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Issues concerning Charges for Driving While Intoxicated in Texas Federal Courts.

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ARTICLE

ISSUES CONCERNING CHARGES FOR DRIVING WHILE INTOXICATED IN TEXAS FEDERAL COURTS

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I. INTRODUCTION

Each year numerous defendants appear in Texas state courts charged with offenses related to driving while intoxicated. These defendants are prosecuted pursuant to Texas statutes and regulations as well as binding decisions from Texas state courts.

At the same time, a number of defendants appear in federal courts throughout Texas charged with offenses related to driving while intoxicated. In some circumstances, these federal defendants face the same statutory elements of the crime as well as the same potential penalties as they would in a Texas state court. However, in many cases, the statutory elements and the potential

penalties are different. Moreover, certain rights and regulations afforded to Texas state defendants are unavailable to those charged in Texas federal courts.

This Article addresses some of the issues and pitfalls that defendants and their attorneys face when defending against charges for driving while intoxicated in Texas federal courts. It focuses on the applicable precedents from the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit that are binding on Texas federal courts. It also considers other federal court decisions, particularly those that contrast with Texas state law.

Section II addresses the federal government's exclusive jurisdiction over federal enclaves, noting that many agencies issue their own regulations criminalizing driving while intoxicated on federal agency property. Section III addresses the prosecution of driving while intoxicated in federal enclaves for which no specific agency regulations apply. It discusses the Assimilative Crimes Act and how Texas law applies to crimes in these enclaves. Section IV focuses on the right to a jury trial in all criminal cases in Texas state courts contrasted with a limit of that right for petty offenses (including most charges for driving while intoxicated) in Texas federal courts. Finally, Section V discusses the primacy of federal procedural and substantive law controlling charges for driving while intoxicated in Texas federal courts.

II. FEDERAL REGULATIONS GOVERN CHARGES FOR DRIVING WHILE INTOXICATED ON CERTAIN FEDERAL LANDS

The United States Constitution provides that the federal government shall have exclusive jurisdiction over any places it purchases: "The Congress shall have power . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."[1] Congress has defined the territorial jurisdiction of the United States as

> [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by

1. U.S. CONST. art. I, § 8, cl. 17.

> consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.[2]

Needless to say, the list of federal lands covered by this definition covers a wide scope, including courthouses, post offices, military bases, national parks, locks and dams, and navy yards.[3]

In order for a person to be charged in a federal court with a charge for driving while intoxicated, there must be federal jurisdiction. For example, every part of a military base is within the territorial jurisdiction of the United States.[4] In *United States v. Reff*,[5] the defendant argued to no avail that the area near the Fort Hood visitors' center was not within federal jurisdiction.[6] Similarly, the road outside the main guard post leading to the Corpus Christi Naval Air Station is part of the public property that is deemed to be within federal jurisdiction.[7] Drivers periodically take a mistaken left turn off a main highway in Corpus Christi that leads them, with almost no chance of correcting the mistake, straight to the guard post.[8] Ultimately, the government has the

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2. 18 U.S.C. § 7(3) (2006).

3. *See* United States v. State Tax Comm'n of Miss., 412 U.S. 363, 371–72 (1973) (recognizing military bases as federal land); S. R. A., Inc. v. Minnesota, 327 U.S. 558, 560, 562–63 (1946) (classifying post offices as federal land subject to the jurisdiction of the United States); Bowen v. Johnston, 306 U.S. 19, 22–23 (1939) (holding that the United States could have exclusive jurisdiction over a national park); James v. Dravo Contracting Co., 302 U.S. 134, 142–45 (1937) (including locks and dams as areas of federal land); Murray v. Joe Gerrick & Co., 291 U.S. 315, 318 (1934) (defining a navy yard as federal land); Battle v. United States, 209 U.S. 36, 37–38 (1908) (recognizing federal jurisdiction over courthouses); United States v. Reff, 479 F.3d 396, 400 (5th Cir. 2007) (per curiam) (stating that military reservations are within the jurisdiction of the United States); United States v. Tanner, 571 F.2d 334, 335 (5th Cir. 1978) (per curiam) (finding a federal prison under exclusive jurisdiction of the United States); Krull v. United States, 240 F.2d 122, 130 (5th Cir. 1957) (ruling that the United States succeeded in showing that it could exercise jurisdiction over a national park); City of Birmingham v. Thompson, 200 F.2d 505, 507–09 (5th Cir. 1952) (including a Veterans Administration Hospital under the exclusive jurisdiction of the United States); *see also* Note, *The Federal Assimilative Crimes Act*, 70 HARV. L. REV. 685, 685–86 (1957) (discussing the extensive scope of 18 U.S.C. § 7(3)).

4. *Reff*, 479 F.3d at 400–01 (citing United States v. Bell, 993 F.2d 427, 429 (5th Cir. 1993)).

5. United States v. Reff, 479 F.3d 396 (5th Cir. 2007) (per curiam).

6. *Id.* at 399.

7. *See* United States v. Martinez, No. CR C-08-29M, 2008 WL 620534, at *1, *5 (S.D. Tex. Mar. 3, 2008) (invoking federal jurisdiction for a defendant who was at the main gate of a military base).

8. *See id.* at *5 (discussing how the defendant took a wrong turn and ended up at the main gate).

burden of establishing that the offense took place on federal property.[9]

The location of where a person is arrested within federal jurisdiction determines how an individual is charged. For example, the Department of the Interior has issued regulations addressing vehicles and traffic safety for areas within the National Park Service, including national parks and national forests.[10] Within its large boundaries, Texas has thirteen national parks,[11] fifteen national wildlife refuges,[12] four national forests,[13] and two national grasslands.[14]

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9. *See id.* at *7 (stating that the government must meet its burden beyond a reasonable doubt).

10. 36 C.F.R. pt. 4 (2010). "The applicability of the regulations in this part is described in § 1.2 of this chapter. The regulations in this part also apply, regardless of land ownership, on all roadways and parking areas within a park area that are open to public traffic and that are under the legislative jurisdiction of the United States." *Id.* § 4.1; *see also id.* § 1.2 (describing the applicability of the regulations in 36 C.F.R. pt. 4).

11. These parks include: Alibates Flint Quarries National Monument, Amistad National Recreation Area, Big Bend National Park, Big Thicket National Preserve, Chamizal National Memorial, Fort Davis National Historic Site, Guadalupe Mountains National Park, Lake Meredith National Recreation Area, Lyndon B. Johnson National Historical Park, Padre Island National Seashore, Palo Alto Battlefield National Historic Site, Rio Grande Wild and Scenic River, and San Antonio Missions National Historical Park. *National Parks of Texas*, NAT'L PARK SERV., http://www.nps.gov/archive/bith/TXNP.htm (last visited Jan. 24, 2011); *see also* United States v. Matzke, Mag. No. C-09-1037, 2010 WL 1257810, at *2 (S.D. Tex. Mar. 26, 2010) (acknowledging that Padre Island National Seashore is within federal jurisdiction).

12. These national refuges include: Anahuac National Wildlife Refuge, Aransas National Wildlife Refuge, Attwater Prairie Chicken National Wildlife Refuge, Balcones Canyonlands National Wildlife Refuge, Buffalo Lake National Wildlife Refuge, Hagerman National Wildlife Refuge, Laguna Atascosa National Wildlife Refuge, Lower Rio Grande Valley National Wildlife Refuge, McFaddin National Wildlife Refuge, Muleshoe National Wildlife Refuge, Santa Ana National Wildlife Refuge, Texas Mid-Coast Refuge Complex (consisting of Brazoria National Wildlife Refuge, Big Boggy National Wildlife Refuge, and San Bernard National Wildlife Refuge), and Trinity River National Wildlife Refuge. *National Wildlife Refuges—Texas Refuges*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/southwest/refuges/txrefuges.html (last visited Jan. 24, 2011).

13. These national forests include: Angelina National Forest, Davy Crockett National Forest, Sabine National Forest, and Sam Houston National Forest. *National Forests & Grasslands in Texas*, USDA FOREST SERV., http://www.fs.fed.us/r8/texas/ (last visited Jan. 24, 2011).

14. Caddo-LBJ National Grasslands. *Caddo-LBJ National Grasslands*, USDA FOREST SERV., http://www.fs.fed.us/r8/texas/recreation/caddo_lbj/caddo-lbj_gen_info.shtml (last visited Jan. 24, 2011).

