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

John Lynch, University of Baltimore
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John A. Lynch, Jr. 1

I. INTRODUCTION

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

When this war is over, Americans need to do some serious thinking about the all-volunteer armed forces, the one legacy of the Vietnam War with which the nation seemed comfortable. Among other things, we have to decide whether a single parent, and, in many cases, both parents, should be deployed in war zones.

Is the nation’s reliance on an army of volunteers worth the emotional grief that comes from ripping military parents away from their children? Do the children of American servicemen and women have to be the first casualties of war? 2

The composition of the United States force that deployed to the Persian Gulf at that time confronted the American people with a specter that many found agonizing—a significant number of children, sometimes very young children, were left at home without a parent. 3 Although military deployment of soldiers has always entailed emotional disruption of families, 4 in past wars, the American military was made up mostly of unmarried young males, 5 it was not nearly as likely to leave large numbers of children at home without a parent.

1 Professor of Law, University of Baltimore School of Law. The author expresses his appreciation of Christine Moore, University of Baltimore School of Law Class of 2017 and a 20 year veteran of the United States Air Force. The author was assisted in the preparation of this article by a stipend provided by the University of Baltimore School of Law.

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

3 The Department of Defense estimated that in 18,400 families children were separated from their parents, including 1200 dual-military families. Rich Shaughnessy, Children Bear Burden of War; Call-up of Moms, Dads Left Kids Without Parents, SAN DIEGO UNION TRIB., March 9, 1991, [hereinafter Shaughnessy] at A1.


In the midst of Desert Storm, the press detailed many heart-rending scenes: an Army private threatened to report for deployment with her new born of four months after her husband was also deployed to Saudi Arabia, or the four-month-old twins being left with their grandmother. Such spectacles created an outcry among child advocacy groups and in Congress. Sen. John Heinz of Pennsylvania introduced legislation to prohibit the military from assigning a single parent or both parents of the same minor child “to duty in the Persian Gulf theatre of operations.” This bill was not passed. The Senate instead adopted a substituted amendment by Sen. John Glenn of Ohio which included language commending the Department of Defense for “the efforts it has made to be sensitive to the family needs of members of the Armed Forces consistent with military requirements,” and emphasizing that “military readiness and the interests of national security require that the Department of Defense have maximum flexibility in the assignment and deployment of military personnel . . . .” Then Rep. Barbara Boxer of California introduced legislation similar to that introduced by Sen. Heinz, which fared no better in the House of Representatives.

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12 H.R. 537, sec 1 of which provided:

(a) BOTH PARENTS IN ARMED FORCES- If a husband and wife who have a minor child are both members of the armed forces on active duty and are both assigned to perform duty in a region designated by the Secretary of Defense as a hostile fire or imminent danger region, the Secretary at the request of the members from the obligation of performing such duty. The Secretary may select which of the two members is to be relieved.

(b) SINGLE PARENT- If a single parent who has a minor child is a member of the Armed Forces on active duty and is assigned to perform duty in a region designated by the Secretary of Defense as a hostile fire or imminent danger region, the Secretary at the request of the member shall relieve the member from the obligation of performing such duty.

(c) EFFECT OF OPERATON OF SECTION-
Both Sen. Heinz and Rep. Boxer said that the objective of their proposed legislation was to prevent the creation of orphans.\textsuperscript{13} Notwithstanding public distaste for that prospect, Congress was swayed by reluctance to interfere with the military during the deployment.\textsuperscript{14}

Concern about these new issues resulted in hearings by a House of Representatives subcommittee.\textsuperscript{15} These hearings involved testimony for and against legislation intended to allow single parents or one member of dual-military couples to defer deployment. Much of the opposition to such legislation focused on the unfairness of allowing exemption from deployment based on parenthood.\textsuperscript{16} Another concern expressed was that such legislation would set back the career prospects of women in the armed forces.\textsuperscript{17} This latter concern was apparently based on an assumption that most military single parents were female, which is not the case.\textsuperscript{18}

\begin{enumerate}[label=(d)]
\item REASSIGNMENT TO OTHER DUTY- If a member of the Armed Forces is relieved under this section from an obligation to perform certain duty, the Secretary of Defense shall endeavor to assign the member to perform other duty that does not require the separation of the member from a child.
\item DELAY OF DISCHARGE OR RETIREMENT FROM ARMED FORCES-If a member of the Armed Forces is relieved from an obligation to perform certain duty, the Secretary of Defense may delay the date of the discharge or retirement of the member by the lesser of—
\begin{enumerate}
\item the period of the duty assignment from which the member is relieved; and
\item such period as the Secretary may determine.
\end{enumerate}
\end{enumerate}

This bill died in subcommittee. See \url{http://thomas.loc.gov/cgi-bin/bdquery/z?102:HR00537:@@@X}.


\textsuperscript{14} Clymer, \textit{supra} n. 8, and Priest, \textit{supra} n. 6.


\textsuperscript{16} This was put stridently by Rep. Arthur Ravenel, Jr.:

\begin{quote}
[Soldiers] are in the same unit and they ceaselessly train, and they are friends. All of a sudden, an emergency develops, and we have to deploy to fight—or possibly fight. The guy who is a single parent can say ‘Oh no, I’ve got an option here in the law, and I can request not to be deployed,’ and he is not deployed . . . . I know I would resent it very much if I had to fight but he didn’t because he has a child back home, possibly living with a grandmother or something like that. \textit{Id.} at 33.
\end{quote}

\textsuperscript{17} Assistant Secretary of Defense for Force Management and Personnel Christopher Jehn testified:

\begin{quote}
Finally, I want to make sure that everyone understands that this is a woman’s issue. This legislation
Fortunately, the First Gulf War was short, as were the disruptions of the lives of military families that it occasioned. Notwithstanding legislation directing the military to study and evaluate uniform standards for deployment of the parents of young children, by the time of the start of United States military operations in Afghanistan in 2001 and Iraq in 2003, the policies of the military had not changed. And so the country revisited the spectacle of children of deployed soldiers left with grandparents, friends of their parents or even their older siblings, or parents risking military discipline by refusing to deploy, or a mother who was able to avoid leaving her children on their own through the intervention of a United States Senator.

