

January 2018

## Protect Our Military Children: Congress Must Rectify Jurisdiction on Military Installations to Address Juvenile-on-Juvenile Sexual Assault

George R. Lavine III

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

---

### Recommended Citation

Lavine, George R. III (2018) "Protect Our Military Children: Congress Must Rectify Jurisdiction on Military Installations to Address Juvenile-on-Juvenile Sexual Assault," *Wyoming Law Review*: Vol. 18: No. 1, Article 2.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol18/iss1/2>

This Article is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

---

# WYOMING LAW REVIEW

VOLUME 18

2018

NUMBER 1

---

## PROTECT OUR MILITARY CHILDREN: CONGRESS MUST RECTIFY JURISDICTION ON MILITARY INSTALLATIONS TO ADDRESS JUVENILE-ON-JUVENILE SEXUAL ASSAULT

*Major George R. Lavine III\**

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 116 |
| II.  | WHY CONGRESSIONAL ACTION IS REQUIRED.....  | 119 |
| A.   | <i>Inadequate Prosecutorial Response</i> .....   | 119 |
| 1.   | <i>Prohibitive Framework</i> .....   | 119 |
| i.   | <i>Exclusive Federal Legislative Jurisdiction and<br/>Juvenile Certification</i> ..... | 119 |
| ii.  | <i>Development of Federal Juvenile Delinquency Law</i> .....                           | 121 |
| iii. | <i>Required Certification</i> .....  | 122 |
| 2.   | <i>Lack of Federal Interest</i> .....  | 123 |
| 3.   | <i>Abysmally Low Federal Juvenile Delinquency<br/>Prosecution Rates</i> .....          | 125 |
| B.   | <i>DoD's Unwillingness to Utilize Authority Granted by Congress</i> .....              | 129 |
| 1.   | <i>Retrocession Rarely Used</i> .....  | 129 |
| 2.   | <i>Alleged Relinquishment of Jurisdiction by Invalid Means</i> .....                   | 131 |

---

\* MAJ Lavine is a Judge Advocate (Attorney) in the United States Army and a member of the Wyoming State Bar. He is a graduate of the United States Air Force Academy, Texas A&M University, the University of Montana School of Law, and The Judge Advocate General's Legal Center and School. MAJ Lavine prosecuted criminal cases in state court as a Deputy County and Prosecuting Attorney in Rawlins, Wyoming, in federal court as a Special Assistant U.S. Attorney at Fort Hood, Texas, and in military court as Trial Counsel assigned to 1st Air Cavalry Brigade, 1st Cavalry Division. As an Army Special Victims' Counsel, he represented adult and child victims of sexual assault and testified before a Defense Advisory Committee (Judicial Proceedings Panel) on the negative impact of victim retaliation. MAJ Lavine wishes to express his sincere gratitude to the Editorial Board of the Wyoming Law Review for their vision and courage in publishing an article of this nature, and adds his thanks for their insightful comments. As the son of military parents and a victim himself of juvenile-on-juvenile sexual assault, MAJ Lavine dedicates this article to all child victims of sexual assault and their families. The views expressed in this paper are the author's own and should not be attributed to the Department of the Army or the Department of Defense.

- C. *Federal Litigation Is Uncertain to Bring Change* ..... 136
  - 1. *Crime Victims’ Rights Act* ..... 136
  - 2. *Equal Protection of the Laws* ..... 138
  - 3. *Failure to Act* ..... 142
  - 4. *Negligent Failure to Warn* ..... 143
- III. WHAT CONGRESS MUST DO ..... 147
  - A. *Retrocede Jurisdiction over Juveniles* ..... 147
  - B. *Mandate Annual Reporting to Ensure Accountability* ..... 150
  - C. *Mandate Warnings to Families* ..... 153
- IV. CONCLUSION ..... 154
- IV. ADDENDUM ..... 155
- APPENDIX A. LTC SUTER STATISTICAL ABSTRACT ..... 158
- APPENDIX B. MAJ ROMAN STATISTICAL ABSTRACT ..... 159
- APPENDIX C. ARMY CID DATA REGARDING JUVENILE-ON-JUVENILE CRIME ..... 160
- APPENDIX D. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
FORT KNOX ..... 161
- APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD ..... 163
- APPENDIX F. RELINQUISHMENT/RETROCESSION OF JURISDICTION—FORT  
STEWART AND HUNTER ARMY AIRFIELD ..... 169
- APPENDIX G. PROPOSED MODIFYING LANGUAGE (CHANGES IN BOLD) ..... 172
- APPENDIX H. PROPOSED REPORTING LEGISLATION ..... 174
- APPENDIX I. MANDATORY WARNING TO FAMILIES—CONUS ..... 176
- APPENDIX J. MANDATORY WARNING TO FAMILIES—OCONUS ..... 177

“Military children make up a very special part of our nation’s population. Although young, these brave sons and daughters stand in steadfast support of their military parents.”<sup>1</sup>

I. INTRODUCTION

“Do you want to be part of my Playboy Club?”<sup>2</sup> When posed the question by his 13-year-old male neighbor in 1996, the naive 7-year-old boy had no idea that answering “yes” would lead to his own rape.<sup>3</sup> The 7-year-old was not the only target of the juvenile offender, as two other neighborhood children were allegedly molested and others were asked to “perform various sex acts to join [the 13-year-old’s] ‘Playboy Club’ in a wooded ravine behind their homes in the Beachwood

---

<sup>1</sup> See *Special Report: Month of the Military Child*, UNITED STATES DEPARTMENT OF DEFENSE, [https://www.defense.gov/News/Special-Reports/0416\\_militarychild/](https://www.defense.gov/News/Special-Reports/0416_militarychild/) (last visited Nov. 6, 2016).

<sup>2</sup> Hypothetical question based on reported facts. See *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping 7-year-old Boy at Fort Lewis*, SEATTLE TIMES (May 13, 1996), <http://community.seattletimes.nwsourc.com/archive/?date=19960513&slug=2329059>.

<sup>3</sup> See *id.*

housing area” on Fort Lewis, Washington, a large military installation.<sup>4</sup> Despite a confession from the 13-year-old juvenile male, he was not prosecuted for his crimes.<sup>5</sup> The mother of the 7-year-old victim would learn that such non-prosecution was the norm at the military installation due to a lack of federal interest.<sup>6</sup> Because the State of Washington ceded exclusive legislative jurisdiction to the federal government over the lands that would become Fort Lewis in 1917, the state could not subject the juvenile offender to its laws.<sup>7</sup> The 7-year-old-boy and his military family had no hope of ever receiving justice.<sup>8</sup> He was too scared to leave his yard, resorted to sleeping on the floor in a corner of his bedroom, and hid knives to protect himself in case the juvenile rapist returned.<sup>9</sup> He was so depressed that he verbalized wanting to die.<sup>10</sup> To make matters worse, the 13-year-old and his family continued living down the street without repercussions for nearly two months before finally being evicted, which simply moved the problem into the civilian community.<sup>11</sup> The victim’s mother said, “[a]lmost every day I’d look out the kitchen window and see the little pervert on his way to school . . . [h]e’d smile at me and wave.”<sup>12</sup>

As appalling as the lack of a prosecutorial response to the juvenile-on-juvenile sexual assault at Fort Lewis was, so, too, was the fact that decades before, the Department of Defense (DoD) realized that exclusive federal legislative jurisdiction on military installations was an impediment to dealing with juvenile delinquency.<sup>13</sup> The jurisdictional scheme creates a black hole for juvenile justice—federal prosecutors routinely decline to prosecute juvenile-on-juvenile sexual assault cases and local prosecutors lack legal authority to apply state laws to juvenile criminal conduct on the federal lands.<sup>14</sup> Congress passed legislation in 1970 permitting the relinquishment of all or part of the legislative jurisdiction of the United States over its lands to the surrounding states through administrative action, a process also referred to as retrocession of jurisdiction.<sup>15</sup> However, it left

---

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* William K. Suter, *Juvenile Delinquency on Military Installations*, ARMY LAW., July 1975, at 8–14.

<sup>14</sup> *See supra* notes 6–7 and accompanying text.

<sup>15</sup> Act of Oct. 26, 1970, Pub. L. 91-511, 84 Stat. 1226 (codified as amended at 10 U.S.C. § 2683 (2012)); U.S. ATT’Y GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. I, 10 (U.S. Government Printing

the decision to seek such relinquishment to the discretion of the Secretary of each individual executive department.<sup>16</sup> The DoD has retroceded exclusive federal legislative jurisdiction over juvenile crimes on military installations only a handful of times<sup>17</sup> despite clear indicators that the non-prosecution of juvenile-on-juvenile sexual assaults is a loathsome trend across the force.<sup>18</sup> Congress must statutorily require the DoD to seek retrocession of exclusive federal legislative jurisdiction over juvenile crimes on all military installations, thereby enabling the surrounding states to extend the reach of justice into the lives of military children sexually victimized by their juvenile peers.<sup>19</sup>

This paper begins by discussing, in Part II, why Congressional action is required to rectify exclusive federal legislative jurisdiction.<sup>20</sup> An inadequate prosecutorial response,<sup>21</sup> the DoD's unwillingness to utilize retrocession authority,<sup>22</sup> and the uncertainty of federal litigation to bring about change all point to great deficiencies in the status quo.<sup>23</sup> Part III provides specific legislative proposals that address and rectify the deficiencies.<sup>24</sup> In addition to uniform retrocession of jurisdiction, Congress should ensure proper accountability for both the Department of Justice (DoJ) and the DoD by instituting reporting requirements concerning the investigation and prosecution of felony juvenile crime on military installations.<sup>25</sup> Congress should also require that servicemembers and their families, contemplating moving into family housing on military installations with exclusive federal legislative jurisdiction, be provided written warnings that federal prosecutors rarely prosecute juvenile-on-

---

Office 1957); U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 8 (Feb. 21, 1974) [hereinafter AR 405-20]; U.S. DEP'T OF NAVY, REAL ESTATE PROCEDURAL MANUAL P-73, Ch. 26, para. 10d (Apr. 25, 2011).

<sup>16</sup> See AR 405-20, *supra* note 15, at para. 8; U.S. DEP'T OF NAVY, REAL ESTATE PROCEDURAL MANUAL P-73, Ch. 26, *supra* note 15, at para. 10d.

<sup>17</sup> See *infra* notes 112–21 and accompanying text. The military installations that have retroceded jurisdiction over juvenile crimes include Fort Knox, Kentucky, in 1999, Joint Base Lewis-McChord, Washington, in 2001, and Fort Stewart, Georgia, in 2015. *Id.*

<sup>18</sup> See *infra* Appendix B; Suter, *supra* note 13, at 17; *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping 7-year-old Boy at Fort Lewis*, *supra* note 2; Emily M. Roman, *Where There's a Will, There's a Way: Command Authority over Juvenile Misconduct on Areas of Exclusive Federal Jurisdiction, and the Utilization of Juvenile Review Boards*, ARMY LAW., May 2015, at 46; Jeremy Schwartz & Rose Thayer, *At Fort Hood, Juvenile Crimes that go Unprosecuted*, AUSTIN AM.-STATESMAN (Nov. 6, 2015), <http://www.mystatesman.com/news/local-military/fort-hood-juvenile-crimes-that-unprosecuted/F9KZvaBPDFouLEc3ewgsaN> [hereinafter *At Fort Hood*].

<sup>19</sup> See *infra* notes 263–89 and accompanying text.

<sup>20</sup> See *infra* notes 28–258 and accompanying text.

<sup>21</sup> See *infra* notes 28–104 and accompanying text.

<sup>22</sup> See *infra* notes 105–63 and accompanying text.

<sup>23</sup> See *infra* notes 170–258 and accompanying text.

<sup>24</sup> See *infra* notes 259–327 and accompanying text.

<sup>25</sup> See *infra* notes 263–89, 290–317 and accompanying text.

juvenile crime.<sup>26</sup> This paper concludes by touching on the resolve required by Congress to enact the legislative proposals and ensure military children receive the same protections under the law that they would living in civilian communities.<sup>27</sup>

## II. WHY CONGRESSIONAL ACTION IS REQUIRED

### A. *Inadequate Prosecutorial Response*

#### 1. *Prohibitive Framework*

##### i. *Exclusive Federal Legislative Jurisdiction and Juvenile Certification*

At the outset, it is important to understand how exclusive federal legislative jurisdiction functions.<sup>28</sup> Acquisition of exclusive federal legislative jurisdiction over a land area within a state occurs in one of three ways: (1) a state's consent to federal purchase of land area for the purpose of establishing a military installation; (2) a state's cession of legislative jurisdiction over the land area to the federal government; or (3) reservation by the federal government of legislative jurisdiction over the land area when the State joins the Union.<sup>29</sup> While the U.S. Constitution mentions "exclusive legislation" instead of exclusive jurisdiction, the two phrases are synonymous.<sup>30</sup> Exclusive jurisdiction over federal lands means the laws and statutes governing those areas "must be supplied by the federal government, not the states[.]"<sup>31</sup> Under an exclusive jurisdiction scheme, "[C]ongress acts as a state government with total legislative, executive and judicial power."<sup>32</sup> Concurrent jurisdiction, on the other hand, exists where both the state and the federal government have the independent authority to apply and enforce their laws over federal lands, so long as there is no interference with federal government uses of the lands.<sup>33</sup>

---

<sup>26</sup> See *infra* notes 318–27 and accompanying text.

<sup>27</sup> See *infra* notes 328–34 and accompanying text.

<sup>28</sup> See *infra* notes 29–42 and accompanying text.

<sup>29</sup> See U.S. CONST. art. I, § 8, cl. 17; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 531–33 (1885).

<sup>30</sup> *James v. Dravo Contracting Co.*, 302 U.S. 134, 141 (1937). For ease of reading, "exclusive jurisdiction" will be used throughout the remainder of the paper.

<sup>31</sup> *Allison v. Boeing Laser Technical Servs.*, 689 F.3d 1234, 1236 (10th Cir. 2012) (citing *Pac. Coast Dairy v. Dep't of Agric.*, 318 U.S. 285, 294 (1943)).

<sup>32</sup> *United States v. Jenkins*, 734 F.2d 1322, 1325–26 (9th Cir. 1983).

<sup>33</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976); *North Dakota v. United States*, 495 U.S. 423, 429 n.2 (1990); *James*, 302 U.S. at 143, 147–48; see also AR 405-20, *supra* note 15, at para. 3(c).

It is well-settled, in both federal and state courts, that the federal government has exclusive authority to enforce its laws against adult offenders committing crimes in areas of exclusive jurisdiction, including military installations.<sup>34</sup> Jurisdiction is viewed as being a territorial bar to the application of state criminal laws and is not limited to subject-matter.<sup>35</sup> When it comes to juvenile offenders, federal appellate courts have consistently ruled that exclusive jurisdiction over lands means that federal juvenile delinquency law operates to the exclusion of state delinquency laws.<sup>36</sup> The federal appellate court rulings, however, have not prevented some states from asserting jurisdiction over juveniles committing

---

<sup>34</sup> See *Benson v. United States*, 146 U.S. 325, 329–331 (1892) (sustaining federal jurisdiction with respect to an indictment for murder committed by a defendant on a portion of the Fort Leavenworth Military Reservation where the State of Kansas ceded exclusive jurisdiction); *Bowen v. Johnston*, 306 U.S. 19, 21, 28–30 (1939) (holding federal district court had exclusive jurisdiction to try defendant for murder committed in Chickamauga and Chattanooga National Park after the State of Georgia ceded exclusive jurisdiction over park lands to the United States); *United States v. Unzeuta*, 281 U.S. 138, 140, 144–46 (1930) (holding federal government properly exercised its criminal jurisdiction over a defendant indicted for murder where the act took place on Fort Robinson Military Reservation, where the State of Nebraska previously ceded all jurisdiction save for civil and criminal process); *United States v. Watkins*, 22 F.2d 437, 438, 441 (N.D. Cal. 1927) (holding federal government properly exercised its criminal jurisdiction over a defendant indicted for murder committed on the Presidio, where exclusive jurisdiction over the land was ceded by the State of California and accepted by Congress); *State v. Morris*, 68 A. 1103, 1104 (N.J. 1908) (overturning state court conviction for assault where defendant committed the crime on Fort Hancock, a military reservation whose lands the United States purchased with the state legislature’s consent); *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 699 (Mo. App. 2010) (overturning defendant’s state court conviction for burglary and property damage crimes occurring in a United States post office situated on land where the State of Missouri ceded exclusive jurisdiction to the federal government). Additionally, a state court in Alabama dismissed a criminal case against a defendant charged with felony homicide by vehicle and seven felony counts of first-degree assault stemming from a vehicle crash on Fort Rucker, where jurisdiction over the land was previously ceded by the State of Alabama to the United States. Melissa Braun, *Judge Rules No Local Jurisdiction in Fatal Fort Rucker Bus Wreck*, THE SOUTHEAST SUN (Oct. 1, 2009), [http://www.southeastsun.com/fortrucker/article\\_8d1f5f46-d8a0-5c17-8287-c1ef06849feb.html](http://www.southeastsun.com/fortrucker/article_8d1f5f46-d8a0-5c17-8287-c1ef06849feb.html). The local district attorney eventually agreed with defense attorneys that exclusive jurisdiction on Fort Rucker negated state authority to prosecute the case. *Id.* Inexplicably, Army attorneys at Fort Rucker had urged prosecution in state, rather than federal, court. *Id.*

<sup>35</sup> AR 405-20, *supra* note 15, at para. 3a; U.S. DEP’T OF NAVY, REAL ESTATE PROCEDURAL MANUAL P-73 Ch. 26, *supra* note 15, at para. 10d (Apr. 25, 2011); Assimilative Crimes Act, 18 U.S.C. § 13 (2012).

<sup>36</sup> *United States v. Daye*, 696 F.2d 1305, 1306–07 (11th Cir. 1983) (holding Florida state court could not prosecute a juvenile male committing crimes on Everglades National Park, whose lands are covered by exclusive jurisdiction); *United States v. Juvenile Male*, 939 F.2d 321, 322–24 (6th Cir. 1991) (holding Kentucky juvenile court had no jurisdiction over juvenile who committed a sexual assault on Fort Knox military reservation, whose lands are covered by exclusive jurisdiction); *United States v. J.D.T.*, 762 F.3d 984, 998, 994–95 (9th Cir. 2014) (upholding certification by federal prosecutors that Arizona state and juvenile courts lacked jurisdiction over a ten-year-old juvenile male charged with acts of juvenile delinquency, including aggravated sexual abuse, and abusive sexual contact against five younger males, aged five to seven years, that took place on Fort Huachuca, Arizona). The Government’s appellate argument in *J.D.T.* asserted that Arizona courts lacked jurisdiction since no state court proceedings were initiated against the juvenile. *J.D.T.*, 762 F.3d at 988. However, an Assistant U.S. Attorney publicly stated outside a federal courtroom,

criminal acts on military installations.<sup>37</sup> Part of the rationale employed by the state courts is that their juvenile delinquency laws are civil and not criminal in nature.<sup>38</sup> The Supreme Court has moved away from an absolute territorial bar when determining the applicability of a state's civil laws to federal lands with exclusive jurisdiction.<sup>39</sup> Instead, the Court has held that where there is no "friction" between the exercise of a state's power and the assertion of jurisdiction by the federal government, the notion of a military installation as an untouchable federal island is pure "fiction."<sup>40</sup> Asserting that state juvenile delinquency laws apply to military installations with exclusive jurisdiction under the "friction, not fiction" doctrine might have more validity if federal courts did not view juvenile delinquency proceedings as being criminal in nature.<sup>41</sup> Additionally, as discussed below, Congress enacted a federal juvenile delinquency statute—18 U.S.C. § 5032—that contemplates situations in which the states do not have jurisdiction over juveniles, such as crimes committed on military installations with exclusive jurisdiction.<sup>42</sup>

### *ii. Development of Federal Juvenile Delinquency Law*

By 1931, nearly all states had developed juvenile courts, whereas the concept of juvenile delinquency was not yet codified in the Federal Penal Code.<sup>43</sup> The

---

during appellate hearings, that federal prosecutors took the case because of "the severity of the conduct"—anal penetration, repetitive delinquent behavior, and threats—and because the acts took place on Fort Huachuca. Zusha Elinson, *Federal Youth Case On Trial*, WALL STREET J. (Oct. 7, 2013), <https://www.wsj.com/articles/federal-youth-case-on-trial-1381186814>. Fort Huachuca is an Army installation with exclusive jurisdiction. See Suter, *supra* note 13, at 17; Roman, *supra* note 18, at 46.

