robert K. Fullinwider, *The All-Volunteer Force and Racial Balance*, in CONSCRIPTS AND VOLUNTEERS: MILITARY REQUIREMENTS, SOCIAL JUSTICE, AND THE ALL-VOLUNTEER FORCE 178, 181 (Robert K. Fullinwider ed., 1983).

296. Edwin Dorn, *Race and the American Military: Past and Present*, in ETHNIC ARMIES: POLYETHNIC ARMED FORCES FROM THE TIME OF THE HABSBURG TO THE AGE OF THE SUPERPOWERS 89, 107 (N. F. Dreisziger ed., 1990).

297. John Hillen, *The Gap Between American Society and Its Military: Keep It, Defend It, Manage It*, 4 J. NAT'L SEC. L. 151, 157 (2000).

298. Michael C. Horowitz & Matthew S. Levensdusky, *Drafting Support for War: Conscription and Mass Support for Warfare*, 73 J. OF POL. 524, 532 (2011).

power to choose when, where, and how we use our military are the very people who lack military experience, implicating some pragmatic concerns.

Under Article II, Section 2 of the Constitution, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”²⁹⁹ Twenty-six of the forty-four American presidents were military veterans.³⁰⁰ During the 2012 elections, for the first time in sixty-eight years, neither presidential candidate had served in the military in any capacity.³⁰¹ For the first time in eighty years, neither presidential candidate or vice presidential candidate had served in the military in any capacity.³⁰²

A lack of military experience is even more pronounced in Congress. Under Article I, Section 8 of the Constitution, Congress is charged “[t]o raise and support Armies”³⁰³ and “[t]o provide and maintain a Navy.”³⁰⁴ Despite this constitutional responsibility, since World War II, the percentage of members of Congress with any sort of military service has declined steadily.³⁰⁵ In 1975, two years after the United States discontinued the draft, over seventy percent of legislators had served in the military.³⁰⁶ By Operation Desert Storm in 1991, Congress was only comprised of a bare majority of veterans.³⁰⁷

In 1997, Professor Donald N. Zillman examined the consequences of the decline of military veterans serving in Congress.³⁰⁸ He reviewed the membership of the 102nd through the 105th Congresses and discovered that the percentage of veterans in Congress had dropped to thirty-two percent.³⁰⁹ Professor Zillman found that military service was “almost non-existent for the legislator who came of age in the ‘volunteer’ era starting in 1973.”³¹⁰ He also found that, at the time, no women veterans had ever served in any Congress, despite women comprising almost twelve percent of the

299. U.S. CONST. art. II, § 2, cl. 1.

300. *Military Roots: Presidents Who Were Veterans*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.va.gov/health/NewsFeatures/20110221a.asp> (last visited Aug. 15, 2014).

301. Dilanian, *supra* note 18.

302. *Id.* Notably, during the Vietnam draft, Vice President Biden received five educational deferments and was ultimately disqualified for service because of childhood asthma. *Biden’s Draft Deferments Equal Cheney’s During Vietnam War*, WASH. TIMES (Sept. 1, 2008), <http://www.washingtontimes.com/news/2008/sep/01/bidens-draft-deferments-equal-cheney-during-vietn/>.

303. U.S. CONST. art. I, § 8, cl. 12.

304. *Id.* cl. 13.

305. Susan Davis, *Number of Veterans in Congress Continues To Decline*, USA TODAY (Nov. 20, 2012, 6:48 PM), <http://www.usatoday.com/story/news/nation/2012/11/20/fewer-congress-vets/1716697/>.

306. Jennifer Rizzo, *Veterans in Congress at Lowest Level Since World War II*, CNN (Jan. 21, 2011, 9:17 AM), <http://www.cnn.com/2011/US/01/20/congress.veterans/index.html>.

307. Donald N. Zillman, *Where Have All the Soldiers Gone II: Military Veterans in Congress and the State of Civil-Military Relations*, 58 ME. L. REV. 135, 135 (2006) [hereinafter Zillman II].

308. Professor Zillman is the former dean of the University of Maine Law School and a Vietnam combat veteran.

309. Donald N. Zillman, *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in Government*, 49 ME. L. REV. 85, 90 tbl.3 (1997) [hereinafter Zillman I].

310. *Id.* at 88.

military.³¹¹ He concluded that “[t]he record to date of the volunteer era legislators suggests that military service has ceased to be an essential part of the political résumé.”³¹² In 2006, Professor Zillman reprised his study and found that representation of military veterans in Congress had continued to decline, with military veterans making up only twenty-five percent of Congress.³¹³ The 110th and 111th Congresses continued the decline of legislators with military service. In the 110th Congress, 126 members served in the military.³¹⁴ In the 111th Congress, this number decreased to 120.³¹⁵

The composition of the 112th Congress continued the decline of veteran representation in Congress. However, the 113th Congress includes nine newly elected veterans from the recent U.S. involvement in Iraq and Afghanistan and the first two female combat veterans: Tammy Duckworth (D-IL) and Tulsi Gabbard (D-HI).³¹⁶ But the new Congress also marks the continued decline of veteran representation in both houses. Today, only nineteen percent of federal legislators have served in the military in any capacity.³¹⁷ Professor Zillman predicts that “[w]ithin a decade . . . it will only be the rare senator or representative who knows the military from firsthand experience.”³¹⁸

Undoubtedly, there is a growing gap between the military and the rest of society. The United States has a military at war and a public that is not very engaged.³¹⁹ Why does this matter? Dr. Hillen maintains that “it is healthy for a democracy to have a society and military that differ in values, but not to the point where they are no longer cognizant of each other, or can no longer appreciate each other.”³²⁰ A civil-military gap may undermine the effectiveness of the military by reducing support for defense budgets and increasing recruitment challenges.³²¹

There are more subtle implications to underrepresentation in the military. A deficiency of veterans in positions of government leadership creates distance between the military and the civilians that lead the military.³²² Members of Congress who have actually served may have increased moral authority to send men and women into combat.³²³ To some, however, the value of government leaders serving in the military

311. *Id.* at 89. It was not until 1998 when the first female veteran (Heather Wilson (R-N.M.)) was elected to Congress. Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553, 607 (2003).

312. Zillman I, *supra* note 309, at 108.

313. Zillman II, *supra* note 307, at 136.

314. JENNIFER E. MANNING, CONG. RESEARCH SERV., R41647, MEMBERSHIP OF THE 112TH CONGRESS: A PROFILE 8 (2012).

315. *Id.*

316. Ashley Southall, *A Changing of the Guard Among Veterans in Congress*, N.Y. TIMES (Jan. 4, 2013, 9:27 AM), <http://thecaucus.blogs.nytimes.com/2013/01/04/a-changing-of-the-guard-among-veterans-in-congress/>.

317. Davis, *supra* note 307.

318. Zillman II, *supra* note 307, at 156.

319. Tavernise, *supra* note 286, at A22.

320. Hillen, *supra* note 297, at 164.

321. THOMAS S. SZAYNA ET AL., RAND ARROYO CTR., THE CIVIL-MILITARY GAP IN THE UNITED STATES: DOES IT EXIST, WHY, AND DOES IT MATTER? XIII (2007).