Pursuant to congressional authority,[15] the Secretary of the Interior has issued regulations specifically criminalizing driving while intoxicated:

> Operating or being in actual physical control of a motor vehicle is prohibited while:
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> (1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or
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> (2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.[16]

Generally, such an offense on National Park Service land carries a maximum potential penalty of six months imprisonment, a maximum fine of $5,000, and a $10 special assessment:

> A person convicted of violating a provision of the regulations contained in parts 1 through 7, 12 and 13 of this chapter, within a park area not covered in paragraphs (b) or (c) of this section, shall be punished by a fine as provided by law, or by imprisonment not exceeding 6 months, or both, and shall be adjudged to pay all costs of the proceedings.[17]

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15. *See* 16 U.S.C. § 3 (2006) (granting power to the Secretary of the Interior to make rules and regulations "necessary or proper for the use and management of the parks . . . [that are] under the jurisdiction of the National Park Service").

16. 36 C.F.R. § 4.23(a) (2010); *see also* United States v. Jackson, 273 F. App'x 372, 373 (5th Cir. 2008) (per curiam) (requiring the government to prove the elements of 36 C.F.R. § 4.23(a)).

17. 36 C.F.R. § 1.3(a); *see also* 18 U.S.C. § 3551(b) (2006) (stating that defendants found guilty of a federal crime may be sentenced to a period of probation, to pay a fine, or to receive a term of imprisonment, with a sentence to pay a fine capable of being imposed with other sentences). Any offense with a maximum penalty of six months or less is a Class B misdemeanor. 18 U.S.C. §§ 3559(a)(7), 3581(b)(7); *accord* United States v. Nguyen, 916 F.2d 1016, 1017, 1020 (5th Cir. 1990) ("An offense that is punishable by more than thirty days but less than six months of imprisonment is a 'Class B misdemeanor.'" (citing 18 U.S.C.A. § 3559(a)(7) (West Supp. 1990))); *see also* United States v. Eubanks, 435 F.2d 1261, 1262 (4th Cir. 1971) (per curiam) (holding that it was error to impose a one-year sentence where the maximum allowed by regulation was six months). Any Class B misdemeanor that does not result in a death carries a maximum fine of $5,000. 18 U.S.C. § 3571(b)(6); *accord* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (per curiam) ("[T]he federal [driving under the influence] offense carries a maximum fine of $5,000.").

Such a person may also be sentenced to a term of probation of no more than five years.[18] However, violations "within any national military park, battlefield site, national monument, or miscellaneous memorial transferred to the jurisdiction of the Secretary of the Interior" carry a maximum term of only three months and a fine of just a $100.[19] Typically, I will allow a defendant to pay fines over the course of probation to alleviate any significant financial hardship.[20]

The advantage for defendants charged with such violations is that they cannot be sentenced to a period of time in jail greater than six months regardless of the number of similar offenses in their criminal history.[21] In other words, a defendant is facing a maximum of six months regardless of whether the driving under the influence conviction is for the first driving while intoxicated offense or the tenth. There is a caveat, however, in that the offense may also be charged in state court.[22] For example, Padre

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Moreover, any conviction for a Class B misdemeanor requires a $10 special assessment. 18 U.S.C. § 3013(a)(1)(A)(ii); *accord Nguyen*, 916 F.2d at 1017 (emphasizing that "the district court was required to impose a $10 special assessment for each conviction" for a Class B misdemeanor (citing 18 U.S.C.A. § 3559(a)(7) (West Supp. 1990))).

18. 18 U.S.C. § 3561(c)(2); *see also* United States v. Landeros-Arreola, 260 F.3d 407, 413 (5th Cir. 2001) ("[P]robation [is] a separate form of sentence." (citing 18 U.S.C. §§ 3551(b), 3561, 3565)).

19. 36 C.F.R. § 1.3(b); *see also* 16 U.S.C. § 9a ("The Secretary of the Army is authorized to prescribe and publish such regulations as he deems necessary for the proper government and protection of, and maintenance of good order in, national military parks, national parks, battlefield sites, national monuments, and miscellaneous memorials as are now or hereafter may be under the control of the Department of the Army; and any person who knowingly and willfully violates any such regulation shall be deemed guilty of a misdemeanor and punishable by a fine of not more than $100 or by imprisonment for not more than three months, or by both such fine and imprisonment."). "These park areas are enumerated in a note under 5 U.S.C. [§] 901." 36 C.F.R. § 1.3(b). However, none of these park areas are located in Texas. *See* 5 U.S.C. § 901 (2006) (listing national parks and where each is located).

20. *See* United States v. Lambert, 594 F. Supp. 2d 676, 682 (W.D. Va. 2009) (holding that a magistrate had the authority to allow monthly nominal restitution payments).

21. *See* United States v. Bichsel, 156 F.3d 1148, 1151 (11th Cir. 1998) (per curiam) (concluding that even though some defendants were repeat offenders, they each received no more than the maximum statutory term of six months); United States v. Webster, No. RWT 08-397, 2009 WL 2366292, at *1, *6 (D. Md. July 30, 2009) (affirming a sentence of six months for a defendant whose driving violations caused a collision that left another driver in a vegetative state).

22. *See* Tracey v. State, 350 S.W.2d 563, 563–64 (Tex. Crim. App. 1961) (upholding a driving while intoxicated conviction that occurred on a federal military base); Woodruff v. State, 899 S.W.2d 443, 443, 446 (Tex. App.—Austin 1995, pet. ref'd) (rejecting a

Island National Seashore is located within Kleberg, Kenedy, and Willacy counties in Texas.[23] In some cases, a person charged with driving while intoxicated for incidents occurring on federal property, such as Padre Island National Seashore, may be charged in state court in order to increase the maximum potential penalty.[24]

It is also interesting to note that in some instances the regulations criminalizing conduct may also increase the potential penalty a defendant faces. Anyone charged with unsafe operation of a motor vehicle—which prohibits driving at a speed that is deemed unreasonable or imprudent, failing to maintain control of a vehicle, or driving in a way to cause the tires to skid or squeal—still faces a maximum potential penalty of six months in jail.[25] This regulation differentiates unsafe operation from reckless driving, which is characterized as a more serious offense and which is based on state law: "The elements of this section constitute offenses that are less serious than reckless driving. The offense of reckless driving is defined by State law and violations are prosecuted pursuant to the provisions of section 4.2 of this chapter."[26] In Texas, the charge for reckless driving is defined as "driv[ing] a vehicle in wilful or wanton disregard for the safety of persons or property."[27] A conviction for reckless driving carries a

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defendant's argument that his state-court conviction of driving while intoxicated should be dismissed because the military base was not a "public place" under the Texas Penal Code).

23. U.S. DEP'T OF AGRIC., SOIL SURVEY OF PADRE ISLAND NATIONAL SEASHORE, TEXAS, SPECIAL REPORT 1 (2007), *available at* http://soildatamart.nrcs.usda.gov/Manuscripts/TX613/0/Padre%20Island%20manuscript.pdf.

24. *Cf. Tracey*, 350 S.W.2d at 564 (stating that a portion of a beach located in Texas is considered a public road pursuant to the Texas Penal Code); *Woodruff*, 899 S.W.2d at 443, 446 (noting that the trial court enhanced defendant's punishment for driving while intoxicated that occurred on federal property).

25. 36 C.F.R. § 4.22(b) (2010); *id.* § 1.3(a); *see also* United States v. Keyes, 675 F. Supp. 2d 984, 987 (D. Ariz. 2009) (holding that the regulation was not unconstitutionally vague); United States v. Davis, 261 F. Supp. 2d 343, 348–49 (D. Md. 2003) (identifying a regulation as a general intent offense triggered by the intention to operate a vehicle).

26. 36 C.F.R. § 4.22(a); *see also* United States v. Dye, No. 92-5581, 1993 WL 385336, at *2 (4th Cir. Sept. 29, 1993) (per curiam) (discussing the distinction between an unsafe operation offense pursuant to § 4.22 and a state reckless driving charge); United States v. Lambert, 594 F. Supp. 2d 676, 680 n.5 (W.D. Va. 2009) (recognizing that the federal regulation considers failure to maintain control while driving "'less serious than reckless driving'" (quoting 36 C.F.R. § 4.22(a))).

