

USAWC STRATEGY RESEARCH PROJECT

**POLITICIANS IN THE RANKS:  
A REVIEW OF THE LAW AND POLICY GOVERNING  
CIVIL OFFICEHOLDERS IN MILITARY SERVICE**

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## ABSTRACT

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An important attribute of military professionalism is adherence to the principle of nonpartisanship. Partisanship can undermine military professionalism to the detriment of civil-military relations. The goal of a nonpartisan U.S. military is supported by Federal law and Department of Defense policy restricting the political activities of members of the Armed Forces. Some of these restrictions are directed at members who hold a civil office or desire to seek such an office.

This strategy research paper reviews the law and policy governing civil officeholders in military service, assesses how well it protects the military from involvement in partisan politics or the perception thereof, and recommends needed changes.



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## **POLITICIANS IN THE RANKS: A REVIEW OF THE LAW AND POLICY GOVERNING CIVIL OFFICEHOLDERS IN MILITARY SERVICE**

An Army National Guard major takes leave from Guantanamo Bay, Cuba, and casts the deciding vote in the Missouri Senate's override of the Governor's veto of a bill allowing the carrying of concealed weapons.<sup>1</sup> An Army Reserve captain nearing deployment to Iraq receives a waiver of Department of Defense (DOD) policy allowing him to remain a candidate for a Pennsylvania Senate seat after both U.S. Senators from that state and the Chairman of the Senate Committee on Armed Services contact the Pentagon.<sup>2</sup> Five days before a contested primary election, a U.S. Congressman and Army Reservist is promoted to colonel by President Bush in the Oval Office,<sup>3</sup> a positive note during a campaign in which an opponent accused him of lying about being mobilized for service in Iraq.<sup>4</sup>

Each of these recent examples featuring a politician in uniform prompted public allegations of military involvement in partisan politics. Whether actual or perceived, partisanship has a corrosive effect on military professionalism to the detriment of civil-military relations. It is important that U.S. law and DOD policy support the military's tradition of nonpartisanship; however, the ongoing partial mobilization<sup>5</sup> has shown that current law and policy governing civil officeholders in military service risks entangling the military in partisan politics, or the perception thereof.

After looking at how the principle of nonpartisanship supports military professionalism and healthy civil-military relations, this paper reviews U.S. law and DOD policy governing civil officeholders in military service and recommends changes needed to better protect the military from actual or perceived partisanship.

### **THE IMPORTANCE OF A NONPARTISAN MILITARY**

Actual or perceived partisanship is detrimental to the military profession because it can undermine its legitimacy.<sup>6</sup> Legitimacy in this context is the trust a profession's clients have that members of the profession possess expert knowledge and will apply it effectively for the clients' benefit. A profession's legitimacy erodes when the clients become skeptical of the profession's expertise or believe that the profession pursues its own interests rather than those of the clients.<sup>7</sup> Loss of trust in a profession for either reason may result in more societal control over the profession and ultimately the loss of professional status.<sup>8</sup>

In a democracy, the military's clients are the nation's citizens. With a professional military, the citizens have a high degree of trust that the military will use its expertise to protect the state from threats and preserve its democratic principles and institutions, including subordination of



the military to civilian authority. When this situation prevails, the military has the legitimacy needed to fulfill its vital obligations to the nation without a level of control that could limit its effectiveness.<sup>9</sup> A military loses legitimacy if it is perceived to act in its own institutional interests or the individual interests of its members, including partisan political interests.<sup>10</sup> The ultimate loss of legitimacy would occur with a military coup, but much lesser self-serving actions, even those not directly challenging civilian control, can reduce the trust between a society and its military. The result is less deference by civilian authorities to assertions of military expertise and less military autonomy over its professional jurisdictions.<sup>11</sup>

Since the early 1990s, much has been written on the perceived erosion of the U.S. military's nonpartisan tradition<sup>12</sup> and its negative effect on military professionalism and civil-military relations. Commonly offered evidence of this erosion includes the willingness of most officers to identify themselves as Republicans,<sup>13</sup> the endorsement of political candidates by retired officers,<sup>14</sup> and Colin Powell's public stands against homosexuals in the military and U.S. intervention in Bosnia and Herzegovina while he was Chairman of the Joint Chiefs of Staff.<sup>15</sup> While generally seen as contrary to the tradition of political neutrality and detrimental to professionalism, these examples of partisanship are in areas where there is little delineation of what conduct is permissible as an exercise of a right of citizenship or as an appropriate way of giving military advice and what conduct should be prohibited in the name of nonpartisanship, military professionalism, and good civil-military relations. This paper is concerned with partisanship that occurs within an area where such delineation is longstanding: the intersection of civil office and military service. Because most civil offices are inherently political, there is law and policy governing civil officeholders in military service that ostensibly protects the military from involvement in partisan politics and society from its potential harm.

## **REGULATION OF CIVIL OFFICEHOLDERS IN MILITARY SERVICE**

### **HISTORY**

The history of Federal law on civil officeholders in military service, which began during the early years of military professionalism after the Civil War,<sup>16</sup> is best summarized as a long period of stability followed by an expansion of coverage from 1968 to 1983 and a gradual rollback of coverage beginning in 1990. Until 1956, when the law was expanded to include Air Force officers, only regular Army officers were prohibited from holding and exercising the functions of civil office.<sup>17</sup> Congress did not apply this prohibition to other regular officers until 1968<sup>18</sup> or to reserve officers on extended active duty until 1983.<sup>19</sup> The 1990 rollback was very modest,<sup>20</sup> but in 1999 Congress raised the threshold for coverage of reserve officers on active duty from over

180 days to over 270 days.<sup>21</sup> This trend continued in 2003 when Congress eliminated the prohibition against holding state and local civil office for retired regular officers and reserve officers on active duty for periods over 270 days when holding an office does not violate state law or interfere with performance of military duties.<sup>22</sup>

DOD has only reluctantly regulated its members' political activities, preferring that Congress prescribe rules in this area. Although drafting began in 1956,<sup>23</sup> DOD had no policy on the political activities of its members, including civil officeholders, until 1969.<sup>24</sup> That was seven years after the Department of Justice (DOJ) opined that the Hatch Act's<sup>25</sup> prohibitions on political activities applied to civilian employees only and not to military personnel on active duty,<sup>26</sup> overruling the DOD view that it did.<sup>27</sup> Since 1969, DOD policy on civil officeholders has kept up with law changes,<sup>28</sup> but there has been little change in the principal non-statutory areas it addresses: candidacy for civil office and campaigning.<sup>29</sup>

#### CURRENT LAW

Several Federal laws aim to limit military involvement in politics,<sup>30</sup> but only Title 10, United States Code, Section 973(b)<sup>31</sup> addresses the conflict between being in military service and holding civil office. Section 973(b) is best explained by breaking it down into the two categories of officers it treats differently, its two prohibitions, and the two categories of civil office it covers. The first category of officers is regular officers on the active-duty list, and the second category is retired regular officers and reserve officers on active duty for a period over 270 days. No other officers are covered by the law, and it does not apply to enlisted personnel. The prohibitions are on holding civil office and on exercising the functions of a civil office, and the two categories of civil office are Federal offices and state or local offices. The law does not define civil office.<sup>32</sup>

The law prohibits both categories of officers from holding or exercising the functions of civil offices in the U.S. Government that are elective, require an appointment by the President and Senate confirmation, or are among the other high-level politically appointed positions listed in Title 5, United States Code, sections 5312 through 5317.<sup>33</sup> The law also prohibits regular officers on the active-duty list from holding or exercising the functions of any state or local civil office. Retired regular officers and reserve officers, when they are serving on active duty for over 270 days, are prohibited from holding a state or local civil office when holding such an office is prohibited under state law or when the Secretary of Defense determines that it would interfere with the performance of military duties.<sup>34</sup> While this second category of officers may hold a civil office except when one of these conditions applies, they may not exercise the functions of the office.