322. Zillman I, *supra* note 309, at 87.

323. *Id.* at 102.

goes beyond moral authority. According to Lieutenant Colonel Paul Yingling, “Soldiers, Marines and their families are bearing the whole burden of the war, and 99 percent of the public is disengaged from the war The two control mechanisms to control executive ambition—asking the people to supply the blood and treasure for war—are missing.”³²⁴ The lack of wider participation in the military gives the President a degree of political freedom. Some have gone so far as to say these control mechanisms would have prevented the 2003 U.S. invasion of Iraq.³²⁵ Although there is no way to know if this would be true, it is clear that underrepresentation has resulted in the breaking of some of the core promises of the all-volunteer military.

IV. ADDRESSING THE DRAFT’S FAILURES AND RENEWING THE PROMISES OF THE ALL-VOLUNTEER MILITARY

The nation is in a stage of “patriotism light” right now. . . . Neither the left nor the right is for any type of national service. The liberal line is “something for nothing,” and the conservative line is “every man for himself.” It leaves a gulf in the middle where nothing gets accomplished.³²⁶

When faced with the broken promises of the all-volunteer military, a possible inclination may be to call for a return to the draft. But this Article does not necessarily advocate that position. Both the draft and the volunteer military schemes have resulted in questionable moral effects and inefficiencies.³²⁷ Going forward, it is important to acknowledge the inefficiency and possible immorality of the draft. It is equally important to acknowledge that the last decade of U.S. military involvement overseas has expressed immorality and inefficiency in the all-volunteer force.

The Supreme Court’s treatment of draft laws and policy affords the President and Congress broad powers to implement measures to require national service.³²⁸ The Court has addressed the constitutionality of the military draft on rare occasions, always upholding the government’s right to compel service.³²⁹ The Court has consistently

324. Michael R. Gordon, *Bring Back the Draft*, N.Y. TIMES (Feb. 4, 2010, 8:00 PM), <http://atwar.blogs.nytimes.com/2010/02/04/a-critic-returns/> (quoting Colonel Paul Yingling).

325. See Rangel, *supra* note 28, at A19 (“I believe that if those calling for war knew that their children were likely to be required to serve—and to be placed in harm’s way—there would be more caution and a greater willingness to work with the international community in dealing with Iraq.”).

326. Q&A: Professor Charles Moskos, POLICY TODAY (Jan. 31, 2006), http://www.policytoday.com/index.php?option=com_content&task=view&id=56&Itemid=151.

327. Schubert, *supra* note 294, at 267–69.

328. Many scholars have questioned the lawfulness of the military draft, revisiting issues once addressed by the court long ago, including whether the draft violates the Framers’ intent regarding militias, the Thirteenth Amendment’s involuntary servitude prohibition, or the Equal Protection Clause. See, e.g., Dunn, *supra* note 108, at 6–7 (highlighting historic opposition to the draft during the Civil War and the Vietnam War); Friedman, *supra* note 37, at 1493 (concluding from historical evidence that it was not the Framers’ intent to allow Congress the power to institute a draft); Britt, *supra* note 43, at 401 (indicating the uncertainty of the constitutionality of a compulsory draft and arguing that the Thirteenth Amendment bars such action during times of peace); Kamens, *supra* note 22, at 707–08 (arguing that the draft is unlawful and serves “no legitimate national defense purpose”). While I find these questions interesting, they are beyond the scope of this Article.

329. E.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Billings v. Truesdell*, 321 U.S. 542 (1944); *Selective*

deferred to notions of military need in the face of constitutional challenge.³³⁰ The current state of affairs in the military may justify the need to retool the current system of military staffing. This may be best addressed through the political branches of government by a statute. This Article does not endeavor to provide a model statute here, but instead offers a range of options that consider notions of fairness and individual freedom. These options include implementing universal service, offering a choice in how people serve (including nonmilitary options), implementing measures designed to better ensure that those who choose to serve are making an informed choice, providing appropriate incentives and disincentives for service, and ensuring that those who are harmed in any way in service to their country receive adequate care for the rest of their lives.

A. *Requiring Universal Service*

One way to ensure that the military is staffed fairly is to require everyone to serve in some capacity through universal service. Although the United States has never implemented universal service, the concept is not novel. In early 2003, Senator Ernest Hollings (D-SC) and Representative Charles Rangel (D-NY) introduced the Universal National Service Act in their respective chambers of Congress.³³¹ Representative Rangel, the main architect of the bill (and a Bronze Star and Purple Heart recipient for service during the Korean War)³³² maintained that a return to the draft would more fairly distribute the burdens of war across racial and socioeconomic lines than the volunteer military.³³³

The bill required that *all* residents of the United States between the ages of eighteen and twenty-six perform a two-year period of military or civilian service in support of national defense or homeland security.³³⁴ Under this plan, high school students and those who suffered extreme hardship or physical or mental disability could obtain deferments.³³⁵ Many attacked the bill, viewing it as race baiting or a poison pill to avoid war with Iraq rather than a bona fide effort to reinstate the draft.³³⁶

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

330. *E.g.*, *Rostker*, 453 U.S. at 80; *Billings*, 321 U.S. at 556; *Selective Draft Law Cases*, 245 U.S. at 388.

331. Universal National Service Act of 2003, H.R. 163, 108th Cong. (2003); Universal National Service Act of 2003, S. 89, 108th Cong. (2003).

332. Commentator Ben Stein provided an account of Representative Rangel's war heroics: "In unbelievably difficult service in the Korean War, his unit was swamped, cut off, overwhelmed by hordes of Red Chinese crossing into Korea. In the worst cold weather imaginable, under fire, starving, acting Sergeant Charles Rangel, in a black unit led mostly by white officers, took a large group of men, led them by example, lifted their morale, as they fought their way out to safety. Men were being shot, freezing, getting captured all around him, yet he got most of his men out." *Ben Stein: Charlie Rangel Still a Hero to Me*, CBSNEWS (Nov. 28, 2010, 10:09 AM), http://www.cbsnews.com/8301-504623_162-7096523.html.

333. Charles B. Rangel, *Race of Front-Line Troops Isn't Real Issue*, USA TODAY, Jan. 27, 2003, at 16A.

334. H.R. 163, §§ 2(a), 3(a).

335. *Id.* § 6(a)–(b).

336. See Darryl Fears, *Draft Bill Stirs Debate Over the Military, Race and Equity; Statistics on Minorities' Share of Service's Risks Are Disputed*, WASH. POST, Feb. 4, 2003, at A3 (citing Department of Defense statistics produced to refute some of the claims of racial inequity cited as the purpose behind the bill); Clyde Haberman, *Draft Talk, but Source Is Antiwar*, N.Y. TIMES, Jan. 3, 2003, at B1 (addressing Rangel's motivations for proposing conscription and its political impact); Caspar W. Weinberger, Opinion, *Dodgy*

Nevertheless, the bill marked the first effort in decades to spur debate over equitably sharing military burdens.³³⁷ At least four times since he first introduced the bill (and after the burdens suffered by the all-volunteer military became more apparent) Representative Rangel has renewed his calls for a return to the draft and reintroduced his proposed bill to the House of Representatives.³³⁸ However, Congress has failed to take any action on the bills.

