

# “The Good Soldier Defense is Dead. Long Live the Good Soldier Defense”<sup>1</sup>: The Challenge of Eliminating Military Character Evidence in Courts-Martial

Captain Rory T. Thibault\*

## I. Introduction

Abandoning the weak legal and policy justifications for the broad application of the good Soldier defense is long overdue, especially in sexual offense cases. Congress recently set reform in motion by mandating the amendment of Military Rule of Evidence (MRE) 404(a) to include a direct prohibition of military character evidence for certain offenses and a modification of the standard of admissibility for the remaining offenses.<sup>2</sup> However, the legislative effort and rule drafted by the Joint Service Committee on Military Justice (JSC) present an imperfect solution that is unlikely to withstand judicial scrutiny. The JSC has a limited ability to address some shortcomings of the Congressional mandates, but primary responsibility for shaping the interpretation and survival of the new rule rests with practitioners at the trial and appellate level.

This article addresses both parts of the new rule. First, the constitutionality (or unconstitutionality) of the per se prohibition of military character evidence in certain offenses is examined. Second, the effectiveness of the “residual clause” that limits the good Soldier defense in the remaining offenses where “evidence of the general military character of the accused is not relevant to an element of an offense for which the accused has been charged” is assessed. This assessment is preceded by a brief review of the good Soldier defense’s modern history.<sup>3</sup> This review emphasizes the good Soldier defense’s application in sexual offense cases in order to contextualize the challenges the new rule presents. Finally, recommendations are provided for the JSC and practitioners

to improve the rule and to shape interpretation of the residual clause to achieve meaningful reform.

Celebration of the demise of the good Soldier defense is premature; the per se prohibition upon military character evidence is unlikely to withstand constitutional challenge. Further, the residual clause will achieve little without complimentary litigation to effectively redefine the standard of admissibility. This article provides practitioners with the background required to understand how to shape the new rule, now that it has been promulgated.

## II. Congressional Intent and the Proposed Rule

### A. The Congressional Response to Military Sexual Assault

Criticism of the good Soldier defense is not new, but reform was not seriously contemplated until Congress renewed its focus upon military sexual assault in 2013.<sup>4</sup> The Congressional response was accompanied by a sense of urgency and bi-partisan support in the otherwise contentious 113th Congress.<sup>5</sup> *The Invisible War*<sup>6</sup> and recent high profile cases involving senior leaders<sup>7</sup> have also contributed to calls for military justice reform. A perception that military leaders (including panel members) will “protect their own” and disregard credible allegations when a good performer or senior leader stands accused has colored the debate.<sup>8</sup> In response to growing concerns of the efficacy of the military justice system the National Defense Authorization Act of 2014 (FY14 NDAA) included provisions that expanded

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\* Judge Advocate, U.S. Army. Presently assigned as Battalion Judge Advocate, 2nd Battalion, 5th Special Forces Group (Airborne), Fort Campbell, Kentucky. J.D., 2007, Vermont Law School; B.A., 2004, University of Richmond. Previous assignments include Senior Trial Counsel, Seventh Army Joint Multinational Training Command, Grafenwöhr, Germany, 2013-2014; Defense Counsel, Bamberg, Germany, 2011-2013; Senior Trial Counsel, U.S. Army Combined Arms Support Command and Sustainment Center of Excellence, Fort Lee, Virginia, 2010-2011; Trial Counsel, 49th Quartermaster Group, Fort Lee, Virginia 2009-2010; and Administrative Law Attorney, U.S. Army Combined Arms Support Command, Fort Lee, Virginia 2008-2009. Member of the bar of Vermont.

<sup>1</sup> “The king is dead, long live the king!” is an aphorism, based upon the traditional proclamation made following the accession of a new monarch in medieval Europe. “The king is dead” is the announcement of a monarch who has just died, while “long live the king” refers to the heir who ascends to a throne upon the death of the preceding monarch. Thus, while the king may be dead, the monarchy continues on.

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. Law No. 113-291, § 536, 128 Stat. 3292, 759 (2014).

<sup>3</sup> The “good Soldier defense” is a term used to describe the use of “good military character evidence” by an accused, and thus, is a defense theory premised upon such evidence. See, e.g., Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 117-18 (2001). It is not in itself an affirmative defense; rather, it describes the

defense’s use of good military character evidence at trial and the rationale for introducing such evidence. *Id.*; see also U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGE’S BENCHBOOK para. 7-8-1. (10 Sep. 2014). This article uses the terms in context as appropriate to the discussion.

<sup>4</sup> See, e.g., Jennifer Steinhauer and Thom Shanker, *Congress Stepping Up Its Efforts Against Sexual Assault in Military*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/24/us/congress-steps-up-anti-sexual-assault-efforts.html>.

<sup>5</sup> See, e.g., Alan Fram, *113th Congress Ends with more Fights than Feats*, ASSOCIATED PRESS (Dec. 17, 2014), <http://www.washingtontimes.com/news/2014/dec/17/113th-congress-ends-with-more-fights-than-feats/>.

<sup>6</sup> THE INVISIBLE WAR (Chain Camera Productions 2012).

<sup>7</sup> See, e.g., Nancy Montgomery, *Air Force Pilot’s Sex Assault Dismissal Sparks Cries For Reform*, STARS & STRIPES (Mar. 3, 2013), <http://www.stripes.com/news/air-force-pilot-s-sex-assault-dismissal-sparks-cries-for-reform-1.210371>.

<sup>8</sup> “Too often, the good [S]oldier defense has been seen as overcoming specific evidence directly related to a crime. This appearance undermines the essential perception that a verdict is determined by direct evidence supporting the elements of the crime, not the previous reputation of the defendant.” 159 CONG. REC. S8311-8312 (daily ed. Nov. 20, 2013) (statement of Sen. Reed).

victims' rights and limited command discretion and post-trial clemency powers, but maintained the traditional role of the commander as the centerpiece of the military justice system.<sup>9</sup>

The rationale for limiting the good Soldier defense was foreshadowed in a relatively minor provision of the FY14 NDAA that directed modification of the non-binding discussion to Rule for Court Martial (R.C.M.) 306 by striking “the character and military service of the accused” from the matters a commander should consider in deciding how to dispose of an offense.<sup>10</sup> More symbolic than consequential, the provision demonstrated congressional concern that reliance upon military character will lead to bias and inhibit disposing of cases based upon their factual merit.

The good Soldier defense is at the heart of this concern—presenting a risk of panel nullification at trial. Specifically, an accused, whose guilt has been otherwise proven beyond a reasonable doubt, could be “excused” of criminal liability based upon deference to past achievement or reputation. This risk is amplified in cases where the putative victim is not similarly situated in life or professional esteem as the accused.<sup>11</sup> *United States v. McNeill*, highlights this risk: evidence of good military character excluded on the merits was later admitted during pre-sentencing, triggering the panel to request reconsideration of their guilty finding.<sup>12</sup>

In the second session of the 113th Congress, three separate bills proposed modifying MRE 404(a) to limit admissibility of military character evidence. The Victims' Protection Act of 2014 (VPA)<sup>13</sup> proposed relatively modest reform by modifying the standard of admissibility in the same manner as the residual clause (without any direct prohibitions by offense). An early version of the National Defense Authorization Act of 2015 (FY15 NDAA), passed by the House of Representatives, pursued a bolder approach:

prohibiting general military character evidence outside of defined “military specific offenses.”<sup>14</sup> However, it was the Senate version of the FY15 NDAA that formed the basis of the enacted version: combining a prohibition upon military character evidence in certain offenses with a modification of the standard of admissibility for the remaining offenses.<sup>15</sup>

The influential National Institute of Military Justice Blog (CAAFLOG) named reforming the good Soldier defense the top military justice story of 2014 “because the new restriction so dramatically upends well-settled military law.”<sup>16</sup> Indeed, the effort to limit the applicability of the good Soldier defense conflicts with a long tradition of broad, nearly universal, admissibility. However, the aggressive stance adopted by Congress will face a gauntlet of challenges that a more cautious solution, such as that proposed by the VPA, would not have.

#### B. The Revised MRE 404(a)

In compliance with the FY15 NDAA, the MRE 404(a)(2) was amended to read as follows:

(A) The accused may offer evidence of the accused's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the [Uniform Code of Military Justice]:

- (i) Articles 120-123a;
- (ii) Articles 125-127;
- (iii) Articles 129-132;

<sup>9</sup> Military Justice Improvement Act, S. 1752, 113th Cong. § 2 (2013). See also Military Justice Improvement Act, S. 2292, 113th Cong. §§ 2-3, 5 (2014).

<sup>10</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672, 705 (2013).