## CURRENT POLICY

DOD policy on civil officeholders in military service is in DOD Directive (DODD) 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, along with other policy regulating the political activities of all military personnel on active duty.<sup>35</sup> The intent of this policy is to enforce “the traditional concept that Service members should not engage in partisan political activity.”<sup>36</sup> DOD recently updated DODD 1344.10 to reflect the 2003 change to Section 973(b), and while no Military Service has yet issued separate implementing guidance, those that did so with the previous version of DODD 1344.10 did not further restrict the political activities of their members.<sup>37</sup>

In implementing Section 973(b), DODD 1344.10 defines “civil office” as:

A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as regular or reserve member of a civilian law enforcement, fire, or rescue squad.<sup>38</sup>

DODD 1344.10 also extends the prohibitions of Section 973(b) to enlisted personnel in most situations<sup>39</sup> and specifies that even when members are not otherwise prohibited from holding or exercising the functions of a civil office, they may do so only if there is no interference with their military duties.<sup>40</sup>

Two DODD 1344.10 prohibitions affecting civil officeholders not in Section 973(b) are the prohibitions on being a nominee or candidate for civil office while on active duty<sup>41</sup> and on campaigning.<sup>42</sup> The prohibition on being a nominee or candidate applies whether or not a member had that status before entering active duty or is an incumbent, but only when the prohibition on exercising the functions of a civil office applies.<sup>43</sup> For example, a retired regular member or reserve member on active duty for a period of 270 days or less may be a candidate for civil office. Also, the Secretary of a Military Department or the Secretary's designee may permit a member covered by the prohibition to be a nominee or candidate.<sup>44</sup> This exception allows flexibility in situations when the risk of involving the military in partisan politics is low, for example, when the filing deadline for an elective civil office is during the active duty period, but the election is long afterwards. If granted, this permission does not authorize campaigning or other political activity prohibited by DODD 1344.10.

The prohibition on campaigning is one of several restrictions on political activity in DODD 1344.10 applicable to all members on active duty regardless of how long they are in that status. There are no exceptions to this prohibition, but it has been interpreted to cover only the military

member, not a campaign organization the member controls or anyone else who may campaign for the member.<sup>45</sup>

Civil officeholders affected by the prohibitions against being a nominee or candidate for, holding, or exercising the functions of a civil office may request retirement (if eligible), discharge, or release from active duty, but DODD 1344.10 restricts the Military Departments' ability to approve such requests. It lists several circumstances in which the civil officeholder may not voluntarily leave active duty to pursue a prohibited political activity, but the most common is during a period of declared war or national emergency, or any other period when a unit or individual of a Reserve Component is involuntarily on active duty.<sup>46</sup> During the ongoing national emergency,<sup>47</sup> this provision leaves mobilized civil officeholders with two options: comply with the prohibitions of DODD 1344.10 or face adverse action.<sup>48</sup>

### **SHORTCOMINGS OF CURRENT LAW AND POLICY**

The current partial mobilization has been the biggest test of the effectiveness of Federal law and DOD policy governing civil officeholders in military service since 1983, when Section 973(b) was expanded to include reserve officers on active duty. Its duration far exceeds that of the partial mobilization for the first Persian Gulf War, with more reservists serving on active duty for longer than the Section 973(b) threshold.<sup>49</sup> Not surprisingly, it has been active duty service for a year or more by reservists who are also serving politicians that has most tested the ability of Section 973(b) and DODD 1344.10 to accomplish their purpose of protecting the military from partisanship or the appearance thereof. Their failure to effectively regulate politicians on active duty without involving the military in allegations of partisanship is evident from a few cases that received extensive media attention, but the shortcomings of the law and policy revealed by these cases likely lead to similar perceptions of partisanship in cases of mobilized civil officeholders that are not in the headlines.

Perhaps the greatest shortcoming of Section 973(b) is that its prohibition on exercising the functions of civil office as applied to reserve officers appears to have been drafted to minimize the imposition on civil officeholders who want to serve in a Reserve Component rather than to protect the military from partisanship, the ostensible purpose of the law. By not prohibiting reserve officers from exercising the functions of a civil office unless they are on an active duty tour of over 270 days, Section 973(b) sanctions the mixing of active duty military service and politics for a considerable period of time. This is troubling because such mixing during active duty service not covered by the law can create perceptions of partisanship as easily as it can during a period over 270 days.

The DODD 1344.10 policy that civil officeholders not covered by Section 973(b) may perform the functions of their civil office only if they do not interfere with military duties does not prevent this situation because some politicians will attempt to serve both the military and their constituents. Also, because the statutory prohibition is based on the length of the active duty tour rather than on the potential for partisan entanglements or the perception of them, some civil officeholders mobilized for a year do not understand why they cannot perform both their military and civil office duties. They believe they should be allowed to perform all of these duties for what is only 95 more days.<sup>50</sup>

The 1983 expansion of Section 973(b) to cover certain reservists on active duty was consistent with the Total Force concept already in place in the Military Services.<sup>51</sup> But by establishing an over 180-day threshold and later replacing it with a less restrictive over 270-day threshold, Congress has shown that it never fully embraced the idea that the introduction of partisanship by reservists on active duty is as big a threat to military professionalism as its introduction by any other source. This congressional ambivalence over how professional reservists on active duty need to be was evident in 2003 when the House of Representatives voted to drop reserve and retired regular officers holding elective offices from Section 973(b) coverage.<sup>52</sup> Senate conferees blocked that effort by prevailing on their House counterparts to preserve the prohibition on such officers exercising the functions of civil office in exchange for weakening the prohibition on holding civil office<sup>53</sup>

A second shortcoming of Section 973(b) is that it does not address candidacy for civil office. The period in which someone on active duty is a candidate for elective civil office is a time prone to allegations of military partisanship because there is often an opponent with an incentive to make them. Accordingly, DODD 1344.10 prohibits candidacy for civil office except when the potential for involving the military in partisan politics is low. This policy prohibition is inadequate in two respects. First, it applies only to reservists who meet the over 270-day threshold of Section 973(b) rather than to all reservists on active duty. This limited coverage reflects the concern that Congress would object to DOD prohibiting candidacy during active duty tours of 270 days or less when it has not prohibited exercising the functions of civil office during tours of that length, but it permits an activity likely to involve the military in allegations of partisanship to occur during significant periods of active duty.

Second, the policy prohibition on candidacy for civil office does not protect military authorities from political pressure to grant an exception or waiver. This inadequacy was seen in the widely reported case of John Pippy, a captain in the Army Reserve. In early March 2003, Pippy was a Pennsylvania State Representative on leave of absence after being mobilized the

previous month for a one-year period.<sup>54</sup> Prior to receiving active duty orders, he had become the Republican candidate in a special election for a vacant seat in the Pennsylvania Senate scheduled for 11 March 2003.<sup>55</sup> When the Army decided on 5 March to deny Pippy an exception to the prohibition on being a candidate for civil office because his active duty tour had just begun,<sup>56</sup> the Office of the Secretary of Defense received calls from Pennsylvania's two U.S. Senators, Republicans Arlen Specter and Rick Santorum, and the Republican Chairman of the Senate Committee on Armed Services, Senator John Warner.<sup>57</sup> Although in waiving the prohibition so Pippy could remain a candidate the Deputy Secretary of Defense cited the fact that the Army had changed its position, the nearness of the election, and a desire not to deprive Pennsylvania voters of an elective choice,<sup>58</sup> this case shows how congressional interest in a DOD policy matter can create the appearance of partisanship. The perception that Pippy, who won the election, received preferential treatment because he was a Republican was reinforced by allegations of partisanship from the Pennsylvania Senate's Democratic Leader,<sup>59</sup> Pippy's opponent,<sup>60</sup> and the *Pittsburgh Post-Gazette*.<sup>61</sup>

One shortcoming of Section 973(b) and DODD 1344.10 is that there is little DOD can do to repair the damage when a politician on active duty violates a prohibition. A perception that the military is engaged in partisan politics may be created as soon as a violation becomes public knowledge. DOD can deny allegations of partisanship, but the denials may not erase perceptions already formed in what is usually a heated partisan atmosphere. Correcting an erroneous perception of partisanship is complicated by the inability of the civil officeholder's command to publicize any disciplinary action it took for the violation because of Privacy Act<sup>62</sup> concerns. This inability can even reinforce such a perception because the public may think the military took no action.