<sup>37</sup> New Jersey *ex rel.* D.B.S., 349 A.2d 105, 106–07 (N.J. Super. Ct. App. Div. 1975) (upholding New Jersey state juvenile delinquency adjudication where larceny of items from homes occurred on Fort Dix); M.R.S. v. State, 745 So. 2d 1139, 1139 (Fla. Dist. Ct. App. 1999) (upholding Florida state juvenile delinquency adjudication where property was stolen from vehicles on Eglin Air Force Base); *In re Charles B.*, 765 N.Y.S.2d 191, 192, 195–96 (N.Y. Fam. Ct. 2003) (upholding New York state juvenile delinquency adjudication where burglary and larceny occurred on West Point Military Reservation).

<sup>38</sup> *D.B.S.*, 349 A.2d at 107; *In re Charles B.*, 765 N.Y.S.2d at 193–94.

<sup>39</sup> See *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624, 625–26 (1953) (upholding annexation of a U.S. Naval facility by the city of Louisville, Kentucky).

<sup>40</sup> *Id.* at 627.

<sup>41</sup> See *United States v. Juvenile*, 599 F. Supp. 1126, 1131 (D. Or. 1984). "Although a proceeding under 18 U.S.C. § 5032 is classified as procedural rather than criminal, it cannot be said that the proceedings are not criminal in nature. The juvenile is charged in a criminal information, then arraigned to enter a plea of guilty or not guilty. He may be detained prior to the adjudication hearing, and if found to be a delinquent he faces the possibility of incarceration. Thus, the juvenile is subjected to criminal proceedings even though criminal conviction is not entered on his record." *Id.*

<sup>42</sup> See 18 U.S.C. § 5032 (2012); see *infra* notes 43–52 and accompanying text.

<sup>43</sup> Arthur W. James, *The Federal Juvenile Delinquency Act After Two Years of Operation*, 4 FED. PRO. 21, 21 (1940).



federal criminal system treated juveniles the same as adults, even if they were as young as nine years of age.<sup>44</sup> Dealing primarily with cases of juvenile interstate joyriding,<sup>45</sup> Congress enacted legislation in 1932 permitting U.S. Attorneys to surrender an offender of federal law under the age of twenty-one years to the offender's state of domicile if the juvenile had simultaneously offended a criminal or delinquency law of said state.<sup>46</sup> The purpose was to cooperate with states in the care and treatment of juvenile offenders.<sup>47</sup> However, a major shortcoming of the legislation was its failure to provide for federal juvenile delinquency disposition for juvenile criminal offenders who committed crimes on tribal lands or military installations, two locations where state juvenile courts lacked jurisdiction.<sup>48</sup>

In 1938, Congress passed the Federal Juvenile Delinquency Act.<sup>49</sup> A person seventeen years of age or under committing an offense against the laws of the United States could be prosecuted as a juvenile delinquent.<sup>50</sup> The procedure afforded certain protections based on the person's youth, such as not being jailed with adults and more rehabilitative options upon sentencing.<sup>51</sup> In 1974, Congress substantially revised the Act, renamed the Juvenile Justice and Delinquency Prevention Act (JJJPA), in part to align federal juvenile delinquency procedures with those already in effect in the states and also to encourage preferred state practices through the use of federal grants.<sup>52</sup>

### *iii. Required Certification*

The JJJPA also implemented a certification procedure, the purpose of which is to defer adjudication of juvenile crimes to the states whenever possible owing to the federal correction system lacking the resources to process large numbers of juveniles or keep juvenile offenders near their homes for treatment.<sup>53</sup> In order to initiate federal charges against a juvenile, now defined as a person under the

---

<sup>44</sup> *Id.*

<sup>45</sup> CHARLES DOYLE, CONG. RESEARCH SERV. RL 30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 2 n.3 (2004).

<sup>46</sup> Act of June 11, 1932, ch. 243, 47 Stat. 301 (codified as amended at 18 U.S.C. § 5001 (2012)).

<sup>47</sup> *See id.*

<sup>48</sup> DOYLE, *supra* note 45, at 2.

<sup>49</sup> Federal Juvenile Delinquency Act, ch. 486, 52 Stat. 764 (1938) (repealed and provisions now codified at 18 U.S.C. §§ 5031–5037 (2012)); 18 U.S.C. §§ 921–927 (1940 ed.).

<sup>50</sup> 18 U.S.C. § 921.

<sup>51</sup> 18 U.S.C. § 925.

<sup>52</sup> *See* LaTanya Gabaldon-Cochran, *Federal and Tribal Court Jurisdiction Over Youthful Offenders in Indian Country*, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW TRIBAL JUDICIAL INSTITUTE, [https://law.und.edu/tji/\\_files/docs/monograph-youthful-offenders.pdf](https://law.und.edu/tji/_files/docs/monograph-youthful-offenders.pdf) (last visited Nov. 22, 2016).

<sup>53</sup> 120 CONG. REC. 25,162 (1974).

age of eighteen years, a certifying official must assert to a federal district court judge that one of several conditions exists.<sup>54</sup> One condition meeting the necessary certification requirement is that a state juvenile court does not have jurisdiction over the juvenile offender.<sup>55</sup> Because federal appellate courts have held that state juvenile courts do not have jurisdiction over federal lands, including military installations, with exclusive jurisdiction, certification to proceed against juveniles on such lands should be a mere formality.<sup>56</sup> However, because of a lack of federal interest, certification to prosecute juvenile offenders is rarely sought.<sup>57</sup>

## 2. *Lack of Federal Interest*

The federal interest concept is a core component of federal prosecution priorities, which serve as a focus for prosecution offices with limited resources trying to make the biggest impact on serious crime.<sup>58</sup> Although the installation commander has, pursuant to the delegated authority of the Secretary of Defense, the responsibility for maintaining good order and discipline on the military installation, that duty alone will seldom qualify as sufficient federal interest for a federal prosecutor to proceed against a juvenile.<sup>59</sup>

An analogous situation, helpful in understanding the mindset of federal prosecutors, occurs on tribal lands.<sup>60</sup> Despite being the sole entity with authority to prosecute serious crimes resulting in prison sentences in excess of three years on most Indian reservations, there is little federal interest among the ranks of federal prosecutors to do so.<sup>61</sup> Margaret Chiara, the former U.S. Attorney for the District

---

<sup>54</sup> 18 U.S.C. § 5032 (2012).

<sup>55</sup> *Id.* Other conditions include that the state refuses to exercise jurisdiction, the state lacks adequate programs or services for the juvenile offender, or the offense charged is a firearms offense, drug trafficking offense, importation offense, or crime of violence, and there is a substantial federal interest in the case or offense to warrant federal jurisdiction. *Id.*

<sup>56</sup> See *supra* note 36 and accompanying text. Under the Supremacy Clause, the aforementioned federal court rulings should be dispositive as to whether or not states can enforce their juvenile delinquency laws on military installations with exclusive jurisdiction. See U.S. CONST. art. VI, cl. 2. Federal laws preempt state laws where there is conflict between the two. *Id.*; see also Erin Smith, *Federal and State Preemption Basics: What Every Drafter Ought to Know*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 12, 2016), <http://www.ncsl.org/Portals/1/Documents/lss/NCSLPreemptionWebinarSlides.pdf>.

<sup>57</sup> See *infra* notes 58–68 and accompanying text.

<sup>58</sup> See Memorandum from Att’y Gen. Eric Holder to All Fed. Prosecutors (May 19, 2010), [http://www.miefdo.org/forms/Attorney\\_General\\_Eric\\_Holder\\_Memo\\_re\\_Department\\_Policy\\_on\\_Charging\\_and\\_Sentencing.pdf](http://www.miefdo.org/forms/Attorney_General_Eric_Holder_Memo_re_Department_Policy_on_Charging_and_Sentencing.pdf); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL 9-27.220, 9-27.230 (1997).

<sup>59</sup> See U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-5b(1) (Nov. 6, 2014).

<sup>60</sup> See Michael Riley, *Promises, Justice Broken*, DENVER POST (last updated May 7, 2016), <http://www.denverpost.com/2007/11/10/promises-justice-broken/>.

<sup>61</sup> *Id.*

of Western Michigan, which has jurisdiction over several Indian reservations, highlighted the lack of motivation to prosecute crimes on tribal lands:

“I’ve had (assistant U.S. attorneys) look right at me and say, ‘I did not sign up for this’ . . . They want to do big drug cases, white-collar crime and conspiracy. And I’ll tell you, the vast majority of the judges feel the same way. They will look at these Indian Country cases and say, ‘What is this doing here? I could have stayed in state court if I wanted this stuff’ . . . It’s a terrible indifference, which is dangerous because lives are involved.”<sup>62</sup>

Kevin Washburn, a former federal prosecutor and current law professor at the University of Minnesota, echoed those sentiments:

“Most federal prosecutors went into the U.S. attorney’s office because they wanted to do complex, sophisticated, sexy prosecutions, not felony prosecutions of pedestrian crime . . . Certainly, murders are going to be a high priority. They’re going to give less attention to some of the lesser offenses, including serious assaults, robbery, arson, a whole host of things.”<sup>63</sup>

Entwined with a lack of federal interest is an unwillingness by federal prosecutors to appreciate the physical and emotional trauma that sexual assaults have on juvenile victims and families.<sup>64</sup> Research demonstrates that common long-term effects of childhood sexual abuse include depression, guilt, shame, self-blame, body image problems, eating disorders, stress, anxiety, dissociative behavior, and difficulty establishing interpersonal relationships.<sup>65</sup> Some juvenile-on-juvenile sexual assault victims view dealing with the negative effects and horrible memories of abuse as a “life sentence.”<sup>66</sup> Federal prosecutors at Fort Hood, however, urged the mother of a 10-year-old boy who suffered years of juvenile-on-juvenile sexual assault to forego pursuing charges, suggesting that juvenile sexual assault crimes are not serious.<sup>67</sup> The mother stated of the experience, “[t]he overall sense was: This is the way it is, just go with it and suck it up and move on.”<sup>68</sup>

---

<sup>62</sup> *Id.*

<sup>63</sup> Michael Riley, *Principles, Politics Collide*, DENVER POST (Nov. 13, 2007), [http://www.denverpost.com/news/ci\\_7446439](http://www.denverpost.com/news/ci_7446439).

<sup>64</sup> See *infra* notes 65–68 and accompanying text.

<sup>65</sup> Melissa Hall & Joshua Hall, *The Long-term Effects of Childhood Sexual Abuse: Counseling Implications*, 2-3 AM. COUNSELING ASS’N 1, 2 (2011), [https://www.counseling.org/docs/disaster-and-trauma\\_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf](https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf).

<sup>66</sup> See Anna Hopkins, *I Will Have a Life Sentence*, DAILY MAIL (Apr. 10, 2017), <http://www.dailymail.co.uk/news/article-4399714/Girl-abused-older-brother-addresses-court.html>.

<sup>67</sup> See Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>68</sup> *Id.*

### 3. *Abysmally Low Federal Juvenile Delinquency Prosecution Rates*

The lack of federal interest regarding juvenile crime on military installations with exclusive jurisdiction results in abysmally low federal prosecution rates of juvenile delinquency, including the serious crime of juvenile-on-juvenile sexual assault.<sup>69</sup> Then-Lieutenant Colonel William Suter surveyed the field and authored his 1974 Juvenile Delinquency Statistical Abstract.<sup>70</sup> He received responses from seventeen Army installations with exclusive jurisdiction for which there was not a single federal juvenile delinquency prosecution despite 1,552 reports of juvenile crimes at those locations for the year.<sup>71</sup> While certainly not all of those reported incidents were felonies, or juvenile-on-juvenile sexual assaults, then-LTC Suter did note that “numerous staff judge advocates have great difficulty in convincing local U.S. Attorneys to assume jurisdiction of serious juvenile cases arising on installations.”<sup>72</sup> In 2015, Major Emily Roman duplicated LTC Suter’s survey, albeit on a smaller scale.<sup>73</sup> She received responses from ten Army installations with exclusive jurisdiction for which there was not a single federal juvenile delinquency prosecution despite 288 reports of juvenile crimes for the year.<sup>74</sup> The Army’s Criminal Investigation Command (CID), responsible for investigating felony-level crime,<sup>75</sup> reports that there were 45,401 incidents of serious crime committed by juveniles, including 6,175 incidents of juvenile-on-juvenile crime, on Army installations from 2004 to 2015.<sup>76</sup> There is no indication that federal prosecutors routinely prosecuted juvenile crimes at any Army installation.<sup>77</sup>

---

<sup>69</sup> See *infra* notes 70–103 and accompanying text.

<sup>70</sup> Suter, *supra* note 13, at 17–18. LTC Suter would later serve as Acting Judge Advocate General of the Army and the 19th Clerk of Court of the Supreme Court. Richard Brust, *A Court and Army Officer: Retired General William Suter Salutes His 20th Year as Clerk*, 97 A.B.A.J. 20 (2011).

<sup>71</sup> See Suter, *supra* note 13, at 17. The installations with exclusive jurisdiction and no federal juvenile delinquency prosecutions are Fort Huachuca, Fort Monmouth, Redstone Arsenal, White Sands Missile Range, Fort Belvoir, Fort Eustis, Fort Gordon, Fort Benning, Fort McClellan, Fort Jackson, Fort Leavenworth, Fort Ord, Fort Meade, Fort Devens, Fort Hood, Fort Carson, and Fort Lewis. *Id.* Note that “mixed” is not an actual type of legislative jurisdiction, but is instead used to designate an installation comprised of some lands with exclusive jurisdiction and some lands with concurrent jurisdiction. *Id.* Several of the listed installations indicate a U.S. magistrate “handled” cases informally, which is not the same thing as a federal juvenile delinquency hearing. *Id.*

<sup>72</sup> Suter, *supra* note 13, at 13.

<sup>73</sup> Roman, *supra* note 18, at 46.

<sup>74</sup> *Id.* The installations with exclusive jurisdiction and no federal juvenile delinquency prosecutions are Fort Benning, Fort Gordon, Fort Hood, Fort Huachuca, Fort Irwin, Fort Knox, Fort Leavenworth, Redstone Arsenal, Fort Riley, and Fort Stewart. *Id.*

<sup>75</sup> *General Questions: What are the types of crimes CID investigates?*, U.S. ARMY CRIM. INVESTIGATION COMMAND, <http://www.cid.army.mil/faq.html> (last visited Apr. 6, 2017). Army CID investigates “deaths, sexual assault, armed robbery, procurement fraud, computer crimes, counter-drug operations and war crimes.” *Id.*

<sup>76</sup> Data provided by U.S. Army Crime Records Center in response to a research request from the author (request and response on file with the author). See *infra* Appendix C.

<sup>77</sup> See *infra* note 79 and accompanying text.

Focusing specifically on juvenile-on-juvenile sexual assaults occurring on military installations with exclusive federal jurisdiction, anecdotal evidence indicates federal prosecutors seldom, if ever, seek certification over such crimes, even when strong evidence exists to warrant prosecution.<sup>78</sup> Examples include the following:

A search of the Federal Judicial Center's integrated criminal database reveals that U.S. Attorneys whose offices oversee federal prosecutions at nineteen Army installations with primarily exclusive jurisdiction initiated no more than five total juvenile delinquency proceedings against juvenile sexual assault offenders from 2004 to 2015.<sup>79</sup>

A memo from Fort Hood, Texas, revealed thirty-nine cases of reported juvenile-on-juvenile sexual assault from 2006 to 2012, without a single federal juvenile delinquency prosecution.<sup>80</sup>

The Navy and Marine Corps reported 126 cases of juvenile-on-juvenile sexual assault on Navy and Marine Corps installations involving offenders under the age of sixteen years from 2012 to 2015, but anecdotal evidence indicates no routine federal prosecutions at any installation.<sup>81</sup>

Fort Riley, Kansas, averages five to seven juvenile-on-juvenile sexual assault cases per year but has not had a federal juvenile delinquency case in at least the last fifteen years.<sup>82</sup>

At the former Fort Dix, now a part of Joint Base McGuire-Dix-Lakehurst, serious cases, like juvenile-on-juvenile sexual

---

<sup>78</sup> See *infra* notes 79–103 and accompanying text.

<sup>79</sup> See *Federal Court Cases: FJC Integrated Database (IBD) 1970 to Present*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/research/idb/interactive/IDB-criminal-since-1996> (last visited Nov. 12, 2017). The Federal Judicial Center (FJC) is the research and education agency of the federal judiciary, and its integrated criminal database is located at the FJC website. *Id.* The author queried the database for federal juvenile delinquency filings involving sexual assault and originating in federal judicial districts and counties that contain Fort Belvoir (0), Fort Benning (0), Fort Bliss (1 guilty plea), Fort Bragg (1 unknown disposition), Fort Campbell (0), Fort Carson (0), Fort Hood (0), Fort Huachuca (1 guilty finding after trial, 1 dismissed), Fort Jackson (0), Fort Leavenworth (0), Fort Leonard Wood (0), Fort Meade (0), Fort Polk (0), Redstone Arsenal (0), Fort Riley (0), Fort Rucker (0), Fort Sill (0), Fort Stewart (1 guilty plea), West Point (0). *Id.*

<sup>80</sup> Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>81</sup> Statistics compiled from DEP'T OF THE NAVY, NAVAL CRIM. INVESTIGATIVE SERV., ANNUAL CRIME REPORTS (2012–2015) (obtained through a Freedom of Information Act Request and on file with the author).