<sup>11</sup> See *supra* text accompanying note 8; see also Jennifer Hlad, *Restriction of 'Good Soldier' Defense at Center of Senate Bill* (Mar. 11, 2014), <http://www.stripes.com/news/us/restriction-of-good-soldier-defense-at-center-of-senate-bill-1.272243>.

<sup>12</sup> *United States v. McNeill*, 17 M.J. 451 (C.M.A. 1984).

<sup>13</sup> Victims Protection Act of 2014, S. 1917, 113th Cong. § 3(g) (2014). The Victims Protection Act of 2014 was passed by the Senate with a vote of 97-0 on March 10, 2014 and was referred to the Committee on Armed Services, among others, in the House of Representatives. *Victims Protection Act of 2014*, CONGRESS.GOV (March 11, 2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1917>. If enacted, Military Rule of Evidence (MRE) 404(a) would have been “modified to clarify that the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused, except that evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.” S. 1917, 113th Cong. § 3(g) (2014).

<sup>14</sup> Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. § 537 (passed 335-98 by the House of Representatives). 160 CONG. REC. H4804-05 (daily ed. May 22, 2014). The military-specific offenses specified include Articles 84 through 117, Uniform Code of Military Justice (UCMJ), with the exception of Article 106 and Article 112a, UCMJ. *Id.* Although, the latter offense is described as “Article 112” suggesting the offense of “drunk on duty” was omitted in error. Articles 133 and 134, UCMJ, are also designated as military-specific offenses. H.R. 4435, 113th Cong. § 537(b). For the applicable offenses, the rule would be amended “to clarify that the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused, except when evidence of a trait of the military character of an accused is relevant to an element of an offense for which the accused has been charged.” *Id.* at § 537(a).

<sup>15</sup> Carl Levin National Defense Authorization Act for Fiscal Year 2015, S. 2410, 113th Cong. § 545(g) (2014).

<sup>16</sup> Zachary D. Spillman, *Top Ten Military Justice Stories of 2014—#1: Restriction of the Defense of Good Military Character*, NIMJ BLOG-CAAFLOG (Jan. 3, 2015), <http://www.caaflg.com/2015/01/03/top-ten-military-justice-stories-of-2014-1-restriction-of-the-defense-of-good-military-character/>.

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(v) An attempt or conspiracy to commit one of the above offenses.<sup>17</sup>

The draft rule proposed by the JSC did not deviate from the language prescribed by the FY15 NDAA.

### III. Constitutionality of the Per Se Prohibition

The Constitution guarantees an accused “a meaningful opportunity to present a complete defense.”<sup>18</sup> The right to present a defense is derived from the Sixth Amendment rights to obtain witnesses and confront adverse witnesses as well as the Fifth Amendment guarantee of due process of the law.<sup>19</sup> However, as *United States v. Scheffer* provides, the right to present a defense is not absolute:

A defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant’s interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not “arbitrary” or “disproportionate to the purposes they are designed to serve.”<sup>20</sup>

Further, “the exclusion of evidence [is] unconstitutionally arbitrary or disproportionate only where it has infringed upon a *weighty interest of the accused*.”<sup>21</sup>

Federal circuit courts have interpreted this to mean that “the exclusion of evidence seriously undermine[s] ‘fundamental elements of the [accused]’s defense’ against the crime charged,”<sup>22</sup> or in the context of the entire record of trial, that the excluded evidence creates a reasonable doubt that did not otherwise exist.<sup>23</sup> It is also worth noting that under military law, a trait of character is pertinent when it “is one which is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it.”<sup>24</sup> Clearly, under some circumstances military character evidence is sufficiently “weighty” to warrant constitutional protection.<sup>25</sup>

#### A. Is the Per Se Prohibition Arbitrary?

An “arbitrary rule” is one that excludes “important defense evidence but [does] not serve any legitimate interests” of Government—specifically, interests relating to the trial process itself.<sup>26</sup> Consequently, identifying the legitimate interests served by the per se prohibition is a starting point of analysis. The good Soldier defense’s history of broad admissibility suggests that the per se prohibition is arbitrary, at least rhetorically; however, the standard of admissibility is flawed and overly broad. Critically, for this analysis, the current standard fails to adequately distinguish military character evidence that is merely relevant versus evidence that is constitutionally required.<sup>27</sup>

Identifying the policy and trial interests served by the per se prohibition is not readily ascertained from the legislative history of the new rule. Most significantly, there is scant material available to provide a coherent explanation for the delineation of offenses subject to the per se prohibition. In contrast, the VPA’s scope of applicability to all offenses was clear.<sup>28</sup> Likewise, the House version of the FY15 NDAA

<sup>17</sup> Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057-6058 (Dep’t of Def. Feb. 4, 2015) (notice of response to public comments).

<sup>18</sup> *California v. Trombetta*, 467 U.S. 479, 485 (1984) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (internal citations and ellipses omitted).”)

<sup>19</sup> “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense,” and “[t]his right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19 (1967).

<sup>20</sup> *United States v. Scheffer*, 523 U.S. 303, 308 (1997) (internal quotations and citations omitted).

<sup>21</sup> *Id.* (emphasis added) (citing *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. at 22-23).

<sup>22</sup> *Miskel v. Karnes*, 397 F.3d 446, 455 (6th Cir. 2005) (quoting *Scheffer*, 523 U.S. at 315). See also *Rock*, 483 U.S. at 55 (quoting *Chambers*, 410 U.S. at 295).

<sup>23</sup> See, e.g., *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006) (quoting *Washington v. Schriver*, 255 F.3d 45, 47 (2d Cir. 2001)).

<sup>24</sup> *United States v. Court*, 24 M.J. 11, 14 (C.M.A. 1987).

<sup>25</sup> “The Supreme Court long has recognized that, in some circumstances, character evidence alone ‘may be enough to raise a reasonable doubt of guilt,’ as ‘the jury may infer that’ an accused with such a good character ‘would not be likely to commit the offense charged.’” *United States v. Gagan*, 43 M.J. 200, 202 (C.A.A.F. 2005) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361 (1896)). The good Soldier defense has undoubtedly influenced, if not determined, the outcome of courts-martial; however, it may have also defeated the ends of justice in cases where it should not have been admitted.

<sup>26</sup> *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). *Holmes*’ discussion of *Scheffer* noted that the prohibition upon polygraph evidence at issue “serve[d] several legitimate interests in the criminal trial process,” indicating such interests are trial focused and do not necessarily extend to include broad policy interests of the Government. *Id.* Ensuring “fairness” in the trial process is the baseline objective of any constitutionally-sustainable rule that excludes evidence meeting the definition of “relevant” under MRE 401.

<sup>27</sup> The author takes the position that admissibility has far exceeded the latter standard—with military character evidence admitted anytime it may be vaguely connected to a controversy at trial.

<sup>28</sup> See *supra* text accompanying note 13. From the context of the overall bill, the change appears to have been motivated by a desire to impact the

established and defined a distinction between military specific offenses and common law crimes.<sup>29</sup> Section 536 of the enacted FY15 NDAA provides no such reasoning for the per se prohibition's applicability to some, but not all, of the common law offenses under the Uniform Code of Military Justice (UCMJ).<sup>30</sup>

Specifically, offenses charged as violations of Articles 118 (murder), 119 (manslaughter), 119a (death or injury of an unborn child), 124 (maiming), and 128 (assaults), UCMJ, are not subject to the per se prohibition. Only speculation and inference provide any explanation for Congress' determination that these offenses be treated differently. Moreover, the Congressional Report accompanying the FY15 NDAA adds confusion by stating that the objective of section 536 is to prohibit the good Soldier defense in sexual offenses cases.<sup>31</sup> The absence of useful legislative history or explanatory text does not render the new rule arbitrary itself—however, it does exacerbate concerns of “arbitrariness” and leaves the interests served by the per se prohibition open to interpretation.

The language of the new rule also does not explain the interests served or rationale for differentiating between offenses. First, there is no unifying element or theory of criminal liability tying offenses as disparate as rape, arson, and fraud against the United States Government together.<sup>32</sup>

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good Soldier defense in sexual offense cases despite its broader reach. Had the Victims' Protections Act (VPA) been enacted, the modification of the standard would not have raised the constitutional concerns of the per se prohibition. Further, the Response Systems to Adult Sexual Assault Crimes Panel recommended that, “Congress should enact Section 3(g) of the [VPA] because it may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time”. RESPONSE SYSTEMS PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, 50 (June 2014), [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf) [hereinafter RESPONSE SYSTEMS PANEL]. But, it cautioned “that this change is unlikely to result in significant modification of current trial practice.” *Id.*

<sup>29</sup> See *supra* text accompanying note 14.