This shortcoming was seen in the case of Jonathan Dolan, a major in the Missouri National Guard and a Republican member of the Missouri State Senate. In September 2003, while on a one-year active duty tour at Guantanamo Bay, Cuba, Dolan requested and received leave for the purpose of returning to Missouri to participate in efforts to override the Democratic Governor's veto of bills to authorize the carrying of concealed weapons and require women to consult with a doctor and then wait 24 hours before having an abortion. In violation of the statutory and policy prohibition on exercising the functions of his civil office, Dolan voted in the two successful override efforts, casting the deciding vote on the weapons bill.<sup>63</sup> While Dolan's command erred in giving him leave for that purpose, it denied any partisan motive.<sup>64</sup> But the denials did not stop the national media coverage of Democratic allegations of partisanship,<sup>65</sup> and its inability to fully discuss the subsequent investigation and actions taken pursuant to it

hindered the command's efforts to counter the perception of partisanship some in the public had.<sup>66</sup>

Another shortcoming of Section 973(b) and DODD 1344.10 is that even when the law and policy are applicable and followed, the public may still think the military is involved in partisan politics because the prohibitions on exercising the functions of civil office and campaigning apply only to the military member, not to the member's civil office staff, family, or other supporters. For example, the public may think a civil officeholder on active duty for a year is performing both military and civil office functions because constituent service offices are still open. Also, in the case of members with an exception to the prohibition on being a candidate for civil office, the general public may think the member is campaigning when the campaign staff has published brochures with a photograph of the candidate in a military uniform, a practice that is allowed when the photograph is presented as biographical information and does not imply an official endorsement.<sup>67</sup> Expanding these prohibitions to other parties is not feasible because of constitutional<sup>68</sup> and enforcement concerns, but the inability to do so highlights the difficulty of preventing the perception of military partisanship when both law and policy permit politicians to serve on active duty for extended periods.

A final shortcoming of Section 973(b) and DODD 1344.10 is that the effectiveness of the prohibition on exercising the functions of civil office is limited by its ambiguity, with neither law nor policy defining the functions of civil office. While most would agree that voting is such a function, it is less clear when a civil officeholder's communications with civil office staff, colleagues, and constituents fall within the prohibition's coverage. Given the many civil offices to which the prohibition applies, any list of the functions covered by the prohibition would likely include some actions that can be performed without the risk of perceived partisanship and leave off some that cannot be. Accordingly, it is appropriate that the law and policy rely on the judgment and professionalism of civil officeholders and their commanders in deciding what actions are prohibited during covered service. But while unavoidable, this ambiguity allows civil officeholders who have not inculcated the principle of nonpartisanship to continue performing actions that may create the perception of military partisanship.

#### **THE SPECIAL CASE OF MEMBERS OF CONGRESS**

The prohibitions on holding and exercising the functions of civil office of Section 973(b) and DODD 1344.10 apply to Members of Congress on their face, but other DOD policies make them inapplicable in practice. DODD 1200.7, *Screening the Ready Reserve*, requires Members of Congress to be screened out of the Ready Reserve and transferred to the Standby Reserve

because they occupy a “key position” that cannot be vacated during a national emergency or mobilization without “seriously impairing” the capability of Congress to function effectively.<sup>69</sup> DODD 1235.9, *Management of the Standby Reserve*, specifies that members of the Standby Reserve may be ordered to active duty in time of war or national emergency only if there are not enough qualified Ready Reservists available in the categories required.<sup>70</sup> These directives have kept Members of Congress from serving the long periods of active duty covered by Section 973(b), but they may still participate in training activities without pay, earn retirement points, and be promoted while in the active Standby Reserve.<sup>71</sup> This leaves ample opportunity for their political careers to intersect with their military status in ways that create the appearance of military partisanship, a conflict that has periodically raised the issue of whether simultaneous service in Congress and in a Reserve Component of the military violates the U.S. Constitution.

The relevant constitutional provision states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>72</sup> At various times, this provision has been interpreted by the House of Representatives,<sup>73</sup> the Senate,<sup>74</sup> and a U.S. District Court judge<sup>75</sup> to prohibit Members of Congress from serving in the military. But because of issues of standing,<sup>76</sup> the Supreme Court has not ruled on the merits of this issue, and the Executive Branch has consistently cited the constitutional provision stating that Congress shall judge the qualifications of its members<sup>77</sup> in declining to act on its Incompatibility Clause concerns by terminating the military status of Members of Congress.

Congress last found one of its members in violation of the Incompatibility Clause in 1916, when the House Committee on the Judiciary concluded that a Congressman could not hold a National Guard commission.<sup>78</sup> Since then, many Members of Congress have had military status. In the 91st Congress from 1969 to 1970, 130 members were in a Reserve Component,<sup>79</sup> including more than half the Senate Committee on Armed Services and one-third of its House counterpart.<sup>80</sup> The number has steadily decreased, but 13 Congressmen were in an active reserve status during the first Persian Gulf War<sup>81</sup> and four are today.<sup>82</sup> Members of Congress have occasionally noted the apparent unconstitutionality of simultaneous service in Congress and a Reserve Component of the military, but Congress has declined to investigate the matter.<sup>83</sup>

Before and after its unsuccessful 1971 District Court defense of the practice of allowing Members of Congress to serve in a Reserve Component,<sup>84</sup> the Executive Branch expressed concern about its constitutionality. In 1943, Attorney General Francis Biddle advised President Roosevelt of Congress’ history of applying the Incompatibility Clause to bar its members from military service, but noted that the House and Senate had not always acted and recommended against “commissioning or otherwise utilizing the services” of Congressmen in the military. He



did not recommend taking action with regard to the military status of those Congressmen who already had it.<sup>85</sup> Biddle thereby set the precedent that is followed today: the Executive Branch uses policy to minimize the effect of the constitutional infirmity of having Members of Congress in the military, but leaves the job of removing the infirmity to Congress.

In 1977, after a Congressman complained to the President about other members holding reserve commissions, a DOJ opinion noted the constitutional issue and advised that “the exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress.”<sup>86</sup> When the issue came up again after Iraq invaded Kuwait in 1990, the DOD General Counsel said there were “serious concerns” about the constitutionality of Members of Congress having reserve commissions, but he cited the previous DOJ opinions in recommending that resolution of the issue “be deferred to a more opportune time.”<sup>87</sup> Since then, neither the Executive Branch nor Congress has addressed the Incompatibility Clause issue.<sup>88</sup>

This inaction and the DOD policy for managing Members of Congress who serve in a Reserve Component leaves the military vulnerable to partisanship or the perception thereof. By moving these members to the Standby Reserve and restricting their mobilization, DODD 1200.7 and DODD 1235.9 reduce but do not eliminate the potential for the type of conflict of interest the Incompatibility Clause was intended to prevent, conflicts that may also create a perception of partisanship. The Constitution’s drafters saw the Incompatibility Clause as necessary to maintain the separation of powers. By barring the simultaneous holding of legislative and executive offices, they sought to prevent elected officials from being subverted by the benefits of executive office.<sup>89</sup>

With Members of Congress eligible for promotion and retirement credit in the active Standby Reserve, the perception that such subversion is possible can still occur and is reinforced when members are promoted while serving in what the public may see as do nothing military jobs in Washington.<sup>90</sup> The perception that military service by Members of Congress is just a political quid pro quo is perhaps greatest in the case of members who are in the President’s political party, as are the four reservists now in Congress.<sup>91</sup> Military actions can then appear even more partisan, as did the President’s Oval Office promotions of Senator Lindsey Graham and Representative Steve Buyer to colonel less than a week before Buyer faced a primary election challenge.<sup>92</sup>

Having high-profile politicians like Members of Congress in military service can also involve the military in partisan politics in unexpected ways. While the policy preventing members from being mobilized reduces the potential for such involvement, it did not help in

2003 when notwithstanding that policy two Congressmen sought to serve in Operation Iraqi Freedom. One case received no media attention,<sup>93</sup> but DOD was put in an awkward position when Representative Buyer prematurely told the Speaker of the House and announced in a news release that the Army was calling him to active duty for service in Iraq.<sup>94</sup> No exception to DOD policy followed, and the veracity of Buyer's statements became a campaign issue in Indiana,<sup>95</sup> presenting DOD with a partisan minefield to negotiate.