In June, 2007, Sen. Judd Gregg of New Hampshire introduced legislation that would have limited simultaneous deployment to combat zones of dual-military couples who have minor children. This bill did not become law. The same day Sen. Gregg introduced another bill that would have required the threats to turn back to the time when marriage or motherhood was cause for discharge or discrimination in assignment. Id. at 39-40.

DACOWITS, the Defense Advisory Committee on Women in the Service, through its chair, Becky M. Costantino, opposed the proposal on the basis that existing “[h]umanitarian provisions” allowed the armed forces to allow exceptions to deployment on a case by case basis. Id. at 94.

As noted infra nn. 121, 122 and accompanying text, DACOWITS would change its position in the midst of the conflicts in Afghanistan and Iraq.

18 The majority of single parents in the military are male. In 2012 there were 48,463 male single parents in the active force and 24,008 females, U.S. DEP’T OF DEFENSE, 2012 DEMOGRAPHIC PROFILE OF THE MILITARY COMMUNITY 130 (2012) [hereinafter 2012 DEMOGRAPHICS], although females are disproportionately represented because the active forces are 14.6% female. Id. at 19. In the reserves there are 53,556 male single parents and 26,758 females. Id. at 153.


20 For example, a grandmother moved to a Colorado military facility from her home and husband in Akron, Ohio to care for her daughter’s six children and step-children, aged 6 to 12. “I volunteered, but I never thought it would happen,” she said. See Richard Jerome, Jason Bane, Cathy Free and Jane Sims Podesta, 2 Soldiers 6 Kids 1 Exhausted Grandmother, PEOPLE, Sept. 8, 2003, at 59.


Secretary of Defense to conduct a study on the effects on “children, infants and toddlers” of deployment of reservist parents. 24 This bill did not pass either. Instead, Congress enacted a requirement that the Department of Defense adopt policies and plans for military family readiness. 25 The legislation Congress enacted did not address specifically the concern in Sen. Gregg’s bill concerning “psychological and emotional resilience” of children coping with deployment.26

Thus, during both of the massive foreign deployments following creation of the all-volunteer force, the issue of whether children ought to be left without their parents arose. In both instances legislation was introduced to restrict the military’s power to do so. In both instances, such restrictions did not become law.

24 S. 1660, 110th Cong. (2007). Sec. 2 of this bill would have required the Secretary of Defense to consider the need (A) to develop materials for parents and other caretakers of children of members of the National Guard and Reserve who are deployed to assist such parents and caretakers in responding to the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children, including the role such parents and caretakers can play in addressing and mitigating such implication; (B) to develop programs and activities to increase awareness throughout the military and civilian communities of the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children and their families and to increase collaboration within such communities to address and mitigate such implications; (C) to develop training for early child care and education, mental health, health care, and family support professionals to enhance the awareness of such professionals of their role in assisting families in addressing and mitigating the adverse implications of such deployment (and the death or injury of such members during such deployment) for such children; and (D) to conduct research on best practices for building psychological and emotional resiliency in such children in coping with the deployment of such members.

25 10 U.S.C. 1781b, which provides that the purposes of such policy and plans are:

(1) To ensure that the military family readiness programs and activities of the Department of Defense are comprehensive, effective, and properly supported.
(2) To ensure that support is continuously available to military families in peacetime and in war, as well as during periods of force structure change and relocation of military units.
(3) To ensure that the military family readiness programs and activities of the Department of Defense are available to all military families, including military families of members of the regular components and military families of members of the reserve components.
(4) To make military family readiness an explicit element of applicable Department of Defense plans, programs and budgeting activities, and that achievement of military family readiness is expressed through Department-wide goals that are identifiable and measurable.
(5) To ensure that the military family readiness programs and activities of the Department of Defense undergo continuous evaluation in order to ensure that resources are allocated and expended for such programs and activities to achieve Department-wide family readiness goals.

26 S. 1660, supra note 24.
Congress’ inaction has left the issue of the advisability of leaving young children without parents to the armed services, and, in cases of insurmountable hardship, all services have procedures for deferring deployment on the basis of humanitarian considerations.\textsuperscript{27} At a time of military conflict that constitutes a national emergency maintaining combat capability and unit cohesion in the armed forces are unquestionably paramount considerations.\textsuperscript{28} But these vital concerns have at times been tempered by humanitarian concerns. For example, a sole surviving child, whose father, mother, brother or sister is killed, captured or missing in action, or is permanently and totally disabled, may request not to be assigned to duty involving actual combat with the enemy.\textsuperscript{29} This exemption applies automatically if the soldier or his or her parents or spouse so request.


\textsuperscript{28} Those were the concerns of then Defense Secretary Richard Cheney and Army Chief of Staff Gen. Colin Powell in resisting legislation that would have restricted limitations on deployment of dual-military or single parents during Operation Desert Storm. See Rick Maze, Pentagon Balks at Change in Parent Assignment Policy, NAVY TIMES, Feb. 25, 1991, at 3. [hereinafter Maze].