<sup>30</sup> This exceeded the Response Systems to Adult Sexual Assault Crimes Panel's recommendation. RESPONSE SYSTEMS PANEL, *supra* note 28. Further, responses to a request for information (RFI) from the Panel to the Department of Defense and the services reveal concern over prohibiting military character evidence beyond sexual offenses. For example,

[e]liminating the defense's ability to present good military character evidence would have an unfavorable effect on a broad range of courts-martial” [and] [i]t is important to remember that the military justice system deals with a wide variety of offenses, including both common law crimes and purely military offenses. Good military character evidence promotes fair and just outcomes in many of those cases. It is important to avoid changes to the military justice system designed to have a particular impact on sexual assault prosecutions without a full understanding and appreciation of how those changes would affect the system's fairness when trying cases presenting a vast array of criminal charges.

RESPONSE SYSTEMS PANEL, RESPONSE TO REQUEST FOR INFORMATION 108, <http://responsesystemspanel.whs>.

Second, common law offenses not subject to the per se prohibition relate to murder, lesser included offenses thereof, or offenses premised upon bodily harm. This could be indicative of a desire to preserve the good Soldier defense in alleged war crimes cases—where the lawfulness of actions or omissions may be closely related to duty. However, crediting duty status or circumstances presents an inconsistency: forgery and fraud offenses may likewise be committed ostensibly in the scope of duty, while many assaults may have no connection to the military at all. Congress's absence of a coherent rationale for differentiating between offenses contributes to arguments that the new rule is flawed and arbitrary in application.<sup>33</sup>

The per se prohibition also faces a difficult reconciliation with existing rules and principles of evidence. “[T]he Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant.”<sup>34</sup> Military Rule of Evidence 403 requires that relevant evidence must bear sufficient probative value to overcome countervailing interests or considerations.<sup>35</sup> This concept of balancing also applies to evidence offered under MRE 404(b) and MRE 413.<sup>36</sup> Rules of this nature are “familiar and unquestionably constitutional.”<sup>37</sup> Likewise, MRE 412 includes a balancing requirement under its “constitutionally required” exception, while also providing specific exceptions.<sup>38</sup> In contrast to the

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mil/Public/docs/Background\_Materials/Requests\_For\_Information/RFI\_Response\_Q108.pdf (last visited Dec. 10, 2015).

<sup>31</sup> Instead, the congressional record states that the purpose was to eliminate the “good [S]oldier defense” for the purpose of showing the probability of innocence for sex-related offenses.” H.R. REP. NO. 113-714, at 75 (2014).

<sup>32</sup> See 10 U.S.C. §§ 120-132 (2015).

<sup>33</sup> Further, assuming the exclusion of common law offenses from the per se prohibition is based upon an element of bodily harm, the same issues of inconsistency and lack of a clear policy purpose are presented: Most sexual offenses include an element of bodily harm. See 10 U.S.C. § 920 (2015).

<sup>34</sup> *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

<sup>35</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 403 (2012) [hereinafter MCM]; *Dimberio*, 56 M.J. at 26 (“Rules such as Mil. R. Evid. 403 and 404(a) that exclude evidence from criminal trials do not abridge an accused's constitutional right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. Evidence may be excluded even though of probative value if ‘its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.’” (quoting *Michelson v. United States*, 335 U.S. 469 (1948))); see also *United States v. Clemons*, 16 M.J. 44, 50 (C.M.A. 1983) (Everett, J., concurring) (“In some situations there are strong public policies that favor excluding certain types of relevant evidence.”).

<sup>36</sup> See, e.g., *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989); *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000).

<sup>37</sup> *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion)).

<sup>38</sup> See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Further, in assessing whether MRE 412 infringes upon an accused's right to present a defense, *Gaddis* notes that the legislative history of MRE 412 “‘makes clear the drafters' intention that this rule should not be applied in derogation of a

per se prohibition, none of these constitutionally-sustainable rules are absolute in nature; the absence of any exceptions or mechanism to balance competing interests presents a significant, if not existential, challenge to the rule.

Returning to *Scheffer*, the Supreme Court held that the absolute prohibition upon polygraph evidence required by MRE 707 did not infringe upon the right to present a defense. Policy considerations for exclusion were persuasive, but it was the Court's determination that polygraph evidence could never satisfy a balancing test that proved dispositive in sustaining the rule.<sup>39</sup> *Scheffer* relied upon a lineage of cases where the right to present a defense was threatened by statute or rules: one such rule precluded an accused from testifying at trial based upon her "hypnotically refreshed" memories,<sup>40</sup> another limited the ability of a co-accused to be called as a witness by a fellow co-accused in the latter's trial,<sup>41</sup> and a common law rule contributed to an accused being denied the opportunity to impeach his own witness.<sup>42</sup> Each case included a bright line rule of prohibition, depriving the trial court of the ability to consider the limitation in light of the particular circumstances of a case; all ended in reversal.<sup>43</sup> These cases involved the denial of any opportunity for the fact finder to consider evidence relating to a *factual matter* in dispute or to consider the confrontation of a witness in support of a defense theory.<sup>44</sup>

It is unclear whether evidence of a *subjective matter*, such as military character evidence, may be treated differently. However, courts have observed that "[t]he power of character evidence cannot be underestimated,"<sup>45</sup> and, "in some circumstances, character evidence alone may be enough to raise a reasonable doubt of guilt, as the jury may infer that an accused with such a good character would not be likely to commit the offense charged."<sup>46</sup> This rationale has sustained

the good Soldier defense in modern practice and is indicia of the "weighty" nature that character evidence may attain. Irrespective of whether evidence is factually based or subjective, an accused's "due process rights are [not] violated any time a . . . court excludes evidence that [an accused] believes is the centerpiece of his defense," rather, "a defendant's due process rights are violated when a . . . court excludes important evidence on the basis of an arbitrary, *mechanistic*, or *per se rule*, or one that is disproportionate to the purposes it is designed to serve."<sup>47</sup> This suggests that courts are unlikely to treat opinion or reputation evidence differently than more substantive evidence.

The propagation of the dubious legal reasoning underlying the current standard of admissibility has left no distinction between evidence that is merely relevant versus that which is constitutionally required. The so-called "nexus test" (discussed in depth in Section IV, *infra*) allows for admission of military character evidence so broadly that the relationship between an offense and character evidence is often "strained."<sup>48</sup> Defining, or redefining, the proper standard for admissibility plays a role in determining whether the rule is arbitrary. Specifically, whether the existing standard—emphasizing a subjective assessment of an offense's attendant circumstances—or an objective assessment strictly limited to an offense's elements emerges as the standard will greatly impact this issue.

Ultimately, without a determination that military character evidence could never be admitted in the offenses subject to the per se prohibition, it will be difficult for the judiciary to find that the per se prohibition is not mechanistic or arbitrary.<sup>49</sup> This consideration is also shared in the disproportionality analysis: a rule that prohibits constitutionally-required evidence is inherently

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criminal accused's constitutional rights." *Id.* at 253 (quoting *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)). *See also* *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004); *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (discussing the clear policy purposes, legislative intent, and drafter's analysis of MRE 412 and Federal Rule of Evidence (Fed. R. Evid.) 412, respectively).

<sup>39</sup> *United States v. Scheffer*, 523 U.S. 303, 307-08 (1997). The lack of scientific reliability in polygraph results contributed to the conclusion that such evidence could never overcome an MRE 403 balancing test—the prejudice of such evidence could never outweigh the nominal probative value of such evidence provided, based upon its lack of reliability and basis in opinion. *Id.* Further, *United States v. Collier* held that "the term 'unfair prejudice' in the context of [MRE] 403 . . . addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009).

<sup>40</sup> *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

<sup>41</sup> *Washington v. Texas*, 388 U.S. 14, 16-17 (1967).

<sup>42</sup> *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973).

<sup>43</sup> *See Rock*, 483 U.S. at 44; *Washington*, 388 U.S. at 14; *Chambers*, 410 U.S. at 284.

<sup>44</sup> *See Rock*, 483 U.S. at 56; *Washington*, 388 U.S. at 16-17; *Chambers*, 410 U.S. at 302-03.

<sup>45</sup> *United States v. Gagan*, 43 M.J. 200, 202-03 (C.A.A.F. 2005) (citing *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361 (1896)).

<sup>46</sup> *Gagan*, 43 M.J. at 202-03. Further, "[A]dmissibility of good character evidence is rooted in common observation and experience that a person who has uniformly pursued an honest and upright course of conduct will not depart from it and do an act inconsistent with it." *Id.* at 203 (citing 1A J. WIGMORE, EVIDENCE § 55 (Tillers rev. 1983)). Whether the strength of this dicta is justified in practice is open to debate.

<sup>47</sup> *Alley v. Bell*, 307 F.3d 380, 394 (6th Cir. 2002) (emphasis added).