## **A FRAMEWORK FOR CHANGE**

Section 973(b), DODD 1344.10, and the policies affecting Members of Congress in a Reserve Component do not adequately shield the military from involvement in partisan politics or from perceptions of partisanship. Underlying all of their shortcomings is that protection of the military from partisanship is not the overriding principle that has influenced their content. A nonpartisan military is their ostensible goal, but that principle has been overridden by a desire to make reserve military service compatible with holding civil office. The idea that Americans from all occupations should serve in a Reserve Component and answer their nation's call to active duty in time of national need is an important one, but it is not more important to our democracy than a military perceived as nonpartisan. Current law and policy governing the potential conflict between the tradition of the citizen-soldier and the military's tradition of nonpartisanship that occurs when civil officeholders are in military service subordinates the latter tradition to the former. Both law and policy should be changed so that preserving a nonpartisan military is their overriding principle.

Changing Section 973(b) and DOD policy affecting civil officeholders in military service so that protecting against partisanship is the overriding consideration will likely reduce the number of civil officeholders in active reserve service and encounter opposition for that reason. One argument will be that because many politicians today have not served in the military and it is important for politicians to have military experience, we should do nothing to reduce the number of those who are gaining that experience while in office. This argument minimizes the risk of partisanship, overlooks former military personnel as the best solution to the military experience deficit among politicians, and helps show why the law and policy in this area should be changed to better guard against partisanship.

If the number of politicians with military experience has decreased, then it is likely that among certain constituencies the value of such experience as political currency has increased. If a political motivation is at least part of the reason why some civil officeholders join or remain in a Reserve Component, then it is also likely that such civil officeholders may be reluctant to put

politics aside when mobilized, increasing the risk of involving the military in them. This problem may be compounded if civil officeholders who are reservists align with the Republican Party to the extent active component officers do.<sup>96</sup> High-profile cases involving Republican politicians in military service may validate concerns some have expressed about the military's political neutrality.

## **RECOMMENDATIONS**

### **LAW CHANGES**

Congress should amend Section 973(b) to prohibit officers on active duty, regardless of component or length of active duty tour, from exercising the functions of a civil office. This change would eliminate the law's current distinctions that are unrelated to protecting the military from partisanship. It would then be clear that exercising the functions of civil office while on active duty is never acceptable and that the professional norm of nonpartisanship<sup>97</sup> will be enforced with the same standard for all officers on active duty rather than by the current two-tier standard that expects a lesser degree of professionalism from certain reservists.

Congress should also amend Section 973(b) to prohibit candidacy for civil office while on active duty. While some exception authority should be kept for when it is unlikely that a candidacy will create a perception of partisanship, making this prohibition statutory would recognize its importance as a way of protecting the military from partisanship and insulate DOD from congressional pressure to waive it.

### **POLICY CHANGES**

In addition to changing DODD 1344.10 to reflect any law changes, DOD should change DODD 1200.7 so that members of the Ready Reserve holding civil offices with high potential for involving the military in partisan politics if the incumbent is mobilized are transferred to the inactive Standby Reserve. At a minimum, state-level elective offices should be covered by this policy, but some other offices may warrant coverage, such as certain mayoral offices.<sup>98</sup>

State legislatures can be very partisan and have an impact outside their states through legislation of national interest or when redrawing congressional districts. Accordingly, as shown by the Pippy and Dolan cases that attracted both national media attention and inquiries by Members of Congress,<sup>99</sup> actions of state legislators on active duty have high potential to create at least the appearance of military partisanship. Giving these civil officeholders a military status where active duty service is unlikely is necessary because of shortcomings in Section 973(b) and DODD 1344.10 that cannot be eliminated by amending them. These shortcomings are the

inability to delineate all prohibited civil office functions, the difficulty in changing an erroneous perception of partisanship once it has been created by a violation of the rules, and the inability to regulate actions of members of a civil officeholder's staff and others that may create the perception of military partisanship even when the civil officeholder follows the rules.

This recommended policy change does not go as far as the suggestion that all elected civil officeholders be excluded from reserve service,<sup>100</sup> but it is similarly based on the idea that protecting the military from partisanship must take priority over having an active reserve force that includes all civilian occupations. The change will be unpopular among affected politicians who believe they can simultaneously serve their nation and their constituents, but it is necessary given the limitations of Section 973(b) and DODD 1344.10. This recommendation is limited to those civil officeholders in high-level elective offices because in the case of other offices, which are often less partisan and have little or no staff, it is likely that Section 973(b) and DODD 1344.10, if changed as recommended, can adequately protect the military from partisanship.

Additionally, DOJ should lead an Executive Branch effort to get Congress to resume enforcing the Incompatibility Clause by requiring its members to choose between service in Congress and military service, as it did through 1916.<sup>101</sup> If that effort fails, DOD should change DODD 1200.7 so that Members of Congress transfer to the inactive Standby Reserve. This would mitigate the effect of Congress not removing the constitutional infirmity caused by simultaneous service in Congress and the military because in an inactive status Members of Congress would be ineligible for promotion or retirement points.<sup>102</sup> Removing these benefits would reduce the potential for conflicts of interest and actual or perceived military partisanship.

DOD may be reluctant to support an effort to change the military status of Members of Congress because it probably benefits from the status quo as much as the members do. But this type of mutually beneficial relationship is what concerned the Constitution's framers when they wrote the Incompatibility Clause. While their concern was that this conflict of interest could subvert the people's elected representatives,<sup>103</sup> to the extent that it creates the perception that the military is partisan it may also damage civil-military relations. Both results are unwelcome in a democracy.

Congress appears comfortable with allowing its members to serve in a Reserve Component, but this is a good time for the Executive Branch to raise the Incompatibility Clause issue. With the four Congressmen now in military service all Republicans,<sup>104</sup> it is unlikely that anyone would attribute partisan motives to a request that they resign their commissions or retire.

## **CONCLUSION**

The ongoing partial mobilization has shown that current law and policy governing civil officeholders in military service inadequately protects the military from involvement in partisan politics or the perception thereof. It prioritizes accommodation of politicians' desire to serve in the Reserve Components over the military's need to avoid partisan entanglements that can undermine professionalism to the detriment of civil-military relations. Congress should reverse its priorities, bar its members from military service, and amend the statute affecting other civil officeholders. DOD should not wait for congressional action before changing its policy to reduce the potential for military involvement in partisan politics. At a time when some are saying the military's tradition of nonpartisanship has eroded, these steps would help reinvigorate the principle of a politically neutral military that is so important to military professionalism and democracy.

WORD COUNT=5986

## ENDNOTES

<sup>1</sup> Tim Hoover, "Democrats Take Issue with Senator's Military Leave of Absence in Veto Override Vote," *Kansas City Star*, 12 September 2003, sec. A, p. 1 (888 words) [database on-line]; available from Lexis-Nexis; accessed 26 August 2004.

<sup>2</sup> Mark Belko, "Rumsfeld Overrides Army, Lets Pippy Run," *Pittsburgh Post-Gazette*, 6 March 2003, sec. A, p. 1 (769 words) [database on-line]; available from Lexis-Nexis; accessed 26 August 2004.