After more than a decade of war and a likely continuation of violent extremism aimed at the U.S. people and interests, the United States could very well have its military deployed indefinitely. Other countries rely on universal military service in the face of similarly persistent threats. Although each country has its own culture and distinct threats, perhaps the United States can learn from such countries' experiences.³³⁹ Israel, for example, mandates military service for most men and women for periods up to three years.³⁴⁰ Israel lauds its military as the "people's army" because it has been historically very representative of the diverse Israeli society, requiring military service from most religious sectors, Mizrahi groups, Druze, and women.³⁴¹ In February 2012, the Israeli Supreme Court ended exemptions for ultra-Orthodox Jews.³⁴² Moreover, some Israelis have made increased calls for compulsory service for Arabs, another group customarily exempted from service.³⁴³ The call for greater participation from these groups, along with some perceived unfairness in the application of other exemptions, has galvanized Israelis to reexamine how the institution of conscription is used in their country.³⁴⁴ Nevertheless, the Israeli system provides an enduring example of a country that faces a perpetual threat and has relied upon universal service to meet it.

If Congress were to institute a system of universal service, over time, more members of Congress would have served in the military. More veterans in Congress may bring about greater awareness of military issues and the implications of going to

Drafters; Congress's Dodgy Drafters Try To Undermine the Military, WALL ST. J., Jan. 11, 2003, at A10 (arguing that the bill was an attempt "to play both the race and class-warfare cards").

337. See James Lacey, *The Argument: Should America Reinstate the Draft? No.*, SAT. EVENING POST, January/February 2013, at 13 ("Thanks to Rep. Charles B. Rangel, the recurring question of whether to reinstate the draft has been thrust to the front of the public-policy debate.").

338. Charles Babington, *Amid Uproar Over War, Rangel Renews Call for Draft*, WASH. POST, Nov. 20, 2006, at A4; Sarah Parnass, *Rep. Rangel: Bring Back the Draft and Open It Up to Women*, ABCNEWS (Feb. 15, 2013, 3:49 PM), <http://abcnews.go.com/blogs/politics/2013/02/rep-rangel-bring-back-the-draft-and-open-it-up-to-women/>.

339. Admittedly (and as an early advisor to this Article pointed out), in Israel, the understanding of the relationship between the government and its citizens is profoundly different from that in the United States. Furthermore (and as I briefly discuss), Israel itself is embroiled in a debate in how it wants to man its military in the future. Nevertheless, the lessons learned from the Israeli experience may be worth examining when considering universal service.

340. Defence Service Law, 5746–1986, § 15, SH No. 1170 (Isr.).

341. Guy I. Seidman & Eyal A. Nun, *Women, the Military and the Court: Israel at 2001*, 11 S. CAL. REV. L. & WOMEN'S STUD. 91, 96 (2001).

342. Ethan Bronner, *Israeli Court Invalidates a Military Exemption*, N.Y. TIMES, Feb. 23, 2012, at A4.

343. *Id.*

344. *Id.*; Jodi Rudoren, *The Fight Over Who Fights in Israel*, N.Y. TIMES, May 20, 2012, at SR4.

war.³⁴⁵ Additionally, universal service may make the general public more sensitive to sending its troops into harm's way.³⁴⁶ General Stanley McChrystal recently argued that mandatory national service would ensure that "everybody has skin in the game" and, therefore, galvanize the general public to be more invested in decisions to go to war.³⁴⁷ Historical examples show that when there is a volunteer military, the government has broader license to deploy forces across the globe.³⁴⁸ Conversely, when the United States has relied on conscription, the public has displayed greater skepticism about using force.³⁴⁹ Because the use of the draft impacts the public's attitude toward the use of force, leaders exercise greater restraint when they consider going to war.

B. Providing a Choice in How People Serve

If the United States adopts universal service, providing a choice in how people serve would provide some individual freedom. According to Emer de Vattel, an eighteenth-century Swiss philosopher, "Every citizen is bound to serve and defend the state as far as he [or she] is capable. Society cannot otherwise be maintained; and this concurrence for the common defence is one of the principal objects of every political association."³⁵⁰ But not every man and woman in the United States will respond to the call to arms. Many may oppose serving in the military for religious reasons, pacifism, fear of being killed, or a general aversion to authority. Indeed, "[n]ot all men [and women] are meant to be Navy SEALs, or even serve in the military, but all men [and women] can serve."³⁵¹ While Vattel reminds us that government could not exist without an adequate military, a modern model of compulsory service should allow all men and women to serve in a variety of ways. According to General Peter Pace, former Vice Chairman of the Joint Chiefs of Staff,

All of us should be talking about the value of service to country . . . Not just about military service to country, but about young folks finding a niche in this society where they can serve the country for some time [and], in my mind, pay back a little bit what they've gotten from this country.³⁵²

345. See Zillman I, *supra* note 309, at 87 (explaining that during the Cold War period many military veterans were the leaders of the American government and "provided a bridge between civilian and military leadership"); Clarence Page, Editorial, *Feeling a Draft Coming On*, CHI. TRIB., Jan. 1, 2003, at C23 (noting that a return to the draft may "make his fellow members of Congress think a little longer and harder before they send our nation's sons and our daughters into harm's way").

346. A 2011 study found that public support for the use of force falls by seventeen percent when conscription is employed in lieu of an all-volunteer force. Horowitz & Levendusky, *supra* note 298, at 529.

347. Rogin, *supra* note 28.

348. See Horowitz & Levendusky, *supra* note 298, at 524 (explaining that evidence from the Civil War and World War I suggests that when societies employ conscription the public "becomes more skeptical of the decision to use force").

349. *Id.*

350. EMER DE VATTEL, THE LAW OF NATIONS 473 (Béla Kapossy & Richard Whatmore eds., 2008) (1758); see also Selective Draft Law Cases, 245 U.S. 366, 368 (1918) (paraphrasing Vattel: "The highest duty of the citizen is to bear arms at the call of the nation. This duty is inherent in citizenship; without it and the correlative power of the State to compel its performance society could not be maintained.").

351. William J. Bennett, *A Navy SEAL's Wise Advice to Graduates*, CNN (May 25, 2012, 5:01 PM), <http://www.cnn.com/2012/05/23/opinion/bennett-navy-seal-speaker/>.