<sup>48</sup> *See* Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 131 MIL. L. REV. 171, 185 (1990).

<sup>49</sup> The recommendation of the Response Systems to Adult Sexual Assault Crimes Panel do not create a per se prohibition, and the Army and Coast-Guard responses to the panel should have warned Congress of this issue: "Amending the rules of evidence to preclude 'good military character' evidence in all cases could have constitutional implications on an accused's right to present a defense . . . Eliminating the ability to introduce character on the terms provided in the [MRE] would raise a substantial constitutional issue insofar as it would impede the accused's right to present a defense." RESPONSE SYSTEMS PANEL, *supra* note 28; *see also* RESPONSE SYSTEMS PANEL, RESPONSE TO REQUEST FOR INFORMATION 108, *supra* note 30.

disproportionate, no matter how strong other legitimate interests may be. Considering the variability in probative value of evidence based upon the circumstances of a case and the strong preference for balancing competing interests under the rules of evidence, the per se prohibition is likely to be read as one of the “mechanistic” rules that the Supreme Court has declared unconstitutional.<sup>50</sup>

## B. Is the Per Se Prohibition a Disproportionate Solution?

Whether the good Soldier defense has assumed “constitutional proportions” is not directly addressed under military or federal case law.<sup>51</sup> However, the ubiquity of the defense makes it difficult to argue that it never assumes such magnitude at trial, even if presented as a complimentary theory to more substantive defenses. The current standard of admissibility makes a disproportionality analysis somewhat difficult, since military character evidence may be relevant in some manner, but not case dispositive or requiring constitutional protection.<sup>52</sup> Only a retrospective analysis, after all evidence has been considered and findings made, can resolve whether military character evidence was sufficiently “weighty” or likely to have changed the outcome of a case.<sup>53</sup>

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<sup>50</sup> Alternatively, though to the detriment of meaningful reform, the strongest argument that the per se prohibition is not arbitrary may be to emphasize the term “general military character” which is ill defined. *See United States v. Wattenbarger*, 21 M.J. 41, 45 (C.M.A. 1985). “General military character” is tolerated as an amalgamation of more specific traits, and not sufficiently “general” to be disqualified under MRE 404(a). Whether good military character has become synonymous with good general character is open to debate. *Cf. United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (holding that “a person’s military character is properly considered a particular trait of his general character . . .”). Acceptance of this blurred line between general character and military character is indicia of the powerful nature of tradition, or more charitably, *stare decisis*. “[A]dherence to precedent ‘is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). However, precedent “need not be followed when the precedent at issue is ‘unworkable or . . . badly reasoned.’” *Id.* Abandoning this logic could preclude the need for a constitutional analysis of the rule, leaving it to be interpreted as a restatement of existing law: That evidence of general character is inadmissible. Effectively, aspects of military character would remain admissible in all offenses, so long as what is offered is something more than generalized military character evidence. In other words, the per se prohibition could be preserved by arguing that it is irrelevant and redundant. However, the net effect may be a nullity as subsets of military character such as “character for personal responsibility” or civilian equivalents such as “law abidingness” emerge to assume this role in defense strategy. Only a change in the overall standard of admissibility would bring about any reform. Prosecutors could find themselves in an even more difficult position: With positive aspects of an accused’s character admitted, but the increased specificity stifling effective rebuttal or cross examination upon an accused’s “skeletons in the closet.”

<sup>51</sup> “To my knowledge, the Supreme Court has not made any specific pronouncement as to whether this evidentiary rule or its counterpart in federal or state evidentiary codes has a constitutional dimension.” *United States v. Vandelinder*, 20 M.J. 41, 49 (C.M.A. 1985) (Cox, J., concurring). However, the opinion further notes that “[r]econsideration of . . . the relationship of Article 59(a), [UCMJ], to the standard for constitutional

*United States v. Holmes* illustrates this problem. *Holmes* ended in reversal because of the standard used to exclude evidence of third-party guilt offered by the defense, not because exclusion of such evidence would always infringe upon the right to present a defense.<sup>54</sup> The trial court erred by crediting the prosecution theory and evidence, while conversely finding that defense “evidence of third-party guilt ha[d] only a weak logical connection to the central issues of the case.” The Court was troubled by the fact that “the strength of the prosecution’s case [could not] be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact.”<sup>55</sup> The difficulty in weighing the value of military character evidence without assuming the role of the fact finder has almost certainly contributed to the deference the good Soldier defense enjoys in practice: a “better safe than sorry” approach appears to be widespread even when evidence may be “only marginally relevant.”<sup>56</sup>

The potentially disproportionate consequences of the per se prohibition may be assessed through vignettes:

First, assume that a company supply sergeant has been charged with larceny of Government property in violation of Article 121, and loss or willful disposition of Government property in violation of

error may be appropriate.” *Id.* at n.2. *See also United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006) (describing the burden to demonstrate constitutional error).

<sup>52</sup> The absence of clear reasoning for the application of the per se prohibition (with perhaps the exception of sexual offenses) also contributes to this difficulty. *See supra* text accompanying note 26.

<sup>53</sup> *See United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). *See also infra* text accompanying note 94.

<sup>54</sup> In a victim-based crime, the good Soldier defense may provide an inference of doubt as to whether the offense occurred at all or the complaining witness has mistakenly identified the offender. The latter is similar to the defense theory of third-party guilt in *Holmes*, conceding that an offense occurred, but raising doubt that the accused committed it. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006).

<sup>55</sup> *Id.*

The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution’s proof, and the true strength of the prosecution’s proof cannot be assessed without considering challenges to the reliability of the prosecution’s evidence. Just because the prosecution’s evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.

*Id.*

<sup>56</sup> *Id.* at 325 (quoting *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also infra* text accompanying note 90 (discussing the often low probative value or impact military character evidence).

Article 108 loss or willful disposition of Government property, UCMJ, as an alternate theory of liability. Prior to unit equipment going missing and ending up at an off-post pawn shop, the Accused was an exemplary Soldier with top-tier non-commissioned officer evaluation reports, his supply standard operating procedure was adopted across his entire battalion, and he had brought a disorganized supply room and subpar supply squad up to standard. In this case, he did not make any statements, and the defense theory is that a subordinate, who denies wrongdoing, actually stole the property. Further, the elderly pawn shop owner cannot identify the Soldier who pawned the equipment and lost the record of the transaction.

This vignette exposes several problems. First, the charged offenses expose a situation where the good Soldier defense could apply to the “military specific offense” charged under Article 108 but not the offense under Article 121, UCMJ. Notably, the former is a general intent crime, while the latter is a specific intent crime. At times the prosecution may allege alternate theories of a case out of necessity, but in this scenario doing so may be detrimental to the overall case; irrespective of a limiting instruction it may be difficult to avoid the spillover of the fact finder’s opinion of the accused from one offense to the other. Second, under the current standard of admissibility, the good Soldier defense could be admitted and considered as a defense for both offenses. A clearly articulable basis for a military nexus exists—both in terms of the accused’s duties and the nature of the property. Even a strict elements based test of admissibility may not preclude this evidence, absent a per se prohibition, assuming the specification alleges that the items are “military property.”<sup>57</sup>

Consider another vignette involving a sexual offense, also exposing the potential for a disproportionate impact of the per se prohibition:

Assume that a male drill sergeant is accused by a female trainee of performing non-consensual oral sodomy during a counseling session in the accused’s office during duty hours. There are no witnesses and no physical evidence is recovered

due to delayed reporting. Further, the putative victim states that under other circumstances she would have engaged in sexual acts with the accused, but in this situation felt coerced. Specifically, she felt that she had to engage in the sexual act based upon the accused’s rank, position, and the inference that the counseling session would end in a recommendation for her separation from the Army if she did not acquiesce.<sup>58</sup> In a statement to law enforcement, the drill sergeant denies any sexual contact or acts, but admits that he found the putative victim attractive. He further claims that she made sexual advances toward him during the counseling session, which he declined. The drill sergeant has an exemplary military record, is happily married, and is a youth pastor at his local church. He also scores a 300 on the Army physical fitness test.

Generally, elements of a sexual assault offense do not directly implicate military responsibility or duties. Likewise, the relationship between the parties is seldom, if ever, required to be directly alleged in a specification, even it is essential to the theory of the case.<sup>59</sup> However, in this scenario the theory of criminal liability is predicated upon a senior-subordinate relationship and military duty—manifested in an ability to coerce the putative victim by threatening wrongful action or quid pro quo.<sup>60</sup> Only by assessing this situation strictly by the statutory elements could the significance of the accused’s military duties, relationship to the putative victim, and context of the threat be overlooked. This vignette highlights the risk of a disproportionate outcome by applying the per se prohibition: a conviction that would not have occurred, but for the exclusion of such evidence that adds context to the military duty at the center of the case.