In today’s military there are no hard and fast rules for deciding whether a child is to be left with someone other than her parents on account of deployment. That does not mean that children are always left without their parents. The military has allowed discharges to parents to parents whose children would otherwise be left in an unsatisfactory arrangement for their care. But the military services are subject to no constraining legislative direction in deciding whether to leave military children solely in the custody of persons other than their parents. In the absence of such statutory constraints, the military decides such matters based upon its judgment. This judgment is informed in significant part by a premise that the soldier, sailor, airman or Marine has voluntarily undertaken his or her obligation to serve in the armed forces. It may be said that in the all-volunteer military, service members make a conscious choice to subject themselves to the needs of the military.

But the children of service members do not volunteer for service, and indeed cannot sign on to any service obligation that may deprive them of parental care and attention even though the decision of their parents to join the military may provide their children with material and other rewards they might not otherwise enjoy. Unquestionably, life or death issues entailed in armed conflict, for members of the armed forces, their families and for the country, require extraordinary deference by legislators and the public to the military’s judgment in matters pertaining deployment of military personnel. But leaving a very young child without his or her parents for the length of a wartime deployment poses a risk of psychological harm to such a child. What may seem to be a fair circumstances. The Military Selective Service Act, 50 U.S.C. App. Sec. 456 (o) (2006) also contains a similar exemption from induction into the armed forces.

30 In the first few months of the first Persian Gulf War, for example, the Navy allowed the discharge of 44 reservists on account of child care problems. Maze, supra note 28, at 3. The military asserted this capacity to make exceptions in cases of “extreme hardship” in resisting Heinz-Boxer proposed legislation. Statement of Assistant Secretary of Defense Stephen Duncan in 1991 Hearings, supra note 15, at 54.


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

33 For example, active duty and reserve soldiers are eligible for retirement after 20 years of service and are eligible for health care for life. See e-How, at http://www.ehow.com/info_7767703_army-20year-retirement-benefits.html (last visited December 29, 2013).
reconciliation between the national interest and the interests of a member of the armed forces who has volunteered for military service may not, as a matter of public policy, be satisfactory with respect to the service member’s child. As in a child custody dispute in the context of a divorce, there must be a recognition that competing interests motivate the competitors to protect their own interests, and not necessarily the interests of the child. And so, the states have universally adopted the best interest of the child approach in determining child custody and other matters concerning children.\textsuperscript{34}

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

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

In an inquiry with respect to the child’s best interests, even the rights of parents must yield in appropriate cases.\textsuperscript{37} One factor the court considers in making a custody determination is the child’s mental health.\textsuperscript{38}

The combat deployment of parents of very young children may entail a “competition” not entirely unlike that of divorcing parents for custody, only it is not the physical presence of the child at

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\item \textsuperscript{34} Jeff Atkinson, MODERN CHILD CUSTODY PRACTICE sec. 4.2 (2d ed. 2006). \textit{See also} CHILD WELFARE INFORMATION GATEWAY, CHILDREN’S BUREAU U.S. DEP’T OF HEALTH & HUMAN SERV., DETERMINING THE BEST INTERESTS OF THE CHILD (2012), at 1. Available at \url{https://www.childwelfare.gov/systemwide/laws/policies/statutes/best_interest.cfm} [hereinafter DETERMINING THE BEST INTERESTS OF THE CHILD].
\item \textsuperscript{35} Id. at 2.
\item \textsuperscript{36} \textit{Finlay v. Finlay}, 148 N.E. 624, 626 (N.Y. 1925) (citations omitted).
\item \textsuperscript{37} DONALD T. KRAMER, I THE LEGAL RIGHTS OF CHILDREN 48 (2d rev. ed. 2005)
\item \textsuperscript{38} DETERMINING THE BEST INTERESTS OF THE CHILD, supra n. 34, at 3.
\end{itemize}
\end{footnotesize}
issue, but rather that of the parent. Both the military and parenthood have claims for the parent’s presence.

Military exigencies and national security require that the armed forces have the authority to compel military personnel to risks and hardship of combat deployment when the national interest requires. That power of government was recognized long before the era of the all-volunteer force. 39 In today’s military, all service members may be have said to have “signed on” to all that follows until the completion of their contractual obligations. But since service members today, unlike those in the past, 40 are more likely to have families and children, 41 the well-being of their children must be said to take on a new prominence as a matter of national interest. And is it not unreasonable to question whether the children of service members “signed on” to the consequences of government action that may be detrimental to their emotional well-being. 42

As noted, the determination of whether a very young child may be deprived entirely of the care and attention of their parents through deployment is now made by the military without congressionally-imposed standards. This article shall set out a legislative proposal for limiting such deployment for both of dual-military parents or single parents of preschool children. Before doing that, however, it will in Part II address how the present policy with respect to combat deployment of parents has developed and, particularly, how the military has responded to the needs of children during the first Persian Gulf

40 Military Recognition of Family Concerns, supra, n. 4 at 289.
41 For example, in 2012, 43.9% of active service members, 2012 DEMOGRAPHICS, supra, n. 17 at 128 and 43% of reservists, id. at 149, have children.
42 In an editorial Sen. Heinz commented ironically on the notion that military personnel volunteer for adverse consequences of deployment to their children:

It is questionable whether an 18-year-old tantalized by offers of tuition money has any inkling of what he or she is giving up by “volunteering” to leave children yet to be born behind. Our righteous insistence that “a deal is a deal” is disturbingly reminiscent of the story of Rumpelstiltskin, the dwarf in German folklore who exacts a terrible price for helping a desperate young woman—her first-born child.