<sup>82</sup> E-mail from Special Assistant U.S. Att'y, Fort Riley, Kan., to author (Feb. 1, 2017) (on file with author). Under a Memorandum of Agreement, the State of Kansas adjudicates cases referred by military authorities, even though formal retrocession of jurisdiction has not been enacted. *Id.*

assault, are referred directly to the U.S. Attorney's Office. The last such case was in 2014, resulting in an indictment that was later dismissed. There have been additional cases of juvenile-on-juvenile sexual assault investigated in the last six years but no federal prosecutions.<sup>83</sup>

A five-year-old girl was sexually assaulted by a 16-year-old juvenile male in 2001 on Fort Hood, Texas.<sup>84</sup> Army investigators gathered evidence and referred the case to federal prosecutors.<sup>85</sup> Four years later, in 2005, a juvenile delinquency proceeding still had not been initiated, causing an exasperated Army investigator to write directly to the U.S. Attorney's Office in Waco: "(T)his office has contacted various appointed (prosecutors) to determine what action, if any, was going to be pursued . . . As of this date, no prosecution was ever initiated."<sup>86</sup>

A mother walked in on her 13-year-old stepson molesting her 10-year-old biological son in 2010 on Fort Hood, Texas.<sup>87</sup> She learned that the abuse had been occurring since her young son was 7-years-old.<sup>88</sup> She immediately reported the sexual assault to Army law enforcement personnel, who investigated and obtained a confession from the juvenile offender.<sup>89</sup> Despite the mother expressing a strong desire to prosecute him, a federal prosecutor at the U.S. Attorney's Office in Waco declined to prosecute the case three months later without meeting the victim or his mother and without providing a reason for taking no action.<sup>90</sup> Today, because he had no record of juvenile delinquency as a sex offender, the juvenile offender serves as a Lance Corporal in the United States Marine Corps.<sup>91</sup>

---

<sup>83</sup> E-mail from Staff Att'y, Joint Base McGuire-Dix-Lakehurst, N.J., to author (Jan. 11, 2017) (on file with author). Local state prosecutors handle "run of the mill" juvenile cases from the military installation. *Id.*

<sup>84</sup> Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> E-mail from mother of juvenile victim, Fort Hood, Tex., to author (Oct. 10, 2016) (on file with author). An applicant for military service is considered ineligible if he or she was found to be a juvenile delinquent by a federal or state court for committing the felony crime of rape, sexual abuse, sexual assault, incest, or other sexual offense, or has been required by a court to register as a sex offender. 32 § C.F.R. 66.6(b)(8)(iii) (2012). No waivers are permitted. *Id.*

At Fort Campbell, Kentucky, a 16-year-old sexually assaulted a 5-year-old female family member numerous times.<sup>92</sup> The case was investigated and a videotaped confession to the crime by the juvenile offender was obtained.<sup>93</sup> The case was forwarded to federal prosecutors in 2012, but was declined for prosecution.<sup>94</sup>

On an Air Force base in the southern United States, a sixteen-year-old male juvenile sexually assaulted three female girls fourteen to sixteen years of age in a high school during or shortly after school hours.<sup>95</sup> One victim protested and physically resisted; another victim fought back.<sup>96</sup> The juvenile offender admitted to one of the sexual assaults. Despite being faced with a serial juvenile-on-juvenile sexual offender, federal prosecutors declined to take any action.<sup>97</sup> There was no coordination with the victims or parents over the decision not to prosecute.<sup>98</sup> Authorities merely barred the juvenile offender from entering onto the military installation, so he began attending a different high school in the local community.<sup>99</sup>

On Fort Belvoir, Virginia, a sixteen-year-old girl was the victim of a physical assault and attempted rape at the hands of a sixteen-year-old male juvenile in her family's living quarters in 2016.<sup>100</sup> Despite cooperating with Army investigators, who collected DNA evidence and overheard the juvenile offender confess to the attack in a pretext phone call that was emotionally difficult for the victim, federal prosecutors took no action.<sup>101</sup> The family requested to meet with the U.S. Attorney for the Eastern District of Virginia to understand why the case, which law enforcement indicated was strong, was not prosecuted.<sup>102</sup> The U.S. Attorney

---

<sup>92</sup> E-mail from Army Judge Advocate, to author (Mar. 12, 2017) (on file with author).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> E-mail from Air Force Judge Advocate, to author (Mar. 12, 2017) (on file with author).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> E-mail from mother of juvenile victim, Fort Belvoir, Va., to author (Aug. 30, 2016) (on file with author).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



never responded and the Assistant U.S. Attorney responsible for declining the case refused to meet with the family.<sup>103</sup>

The black hole of juvenile justice on military installations that allows the above situations to occur does not have to be so, but the DoD has been unwilling to retrocede jurisdiction over juveniles on the vast majority of its military installations.<sup>104</sup>

## *B. DoD's Unwillingness to Utilize Authority Granted by Congress*

### *1. Retrocession Rarely Used*

The Property Clause of the U.S. Constitution grants Congress the “power to dispose of and make all needful rules and regulations” over federal lands and other property belonging to the United States.<sup>105</sup> A Presidentially-approved interdepartmental committee that studied exclusive jurisdiction recommended to the Attorney General in 1956 that “the most immediate need” was “to make provision for the retrocession of unnecessary jurisdiction to the States,” in part because areas with exclusive legislative jurisdiction encountered problems with “juvenile offenses.”<sup>106</sup> Fourteen years later, the Public Land Law Review Commission reached a similar conclusion, recommending to the President and Congress that a general statute should be passed authorizing federal departments and agencies to “retrocede exclusive [f]ederal legislative jurisdiction to the states, with the consent of the states.”<sup>107</sup> Congress eventually passed, in October of 1970, legislation permitting the Secretary concerned to relinquish, or retrocede, to a surrounding state, commonwealth, or territory “all or part of the legislative jurisdiction of the United States over lands or interests under his control.”<sup>108</sup> Part of the legislation’s purpose was to alleviate the time-consuming process of obtaining specific Congressional action regarding jurisdiction over designated

---

<sup>103</sup> E-mail from mother of juvenile victim, Fort Belvoir, Va., to author (Aug. 30, 2016) (on file with author).

<sup>104</sup> See *infra* notes 105–21 and accompanying text.

<sup>105</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>106</sup> U.S. ATTORNEY GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, *supra* note 15, pt. I, 19, 71.

<sup>107</sup> PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 279 (1970).

<sup>108</sup> Act of Oct. 26, 1970, Pub. L. 91-511, 84 Stat. 1226 (codified as amended at 10 U.S.C. § 2683 (2012)). Although relinquishment, versus retrocession, would technically be more accurate in a situation where the United States was relinquishing legislative jurisdiction over lands it had initially reserved to itself when the State joined the Union, the terms are used interchangeably. See U.S. ATTORNEY GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, *supra* note 15, at pt. I, 10; AR 405-20, *supra* note 15, at para. 8; U.S. DEP’T OF NAVY REAL ESTATE PROCEDURAL MANUAL P-73 Ch. 26, *supra* note 14, at para. 10d.



federal lands.<sup>109</sup> Regarding military installations, the Secretary of Defense delegated retrocession authority to the military department—Army, Navy, or Air Force—having real property accountability for the installation.<sup>110</sup> To effectuate retrocession of jurisdiction, the Secretary of the military department relinquishes jurisdiction to the Governor or designated legislative body of the surrounding state.<sup>111</sup>

The DoD has invoked its authority to retrocede exclusive jurisdiction only a handful of times to address juvenile crime—despite one military department, the U.S. Army, stating that its policy is to retrocede unnecessary federal jurisdiction.<sup>112</sup> In 1999, the Department of the Army retroceded exclusive jurisdiction over 102,831.6 acres of land at the Fort Knox Military Reservation, Fort Knox, Kentucky, as it pertained to “juveniles who commit offenses on Fort Knox.”<sup>113</sup> Following retrocession, Fort Knox became a military installation with concurrent jurisdiction over juveniles, meaning both the state and the federal government had the same authority to exercise jurisdiction over juvenile crimes.<sup>114</sup> Similarly, in 2001, the Department of the Army and the Department of the Air Force retroceded exclusive jurisdiction over juveniles on roughly 62,234.56 acres of land now known as Joint Base Lewis-McChord, Washington, to the State of Washington.<sup>115</sup> This retrocession followed a series of unflattering newspaper articles concerning the impact of exclusive jurisdiction on juvenile crime highlighted by the lack of accountability for a serial juvenile-on-juvenile sexual assault offender who had

---

<sup>109</sup> AR 405-20, *supra* note 15, at para. 2b.

<sup>110</sup> U.S. DEP’T OF DEF., INSTR. 4165.70, REAL PROPERTY MANAGEMENT, para 6.11 (Apr. 6, 2005). An earlier version of this delegation is found in the since canceled DEP’T OF DEF. DIR. 5160.63, DELEGATIONS OF AUTHORITY VESTED IN THE SECRETARY OF DEFENSE TO TAKE CERTAIN REAL PROPERTY ACTIONS, para C.1 (July 6, 1972).

<sup>111</sup> 10 U.S.C. § 2683; AR 405-20, *supra* note 15, at para. 8.

<sup>112</sup> *See* AR 405-20, *supra* note 15, at para. 2b.

<sup>113</sup> Letter from Paul W. Johnson, Deputy Assistant Sec’y (Installation and Housing), Dep’t of the Army, to the Honorable Paul E. Patton, Governor, State of Ky. (Jun. 8, 1999) (on file with the Office of the Staff Judge Advocate, Fort Knox, Ky.) (accepting the retrocession of exclusive federal legislative jurisdiction and establishing concurrent juvenile legislative jurisdiction over Fort Knox Military Reservation, Ky., effective June 16, 1999). *See infra* Appendix D (letter and reply by the State of Ky. accepting jurisdiction).

<sup>114</sup> *See* AR 405-20, *supra* note 15, at para. 3(c), 4(b).

<sup>115</sup> Letter from Paul W. Johnson, Deputy Assistant Sec’y (Installation and Housing), Dep’t of Army, to Honorable Gary Locke, Governor of Wash. (Sept. 6, 2000) (on file with the Office of the Staff Judge Advocate, Joint Base Lewis-McChord, Wash.) (retroceding exclusive federal legislative jurisdiction and establishing concurrent juvenile legislative jurisdiction over Fort Lewis Military Reservation, Wash., effective Jan. 1, 2001); Letter from Jimmy G. Dishner, Deputy Assistant Sec’y (Installation), Dep’t of Air Force, to the Honorable Gary Locke, Governor of Wash. (July 2, 1998) (on file with the Office of the Staff Judge Advocate, Joint Base Lewis-McChord, Wash.) (retroceding exclusive federal legislative jurisdiction and establishing concurrent juvenile legislative jurisdiction over McChord Air Force Base, Wash., effective Jan. 1, 2001). *See infra* Appendix E (letters and replies by the State of Wash. accepting jurisdiction).

terrorized his neighborhood.<sup>116</sup> The State of Washington now has concurrent jurisdiction over juveniles at Joint Base Lewis-McChord.<sup>117</sup>

In 2015, Fort Stewart and Hunter Army Airfield, two Army installations in Georgia, retroceded jurisdiction on a combined 282,674.12 acres of land to the state.<sup>118</sup> The two installations now enjoy concurrent legislative jurisdiction with the state over all matters, including juvenile delinquency.<sup>119</sup> The Fort Stewart installation newspaper noted that “a significant benefit achieved by this retrocession is access to the State of Georgia’s juvenile justice system for individuals under the age of 18 who commit crimes on post.”<sup>120</sup> Although retrocession of jurisdiction worked exactly as Congress intended at Fort Stewart,<sup>121</sup> the vast majority of military installations faced with the same juvenile justice problem have not followed suit.<sup>122</sup>

## 2. *Alleged Relinquishment of Jurisdiction by Invalid Means*

Instead of formally retroceding jurisdiction pursuant to the authority granted by Congress to the DoD, military commanders and their advising judge advocates

<sup>116</sup> *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping a 7-year-old Boy at Fort Lewis*, *supra* note 2; *McChord, Fort Lewis to Give Up Some Authority over Juveniles*, SEATTLE TIMES (June 4, 1996), <http://community.seattletimes.nwsourc.com/archive/?date=19960604&slug=2332770>.

<sup>117</sup> *See supra* note 115 and accompanying text.

<sup>118</sup> Memorandum of Agreement between the United States and the State of Ga., signed by Paul D. Cramer, Deputy Assistant Sec’y (Installations, Housing, and Partnerships), Dep’t of the Air Force, and the Honorable Nathan Deal, Governor of Ga. (June 6, 2015) (on file with Office of the Staff Judge Advocate, Fort Stewart, Ga.) (retroceding exclusive federal legislative jurisdiction and establishing concurrent juvenile legislative jurisdiction over portions of Fort Stewart and Hunter Army Airfield, Ga.). *See infra* Appendix F.

<sup>119</sup> Elizabeth Smitham & Ashanti B. Wallace, *Ask the Judge: civilian misconduct on the military installation*, THE FRONTLINE (Apr. 21, 2016), <http://www.stewartfrontline.com/archives/2817/>.

<sup>120</sup> *Id.*

<sup>121</sup> Interview with Elizabeth Smitham, Special Assistant U.S. Att’y, in Fort Stewart, Ga. (Oct. 10, 2016). Since retrocession of jurisdiction at Fort Stewart, two juvenile offenders have been prosecuted for juvenile-on-juvenile sexual assault on the installation *Id.* Both were sentenced to home confinement and are wearing ankle monitors, as ordered by a Georgia state delinquency court. *Id.*

<sup>122</sup> Suter, *supra* note 13, at 17. Then-Lieutenant Colonel William Suter’s 1974 survey of thirty Army installations revealed twenty-three (77%) with overall exclusive jurisdiction, seven (23%) with some portion that had exclusive jurisdiction, and none (0%) that had overall concurrent jurisdiction. *Id.* Major Emily Roman’s 2015 survey of eighteen Army installations revealed nine (50%) with overall exclusive jurisdiction, eight (44%) with some portion that had exclusive jurisdiction, and one (6%) that had overall concurrent jurisdiction. Roman, *supra* note 18, at 46. According to the Department of Defense Base Structure Report for Fiscal Year 2015, the active Army has a total of 103 installations, the active Navy (which includes the Marine Corps) has 104 installations, and the active Air Force has 86 installations. DEP’T OF DEF, BASE STRUCTURE REP-FISCAL YEAR 2015 BASELINE 4 (2015), <http://www.acq.osd.mil/eie/Downloads/BSI/Base%20Structure%20Report%20FY15.pdf>. However, research indicates that the only military installations that have retroceded jurisdiction over juvenile crimes are Fort Knox, Kentucky, in 1999, Joint Base Lewis-McChord, Washington, in 2001, and Fort Stewart, Georgia, in 2015. *See supra* notes 112–21 and accompanying text.

have pursued other means to try to hold juvenile offenders accountable and ensure they are rehabilitated.<sup>123</sup> The means include referring juvenile cases directly to state courts,<sup>124</sup> signing memoranda of agreement with local state prosecutors for the routine referral of juvenile cases to their offices,<sup>125</sup> and seeking opinions from state attorneys general to validate juvenile referral practices.<sup>126</sup> State court referrals will be reviewed first.<sup>127</sup>

In 1973, authorities at Fort Dix, New Jersey, referred the case of a juvenile offender to the state's juvenile court via petition.<sup>128</sup> After being adjudged a delinquent, the juvenile appealed on the grounds that the state lacked authority to try him because Fort Dix was a military installation with exclusive jurisdiction.<sup>129</sup> The appellate court upheld the finding of juvenile delinquency, viewing the referral of the case the same as a surrender of jurisdiction under federal law.<sup>130</sup> The court did not contemplate the formal procedure to relinquish exclusive jurisdiction laid out in 10 U.S.C. § 2683.<sup>131</sup> Had the court done so, it should have realized that Fort Dix authorities lacked the power to relinquish jurisdiction by simply referring a case to a state court, which itself lacked the authority to accept jurisdiction on behalf of the State of New Jersey.<sup>132</sup> The court conflated surrendering of the juvenile person—allowed under federal law since 1932 if the state already had jurisdiction over the juvenile under its own laws—with relinquishing territorial jurisdiction—allowed under federal law since 1970 only following a specified formal process.<sup>133</sup> Despite its flawed logical reasoning, the New Jersey state court's opinion proved to be somewhat influential.<sup>134</sup> Other state courts later cited to it when asserting jurisdiction over acts of juvenile delinquency occurring on Eglin Air Force Base (Florida) and West Point (New York), military installations with exclusive jurisdiction.<sup>135</sup>

---

<sup>123</sup> See *infra* notes 128–61 and accompanying text.

<sup>124</sup> See *infra* notes 128–43 and accompanying text.

<sup>125</sup> See *infra* notes 144–51 and accompanying text.

<sup>126</sup> See *infra* notes 152–61 and accompanying text.

<sup>127</sup> See *infra* notes 128–43 and accompanying text.

<sup>128</sup> New Jersey *ex rel.* D.B.S., 349 A.2d 105, 106 (N.J. Super. Ct. App. Div. 1975).

<sup>129</sup> *Id.* at 106–07.

<sup>130</sup> *Id.* at 107.

<sup>131</sup> See *id.*

<sup>132</sup> See 10 U.S.C. § 2683(a).

<sup>133</sup> See *supra* notes 46, 108 and accompanying text.

<sup>134</sup> See *infra* notes 135–36 and accompanying text.

<sup>135</sup> M.R.S. v. State, 745 So. 2d 1139, 1139 (Fla. Dist. Ct. App. 1999); *In re* Charles B., 765 N.Y.S.2d 191, 194–95 (N.Y. Fam. Ct. 2003). The complainant who filed the juvenile delinquency petition in the West Point case was not a state juvenile prosecutor, but was instead an active duty member of the U.S. Army's Judge Advocate General's Corps. *Id.*

The referral approach, however, sometimes backfires spectacularly.<sup>136</sup> In 1991, the Supreme Court for the State of North Carolina dismissed state murder charges filed against an adult male who, as a fifteen-year-old juvenile, was alleged to have killed three members of his family in 1981 in family housing on Camp Lejeune, North Carolina.<sup>137</sup> Federal prosecutors previously attempted to charge him on two occasions as an adult in federal court, but the Fourth Circuit Court of Appeals thwarted their efforts.<sup>138</sup> Federal prosecutors then referred the case to North Carolina state prosecutors, who obtained an indictment for the murders.<sup>139</sup> The North Carolina Supreme Court, however, in deciding the validity of state jurisdiction, determined the prior 18 U.S.C. § 5032 certification made by federal prosecutors bound the court.<sup>140</sup> The certification stated North Carolina lacked jurisdiction over the juvenile as his crimes occurred on a military installation with exclusive jurisdiction.<sup>141</sup> Although exclusive jurisdiction led to the “undesirable result” of the alleged juvenile perpetrator being released from jail, the North Carolina Supreme Court concluded that it could only declare the law as it found it.<sup>142</sup> No subsequent prosecution of the alleged juvenile murderer ever took place; Camp Lejeune still remains under exclusive jurisdiction.<sup>143</sup>

Another invalid means of relinquishing jurisdiction involves the signing of Memoranda of Agreement (MOAs).<sup>144</sup> The MOAs, signed by military installation commanders and county attorneys, establish procedures under which military authorities refer juvenile offender cases arising on military installations with exclusive jurisdiction to local prosecutors for adjudication in state juvenile delinquency hearings.<sup>145</sup> Sometimes, the MOAs include a statement that

---

<sup>136</sup> See *infra* notes 137–43 and accompanying text.

<sup>137</sup> *State v. Smith*, 400 S.E.2d 405, 406, 409–10 (N.C. 1991). Camp Lejeune is a Marine Corps military installation with exclusive jurisdiction. *Id.* at 407–09.

<sup>138</sup> *United States v. Juvenile Male*, 819 F.2d 468, 469–70 (4th Cir. 1987) (holding it was a violation of ex post facto clause of the U.S. Constitution to try the juvenile defendant under an act not in effect at the time of the alleged crimes); *United States v. Smith*, 851 F.2d 706, 709–10 (4th Cir. 1988) (holding once the federal government proceeded against a person under the Juvenile Delinquency Act, it could not proceed against him under another act).

<sup>139</sup> See *Smith*, 400 S.E.2d at 409.

<sup>140</sup> *Id.* at 408–09.

<sup>141</sup> *Id.* at 408.

<sup>142</sup> *Id.* at 409–10.

<sup>143</sup> See Kay Lindell, *Base Case Evidence Ignored? Federal Investigators Axed Suspect Sketch*, THE DAILY NEWS, Apr. 27, 2008; *Legal Services Support Team—Camp Lejeune*, MARINES, <http://www.mcieast.marines.mil/Staff-Offices/Legal-Services-Support-Section-East/Legal-Services-Support-Team-Camp-Lejeune/SAUSA/> (last visited Apr. 7, 2017).

<sup>144</sup> See *infra* notes 145–51 and accompanying text.