Under many offenses subject to per se prohibition the facts and circumstances contributing to the theory of criminal liability may be substantially based upon the accused’s military duties or status, despite their nature as common law offenses. Likewise, military duty or status may have no connection to offenses not subject to prohibition, even if described as “military specific.”<sup>61</sup> Ultimately, the per se prohibition as enacted is incompatible with the nuance or balancing required to avoid infringement upon the right to present a defense. The rule’s absolute terms make it likely

<sup>57</sup> Other interesting issues are presented. For example, further assume that the prosecution provides notice under MRE 404(b) that the accused was facing financial problems at the time of the alleged offense. The military judge denies a defense motion in limine and determines that the prosecution may offer such evidence as a motive of the accused. Whether good military character evidence could be used to rebut this type of evidence, if otherwise prohibited, is an issue worthy of consideration in the future.

<sup>58</sup> For a prosecution under Article 120(b)(1)(A), UCMJ, “The term ‘threatening or placing that other person in fear’ means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.” MCM, *supra* note 35, pt. IV, ¶ 45.a.(g).(7); 10 U.S.C. § 920(g)(7) (2015).

<sup>59</sup> As an exception, an offense charged under Article 120(b)(1)(D) alleging an actual or purported relationship between the parties may necessitate charging the element of “inducing a belief by any artifice, pretense, or concealment that the person is another person.” UCMJ art. 120 (2012). For example, a medic pretending to be a gynecologist for purposes of digitally penetrating a fellow Soldier.

<sup>60</sup> Further, consider if the accused had also been charged under Article 92 for violating Army Command Policy prohibiting inappropriate relationships between individuals of different grades. See U.S. DEP’T OF ARMY REG. 600-20, ARMY COMMAND POLICY para. 4-14.b. (6 Nov. 2014).

<sup>61</sup> For example, riot or breach of peace in violation of Article 116, UCMJ. See *supra* text accompanying note 14.

that once a court determines that exclusion in one circumstance has infringed upon the right to present a defense the whole prohibition will fall—underscoring the importance of the residual clause’s interpretation.

#### IV. The Residual Clause in Context

The residual clause’s language alone will do little to change the status quo of admissibility, but other contemporary military justice developments provide a basis for developing a more restrictive standard. The tenuous constitutional footing of the per se prohibition means practitioners should not overlook shaping of the “new” standard prescribed by the residual clause—as this may be *the* standard of the future. However, whether the residual clause presents anything “new” is debatable; it does little more than integrate part of the former drafter’s analysis into the rule. The former drafter’s analysis has been broadly interpreted or ignored by military courts,<sup>62</sup> providing that:<sup>63</sup>

[MRE 404(a) is a] significant change from Para. 138 f of the 1969 Manual [for Courts-Martial] which also allows evidence of “general good character” of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. It is the intention of the Committee, however, to *allow the defense to introduce evidence of good military character when that specific trait is pertinent*. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.<sup>64</sup> (emphasis added).

The new rule has effectively merged the emphasized portion of the drafter’s analysis with a definition of

“pertinent” similar to that found in the case law on the subject.<sup>65</sup> Accordingly, the residual clause does not by itself present a drastic departure from the status quo. Allowing military character evidence when “relevant to any element of an offense” nominally clarifies *what* must be considered, but fails to redefine *how* judges do so. A vast array of circumstances may be imputed or inferred to be related to an element of an offense, leaving the trial judiciary significant leeway to interpret this revision as reconcilable with the current standard.

The ambiguity of the former rule and drafter’s analysis contributed to the broad interpretation of the admissibility of military character. Promulgation of MRE 404(a) in 1980 ushered in the modern era of the good Soldier defense,<sup>66</sup> and prohibited evidence of “general good character.”<sup>67</sup> However, the rule and analysis were generally imprecise.<sup>68</sup> Early interpretations of MRE 404(a) limited the good Soldier defense to military specific offenses, though this reasoning was quickly abandoned.<sup>69</sup> Many were critical of the rule and analysis, and “[t]he leading treatise on the Military Rules of Evidence stated: ‘[i]t might have been preferable for the drafters to amend the rule itself to reflect [limiting the good Soldier defense], rather than attempting to accomplish it through the non-binding Drafters’ [analysis].’”<sup>70</sup>

The legal arguments providing for broad use of the good Soldier defense have traditionally been complimented by several policy considerations: (1) military life entails a “separate society,” (2) the unique nature of military offenses, (3) Soldiers are “under surveillance” and subject to constant scrutiny, and (4) the long standing “tradition” of allowing military character evidence at trial. Proponents argue that each of these factors make “military character” an important

<sup>62</sup> See, e.g., *infra* text accompanying note 73.

<sup>63</sup> MCM, *supra* note 35, MIL. R. EVID. 404 analysis at A22-34.

<sup>64</sup> Paragraph 138f, referenced in the analysis, stated in part, “To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen.” MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f. (1969).

<sup>65</sup> See, e.g., *United States v. Court*, 24 M.J. 11, 14 (C.M.A. 1987).

<sup>66</sup> See Capofari, *supra* note 48, at 172-74 (providing a thorough history of the good Soldier defense and the treatment of character evidence before 1980).

<sup>67</sup> Capofari noted:

The drafters acknowledged that limiting favorable character evidence to pertinent traits was a “significant change” from prior military practice. The only justification for the change given by the drafters was that “general good character” is not a specific

trait. Then the drafters attempted to backpedal. Recognizing the longstanding use of good military character at courts-martial, the drafters stated that the committee intended to continue to permit this evidence “when that specific trait is pertinent.”

*Id.* at 176. Military Rule of Evidence 405(a) allows for opinion or reputation evidence, not specific instances of conduct. MCM, *supra* note 35, MIL. R. EVID. 405(a).

<sup>68</sup> The rule did not attempt to fundamentally alter the overall use of character evidence at trial which is described as “archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.” *Michelson v. United States*, 335 U.S. 469, 486 (1948) (Jackson, J., concurring) (further remarking “[b]ut somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”). *Id.*

<sup>69</sup> See *infra* text accompanying note 75.

<sup>70</sup> Capofari, *supra* note 48, at 177.

trait of character in practice.<sup>71</sup> One judge summarized this sentiment:

[I]n my judgment, the fact that a person has given good, honorable, and decent service to his country is always important and relevant evidence for the triers of fact to consider. Commanders consider it not only when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense.<sup>72</sup>

This widely prevailing view is embedded in case law and will be difficult to eradicate in practice.<sup>73</sup> Interpretation of the residual clause as a significant limitation upon military character evidence runs counter to thirty five years of case law and an expansive judicial view of what is pertinent. Understanding the nexus requirement for admissibility, and its weaknesses, is essential for proponents of a more restrictive standard.

#### A. Military Character as a Pertinent Trait: The Nexus Requirement

The former drafter's analysis suggests that the probative value of military character evidence is at its zenith when a clear and logical connection between military character and the charged offense, or an element thereof, exists. Admissibility in the illustrative example, disobedience of orders, is logical but is less so in offenses that are unrelated to military service.<sup>74</sup> Initial interpretations of MRE 404(a) were persuaded by the drafter's analysis and adopted a restrictive

standard, but this deferential view was rejected by the Court of Military Appeals.<sup>75</sup>

As the body of case law developed in the mid to late 1980s, military character was found pertinent in an increasingly broad array of offenses, including: drug use,<sup>76</sup> drug possession,<sup>77</sup> assault, aggravated assault, maltreatment,<sup>78</sup> larceny, wrongful appropriation, unlawful entry,<sup>79</sup> conduct unbecoming an officer and a gentleman,<sup>80</sup> and consensual and non-consensual sexual misconduct. Critically, *United States v. Vandelinder* rejected an offense or element based standard, holding that "[i]t is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is 'pertinent.'"<sup>81</sup> Concurrently, the proposition that a good Soldier would be unlikely to intentionally jeopardize his or her personal readiness or the good order and discipline of a unit also became central to judicial reasoning.<sup>82</sup> The combination of this subjective standard and assumption upon behavior formed the "nexus requirement." This standard has allowed for expansive admissibility and propagated the myth that military character evidence is *always* admissible.

Thus, a standard of "questionable salience"<sup>83</sup> premised upon a behavioral assumption without any empirical basis, and the circumstances of an offense, rather than the elements of an offense has prevailed for over thirty years. This standard does not distinguish between evidence that is merely favorable to an accused versus evidence that is constitutionally required.

#### B. Tenuous Reasoning: The Nexus Requirement in Practice

<sup>71</sup> Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 135-43 (2001).