War and the more recent conflicts in Afghanistan and Iraq. In Part III it will address the psychological and other effects of depriving young entirely of the presence of their parents. Finally, it will propose a limitation on deployment of both members of dual-military parents and single parents of preschool children and will address the appropriateness of such a policy in light of national defense and other national priorities.

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

In the face of unprecedented need to deploy parents of minor children, it is neither surprising nor objectionable that the military leadership would insist on the obligations of service members concerning military readiness. It is also not surprising that during both national emergencies involved in the First Gulf War and later conflicts in Afghanistan and Iraq that Congress rejected proposals to protect children from being left without their parents. The response of the military to the plight of young children alone at home was not heartless and inflexible.

And, in truth, the unhappy predicament of leaving children without their parents was the culmination of changes visited upon the military by overriding forces in society. It was not something that had happened on that scale before the end of the Vietnam War, when the military was made up

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

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


44 Stephen Duncan, Assistant Secretary of Defense for Reserve Affairs, testified that the service secretaries had authority to approve a delay in deployment in exceptional cases or to process parents for separation from the service. 1991 Hearings, supra, n, 15, at 54.
mostly of young, unmarried males. Even before the end of the Vietnam War, public opposition to the military draft prompted President Nixon to create a commission chaired by former Defense Secretary Thomas S. Gates, which in 1970 proposed elimination of conscription. Authority for conscription ended June 30, 1973. The military then moved to an all-volunteer force. In the absence of the high-turnover pool of young male draftees that directly or indirectly provided much of the manpower, military recruitment was redirected in two ways likely to affect the well-being of children—toward enlistment of career military and of women. People remaining in the military longer are more likely to be or become married and to have children. At the end of the era of the military draft, fewer than 2% of soldiers in the Army were women. This percentage has increased significantly. And, in all of the services, nearly half or more of all personnel are married. The large numbers of both female and married military personnel mark significant departures from the military of the past. The military has not accepted all of these changes willingly.


48 Jeanne Holm, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 246 (1982).

49 Mady Wechsler Segal and Jesse J. Harris, What We Know about Army Families 7 (Sept. 1993) (report for U.S. Army Research Institute for Behavioral and Social Sciences), available at http://hancle.dtic.mil/100.2/ADA27189. [Hereinafter Segal and Harris].

50 Segal and Harris, supra n. 49, at 9.

51 Id. at 9.

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

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

54 Enlisted personnel in the Army were not permitted to marry until 1925 and until World War II, they could be discharged if they married without permission. Rosemary Skaine, WOMEN AT WAR: GENDER ISSUES OF AMERICANS IN COMBAT 213 (1999). Until 1967, there was a 2% limit on women in the military, see Linda Strite Murnane, Legal Impediments to Service: Women in the Military and the Rule of Law, 14 DUKE J. OF GENDER L. &
The military has reacted to the potentially disruptive effect of deployment on parenthood, and *vice versa*, by preventing the enlistment of single parents. The Army has a parallel policy, and states the rationale therefor as follows:

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

Of course, preventing enlistment of single parents does not prevent the armed forces from having large numbers of single parents in the ranks. This significant number of single parents, as well as the phenomenon of the dual-military couple, raises the same issues of deployment readiness that caused the military to prevent enlistment of single custodial parents.

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55 The Executive Order excluding pregnant women was rescinded by the Defense Department only in the face of litigation. PHILIPPA STURM, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS 115 (2004). See also *Struck v. Secretary of Defense*, 460 F. 2d 1372 (9th Cir. 1971), *vacated* 409 U.S. 1071 (1972).

Although the removal of this automatic pregnancy exclusion, applicable only to women, eliminated a significant career impediment, women were treated differently in an important respect going to the heart of the military mission—they were excluded from combat. That, of course, is to change as a result of former Defense Secretary Panetta’s rescinding of the ban on women military personnel in combat on January 24, 2013, to be implemented by January 1, 2016. *Defense Department Rescinds Direct Combat Exclusion Rule: Services to Expand Introduction of Women into Previously Restricted Occupations and Units*, U.S. DEPARTMENT OF DEFENSE NEWS RELEASE 027-13, Jan. 24, 2013, at [http://www.defense.gov/Releses/Release.uspx?ReleaseD=15784](http://www.defense.gov/Releses/Release.uspx?ReleaseD=15784) (last visited Jan. 7, 2014).


57 For example, 7.8% of the members of the United States military services are single parents. See U.S. Military About.Com. [http://www.usmilitary.about.com/cs/genfamily/a/familycare.htm](http://www.usmilitary.about.com/cs/genfamily/a/familycare.htm) (last visited Jan. 7, 2014).

The armed services have responded to this by requiring service members who become single custodial parents after enlistment and dual-military couples to maintain family care plans. A Department of Defense Instruction applicable to all branches of the military requires a family care plan of all “single member parents with custody of children and military couples with dependents.” The requirement to create such a plan may be activated by birth of a child, adoption, loss of a spouse, enlistment of a spouse in the military, assumption of sole care for an elderly or disabled family member or absence of a spouse on account of job commitments. An active-duty military member must notify his or her commanding officer of any such change in circumstances within 30 days, a reservist within 60 days.

Most importantly, a family care plan must specify a caregiver for the service member’s dependent children. The guidelines provide that such caregiver is an individual who is not a member of the armed services, and who is at least 21 years old and is capable of self-care and care of children or other dependent family members, and who agrees, preferably in writing, to care for one or more family members during a service member’s absence for indefinite periods to ensure that the service member is available for worldwide duties. The plan must also include necessary arrangements to relocate the caregiver or family members, and arrangements for the financial well-being of family members covered by the plan and a power of attorney. The guidelines require that a service member certify the family care plan annually with his or her commander.