27. TEX. TRANSP. CODE ANN. § 545.401(a) (West 1999); *see also* Pease v. State, No. 03-06-00369-CR, 2007 WL 2274879, at *2 (Tex. App.—Austin Aug. 9, 2007, no pet.) (mem. op.) ("The statute does not specify any particular manner or means of committing the offense, probably because there are countless ways in which a person can drive a vehicle in

maximum potential penalty of thirty days in jail and a fine of no more than $200.[28]

Other federal agencies also regulate criminal offenses on their property, including offenses for driving while intoxicated. For example, the Department of Veterans Affairs operates numerous facilities in Texas[29] and maintains its own police force that periodically arrests individuals for criminal violations.[30] Congress has authorized that "a Department [of Veteran Affairs] police officer may make arrests on Department property for a violation of a Federal law or any rule prescribed under section 901(a)."[31]

For our purposes, anyone convicted of operating a vehicle while under the influence of alcohol is punished pursuant to federal regulations issued by the Department of Veterans Affairs.[32] If convicted, a defendant faces up to six months in jail, a $500 fine, a $10 special assessment as well as a term of probation not to exceed five years.[33]

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wilful or wanton disregard for the safety of persons or property, including each of the ways alleged in the information. We conclude that the language of the statute indicates that the legislature intended to penalize the act of reckless driving, regardless of the specific ways in which that act may be committed. Therefore, we hold that the unanimity requirement goes to the act of driving a vehicle in wilful and wanton disregard for the safety of persons or property, while the jury need not be unanimous on the manner or means of committing the act.").

28. TEX. TRANSP. CODE ANN. § 545.401(b); *accord* Benge v. State, 94 S.W.3d 31, 37 n.9 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (indicating that the Texas Transportation Code limits the fine for reckless driving to no more than $200).

29. The Department of Veterans Affairs has numerous medical centers and clinics located throughout Texas. *See Facilities by State—Texas*, U.S. DEP'T OF VETERANS AFF., http://www.va.gov/directory/guide/state.asp?State=TX&dnum=ALL (last visited Jan. 24, 2011) (providing a list of locations for Veterans Affairs facilities across the State of Texas); *see also* United States v. Dixon, 273 F.3d 636, 638 (5th Cir. 2001) (stating that the Veterans Affairs Medical Center is "a facility within the territorial jurisdiction of the United States" (citing 18 U.S.C. § 7(3))).

30. *See VA Specialized Skilled Occupations-Trades Careers*, U.S. DEP'T OF VETERANS AFF., http://www.va.gov/JOBS/career_types/skilled.asp (last visited Jan. 24, 2011) (providing the job description of a Veterans Affairs police officer, which encompasses the authority to arrest violators of the law).

31. 38 U.S.C. § 902(a)(3) (2006); *accord* Williams v. United States, No. H-08-2350, 2009 WL 3459873, at *10 (S.D. Tex. Oct. 20, 2009) (noting that when a person violates a federal law or regulation on Veterans Affairs property, Veterans Affairs police officers are empowered to make arrests).

32. 38 C.F.R. § 1.218(a)(7) (2009) (addressing security and law enforcement at Veterans Affairs facilities); *see also* 38 U.S.C. § 901 (granting authority for the Department of Veterans Affairs to prescribe rules for conduct and penalties for violations).

33. 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2); 38 C.F.R. § 1.218(b)(15); *see also*

Congress has granted the United States Postal Service various general powers, including the power "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title."[34] Pursuant to this authority, the Postal Service has issued regulations concerning conduct on its property, including criminalizing specific behavior.[35]

Among various criminal offenses, the regulations ban driving while intoxicated on Postal Service property: "A person under the influence of an alcoholic beverage . . . may not . . . operate a motor vehicle on postal property."[36] Furthermore, a Postal Service security force is authorized to enforce the various regulations.[37] Interestingly, the regulations specifically indicate that charges are to be heard in federal court: "Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules."[38] If convicted of any of the offenses, including driving while intoxicated, a defendant faces up to one month in jail, a $5,000 fine, a $10 special assessment, and a term of probation not to exceed five years.[39]

Williams, 2009 WL 3459873, at *10 ("Behavior or conduct in violation of any [Veterans Affairs rules set forth in the Code of Federal Regulations] may subject an individual to arrest or removal from VA premises.").

34. 39 U.S.C. § 401(2) (2006).

35. 39 C.F.R. § 232.1 (2010).

36. *Id.* § 232.1(g)(1).

37. *Id.* § 232.1(q)(1) ("Members of the U.S. Postal Service security force shall exercise the powers provided by 18 U.S.C. [§] 3061(c)(2) and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property and persons thereon.").

38. *Id.* § 232.1(p)(1).

39. *Id.* § 232.1(p)(2) ("Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to fine of not more than [that allowed under Title 18 of the United States Code] or imprisonment of not more than 30 days, or both."); 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2), 3571(b)(6) (2006).

III. A CHARGE FOR DRIVING WHILE INTOXICATED ON FEDERAL LAND WITHOUT ANY APPLICABLE FEDERAL REGULATIONS IS GOVERNED BY THE ASSIMILATIVE CRIMES ACT

On federal land, such as a military base, there are often no specific regulations addressing how some crimes are charged and penalized for civilian defendants. For example, there is no specific offense charging driving while intoxicated on a military base as a crime. Instead, Congress has assimilated state laws criminalizing driving while intoxicated to cover similar offenses on military bases through the Assimilative Crimes Act.[40]

A. *History of the Assimilative Crimes Act*

On April 30, 1790, the First Congress enacted the first statute criminalizing specific offenses, including treason, misprision of treason, murder, manslaughter, piracy, forgery, perjury, etc.[41] Some of these offenses, such as murder, were common law crimes that could only be prosecuted in federal court if they occurred on federal land.[42] Other offenses, such as perjury, concerned offenses that occur in federal courts.[43]

Thirty-five years later, Congress enacted the first statute assimilating state law into federal law if an offense occurred on any federal land:

> That, if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a

40. 18 U.S.C. § 13(a)–(b)(1) (adopting the laws of the states for driving under the influence in federal territory).

41. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 112–19 (1790) (codified as amended in scattered sections of 18 U.S.C.) (providing for "the punishment of certain crimes against the United States"); *see also* United States v. Sharpnack, 355 U.S. 286, 288 (1958) ("The first Federal Crimes Act . . . defined a number of federal crimes and referred to federal enclaves.").

42. *See, e.g.*, 1 Stat. at 113 ("[I]f any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of [the] country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death.").

43. *See, e.g., id.* at 116 ("[I]f any persons shall wilfully and corruptly commit perjury, . . . or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years . . . .").

> conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.[44]

Seven years after this enactment, in *United States v. Paul*,[45] the Supreme Court heard a case arising out of the Southern District of New York in which the defendant was charged with burglary in the third degree of a store in West Point, New York, which was within the exclusive jurisdiction of the United States.[46] Based on the 1825 congressional statute, the defendant was charged with an offense by a statute passed by the New York legislature in 1829.[47] Because the store in question was not a dwelling, the common law crime of burglary did not apply. Writing for the Court, Chief Justice John Marshall explained "that the third section of the act of congress, entitled 'an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' passed March 3, 1825, *is to be limited to the laws* of the several states *in force at the time of its enactment*."[48]

Since this 1825 statute was enacted, "Congress has confirmed that policy by enacting an unbroken series of Assimilative Crimes Acts."[49] Because of the Court's decision in *Paul*, Congress enacted new Assimilative Crimes Acts to incorporate newly created state laws into federal law for federal enclaves.[50] Thus, between 1866, when the first reenactment was passed, and 1948, Congress re-assimilated state law into federal law for federal enclaves eight times.[51] Finally, in 1948, Congress revised the lan-

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44. Act of Mar. 3, 1825, ch. 65, § 3, 4 Stat. 115, 115 (1825) (providing "more effectually to provide for the punishment of certain crimes against the United States") (codified as amended in scattered sections of 18 U.S.C.); *see also Sharpnack*, 355 U.S. at 290 ("In the Act of 1825, sponsored by Daniel Webster in the House of Representatives, Congress expressly adopted the fundamental policy of conformity to local law.").

45. United States v. Paul, 31 U.S. 141 (1832).

46. *Id.* at 142.

47. *See id.* (charging the defendant with burglary in the third degree).

48. *Id.* (emphasis added).

49. *Sharpnack*, 355 U.S. at 289.

50. *Id.* at 290–91.