352. Jon R. Anderson, *Army Vice Chief of Staff Cody Worried About Future of All-Volunteer Military*,

Charles Moskos, a prominent military sociologist and draftee during Vietnam, proposed a system of compulsory national service that included options to serve outside of the military.³⁵³ Professor Moskos offered a three-tiered system that included options for participation in military service, homeland defense, or civilian organizations like AmeriCorps, Freedom Corps, and the Peace Corps.³⁵⁴ Under this system, the period of obligated service would be tied to the dangerousness or difficulty of the assignment, with more perilous or arduous service incurring greater rewards or benefits.³⁵⁵ Similarly, Thomas Ricks suggested a system of mandatory national service in which conscripts who did not wish to deploy would perform functions that are now contracted out to PMCs, including “paperwork, painting barracks, mowing lawns, [and] driving generals around.”³⁵⁶ Furthermore, Mr. Ricks offered a system of alternative service “for a slightly longer period and equally low pay—teaching in low-income areas, cleaning parks, rebuilding crumbling infrastructure, or aiding the elderly.”³⁵⁷ In 2009, Representative James McDermott (D-WA) introduced a bill that proposed establishing a commission to examine the possibility of implementing systems like the ones proposed by Professor Moskos and Mr. Ricks.³⁵⁸ But, like Representative Rangel’s proposal, the bill languished in Congress and eventually died.³⁵⁹

Furthermore, technology is changing the nature of warfare. Out of necessity, the type of service a conscript might perform today would be significantly different than the service of a draftee during Vietnam. Consider cyber warfare. Former Secretary of Defense Leon Panetta has warned of a looming “cyber-Pearl Harbor.”³⁶⁰ If U.S. computer systems become subject to a large-scale cyber attack, the military may need to rely on the expertise of computer technology professionals in the private sector. Some scholars have even proposed conscription as a possible mechanism to leverage this expertise.³⁶¹

Admittedly, conscripting a civilian workforce in peacetime is different from military conscription and may implicate different legal restrictions. A *Harvard Law Review* Note from almost a century ago argues that while civilian conscription would be met “with instinctive hostility,” there may be some constitutional authority for Congress to make such laws.³⁶² Although the Supreme Court has not addressed the

STARS & STRIPES (Mar. 19, 2005), <http://www.stripes.com/news/army-vice-chief-of-staff-cody-worried-about-future-of-all-volunteer-military-1.30715>.

353. Charles Moskos & Paul Glatris, *Now Do You Believe We Need A Draft?*, WASH. MONTHLY, Nov. 2001, at 9–11.

354. *Id.* at 11.

355. *Id.*

356. Ricks, *supra* note 28, at A21.

357. *Id.*

358. Congressional Commission on Civic Service Act, H.R. 1444, 111th Cong. (2009).

359. H.R. 1444 (111th): CONGRESSIONAL COMMISSION ON CIVIC SERVICE ACT, GOV.TRACK.US, <https://www.govtrack.us/congress/bills/111/hr1444> (last visited Aug. 15, 2014).

360. Elisabeth Bumiller & Thom Shanker, *Panetta Warns of Dire Threat of Cyberattack on U.S.*, N.Y. TIMES, Oct. 12, 2012, at A1.

361. Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT’L L. 1011, 1053–62 (2010).

362. Note, *Civil Conscription in the United States*, 30 HARV. L. REV. 265, 265–69 (1917).

issue of civilian conscription in some time, cases in which the Court has recognized “duties . . . which society may compel” beyond military service remain good law.³⁶³

C. *Making Military Service an Informed Choice*

To the greatest extent possible, laws should ensure that those who choose to serve in the military are making an informed choice. Although the all-volunteer military promised greater individual freedom and freedom of choice, it continues to attract many enlistees from the most socially and economically underprivileged segments of society.³⁶⁴ To take the point to the Marxist extreme, the choice between service in the military and starving is hardly a choice at all.³⁶⁵ Obviously, this overstates the situation with respect to today’s military. While the overwhelming majority of those who join the service today are not necessarily starving before they enlist, most Americans who do join the military are from the working class. The most widely cited reason that people join the military is to serve; a close second, however, is for the chance to receive an education not easily obtained otherwise.³⁶⁶ A modern system of compulsory service should strive to ensure that those who choose military service do so in an informed manner.

Even under the most informed circumstances, there is no foreseeing what military service actually will entail. There are no clear answers for how to make military service a completely informed choice. Nevertheless, perhaps an examination of military recruitment tactics could provide insight into the level of choice provided to those who wish to join.³⁶⁷ As one journalist has noted, the military today is as much an “all-recruit” force as it is an all-volunteer force.³⁶⁸ Military advertising and recruitment is at least a \$666.7 million enterprise yearly.³⁶⁹ This budget is used on high-impact

363. *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944); *see also* *Butler v. Perry*, 240 U.S. 328, 333 (1916) (upholding a Florida law that permitted local government to conscript citizens to work on roads and bridges without pay for six days each year); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942) (“The Constitution art. 1, § 8 grants to Congress power ‘to raise and support Armies,’ ‘to provide and maintain a Navy,’ and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less.” (internal citation omitted)). Further examination of these authorities would be necessary but is beyond the scope of this Article.

364. *See supra* Part III.B for a discussion of the socioeconomic effects of a volunteer military and an analysis of the degeneration of candidate qualifications under the volunteer military.

365. *See* Schubert, *supra* note 294, at 266 (arguing that “wage slavery” exists in the drafted military). David Friedman, a libertarian, envisions a scenario where a draft could be avoided by recruiting an army “by paying very high salaries and financing them with taxes so high that anyone who does not volunteer starves to death.” DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM* 174 (1989). Friedman notes that the coercive tax is no different than a coercive draft. *Id.*

366. *See* Jim Garamone, *U.S. Military Recruiting Demographics*, AMERICAN FORCES PRESS SERVICE (Nov. 27, 2005), <http://usmilitary.about.com/od/joiningthemilitary/a/demographics.htm> (“Military service offers money for college—money a large segment of the population doesn’t have. For those people, the military is an attractive option.”).

367. *See* DAVID R. SEGAL, *RECRUITING FOR UNCLE SAM: CITIZENSHIP AND MILITARY MANPOWER POLICY* (rev. ed. 2002), for a comprehensive history of U.S. military recruiting.

368. Thom Shanker, *Who Will Fight This War?*, N.Y. TIMES, Sept. 30, 2001, at WK2.

369. OFFICE OF THE UNDER SEC’Y OF DEF. (COMPTROLLER), *OPERATION AND MAINTENANCE OVERVIEW: FISCAL YEAR 2012 BUDGET ESTIMATES* 166 (2011).

advertising campaigns and video games that overly promise educational opportunities and do not accurately portray the lives of service members or mention the dangers of war.³⁷⁰ Under the No Child Left Behind Act, publicly funded schools are required to provide military recruiters with access to students and student information.³⁷¹ The military actively targets youth in its advertising model, often directing efforts at students who are still in middle school.³⁷² Recruiters focus on schools populated with working-class students because they are more likely to enlist than their more affluent counterparts.³⁷³

Of course, with the implementation of universal service, these problems might solve themselves. The military likely will not need to advertise so aggressively if everybody has to at least consider military service. Many scholars believe that a greater cross section of society would serve in the military if universal service were compelled, even if civilian service alternatives existed.³⁷⁴ In the absence of the implementation of universal service, efforts to provide more accurate, regulated, and widespread information about joining the military would encourage a more informed choice for those who wish to serve.