<sup>72</sup> *United States v. Court*, 24 M.J. 11, 13 (C.M.A. 1987) (Cox, J., concurring in part, dissenting in part). This point must be balanced against the reality that despite considering extraneous factors such as military character, the convening authority nevertheless referred the case to court-martial. Judge Cox's opinion appears open to the fact finder deviating from making a thorough and impartial determinations based upon fact.

<sup>73</sup> "These rules have been interpreted very expansively by this Court: 'The broad availability of the good [S]oldier defense is supported by many legal doctrines and policy arguments, but none withstand close analysis. Cloaked in the mantle of longstanding court-martial tradition, justified by doctrines of questionable salience, and preserved by judges resistant to the Military Rules of Evidence's limitations on character evidence, the good [S]oldier defense advances the perception that one of the privileges of high rank and long service is immunity from conviction at court-martial.' This comes "'at the expense of the overall fairness of the court-martial system.'" *United States v. Brewer*, 61 M.J. 425, 433-34 (C.A.A.F. 2005) (Crawford, J., dissenting) (quoting Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 881 (1999)).

<sup>74</sup> However, Lieutenant Colonel Capofari believed otherwise, writing that "disobedience of orders was a poor example. The prohibitions in general regulations define many crimes, and violations of these regulations are punished as disobedience." Capofari, *supra* note 48, at 176.

<sup>75</sup> See, e.g., *United States v. Cooper*, 11 M.J. 815, 816 (A.F.C.M.R. 1981) (providing that "there must be some direct connection between the specific character trait and the offense charged. This connection is made when the accused is charged with an offense which is exclusively military in nature, because individuals with good military character are unlikely to commit such offenses."). See also *United States v. Belz*, 14 M.J. 601 (A.F.C.M.R. 1982), *rev'd*. *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (setting aside the decision based upon its reliance upon Cooper).

<sup>76</sup> *United States v. Brown*, 41 M.J. 1, 3 (C.M.A. 1994).

<sup>77</sup> *Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985); see also *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984) (concerning character for "law abidingness," a close cousin of good military character).

<sup>78</sup> *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984).

<sup>79</sup> *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1984).

<sup>80</sup> *United States v. Court*, 24 M.J. 11, 11-12 (C.M.A. 1987).

<sup>81</sup> *Vandelinder*, 20 M.J. at 44.

<sup>82</sup> See, e.g., *Piatt*, 17 M.J. at 446; *Clemons*, 16 M.J. at 44; *Court*, 24 M.J. at 11-12.

<sup>83</sup> See *supra* text accompanying note 73.

Notwithstanding the per se prohibition upon military character evidence in sexual offense cases, the legal basis for admissibility was generally poor to begin with for such offenses. The permissive standard of admissibility is reflected in the few published cases that address sexual offenses;<sup>84</sup> such evidence was found pertinent in *United States v. Wilson*<sup>85</sup> and *United States v. Hurst*,<sup>86</sup> albeit tenuously so. In these cases, the military nexus was satisfied by the location and relationship of misconduct to the military community.<sup>87</sup>

In *Wilson*, the military judge found military character to be pertinent to the offenses of maltreatment and assault upon a subordinate, but not in relation to (consensual) sodomy, adultery and indecent language.<sup>88</sup> At trial, the accused testified and denied ever making sexually-charged comments or engaging in adultery with his subordinates' wives.<sup>89</sup> Conceding that the "persuasiveness of such evidence [was] not particularly great," the Court of Military Appeals nevertheless held that the military judge erred by instructing the panel not to consider the evidence in the latter set of offenses.<sup>90</sup> The Court found a sufficient nexus because the case involved "the wife of a subordinate enlisted person under [the accused's] direct supervision," that "[t]he sexual-conduct offenses occurred in the homes of [the accused] and the subordinate soldier which were located in an overseas civilian community . . . [, and] that all these offenses stemmed from

[the accused's] military and later social relationship with the subordinate soldier."<sup>91</sup>

In *Hurst*, the nexus was based upon "[t]he location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family [that] clearly call into question [the accused's] character as a military officer."<sup>92</sup> These cases serve to illustrate how broadly judicial reliance upon the assumption that a good Soldier would not knowingly engage in conduct disruptive to readiness or adverse to his or her unit may be applied.<sup>93</sup> Despite the exclusion of pertinent evidence, neither case resulted in relief for the respective appellants. Both were examined under a four-pronged test for prejudice, assessing whether: (1) the case against the accused was strong and conclusive, (2) the defense theory of the case was feeble or implausible, (3) the proffered testimony was sufficiently material to the defense, and (4) the quality of the proffered defense evidence and whether there was any substitute for it in the record of trial.<sup>94</sup>

These cases illustrate a persistent willingness to declare military character pertinent, but concede that such evidence is not particularly compelling. This underscores the confusion between *relevant evidence* and *constitutionally required evidence*. As *Hurst* noted, "[s]uffice to say, the probative value of such generalized evidence is low."<sup>95</sup> This dissonance presents a challenge to the new rule; one that is likely to require more than commentary in the drafter's analysis to

<sup>84</sup> Cf. *United States v. Hooks*, 24 M.J. 713 (A.C.M.R. 1987) (finding no nexus in an "off-post, off-duty rape and kidnapping of a German female." Further, "[B]ased on the nature and elements of the charges and their specifications, together with the circumstances . . . direct evidence of appellant's military character which was excluded from evidence was not pertinent." Instead, character for truthfulness, law-abidingness, and peacefulness were admitted. Additionally, as a service court decision predating *Wilson* and *Hurst*, it is of limited utility).

<sup>85</sup> *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989).

<sup>86</sup> *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

<sup>87</sup> "The location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family clearly call into question appellant's character as a military officer." *Id.* at 482.

<sup>88</sup> "The military judge admitted the evidence for the obvious 'military' offenses of maltreatment and assault on subordinate servicemembers. He expressly prohibited the members from considering the evidence for what he called the 'civilian' offenses of sodomy, adultery and communicating indecent language, although they involved the wives of appellant's subordinates." *Wilson*, 28 M.J. at 49. See also *Hurst*, 29 M.J. at 482.

<sup>89</sup> Further, the statements or testimony of the respective accused amounted to affirmative denials of some or all of the elements of the charged offenses by claiming a lack of intent and memory, or outright denial. Thus, the good Soldier defense was presented largely as ersatz credibility evidence intended to bolster the core defense theories. In both cases, character for truthfulness was arguably the trait truly at issue.

<sup>90</sup> In *Wilson*, the court stated,

[T]he probative value of appellant's character evidence was not great. He attempted to buttress his denial . . . by offering evidence . . . [that] he was an outstanding professional [S]oldier. However, the persuasiveness of such evidence is

not particularly great because it failed to specifically address the particular type of conduct at issue in the charges against him. Here, no particular evidence was admitted showing his exemplary social conduct with the wives of his subordinates." *United States v. Vandelinder*, 20 M.J. 41, 49 (C.M.A. 1985). In *Hurst*, the inference that the accused was less likely to commit the alleged offense because of his excellent evaluation reports was "somewhat speculative because the reports fail to directly address his sexual morality or his performance as a father.

*Hurst*, 29 M.J. at 482.

<sup>91</sup> *Wilson*, 28 M.J. at 50.

<sup>92</sup> *Id.*

<sup>93</sup> "Admittedly, appellant's 13-year record of exemplary service would have provided 'the basis for an inference that' he 'was too professional a [S]oldier to have committed offenses which would have adverse military consequences.' However, the persuasiveness of this inference is somewhat speculative because the [evaluation] reports fail to directly address his sexual morality . . ." *Hurst*, 29 M.J. at 482 (quoting *Wilson*, 20 M.J. at 49 n.1).

<sup>94</sup> *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). This test appears permissible at the appellate level, but as *Holmes* indicates, trial courts may not conduct such an analysis without interfering with the traditional role of the fact finder by crediting or discrediting aspects of prosecution or defense evidence under the first two prongs. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006). The latter two prongs are also more effectively assessed post-trial.

<sup>95</sup> *Hurst*, 29 M.J. at 482.

resolve. Litigation will be the primary means of changing the standard.

## V. Refining and Supporting the New Rule

### A. The Per Se Prohibition: For a Limited Time Only

The JSC has little ability to influence the survival of the per se prohibition on a constitutional challenge. The absolute nature of the prohibition prevents the JSC from adding language to the new rule that could generally preserve the rule, such as a caveat of “except when constitutionally required” added to the text.<sup>96</sup> The JSC could add its own articulation of the interests served by the per se prohibition to the drafter’s analysis, but the relative dearth of contemporary scholarly writing criticizing the good Soldier defense or empirical evidence demonstrating unjust outcomes based upon the defense presents a significant limitation.<sup>97</sup> Whether the JSC could create its own reasoning for the rule without a clear basis in law or public record is questionable. Thus, absent Congressional action to rescind or amend section 536 of the FY15 NDAA, the JSC is relatively powerless to change the parameters of judicial interpretation of the per se prohibition. Further, not including these changes or considerations upon promulgation of the rule presents the risk of events overcoming any attempt to mitigate these challenges.