51. *See id.* at 291 (noting the enactments of 14 Stat. 13 (1866), Rev. Stat. § 5391 (1874), 30 Stat. 717 (1898), 35 Stat. 1145 (1909), 48 Stat. 152 (1933), 49 Stat. 394 (1935), 54 Stat. 234 (1940), 18 U.S.C. § 13 (1948)); *see also* Note, *The Federal Assimilative Crimes*

guage specifically to assimilate state laws that were enacted before or after the enactment of the Assimilative Crimes Act.[52] Along the way, the Supreme Court also found that the Assimilative Crimes Act was constitutional.[53]

B. *The Assimilative Crimes Act Is Designed to Fill Gaps in Federal Criminal Law with the Existing State Criminal Law Where the Offense Is Charged*

Pursuant to 18 U.S.C. § 7(3), military bases are within the exclusive territorial jurisdiction of the United States.[54] While there are several statutes criminalizing acts on federal land,[55] Congress has not attempted to enact a specific statutory violation for each crime. Instead, Congress enacted the Assimilative Crimes Act to incorporate state criminal statutes:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.[56]

Moreover, Congress specifically addressed offenses for driving under the influence:

> Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession,

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Act, 70 HARV. L. REV. 685, 688 (1957) (discussing the history of the Act).

52. *Sharpnack*, 355 U.S. at 292.

53. Franklin v. United States, 216 U.S. 559, 568–69 (1910) (rejecting the argument that the 1898 version of the Assimilative Crimes Act was unconstitutional because it delegated congressional legislative powers to state legislatures).

54. *See* 18 U.S.C. § 7(3) (2006) (stating that "[a]ny lands reserved . . . for the erection of a fort, magazine, arsenal, dock-yard, or other needful building" is within the territorial jurisdiction of the United States).

55. *See id.* §§ 81, 113, 1111–1112, 2111 (criminalizing the acts of arson, assault, murder, manslaughter, and robbery committed on federal lands).

56. *Id.* § 13(a).

> or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.[57]

As the Fifth Circuit has explained, the Assimilative Crimes Act has two basic functions: "First, it fills gaps in the federal criminal code that governs federal enclaves. Second, it conforms the laws regulating a federal enclave to those of the state in which the enclave is located."[58]

Prosecution pursuant to the Assimilative Crimes Act "does not enforce state law but rather federal law assimilating state law."[59] "Thus, a state court's interpretation of an assimilated state law is merely persuasive authority."[60] In *Johnson v. Yellow Cab Transit Co.*,[61] the Supreme Court held that even though prosecutions involving the Assimilative Crimes Act necessarily concern state law, any issue before the Court is "an issue upon which federal courts are not bound by the rulings of state courts."[62] The Fifth Circuit has relied on *Yellow Cab Transit Co.* in determining that it is not bound by state substantive law.[63]

C. *Texas Has Numerous Military Bases As Well As Federal Lands Covered by the Assimilative Crimes Act*

With the exception of the United States Marine Corps, all of the major military branches have several installations in Texas. For

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57. *Id.* § 13(b)(1). The referenced exceptions include a maximum of a year for any offense committed with a minor in the car, a maximum of five years for any offense where a minor suffers serious bodily injury, and a maximum of ten years for any offense where a minor is killed. *Id.* § 13(b)(2)(A).

58. United States v. Collazo, 117 F.3d 793, 794 (5th Cir. 1997) (citations omitted) (citing United States v. Sharpnack, 355 U.S. 286, 289–91 (1958)); *see also* United States v. Teran, 98 F.3d 831, 834 (5th Cir. 1996) ("The purpose of the Assimilative Crimes Act . . . is to provide a set of criminal laws for federal enclaves by using the criminal law of the local state to fill in the gaps in federal criminal law." (citing United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979))).

59. *Collazo*, 117 F.3d at 795 (citing *Brown*, 608 F.2d at 553).

60. *Id.* (citing United States v. Kiliz, 694 F.2d 628, 629 (9th Cir. 1982)).

61. Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944).

62. *Id.* at 391 (citing Puerto Rico v. Shell Co. (P.R.), 302 U.S. 253, 266 (1937)).

63. *See* United States v. Webb, 747 F.2d 278, 284 (5th Cir. 1984) (holding that the purpose of prosecutions under the Assimilative Crimes Act is to enforce federal law, and noting that Texas state law is merely advisory).

example, Texas has three naval stations[64] and eight Air Force bases.[65] The United States Army has three forts as well as a camp and two depots in Texas.[66] Of course, a criminal act committed on any other federal land may invoke federal criminal jurisdiction, including the numerous ports of entry.[67]

Similarly, there are approximately eighteen permanent Border Patrol checkpoints in Texas.[68] In *United States v. Mapp*,[69] the defendant was stopped and arrested for driving under the influence at a "driver's license" checkpoint set up by a state trooper with the assistance of a park ranger.[70] The checkpoint was located on a state highway underneath a bridge alongside the Natchez

64. These naval stations include: Naval Air Station Corpus Christi, Naval Air Station Fort Worth, and Naval Air Station Kingsville. U.S. Navy, *Navy Facilities Within the United States*, NAVY.MIL, http://www.navy.mil/navydata/navy_legacy_hr.asp?id=195 (last visited Jan. 24, 2011); *see also* United States v. Myers, No. 2:08mj632, 2009 WL 68816, at *2 (S.D. Tex. Jan. 8, 2009) (stating that the Corpus Christi Naval Air Station is within the special territorial jurisdiction of the United States).

65. Air Force bases in Texas include: Brooks City Base, Dyess Air Force Base, Goodfellow Air Force Base, Lackland Air Force Base, Laughlin Air Force Base, Randolph Air Force Base, Sheppard Air Force Base, and Air Force Plant 4. *U.S. Military Major Bases and Installations: Texas*, ABOUT.COM, http://usmilitary.about.com/library/milinfo/statefacts/bltx.htm (last visited Jan. 24, 2011); *see also* United States v. Sharpnack, 355 U.S. 286, 286 (1958) (recognizing Randolph Air Force Base as a federal enclave); United States v. Martinez, 274 F.3d 897, 900 n.1 (5th Cir. 2001) ("There is federal jurisdiction for these crimes because they were committed at Lackland Air Force Base, a federal facility."); Vincent v. Gen. Dynamics Corp., 427 F. Supp. 786, 790–91 (N.D. Tex. 1977) (finding that Air Force Plant 4 is on federal land).

66. Major Army installations in Texas include: Fort Bliss, Fort Hood, Fort Sam Houston, Red River Army Depot, Corpus Christi Army Depot, and Camp Bullis. *U.S. Military Major Bases and Installations: Texas*, ABOUT.COM, http://usmilitary.about.com/library/milinfo/statefacts/bltx.htm (last visited Jan. 24, 2011); *see also* United States v. Bell, 993 F.2d 427, 429 (5th Cir. 1993) (recognizing that Fort Hood is "within the special territorial jurisdiction of the United States"); England v. United States, 174 F.2d 466, 467 (5th Cir. 1949) (stating that Fort Sam Houston is "within the special territorial jurisdiction of the United States"); United States v. Castello, 526 F. Supp. 847, 848 (W.D. Tex. 1981) (noting that Fort Bliss is "within the special territorial jurisdiction of the United States").

67. For example, the Paso del Norte Bridge in El Paso, Texas, constitutes a special territorial jurisdiction of the United States. *See* United States v. Aragon, 338 F. App'x 364, 364–65 (5th Cir. 2009) (per curiam) (reviewing a case related to an assault that took place on the Paso del Norte Bridge).

68. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 8–9 (2009), *available at* http://www.gao.gov/new.items/d09824.pdf.

69. United States v. Mapp, No. 3:05CR156TSL-JCS, 2007 WL 1673585 (S.D. Miss. June 7, 2007).

70. *Id.* at *1.