<sup>145</sup> See U.S. DEP’T OF ARMY, REG. 27-3, TRAINING AND DOCTRINE COMMAND, MILITARY JUSTICE JURISDICTION/CIVILIAN CRIMINAL FOR FORT MONROE, VIRGINIA para. 5-2 (Nov. 16, 2007); U.S. DEP’T OF ARMY, REG. 27-2, TRAINING AND DOCTRINE COMMAND, MILITARY JUSTICE JURISDICTION, CIVILIAN CRIMINAL JURISDICTION ON FORT EUSTIS, AND DESIGNATION OF SUPERIOR COMPETENT AUTHORITIES, para. 3-2 (Mar. 22, 2016), <https://www.tradoc.army.mil/tpubs/regs/TR27-2.pdf>; Memorandum of

jurisdiction on the military installation is not being altered in any way, despite the agreed upon outcome that local prosecutors will have the ensuing authority to prosecute juvenile delinquency occurring on the military installations.<sup>146</sup> Other times, the MOAs themselves purport to alter jurisdiction, despite not complying with 10 U.S.C § 2683.<sup>147</sup> While the U.S. Attorneys' Manual (USAM) states that local prosecutors can assume jurisdiction over juvenile offenders on a case-by-case basis or through a general understanding,<sup>148</sup> it cites no case law or authority in support of its position, which runs counter to the assertions of DoJ certifying officials in federal district court.<sup>149</sup> The USAM also does not address the relinquishment of jurisdiction procedures required by 10 U.S.C. § 2683.<sup>150</sup> As the USAM provides only internal DoJ guidance and does not create enforceable law, there is no legal support for utilizing MOAs to transfer jurisdiction.<sup>151</sup>

A final invalid means of relinquishing jurisdiction pursued by the leadership of military installations is to seek favorable opinions from state attorneys general that provide the illusion of validity.<sup>152</sup> In 1981, the Office of the Attorney General for the State of Kansas issued an opinion that state district courts in the counties surrounding Fort Riley, Kansas, could extend their jurisdiction over juveniles residing on the military installation despite the presence of exclusive jurisdiction.<sup>153</sup> The Kansas opinion relied heavily on the New Jersey state appellate opinion concerning juvenile offenders on Fort Dix discussed above, emphasizing in a similar fashion that application of state juvenile delinquency laws on Fort Riley would benefit juveniles and that Fort Riley authorities did not oppose the

---

Agreement between Headquarters, Fort Riley, and the counties of Geary and Riley, Kan., signed by Brig. Gen. David C. Peterson, Commanding Gen. (Fort Riley), and Steve Opat, Geary County Att'y, and Barry Wilkerson, Riley County Att'y (2010) (on file with Office of the Staff Judge Advocate, Fort Riley, Kan.).

<sup>146</sup> Memorandum of Agreement between Headquarters, Fort Riley, and the counties of Geary and Riley, Kan. *supra* note 130. "This agreement neither creates additional jurisdiction nor limits or modifies the existing jurisdiction vested in the parties." *Id.*

<sup>147</sup> See Letter from Duncan Cavanah, Assistant Christian Cty. Att'y, Ky. (May 15, 2014) (on file with Office of the Staff Judge Advocate, Fort Campbell, Ky.); Letter from Sarah Wojnarowski, Assistant Dist. Att'y, 23rd Judicial Dist., Tenn. (June 5, 2014) (on file with Office of the Staff Judge Advocate, Fort Campbell, Ky.); Letter from Randall Braboy, Trigg Cty. Att'y, Ky. (June 6, 2014) (on file with Office of the Staff Judge Advocate, Fort Campbell, Kentucky).

<sup>148</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, CRIMINAL RESOURCE MANUAL § 41 (2017).

<sup>149</sup> See *supra* note 36 and accompanying text.

<sup>150</sup> See *supra* note 148 and accompanying text.

<sup>151</sup> See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, INTRODUCTION § 1-1.000 (1997).

<sup>152</sup> See *infra* notes 153–61 and accompanying text.

<sup>153</sup> 81-14 Op. Kan. Att'y Gen. (Jan. 16, 1981). Fort Riley was established in 1853 and exclusive jurisdiction was ceded over the lands by the state in 1899 "for all purposes," save for service of criminal and civil process and taxation over certain entities. *Id.*

exercise of jurisdiction.<sup>154</sup> The Kansas opinion made no mention of the statutorily required retrocession of jurisdiction process found in 10 U.S.C. § 2683.<sup>155</sup>

In 2012, officials from Fort Gordon, Georgia, requested that the Office of the Attorney General for the State of Georgia approve their request for assistance from the surrounding state juvenile court system.<sup>156</sup> Fort Gordon did “not have resources or facilities to handle juveniles;” the surrounding county had counseling, truancy reduction, life skills, and tutoring programs aimed at rehabilitating juvenile delinquents.<sup>157</sup> An interesting aspect of the request is that DoD authorities made it despite the fact that the same Attorney General’s office concluded in 1994 that Georgia could not extend its juvenile delinquency laws to Fort Stewart, Georgia, because the military installation had exclusive jurisdiction at the time.<sup>158</sup> Persistence paid off for DoD authorities, however, as the AG’s office eventually reversed course and opined, albeit unofficially, that Georgia was able to “assume jurisdiction over matters of juvenile delinquency” occurring on all military installations in the state except where “a federal authority makes a certification under 18 U.S.C. § 5032 that the state system cannot assume jurisdiction.”<sup>159</sup> The apparently novel interpretation of federal law advanced by the Assistant Attorney General envisions exclusive jurisdiction that comes in and out of being based on the certification of a U.S. Attorney, not the ceding or retroceding of exclusive jurisdiction.<sup>160</sup> It stands in stark contrast to opinions from Attorneys General for Texas and California, who concluded that only after proper state authorities formally accepted jurisdiction retroceded by the federal government could local prosecutors charge juveniles for criminal conduct committed on federal lands.<sup>161</sup>

Since all of the alleged means of relinquishing jurisdiction over juveniles mentioned above lack statutory authority, their usage indicates commanders at some military installations are willing to utilize illegitimate means to maintain good order and discipline among the juvenile population.<sup>162</sup> At installations where DoD and DoJ authorities make no effort whatsoever to hold juveniles accountable for serious sexual criminal conduct, victims and families may contemplate turning to federal courts for vindication of their suffering.<sup>163</sup>

---

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> 2012-2 Unofficial Op. Ga. Att’y Gen. (June 14, 2012).

<sup>157</sup> *Id.*

<sup>158</sup> 94-10 Unofficial Op. Ga. Att’y Gen. (Aug. 10, 1994).

<sup>159</sup> 2012-2 Unofficial Op. Ga. Att’y Gen., *supra* note 156.

<sup>160</sup> *See* 2012-2 Unofficial Op. Ga. Att’y Gen., *supra* note 156.

<sup>161</sup> *See* MW-294 Op. Tex. Att’y Gen. 938, 941 (Feb. 4, 1981); ROGER W. HAINES, JR., FEDERAL ENCLAVE LAW, U.S. JURISDICTION OVER “SPECIAL TERRITORIAL” AREAS WITHIN THE STATES 247–48 (2011).

<sup>162</sup> *See supra* notes 128–61 and accompanying text.

<sup>163</sup> *See infra* notes 164–70 and accompanying text.



### C. *Federal Litigation Is Uncertain to Bring Change*

The lack of prosecution of juvenile-on-juvenile sexual assault on military installations with exclusive jurisdiction creates an undue burden on our military men and women.<sup>164</sup> They must shift their focus from being warfighters to being litigators in order to seek justice for their victimized young sons and daughters.<sup>165</sup> On behalf of their children, servicemembers could bring suit against the United States government and its agencies to: (1) enforce the right to confer with federal prosecutors under the Crime Victims' Rights Act,<sup>166</sup> (2) ensure equal protection of the laws as guaranteed by the U.S. Constitution,<sup>167</sup> (3) challenge the DoJ's juvenile-on-juvenile crime non-prosecution policy pursuant to the Administrative Procedures Act,<sup>168</sup> and (4) provide warnings to families considering living on military installations with exclusive jurisdiction.<sup>169</sup> As will be seen, no litigation path is certain to bring about change to DoJ and DoD policies.<sup>170</sup>

#### 1. *Crime Victims' Rights Act*

Victims of juvenile-on-juvenile crime whose cases are automatically declined for prosecution could pursue injunctive relief<sup>171</sup> against the DoJ for its widespread practice of failing to grant "[t]he reasonable right to confer with the attorney for the Government in the case" as provided by the Crime Victims' Rights Act (CVRA).<sup>172</sup> In 2004, Congress passed the CVRA with the goals of ensuring victim understanding regarding what is taking place in the criminal justice process and allowing them to play a role in said process.<sup>173</sup> A pertinent question eventually arose: Do federal prosecutors have CVRA obligations to victims prior to formal charges being filed?<sup>174</sup> An affirmative answer to the question has particular relevance for victims of juvenile-on-juvenile sexual assault on military installations

<sup>164</sup> See *infra* note 165 and accompanying text.

<sup>165</sup> See *infra* notes 166–69 and accompanying text.

<sup>166</sup> See *infra* notes 171–90 and accompanying text.

<sup>167</sup> See *infra* notes 191–213 and accompanying text.

<sup>168</sup> See *infra* notes 214–28 and accompanying text.

<sup>169</sup> See *infra* notes 229–58 and accompanying text.

<sup>170</sup> See *infra* notes 171–258 and accompanying text.

<sup>171</sup> Paul G. Cassell, Professor, University of Utah, Briefing to U.S. Army's Special Victims' Counsel (Dec. 2014) (providing the notion of an injunction regarding the CVRA). "An injunction is an equitable remedy, designed to protect property or other rights from irreparable injury by prohibiting or commanding certain acts." 42 AM. JUR. 2D *Injunctions* § 1 (2017).

<sup>172</sup> 18 U.S.C. § 3771(a)(5) (2012).

<sup>173</sup> See 150 CONG. REC. 7,297 (2004).

<sup>174</sup> Paul G. Cassell, Nathaneal J. Mitchell, & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM L. & CRIMINOLOGY 59, 61 (2014).

with exclusive jurisdiction, as federal prosecutors currently provide them with no answers concerning the lack of charging in their cases.<sup>175</sup>

Most federal courts conclude that victims do have CVRA rights prior to the formal filing of charges.<sup>176</sup> The Fifth Circuit Court of Appeals held that CVRA rights apply before trial in a case where the government agreed to a plea deal favorable to a wealthy defendant without first conferring with victims.<sup>177</sup> Similarly, courts in the Eastern District of New York and the Eastern District of Virginia found that rights accrue under the CVRA even before prosecution commences.<sup>178</sup> The most in-depth analysis of pre-charging CVRA rights comes from a case in the Southern District of Florida.<sup>179</sup> The court held that the CVRA's "statutory language clearly contemplates pre-charge proceedings" and that "[i]f the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime."<sup>180</sup>

Unfortunately, the DoJ, which oversees Assistant U.S. Attorneys responsible for prosecuting crime on land areas that include military installations, takes the counterview in court and in its written guidance.<sup>181</sup> Specifically, in 2010, the DoJ opined that the earliest a crime victim under the CVRA could be identified would be upon the filing of a criminal complaint despite federal court rulings to the contrary.<sup>182</sup> In response, then-Senator Jon Kyl, one of the CVRA's congressional sponsors, wrote to then-Attorney General Eric Holder to lodge his strong disagreement with the DoJ's conclusions.<sup>183</sup> Senator Kyl stated, "[w]hen Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case."<sup>184</sup>

Under the DoJ's interpretation of the CVRA, no juvenile-on-juvenile sexual assault victim, whose case is declined before a juvenile offender is charged, has a

<sup>175</sup> See *infra* notes 185–88 and accompanying text.

<sup>176</sup> See *infra* notes 177–80 and accompanying text.

<sup>177</sup> *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

<sup>178</sup> See *United States v. Rubin*, 558 F. Supp. 2d 411, 419 (E.D. N.Y. 2008); *United States v. Oakum*, 2009 WL 790042, at \*2 (E.D. Va. 2009).

<sup>179</sup> *Does v. United States*, 817 F. Supp. 2d 1337, 1341–43 (S.D. Fla. 2011).

<sup>180</sup> *Id.* at 1341–42; see also Cassell et al, *supra* note 174, at 75.

<sup>181</sup> See *The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004*, 35 Op. O.L.C. 1, 4 (Dec. 17, 2010).

<sup>182</sup> *Id.*

<sup>183</sup> 157 CONG. REC. S3608 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl).

<sup>184</sup> *Id.* Sen. Kyl further stated: "I made clear that crime victims had a right to consult about both 'the case' and 'case proceedings'—i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court 'proceedings.'" *Id.*



right to confer with the federal prosecutor making the decision.<sup>185</sup> The mother of the sixteen-year-old victim of attempted rape at Fort Belvoir wrote directly to the U.S. Attorney for the Eastern District of Virginia, Dana Boente, asserting her daughter's CVRA rights and requesting to know why a federal prosecutor declined to file charges despite Army investigators telling her the evidence in the case was very strong.<sup>186</sup> The mother and juvenile victim were rebuffed; Mr. Boente never responded.<sup>187</sup> An Army Judge Advocate told the mother and juvenile victim that the Chief Assistant U.S. Attorney who oversees charging decision for crimes occurring on the installation, Patricia Haynes, was simply too busy and could not accommodate meetings with every family or individual with questions about decisions she makes.<sup>188</sup> Such a stance is the antithesis of one of the goals of the CVRA—victim participation.<sup>189</sup> It also prevents victims from addressing federal prosecutors over what appears to be a de facto policy of non-prosecution of juvenile-on-juvenile sexual assault on military installations with exclusive jurisdiction—a policy that violates the Equal Protection Clause of the U.S. Constitution.<sup>190</sup>

## 2. *Equal Protection of the Laws*

Under the Fourteenth Amendment to the U.S. Constitution, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>191</sup> Equal protection of the laws as enforced by the federal government is an important right for victims of juvenile-on-juvenile sexual assault on military installations with exclusive jurisdiction, for they do not have the ability to turn to state courts for justice.<sup>192</sup> Although on its face the Fourteenth Amendment only applies to discriminatory actions by a state, the Supreme Court held in a unanimous decision that discriminatory actions by the federal government violates due process protections guaranteed by the Fifth Amendment.<sup>193</sup> While the Fifth Amendment does not contain a stated equal protection clause, the Court determined that the Fifth Amendment's guarantee of “liberty” prohibits discrimination and functions as an equal protection standard.<sup>194</sup> As Chief Justice

---

<sup>185</sup> See *supra* notes 31, 181–82 and accompanying text.

<sup>186</sup> E-mail from mother of juvenile victim, Fort Belvoir, Va., to author, *supra* note 100.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *supra* note 173 and accompanying text.

<sup>190</sup> See *infra* notes 191–213 and accompanying text.

<sup>191</sup> U.S. CONST. amend. XIV, §1.

<sup>192</sup> See *infra* notes 193–98 and accompanying text.

<sup>193</sup> *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>194</sup> *Id.* at 499, 500.

Warren noted, “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”<sup>195</sup>

The memo from Fort Hood, Texas, discussed previously, reveals a course of conduct undertaken by the DoJ that is unlawfully discriminatory as evidenced by the following data: Of the thirty-nine cases of reported juvenile-on-juvenile sexual assault from 2006 to 2012 on the military installation with exclusive jurisdiction, federal prosecutors declined to prosecute a single case of juvenile delinquency.<sup>196</sup> The State of Texas, during a five-year period, prosecuted nearly 600 fourteen-year-olds alone for juvenile-on-juvenile sexual assault, demonstrating that victims of juvenile crime receive equal protection of the laws only if the crimes occur off the military installation.<sup>197</sup> Fort Hood is hardly an outlier. Statistics from nineteen other Army installations with exclusive jurisdiction revealed little to no effort by federal prosecutors to initiate federal delinquency proceedings against juvenile sexual assault offenders from 2004 to 2015, despite indications of frequent occurrences of felony-level juvenile-on-juvenile crime.<sup>198</sup>

Legal scholars might be quick to point out that prosecutors enjoy absolute immunity for their charging decisions/government duties, but it is key to focus on the discriminatory effect of the de facto policy of non-prosecution instead of characterizing it as discrete actions by individual attorneys.<sup>199</sup> A policy that treats juvenile-on-juvenile sex assault victims differently than victims sexually assaulted by adults violates due process and equal protection rights, as there is no rational basis for such discrimination and it does not further a legitimate governmental purpose.<sup>200</sup> It results in a situation wherein federal prosecutors make decisions

---

<sup>195</sup> *Id.* at 499.

<sup>196</sup> See Schwartz & Thayer, *At Fort Hood*, *supra* note 18. Federal prosecutors were not averse to charging adult-on-juvenile sexual assault on Fort Hood during the same time period. See, e.g., Press Release, Dep’t of Justice, U.S. Atty’s Office, W. Dist. Of Tex., Former U.S. Army Soldier Sentenced To Nearly 30 Years In Federal Prison For Production Of Child Pornography (Apr. 16, 2014), <https://www.justice.gov/usao-wdtx/pr/former-us-army-soldier-sentenced-nearly-30-years-federal-prison-production-child>.

<sup>197</sup> See Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>198</sup> See *supra* notes 76–79 and accompanying text.

<sup>199</sup> See generally *Imbler v. Pachtman*, 424 U.S. 409, (1976) (discussing prosecutorial immunity).

<sup>200</sup> See *Rational Basis*, CORNELL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/rational\\_basis](https://www.law.cornell.edu/wex/rational_basis) (last visited Apr. 9, 2017). Rational basis review is a judicially created test used to determine the constitutionality of government laws or actions; it is the most deferential form of judicial review when compared to strict scrutiny and intermediate scrutiny. *Id.* Under rational basis scrutiny, treating a classification of persons differently “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993).

based not on the merits of the cases but on the ages of the perpetrators and victims.<sup>201</sup> The Civil Rights Division of the DoJ asserted that such a de facto policy is discriminatory when it determined that a county attorney's office in Montana violated the equal protection rights of sexual assault victims through a "pattern or practice" that included unexplained low prosecution rates of less than 17% in their class of cases and a systematic failure to interview victims prior to making charging decisions.<sup>202</sup> The Civil Rights Division admonished the state that "failure to take action, on a discriminatory basis, can constitute unlawful discrimination."<sup>203</sup> Surely, if the Civil Rights Division were to shift its gaze to the DoJ's de facto policy of non-prosecution of juvenile-on-juvenile sexual assault on military installations with exclusive jurisdiction, it would arrive at the same conclusion of "institutional indifference" that it did when investigating the county attorney's office in Montana.<sup>204</sup> The policy results in prosecution rates of 0% at many locations<sup>205</sup> and refusals to meet with victims of juvenile-on-juvenile sexual assault before declining their cases.<sup>206</sup>

While the federal government was able to bring about change in the state's discriminatory prosecution policies without court action and merely through

---

<sup>201</sup> See *supra* notes 76–79 and accompanying text.

<sup>202</sup> Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Civil Rights Div., & Michael W. Cotter, U.S. Att'y, Dist. of Mont., to Fred Van Valkenburg, Cty. Att'y, Missoula Cty., Mont. (Feb. 14, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula\\_ltr\\_2-14-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_ltr_2-14-14.pdf).

<sup>203</sup> *Id.* (citing *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989)). The *DeShaney* Court held "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n.3. The Samuels letter also cited to *Bell v. Maryland*, which held that "denying the equal protection of the laws includes the omission to protect." *Bell v. Maryland*, 378 U.S. 226, 309–11 (1964).

<sup>204</sup> See Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., Civil Rights Div., & Michael W. Cotter, U.S. Att'y, Dist. Of Mont., to Fred Van Valkenburg, Cty. Att'y, Missoula Cty., Mont., *supra* note 202.