D. *Incentivizing Service*

In order to encourage widespread participation, laws could incentivize military or civilian service. Registration with the Selective Service System is already required to receive certain student financial aid, some job training benefits, federal employment eligibility, and citizenship.³⁷⁵ Laws could link these incentives to actual performance of service rather than just mere registration. But incentives alone may not sufficiently overcome underrepresentation. Perhaps withholding some societal privileges from those choosing not to serve or from those who are absolutely opposed to service in any form should be considered. In this Part, a spectrum of incentives and privileges is considered.

1. Privileges: Offering Citizenship to Noncitizen Immigrants

Citizenship is one possible use of privileges to incentivize service. In recent years, in addition to dependence on measures like Stop-Loss and PMCs, the U.S. military has relied heavily upon noncitizen immigrants to fill staffing needs. The Immigration and

370. CONSTITUTIONAL LITIGATION CLINIC, RUTGERS SCHOOL OF LAW NEWARK, TARGETING YOUTH: WHAT EVERYONE SHOULD KNOW ABOUT MILITARY RECRUITING IN PUBLIC HIGH SCHOOLS, at Executive Summary (2008), available at <http://law.newark.rutgers.edu/files/u/MilitaryRecruitingReportConLitFinal.pdf>.

371. 20 U.S.C. § 7908(a)(1)–(3) (2012).

372. See Shannon K. McManimon et al., *A Pedagogy of Ceaseless War: JROTC and the Military Occupation of US Schools*, in EDUCATING FOR PEACE IN A TIME OF “PERMANENT WAR”: ARE SCHOOLS PART OF THE SOLUTION OR THE PROBLEM? 101, 105 (Paul R. Carr & Brad J. Porfilio eds., 2012) (noting the presence of military-run programs in elementary and middle schools designed to encourage enlistment).

373. Charlie Savage, *Military Recruiters Target Schools Strategically*, BOSTON GLOBE, Nov. 29, 2004, at A1.

374. Charles Moskos, *Patriotism-Lite Meets the Citizen-Soldier*, in UNITED WE SERVE: NATIONAL SERVICE AND THE FUTURE OF CITIZENSHIP 33, 35–39 (E.J. Dionne Jr. et al., eds. 2003).

375. SELECTIVE SERVICE SYSTEM: A PRIMER 6–7, available at <http://www.sss.gov/PDFs/Educational%20Materials/Primer.pdf>.

Nationality Act provides relaxed naturalization requirements for aliens who served in the military during designated times of hostility.³⁷⁶ In addition, the U.S. Citizenship and Immigration Services has streamlined the application and naturalization process for military personnel serving on active duty or recently discharged. Since the attacks of September 11, 2001, nearly 90,000 people have earned citizenship by serving in the armed forces.³⁷⁷ President Obama's DREAM (Development, Relief and Education for Alien Minors) Act would allow a path to citizenship after serving in the military for two years and receiving an honorable discharge.³⁷⁸ Recently, some have called for relaxing military enlistment rules to allow young, undocumented immigrants to enter military service in exchange for citizenship.³⁷⁹ Such persons would be allowed to enlist only after being approved for Deferred Action for Childhood Arrivals, a government program that allows immigrants who arrived in the United States illegally as a child to live and work here lawfully.³⁸⁰ Fast-tracking opportunities to obtain citizenship for noncitizen immigrants may be one way to incentivize service through privileges.

2. Benefits: A Reformed G.I. Bill

The G.I. Bill provides one way of using benefits to incentivize service; it currently applies to the military but could be applied more broadly to those who serve in a civilian setting.³⁸¹ But in order to provide a true incentive to serve, the G.I. Bill may require some overhaul. After the fall of Japan and Germany at the end of World War II, millions of armed services members demobilized. The reintegration of 16 million veterans was considered a "major domestic problem."³⁸² Congress enacted legislation to assist veterans, including laws that required veterans to be granted employment preference with companies that received federal funds.³⁸³ But no other Act had more impact on the reintegration and betterment of veterans' lives after the war than the G.I.

376. 8 U.S.C. § 1440 (2012); *see also* Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2002) (designating the period after September 11, 2001, as a period of armed conflict with a hostile foreign force for the purpose of granting exception from the usual requirements for naturalization under 8 U.S.C. § 1440).

377. *Naturalization Through Military Service: Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last updated June 25, 2013), <http://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet>.

378. President Obama's DREAM Act proposed a path to citizenship for illegal immigrants who had been brought to the United States as children either through obtaining a college degree or service in the military. S. 3992, 111th Cong. (2010). During the 2012 election season, many proposed a military-only version of the DREAM Act. Erika Bolstad, *Rep. Rivera Introduces Modified DREAM Act for Military*, MCCLATCHYDC (Jan. 26, 2012), <http://www.mcclatchydc.com/2012/01/26/137052/rep-rivera-introduces-modified.html>. Both of these proposals would break the promises of the all-volunteer military. Presenting a choice between education and military service in exchange for the same benefits of citizens favors those with access to higher education. Even more concerning, only allowing a path to citizenship through military service seems to encourage a military of immigrants.

379. Ted Hesson, *DREAMers Ask To Serve in the Military*, ABC (Oct. 13, 2013, 5:50 PM), http://abcnews.go.com/ABC_Univision/News/dreamers-serve-military/story?id=18313706.

380. *Id.*

381. Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284.

382. Susan M. Hartmann, *Prescriptions for Penelope: Literature on Women's Obligations to Returning World War II Veterans*, 5 WOMEN'S STUD. 223, 224 (1978).

383. Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387.

Bill.³⁸⁴ In 1995, President Bill Clinton praised the G.I. Bill, noting it “gave generations of veterans a chance to get an education, to build strong families and good lives, and to build the nation’s strongest economy ever, to change the face of America.”³⁸⁵ Indeed, the original version of the G.I. Bill conferred a breathtaking array of benefits to veterans, including low-cost mortgages, low-interest business loans, tuition and living expenses to attend *any* college in the country, and up to one year of unemployment compensation.³⁸⁶ Over time, however, these benefits became watered down and underutilized.

By 1984, the original G.I. Bill had evolved into the Montgomery G.I. Bill.³⁸⁷ Under this system, service members had to “opt in” during their initial enlistment and pay the Department of Veterans Affairs a nonrefundable \$1,200 in monthly increments during their first year of service. This system was a stark contrast to the G.I. Bill enacted during World War II, which covered all costs of education from college through graduate school with no out-of-pocket expense to the veteran. By 2008, the G.I. Bill covered only half the average cost for tuition, room, and board.³⁸⁸ Coupled with skyrocketing costs, higher education once again became a stretch for veterans who joined the military precisely for the opportunity to go to college.

In response, Congress passed, and President George W. Bush signed, the Post-9/11 Veterans Educational Assistance Act, which was designed to provide today’s veterans with the same educational benefits that helped World War II veterans.³⁸⁹ In 2011, President Barack Obama signed the Post-9/11 Veterans Educational Assistance Improvements Act of 2010 into law.³⁹⁰ The Post-9/11 G.I. Bill (as it is commonly referred) provides significantly improved benefits from the Montgomery G.I. Bill, including four years of full tuition at a state school, a generous living stipend, the ability to transfer benefits to a spouse or child, and the elimination of buy-in fees.³⁹¹ Nevertheless, the Post-9/11 G.I. Bill still falls well short of the World War II-era bill. Many have criticized the Post-9/11 G.I. Bill for not covering the full costs of private education and only allowing full tuition payments at public schools in states where the veteran holds residency.³⁹² Others have critiqued the Department of Veterans Affairs

384. 58 Stat. 284; *see generally* Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967 (2008) (exploring the relationship between veterans’ benefits, race, and gender and summarizing the credit the G.I. Bill has received for promoting social mobility, democratizing elite universities and colleges, stimulating the economy, and galvanizing suburbanization).

385. GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS* 2 (2009).

386. 58 Stat. 284.

387. Veterans’ Educational Assistance Act of 1984, Pub. L. 98-525, § 701, 98 Stat. 2492.

388. *See Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. 1 (2008) (statement of Eric A. Hilleman, Deputy Dir., Nat’l Legislative Serv., Veterans of Foreign Wars of the United States).

389. Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 122 Stat. 2357. Notably, President Bush initially opposed the bill.

390. Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 111-377, 124 Stat. 4106.

391. 124 Stat. at 4110–12.

392. *See, e.g.*, Bob Brewin, *Lawmakers Put Coal in Vets’ Stockings*, NEXTGOV (Dec. 16, 2010), <http://www.nextgov.com/defense/whats-brewin/2010/12/lawmakers-put-coal-in-vets-stockings/54121/>

for significant delays in providing funding.³⁹³ Additionally, without much consequence, many veterans' educational benefits have flowed to for-profit schools that have preyed on veterans by using aggressive and deceptive marketing tactics.³⁹⁴ In the absence of universal service, the G.I. Bill could be reformed either to (1) attract volunteers from a wider cross section of society or (2) provide a level of benefits that enables true social mobility for veterans.

3. Withholding the Privileges of Society for Failing To Serve

Full guarantees of college education, a fast-track to citizenship, or other incentives may not address the problem of underrepresentation in the military. While incentivizing service with such benefits may bring about a more fair exchange between a volunteer service member and the government, the incentives so far discussed are most attractive to immigrants and those who cannot otherwise afford a college education. Accordingly, in the absence of universal service, perhaps a system of service should balance incentives to serve with penalties for choosing not to serve.

Despite potential constitutional obstacles, some scholars have recommended that military or civilian service could be a prequalifying condition to holding certain federal offices. Historian William McNeill suggested that military service should be a mandatory qualification for civilian leadership positions.³⁹⁵ Writing during the Vietnam era, McNeill noted that college cannot be an acceptable substitute for military service in a democracy:

If the United States decides nevertheless to accept the risks of relying upon long-term-service professional troops of the sort suited for conducting distant, low-grade wars and for garrison duty overseas, then devices must be found for linking military leadership more closely with the leadership of civil society. The existing policy of exempting the future leaders of civilian life from military service positively invites divergence of viewpoint and seems almost suicidal in a democracy. In case a selective draft continues to be necessary—assuming that we do not wish to invite a coup d'état—then it is precisely those who go to college and are headed for the privileged places in our society who should be drafted. Unwillingness to qualify for social leadership at such a price amounts to abdication.³⁹⁶

Military veteran and renowned science fiction author Robert Heinlein takes this idea a step further in his book *Starship Troopers*.³⁹⁷ Although *Starship Troopers* is

(quoting Rep. Steve Buyer's criticisms of the Post-9/11 G.I. Bill); Daniel Caldwell, *Is the "New" Post-9/11 GI Bill Really A "Win" For Vets*, VANTAGE POINT (Dec. 30, 2010), <http://www.blogs.va.gov/VAntage/1027/is-the-new-post-911-gi-bill-really-a-win-for-vets/> (highlighting the problems with the bill, such as the annual tuition cap and how the annual stipend is paid). The G.I. Bill Tuition Fairness Act of 2013 would require state-supported schools to charge veterans in-state rates regardless of residency. H.R. 357, 113th Cong. (2013).

393. James Dao, *Late Benefit Checks Causing Problems for Veterans Attending College on New G.I. Bill*, N.Y. TIMES, Sept. 25, 2009, at A16.

394. Hollister K. Petraeus, Editorial, *For-Profit Colleges, Vulnerable G.I.'s*, N.Y. TIMES, Sept. 22, 2011, at A31.

395. William H. McNeill, *The Draft in Light of History*, in *THE MILITARY DRAFT*, *supra* note 37, at 59, 64–65.

396. *Id.*

397. ROBERT A. HEINLEIN, *STARSHIP TROOPERS* (Ace Trade Paperback 2006) (1959).

primarily known as a work of science fiction, it “constructs a model of citizenship explicitly and completely based on a reciprocal nation/citizen relationship.”³⁹⁸ Heinlein proposes a system of government in which citizenship is obtained solely through federal service of some stripe.³⁹⁹ Although “tax payers have *some* rights,” voting rights, for example, can only be earned by serving at least two years.⁴⁰⁰

The proposals offered here would undoubtedly face political and legal challenges. Although McNeill’s and Heinlein’s schemes go too far in limiting access to political office and in withholding suffrage rights for failing to serve, there is something democratic about connecting the privileges of citizenship with the burdens of service. As Professor David M. Kennedy has noted, “Since the time of the ancient Greeks through the American Revolutionary War and well into the 20th century, the obligation to bear arms and the privileges of citizenship have been intimately linked.”⁴⁰¹ This connection between military service and political participation also has constitutional roots. Professor Akhil Reed Amar maintains that “the classical republican vision underlying the Second Amendment . . . linked military and political participation.”⁴⁰² Although the idea may seem foreign or extreme, linking some of the privileges of citizenship with the burdens of service may be a return to the United States’ founding values.

E. *Serving the Needs of Returning Service Members*

In demonstrating the broken promises of an all-volunteer military, this Article has only focused on some of the unintended and perhaps unforeseeable consequences of war. This says nothing about the more predictable and known costs of war. Most people are at least roughly aware of the 4,491 casualties suffered by U.S. forces in Iraq and 2,340 casualties in Afghanistan.⁴⁰³ But another 52,022 service members were wounded during these conflicts.⁴⁰⁴ Yet another estimated 320,000 veterans experienced a traumatic brain injury while deployed, and recent estimates maintain that 400,000 service members suffer from “the invisible wounds of war including combat-related stress, major depression, and [PTSD].”⁴⁰⁵

Additionally, the wars in Iraq and Afghanistan have brought about an increase in female veterans.⁴⁰⁶ The Department of Veterans Affairs estimates there are currently

398. Kevin Pimentel, Note, *To Yick Wo, Thanks For Nothing!: Citizenship for Filipino Veterans*, 4 MICH. J. RACE & L. 459, 461 (1999).

399. HEINLEIN, *supra* note 397, 193–94.

400. *Id.* at 24, 171.

401. David M. Kennedy, Op-Ed., *The Best Army We Can Buy*, N.Y. TIMES, July 25, 2005, at A19.

402. Akhil Reed Amar, Heller, HLR, and Holistic Legal Reasoning, 122 HARV. L. REV. 145, 188 (2008).

403. UNITED STATES DEPARTMENT OF DEFENSE, CASUALTY STATUS, <http://www.defense.gov/news/casualty.pdf> (last visited Aug. 15, 2014).