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61 Id. at d.
62 Id. at e.2.
63 Id. at b.
64 Id. at DEFINITIONS.
65 Id. at c.1.(d).
66 Id. at c.1.(c).
67 Id. at a.1.(d).
dual-military couple members with dependent children to maintain family care plans. The Army Regulation provides that soldiers who fail to comply with the policy requiring maintenance of a Family Care Plan “should be considered for separation from the service.”

Unless the person designated in a family care plan is the other, noncustodial parent of the child of a single-parent service member, the result of deployment of the service member is to place his or her child in the care of a non-parent, perhaps a non-relative. For reasons discussed at the beginning of this article, and below in Part III, this is sometimes not really what a service member hopes will ever happen or what is good for the child’s emotional development. But agreeing to leave one’s child with “someone else,” while keeping one’s fingers crossed that it will never happen, allows the service member with dependents to attain the benefits of military life.

In its insistence that a service member execute a family care plan, the military reconciles its (legitimate) insistence that its service members “be able to satisfactorily perform their duties and remain available for worldwide deployment at all times” with service members’ responsibilities as parents, notwithstanding that such deployment may leave young children in circumstances that their parent or parents, if they could foresee such circumstances would actually come to pass, would not deem appropriate.

Military deployments are not the only circumstances that may separate parents from their children. But such deployments are singularly troublesome in that it is the government that brings

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69 ARMY REGULATION 600-20, supra n. 69, at 5-5. g. (12). MARINE CORPS ORDER 1740-13B, supra n. 69, provides a similar sanction for failure to maintain a family care plan. At 4.a. (2) (d).
70 Department of Defense Instruction No. 1342.19, supra n 60, at 2.(d).
about such separation, albeit on the basis of military necessity and the national interest. The military is not unaware of, and sympathetic to the adverse impact of deployment on military families.\textsuperscript{71} All of the services have the ability to make exceptions in the face of compelling hardship,\textsuperscript{72} but ultimately, how to address such hardships is exclusively the purview of the military.

There are times, of course, when almost any other competing consideration should yield to military necessity. Were the United States to be confronted with physical invasion on multiple fronts, as were the Israelis during the so-called Yom Kippur War in 1973, perhaps all personal considerations of military personnel and their families would be subordinated to military exigency.\textsuperscript{73} Fortunately, the nature of modern warfare and world geography likely preclude such an exigency for the United States. But if a single parent of a preschooler designated for foreign deployment is a fuel truck driver, it is likely that his or her unit still needs a certain number of fuel truck drivers.\textsuperscript{74} There is no question that the all-volunteer force has been strained by unprecedented demands of foreign combat since 2001.\textsuperscript{75} And the Army has announced that it intends to reduce its active component to 490,000 soldiers by the end of 2015.\textsuperscript{76}

\textsuperscript{71} REPORT ON THE IMPACT OF DEPLOYMENT OF MEMBERS OF THE ARMED FORCES ON THEIR DEPENDENT CHILDREN, supra n. 59, at 15.

\textsuperscript{72} Supra n. 27.

\textsuperscript{73} See ABRAHAM RABINOVICH, THE YOM KIPPUR WAR 269 (describing desperate measures contemplated in the face of the Syrian advance in Israel’s north). And yet, remarkably, under the Israeli Defense Service Law of 1986, sec. 39, women who are married or have children are exempt from otherwise compulsory military service.


In deciding whether to accommodate the hardship of a single parent or of a deployed dual-military couple, the military must balance such personal exigencies with the needs of the force in light of the resources made available by Congress. As noted earlier, Congress has so far refused to impose any limitation on the military in deploying all of a young child’s parents. For the reasons addressed in the next section, this article contends that such a limitation should be imposed by Congress in the best interest of such children. In essence, Congress is in the best position to weigh with some detachment the needs of the military and the psychological well-being of military children, and to ensure comcomitantly that the military has the resources to accommodate restrictions imposed upon the military.

III. WHY SEPARATION OF YOUNG CHILDREN FROM ALL OF THEIR PARENTS THROUGH DEPLOYMENT IS NOT IN THE BEST INTEREST OF SUCH CHILDREN

The effects of parental separation from children during wartime is not a new subject. In the past, such literature focused on paternal absence. The number of women, single parents and dual-military couples with children have raised issues concerning separation of children from parents and its consequences to a greater degree than ever before.

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77 See nn. 9-26 and accompanying text.
78 See, e.g. Diane Foster, Stephen Davies, Howard Steele, The Evaluation of British Children during World War II: A preliminary investigation into long-term psychological effects, 7 AGING & MENTAL HEALTH, 398 (2003 [hereinafter evacuation of British Children during World War II], which found at 402 that 43.2% of those evacuated as children in wartime Britain believed that their lives changed for the worse after such evacuation.
80 In 2012 females made up 14.6% of members of the active military. U.S. DEP’T OF DEFENSE, 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 19 (2012) and 18.2% of members of the reserves. Id. at 65.
81 In 2012 there were 72,471 single parents in the active military. Id, at 130.
82 In 2012 there were 50,766 active duty and reserve service members in dual military marriages with children. Id. at 112.
Such issues came to the fore particularly with the First Gulf War in 1990-91. In the context of legislative proposals discussed earlier83 and the House held hearings. The most dramatic witness testifying in favor of limiting the military’s power to leave children without either parent was Dr. Bryant Welch, who was then Executive Director, Practice Directorate of the American Psychological Association. Dr. Welch testified that prolonged separation from both parents during a time of war “is a very significant psychological hazard.” 84