<sup>205</sup> Suter, *supra* note 13, at 17; Roman, *supra* note 18, at 46. Military installations with exclusive jurisdiction where no federal prosecution of juvenile delinquency took place, as identified in 1974, include Fort Huachuca, Fort Monmouth, Redstone Arsenal, White Sands Missile Range, Fort Belvoir, Fort Eustis, Fort Gordon, Fort Benning, Fort McClellan, Fort Jackson, Fort Leavenworth, Fort Ord, Fort Meade, Fort Devens, Fort Hood, Fort Carson, and Fort Lewis. Suter, *supra* note 13, at 17–18. Note that "mixed" is not an actual type of legislative jurisdiction, but is instead used to designate an installation comprised of some lands with exclusive jurisdiction and some lands with concurrent jurisdiction. See *id.* Several of the listed installations indicate a U.S. magistrate "handled" cases informally, which is not the same thing as a federal juvenile delinquency hearing. See *id.* Military installations with exclusive jurisdiction where no federal prosecution of juvenile delinquency took place, as identified in 2014, include Fort Benning, Fort Gordon, Fort Hood, Fort Huachuca, Fort Irwin, Fort Knox, Fort Leavenworth, Redstone Arsenal, Fort Riley, and Fort Stewart. Roman, *supra* note 18, at 46.

<sup>206</sup> See *supra* notes 185–89 and accompanying text.

investigation, the average military family has no such authority or clout.<sup>207</sup> Additionally, unlike county and district attorneys in a state, who are elected by and accountable to a local population, U.S. Attorneys and Assistant U.S. Attorneys do not operate under local government control, and therefore view themselves as being immune from local oversight.<sup>208</sup> During a public hearing in the District of Columbia concerning the lack of federal prosecution of sexual assault, assistant U.S. Attorney Patricia Riley stated, “[t]he decision to prosecute or not prosecute is entrusted to our sole discretion . . . [a]nd neither the court nor any other agency or any other individual can second-guess that.”<sup>209</sup>

Children of military servicemembers who are victims of juvenile-on-juvenile sexual assault should not be denied equal protection of the laws simply because juveniles committed the crimes or because the crimes occurred on military installations with exclusive jurisdiction.<sup>210</sup> Non-prosecution of serious juvenile crime hinders the ability of a commander to enforce “good order and discipline” on a military installation.<sup>211</sup> To influence the DoJ to change course on its de facto non-prosecution policy, a federal court will need to rule that the policy violates the Equal Protection Clause.<sup>212</sup> Considering that the Supreme Court has found laws in violation of the principle of equal protection under rational-basis scrutiny only seventeen times out of over one hundred challenges between 1971 and 2014, such an outcome is unlikely.<sup>213</sup>

---

<sup>207</sup> See Press Release, Dep’t of Justice, Office of Pub. Affairs, Justice Department Reaches Settlement to Reform the Missoula, Mont. Police Department’s Response to Sexual Assault (May 15, 2013), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-reform-missoula-mont-police-departments-response-sexual>; *supra* notes 67–68 and accompanying text.

<sup>208</sup> Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors Seek Answers*, REWIRE (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/>.

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* note 200 and accompanying text.

<sup>211</sup> See AR 600-20, *supra* note 59, at para. 2-5b(1).

<sup>212</sup> See *supra* notes 208–09 and accompanying text.

<sup>213</sup> See Raphael Holoszyk-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071 (2015); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 370 (1999); see also *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013); *Romer v. Evans*, 517 U.S. 620, 623–33 (1996); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989); *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n*, 488 U.S. 336, 345–46 (1989); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–50 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 622–24 (1985); *Williams v. Vermont*, 472 U.S. 14, 35–37 (1982); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973); *James v. Strange*, 407 U.S. 128, 140–42 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172, 175–76 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 447, 454–55 (1972); *Lindsey v. Normet*, 405 U.S. 56, 79 (1972); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

### 3. *Failure to Act*

In addition to arguing the policy is a violation of Constitutional protections, a parallel view is that de facto non-prosecution violates the Administrative Procedures Act (APA).<sup>214</sup> The Administrative Procedures Act (APA) provides the right of judicial review to “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action,” including an agency or employee’s failure to act, as long as the action is a “final agency action for which there is no other adequate remedy in a court.”<sup>215</sup> An agency’s “refusal to initiate enforcement proceedings” pertaining to specific federal legislation is reviewable “if the agency consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>216</sup> Current military installation housing residents could demonstrate harm by showing that juveniles commit more and elevated levels of crime when they know they won’t be prosecuted; servicemembers who wish to enjoy the benefits of living in housing on military installations but choose not to for fear that juveniles who sexually abuse or seriously harm their children will go unprosecuted could also show harm.<sup>217</sup> Thus, the basis for the injunction request against the DoJ would be for the agency to stop its practice of refusing to enforce juvenile delinquency laws on the majority of military installations with exclusive jurisdiction, particularly with regard to serious cases such as juvenile-on-juvenile sexual assault.<sup>218</sup>

While it is true that federal prosecutors retain broad discretion to enforce the nation’s criminal laws, the power to prosecute is not unfettered and must adhere to constitutional constraints.<sup>219</sup> “[P]rosecutorial discretion encompasses discretion to not enforce a law or to prioritize partial enforcement of a law,” but does not grant “discretion to not follow a law imposing a mandate or prohibition on the Executive Branch.”<sup>220</sup> When Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP) in 1974, it concluded that juvenile delinquency problems should be addressed through quality prevention programs or through:

---

<sup>214</sup> See *infra* notes 215–28 and accompanying text.

<sup>215</sup> 5 U.S.C. §§ 551, 702, 704 (2012).

<sup>216</sup> *WildEarth Guardians v. U.S. Dep’t of Justice*, 181 F. Supp. 3d 651, 664 (D. Ariz. 2015) (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

<sup>217</sup> See *id.* at 659 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). A federal court will not take action unless it has jurisdiction, which hinges on a suing party demonstrating standing by showing that he or she has suffered an actual or imminent injury, the injury is particularized and concrete, the injury stems from the challenged conduct, and a favorable ruling from the court will resolve the injury. *Id.*

<sup>218</sup> See *supra* notes 215–17 and accompanying text.

<sup>219</sup> *WildEarth Guardians*, 181 F. Supp. 3d at 664, 665 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

<sup>220</sup> *Id.* at 665.

“[P]rograms that assist in holding juveniles accountable for their actions and in developing the competencies necessary to become responsible and productive members of their communities, including a system of graduated sanctions to respond to each delinquent act, requiring juveniles to make restitution, or perform community service, for the damage caused by their delinquent acts, and methods for increasing victim satisfaction with respect to the penalties imposed on juveniles for their acts.”<sup>221</sup>

The DoJ’s de facto non-prosecution policy in which all, or nearly all, juvenile criminal cases on military installations with exclusive jurisdiction are declined as a matter of course ignores the JJDPA.<sup>222</sup> Congressional intent is to subject juvenile offenders to programs that hold them accountable, develop them into responsible and productive members of society, and increase victim satisfaction in the juvenile justice process.<sup>223</sup> Proceeding against a juvenile using the federal juvenile delinquency statute permits a federal court to make such programs a mandatory part of probation following a finding of juvenile delinquency; failing to prosecute cases denies juvenile offenders necessary treatment, endangers society, and denigrates victims.<sup>224</sup> It can be argued that the de facto non-prosecution policy is so extreme as to amount to an abdication of the DoJ’s duty regarding juvenile delinquency on territorial lands where it has sole authority to execute the laws.<sup>225</sup>

Whether or not the purpose of the JJDPA would be interpreted by a court of law as a statutory mandate that would override normal prosecutorial discretion is far from certain.<sup>226</sup> This uncertainty is compounded by the fact that the de facto policy against non-prosecution is not a formal written policy.<sup>227</sup> Thus, the outcome of any APA litigation is not guaranteed.<sup>228</sup>

#### 4. *Negligent Failure to Warn*

Servicemembers and their family members could seek to enjoin the DoD from failing to warn potential family housing residents on military installations about the DoJ’s de facto non-prosecution policy and its impact on juvenile

---

<sup>221</sup> Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified at 34 U.S.C. § 11101 (a)(10)(B) (2012)).

<sup>222</sup> *See id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See supra* note 216 and accompanying text.

<sup>226</sup> *See supra* notes 216, 219–20 and accompanying text.

<sup>227</sup> *See supra* notes 2, 18, 72 and accompanying text.

<sup>228</sup> *See supra* notes 226–27 and accompanying text.

justice.<sup>229</sup> However, a more compelling way to accomplish that end result would be to bring a series of suits under the Federal Tort Claims Act (FTCA) in which the DoD and its military departments would find themselves subject to liability under a theory of negligent failure to warn.<sup>230</sup> To prove a claim against the DoD, a claimant would have to show that the DoD had a duty to warn him/her about the de facto policy of non-prosecution of juvenile-on-juvenile sexual assault crimes; that the DoD breached the duty by not providing a warning; that the lack of warning caused any alleged harm; and that the harm led to actual injury or other damages.<sup>231</sup>

It can be argued that, as a landowner, the DoD has a duty of reasonable care to entrants on its land with regard to dangerous conditions.<sup>232</sup> The de facto policy of non-prosecution of juvenile crime on its military installations with exclusive jurisdiction is a dangerous condition unknown to the vast majority of servicemembers and their families, who are authorized to reside in installation housing by virtue of uniformed service.<sup>233</sup> The DoD has known about the dangerous condition since at least 1975.<sup>234</sup> The DoD has already seen fit to warn potential housing residents of the impact of living on a military installation with exclusive jurisdiction, albeit in a different context.<sup>235</sup> At Fort Bragg, North Carolina, housing authorities provide the following warning:

The Home is located within exclusive federal jurisdiction of the United States and therefore under military control, which includes the Installation Commander's inherent authority and obligation to ensure good order and discipline. As such, the Installation Commander has the right and power to inspect, search and/or order the inspection or search of military persons and property within all housing areas of Fort Bragg.<sup>236</sup>

However, as the DoD does not warn residents of the de facto policy of non-prosecution of juvenile crime, it is a breach of its alleged duty to warn.<sup>237</sup> Next, a

---

<sup>229</sup> See *supra* notes 198–206 and accompanying text.

<sup>230</sup> See 28 U.S.C. § 1346(b) (2012). “[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW. INST. 1965).

<sup>231</sup> See RESTATEMENT (SECOND) OF TORTS §§ 281, 328A (AM. LAW. INST. 1965).

<sup>232</sup> See *id.* § 342–343.

<sup>233</sup> See *infra* note 240 and accompanying text.

<sup>234</sup> See Suter, *supra* note 13, at 17.

<sup>235</sup> *Resident Occupancy Agreement*, FORT BRAGG COMMUNITIES, LLC (Mar. 17, 2014), [http://corviasmilitaryliving.com/global\\_content/resident\\_responsibilities/Bragg\\_Military\\_ROA.pdf](http://corviasmilitaryliving.com/global_content/resident_responsibilities/Bragg_Military_ROA.pdf).

<sup>236</sup> *Id.*

<sup>237</sup> See *supra* notes 231–32 and accompanying text.



claimant would need to show that a warning could have prevented the harm.<sup>238</sup> A family which received a proper warning could have avoided the harm of non-prosecution of juvenile-on-juvenile sexual assault by choosing not to live on or have their children utilize services provided by the military installation.<sup>239</sup> In the case of the 10-year-old boy sexually assaulted by his older step-brother discussed earlier, the mother of the child victim explained as much in a letter to Fort Hood's Office of the Staff Judge Advocate:

“My husband has deployed 3 times to Iraq, been shot at, almost blown up, and has spent years far from his wife and children. We moved to on-post housing thinking that this was the safest place to raise our family. Never could we have imagined that a crime like this could be committed against one of our children and the only one being protected would be the perpetrator . . . Had I known this was the case I never would have moved on post.”<sup>240</sup>

Finally, the alleged harm must be shown to be separate and apart from the actual sexual assault.<sup>241</sup> The harm would be in the form of emotional distress.<sup>242</sup> Importantly, the DoJ already acknowledges that victims of crime treated with disrespect, not informed of the status of their cases, and not even interviewed by a prosecutor before the decision is made to decline charges in their cases are re-victimized by the criminal justice process.<sup>243</sup> The re-victimization leads to emotional harm separate and apart from the harm by the physical sexual assault.<sup>244</sup> The mother of the 5-year-old victim at Fort Hood, mentioned previously, firmly believes that had the 16-year-old juvenile offender been held accountable at the time, it would have had a significantly positive impact on her daughter.<sup>245</sup> Instead, the child victim experienced numerous issues growing up, including the inability to trust others, separation anxiety, and the inability to create healthy relationships.<sup>246</sup> She still feels as if she must be vigilant, remaining on constant guard to protect herself because no one else will.<sup>247</sup> Similarly, the 7-year-old male juvenile victim discussed in the introduction, who slept in corners and hid knives

---

<sup>238</sup> See *supra* notes 231–32 and accompanying text.

<sup>239</sup> See *infra* note 240 and accompanying text.

<sup>240</sup> Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>241</sup> See *supra* notes 231–32 and accompanying text.

<sup>242</sup> See *infra* note 243 and accompanying text.

<sup>243</sup> Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., Civil Rights Div., & Michael W. Cotter, U.S. Att’y, Dist. of Mont., to Fred Van Valkenburg, Cty. Att’y, Missoula Cty., Mont., *supra* note 202.

<sup>244</sup> See *supra* note 243 and accompanying text.

<sup>245</sup> E-mail from mother of juvenile victim, Fort Hood, Tex., to author, *supra* note 91.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*



to protect himself from his attacker, displayed clear signs of emotional distress related to the fact that the juvenile went unprosecuted.<sup>248</sup>

Juvenile-on-juvenile sexual assault is certainly foreseeable on military installations based on aforementioned surveys, media reports, and a DoJ bulletin indicating that juveniles account for 35.6% of persons known to have committed sexual offenses against juveniles.<sup>249</sup> The victims, and their families, suffer serious emotional distress when they realize that their alleged sexual assault offenders will neither face punishment nor be ordered into treatment, despite evidence of guilt, simply because the offenders are juveniles.<sup>250</sup> Prior warnings about the non-prosecution policy would have a direct impact on a family's decision whether or not to live on a military installation and allow them the option to not expose their children to the risk of emotional harm from non-prosecution of juvenile crime, should their children become victims themselves.<sup>251</sup>

It is instructive to provide some frame of reference for the total dollar amount of damages for which the federal government could be liable under the FTCA.<sup>252</sup> Taking the average maximum state individual victim compensation benefit of \$25,000 as a very conservative damage amount,<sup>253</sup> then multiplying this amount by the 6,175 victims of felony-level juvenile-on-juvenile crime reported on Army installations from 2004 to 2015, results in an estimate in excess of \$154 million in liability.<sup>254</sup> The total liability amount would rise if calculations included juvenile victims from Air Force, Navy, and Marine Corps installations.<sup>255</sup> Ideally, FTCA lawsuits would incentivize the DoD to recognize its duty to warn potential housing residents about the DoJ's de facto policy of non-prosecution of juvenile-on-juvenile sexual assault and the negative impact of exclusive jurisdiction.<sup>256</sup> Implementing appropriate warnings would enable servicemembers and their families to make informed choices on whether or not to subject their children

---

<sup>248</sup> See *supra* notes 9–11 and accompanying text.

<sup>249</sup> David Finkelhor, Richard Ormrod, & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>.

<sup>250</sup> See *supra* notes 9–12, 65–66, 245–48 and accompanying text.

<sup>251</sup> See *supra* note 240 and accompanying text.

<sup>252</sup> 28 U.S.C. § 2674. “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” *Id.*

<sup>253</sup> *Crime Victim Compensation: An Overview*, NATIONAL ASSOCIATION OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=14> (last visited Mar. 5, 2016). The amount of monetary damages would likely be higher, but this value is being used so there is no claim of inflating the total amount in order to overstate liability.

<sup>254</sup> See *supra* note 76 and accompanying text.

<sup>255</sup> See *supra* notes 81, 99 and accompanying text.

<sup>256</sup> See *supra* note 231–32 and accompanying text.

to the artificial condition that exists.<sup>257</sup> The DoD and military installation commanders are unlikely to find such warnings palatable given that family housing communities are held out to be safe and welcoming places to live.<sup>258</sup>

### III. WHAT CONGRESS MUST DO

Legislation by Congress is the best hope for far-reaching and meaningful change to the barriers in dealing with juvenile-on-juvenile sexual assault on military installations with exclusive jurisdiction.<sup>259</sup> Congress must pass legislation, potentially named The Protect Our Military Children Act, rectifying current deficiencies in jurisdiction over juveniles on military installations,<sup>260</sup> implementing accountability for investigators and federal prosecutors through annual reporting requirements,<sup>261</sup> and providing warnings to potential family housing residents.<sup>262</sup>

#### A. *Retrocede Jurisdiction over Juveniles*

The most important initiative Congress can undertake to rectify non-prosecution of juvenile-on-juvenile sexual assaults on military installations is to mandate retrocession of exclusive jurisdiction over juvenile crimes so that surrounding states have concurrent jurisdiction over them.<sup>263</sup> Retrocession of jurisdiction will enable surrounding states to legally assert their juvenile delinquency laws.<sup>264</sup> Victims seeking justice will no longer have to rely solely on federal prosecutors who are uninterested in prosecuting juvenile crime.<sup>265</sup> Retrocession of jurisdiction must become mandatory, particularly since DoD continues to demonstrate an unwillingness to embrace it as a uniform solution to the widespread problem of non-prosecution of juvenile-on-juvenile sexual assault.<sup>266</sup> Following the revelation of non-prosecution of juvenile-on-juvenile sex crimes at Fort Hood, an Army spokeswoman stated:

---

<sup>257</sup> See *supra* note 240 and accompanying text.

<sup>258</sup> See *Apply: Advantages of Living on Base*, CORVALIS, <http://airforce.corviasmilitaryliving.com/apply/advantages> (last visited Apr. 9, 2017). This website for a civilian company that manages family housing on U.S. Air Force Bases touts that one benefit of living on a military installation is being part of “the ultimate gated community.” *Id.* The website makes no mention of the detrimental impact of non-prosecution of juvenile-on-juvenile sexual assault on military children and families. See *id.*

<sup>259</sup> See *supra* notes 171–258 and accompanying text.

<sup>260</sup> See *infra* notes 263–89 and accompanying text.

<sup>261</sup> See *infra* notes 290–317 and accompanying text.

<sup>262</sup> See *infra* notes 318–27 and accompanying text.

<sup>263</sup> See *infra* notes 264–89 and accompanying text.

<sup>264</sup> See *supra* notes 105–21 and accompanying text.

<sup>265</sup> See *supra* notes 58–68 and accompanying text.

<sup>266</sup> See *supra* notes 112–21 and accompanying text.

Each installation has unique jurisdictional issues that cannot be appropriately addressed by applying the same approach for each. The local installation commander, as advised by the servicing staff judge advocate, is best situated to decide how to address juvenile misconduct, since that commander has the appropriate detailed understanding of any unique issues on the respective installation.<sup>267</sup>

Contrary to the spokeswoman's comments, the issues leading to the non-prosecution of serious juvenile crime on military installations with exclusive jurisdiction are not unique to each location.<sup>268</sup> Federal prosecutors rarely, if ever, prosecute juvenile crime, even when it involves juvenile-on-juvenile sexual assault.<sup>269</sup> Where states do not assert jurisdiction over juveniles, victims and families receive no justice whatsoever.<sup>270</sup> At the few locations where states do assert jurisdiction over juveniles, the legal basis for doing so is highly flawed based on federal court precedent and prior certifying actions by DoJ officials.<sup>271</sup> Congress has not approved the means used to assert state jurisdiction, and these means constitute a usurpation of authority vested in the Secretary of Defense (and the military department designees) and Governors (or designated legislative bodies) of the individual states.<sup>272</sup> The DoD, in an unwise showing of deference by civilian authorities to senior uniformed personnel, chooses to defer decisions to seek retrocession to military installations commanders, who do not have the designated authority nor the interest to seek such a change.<sup>273</sup> The Secretary of the Army took no action at Fort Hood to protect juveniles, and instead waited on a request from the installation commander, Lt. Gen. Sean MacFarland, who was serving abroad as the head of the coalition fighting the Islamic State group in Iraq and Syria.<sup>274</sup> No request for retrocession was forthcoming.<sup>275</sup>

---

<sup>267</sup> Jeremy Schwartz & Rose Thayer, *Pentagon Asks for Review of Juvenile Prosecutions Throughout Army*, AUSTIN AM.-STATESMAN (Nov. 24, 2015), <http://www.mystatesman.com/news/local-military/pentagon-asks-for-review-juvenile-prosecutions-throughout-army/oxiLOYU7rYMhG16q2hhJpI/>.