<sup>3</sup> Maureen Groppe, "Direct from Bush: Buyer's New Reserve Rank," *Gannett News Service*, 30 April 2004 (724 words) [database on-line]; available from Lexis-Nexis, accessed 27 August 2004.

<sup>4</sup> Jim Schenke, "Challenger Claims Buyer Lied about His Military Status," *Lafayette-West Lafayette (IN) Journal and Courier Online*, 5 September 2003; available from <[http://www.lafayettejc.com/news20030905/200309052local\\_news1062738248.shtml](http://www.lafayettejc.com/news20030905/200309052local_news1062738248.shtml)>; Internet; accessed 27 August 2004.

<sup>5</sup> President, Executive Order, "Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation, Executive Order 13223," *Federal Register* 66, no. 181 (18 September 2001): 48201; available from <<http://www.defenselink.mil/ra/mobil/pdf/e.o.13223.pdf>>; Internet; accessed 29 November 2004 and President, Executive Order, "Amendment to Executive Order 13223, Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation, Executive Order 13253," *Federal Register* 67, no. 13 (16 January 2002): 2791; available from <<http://www.defenselink.mil/ra/mobil/pdf/e.o.13253.pdf>>; Internet; accessed 29 November 2004.

<sup>6</sup> Social scientists do not agree on what distinguishes professions from mere occupations, but in sociologist James Burk's concept of a profession there are three distinguishing factors: expertise in applying a specialized body of knowledge, a jurisdiction in which the expert knowledge is applied, and legitimacy. James Burk, "Expertise, Jurisdiction, and Legitimacy of the Military Profession," in *The Future of the Army Profession*, ed. Lloyd J. Matthews (Boston: McGraw-Hill, 2002), 23.

<sup>7</sup> Ibid., 31; Don M. Snider and Gayle L. Watkins, "Introduction," in *The Future of the Army Profession*, ed. Lloyd J. Matthews (Boston: McGraw-Hill, 2002), 7.

<sup>8</sup> Allan R. Millett, *Military Professionalism and Officership in America* (Columbus, OH: Mershon Center of The Ohio State University, 1977), 3.

<sup>9</sup> Marybeth Peterson Ulrich, "Infusing Civil-Military Norms in the Officer Corps," in *The Future of the Army Profession*, ed. Lloyd J. Matthews (Boston: McGraw-Hill, 2002), 245-46.

<sup>10</sup> Ibid., 259.

<sup>11</sup> Millett, 3. Nonpartisanship as an important aspect of military professionalism figures prominently in civil-military relations theory. When social scientists began studying the military as a profession in the mid-twentieth century, professionalism was seen as the solution to the central problem of civil-military relations: how to reconcile having a military effective enough to

protect a society without having it usurp the society's democratic principles. In the early theories, a professional military that avoids partisan politics is seen as essential to maintaining civilian control of the military and thus preventing this usurpation. Samuel Huntington expressed an absolutist view of the political neutrality of military officers, stating that "politics is beyond the scope of military competence, and the participation of military officers in politics undermines their professionalism, . . . ." Under his theory, professional military officers operate completely outside the political sphere, and because they pose no threat to civilian control, they are allowed to apply their expertise without the civilian interference that would lead to society being less protected. Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Harvard University Press, 1957), 2, 71, 83-85. Morris Janowitz put forth a more realistic theory, recognizing that military professionals, as products of civilian society, hold political beliefs and must often operate in the political realm to effectively carry out their duties. But his theory still relies on the "partisan neutrality" of military professionals as a primary mechanism of civilian control. Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (New York: The Free Press, 1971), 234. While these theories have been challenged for relying too much on professionalism to ensure civilian control of the military, the early theorists' view that nonpartisanship is an important element of military professionalism is widely shared. Peter D. Feaver, "The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control," *Armed Forces and Security* 23 (Winter 1996): 164-67; Samuel E. Finer, *The Man on Horseback: The Role of the Military in Politics* (London: Pall Mall Press, 1962), 24-27. Contemporary civil-military relations experts recognize that military professionals must have an awareness of and form opinions on domestic politics in order to exercise their rights as citizens and a degree of political expertise in order to competently advise civilian leaders on national security policy, but they agree that partisanship is unprofessional and detrimental to civil-military relations. Ulrich, 258; Richard D. Hooker, "Soldiers of the State: Reconsidering American Civil-Military Relations," *Parameters* 33 (Winter 2003-04): 14.

<sup>12</sup> The U.S. military's tradition of nonpartisanship began in the early years of military professionalism following the Civil War. Huntington, 230-31. Beginning their quest for professional legitimacy with a history of military involvement in partisan politics in a country that had traditionally been wary of a large standing military, advocates of professionalism embraced nonpartisanship as an important corollary to the central professional ethic of military subordination to civilian control. Russell F. Weigley, "The American Military and the Principle of Civilian Control from McClellan to Powell," *Journal of Military History* 57, no. 5 (October 1993): 37; Lance Betros, "Officer Professionalism in the Late Progressive Era," in *The Future of the Army Profession*, ed. Lloyd J. Matthews (Boston: McGraw-Hill, 2002), 282. General William Tecumseh Sherman, Commanding General of the Army from 1869 to 1883 and an early leader of the professionalism movement, stressed the importance of separating the military from politics, saying that "no Army officer should form or express an opinion" on party politics. *Ibid.* This view of political neutrality anticipated the separate military and political spheres of Huntington's theory and helped establish a nonpartisan tradition that was strong enough to survive a period of increased partisan activity by Army officers prior to World War I. Betros, 271.

<sup>13</sup> Ole R. Holsti, "Of Chasms and Convergences: Attitudes and Beliefs of Civilians and Military Elites at the Start of the New Millennium," in *Soldiers and Civilians: The Civil-Military Gap and American National Security*, ed. Peter D. Feaver and Richard H. Kohn (Cambridge, MA: Belfer Center for Science and International Affairs, 2001) 27; Thomas E. Ricks, "The Widening Gap between the Military and Society," *Atlantic Monthly*, July 1997, 72.

<sup>14</sup> Ulrich, 260-62.

<sup>15</sup> Weigley, 27-32.

<sup>16</sup> Congress passed the first such law in 1868. It applied only to the Army and stated that any officer, other than an officer on the retired list, who accepted or held an appointment in the Foreign Service of the United States would be considered to have resigned from the Army. *Act of 30 March 1868, Statutes at Large* 15, ch. 38, sec. 2, 58. This law was eventually codified as Title 10, United States Code, Section 577. *U.S. Code*, vol. 10, sec. 577 (1952).

<sup>17</sup> In 1870, Congress passed a law prohibiting Army officers on the active list from holding any elective or appointive civil office. It also stated that any officer accepting or exercising the functions of a civil office would “thereby cease to be an officer of the Army” and that “his commission shall be thereby vacated.” *Act of 15 July 1870, Statutes at Large* 16, ch. 294, sec. 18, 319. The law was later codified as Title 10, United States Code, Section 576(b). *U.S. Code*, vol. 10, sec. 576(b) (1952). In 1956, as part of a comprehensive revision of Title 10, Congress combined Sections 576(b) and 577 into one section for the Army and one for the Air Force. *Act of 10 August 1956, Statutes at Large* 70A, ch. 1041, 203, 527. The new sections were Title 10, United States Code, Sections 3544 and 8544, respectively. They were substantively unchanged from the previous sections, but language was added to clarify that the prohibition on holding and exercising the functions of a civil office applied to Federal, state, and local civil offices, but only to regular officers on the active list. *U.S. Code*, vol. 10, secs. 3544(b), 8544(b) (1964).