404. *Who We Serve*, WOUNDED WARRIOR PROJECT, <http://www.woundedwarriorproject.org/mission/who-we-serve.aspx> (last visited Aug. 15, 2013).

405. *Id.*

406. See Lindsay Wise, *Houston VA Sees Spike in Female Veterans Seeking Care*, HOUSTON CHRONICLE (Sept. 29, 2010), <http://www.chron.com/news/houston-texas/article/Houston-VA-sees-spike-in-female-veterans-seeking-1711861.php> (noting that women are one of the “fastest-growing segments of the veteran population”).

1.8 million female veterans.⁴⁰⁷ An estimated 50,000 more women will leave the military in the next five years.⁴⁰⁸ While female veterans face the same challenges as their male counterparts, they experience comparatively greater rates of PTSD, divorce, and homelessness.⁴⁰⁹ As an added complication, the Pentagon estimates that one in five women is sexually assaulted during her military career.⁴¹⁰ Veterans' facilities appear to be ill equipped to face the challenges of the growing population of women veterans, with many lacking adequate female doctors or even women's restrooms.⁴¹¹

There is an undeniable moral and ethical obligation for the American people to care for service members who have suffered by going into harm's way at the behest of the country. Throughout history, the U.S. government has reinforced its commitment to take care of its military veterans. During a recent Veterans' Day speech, President Obama proclaimed, "Today, a proud nation expresses our gratitude. But we do so mindful that no ceremony or parade, no hug or handshake is enough to truly honor that service. . . . [W]e must commit—this day and every day—to serving you as well as you've served us."⁴¹²

Indeed, the President and Congress have enacted several initiatives and laws in recent years designed to cure some of the ills described in this Article. The Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 is a comprehensive bipartisan bill that endeavors to provide improved healthcare, housing, education, and job opportunities to veterans.⁴¹³ In August 2012, President Obama signed an Executive Order designed to improve suicide prevention programs and provide greater access to mental health services for service members and veterans.⁴¹⁴ The Returning Heroes Tax Credit and the Wounded Warriors Tax Credit provide tax relief for businesses that hire unemployed veterans and veterans with service-connected disabilities.⁴¹⁵ The White House has announced numerous other initiatives designed to help veterans.⁴¹⁶ The First Lady of the United States, Michelle Obama, has been rightfully praised for lending her voice to initiatives supporting military families and veterans.⁴¹⁷

407. William Porter, *Denver's Brandon Center Serves Women Who Served*, DENVER POST (July 13, 2010, 1:00 AM), http://www.denverpost.com/headlines/ci_15500403.

408. Marisa Peñaloza & Quil Lawrence, *Female Soldiers Face Tough Switch from Front Lines to Homefront*, NPR (March 14, 2013, 11:24 AM), <http://www.npr.org/2013/03/17/174301855/female-soldiers-face-tough-switch-from-front-lines-to-homefront>.

409. *Id.*

410. *Id.*

411. *Id.*

412. Barack H. Obama, U.S. President, Remarks by the President on Veterans Day at Arlington National Cemetery (Nov. 11, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/11/11/remarks-president-veterans-day>.

413. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, 126 Stat. 1165.

414. Exec. Order No. 13,625, 77 Fed. Reg. 54,783 (Aug. 31, 2012).

415. Veterans Opportunity To Work (VOW) To Hire Heroes Act of 2011, Pub. L. No. 112-56, 125 Stat. 711 (codified as amended in scattered sections of 38 U.S.C.).

416. *Veterans and Military Families*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/veterans> (last visited Aug. 15, 2014).

417. Mark Benjamin, *Michelle Obama's Veterans' Initiative: Meat or Just Sizzle?*, TIME (Sept. 19,

Nevertheless, some have critiqued these efforts as “fluffy” and “less than mediocre.”⁴¹⁸ Some have called for the resignation of Secretary of Veterans Affairs, Eric Shinseki, for the many problems plaguing his organization in light of the exponentially increased number of veterans needing care.⁴¹⁹ However well intentioned, laws and initiatives are meaningless unless they are effective. Despite the efforts of the federal government, veterans remain plagued by joblessness, homelessness, and suicide at comparatively greater rates than the civilian population.

Any moral society would demand that the basic needs of veterans be met in exchange for the sacrifices that their country has asked of them. Supporting our troops and our veterans must go beyond bumper stickers and political bluster. The true measure of our society will be defined by how we treat our returning veterans. There is also a pragmatic concern at stake. In the words of George Washington, “the willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their country.”⁴²⁰ If Washington’s words are correct and the issues that plague veterans remain, even fewer will want to fight our future battles.

CONCLUSION

This Article proposes first steps toward developing a more thoughtful approach to staffing our military. It offers a menu of options that seek to balance the sometimes competing imperatives of fairness and individual liberty. These options include implementing universal service, offering a choice in how people serve (including nonmilitary options), implementing measures designed to better ensure that those who choose to serve are making an informed choice, providing appropriate incentives for service, and ensuring that those who are harmed in any way in service to their country receive adequate care for the rest of their lives. Ultimately, the debate over the need for a new paradigm can be settled only through fuller assessment of frameworks that safeguard principles of freedom, notions of fairness, and other values, while maintaining and advancing military readiness. These factors need to be considered collectively and not in isolation.

The elements this Article proposes are ambitious and optimistic. This Article does not purport to consider all factors. This Article does not show direct causation between the harms it identifies and its offered solutions; it only speculates that the elements proposed will bring about relief. This Article does not propose how a system of universal service would be funded⁴²¹ or how universal service would impact military

2011), <http://nation.time.com/2011/09/19/michelle-obamas-veterans-initiative-meat-or-just-sizzle/#ixzz2OpQklops>.

418. *Id.*; Joe Klein, *Ten Years After: A National Disgrace*, TIME (Mar. 25, 2013), <http://www.time.com/time/magazine/article/0,9171,2138562,00.html>.

419. Joe Klein, *VA Claims Backlog: Shinseki Should Resign*, TIME (Mar. 14, 2013), <http://nation.time.com/2013/03/14/va-claims-backlog-shinseki-should-resign/>.

420. JONATHAN MILLER, *THE COMPASSIONATE COMMUNITY: TEN VALUES TO UNITE AMERICA* 107 (2006).

421. According to one estimate, a public service program may cost \$25 billion annually. ROBERT E. LITAN, BROOKINGS INST., *DIVERSITY IN ISRAEL: LESSONS FOR THE UNITED STATES* (2002), *available at*

readiness. Finally, this Article does not fully consider the constitutionality or legality of creating a new system of service.

In addition to the foregoing concerns, and most prominently, a lack of political will and institutional desire would provide significant obstacles to implementing any change to the military staffing system. To many, universal service seems politically and culturally impossible. Perhaps still suffering from a Vietnam hangover, congressmen and presidents are convinced that their constituents would strongly oppose any kind of mandatory service. Traditionally, military leadership has provided enthusiastic support to the continuation of the all-volunteer military, and the military has protested against any notion of a return to the draft.⁴²² The changing nature of warfare brought about by new strategies and the emergence of new technologically advanced weapons, such as cyber-attacks or drones, only bolsters arguments that the military would not benefit from universal service or a draft.