<sup>268</sup> See *infra* notes 269–73 and accompanying text.

<sup>269</sup> See Suter, *supra* note 13, at 17; *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping 7-year-old Boy at Fort Lewis*, *supra* note 2; Roman, *supra* note 18, at 46; Schwartz & Thayer, *At Fort Hood*, *supra* note 18; *supra* note 79 and accompanying text.

<sup>270</sup> See Suter, *supra* note 13, at 17; *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping 7-year-old Boy at Fort Lewis*, *supra* note 2; Roman, *supra* note 18, at 46; Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>271</sup> See *supra* note 36 and accompanying text.

<sup>272</sup> See 10 U.S.C. § 2683(a) (2012).

<sup>273</sup> See Stephen E. Castlen & Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 138 (1997). Other commentators have attributed the scarcity of retrocession of exclusive jurisdiction on military installations to additional factors, such as ignorance, lack of continuity among installation personnel, deference to the status quo, fear of giving something up, and misconceptions about the impact of concurrent jurisdiction. *Id.*

<sup>274</sup> See Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>275</sup> See *supra* note 267 and accompanying text.

Congress enacted something similar to mandatory retrocession jurisdiction over tribal lands.<sup>276</sup> Congress allowed certain surrounding states to apply their criminal and civil laws to tribal lands within their borders with the passage of Public Law 280 in 1953.<sup>277</sup> The federal government's relinquishment of jurisdiction is important to note because, after the passage of the Federal Enclaves Act in 1817, all tribal lands were treated as federal enclaves in much the same way as military installations with exclusive federal legislative jurisdiction.<sup>278</sup> Public Law 280 now allows the State of Idaho, for instance, to enforce its state laws regarding compulsory school attendance, juvenile delinquency, and youth rehabilitation on tribal lands that, while physically located within its borders, previously laid outside the reach of its jurisdiction.<sup>279</sup>

An application of the same kind of jurisdictional shift over juveniles would immediately benefit a military installation like Fort Hood.<sup>280</sup> Federal prosecutors in the geographically designated Western District of Texas are responsible for crime fighting activities across sixty-nine counties, focusing their efforts on "complex white-collar crime, public corruption, health care fraud, offenses committed on federal property, bank robbery, illegal immigration, drug trafficking, and firearms violations."<sup>281</sup> There are no federal prosecutors in the Western District designated to prosecute juvenile crime.<sup>282</sup> Bell County, Texas, on the other hand, has two full-time state juvenile prosecutors and is one of two counties surrounding Fort Hood that would assume jurisdiction over juveniles following retrocession.<sup>283</sup> Currently, Bell County's juvenile prosecutors handle felony offenses which range mostly from major theft to murder; they review approximately sixty-five to seventy juvenile offender cases each month.<sup>284</sup>

---

<sup>276</sup> See *infra* notes 277–79 and accompanying text.

<sup>277</sup> 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012); 25 U.S.C. §§ 1321–1326 (2012).

<sup>278</sup> 18 U.S.C. § 1152 (2012); see also Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI: FBI LAW ENFORCEMENT BULLETIN (May 2012), <https://leb.fbi.gov/2012/may/indian-country-and-the-tribal-law-and-order-act-of-2010>.

<sup>279</sup> *Fort Hall Indian Reservation Issues*, BINGHAM COUNTY PROSECUTOR'S OFFICE, [http://www.co.bingham.id.us/prosecutor/prosecutor\\_ft\\_hall.html](http://www.co.bingham.id.us/prosecutor/prosecutor_ft_hall.html) (last visited Nov. 18, 2017).

<sup>280</sup> See *infra* notes 281–84 and accompanying text.

<sup>281</sup> *Criminal Division*, DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S OFFICE, WESTERN DISTRICT OF TEXAS, <https://www.justice.gov/usao-wdtx/divisions/criminal-division> (last visited Mar. 1, 2016).

<sup>282</sup> Telephone Interview with Bettina Richardson, U.S. Attorney's Office, Western District of Texas (Apr. 2012) (discussing Assistant U.S. Attorneys' roles and responsibilities throughout the district).

<sup>283</sup> Telephone Interview with Bill Murphy, Bell County Attorney's Office, Juvenile Division (Apr. 2012) (discussing Bell County juvenile prosecutor staffing); *About Bell County*, BELL COUNTY, <http://www.bellcountytexas.com/index.php> (last visited Mar. 10, 2016); *Cities in Coryell County*, CORYELL COUNTY, <http://www.bellcountytexas.com/index.php> (last visited Mar. 10, 2016).

<sup>284</sup> *Bell County Attorney's Office*, BELL COUNTY, [http://www.bellcountytexas.com/county\\_government/county\\_attorney/index.php](http://www.bellcountytexas.com/county_government/county_attorney/index.php) (last visited Mar. 10, 2016).

Appendix G displays how the language of an amended 10 U.S.C. § 2683 (“Relinquishment of legislative jurisdiction; minimum drinking age on military installations”) should read in order to mandate retrocession of jurisdiction over juveniles on all military installations with exclusive jurisdiction.<sup>285</sup> Instead of leaving it up to the Secretary of Defense to retrocede such jurisdiction whenever he considers it desirable, the proposed statute would require the Secretary of Defense to relinquish jurisdiction with respect to juvenile crimes on military installations such that concurrent legislative jurisdiction shall exist with the surrounding state, commonwealth, territory, or possession.<sup>286</sup> Further, the statute would require the Secretary of Defense to report any surrounding state, commonwealth, territory, or possession that refuses to accept concurrent jurisdiction and the reason why.<sup>287</sup> Possessing the power of the purse, Congress could withhold funds for family housing and programs otherwise provided to military departments refusing to comply with mandatory retrocession of jurisdiction over juveniles.<sup>288</sup> Congress could similarly withhold certain federal funds otherwise provided to surrounding states refusing to accept jurisdiction over juveniles.<sup>289</sup>

### *B. Mandate Annual Reporting to Ensure Accountability*

Recently, Congress has used annual reporting requirements in order to ensure accountability regarding the investigation and prosecution of serious crimes on tribal lands and sexual assault in the military.<sup>290</sup> Following a series of newspaper articles discussing federal prosecutors’ apathy for serious crimes on tribal lands, along with alarmingly high prosecution declination rates (i.e. 72% for child sex crimes and 76.5% for adult sex crimes),<sup>291</sup> Congress passed the Tribal Law and Order Act in 2010.<sup>292</sup> A key part of the Act requires federal prosecutors to provide yearly reports on the number of criminal cases declined for prosecution and the reason for declination.<sup>293</sup> In the National Defense Authorization Act for Fiscal

---

<sup>285</sup> See *infra* Appendix G.

<sup>286</sup> See *infra* Appendix G.

<sup>287</sup> See *infra* Appendix G.

<sup>288</sup> See 10 U.S.C. § 2821 (2012) (requiring authorization of appropriations for construction and acquisition of military family housing).

<sup>289</sup> See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (upholding the withholding of 5% of federal highway funds to any state refusing to comply with the National Minimum Drinking Age Amendment); see also Brian Resnick & Emma Roller, *Four Times the Government Held Highway Funding Hostage*, *THE ATLANTIC* (Jul. 16, 2014), <https://www.theatlantic.com/politics/archive/2014/07/four-times-the-government-held-highway-funding-hostage/454167/>.

<sup>290</sup> See *infra* notes 291–95 and accompanying text.

<sup>291</sup> See Riley, *Principles, Politics Collide*, *supra* note 63.

<sup>292</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Title II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C. 2012)).

<sup>293</sup> *Id.*

Year 2011, Congress directed that the Secretary of each military department be required to report annually to the Secretary of Defense “on the sexual assaults involving members under their jurisdiction, and to include a plan for reducing the number of such assaults and improving sexual assault response.”<sup>294</sup> The Secretary of Defense then forwards the reports to the defense committees, together with comments and recommendations.<sup>295</sup>

The government does not require federal prosecutors in other jurisdictions to accurately track sexual assault cases reported to them, actions taken after referral, or case outcomes.<sup>296</sup> U.S. Attorney Kate Pflaumer in Seattle “said she was unable to determine, without research, how many juvenile prosecutions her office handled in the past 10 years” when reacting to reports that juvenile-on-juvenile sexual assaults were going unpunished on Fort Lewis.<sup>297</sup> Assistant U.S. Attorney Mark Frazier in Waco could only say that prosecution of juveniles in federal court is “fairly rare” when responding to reports that juvenile-on-juvenile sexual assaults were going unpunished at Fort Hood.<sup>298</sup> Assistant U.S. Attorney Patricia Riley, when responding to the lack of prosecution of sexual assault in the District of Columbia, stated, “[o]ur data systems do not easily yield information . . . For some reason data eludes us more than I would like it to.”<sup>299</sup> Joanne Archambault, executive director of End Violence Against Women International, views the lack of data on prosecution rates and disposition of sexual assault cases as intentional: “They don’t even keep those records, and it’s not by accident, Archambault said. Prosecutors don’t want people to know what’s being sent to them. And that’s across the country, which is interesting because prosecutors’ offices will publish [domestic violence] stats. But you won’t see prosecutors publishing sexual assault stats.”<sup>300</sup>

Military criminal investigators, who are often the first to begin investigations into and collect evidence from juvenile-on-juvenile sexual assaults on military installations, are also not required to keep statistics on such investigations and their outcomes.<sup>301</sup> The Naval Criminal Investigative Service, in its annual crime report, provides only limited statistics concerning juvenile-on-juvenile sexual

---

<sup>294</sup> Improved Sexual Assault Prevention and Response in the Armed Forces, Pub. L. No. 111-383, § 1631(a).

<sup>295</sup> *Id.* at § 1631(d)(2).

<sup>296</sup> See *infra* notes 297–300 and accompanying text.

<sup>297</sup> *Bases a Black Hole for Juvenile Justice—Teen Accused of Raping 7-year-old Boy at Fort Lewis*, *supra* note 2.

<sup>298</sup> Schwartz & Thayer, *At Fort Hood*, *supra* note 18.

<sup>299</sup> Resnick, *supra* note 208.

<sup>300</sup> Resnick, *supra* note 208.

<sup>301</sup> See *infra* notes 302–05 and accompanying text.

assault in its annual Crime Statistics Report.<sup>302</sup> The reports from 2012 to 2015 indicate a total of 126 cases of juvenile-on-juvenile sexual assaults involving alleged juvenile offenders under the age of 16 years occurring on Navy and Marine Corps bases.<sup>303</sup> There is no data on the outcome of any of the cases.<sup>304</sup> The Army's Criminal Investigation Command (CID) has the ability to query its database for cases involving juvenile subjects committing crimes against juvenile victims, but cannot delineate sexual assault offenses and does not track final case disposition.<sup>305</sup> As mentioned previously, the Army is aware of 6,175 cases of felony-level juvenile-on-juvenile crime from 2004 to 2015.<sup>306</sup>

The lack of annual reporting requirements for juvenile-on-juvenile sexual assault cases on military installations contributes to the dearth of subsequent prosecutions.<sup>307</sup> To counter such an impact, Congress must mandate annual investigation and prosecution statistics in the same manner it did with the Tribal Law and Order Act.<sup>308</sup> The Federal Bureau of Investigation and military law enforcement organizations should be required to compile annual data, by military installation, on felony-level juvenile crime.<sup>309</sup> Included in the data should be the types of crimes, juvenile offender data, victim data, and reasons for deciding against referring investigations for prosecution.<sup>310</sup> For prosecution data, Congress should require annual reports of felony-level juvenile cases occurring on military installations that were referred to federal prosecutors.<sup>311</sup> Included in the data should be the types of crimes alleged, the statuses of the juvenile subjects and victims, the reasons for declining prosecutions, and whether or not the declining attorney granted the juvenile victim and his/her parent or guardian the reasonable right to confer prior to declination.<sup>312</sup> Additionally, the DoD must be required to submit to Congress annual reports on the same information in the aggregate and by military department and specific installation.<sup>313</sup> Appendix H includes suggested language for this proposed legislation.<sup>314</sup> Implementing annual

---

<sup>302</sup> Statistics compiled from *Annual Crime Reports*, DEP'T OF THE NAVY, NAVAL CRIM. INVESTIGATIVE SERV., *supra* note 81.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> E-mail from LTC Matthew Vinton, Fort Belvoir, Va. (Jan. 25, 2017) (on file with author).

<sup>306</sup> Data provided by U.S. Army Crime Records Center in response to a research request from the author (request and response on file with the author). *See infra* Appendix C.

<sup>307</sup> *See supra* note 18 and accompanying text.

<sup>308</sup> *See supra* notes 291–93 and accompanying text.

<sup>309</sup> *See infra* Appendix H.

<sup>310</sup> *See infra* Appendix H.

<sup>311</sup> *See infra* Appendix H.

<sup>312</sup> *See infra* Appendix H.

<sup>313</sup> *See infra* Appendix H.

<sup>314</sup> *See infra* Appendix H.



reporting requirements will ensure accountability for the actions, or inaction, of federal prosecutors and investigators, along with military investigators.<sup>315</sup> It will also help identify those military installations with concurrent jurisdiction over juvenile crimes where the surrounding states refuse to prosecute juvenile delinquency.<sup>316</sup> If the reluctance to prosecute stems from local prosecution offices being overwhelmed by the amount of juvenile criminal offenses originating on military installations, then Congress should consider funding grants to hire additional prosecutors in the same manner that it does with Project Safe Neighborhood.<sup>317</sup>

### C. Mandate Warnings to Families

Congress must ensure military installation commanders warn servicemembers and their family members about the federal de facto policy of non-prosecution of juvenile crime before they decide to live on military installations with exclusive jurisdiction.<sup>318</sup> The warnings should also be made to family members moving overseas to accompany servicemembers stationed in foreign countries.<sup>319</sup> Although not as well documented, there is also a lack of federal prosecution of juvenile-on-juvenile sexual assaults occurring on military installations overseas.<sup>320</sup> Under the Military Extraterritorial Jurisdiction Act (MEJA), it is a federal crime to engage in conduct outside the United States that would constitute a felony under federal law if committed within the special maritime and territorial jurisdiction of the United States.<sup>321</sup> MEJA applies to members of the armed forces and civilians employed by or accompanying the armed forces outside the United States.<sup>322</sup> Thus, perpetrators of juvenile-on-juvenile sexual assault in foreign countries who reside there as dependents of servicemembers can be prosecuted by federal prosecutors for their crimes.<sup>323</sup> However, prosecution of juveniles under MEJA

---

<sup>315</sup> See *supra* notes 302–05 and accompanying text.

<sup>316</sup> See Jeremy Schwartz, *Congressmen Push for Solution to Fort Hood Juvenile Prosecutions*, AUSTIN AM.-STATESMAN (Nov. 16, 2015), <http://www.mystatesman.com/news/local-military/congressmen-push-for-solution-fort-hood-juvenile-prosecutions/xzrqdoHfyavXVEZvDHCzOzM/>. As an example, Bell County Judge Jon Burrows indicated Bell County might hesitate to prosecute juvenile delinquency on Fort Hood due to the cost of in and out-of-county treatment centers, which it would expect military authorities to fund. *Id.*

<sup>317</sup> *Project Safe Neighborhoods (PSN)*, BUREAU OF JUSTICE ASSISTANCE, UNITED STATES DEPARTMENT OF JUSTICE, [https://www.bja.gov/programdetails.aspx?program\\_id=74](https://www.bja.gov/programdetails.aspx?program_id=74) (last visited Apr. 10, 2017).

<sup>318</sup> See *supra* notes 240, 258 and accompanying text.

<sup>319</sup> See *infra* notes 320–26 and accompanying text.

<sup>320</sup> See *infra* notes 324–26 and accompanying text.

<sup>321</sup> 18 U.S.C. § 3261 (2012).

<sup>322</sup> *Id.*

<sup>323</sup> See DEP'T OF DEF. INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS, para. 2.5 (2005).



is even rarer than prosecution of juvenile-on-juvenile sexual cases on military installations with exclusive jurisdiction in the United States.<sup>324</sup> Anecdotal evidence from Navy, Air Force, and Army Special Victims' Counsel stationed overseas reveal that U.S. Attorneys consistently reject juvenile-on-juveniles sexual assault cases despite strong evidence or indication of serial offenders.<sup>325</sup> Families of affected victims are turned away by host nation authorities, as well, who demure on cases involving only U.S. juvenile offenders and victims.<sup>326</sup> Appendices H and I together suggest appropriate warning language for proposed notifications to military servicemembers stationed in the continental United States who are contemplating moving into family housing on military installations with exclusive jurisdiction, or who are being stationed overseas.<sup>327</sup>

#### IV. CONCLUSION

The DoD designates each April the Month of the Military Child “to honor the unique contributions and sacrifices made by military children on behalf of their country.”<sup>328</sup> However, the DoD allows nearly 340,000 children to live on its military installations without affording them equal protection of the laws.<sup>329</sup> The lack of protection is especially acute in cases of juvenile-on-juvenile sexual assault, a widespread occurrence.<sup>330</sup> The physical and emotional trauma from sexual assault impacts not only juvenile victims, but their servicemember parents as well. The DoD fails to warn parents about the DoJ's de facto policy of non-prosecution of serious juvenile crime prior to them moving their families into housing on military installations.<sup>331</sup> For over forty years, the DoD has known that the DoJ is uninterested in prosecuting juvenile crime, but only rarely has it utilized retrocession of exclusive jurisdiction to surrounding states in order to address the juvenile justice gap.<sup>332</sup> It is well past time for Congress to enact

---

<sup>324</sup> See *United States v. Under Seal*, 709 F.3d 257, 259–60 (4th Cir. 2013). Research reveals one citable case. See *id.*

<sup>325</sup> Interviews with Special Victims' Counsel from the U.S. Army, U.S. Navy, and U.S. Air Force, at Ramstein Air Base, Germany (Sept. 2015).

<sup>326</sup> Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW., Jun. 2005, at 41.

<sup>327</sup> See *infra* Appendices H and I.

<sup>328</sup> *Special Report: Month of the Military Child*, *supra* note 1.

<sup>329</sup> *Special Report: Month of the Military Child*, *supra* note 1. The DoD states there are 1,126,326 children of active duty servicemembers. *Id.* Thirty percent of those children live on military installations. See Jim Garamone, *Military Children Serve, Too*, DEP'T OF DEFENSE NEWS, DEFENSE MEDIA ACTIVITY (Apr. 12, 2016), <https://www.defense.gov/News/Article/Article/719407/military-children-serve-too>.

<sup>330</sup> See *supra* notes 66, 76–103 and accompanying text.

<sup>331</sup> See *supra* notes 240, 258 and accompanying text.