<sup>18</sup> *Act of 2 January 1968, Statutes at Large* 81, sec. 4(a)(5), 759. This law applied the prohibition to Navy, Marine Corps, and Coast Guard officers and was codified as Title 10, United States Code, Section 973(b), replacing Sections 3544 and 8544. *U.S. Code*, vol. 10, sec. 973(b) (1970). Like its predecessors, this provision applied only to regular officers on the active list and provided that acceptance of a civil office or the exercise of its functions would terminate an officer’s appointment. In 1980, Congress substituted “active duty” for “active list” in Section 973(b). *Defense Officer Personnel Management Act, Statutes at Large* 94, sec. 116, 2878 (1980).

<sup>19</sup> *National Defense Authorization Act for Fiscal Year 1984, Statutes at Large* 97, sec. 1002, 655 (1983). This law was a complete rewrite of Title 10, United States Code, Section 973(b). Its expanded coverage included not only regular officers on the active-duty list, but also retired regular officers and reserve officers when serving on active duty under a call or order to active duty for a period over 180 days. The law also modified the prohibition on holding and exercising the functions of civil offices so that it applied to only certain offices in the U.S. Government, but covered officers were still prohibited from holding and exercising the functions of all state and local civil offices. Finally, the law removed the language automatically terminating the military appointment of an officer that violated one of the section’s prohibitions.

<sup>20</sup> An exception for civil offices on school boards located exclusively on military reservations was added as Title 10, United States Code, Section 973(c) in 1990. *National Defense Authorization Act for Fiscal Year 1991, Statutes at Large* 104, sec. 556, 1570 (1990); *United States Code*, vol. 10, sec. 973(c) (1994).

<sup>21</sup> *National Defense Authorization Act for Fiscal Year 2000, Statutes at Large* 113, sec. 506, 591 (1999). The new coverage threshold also applied to retired regular officers on active duty.



<sup>22</sup> *National Defense Authorization Act for Fiscal Year 2004, Statutes at Large* 117, sec. 545, 1479 (2003).

<sup>23</sup> Department of Defense, "Political Activity," draft directive, Washington, D.C., 1956.

<sup>24</sup> Department of Defense, *Political Activities by Members of the Armed Forces*, Department of Defense Directive 1344.10 (Washington, D.C.: U.S. Department of Defense, 23 September 1969). Before DOD Directive (DODD) 1344.10, the only policy affecting civil officeholders in military service was a 1944 joint agreement between the War and Navy Departments governing the participation of military personnel in political campaigns. War and Navy Departments, "Participation of Members of the Armed Services in Political Campaigns," joint agreement, Washington, D.C., 13 March 1944. The Air Force had no policy in this area. "Political Activity," Memorandum for COL Irvin, Washington, D.C., 18 September 1958. The joint agreement, in addition to restating the Title 10, United States Code, Section 973(b) predecessor then in effect, allowed members of the regular Army, Navy, and Marine Corps to accept a nomination for a civil office if such nomination was tendered without direct or indirect solicitation on the member's part. Reserve members on active duty could become candidates for civil office without this restriction. The agreement also provided that in the case of both regular and reserve members, candidacy for civil office could not interfere with their military duties and, if elected, the member could not "act in his official capacity as the holder of the office, or perform any of the duties thereof" while on active duty. While not automatic, the agreement contemplated discharge or release from active duty as the usual result following a member's election to civil office. War and Navy Departments, "Participation of Members of the Armed Services in Political Campaigns." The agreement did not address campaigning, probably because of the assumed applicability of the Hatch Act to military personnel. The initial DODD 1344.10 made no distinction between regular and reserve members on active duty in its policy on candidacy for civil office and campaigning, although it applied only to members on active duty for more than 30 days. Campaigning was prohibited and any candidacy for civil office required the permission of the Secretary of the Military Department concerned or the Secretary's designee. Department of Defense, *Political Activities by Members of the Armed Forces* (1969), 1-4.

<sup>25</sup> *Act of 2 August 1939, Statutes at Large* 53, 1147. The provisions of this Act, as amended, that apply to Federal civilian employees are codified at Title 5, United States Code, Sections 7321-26. *U.S. Code*, vol. 5, secs. 7321-26 (2000).

<sup>26</sup> Attorney General Nicholas deB. Katzenback, Washington, D.C., letter to DOD General Counsel Cyrus R. Vance, Washington, D.C., 3 July 1962.

<sup>27</sup> Assistant Secretary of Defense Charles C. Finucane, memorandum for the Secretary of Defense, Washington, D.C., 27 December 1960.

<sup>28</sup> Department of Defense, *Political Activities by Members of the Armed Forces*, Department of Defense Directive 1344.10, Change 1 (Washington, D.C.: U.S. Department of Defense, 20 March 1970); Department of Defense, *Political Activities by Members of the Armed Forces*, Department of Defense Directive 1344.10, Change 2 (Washington, D.C.: U.S. Department of Defense, 24 October 1972); Department of Defense, *Political Activities by Members of the Armed Forces*, Department of Defense Directive 1344.10, Change 3 (Washington, D.C.: U.S. Department of Defense, 18 February 1975); Department of Defense, *Political Activities by Members of the Armed Forces*, Department of Defense Directive 1344.10 (Washington, D.C.: U.S. Department of Defense, 25 September 1986); Department of Defense, *Political Activities*

by Members of the Armed Forces, Department of Defense Directive 1344.10, Change 1 (Washington, D.C.: U.S. Department of Defense, 25 September 1987); Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty*, Department of Defense Directive 1344.10 (Washington, D.C.: U.S. Department of Defense, 15 June 1990); Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty*, Department of Defense Directive 1344.10, Change 1 (Washington, D.C.: U.S. Department of Defense, 7 January 1994); Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty*, Department of Defense Directive 1344.10, Change 2 (Washington, D.C.: U.S. Department of Defense, 17 February 2000); Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty*, Department of Defense Directive 1344.10 (Washington, D.C.: U.S. Department of Defense, 2 August 2004).

<sup>29</sup> The major policy difference between the initial DODD 1344.10 and the current version is that in 1969 the Secretaries of the Military Departments had more discretion to retire, discharge, or release from active duty members whose political activities conflict with the statutory prohibitions of Title 10, United States Code, Section 973(b) or the policy restrictions of DODD 1344.10.

<sup>30</sup> These laws restrict the keeping of troops at polling places (*U.S. Code*, vol. 18, sec. 592 (2000)) and prohibit interference by the military in state elections (*U.S. Code*, vol. 18, sec. 593 (2000)), the polling of members of the military with respect to how they voted or intend to vote (*U.S. Code*, vol. 18, sec. 596 (2000)), and the use of military authority to influence how members of the military vote (*U.S. Code*, vol. 18, sec. 609 (2000)).

<sup>31</sup> *U.S. Code*, vol. 10, sec. 973(b) (2000), as amended by *National Defense Authorization Act for Fiscal Year 2004*, *Statutes at Large* 117, sec. 545, 1479 (2003).

<sup>32</sup> But Title 10, United States Code, Section 973(c) excludes from the prohibitions of Section 973(b) nonpartisan civil office on independent school boards located exclusively on military reservations. *United States Code*, vol. 10, sec 973(c) (2000).

<sup>33</sup> *U.S. Code*, vol. 5, secs. 5312-17 (2000). Title 10, United States Code, Section 973(b) allows any officer on active duty to hold or exercise the functions of any other civil office in the U.S. Government when assigned or detailed to that office or to perform those functions.

<sup>34</sup> The law also specifies that the Secretary of Homeland Security can make this determination in the case of a Coast Guard officer when the Coast Guard is not operating as part of the Navy.

<sup>35</sup> Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty* (2004).

<sup>36</sup> *Ibid.*, 12, 13.

<sup>37</sup> Department of the Army, *Army Command Policy*, Army Regulation 600-20 (Washington, D.C.: U.S. Department of the Army, 13 May 2002), 24-25; Department of the Air Force, *Political Activities by Members of the U.S. Air Force*, Air Force Instruction 51-902 (Washington, D.C.: U.S. Department of the Air Force, 1 January 1996); U.S. Marine Corps, *Political Activities*, Marine Corps Order 5370.7B (Washington, D.C.: U.S. Marine Corps, 8 March 1993).