Trace National Parkway.[71] In his appeal, the defendant "argue[d] that the government failed to prove at trial that the National Park System had concurrent jurisdiction over Mississippi Highway 43, so as to have jurisdiction to prosecute him criminally."[72] The *Mapp* court found that the prosecution provided sufficient evidence that the federal government had proper jurisdiction over the arrest location to establish federal jurisdiction over the offense.[73] Additionally, the court found that the checkpoint was constitutional.[74]

In *United States v. Rodriguez*,[75] the defendant challenged his stop at a road checkpoint on the Padre Island National Seashore as "an unconstitutional seizure in violation of the Fourth Amendment."[76] The checkpoint was designed to audit the collection of park fees to determine whether there was any employee fraud or embezzlement.[77] Upon arrival at the checkpoint, the ranger detected alcohol on the defendant's breath.[78] As a result, the defendant was arrested and charged with driving while intoxicated.[79] After assessing the public interest, balancing that interest against the individual's interests, and assessing the severity of the interference with the individual's liberty, the stop at the checkpoint was found constitutional.[80]

D. *Texas Law Concerning Driving While Intoxicated Is Assimilated for Offenses on Texas Military Bases*

The Texas legislature enacted a statute addressing the driving of a vehicle while intoxicated:

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71. *Id.*
72. *Id.*
73. *Id.* at *3.
74. *Mapp*, 2007 WL 1673585, at *3, *5.
75. United States v. Rodriguez, No. C-09-1026M, 2009 WL 5214031 (S.D. Tex. Dec. 23, 2009).
76. *Id.* at *1.
77. *Id.*
78. *Id.*
79. *Id.*
80. *See Rodriguez*, 2009 WL 5214031, at *2–4 (concluding that "the road audit involve[d] an important public concern, a method that advance[d] that concern, and minimal encroachment into the private lives of park visitors"); *see also* United States v. Green, 293 F.3d 855, 862 (5th Cir. 2002) (holding that a suspicionless roadblock checkpoint at Fort Sam Houston did not violate the Fourth Amendment).

> (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
>
> (b) Except as provided by Subsection (c) and § 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.
>
> (c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.[81]

The Texas legislature has defined intoxication as either having a blood "alcohol concentration of 0.08 [percent] or more," or "not having the normal use of mental or physical faculties by reason of the introduction of alcohol."[82] A Class B misdemeanor carries a potential penalty of a maximum of 180 days in jail and a fine not to exceed $2,000 as well as a $10 special assessment.[83]

Unlike charges for driving while intoxicated in national parks, where the maximum potential penalty is the same whether the defendant is convicted of his first offense or his tenth,[84] pursuant to the Assimilative Crimes Act, the potential penalties are enhanced in Texas for a second offense charged as a Class A misdemeanor.[85] Indeed, the penalties essentially double for a second offense to a maximum of one year in jail and a fine not to exceed $4,000 as well as a $25 special assessment.[86] Similarly, a charge for driving while intoxicated after two previous convictions for the same offense is further enhanced to a third-degree felony under

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81. TEX. PENAL CODE ANN. § 49.04 (West 2003); *see also* United States v. Collazo, 117 F.3d 793, 794 (5th Cir. 1997) (applying section 49.04 to a driving while intoxicated conviction at Kelly Air Force Base).

82. TEX. PENAL CODE ANN. § 49.01(2).

83. 18 U.S.C. § 3013(a)(1)(A)(ii) (2006); TEX. PENAL CODE ANN. § 12.22. Additionally, such a defendant may be sentenced to a term of probation of up to five years. 18 U.S.C. § 3561(c)(2). Finally, following a term of imprisonment, the defendant may be sentenced to a one year term of supervised release. *Id.* § 3583(b)(3).

84. *See* 36 C.F.R. § 1.3(a) (2010) (outlining the maximum penalty of six months in jail for the offense of driving while intoxicated in a national park); *id.* § 4.23(a) (criminalizing driving while intoxicated while in a national park).

85. TEX. PENAL CODE ANN. § 49.09(a).

86. 18 U.S.C. § 3013(a)(1)(A)(iii); TEX. PENAL CODE ANN. § 12.21; *see also* United States v. Bailey, 75 F. App'x 258, 259 (5th Cir. 2003) (per curiam) (holding that the imposition of a special assessment greater than the mandated $25 for a Class A misdemeanor is reversible error).

Texas law with increased penalties.[87]

IV. THERE IS NO RIGHT TO A JURY TRIAL FOR A PETTY OFFENSE IN FEDERAL COURT

The United States Constitution established the right to a jury trial in criminal cases. For example, in Article III, the Framers determined that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."[88] Additionally, the Bill of Rights mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[89]

A. *Since the Founding of the Republic of Texas, the Right to a Jury Has Been Available for All Criminal Offenses*

Similarly, the Texas Constitution establishes that "[i]n *all* criminal prosecutions the accused shall have a speedy public trial by an impartial jury."[90] More importantly, the Texas Constitution

87. TEX. PENAL CODE ANN. § 49.09(b)(2). A defendant convicted of a third-degree felony faces a term in prison between two and ten years and a maximum fine of $10,000 as well as a $100 special assessment. 18 U.S.C. § 3013(a)(2)(A); TEX. PENAL CODE ANN. § 12.34; *see also* United States v. Navarro, 289 F. App'x 724, 724–26 (5th Cir. 2008) (per curiam) (affirming a five-year sentence pursuant to section 49.09(b) of the Texas Penal Code); United States v. Moore, 215 F. App'x 322, 323 (5th Cir. 2007) (per curiam) (upholding a two-year sentence pursuant to section 49.09(b)). Additionally, such a felony defendant may be sentenced to a term of probation between one year and five years. 18 U.S.C. § 3561(c)(1). Finally, following a term of imprisonment, the felony defendant may be sentenced to a maximum of three years on supervised release. *Id.* § 3583(b)(2).

88. U.S. CONST. art. III, § 2, cl. 3; *see also* Singer v. United States, 380 U.S. 24, 31 (1965) ("The clause was clearly intended to protect the accused from oppression by the Government . . . ."); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 7, 8 ("So universal was the support for this right that those who opposed the ratification of the Constitution, the so-called Anti-Federalists, criticized the jury trial provision of Article III only because it did not go far enough."); Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 135 (1997) ("So important was the right to criminal jury trial that it was one of the few rights enumerated in the Constitution as originally proposed.").

89. U.S. CONST. amend. VI; *see also* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 7, 9 ("Because the Sixth Amendment is essentially an elaboration of the jury trial provision in Article III, the Supreme Court's jury trial jurisprudence has properly focused upon the language of the Sixth Amendment.").

90. TEX. CONST. art. I, § 10 (emphasis added); *accord* TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2005) (adopting the language in the Texas Constitution); *see also* Bearden

specifically addresses the right to a jury trial: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."[91] The failure to provide a defendant with a jury trial is a basis for reversal:

> The glaring error, however, requiring a reversal of the case, is found in the fact that the court tried the case without a jury when a jury had not been waived by the accused. The right of trial by jury is one of the sacred rights which our courts should accord every person charged with crime, independent of his guilt or innocence. Our Constitution guarantees to every person charged with crime a fair and impartial trial, with the right to submit the matter of punishment to a jury, even when he pleads guilty to the offense, and this right obtains in misdemeanor cases the same as in felony, unless and until waived in accordance with law.[92]

The right to a jury trial is longstanding in Texas legal history.[93] The Constitution of the Republic of Texas of 1836 first ensured the right as developed in English common law because its absence under Mexican rule was a primary reason for Texas declaring independence.[94]

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v. State, 648 S.W.2d 688, 693 (Tex. Crim. App. 1983) (en banc) ("The right to trial by jury is no less protected because the trial is for a misdemeanor."); Samudio v. State, 648 S.W.2d 312, 313 (Tex. Crim. App. 1983) (en banc) ("[A] defendant in a misdemeanor case has the same right to a trial by jury as a defendant charged with a felony." (citing Franklin v. State, 576 S.W.2d 621 (Tex. Crim. App. 1978) (en banc))); White v. State, 228 S.W.2d 183, 185 (Tex. Crim. App. 1950) ("Being charged with a misdemeanor, he had the right to a trial by jury."); Yarborough v. State, 981 S.W.2d 846, 848 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) ("By constitution and statute, Texas has firmly established a right to jury trial in all criminal proceedings, regardless of punishment." (citing *Franklin*, 576 S.W.2d at 623)); Chaouachi v. State, 870 S.W.2d 88, 90 (Tex. App.—San Antonio 1993, no pet.) ("The provision in the Texas Constitution guaranteeing the right to trial by jury (article I, [section] 10) applies to all criminal prosecutions, and consequently the accused in a misdemeanor case has the same right of trial by jury as in felony cases." (citing *Franklin*, 576 S.W.2d at 623)).

91. TEX. CONST. art. I, § 15; *see also* TEX. CODE CRIM. PROC. ANN. art. 1.12 ("The right of trial by jury shall remain inviolate."); *Franklin*, 576 S.W.2d at 623 (referencing article I, section 15 of the Texas Constitution); *Chaouachi*, 870 S.W.2d at 90 (discussing the right to a trial by jury).