Dr. Welch adverted to the predisposition of children at birth to create attachment relationships, usually with parents. 85 According to Dr. Welch, “a warm, sensitive, continuous relationship with at least one attachment figure lays the groundwork for must future psychological development.” 86 Dr. Welch described both short-term and long-term effects of disruption of this bond by the removal from the child of attachment figures.87 In the short term, he testified that children experience an increase in anxiety. 88 He testified further that in the long term children may experience difficulties “in areas of intuitive self-esteem and social skills.” 89

Dr. Welch differentiated among children of different ages concerning the effects of the absence of their parents. Noting that children aged six and over can deal with separations from parents of days or weeks, he stated that such separations disrupted attachment relationships for children aged one to

83 See nn. 9-15 and accompanying discussion.
84 1991 Hearings, supra n. 15 at 133. In his testimony Dr. Welch invoked the work of Anna Freud, who studied the effects of evacuation of British children to the country from areas bombed by the Nazis during World War II. ANNA FREUD, DOROTHY BURLINGHAM, WAR AND CHILDREN (1943). [hereinafter WAR AND CHILDREN]. Dr. Freud contended that those children evacuated from the bombing, but away from the care of their parents, were more upset than those who remained to face the hazards of the bombing. Id. at 37.
85 Id. at 134.

86 Id.
87 Although Dr. Welch’s testimony is nearly a quarter century old, and is largely based on research that had its beginnings in wartime Britain, the importance of attachment formation was acknowledged in a recent report of the Department of Defense. See REPORT ON THE IMPACT OF DEPLOYMENT, supra n. 59, at 19-20.
88 Id.
89 Id.
three. Dr. Welch concluded that “the younger the child, the more disruptive a separation of equal length will be.” It must be noted that Dr. Welch stated that a person other than a parent may function like a parent for this purpose, and that there may be dramatic individual differences between children in their responses to separation from parents.

Dr. Welch's discussion of attachment relationships of military children with their parents evokes the scholarship of Dr. John Bowlby, a British psychiatrist and psychologist whose theories originated in part in his study of British children separated from their parents because of German bombing of heavily populated areas during World War II. Between his early observations and his death in 1993, he articulated attachment theory as a developmental explanation of human behavior.

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

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90 Id. REPORT OF THE IMPACT OF DEPLOYMENT, supra n. 59, makes a similar distinction:

The earlier literature on military deployment-related family separation indicated that young children are more vulnerable to the effects of family separation due to deployment than older children. . . . Recent studies supported these findings from previous studies.

91 1991 Hearings, supra n. 15, at 135.
92 Id.
93 Id. at 136. For example one study stated that boys and younger children appear to be at greater risk for such harm. Stephen J. Cozza, Ryo S. Chen, James A. Pols, Military Families and Children During Operation Iraqi Freedom, 76 PSYCHIATRIC QUARTERLY 371, 376 (2005). Another study suggests that girls are more likely to report depressive symptoms in the face of maternal separation. Penny F. Pierce, Amiram D. Vinokur, Catherine L. Buck, Effects of War-Induced Maternal Separation on Children’s Adjustment During the Gulf War and Two Years Later, 28 JOURNAL OF APPLIED PSYCHOLOGY 1286, 1287 (1998).
96 ATTACHMENT, supra n, 98 at 371.
97 A SECURE BASE, supra n. 98, at 9.
Most of Bowlby’s work focused on behavior observed in interaction, or lack thereof, between infants and their mothers.\(^98\) But in assessing the consequences of the proximity, or not, of attachment figures to young children, Bowlby focused on the conduct of both parents,\(^99\) and, in certain instances, others.\(^100\) The infant’s need for reassurance of the availability of the attachment figure takes different manifestations,\(^101\) and eventually diminishes in its urgency.\(^102\) But while its intensity diminishes, Bowlby posits that this interplay between the infant/child and the attachment figure/s has lasting effects on the child’s behavior.\(^103\)

The success, or not, of this relationship affects children in many ways, according to attachment theory.\(^104\) A child secure in her relationship to her parents at this stage is likely to be more confident and competent.\(^105\) The capacity to make bonds with parents is important to a child’s mental health.\(^106\)

Bowlby’s attachment theory of development is not without critics.\(^107\) Mental well-being is no doubt influenced by experiences beyond infancy.\(^108\) Nevertheless, as an ideal, it is difficult to dispute

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

\(^{99}\) *A SECURE BASE*, supra n. 98 at 136.

\(^{100}\) He noted, for example, that good foster care may have mitigating effects when parents are not available. *LOSS*, supra n. 98, at 438.

\(^{101}\) At eight months an infant seeks to elicit the parent’s attention and is not content until she obtains it. *ATTACHMENT*, supra n. 98, at 247.

\(^{102}\) Thus occurs by the age of 3. *Id.* at 371.

\(^{103}\) *Id.* at 207.

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

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

\(^{105}\) *A SECURE BASE*, supra n. 98, at 10.

\(^{106}\) *Id.* at 121.

\(^{107}\) For example, see Everett Waters, Nancy S. Weinfeld, Claire E. Hamilton, *The Stability of Attachment Security from Infancy to Adolescence and Early Adulthood: General Discussion*, 71 CHILD DEVELOPMENT 703, 704 (2000)
the notion that “attachment of a child to parents is the primary relationship through which we learn to become social beings.”

At the outset of his career Bowlby noted that war and military service disrupts the relationship between parents and children. This is inevitable. But, as noted earlier, military obligations of parents today potentially may deprive children of the care and proximity of both parents at the same time (or the sole parent).