More subtle approaches are available. As one modest example, many have worked to reinvigorate the Reserve Officers Training Corps (ROTC) on the campuses of elite colleges.⁴²³ In 2011, Harvard University reopened its doors to ROTC after an almost forty-year absence.⁴²⁴ Several other elite colleges soon followed suit.⁴²⁵ According to Professor Alan Silver, who led efforts in restoring ROTC at Columbia University, “The problem of equal representation in the military might be partly addressed if the children of social elites served conspicuously in the officer corps through the service academies and ROTC programs.”⁴²⁶

Despite the many merits of these proposals, a more comprehensive solution is warranted. Regardless of whatever real or imagined obstacles still exist, citizens and policymakers must seriously consider an overhaul to the way the U.S. military is staffed. Now is a transformative time in the United States. Past bars to military service no longer exist. In 2010, President Obama repealed “Don’t Ask, Don’t Tell,” paving the way for all to serve regardless of sexual orientation.⁴²⁷ As expressed by military veteran Professor Diane Mazur: “No one can seriously contend that the asserted factual foundation for [*Rostker*]⁴²⁸—that women would be of no utility to the military in the event

<http://www.brookings.edu/research/articles/2002/12/winter-middleeast-litan>.

422. See PEW RESEARCH CTR., *supra* note 29, at 3 (asserting that more than eighty percent of post-9/11 veterans believe the United States should not return to the draft at this time). Recently, this trend has shown signs of reversal, with several retired military leaders suggesting the virtues of the draft. See Anderson, *supra* note 352 (quoting retired Maj. Gen. Edward Atkeson as acknowledging that when the all-volunteer force finally breaks, the United States will “see the draft come back”); Rogin, *supra* note 28 (quoting Gen. Stanley McChrystal’s statement that if the United States goes to war again, “we ought to have a draft”).

423. DONALD ALEXANDER DOWNS & ILIA MURTAZASHVILI, *ARMS AND THE UNIVERSITY* 5 (2012).

424. Tara W. Merrigan & Zoe A. Y. Weinberg, *Harvard To Officially Recognize Naval ROTC*, HARV. CRIMSON (Mar. 3, 2011), <http://www.thecrimson.com/article/2011/3/3/university-program-rotc-returns-harvard/>; Stacy Teicher Khadaroo, *ROTC Returns to Harvard: Does Office Training Program Need Ivy League?*, CHRISTIAN SCI. MONITOR (Mar. 30, 2011), <http://www.csmonitor.com/USA/Education/2011/0330/ROTC-returns-to-Harvard-Does-officer-training-program-need-Ivy-League>.

425. See Jennifer Levitz, *ROTC Returns to Harvard*, WALL ST. J., Sept. 11, 2012, at A3 (noting the return of ROTC at Harvard, Yale, and Columbia).

426. Email from Allan Silver, Professor, Dep’t of Sociology, Columbia University, to Matthew Ivey (Oct. 5, 2012) (on file with author).

427. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

of a draft—still exists, if it ever did.”⁴²⁸ Strengthening Professor Mazur’s contention, in early 2013, former Secretary of Defense Leon Panetta announced that women would be permitted to serve in combat roles that were once only open to men and even speculated that women would now have to register in the Selective Service System.⁴²⁹ As previously discussed, the Obama Administration’s proposed DREAM Act would provide an avenue for young undocumented immigrants, who previously could not join the armed forces, to earn citizenship through military service.⁴³⁰ Despite the Pentagon’s historical resistance to abandon the all-volunteer military, Secretary of Defense Chuck Hagel once suggested that the United States should consider reinstating the draft in order to ensure that all Americans “bear some responsibility” and “pay some price” in defending the nation.⁴³¹ The April 15, 2013, Boston Marathon bombing has reawakened America’s awareness of the threats that we face as a country and, perhaps, our notions of service.⁴³² In the spirit of this time of change and challenge, why not consider a more sweeping overhaul to the way we staff our armed forces and consider service?

This is the time we not only renew our long-dormant conversation on how to staff our military but also on how we consider service more broadly. Inspired by General McChrystal’s call for universal service,⁴³³ the Aspen Institute’s Franklin Project endeavors to develop the best proposal for a volunteer civilian counterpart to military service by harnessing the ideas of leaders in civil service, military, business, and philanthropic organizations.⁴³⁴ This is a promising start to the conversation, but U.S. policymakers must get involved in a meaningful way if any real change is to occur. The 2013 National Defense Authorization Act created the Military Compensation and Retirement Modernization Commission, which is composed of nine congressmen and chartered “to make recommendations to modernize such [military compensation and retirement] systems in order to ensure the long-term viability of the All-Volunteer Force.”⁴³⁵ But oftentimes, commissions are created to avoid controversy or to reach foregone conclusions designed to convince a divided public on a particular issue.⁴³⁶

428. See Mazur, *supra* note 311, at 631 n.245.

429. Press Release, U.S. Dep’t of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Services To Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=15784>; Bryant Jordan, *Panetta: Women May Be Included in Future Draft*, MILITARY.COM (Jan. 25, 2013), <http://www.military.com/daily-news/2013/01/25/panetta-women-may-be-included-in-future-draft.html>.

430. See *supra* note 378 and accompanying text for a discussion of the Obama Administration’s proposed DREAM Act.

431. Secretary of Defense Charles Hagel made these statements as a senator during the United States’ involvement in Iraq and Afghanistan in 2004. Helen Dewar, *Senator: Reconsider the Draft*, CHI. TRIB., Apr. 22, 2004, at 10.

432. Jeré Longman, *Where Finish Line Is a Crime Scene, No Talk of Defeat*, N.Y. TIMES, Apr. 19, 2013, at A21.

433. Rogin, *supra* note 28.

434. *Franklin Project: About Us*, THE ASPEN INSTITUTE, <http://www.aspeninstitute.org/policy-work/franklin-project/about-us> (last visited Aug. 15, 2014).

435. Walter Pincus, Editorial, *Paying for the All-Voluntary Military*, PITTSBURGH POST-GAZETTE, Jan. 17, 2013, at A8.

436. Henderson, *supra* note 153, at 366.

More thoughtful consideration is warranted than this in light of the impact of thirteen years of war on the military. Perhaps the resources and political power of the government commission could be melded with the novel ideas of the Franklin Project, giving rise to a venture capable of both innovation and action. Such an endeavor would be reminiscent of the Gates Commission from forty years ago, when the American people last decided our military staffing system needed reform.

If we wait until the next terrorist attack prompting military response or the next major U.S. military intervention abroad, it will be too late to then decide that military staffing policies need to change. The same small segment of the population will be destined—or perhaps doomed—to continue to carry the burdens of freedom while the rest of us enjoy freedom's benefits. The underlying principles of our government demand better, and our service members deserve better.