92. Freeman v. State, 186 S.W.2d 683, 684 (Tex. Crim. App. 1945).

93. *See* Arvel Ponton, III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 97–99 (1988) (illustrating the historical significance of the right to a jury trial in Texas).

94. *Id.* at 109–10.

In Texas, the right to a jury trial is altered in that a misdemeanor offense requires only a six-person jury.[95] Moreover, "unlike in felony cases, no requirement exists that the defendant submit a written waiver of jury trial."[96]

B. *In Federal Courts, the Right to a Jury Trial Is Not Guaranteed for Petty Offenses*

The constitutional right to a jury trial in Article III of the federal Constitution and the Sixth Amendment must be construed in a manner consistent with the common law.[97] By the fourteenth century in England, the right to a jury trial in all criminal cases was protected; however, as the workload for judges increased, which was due to an increase in crimes, the right was whittled away.[98] Thus, by the seventeenth century, various minor offenses were tried before judges instead of juries.[99] When the Founders established the Constitution, petty offenses were routinely tried in the colonies without a jury.[100] This approach of bench trials for

95. TEX. CONST. art. V, § 13 ("[P]etit juries in a criminal case below the grade of felony shall be composed of six persons."); TEX. CODE CRIM. PROC. ANN. art. 33.01(b) ("In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified jurors."); *see also* TEX. CODE CRIM. PROC. ANN. art. 33.01(a) ("Except as provided by Subsection (b), in the district court, the jury shall consist of twelve qualified jurors. In the county court and inferior courts, the jury shall consist of six qualified jurors.").

96. Ross v. State, 802 S.W.2d 308, 312 (Tex. App.—Dallas 1990, no writ) (citing Lamb v. State, 409 S.W.2d 418, 420 (Tex. Crim. App. 1966)). In a misdemeanor case, there is no requirement that a defendant file a written waiver of his right to a jury trial:

> A recitation in the judgment that the defendant appeared in person and waived his right to trial by jury sufficiently establishes a presumption of regularity and truthfulness, which the court should not set aside lightly. Only an affirmative showing that the defendant executed no waiver will overcome this presumption of regularity and truth.

Id. (citing Lopez v. State, 708 S.W.2d 446, 447–48 (Tex. Crim. App. 1986)); *see also* White v. State, 228 S.W.2d 183, 185 (Tex. Crim. App. 1950) (stating that defendant "had the right to waive a jury and to have a trial before the court").

97. District of Columbia v. Colts, 282 U.S. 63, 72 (1930); Schick v. United States, 195 U.S. 65, 68–69 (1904). Indeed, one scholar has explained "that the only right secured in all the state constitutions crafted between 1776 and 1787 was the right of trial by jury in criminal cases." Timothy Lynch, *Rethinking the Petty Offense Doctrine*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 7, 18 n.20 (citing LEONARD LEVY, EMERGENCE OF A FREE PRESS 227 (1985)).

98. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 923–24 (1926).

99. *Id.* at 925–26.

100. District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); *see also* Duncan v.

petty offenses was employed, in part, to reduce costs and increase the efficiency and speed with which criminal matters were decided.[101]

Since 1888, when *Callan v. Wilson* was decided,[102] the Supreme Court has repeatedly determined that there is no right to a jury trial where a defendant is charged with a petty offense.[103] Indeed, "[a]t least sixteen statutes, passed prior to the time of the American Revolution by the Colonies, or shortly after by the newly-created states, authorized the summary punishment of petty offenses by imprisonment for three months or more."[104] In

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Louisiana, 391 U.S. 145, 160 (1968) ("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice . . . ."). *But see* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 7, 9–10 (arguing that the Article III provision regarding a right to a jury trial in all cases is to be construed literally).

101. Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 137–38 (1997).

102. Callan v. Wilson, 127 U.S. 540 (1888).

103. *See* Baldwin v. New York, 399 U.S. 66, 68 (1970) (stating that *Duncan* "reaffirmed the long-established view that so-called 'petty offenses' may be tried without a jury"); *Duncan*, 391 U.S. at 159 ("[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision . . . ."); *Clawans*, 300 U.S. at 624 ("It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding."); District of Columbia v. Colts, 282 U.S. 63, 72–73 (1930) ("That there may be many offenses called 'petty offenses' which do not rise to the degree of crimes within the meaning of [A]rticle [III], and in respect of which Congress may dispense with a jury trial, is settled."); Schick v. United States, 195 U.S. 65, 68 (1904) (indicating that "there is no constitutional requirement of a jury" for a petty offense); Natal v. Louisiana, 139 U.S. 621, 624 (1891) ("A breach of [a New Orleans city] ordinance is one of those petty offenses against municipal regulations of police which in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury."); *Callan*, 127 U.S. at 552 ("[T]here are certain minor or petty offenses that may be proceeded against summarily, and without a jury . . . ."). *But see Ex parte* Milligan, 71 U.S. 2, 122–23 (1866) ("Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.").

104. *Clawans*, 300 U.S. at 626; *see also id.* ("[A]t least eight others were punishable by imprisonment for six months."). *See generally* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 934–65 (1926) (discussing the history of petty offenses in seven of the original colonies).

drafting the Constitution, the founding fathers intended to continue the common law practice of trials without juries for petty offenses.[105] Historically, Congress defined a petty offense as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both."[106]

In determining whether a specific crime constitutes a petty offense, the Supreme Court has looked for objective criteria to evaluate how serious the crime is in the view of the public.[107] One of the most significant criteria to be addressed is the length of the penalty for the crime.[108]

In *Duncan v. Louisiana*,[109] the defendant was charged with simple battery, which carried a maximum of two years in prison and a $300 fine.[110] Although he sought a jury trial, the request was denied because Louisiana law did not provide a jury trial for simple assault, which was deemed a misdemeanor.[111] Duncan was convicted in a bench trial and sentenced to sixty days in jail and ordered to pay a $150 fine.[112] Louisiana argued that the conviction was constitutionally valid because simple battery was not a serious crime and because the defendant received only sixty days in jail.[113]

The *Duncan* Court noted that federal petty offenses carried a maximum of six months in jail and a $500 fine.[114] The Court further noted that the overwhelming number of states that restrict the right to a jury trial do so for offenses with a maximum of one

105. *Duncan*, 391 U.S. at 160.

106. 18 U.S.C. § 1, Act of June 25, 1948, ch. 645, § 1, 62 Stat. 684, *repealed by* Pub. L. 98-473, § 218(a)(1), 98 Stat. 2027, 2027 (1984). Currently, Congress has defined a "petty offense" as "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than" $5,000 for an individual. 18 U.S.C. §§ 19, 3571(b)(6)–(7) (2006).

107. *Baldwin*, 399 U.S. at 68 (citing *Clawans*, 300 U.S. at 628).

108. *Id.* (citing Frank v. United States, 395 U.S. 147, 148 (1969); *Duncan*, 391 U.S. at 159–61; *Clawans*, 300 U.S. at 628); *see also* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 139–46 (1997) (reviewing the shift toward solely focusing on the severity of the penalty).

109. Duncan v. Louisiana, 391 U.S. 145 (1968).

110. *Id.* at 146.

111. *Id.* at 146 & n.1.

112. *Id.* at 146.

113. *Id.* at 159.

114. *Duncan*, 391 U.S. at 161.

year in jail.[115] Ultimately, the Court did not determine the exact line between serious crimes and petty offenses, but instead reversed the Louisiana state court, simply holding "that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."[116]

Two years later, in *Baldwin v. New York*,[117] the Supreme Court heard a case where the defendant had been convicted for the Class A misdemeanor of jostling, which carried a maximum term of one year in prison.[118] Baldwin's trial was in the New York City Criminal Court, which by statute did not provide for jury trials.[119] Thus, his motion for a jury trial was denied and, after a bench trial, he was found guilty and sentenced to one year in jail.[120]

Before the Supreme Court, Baldwin challenged the constitutionality of the denial of a jury trial.[121] New York argued that the line between serious crimes and petty offenses should be drawn to coincide with the line between felonies and misdemeanors.[122] Misdemeanors in New York carried a maximum potential sentence of just one year in prison.[123] The *Baldwin* Court explained that it had rejected the state's reasoning in *Callan v. Wilson*:

> Indeed[,] we long ago declared that the Sixth Amendment right to jury trial "is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen."[124]

Still, there may be little appreciable difference in the ramifications of a conviction for an offense where the maximum term of imprisonment is six months as opposed to one year.[125]

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115. *Id.*

116. *Id.* at 161–62.