<sup>332</sup> See Suter, *supra* note 13.

legislation such as The Protect Our Military Children Act.<sup>333</sup> Such action will require empathy for juvenile-on-juvenile sexual assault victims and resolve by Congress, which must strongly rebuke the DoD's juvenile jurisdiction status quo.<sup>334</sup> By mandating retrocession of exclusive jurisdiction over juvenile crime on all military installations, requiring annual reporting of the investigation and disposition of serious juvenile criminal cases, and providing warnings to all potential housing residents of the problems with exclusive jurisdiction, Congress can demonstrate to military children victimized by their juvenile peers that they truly are valued.

#### V. ADDENDUM

In September 2017, Army CID released twelve pages of “statistical summaries” concerning investigations into juvenile-on-juvenile sexual assaults occurring on Army installations worldwide during the previous ten years.<sup>335</sup> The data release came in response to a request from the office of Senator Claire McCaskill, a member of the United States Senate Committee on Armed Services.<sup>336</sup> Despite being styled statistical summaries, the data consists of nothing more than one-line entries for each case recording the date, military installation location, and type of each alleged offense, along with whether or not probable cause exists to believe the offense occurred.<sup>337</sup> Not included in the data are the final case disposition and reason for declining to initiate a juvenile delinquency proceeding in each case with probable cause, meaning there is no way to determine prosecution/declination rates or further analyze the data.<sup>338</sup> Army CID noted that victims comprise both genders and range from one to seventeen years old; alleged juvenile offenders comprise both genders and range from ten to seventeen years old.<sup>339</sup>

While the statistical summaries include 209 cases, from Army installations around the world, with credible evidence to believe that the crime of juvenile-on-juvenile sexual assault occurred, there are several reasons to suspect that the actual number of investigated cases is significantly higher.<sup>340</sup> First, an attorney assigned to Army CID asserted that the Army's Crime Records Center (CRC)

---

<sup>333</sup> See *supra* notes 263–327 and accompanying text.

<sup>334</sup> See *supra* notes 65–66, 122 and accompanying text.

<sup>335</sup> See U.S. Dep't of Army, Office of the Chief Legislative Liaison, Executive Summary, Release of Documents to Senator Claire McCaskill (Sep. 20, 2017), and associated statistical summaries (on file with the author).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> See *supra* note 335, *infra* notes 341–48 and accompanying text.

database cannot be searched specifically for juvenile-on-juvenile sexual assaults, only for cases involving juvenile subjects committing crimes against juvenile victims in general.<sup>341</sup> The assertion calls into question the effectiveness of Army CID's query for all juvenile-on-juvenile sexual assault cases occurring on Army installations for the given ten-year period relying only on the CRC database.<sup>342</sup> Second, the statistical summaries purport to show no, or relatively few, juvenile-on-juvenile sexual assault cases at numerous military installations despite the presence of military children.<sup>343</sup> For instance, there are no cases listed for Joint Base Elmendorf-Richardson, Fort Rucker, Fort Polk, Joint Base McGuire-Dix-Lakehurst, Fort Sill, Fort Sam Houston, Italy (Vicenza), and several locations in Germany (Grafenwoehr, Vilseck, and Wiesbaden); there is only one case listed for Fort Gordon, one case listed for all installations in Korea, three cases for Fort Carson, and six cases for Fort Bragg.<sup>344</sup> Focusing on Fort Hood, the statistical summaries include only twenty-seven listed cases from 2007–2017, whereas prior reporting indicated there were thirty-nine cases over a shorter six-year period from the same timeframe, 2006–2012.<sup>345</sup> Finally, the 209 listed cases of juvenile-on-juvenile sexual assault over a ten-year period represent only 4% of the expected total number of juvenile-on-juvenile felony-level criminal cases investigated by Army CID for such a time period based on historical yearly data provided by Army CID, and reprinted in Appendix C.<sup>346</sup> As CID only investigates felony-level crime, the remaining 96% of cases involving juvenile-on-juvenile crime would logically be composed of serious cases such as murder, manslaughter, armed robbery, or aggravated assault.<sup>347</sup> Based on discussions with Army Special Assistant U.S. Attorneys, Army law enforcement officials, and the author's own experience, the 4% total for juvenile-on-juvenile sexual assault is far too low to be considered an accurate reflection of CID investigations into juvenile-on-juvenile sexual assault on Army installations.<sup>348</sup> Instead, applying a greater, but still conservative,

---

<sup>341</sup> See *supra* note 305 and accompanying text.

<sup>342</sup> See *supra* notes 305, 335 and accompanying text.

<sup>343</sup> See *infra* note 344 and accompanying text.

<sup>344</sup> See *supra* note 335 and accompanying text.

<sup>345</sup> See *supra* notes 18, 335 and accompanying text.

<sup>346</sup> See *infra* Appendix C. Army CID investigated 6,175 cases of juvenile-on-juvenile crime on Army installations worldwide from 2004 through 2015, resulting in a yearly average of 514 cases. *Id.* For a ten-year period, the expectation would be to see 5,140 total cases investigated. See *id.*

<sup>347</sup> See *supra* note 75 and accompanying text.

<sup>348</sup> The author had individual discussions about the most common juvenile-on-juvenile type of crime occurring on a given military installation with Army attorneys and law enforcement officials stationed at Fort Hood, Fort Bliss, Fort Stewart, Fort Bragg, Joint Base Lewis-McChord, Fort Belvoir, Fort Sam Houston, Fort Riley, Fort Rucker, Joint Base McGuire-Dix-Lakehurst, and Fort Campbell. These discussions revealed drug possession and use as another common type of crime committed by juveniles and investigated by CID. However, juvenile drug use and possession does not involve a juvenile victim, and therefore does not factor into juvenile-on-juvenile crime statistics.

40% rate yields a more likely total of 2,058 cases of juvenile-on-juvenile sexual assault investigated by Army CID on Army installations worldwide for a ten-year period.<sup>349</sup> No matter the true number of investigated cases, nothing in the data release changes the fact that federal prosecution of juvenile-on-juvenile sexual assault is practically non-existent at military installations with exclusive jurisdiction.<sup>350</sup>

---

<sup>349</sup> See *infra* Appendix C.

<sup>350</sup> See *supra* notes 70–103 and accompanying text.

## APPENDIX A. LTC SUTER STATISTICAL ABSTRACT

1974 Juvenile Delinquency Statistical Abstract<sup>a</sup>

| Name of Installation | Type of Jurisdiction | Acts of On-Post Juvenile Delinquency | Juveniles Prosecuted By |                 | Administrative Actions |          | Referred to State Juvenile Authorities |
|----------------------|----------------------|--------------------------------------|-------------------------|-----------------|------------------------|----------|--|
|                      |                      |                                      | State                   | Federal         | Formal                 | Informal |  |
| Ft Huachuca          | Exclusive            | 30                                   | 0                       | 0               | 26                     | 2        | 0                                      |
| Ft Monmouth          | Exclusive            | 50                                   | 2                       | 0               | 5                      | 10       | 1                                      |
| Redstone             | Exclusive            | 35                                   | 0                       | 0               | 11                     | 0        | 0                                      |
| White Sands          | Exclusive            | 25                                   | 0                       | 0               | 12                     | 4        | 0                                      |
| Ft Knox              | Exclusive            | 50                                   | 2                       | 20              | 60                     | UNK      | 0                                      |
| Ft Belvoir           | Exclusive            | 27                                   | 5                       | 0               | 7                      | 22       | 29                                     |
| Ft Lee               | Exclusive            | 39                                   | 0                       | 2               | 31                     | 2        | 0                                      |
| Ft Eustis            | Exclusive            | 43                                   | 0                       | 25 <sup>b</sup> | 2                      | 25       | 0                                      |
| Ft Gordon            | Exclusive            | 64                                   | 0                       | 5 <sup>b</sup>  | UNK                    | UNK      | 5                                      |
| Ft Benning           | Exclusive            | 456                                  | 12                      | 0               | 4                      | 23       | 15                                     |

| Name of Installation | Type of Jurisdiction | Acts of On-Post Juvenile Delinquency | Juveniles Prosecuted By |                  | Administrative Actions |          | Referred to State Juvenile Authorities |
|----------------------|----------------------|--------------------------------------|-------------------------|------------------|------------------------|----------|--|
|                      |                      |                                      | State                   | Federal          | Formal                 | Informal |  |
| Ft McClellan         | Exclusive            | 10                                   | 0                       | 3 <sup>b</sup>   | 0                      | 2        | 0                                      |
| Ft Rucker            | Mixed                | 45                                   | 0                       | 2                | 23                     | 25       | 0                                      |
| Ft Jackson           | Exclusive            | 22                                   | 0                       | 0                | 16                     | 6        | 0                                      |
| Ft Leavenworth       | Exclusive            | 15                                   | 0                       | 0                | 6                      | 9        | 0                                      |
| Ft Bliss             | Exclusive            | 50                                   | 5                       | 5                | 23                     | 8        | 0                                      |
| Ft Polk              | Mixed                | 20                                   | 10                      | 1                | 0                      | 0        | 5                                      |
| Ft Sill              | Mixed                | 55                                   | 0                       | 3                | 11                     | 8        | 4                                      |
| Ft Wood              | Mixed                | UNK                                  | 0                       | 0                | 1                      | UNK      | 0                                      |
| Ft Ord               | Exclusive            | 560                                  | 0                       | 400 <sup>b</sup> | 10                     | 24       | 0                                      |
| Ft Hamilton          | Exclusive            | 25                                   | 0                       | 1                | 15                     | 10       | 0                                      |
| Ft Meade             | Exclusive            | 64                                   | 0                       | 0                | 17                     | UNK      | 0                                      |
| Ft Devens            | Exclusive            | 37                                   | 0                       | 0                | 3                      | 10       | 1                                      |
| Ft Bragg             | Mixed                | 114                                  | 0                       | 5                | 5                      | 25       | 0                                      |
| Ft Stewart           | Exclusive            | 20                                   | 0                       | 3                | 2                      | 2        | 0                                      |
| Ft Riley             | Mixed                | 0                                    | 0                       | 0                | 5                      | UNK      | 0                                      |
| Ft Campbell          | Exclusive            | 115                                  | 1                       | UNK              | 6                      | UNK      | 2                                      |
| Ft Hood              | Exclusive            | 26                                   | 0                       | 0                | 1                      | UNK      | UNK                                    |
| Ft Sheridan          | Exclusive            | 18                                   | 0                       | 1                | 1                      | 3        | 0                                      |
| Ft Carson            | Exclusive            | 90                                   | 1                       | 0                | 4                      | UNK      | 1                                      |
| Ft Lewis             | Mixed                | 135                                  | 0                       | 6 <sup>b</sup>   | 1                      | 6        | 10                                     |

<sup>a</sup> All figures are approximate.<sup>b</sup> U.S. magistrate "handled" informally.

UNK=unknown.

## APPENDIX B. MAJ ROMAN STATISTICAL ABSTRACT

Juvenile Misconduct on Select Army Installations in Fiscal Year 2014 (FY14)<sup>102</sup>

| <b>Installation</b> | <b>Type of Jurisdiction</b> | <b>Reports of On-Post Juvenile Misconduct</b> | <b>Juvenile Cases Referred to Federal Court</b> | <b>Juvenile Cases Referred to State Court</b> | <b>Juvenile Cases Handled by Administrative Action</b> | <b>Currently Use a Juvenile Review Board</b> |
|---------------------|-----------------------------|---|---|---|--|--|
| Ft Benning          | Exclusive Federal           | 49  | 0   | 0   | 48   | Yes  |
| Ft Bliss            | Exclusive & Concurrent      | Unknown                                       | 0   | 0   | Unknown  | No   |
| Ft Bragg            | Exclusive & Concurrent      | Unknown                                       | 2   | Unknown                                       | 46   | Yes  |
| Ft Campbell         | Exclusive Federal           | Unknown                                       | 0   | Unknown                                       | Unknown  | Yes  |
| Ft Gordon           | Exclusive Federal           | 25  | 0   | 16  | 10   | No   |
| Ft Hood             | Exclusive Federal           | 60  | 0   | 4   | 10   | Yes  |
| Ft Huachuca         | Exclusive Federal           | 5   | 0   | 0   | 0  | Yes  |
| Ft Irwin            | Concurrent                  | 11  | 0   | 5   | 3  | Yes  |
| Ft Knox             | Exclusive & Concurrent      | 30  | 0   | 2   | 4  | Yes  |
| Ft Leavenworth      | Exclusive Federal           | 30  | 0   | 0   | 30   | Yes  |
| Ft Lee              | Exclusive & Concurrent      | Unknown                                       | 0   | 0   | 1  | Yes  |
| J B Lewis-McChord   | Exclusive & Concurrent      | Unknown                                       | 0   | Unknown                                       | 24   | No   |
| Ft Meade            | Exclusive & Concurrent      | 39  | 10  | 28  | 0  | Yes  |
| Redstone Arsenal    | Exclusive Federal           | 2   | 0   | 0   | 1  | No   |
| Ft Riley            | Exclusive Federal           | 75  | 0   | 6   | 8  | Yes  |
| Ft Rucker           | Exclusive & Concurrent      | 24  | 5   | 2   | 8  | Yes  |
| Ft Stewart & HAAF   | Exclusive Federal           | 42  | 0   | 0   | 39   | Yes  |
| White Sands         | Exclusive & Proprietary     | 0   | 0   | 0   | 0  | Yes  |

<sup>102</sup> All figures are approximate.

## APPENDIX C. ARMY CID DATA REGARDING JUVENILE-ON-JUVENILE CRIME

| <b>Unique Cases with Juvenile Subject and/or Victim Status: CY2004–2015</b> |   |                              |                             |
|---|---|------------------------------|-----------------------------|
| <b>CY</b>   | <b>Both Juvenile Subject and Victim</b> | <b>Juvenile Subject Only</b> | <b>Juvenile Victim Only</b> |
| <b>CY04</b>   | 485                                     | 4482                         | 3546                        |
| <b>CY05</b>   | 474                                     | 4630                         | 4503                        |
| <b>CY06</b>   | 457                                     | 4179                         | 4709                        |
| <b>CY07</b>   | 537                                     | 4464                         | 4658                        |
| <b>CY08</b>   | 587                                     | 4319                         | 4821                        |
| <b>CY09</b>   | 593                                     | 4376                         | 5156                        |
| <b>CY10</b>   | 703                                     | 4042                         | 5228                        |
| <b>CY11</b>   | 626                                     | 4227                         | 4644                        |
| <b>CY12</b>   | 623                                     | 3877                         | 4772                        |
| <b>CY13</b>   | 468                                     | 2936                         | 4330                        |
| <b>CY14</b>   | 420                                     | 2621                         | 4051                        |
| <b>CY15</b>   | 202                                     | 1248                         | 2154                        |
| <b>Grand Total</b>  | <b>6175</b>                             | <b>45401</b>                 | <b>52572</b>                |



APPENDIX D. RELINQUISHMENT/RETROCESSION  
OF JUVENILE JURISDICTION—FORT KNOX



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
INSTALLATIONS LOGISTICS AND ENVIRONMENT  
110 ARMY PENTAGON  
WASHINGTON DC 20310-0110

June 8, 1999

RECEIVED  
GOVERNOR'S OFFICE  
JUN 14 4 40 PM '99

Honorable Paul E. Patton  
Governor of Kentucky  
700 Capitol Avenue  
Suite 100  
Frankfort, Kentucky 40501

Dear Governor Patton:

The United States presently exercises limited exclusive legislative jurisdiction over approximately 102,831.60 acres of land located at the Fort Knox Military Reservation, Fort Knox, Kentucky and seeks to relinquish such jurisdiction as necessary to enable the Commonwealth of Kentucky to provide assistance over juveniles who commit offenses on Fort Knox and over civilians who are suspected of being mentally ill and who may pose a danger to themselves and/or others on Fort Knox Military Reservation. A map depicting the installation boundary lines is enclosed for your information.

Kentucky Revised Statutes, Chapter 3, Section 3.110 permit acceptance of retrocession of Federal jurisdiction over lands acquired by or ceded to the Federal Government.

Accordingly, pursuant to the authority in Title 10, United States Code, Section 2683, notice is hereby given that the United States relinquishes and retrocedes to the Commonwealth of Kentucky the following limited jurisdiction:

a. Such authority over the Fort Knox Military Reservation as is necessary to permit the Commonwealth of Kentucky jurisdiction over and the administration of justice for juveniles who commit offenses or are found on the Military Reservation. Such concurrent jurisdiction includes status offenders, public offenders, and youthful offenders as defined by the Kentucky Revised Statutes.

b. Such authority over the Fort Knox Military Reservation as is necessary to exercise concurrent jurisdiction with the Commonwealth of Kentucky for mental health matters. Persons on the Military Reservation shall be considered as residents of the Commonwealth of Kentucky for purposes of KRS Chapter 202A, including, but not limited to, involuntary hospitalization, hospitalization by court order, emergency admissions, arrests, and subsequent proceedings.

I would appreciate your acceptance of this jurisdiction on behalf of the Commonwealth of Kentucky by signing the duplicate copy of the Notice of Acceptance and returning it to this office.

Sincerely,

Paul W. Johnson

Deputy Assistant Secretary of the Army  
(Installations and Housing)  
OASA (I&E)

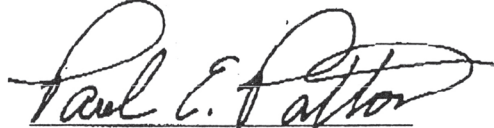
Enclosures

APPENDIX D. RELINQUISHMENT/RETROCESSION  
OF JUVENILE JURISDICTION—FORT KNOX, CONTINUED

NOTICE OF ACCEPTANCE

SUBJECT: Retrocession of Legislative Jurisdiction at Fort Knox Military Reservation,  
Fort Knox, Kentucky

The limited jurisdiction relinquished by the United States to the Commonwealth of Kentucky to enable the Commonwealth of Kentucky to provide assistance over juveniles who commit offenses on Fort Knox and over civilians who are suspected of being mentally ill and who may pose a danger to themselves and/or others on Fort Knox Military Reservation is accepted by me, acting on behalf of the Commonwealth of Kentucky, this 16TH day of June, 1999.

  
Governor of Kentucky

APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD



DEPARTMENT OF THE ARMY  
ASSISTANT SECRETARY  
INSTALLATIONS AND ENVIRONMENT  
110 ARMY PENTAGON  
WASHINGTON DC 20310-0110

January 7, 2000

The Honorable Gary Locke  
Governor of Washington  
Post Office Box 40002  
Olympia, Washington 98504-0002

Dear Governor Locke:

The United States presently exercises exclusive legislative jurisdiction over 57,998.89 acres of land, more or less, comprising a portion of the Fort Lewis Military Reservation in Pierce and Thurston Counties, Washington.

The United States wishes to relinquish exclusive juvenile jurisdiction and establish concurrent juvenile jurisdiction over the 57,998.89 acres to enable the State of Washington to legally provide law enforcement and social services for juveniles on Fort Lewis Military Reservation. Enclosed is a map showing the area over which said jurisdiction is being relinquished and retroceded.

Pursuant to Title 10, United States Code, Section 2683, notice is hereby given that the United States retrocedes to the State of Washington exclusive juvenile legislative jurisdiction and establishes concurrent juvenile legislative jurisdiction over Fort Lewis Military Reservation, Washington.

We would appreciate your acceptance of our request on behalf of the State of Washington in the manner required by State law and returning a copy of such documentation evidencing the State's acceptance of this offer.

Sincerely,

Paul W. Johnson

Deputy Assistant Secretary of the Army  
(Installations and Housing)  
OASA(I&E)

APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD, CONTINUED



GARY LOCKE  
Governor

STATE OF WASHINGTON

OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • TTY/TDD (360) 753-6466

September 6, 2000

The Honorable Paul W. Johnson  
Deputy Assistant Secretary (Installations and Housing)  
Department of the Army  
110 Army Pentagon  
Washington, D.C. 20310-0110

Dear Mr. Johnson:

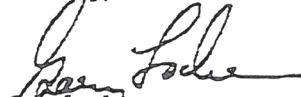
Thank you for your letter of January 7, 2000 relinquishing exclusive federal criminal jurisdiction over juvenile offenders over 57,998.89 acres of Fort Lewis Military Reservation in Pierce County, Washington.