So what is the effect of this unprecedented possibility of depriving young children of their attachment figures at a critical time in the lives of such children? A report of the American Psychological Association on this question states that one of the report’s benefits is to call attention to the paucity of research on the effects of military deployments on the mental health and well-being of children of military families. A study published in the journal of the American Academy of Pediatrics noted that overall, children in the study’s sample of children of deployed parents experienced greater emotional and behavioral difficulties than their civilian counterparts. This is consistent with studies of who suggest that Bowlby may have overstated the risks of separation from parents, but state also that gross failures of early care may have long-term effects on social development.

109 Peter Morris, Attachment and Social Policy, in ATTACHMENT AND HUMAN SURVIVAL 74 (Marci Green, Marc Scholes eds., 2011)
110 Evacuation of British Children During World War II, supra n. 78, at 399.
111 AM. PSYCHOL. ASS’N, THE PSYCHOLOGICAL NEEDS OF U.S. MILITARY MEMBERS AND THEIR FAMILIES: A PRELIMINARY REPORT 5 (2007). The APA is not alone in this contention that the research on the effects of deployment on young children is inadequate. See Jay D. Oshofsky, Molinda M. Chartrand, Military Children from Birth to Five Years, 23 THE FUTURE OF CHILDREN 61, 73 (2013); Anita Chandra, Rachel M. Burns, Terri Tanielian, Lisa H. Jaycox, Molly M. Scott, Understanding the Impact of Deployment on Children and Families 6 (Rand Center for Military Health Policy Research, Working Paper No. WR-566, 2008). A recent study viewed addressing the need for such research as an obligation to the members of the armed force:

As a nation of individuals, families, communities, and systems of care, we share a responsibility to support military children and families by investing in research, services, and policies that honor their service and sacrifice. The best way to show our national gratitude is to respond effectively to their needs. Clinicians, researchers, and community members must work together to understand the challenges that military-connected children face, and to tackle the long-term implications for public health. Patricia Lester, Eric Flake, How Wartime Military Service Affects Children and Families, 23 THE FUTURE OF CHILDREN 121, 134 (2013).

experiences of military children in earlier military conflicts involving the volunteer, increasingly female, and increasingly made up of married personnel, armed forces, 113 and with other studies involving children affected by deployments related to the more recent conflicts in Iraq and Afghanistan. 114 Emotional disruption of children is greater when both parents are deployed. 115 Not all experts agree that separation entailed in deployment causes lasting harm to children. 116 And some who defend the current discretion that the military enjoys in such matters suggest that children left behind and their parents are somehow compensated by the parents’ job security and other economic benefits available in the armed services. 117

Nevertheless, the military’s current ban on enlistment by single parents who have sole custody of minor children 118 appears, at least in part, an implicit acknowledgement that separating parents from their children on account of military operations is not good for children. And contemporaneously with the First Gulf War’s unprecedented scale of deployment of female parents, a presidential commission charged with evaluating assignment of women in the armed services noted public dissatisfaction with the effects of such deployment:

[D]uring and after U.S. intervention in the Gulf War, the American public and military community expressed extreme disapproval of the deployment of single mothers/fathers

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


118 Supra n. 56.
due to possible effects on children left behind.\textsuperscript{119}

The recommendations of this commission clearly intended to prevent complete deployment-related separation of parents from their children.\textsuperscript{120} Similarly, the 2004 Report of the Defense Department Advisory Committee on Women in the Services (DACOWITS) also recommended that “the Services should be encouraged not to deploy both parents of minor children simultaneously” and that single custodial parents and one member of dual military couples,” with the approval of their commander [should be exempt] from stop loss restrictions if their family situation is incompatible with continued military service.”\textsuperscript{121} This represented a turnaround from the position taken by DACOWITS’s chair in the 1991 congressional hearings concerning parent issues related to Desert Storm.\textsuperscript{122}


\textsuperscript{120} The commission’s recommendations included the following:

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

2. For those single parents who have children older than two years and those parents who have been out for two years, they must have an approved and reliable child care package to re-enter the Service.

3. In dual-service families, only one parent should be allowed to serve in a deployable position.

4. Single parents with custody of children under school age should not be allowed to deploy.

5. Single parents should not be permitted to join the Armed Forces (current situation).

6. Spouses of military parents should not be allowed to enter the Service.

7. One parent in a dual-service couple should be forced to separate from the Service.

\textsuperscript{121} Defense Department Advisory Committee on Women in the Services, \textit{2004 REPORT} 76 (2004). Stop loss restrictions permit the services to prevent retirement or separation from the service prior to deployment. \textit{See Jeff Schogol, Gates wants military to minimize stop loss programs, STARS AND STRIPES,} Jan. 27, 2007 at \url{http://Stripes.com/news/gates-wants-military-to-minimize-stop-loss-program-1.51}.

\textsuperscript{122} 1991 Hearings, \textit{supra} n. 15, at 94 (statement of Becky Constantino). Ms. Constantino then opined that a legislatively created exemption from deployment for parents “would prevent each service member’s opportunity to be a dedicated, full and equal partner in defense.”
The military has devoted resources and programs to protect the well-being of military children. But such resources are not as available to the families of reservists, many of whose families do not live on or near military installations. The National Guard and Reserves have recently represented 40% of activated military personnel.