117. Baldwin v. New York, 399 U.S. 66 (1970).

118. *Id.* at 67.

119. *Id.* at 67 & n.2 ("All trials in the court shall be without a jury.").

120. *Id.* at 67.

121. *See id.* at 67–68 (noting the appellate court's rejection of defendant's constitutional argument).

122. *Baldwin*, 399 U.S. at 69–70.

123. *Id.* at 69.

124. *Id.* at 70 (quoting Callan v. Wilson, 127 U.S. 540, 549 (1888)).

125. *Id.* at 73 ("One who is threatened with the possibility of imprisonment for six

The Court noted that the jury removes the possibility of potential oppression by the government against the accused.[126] Despite this significant public policy goal, the Court reiterated that "[w]here the accused cannot possibly face more than six months' imprisonment ... these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications."[127] However, it rejected those "administrative conveniences" in holding that state courts cannot "den[y] an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment."[128]

In *Blanton v. City of North Las Vegas, Nevada*,[129] the Supreme Court decided whether a first-time offender charged with driving under the influence is entitled to a jury trial.[130] Pursuant to Nevada law, a first-time offender faces the possibility of a term of six months in jail or forty-eight hours of community service while wearing clothing labeling the defendant as an offender, as well as a fine not to exceed $1,000 and the suspension of his or her driver's license for ninety days.[131] The defendants sought a jury trial from the North Las Vegas Municipal Court but were denied.[132] Ultimately, appeals were taken to the Nevada Supreme Court, which determined that the defendants were not guaranteed a right to a jury trial under the federal Constitution.[133]

The *Blanton* Court explained that *Baldwin* did not establish a bright-line rule that offenses with a potential penalty of six months or less constitute petty offenses:

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months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation.").

126. *Id.* at 72 ("[T]he primary purpose of the jury is to prevent the possibility of oppression by the [g]overnment; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the [g]overnment that has proceeded against him.").

127. Baldwin v. New York, 399 U.S. 66, 73 (1970).

128. *Id.* at 73–74.

129. Blanton v. City of N. Las Vegas, Nev., 489 U.S. 538 (1989).

130. *See id.* at 539–40 (reporting that petitioners had no prior convictions of driving under the influence).

131. *Id.* at 539–40.

132. *Id.* at 540.

133. *Id.*

> Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty."[134]

Nonetheless, an offense with a maximum potential penalty of six months in jail can be deemed serious only where some additional statutory penalties demonstrate a legislative intent to view the offense as a serious one.[135] Based on the presumption established by the Nevada legislature, the Supreme Court held that the defendants were not entitled to a jury trial for a first-time charge of driving under the influence, even where there was the alternative punishment of community service.[136]

In *United States v. Nachtigal*,[137] the Supreme Court applied the *Blanton* presumption to a charge of driving under the influence of alcohol in a national park.[138] Nachtigal was charged with driving in Yosemite National Park in violation of 36 C.F.R. § 4.23 and faced a maximum potential term of six months in jail and a $5,000 fine. Relying on *Blanton*, a magistrate judge denied Nachtigal's motion for a jury trial.[139] On appeal, the district court and the

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134. *Blanton*, 489 U.S. at 543 (footnote omitted). *But see* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) ("Since [*Duncan*], our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." (citing Frank v. United States, 395 U.S. 147, 149–50 (1969); Baldwin v. New York, 399 U.S. 66, 69 (1970))); Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988) ("Ultimately, the Court chose to close that gap by employing *Baldwin*'s objective, bright-line test grounded in the historical practice of the Colonies and the original states.").

135. *Blanton*, 489 U.S. at 543.

136. *See id.* at 543–45 (concluding that "the statutory penalties [were] not so severe that [the] DUI must be deemed a 'serious' offense" under the Constitution). A year before *Blanton* was decided, the Fifth Circuit, addressing Louisiana law, held that a charge of driving while intoxicated where the maximum penalty was six months in jail did not constitute a serious offense requiring a jury trial. *Landry*, 840 F.2d at 1220; *see also* United States v. Garner, 874 F.2d 1510, 1512 (11th Cir. 1989) (per curiam) (holding that a "first offense DUI under Florida law" was not a serious one); United States v. Sain, 795 F.2d 888, 889 (10th Cir. 1986) (concluding that the Oklahoma driving while impaired statute did not carry with it a right to a jury trial); United States v. Jenkins, 780 F.2d 472, 473, 475 (4th Cir. 1986) (declaring that defendants did not have a right to a jury trial for a first-offense DUI under South Carolina law).

137. United States v. Nachtigal, 507 U.S. 1 (1993) (per curiam).

138. *See id.* at 2–6 (rejecting the appellate court's refusal to recognize the Supreme Court's presumption in *Blanton*).

139. *Id.* at 2.

Ninth Circuit Court of Appeals both concluded that the defendant was entitled to a jury trial.[140] The Supreme Court reversed, finding that *Blanton* was controlling.[141] Although Nachtigal faced a fine that was $4,000 more than the one at issue in *Blanton* as well as a potential five-year term of probation, these penalties were not sufficiently severe to overcome the *Blanton* presumption.[142] Indeed, even if a criminal defendant faces multiple petty offenses for which the aggregate jail time is in excess of six months, there is no right to a trial by jury.[143]

C. *The Implications of* Baldwin v. New York *and Its Progeny for Driving While Intoxicated Petty Offenses*

The *Baldwin* decision essentially merges existing common law and federal law with the obligations of the state courts to provide criminal defendants with a jury trial for any offense carrying a maximum potential penalty in excess of six months in jail.[144] Subsequently, the Supreme Court in *Blanton* and *Nachtigal* categorically expanded petty offenses to cover charges for driving while intoxicated where the maximum penalty is six months in jail.[145] Consequently, there is no federal right to a jury trial for a charge of driving while intoxicated if it is only a petty offense that has a maximum potential jail time of six months.

A defendant charged with a petty offense of driving while intoxicated is still entitled to other constitutional safeguards. In *Argersinger v. Hamlin*,[146] the Supreme Court explained that

140. *Id.* at 2–3.

141. *Id.* at 5–6.

142. *Nachtigal*, 507 U.S. at 5.

143. *See* Lewis v. United States, 518 U.S. 322, 330 (1996) (stating that aggregated petty offenses do not entitle a defendant to a right to a jury trial); *see also* United States v. Sherman, No. 95-5801, 1996 WL 540162, at *1 (4th Cir. Sept. 25, 1996) (per curiam) (relying on *Lewis* to affirm misdemeanor convictions "for driving under the influence, failing to maintain control of a motor vehicle, and refusing to submit to a breath test" (citations omitted)). *But see* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 134 (1997) (characterizing *Lewis* as "the culmination of the Supreme Court's incremental narrowing of the grounds that trigger the right to [a] jury trial").

144. *See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (establishing a defendant's right to a jury trial for any offense that carries the possibility of a maximum prison term of over six months).

145. Blanton v. City of N. Las Vegas, Nev., 489 U.S. 538, 543–44 (1989); *Nachtigal*, 507 U.S. at 4.

146. Argersinger v. Hamlin, 407 U.S. 25 (1972).

defendants charged with petty offenses are still entitled to counsel pursuant to the Sixth Amendment.[147] The Court rejected the argument "that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[148] In *Alabama v. Shelton*,[149] the Supreme Court extended the right to counsel to any criminal defendant who faced the possibility of the loss of liberty based on the potential penalties for the offense.[150] Similarly, each defendant has a right to a public trial, to confront all witnesses, to compulsory process of defense witnesses, and to notice of the charges against him or her.[151]

In every petty-offense charge for driving while intoxicated that I have ever handled, the defendants have either retained their own

147. *Id.* at 30–31.

148. *Id.*; *accord* Landry v. Hoepfner, 840 F.2d 1201, 1206 (5th Cir. 1988) (indicating that the Sixth Amendment entitles a defendant charged with a petty offense to certain constitutional protections). *But see* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that a criminal defendant is not entitled to an attorney where the statute authorizes jail time but the defendant is only sentenced to a fine or other punishment).