<sup>38</sup> Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty* (2004), 9.

<sup>39</sup> Ibid., 4. Enlisted personnel may hold and exercise the functions of nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency.

<sup>40</sup> Ibid., 4-5. The Section 973(b) authority of the Secretary of Defense to determine when the holding of a state or local office by a reservist on active duty for a period over 270 days interferes with the performance of military duties has been specifically delegated to the Secretaries of the Military Departments. Ibid., 5.

<sup>41</sup> Ibid., 3.

<sup>42</sup> Ibid., 2.

<sup>43</sup> Ibid., 3.

<sup>44</sup> In the Army, this authority has been delegated to the member's installation commander or general court-martial convening authority. Department of the Army, *Army Command Policy*, 24.

<sup>45</sup> Brent P. Green <brent.green@hqda.army.mil>, "CPT Pippy Wins Election," electronic mail message to Steven T. Strong <steven.strong@osd.mil>, 12 March 2003. This message documents an interpretation of the prohibition on campaigning provided by Paul S. Koffsky, Deputy DOD General Counsel (Personnel and Health Policy).

<sup>46</sup> Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty* (2004), 5-6. Other circumstances that preclude approving a member's request for voluntary retirement, discharge, or release from active duty are when the member is: obligated to fulfill an active duty service commitment; serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area; ordered to remain on active duty while the subject of an investigation or inquiry; accused of an offense under the Uniform Code of Military Justice or serving a sentence or punishment for such an offense; pending other administrative separation action or proceedings; indebted to the U.S.; or in violation of DODD 1344.10 or an order or regulation prohibiting the member from assuming or exercising the functions of a civil office.

<sup>47</sup> President, Proclamation, "Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation 7463," *Federal Register* 66, no. 181 (18 September 2001): 48197-9; available from <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002\\_cfr\\_3v1&docid=3CFR7463](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_cfr_3v1&docid=3CFR7463)>; Internet; accessed 8 October 2004.

<sup>48</sup> Department of Defense, *Political Activities by Members of the Armed Forces on Active Duty* (2004), 6.

<sup>49</sup> As of 9 September 2004, the Reserve Components' contribution to military operations since 11 September 2001 was 42% higher than their contribution to Operations Desert Shield and Desert Storm in 1990 and 1991. Department of Defense, "Reserves 101," 9 September 2001, 26; available from <<http://www.defenselink.mil/ra/documents/rc101/rc101.pdf>>; Internet; accessed 23 October 2004.

<sup>50</sup> Fred Alvarez, "Elected Officials Soldiering on: Politicians Called to Military Duty Confront a Confusing Set of Rules," *Los Angeles Times*, 7 February 2004, sec. B, p. 1 [database on-line]; available from ProQuest; accessed 5 November 2004.

<sup>51</sup> Richard Lock-Pullan, "An Inward Looking Time: The United States Army, 1973-1976," *Journal of Military History* 67 (April 2003): 501.

<sup>52</sup> Congress, House, *National Defense Authorization Act for Fiscal Year 2004*, 108th Cong., 1st sess., H.R. 1588, *Congressional Record*, 149, no. 76, daily ed. (21 May 2003): H4435.

<sup>53</sup> Congress, House, *National Defense Authorization Act for Fiscal Year 2004: Conference Report to Accompany H.R. 1588*, H.R. Conf. Rep. No. 108-354, 108th Congress, 1st sess., 2003, 695. The change to the statutory prohibition on holding civil office had little practical effect because of DOD's longstanding interpretation that the law that did not require a civil officeholder on active duty for a period over 270 days to resign unless state or local law required it. Director of Legal Policy, DOD, James R. Schwenk, "Civil Office & Military Service," fact sheet prepared in response to White House inquiry, Washington, D.C., 5 March 1991.

<sup>54</sup> General Counsel, Pennsylvania Senate Republican Caucus Stephen C. MacNett, letter to Whom It May Concern, Harrisburg, PA, 19 March 2003.

<sup>55</sup> James O'Toole, "GOP Picks Pippy for Senate Race," *Pittsburgh Post-Gazette*, 16 January 2003, sec. B, p. 4 (364 words) [database on-line]; available from Lexis-Nexis; accessed 14 November 2004.

<sup>56</sup> Deputy Army General Counsel (Ethics & Fiscal) Matt Reres, letter to Commissioner of the Pennsylvania Bureau of Commissions, Elections and Legislation Monna J. Accurti, Washington, D.C., 5 March 2003.

<sup>57</sup> Belko, "Rumsfeld Overrules Army, Lets Pippy Run," sec. A, p. 1.

<sup>58</sup> Deputy Secretary of Defense Paul Wolfowitz, "Candidacy of Captain John Pippy, USAR," memorandum for Secretary of the Army, Washington, D.C., 5 March 2003.

<sup>59</sup> Pennsylvania Senate Democratic Leader Robert J. Mellow, letter to Deputy Secretary of Defense Paul Wolfowitz, Harrisburg, PA, 6 March 2003; Charles Sheehan, "Suit to Bar Reservist from Election Thrown Out," *Associated Press State and Local Wire*, 6 March 2003 (459 words) [database on-line]; available from Lexis-Nexis; accessed 14 November 2004.

<sup>60</sup> Editorial Board, "Voters' Choice: A Senator Now or a Senator Later," *Pittsburgh Post-Gazette*, 7 March 2003, sec. A, p. 22 (510 words) [database on-line]; available from Lexis-Nexis; accessed 14 November 2004.

<sup>61</sup> Sheehan, "Suit to Bar Reservist from Election Thrown Out."

<sup>62</sup> *U.S. Code*, vol. 5, sec. 552a (2000).

<sup>63</sup> Hoover, "Democrats Take Issue with Senator's Military Leave of Absence in Veto Override Vote," sec. A, p. 1; Stephanie Simon, "Missourians Given Leave to Carry Guns; Legislators Override Veto of Concealed-Weapon Permits after a Senator is Granted Time Off

from His Army Post in Cuba for a Last-Minute Vote,” *Los Angeles Times*, 12 September 2003, sec. A, p. 15 [database on-line]; available from Pro-Quest; accessed 14 November 2004.

<sup>64</sup> Simon, “Missourians Given Leave to Carry Guns,” sec. A, p. 15.

<sup>65</sup> Ibid.; Paul Sioca, “Military to Investigate Leave Granted to Lawmaker,” 12 September 2003; available from <<http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/09/12/national1928EDT0768.DTL>>; Internet; accessed 15 November 2004.

<sup>66</sup> Joe Bruemmer, “Letters to Editor: How Did Sen. Dolan Manage to Get Leave?” *St. Louis Post-Dispatch*, 14 September 2003, sec. B, p. 2 (321 words) [database on-line]; available from Lexis-Nexis; accessed 14 November 2004; Joe Sudbay, “In Missouri, A GOP Reservist Breaks the Rules to Pass a Hidden Handgun Law: It’s the Rule of Law for Democrats, and Anything Goes for Republicans,” 16 September 2003; available from <[http://www.buzzflash.com/contributors/03/09/16\\_sudbay.html](http://www.buzzflash.com/contributors/03/09/16_sudbay.html)>; Internet; accessed 15 November 2004; Kathryn Stone <StoneK@hq.southcom.mil> “RE: STLtoday – News – Story.htm,” electronic mail message to Steven T. Strong <steven.strong@osd.mil>, 8 January 2004.

<sup>67</sup> Jeffrey Green <jeffrey.green@osd.mil> “Question Regarding Use of Photos in Political Campaigns,” electronic mail message to Steven T. Strong <steven.strong@osd.mil>, 4 May 2004; Associated Press, “Pippy Can Appear in Uniform in Campaign Ads,” *Associated Press State and Local Wire*, 3 March 2003 (216 words) [database on-line]; available from Lexis-Nexis; accessed 14 November 2004.