Nevertheless, it would be prudent if the JSC were inclined to improve the new rule by adding, “(vi) A lesser included offense of one of the above offenses,” complimenting the attempts and conspiracy language in the rule. The new rule’s failure to address lesser included offenses presents a problem. Consider a case of abusive sexual contact: assault consummated by a battery in violation of Article 128, UCMJ, is a lesser included offense and not subject to per se prohibition. Under the current standard of admissibility, a paradoxical situation could result where military character evidence could be admitted and considered with respect to a lesser offense, but not the greater offense.<sup>98</sup> This addition would not alter the parameters of the per se prohibition’s constitutionality; however, resolving the issue

<sup>96</sup> Such a measure would force the judiciary to resolve the line between “relevant” and “constitutionally required,” although the outcome could still be less than what is desired by advocates of reform.

<sup>97</sup> See, e.g., Hillman, *supra* note 73, at 879. See also *supra* text accompanying notes 28, 30.

<sup>98</sup> A military judge could address this inconsistency by (1) interpreting the prohibition to implicitly encompass lesser included offenses, despite any language directing this outcome; (2) admitting the evidence and providing a (somewhat incoherent) limiting instruction in conformity with the rule; or (3) declaring the per se prohibition unworkable and inconsistent with the right to present a defense.

<sup>99</sup> Consider, as an illustrative example, an assault committed by a Soldier upon a non-commissioned officer in a motorpool. This act could be charged under either Articles 91 or 128, UCMJ. The former includes an

would leave a conceptually stronger rule and improve the rule’s workability in practice.

### B. Shaping the Residual Clause with the Drafter’s Analysis

In contrast to the per se prohibition, the JSC has a stronger opportunity to improve the residual clause. Although not binding, the drafter’s analysis could provide direction to practitioners and the trial judiciary upon interpretation of the new language. As discussed previously, the drafter’s analysis has been “out-flanked” by the broad interpretation of the current rule. Ultimately, limiting what may be considered “relevant to any element of an offense” is critical to constraining the good Soldier defense in practice.

To achieve this, the JSC could prescribe an objective (or at least a less subjective) approach than provided for under the current case law in the new drafter’s analysis. This could counter reluctance within the trial judiciary to disturb decades of case law precedent and interpret the standard to be more restrictive. Assuming that the rule as written will be interpreted to require a more rigid adherence to the elements is risky for proponents of reform. Many in the trial judiciary are likely to balk at disregarding the attendant circumstances of an offense that are not directly captured by an element when determining admissibility.<sup>99</sup> As long as admissibility of character evidence under other rules is not strictly limited to an objective or elemental assessment, the adoption of stricter criteria for admitting military character evidence presents a challenge.<sup>100</sup> Crafting a drafter’s analysis that clearly rejects the current standard is almost essential to ensure the new language is interpreted to be consistent with the existing standard.

Fundamentally, the new rule is flawed: the per se prohibition went too far and the residual clause not far enough in defining change to the rule. Capturing the nuance necessary to create a rule that excludes military character evidence that is merely relevant versus that which is constitutionally required is nearly impossible to do in a succinct manner—as is capturing what an “objective” assessment would entail. The best solution is to incorporate a more detailed description of intent and purpose into the drafter’s analysis. To promote a stricter or more objective

elemental nexus to duty (the non-commissioned officer must be shown to be in the execution of his or her duty) while in the latter the duty status and location are immaterial to the non-jurisdictional elements. Could a judge rely upon the jurisdictional elements of an offense to bypass the new rule because it is alleged to have occurred on post and during a duty day? A legally sufficient specification under Article 128, UCMJ, would not have to expressly allege details such as the offense taking place in a motorpool during duty hours; however, these facts would be almost certainly be introduced at trial to prove the date and location of the offense.

<sup>100</sup> See *United States v. Wright*, 53 M.J. 476, 482-83 (C.A.A.F. 2000) (describing factors to be considered in the admission of evidence under MRE 413 and 414); see also *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (describing the admissibility of evidence under MRE 404(b)).

standard of admissibility, the JSC may declare the intent of the Committee to proscribe military character evidence except when it is *inextricable from an element of an offense*. The following language is illustrative of this principle:

In addition to the statutory elements of an offense, in cases where an element necessarily includes the identification of a named victim, military character evidence may be admitted where a direct and clearly articulable relationship between the accused's duties and the named victim exists. The existence of such a relationship should not in itself serve as a basis of admissibility, rather such relationship must be considered in conjunction with the other elements of the offense. For example, an alleged off-duty aggravated assault at a public park between Soldiers who are assigned to the same battalion would not in itself create a nexus to military duty. In contrast, such a nexus may exist where a drill sergeant is alleged to have assaulted a trainee while in the official performance of his or her duties.

Unequivocally confronting the military nexus test (defined in case law) through the drafter's analysis assures the judiciary will address this matter sooner, rather than later. Moreover, establishing that the existing standard is incompatible with the new language will make it more difficult for the trial judiciary to avoid at least some tightening of the standard. However, if the past is a guide, courts may be willing to sidestep the drafter's analysis, no matter how strongly worded or compelling the illustrative examples may be.

### C. Shaping the Residual Clause Through Litigation

Ultimately, litigation will play a necessary role in shaping the residual clause. Political considerations and public perceptions of military justice notwithstanding, justification for the use of the good Soldier defense is weaker now than a generation ago.<sup>101</sup> A broad litigation strategy to

support reform should: (1) undermine the basis for the subjective military nexus test and its assumption that a "good Soldier" will not jeopardize readiness; (2) challenge the policy arguments supporting admissibility; and, (3) potentially highlight the overly generalized and ill-defined nature of military character as a trait, so far as this generally minimizes its probative value.

It has been suggested that the archaic service-connection test for jurisdiction in courts-martial influenced judicial thinking upon MRE 404(a) when promulgated: "[m]andated by *O'Callahan v. Parker*, the prosecution was required to show that the offense was service connected to establish military jurisdiction. . . . One commentator stated that the test for service connection was dependent only upon the imagination of the prosecutor."<sup>102</sup> Although this doctrine has faded from practice, it draws attention to another doctrine that has been altered since 1980. *United States v. Miller*,<sup>103</sup> decided in 2009, rejected the principle that the terminal elements of Article 134, UCMJ,<sup>104</sup> (entailing prejudice to good order and discipline or discredit of the armed forces) were implied in all enumerated offenses. Subsequently, there has been no judicial reevaluation of the military nexus test.<sup>105</sup> The absence of an implied element conceptualizing duty provides a compelling basis for reexamination of the military nexus test, even if this principle was only a tacit form of judicial reasoning on the subject.<sup>106</sup>

*Miller* and other contemporary cases have emphasized the importance of fair notice in pleadings and the high degree of scrutiny required in determining lesser-included offenses.<sup>107</sup> The reasoning of these cases may be applied to the nexus requirement. Moreover, these cases may be construed as a basis to limit imputation of the "good Soldier ideal" into offenses: if an accused Soldier is not on fair notice that he or she must defend against an element of good order and discipline, how can evidence addressing that issue be relevant to the charged offense? Likewise, using a sexual offense or assault consummated by a battery as an example, the impact of the offense upon the military readiness of any person or the cohesion of a unit is unnecessary to sustain a

<sup>101</sup> Although not a focal point of this article, whether the idea of the military entailing a "separate society" is as compelling today as it was in the 1980s is worth considering.

<sup>102</sup> Capofari, *supra* note 48, at 185 (quoting *O'Callahan v. Parker*, 395 U.S. 258 (1969)). Under the current standard, the nexus required for admissibility is often dependent only upon the imagination of the defense or military judge.

<sup>103</sup> *United States v. Miller*, 67 M.J. 385, 389-90 (C.A.A.F. 2009). *Miller* expanded upon *United States v. Medina*, 66 M.J. 21, 26-29 (C.A.A.F. 2008), and rejected the longstanding view expressed in *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994), that every enumerated offense under the UCMJ includes an implied element of either prejudice to good order and discipline in the armed forces or service discrediting conduct. The analysis focused upon fair notice to the accused and ascertaining lesser included offenses.

<sup>104</sup> 10 U.S.C. § 934 (2015).