After consulting with Pierce County authorities, I am returning with my signature the document you asked me to sign, accepting concurrent jurisdiction over juvenile offenders in the area specified on behalf of the State of Washington, effective January 1, 2001.

Because Pierce County could bear significant costs if all juvenile offenses on the base were prosecuted under state law, I expect that the Army will continue to handle minor cases informally under existing procedures, and will consult with county authorities about referring more serious cases for prosecution under state law.

Thank you for your concern about public safety, accountability for juvenile offenses, and the administration of justice both on the base and in the surrounding community.

Sincerely,

  
Gary Locke  
Governor

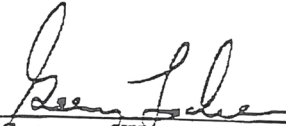
cc: Congressman Norm Dicks  
U.S. Attorney Kate Pflaumer  
County Executive Doug Sutherland  
Prosecuting Attorney John Ladenburg  
Juvenile Court Administrator Dan Erker

APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD, CONTINUED

NOTICE OF ACCEPTANCE

Subject: Retrocession of Exclusive Juvenile Legislative Jurisdiction Over Fort Lewis Military Reservation, Washington

The United States relinquishing of exclusive juvenile jurisdiction and establishing concurrent juvenile jurisdiction at Fort Lewis Military Reservation to the State of Washington is accepted by me, acting on behalf of the State of Washington, this 7<sup>th</sup> day of September, 2000. This acceptance is effective January 1, 2001.

  
\_\_\_\_\_  
Governor of Washington

APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD, CONTINUED



Office of the Assistant Secretary

DEPARTMENT OF THE AIR FORCE  
WASHINGTON, DC

2 JUL 1990

SAF/MII  
1660 Air Force Pentagon  
Washington DC 20330-1660

The Honorable Gary Locke  
Governor of Washington  
Olympia WA 98501

Dear Governor Locke

The United States presently exercises exclusive legislative jurisdiction over 4,235.67 acres of land, more or less, comprising a portion of the McChord Air Force Base, Pierce County, Washington.

The United States wishes to relinquish partial jurisdiction on McChord AFB, Washington. Pursuant to Title 10, United States Code, Section 2683, notice is hereby given that the United States retrocedes to the State of Washington exclusive criminal jurisdiction over juvenile offenders to concurrent jurisdiction over juvenile offenders over the 4,235.67 acres of the base. Concurrent jurisdiction will enable the State of Washington to prosecute violations of law by juveniles on McChord Air Force Base pursuant to the Juvenile Justice Act, RCW 13.40.010 *et seq.*, and to provide social services to those juvenile offenders. Attached is a map showing the area over which such jurisdiction is being relinquished and retroceded.

I would appreciate your acceptance of said jurisdiction on behalf of the State of Washington by your acknowledging receipt on the duplicate of this notice and returning it to this office.

Sincerely

A handwritten signature in cursive script, appearing to read "Jimmy G. Dishner".

JIMMY G. DISHNER  
Deputy Assistant Secretary of the Air Force  
(Installations)

Attachment:  
Map

APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD, CONTINUED

GARY LOCKE  
Governor



STATE OF WASHINGTON  
OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • TTY/TDD (360) 753-6466

September 6, 2000

The Honorable Jimmy G. Dishner  
Deputy Assistant Secretary (Installations)  
Department of the Air Force  
1660 Air Force Pentagon  
Washington, D.C. 20330-1660

Dear Mr. Dishner:

Thank you for your letter of July 2, 1998 relinquishing exclusive federal criminal jurisdiction over juvenile offenders over 4,235.7 acres of McChord Air Force Base in Pierce County, Washington.

After consulting with Pierce County authorities, I am returning with my signature the document you asked me to sign, accepting concurrent jurisdiction over juvenile offenders in the area specified on behalf of the State of Washington, effective January 1, 2001.

Because Pierce County could bear significant costs if all juvenile offenses on the base were prosecuted under state law, I expect that the Air Force will continue to handle minor cases informally under existing procedures, and will consult with county authorities about referring more serious cases for prosecution under state law.

Thank you for your concern about public safety, accountability for juvenile offenses, and the administration of justice both on the base and in the surrounding community.

Sincerely,

A handwritten signature in cursive script that reads "Gary Locke".

Gary Locke  
Governor

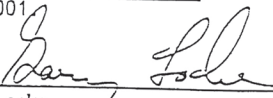
cc: Congressman Norm Dicks  
U.S. Attorney Kate Pflaumer  
County Executive Doug Sutherland  
Prosecuting Attorney John Ladenburg  
Juvenile Court Administrator Dan Erker



APPENDIX E. RELINQUISHMENT/RETROCESSION OF JUVENILE JURISDICTION—  
JOINT BASE LEWIS-McCHORD, CONTINUED

2

The juvenile jurisdiction relinquished above is accepted by me, acting on behalf of the State  
of Washington, this 7<sup>th</sup> day of September, ~~1998~~ 2000.  
This acceptance is effective January 1, 2001

  
\_\_\_\_\_  
Gary Locke  
Governor of Washington

APPENDIX F. RELINQUISHMENT/RETROCESSION OF JURISDICTION—  
FORT STEWART AND HUNTER ARMY AIRFIELD

MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES  
OF AMERICA AND THE STATE OF GEORGIA REGARDING  
RETROCESSION FROM EXCLUSIVE TO CONCURRENT JURISDICTION  
— PORTIONS OF FORT STEWART AND HUNTER ARMY AIRFIELD

MEMORANDUM OF AGREEMENT  
BETWEEN  
THE UNITED STATES OF AMERICA  
AND  
THE STATE OF GEORGIA

REGARDING

THE RETROCESSION BY THE UNITED STATES  
FROM EXCLUSIVE TO CONCURRENT  
JURISDICTION OVER  
CERTAIN LAND LOCATED IN  
CHATHAM, LIBERTY, LONG, EVANS, AND BRYAN COUNTIES, GEORGIA

**WHEREAS**, the United States accepted exclusive jurisdiction over the fee areas currently owned by the United States and operated as Fort Stewart, Georgia by letter from the Secretary of the Army dated September 25, 1953, with acknowledgement by the Governor of Georgia on September 1953. Said letter cited the laws of the State of Georgia, an act of the Legislature of Georgia approved February 15, 1952 (Georgia Laws 1952, page 264) as the ceding statute; AND

**WHEREAS**, the United States accepted exclusive jurisdiction over the fee areas currently owned by the United States and operated as Hunter Army Airfield, Georgia by letter from the Secretary of the Army dated January 15, 1954, with acknowledgement by the Governor of Georgia on January 18, 1954. Said letter cited the laws of the State of Georgia, an Act of the Legislature of Georgia approved February 15, 1952 (Georgia Laws 1952, page 264) as the ceding statute; AND

**WHEREAS**, pursuant to 10 USC 2683, the United States of America desires to retrocede from exclusive to concurrent jurisdiction over portions of said Fort Stewart, Georgia and Hunter Army Airfield, Georgia; AND

**WHEREAS**, in accordance with Georgia law, O.C.G.A. §50-2-27, the State of Georgia consented to the retrocession of jurisdiction by the United States of America, either partially or wholly, and authorized the Governor to accept for the state such retrocession of jurisdiction; AND

APPENDIX F. RELINQUISHMENT/RETROCESSION OF JURISDICTION—  
FORT STEWART AND HUNTER ARMY AIRFIELD, CONTINUED

MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES  
OF AMERICA AND THE STATE OF GEORGIA REGARDING  
RETROCESSION FROM EXCLUSIVE TO CONCURRENT JURISDICTION  
— PORTIONS OF FORT STEWART AND HUNTER ARMY AIRFIELD

**WHEREAS**, this Memorandum of Agreement (MOA), upon execution and approval will constitute evidence of the retrocession from exclusive to concurrent jurisdiction by the United States of America and the acceptance thereof by the State of Georgia.

**NOW THEREFORE**, the parties agree as follows:

1. The United States of America retrocedes jurisdiction from exclusive to concurrent over the land areas, a portion of Fort Stewart, Georgia and Hunter Army Airfield, Georgia, as described in the Exhibits A; and B, attached hereto and made a part hereof, and the Governor of the State of Georgia hereby accepts such retrocession, pursuant to O.C.G.A. §50-2-27 and 10 USC 2683. The power of the installation commander to enforce Army regulations, the Uniform Code of Military Justice, and federal statutes is not affected.

2. Both State and Federal laws are applicable in a concurrent jurisdiction area. Such concurrent jurisdiction shall include the enforcement of laws, rules, and regulations that the Congress of the United States may adopt for the preservation and protection of its property and the maintenance of good order, including the provision of law enforcement services and security; the enforcement of applicable laws, rules, regulations, and ordinances of the United States, the State of Georgia, Liberty, Chatham, Long, Bryan, and Tattnall counties, and the cities of Hinesville and Savannah; and the trial of offenses and ordinance violations in the courts of the United States, the State of Georgia, Liberty County, Chatham County, the City of Hinesville, and the City of Savannah.

3. In the context of O.C.G.A. § 50-2-23.1(c) and (d), nothing contained in this MOA shall be construed as consent either to the preemption of any of the laws and regulations of the State of Georgia or to the exemption of any federal lands from regulation pursuant to the laws and regulations of the State of Georgia to the extent such lands are subject thereto. No provision of this MOA shall be construed as a limitation or restriction upon the power, right and authority of the Georgia General Assembly to enact laws and authorize the promulgation of regulations. Further, the State of Georgia expressly retains civil and criminal jurisdiction over persons and citizens, and jurisdiction over the taxation of private property and the regulation of public utility services.


4. Retrocession from exclusive to concurrent jurisdiction over the subject areas shall be evidenced by the execution of this MOA by the Deputy Assistant Secretary of the Army (Installations, Housing and Partnerships), and the acceptance thereof by the Governor of the State of Georgia.

APPENDIX F. RELINQUISHMENT/RETROCESSION OF JURISDICTION—  
FORT STEWART AND HUNTER ARMY AIRFIELD, CONTINUED

MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES  
OF AMERICA AND THE STATE OF GEORGIA REGARDING  
RETROCESSION FROM EXCLUSIVE TO CONCURRENT JURISDICTION  
— PORTIONS OF FORT STEWART AND HUNTER ARMY AIRFIELD


**RETROCESSION FROM EXCLUSIVE TO CONCURRENT JURISDICTION BY THE  
UNITED STATES OF AMERICA:**

23 April 2015  
Date

  
\_\_\_\_\_  
PAUL D. CRAMER  
Deputy Assistant Secretary of the Army  
(Installations, Housing and Partnerships)

**ACCEPTANCE OF RETROCESSION FROM EXCLUSIVE TO CONCURRENT  
JURISDICTION BY THE STATE OF GEORGIA:**

6/29/15  
Date

  
\_\_\_\_\_  
NATHAN DEAL  
Governor, State of Georgia

Attached Exhibits:

Exhibit A: 277,941.61 acres, more or less, Fort Stewart, Georgia, within Liberty County, Long County, Tattnall County, Evans County, and Bryan County, Georgia  
Exhibit B: 4,732.51 acres, more or less, Hunter Army Airfield, Georgia, within Chatham County, Georgia

## APPENDIX G. PROPOSED MODIFYING LANGUAGE (CHANGES IN BOLD)

10 U.S.C. § 2683—Relinquishment of legislative jurisdiction; minimum drinking age on military installations

(a) Notwithstanding any other provision of law, **and excepting juveniles on lands and interests of the Department of Defense**, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished (1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide.

**(b) With respect to juveniles, the Secretary of Defense shall, within one year of the passage of this section, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, legislative jurisdiction of the United States such that concurrent legislative jurisdiction regarding juveniles shall exist over lands and interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction with respect to juveniles under this section may be accomplished in the same manner described in subsection (a). The Secretary of Defense shall report to Congress immediately any State, Commonwealth, territory, or possession that refuses to accept concurrent legislative jurisdiction with respect to juveniles on Department of Defense lands or interests and the reasons for refusal.**

(c) The authority granted by subsection (a) **and subsection (b) are** in addition to and not instead of that granted by any other provision of law.

(d)

(1) Except as provided in paragraphs (2) and (3), the Secretary concerned shall establish and enforce as the minimum drinking age on a military installation located in a State the age established by the law of that State as the State minimum drinking age.

(2)

(A) In the case of a military installation located—

(i) in more than one State; or

## APPENDIX G. PROPOSED MODIFYING LANGUAGE, CONTINUED

(ii) in one State but within 50 miles of another State or Mexico or Canada, the Secretary concerned may establish and enforce as the minimum drinking age on that military installation the lowest applicable age.

(B) In subparagraph (A), the term “lowest applicable age” means the lowest minimum drinking age established by the law—

(i) of a State in which a military installation is located; or

(ii) of a State or jurisdiction of Mexico or Canada that is within 50 miles of such military installation.

(3)

(A) The commanding officer of a military installation may waive the requirement of paragraph (1) if such commanding officer determines that the exemption is justified by special circumstances.

(B) The Secretary of Defense shall define by regulations what constitute special circumstances for the purposes of this paragraph.

(4) In this subsection:

(A) The term “State” includes the District of Columbia.

(B) The term “minimum drinking age” means the minimum age or ages established for persons who may purchase, possess, or consume alcoholic beverages.

## APPENDIX H. PROPOSED REPORTING LEGISLATION

## (a) COORDINATION AND DATA COLLECTION

(1) INVESTIGATIVE COORDINATION.—Subject to subsection (c), if a law enforcement officer or employee of any Federal or military department or agency terminates an investigation of an alleged felony violation of Federal criminal law on a military installation without referral for prosecution, the officer or employee shall coordinate with the appropriate State, Commonwealth, territory, or possession enforcement officials regarding the status of the investigation and the use of evidence relevant to the case in State, Commonwealth, territory, or possession court with authority over the crime alleged, so long as concurrent legislative jurisdiction exists with the State, Commonwealth, territory, or possession over the lands of the military installation.

(2) INVESTIGATION DATA.—The Federal Bureau of Investigation and military law enforcement organizations shall compile, on an annual basis and by military department and installation, information regarding decisions not to refer to an appropriate prosecuting authority cases in which investigations had been opened into an alleged felony crime committed by a juvenile on a military installation, including—

- (A) the types of crimes alleged;
- (B) the statuses of the accused as far as age and relation to the military;
- (C) the statuses of the victims as far as age and relation to the military; and
- (D) the reasons for deciding against referring the investigation for prosecution.

(3) PROSECUTORIAL COORDINATION.—Subject to subsection

(c), if a United States Attorney declines to prosecute, or acts to terminate prosecution of, an alleged felony violation of Federal criminal law by a juvenile on a military installation, the United States Attorney shall coordinate with the appropriate State, Commonwealth, territory, or possession justice officials regarding the status of the investigation and the use of evidence relevant to the case in State, Commonwealth, territory, or possession court with authority over the crime alleged, so long as concurrent legislative jurisdiction exists with the State, Commonwealth, territory, or possession over the lands of the military installation.

(4) PROSECUTION DATA.—The United States Attorney shall submit to the Department of Defense to compile, on an annual basis and by military department and installation, information regarding all declinations



## APPENDIX H. PROPOSED REPORTING LEGISLATION, CONTINUED

of alleged felony violations of Federal criminal law by juveniles that occurred on military installations that were referred for prosecution by law enforcement agencies, including—

- (A) the types of crimes alleged;
- (B) the statuses of the accused as far as age and relation to the military;
- (C) the statuses of the victims as far as age and relation to the military;
- (D) the reasons for deciding to decline or terminate the prosecutions; and

(E) for any felony juvenile-on-juvenile crimes, whether or not the declining attorney for the Government granted the juvenile victim and his or her parent or legal guardian the reasonable right to confer prior to declination.

(b) ANNUAL REPORTS.—The Department of Defense shall submit to Congress annual reports containing, with respect to the applicable calendar year, the information compiled under paragraphs (2) and (4) of subsection (a)—

(1) organized—

(A) in the aggregate; and

(B)(i) for the Federal Bureau of Investigation and military law enforcement organizations, by military department and installation; and

(ii) for United States Attorneys, by military department and installation; and

(2) including any relevant explanatory statements.

(c) EFFECT OF SECTION.—

(1) IN GENERAL.—Nothing in this section requires any Federal agency or official to transfer or disclose any confidential, privileged, or statutorily protected communication, information, or source to an official of any Indian tribe.

(2) FEDERAL RULES OF CRIMINAL PROCEDURE.—Nothing in this section affects or limits the requirements of Rule 6 of the Federal Rules of Criminal Procedure.

(3) REGULATIONS.—The Attorney General shall establish, by regulation, standards for the protection of the confidential or privileged communications, information, and sources described in this section.

## APPENDIX I. MANDATORY WARNING TO FAMILIES—CONUS

Dear Servicemember/Civilian:

Thank you for considering Fort Truman for your housing/childcare/schooling needs. We pride ourselves on being a safe and welcoming military community that takes care of our own. As you are probably aware, the military justice system does not apply to civilian conduct occurring on Fort Truman. Instead, because Fort Truman is a post with exclusive federal legislative jurisdiction, federal criminal law applies to civilian conduct, including juvenile crimes. However, unlike the surrounding state/commonwealth/territory, the federal judicial system does not regularly prosecute juveniles for their crimes. Federal prosecutors are not resourced to focus on juvenile crime and the federal system does not have the same type of rehabilitative programs at its disposal to deal with juvenile delinquents as the surrounding state/commonwealth/territory. This is important to know, as you or your child may be a victim of juvenile-on-juvenile crime, such as physical or sexual assault, while living, working, or attending school on the installation. Military officials cannot influence the prosecution decisions of federal prosecutors, meaning as a victim of juvenile crime you or your child may not receive the same type of justice you would as if you were living in the surrounding civilian community. While it is possible that the surrounding state/commonwealth/territory may assert jurisdiction over juvenile crime on Fort Truman, because jurisdiction is exclusively federal there is no guarantee of such an outcome.

Your signature acknowledges we have met our moral and legal obligations to warn you about the potential impact of exclusive federal legislative jurisdiction on your family.

## APPENDIX J. MANDATORY WARNING TO FAMILIES—OCONUS

Dear Servicemember/Civilian:

Thank you for considering Kennedy Kaserne for your housing/childcare/schooling needs. We pride ourselves on being a safe and welcoming overseas military community that takes care of our own. As you are probably aware, the military justice system does not apply to civilian conduct occurring on Kennedy Kaserne. Instead, because Kennedy Kaserne is an overseas post, federal criminal law applies to civilian conduct, including juvenile crimes. However, unlike the surrounding country of \_\_\_\_\_, the federal judicial system does not regularly prosecute juveniles for their overseas crimes. Federal prosecutors are not resourced to focus on juvenile crime and the federal system does not have the same type of rehabilitative programs at its disposal to deal with juvenile delinquents as the surrounding country of \_\_\_\_\_. This is important to know, as you or your child may be a victim of juvenile-on-juvenile crime, such as physical or sexual assault, while living, working, or attending school on the post. Military officials cannot influence the prosecution decisions of prosecutors from the country of \_\_\_\_\_, meaning as a victim of juvenile crime you or your child may not receive the same type of justice you would as if you were living in a U.S. civilian community. While it is possible that the country of \_\_\_\_\_ may assert jurisdiction over juvenile crime on Kennedy Kaserne, there is no guarantee of such an outcome.

Your signature acknowledges we have met our moral and legal obligations to warn you about the potential impact of federal and country of \_\_\_\_\_ jurisdiction on your family.