Whatever the state of knowledge about behavioral consequences of depriving infants and other preschool children of the care and attention of their parents, it is nearly impossible to contend, as a matter of good sense, that it is ever a good thing. As discussed, above in Section I, Congress has resisted creation of a parental right to defer deployment without their children outside their care. Congress has not done so lightly. The importance of the military’s mission generally requires great deference by Congress. But the importance of that mission also requires great consideration for the service members who carry it out—the soldiers, sailors and airmen. Other than persons in the clutches of the criminal justice system, no others in our country may be compelled to deprive their young children of their care and attention. As the all-volunteer force has become reliant upon commitment of its members for a greater span of their life cycles, the notion that volunteers “sign on” for whatever eventuates in exchange for college tuition, early retirement and cheap groceries at the PX, is outmoded. So too, is the notion that providing proper attention for very young children is a form of slacking one’s duty.

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125 Melinda M. Chartrand, Benjamin Siegel, At War in Iraq: Children in U.S. Military Families, 7 AMBULATORY PEDIATRICS 1 (2007).
126 This sentiment was encapsulated in questioning by Rep. G.V. Montgomery concerning Rep. Boxer’s proposed legislation in 1991:

In your legislation [Rep. Boxer] you can come to the national training center out at Fort Irwin [as a reservist], but when you have been in for 3 months, then, all of a sudden you decide that you want to get out; you don’t want to go to the Middle East. The problem I see with that is, the service has trained this individual as a tank commander, the service really needs him, but under your bill he could get out. It wouldn’t necessarily be a female here in this situation but a single parent, and he
Parents with young children are not as much a novelty as they were at the time of Desert Storm. The military services should be required to take a new look at adapting to their needs, and more particularly, to the needs of their youngest children. The cost of not doing so during wartime was articulated long ago by Anna Freud,\(^\text{127}\) and the Congress has not addressed this cost for too long.

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

IV. A PROPOSAL FOR CHANGE

The present regime leaves the question of whether to deploy both parents of a dual-military couple or single parents of preschool children to the services themselves. This should be replaced by legislation that allows either of military spouses who have children under five years of age at the time of proposed deployment or single parents who have such children, to defer deployment until after their children reach the age of five.\(^\text{128}\) With respect to dual-military couples, the military would be permitted to select which parent would be deployed. Dual-military parents not selected for deployment and single

\(^\text{127}\) In assessing harm done to children separated from their parents in wartime Britain she stated:

> It has already been generally recognized, and provision has been made accordingly, that the lack of essential foods, vitamins, etc, in early childhood will cause lasting bodily malformation in later years, even if harmful consequences are not immediately apparent. It is not generally recognised that the same is true for mental development of the child. Whenever certain essential needs are not fulfilled, lasting psychological malformations will be the consequence. These essential elements are: the need for personal attachment, for emotional stability, and for permanency of educational influence. WAR AND CHILDREN, supra n. 84, at 11.

parents who elect not to be deployed on the basis of having a child under the age of five would be permitted to separate from the service or transfer to reserve status, \(^{129}\) or to perform military duty at someplace that would not require separation from his or her child until the child attains the age of five. Time in such parental leave would not count for purposes of pay, retirement or time in grade or service. The non-deploying parent could, if he or she does not separate from the service, make to an enlistment agreement that would commence upon the child’s reaching the age of five, or the end of the need to deploy the parent. Upon his or her return to service, the non-deploying service member’s service obligation and career would resume from where it was at the time parental leave began.

The advantages of effecting this change through legislation are, first, that it gives Congress an opportunity to make the informed and disinterested assessment of what is in the best interests of preschool children of military personnel. Adopting this proposal would not amount to a perfect solution for the military or for all children. The nature of the military’s mission inevitably entails disruption of the family lives of service members. Such disruption is probably never a good thing for any family members, and it is most unlikely that the state of psychological knowledge, remarkably rudimentary today, \(^{130}\) will ever reach a point at which there will be consensus as to the precise age of separation of a child from the care of its parents does the most harm. By providing for the deferral of deployment only for parents of preschoolers, the proposal herein focuses only on what seems to have been the most disconcerting disruptions of the bond between parents and children when the country has confronted the need for massive foreign deployment in the era of the all-volunteer force.

Secondly, even though the drawdown of United States forces in Afghanistan \(^{131}\) may perhaps lessen the burden on the military to fulfill its global responsibilities, such a respite may not be eternal. Covering the roles of parents exempted from deployment under the proposal herein may at some point

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\(^{129}\) For instance, to the Standby Reserve. See RESERVE COMPONENTS TO THE ARMED FORCES, \textit{supra} n. 74, at 11.

\(^{130}\) See n. 111, \textit{supra}.

require a larger military. Congress’ taking ownership of the psychological well-being of very young children would entail acknowledgement of personnel costs and explicit assumption of responsibility for such costs. \textsuperscript{132}

\textbf{CONCLUSION}

The American people expect a great deal from its service members. Their representatives have a corresponding responsibility to protect the well-being of military families, especially the most vulnerable members of such families. The issue of the vulnerability of very young children has arisen in both of the large mobilizations that have occurred since abandonment of the military draft. Both times, in the heat of battle, Congress has declined to limit separation of very young children from their parents through deployment. But the failure to taken into consideration the potential harm to very young children of service members imposes a cost on such children that the children cannot and their parents \textit{should not} have to bear. When it comes to the well-being of the children of its service members, the nation must err on the side of caution. Congress must impose a requirement that makes paramount the best interests of the most vulnerable of military children. It must limit the ability of its military to deploy service members in a way that may cause lasting psychological injury to the children of the military. And if such limitation would involve additional costs, they are costs that should be shared by \textit{all} Americans, and not disproportionately imposed upon the military families themselves.

\textsuperscript{132} Some in Congress have acknowledged the importance of doing so, as stated by Rep. Joe Wilson of South Carolina:

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