<sup>105</sup> However, at least one judge has recognized the impact of *Medina*, *Miller*, and *Jones*, writing, "The character trait of 'good military character,' formerly deemed relevant to contest almost every charge under the Code, will now be limited, on the basis of relevance, to those offenses where the trait is truly implicated—it will not be available to defend against battery, but it might be available to defend against battery on a commissioned, warrant, noncommissioned, or petty officer." *United States v. McMurrin*, 69 M.J. 591, 601 (N. M. Ct. Crim. App. 2010) (Booker, S.J., concurring).

<sup>106</sup> The presumption that a good Soldier would not jeopardize readiness or good order and discipline formerly enjoyed an articulable relationship to an element, albeit implied, for all offenses. Although never articulated to be the dispositive basis of admissibility, this understanding may have contributed to judicial deference when determining admissibility of military character evidence.

<sup>107</sup> See, e.g., *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

finding of guilt.<sup>108</sup> These considerations never require proof, and thus, are not relevant if an objective, strictly elemental analysis is conducted. This serves as a strong argument to limit the good Soldier defense outside of Article 134, UCMJ, offenses or offenses containing an element that directly encapsulates some aspect of military service. This change in the construction of offenses has weakened the validity of the current military nexus analysis and is a useful starting point for advocates of more restrictive standard of admissibility.

Beyond legal arguments, the policy justifications<sup>109</sup> for the good Soldier defense are weak in many offenses, with the “tradition” of admissibility the most troubling. Defense teams have probably benefited from this “tradition” by seldom having to fully establish a foundation of military character evidence.<sup>110</sup> Case law reveals that the defense often succeeds in admitting such evidence when the probative value is low, and rarely if ever must demonstrate any degree of predictive power associated with good military character.<sup>111</sup> If forced to do so, defense counsel will find it difficult to provide empirical evidence that good duty performance is indicative of a decreased propensity to commit offenses, especially offenses like sexual assault.<sup>112</sup>

Next, again considering victim based crimes, the view that military life entails a “separate society” and involves constant “surveillance” may be misplaced. The good Soldier defense tends to favor or have greater benefit to individuals who have served a longer period of time, often at higher grades<sup>113</sup>—a segment of the military population more likely to live off-post or in private quarters. Other changes in military housing—including the degree privacy afforded to junior enlisted Soldiers in their barracks—and technology may reduce the persuasiveness of this argument versus the 1980s.<sup>114</sup>

The final policy justification, the “unique military nature of offenses,” is unpersuasive in the setting of many offenses.

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<sup>108</sup> The impact upon the unit or the reputation of the armed forces is never an element of these offenses, even if such evidence would be aggravating for presentencing purposes.

<sup>109</sup> See Katz, *supra* note 71.

<sup>110</sup> See, e.g., *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989); *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

<sup>111</sup> “The location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family clearly call into question appellant’s character as a military officer.” *United States v. Hurst*, 29 M.J. 477, 482 (C.M.A. 1990).

<sup>112</sup> See, e.g., Judith V. Becker & William D. Murphy, What We Know and Do Not Know about Assessing and Treating Sex Offenders, 4 PSYCHOL., PUB. POL’Y., & L. 116, 121 (1998), <http://psycnet.apa.org/journals/law/4/1-2/116.pdf> (“[T]here is no one theory that will explain the heterogeneity of offending, and it is likely that these disorders are multicausal.”).

<sup>113</sup> See Hillman, *supra* note 73.

<sup>114</sup> The assumption that military personnel remain distinctly separate from local civilian communities is worth reconsidering, based upon changes in the size of the military and changes in housing patterns since the 1980s (e.g.

Victim-based offenses charged under Articles 120 or 128, UCMJ, are not inherently of a military nature.<sup>115</sup> These offenses are not aimed specifically at readiness, compliance with regulations, or enforcing social norms within the ranks. Rather, they are a codification of common law crimes that may be charged and applied irrespective of a putative victim’s status or relation to the military.<sup>116</sup> These crimes are fundamentally the same in their nature whether committed by military personnel or by civilians. Of course, within civilian courts, there is no such thing as “the good plumber defense” or the “good barista defense.”<sup>117</sup> In those professions, the fact that an employee is on time, technically proficient at unclogging sinks or making iced lattes, physically fit, and able to maintain accountability of copper pipes or coffee beans is not compelling or pertinent to whether that individual committed a crime. Litigation is the most effective means to challenge the nexus requirement and breadth of the good Soldier defense’s admissibility. However, achieving a strictly objective standard is unlikely given the obstacles created by the preference for balancing interests, the totality of circumstances, and the right to present a defense.

#### D. The Road Not Taken

A more prudent course of action may have been for Congress to limit direct prohibition to sexual offenses (including attempts, conspiracies, and lesser included offenses thereof) as the legislative history suggests was the original purpose and impetus of reform.<sup>118</sup> Evidence of good military character is not inherently confusing, inflammatory, or salacious. Instead, the prejudice of this evidence may be measured by its impact upon the fairness of the trial process.

consolidation under base realignment and closure, changes in the style of military housing, and the potential changes in the degree of privacy afforded to Soldiers).

<sup>115</sup> As the second vignette in Section III discussed, in the case of a senior using authority to compel acquiescence to a sexual offense upon a subordinate, the duty relationship is an exception to this general conclusion.

<sup>116</sup> For example, in *United States v. Hooks*, 24 M.J. 713 (A.C.M.R. 1987), it is conceivable that the military nexus analysis could have resolved in favor of admissibility had the victim had been a dependent rather than a German civilian. The potential for such disparate treatment is problematic from a policy perspective, if not a legal one.

<sup>117</sup> Military character, irrespective of whether it is appropriately a specific or a general trait, is amalgamated from other traits such as technical proficiency in a military occupational specialty (MOS), high physical fitness aptitude, timeliness, and adherence to orders. In essence, it is a catch all term to describe an individual’s job performance. Some of the factors Soldiers encompassed in “military character” are misplaced in the context of a sexual offense case. For example, when could the accountability of office equipment ever be relevant to an alcohol-facilitated sexual assault?

<sup>118</sup> See H.R. REP. NO. 113-714 (2014).

The critical question is whether this evidence confers an unfair advantage upon the accused.

This concern is amplified and apparent in victim-based offenses, namely sexual offenses. Under the Military Rules of Evidence, the defense may attack a putative victim's potential biases or motives under MRE 608(c), as limited by MRE 403 or 412, and then bolster the accused by introducing military character evidence (without the accused testifying). No comparable means of bolstering the reputation of a victim with character evidence is available, except when a character trait (e.g. truthfulness) is first attacked by the defense at trial.<sup>119</sup> Despite the relatively stronger policy basis for limiting the good Soldier defense in sexual offense cases, the constitutionality of an outright prohibition remains doubtful, as the preceding senior-subordinate vignette demonstrates.

A more effective reform effort may have limited its scope to the offenses defined by MRE 413(d) and MRE 414(d), prescribed more precise terms for modification of the standard, and incorporated a notice requirement for military character evidence—forcing the defense to affirmatively establish the basis of admissibility.<sup>120</sup> However, to mitigate the impact on the right to present a defense a prohibition could include “except when constitutionally required” as a caveat to a prohibition. If the new rule is overturned, Congress and the JSC would be wise to respond with more focused limitations aimed at sexual offense (and even domestic violence) cases.

## VI. Conclusion

Irrespective of Congressional action or intent, many judges and practitioners will continue to believe that past “good, honorable, and decent service to [the] country is always important and relevant evidence for the triers of fact to consider.”<sup>121</sup> Conversely, a failure of reform will reinforce perceptions that the military justice system is antiquated, incapable handling sexual offense cases, and in need of drastic reform. When admitted beyond constitutionally-required circumstances, the good Soldier defense credits the idea that the military has made itself a separate society—and will use this status as a justification to protect its own at trial. Ultimately, the best intentions of Congress have left practitioners with a deeply-flawed rule, unlikely to survive judicial review intact. The good Soldier defense is not dead yet.

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<sup>119</sup> MCM, *supra* note 35, MIL. R. EVID. 404(a); *see also id.* MIL. R. EVID. 608(b).

<sup>120</sup> Military Rule of Evidence 404(a) shall be modified to clarify that the military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused in any offense of sexual assault, as defined by MRE 413(d), or any offense of child molestation, as defined by MRE 414(d), and attempts, conspiracies to commit, or lesser included offenses thereof, unless such evidence is constitutionally required. The defense shall file a written motion at least five days prior to entry of pleas specifically describing such evidence unless

the military judge, for good cause shown, requires a different time for filing or permits filing during trial. In other instances, evidence of a trait of the military character of an accused may be offered in evidence by the accused to show the probability of innocence only when pertinent to an element of an offense for which the accused has been charged and a substantial nexus between the accused's military duties or status has been established by the defense.

<sup>121</sup> *United States v. Court*, 24 M.J. 11, 13 (Cox, J., concurring in part, dissenting in part).