<sup>68</sup> Such an expansion would almost certainly be precluded by the free speech guarantee of the First Amendment. U.S. Constitution, amend. 1.

<sup>69</sup> Department of Defense, *Screening the Ready Reserve*, Department of Defense Directive 1200.7 (Washington, D.C.: U.S. Department of Defense, 18 November 1999), 5, 8.

<sup>70</sup> Department of Defense, *Management of the Standby Reserve*, Department of Defense Directive 1235.9 (Washington, D.C.: U.S. Department of Defense, 10 February 1998), 2.

<sup>71</sup> Ibid.

<sup>72</sup> U.S. Constitution, art. 1, sec. 6, cl. 2.

<sup>73</sup> U.S. Attorney General Francis Biddle, “Members of Congress Serving in the Armed Forces,” opinion for the President, 40 Op. Att’y Gen. 301, Washington, D.C., 23 December 1943, 302-3.

<sup>74</sup> Ibid., 302.

<sup>75</sup> *Reservists Committee to Stop the War v. Laird*, 323 F. Supp. 833, 837-839 (D. D.C. 1971), *aff’d mem.*, 495 F.2d 1075 (D.C. Cir.), *rev’d on other ground*, 418 U.S. 208 (1974).

<sup>76</sup> *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

<sup>77</sup> U.S. Constitution, art. 1, sec. 5, cl. 1.

<sup>78</sup> Reservists Committee to Stop the War, 323 F. Supp. at 837-38.

<sup>79</sup> Reservists Committee to Stop the War, 418 U.S. at 211.

<sup>80</sup> Reservists Committee to Stop the War, 323 F. Supp. at 839.

<sup>81</sup> Assistant Secretary of Defense for Reserve Affairs Stephen M. Duncan, "Service of Members of Congress in the Ready Reserve," memorandum for Secretary of Defense, Washington, D.C., 5 September 1990.

<sup>82</sup> Republican Senator Lindsey O. Graham is a colonel in the Air Force Reserve; Republican Representatives Steve Buyer, a colonel, and John M. Shimkus, a lieutenant colonel, are in the Army Reserve; and Republican Representative Mark S. Kirk is a lieutenant commander in the Navy Reserve. Wayne Woolley, "Members of Military Branch into Politics, *Newhouse News Service*, 28 May 2004 (1062 words) [database on-line]; available from Lexis-Nexis; accessed 16 November 2004; Dori Meinert, "President Promotes West Point Graduate Shimkus to Lieutenant Colonel in Army Reserve," 16 May 2001; available from <[http://www.copleydc.com/Archives-2001/meinert\\_5-16-01\\_a.htm](http://www.copleydc.com/Archives-2001/meinert_5-16-01_a.htm)> ; Internet; accessed 15 November 2004; Congress Merge, "Information on Representative Mark S. Kirk of Congressional District Number 10 of Illinois;" available from <<http://www.congressmerge.com/online/db/cgi-bin/newmemberbio.cgi?member=IL10&site=congressmerge>>; Internet; accessed 23 October 2004.

<sup>83</sup> Reservists Committee to Stop the War, 323 F. Supp., 842-43; Assistant Attorney General, Office of Legal Counsel Leon Ulman, "Members of Congress Holding Reserve Commissions," memorandum opinion for the Counsel to the President, No. 77-59, 1 Op. Off. Legal Counsel 242, Washington D.C., 18 October 1977.

<sup>84</sup> Reservists Committee to Stop the War, 323 F. Supp. 838. The Government argued that a reserve officer did not hold an "Office under the United States," citing case and statutory law that permitted reserve officers who were attorneys at law, while they were not on active duty or active duty for training, from practicing before the Treasury Department, prosecuting a case in the Court of Claims, or performing other work that the law prevented officers of the Government from undertaking. *Simmons v. United States*, 55 Ct. Cl. 56 (1920); *U.S. Code* vol. 5, sec. 2105(d) (1970). The District Court rejected this argument, saying that neither the cited case law nor its subsequent codification affected the interpretation of the constitutional bar against Members of Congress holding incompatible offices.

<sup>85</sup> Biddle, "Members of Congress Serving in the Armed Forces," 302-3.

<sup>86</sup> Ulman, "Members of Congress Holding Reserve Commissions," 242.

<sup>87</sup> DOD General Counsel Terrence O'Donnell, "Compatibility of Service in Congress with Reserve Status," memorandum for Secretary of Defense, Washington, D.C., 29 August 1990.

<sup>88</sup> Deputy DOD General Counsel (Personnel and Health Policy) Paul S. Koffsky, conversation with author, 26 March 2003, Washington, D.C.

<sup>89</sup> Reservists Committee to Stop the War, 323 F. Supp. 836.

<sup>90</sup> "Two More 'Paper Soldiers' Getting Promoted for Nothing," 1 May 2004; available from <<http://www.politicalpuzzle.org/archives/2004/05/index.php>>; Internet; accessed 25 August 2004.

<sup>91</sup> Woolley, "Members of Military Branch into Politics."

<sup>92</sup> Groppe, "Direct from Bush: Buyer's New Reserve Rank." President Bush also promoted Representative Shimkus to lieutenant colonel on 15 May 2001. Meinert, "President Promotes West Point Graduate Shimkus to Lieutenant Colonel in Army Reserve."

<sup>93</sup> Representative Mark S. Kirk, letter to Secretary of Defense Donald H. Rumsfeld, Washington, D.C., 10 December 2003; Stephen M. Wellock <[Stephen.Wellock@osd.mil](mailto:Stephen.Wellock@osd.mil)> "Congressman Kirk Request for Tour of Duty in Iraq," electronic mail message to Steven T. Strong <[steven.strong@osd.mil](mailto:steven.strong@osd.mil)>, 8 January 2004.

<sup>94</sup> Laura Zuckerman, "Congressman Buyer Called to Active Duty," news release, Washington, D.C., 20 March 2003. See also Juliet Eilperin, "Ind. Lawmaker Will See War from Front Row: Rep. Buyer's Stint at POW Camp Will Be His Second Tour in Gulf Region," *Washington Post*, 22 March 2003, sec. A, p. 27 [database on-line]; available from Pro-Quest; accessed 18 November 2004.

<sup>95</sup> Schenke, "Challenger Claims Buyer Lied about His Military Status."

<sup>96</sup> Holsti, 27; Ricks, "The Widening Gap between the Military and Society," 72.

<sup>97</sup> Ulrich, 259.

<sup>98</sup> At least 16 states have legislators in a Reserve Component. Charles Sheehan, "Lawmaker Soldiers Called Up," *Salt Lake City Deseret News*, 9 March 2003, sec. A, p. 2 (627 words) [database on-line]; available from Lexis-Nexis; accessed 9 December 2004.

<sup>99</sup> Belko, "Rumsfeld Overrules Army, Lets Pippy Run," sec. A, p. 1 and Sioca, "Military to Investigate Leave Granted to Lawmaker." See also Representative Wm. Lacy Clay, letter to Secretary of Defense Donald H. Rumsfeld, Washington D.C., 12 September 2003.

<sup>100</sup> Former Assistant Secretary of Defense Lawrence Korb has said that elected officeholders should not be in reserve service at all. Philip Dine and Terry Ganey, "Missouri Will Allow Hidden Weapons: Military Makes Rare Exception to Grant Leave for Foe of Veto," *St. Louis Post-Dispatch*, 12 September 2003, sec. A, p. 1 (888 words) [database on-line]; available from Lexis-Nexis; accessed 31 October 2004.

<sup>101</sup> Reservists Committee to Stop the War, 323 F. Supp. at 837-38.

<sup>102</sup> Department of Defense, *Management of the Standby Reserve*, 3.

<sup>103</sup> *Ibid.*, 836.

<sup>104</sup> Woolley, "Members of Military Branch into Politics."

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