149. Alabama v. Shelton, 535 U.S. 654 (2002).

150. *See id.* at 673–74 (expressing that a defendant has the right to counsel if charged with any crime where imprisonment is an issue to be determined). One commentator has claimed that, in her experience, the right to counsel is not guaranteed as required. *See* Mary C. Warner, *The Trials and Tribulations of Petty Offenses in the Federal Courts*, 79 N.Y.U. L. REV. 2417, 2430 (2004) (discussing the author's experience in the Eastern District of New York). Interestingly, the Guidelines for the Administration of the Criminal Justice Act and Related Statutes indicates that it is mandatory that courts appoint counsel to indigent defendants for felonies and Class A misdemeanors, but that such appointment is discretionary for petty offenses as well as infractions. *Compare* GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT AND RELATED STATUTES, ch. 2, pt. A, § 210.20.10(a) (Office of Defender Servs. 2010) ("[R]epresentation *must* be provided for any financially eligible person who is . . . charged with a felony or with a Class A misdemeanor . . . ."), *with id.* § 210.20.20(a)(1) ("Whenever the U.S. magistrate judge or the court determines that the interests of justice so require, representation *may* be provided for any financially eligible person who is . . . charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized . . . ."). Again, I have always advised defendants charged with driving while intoxicated of their right to counsel and have provided one for them where they met the standard for a court-appointed attorney.

151. *Argersinger*, 407 U.S. at 27–28; *accord Landry*, 840 F.2d at 1206 (reiterating that the Sixth Amendment safeguards a defendant's right to a trial in public, to confrontation of witnesses, to notice, and to compulsory process even for petty offenses); *see also* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 7, 11–12 (noting various Sixth Amendment rights available to a defendant regardless of whether the offense is deemed serious or petty); Mary C. Warner, *The Trials and Tribulations of Petty Offenses in the Federal Courts*, 79 N.Y.U. L. REV. 2417, 2427–29 (2004) (discussing the right to counsel and the right to be informed of the charges).

counsel or sought and received court-appointed counsel, with the latter group being the clear majority. All defendants have an initial appearance during which they are advised of the charge against them,[152] their right to remain silent, their right to an attorney, and their right to a bench trial.[153] Moreover, during the pendency of the criminal action, each defendant typically receives a bond, has an arraignment, has either a trial or enters a plea of guilt, and is informed of the right to appeal (first to the district judge and then to the Fifth Circuit).[154]

Regardless of whether the charge is based on the Assimilative Crimes Act or a federal regulation, the petty-offense doctrine establishes that the federal Constitution does not guarantee a jury trial for such offenses.[155] However, it does not prevent states, such as Texas, from providing the right to a jury trial for petty offenses.[156] Similarly, Congress could enact legislation requiring that defendants in federal petty-offense cases be afforded a jury trial.[157]

Any federal defendant facing a petty offense may request a trial by jury. The trial judge may grant the request, independent of the above analysis, indicating that it is not constitutionally mandated. Indeed, I provided a jury trial for a charge of driving while intoxicated on a military base where the maximum potential penalty was six months in jail.[158] In other words, it never hurts to ask.

D. *Petty Offenses Are Tried Before Federal Magistrate Judges*

The Federal Courts Improvement Act of 1996 gives federal magistrate judges the authority to conduct trials and enter sent-

152. The charging document is typically a charge by criminal information. Unlike felonies, misdemeanors do not require an indictment. *See* United States v. Teran, 98 F.3d 831, 835 (5th Cir. 1996) (concluding that since Teran was charged with a misdemeanor, "the conviction could proceed by information").

153. FED. R. CRIM. P. 58(b)(2).

154. FED. R. CRIM. P. 58(b).

155. *Landry*, 840 F.2d at 1205–06.

156. *Id.*

157. *See id.* (stating that the petty-offense doctrine does not prevent the federal government from granting a right to jury trial for petty offenses).

158. *See* Verdict of the Jury, United States v. Handy, No. C-09-1176M (S.D. Tex. Jan. 27, 2010) (on file with the St. Mary's Law Journal) (illustrating a jury verdict from the United States District Court for the Southern District of Texas for a charge of driving while intoxicated).

ences for petty offenses.[159] However, for misdemeanor offenses, the defendant must consent to proceed before the magistrate judge for either a trial or a plea of guilty as well as any sentencing:

> Any person charged with a misdemeanor, other than a petty offense may elect, however, to be tried before a district judge for the district in which the offense was committed. The magistrate judge shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a district judge and that he may have a right to trial by jury before a district judge or magistrate judge. The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record.[160]

In *United States v. Teran*,[161] the defendant was charged with driving while intoxicated on a military base.[162] He consented to proceed before a magistrate judge.[163] Pursuant to the existing Texas statute, his offense was deemed a misdemeanor carrying a maximum penalty of two years.[164] At the sentencing hearing, the

159. *See* 28 U.S.C. § 636(a)(3) (2006) ("Each United States magistrate judge . . . shall have . . . the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section."); *id.* § 636(a)(4) ("Each United States magistrate judge . . . shall have . . . the power to enter a sentence for a petty offense."); FED. R. CRIM. P. 58(b)(3)(A) ("A magistrate judge may take the defendant's plea in a petty offense case."); *see also* United States v. Sanchez, 258 F. Supp. 2d 650, 654 (S.D. Tex. 2003) ("United States Magistrate Judges are authorized to conduct trials and enter sentences regarding [petty offenses] under their own authority and jurisdiction, without the consent of the parties.").

160. 18 U.S.C. § 3401(b) (2006); *accord* 28 U.S.C. § 636(a)(5) ("Each United States magistrate judge . . . shall have . . . the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented."); FED. R. CRIM. P. 58(b)(3)(A) ("In [a non-petty offense] misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge."); *see also* Gonzalez v. United States, 553 U.S. 242, 245 (2008) ("If the parties consent, [federal magistrate judges] may conduct misdemeanor criminal trials . . . ."); United States v. Hazlewood, 526 F.3d 862, 864 (5th Cir. 2008) ("In the Federal Magistrates Act, 28 U.S.C. § 636, Congress conferred jurisdiction to federal magistrate-judge courts to try and sentence a person accused of and convicted of a misdemeanor committed within that judicial district when the defendant expressly consents and when specially designated to exercise such jurisdiction by the district court.").

161. United States v. Teran, 98 F.3d 831 (5th Cir. 1996).

162. *Id.* at 833.

163. *Id.*

164. *Id.*

magistrate judge indicated that the maximum potential penalty was one year in jail, which the defendant acknowledged.[165] Teran received two years of probation but when he subsequently committed a second similar offense, his probation was revoked and he was sentenced to six months in jail.[166] The defendant then challenged the magistrate judge's jurisdiction.[167] The Fifth Circuit found that the magistrate judge did have jurisdiction pursuant to the Assimilative Crimes Act.[168]

Thus, any charge for driving while intoxicated on a national park or on Veteran Affairs property will automatically be assigned to a magistrate judge.[169] The same goes for any petty-offense charge stemming from an incident on federal property, such as a military base, if it is a first-time offense.[170] However, a second misdemeanor offense pursuant to the Assimilative Crimes Act will proceed in front of a magistrate judge only after consent by the defendant.[171] Of course, any felony charges for driving while intoxicated on federal land must be tried before a district judge as opposed to a magistrate judge.[172]

A criminal defendant may appeal a conviction following a trial or a sentence following a guilty plea to the district court judge: "In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed."[173]

165. *Id.*
166. *Teran*, 98 F.3d at 833.
167. *Id.*
168. *Id.* at 835.
169. 28 U.S.C. § 636(a) (2006).
170. *Id.*
171. *Id.* § 3401(b).
172. *Teran*, 98 F.3d at 834.
173. 18 U.S.C. § 3402 (2006); *see also* FED. R. CRIM. P. 58(g)(2)(B) ("A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry."); United States v. Peck, 545 F.2d 962, 964 (5th Cir. 1977) ("Review by the district court of a conviction before the magistrate is not a trial de novo but is the same as review by a court of appeals of a decision by a district court.").

V. CHARGES FOR DRIVING WHILE INTOXICATED IN TEXAS FEDERAL COURTS ARE GOVERNED BY FEDERAL PROCEDURAL AND SUBSTANTIVE LAW AS OPPOSED TO TEXAS LAW

Although the Assimilative Crimes Act fills gaps in federal criminal law with the state law from the jurisdiction where the offense was committed, the statute is a creature of federal law.[174] Accordingly, federal law, as opposed to Texas state law, governs substantive issues concerning charges for driving while intoxicated on federal land.[175] In addition, procedural issues are governed by federal law as well, such that federal courts will apply the Federal Rules of Evidence as opposed to the Texas Rules of Evidence.[176]

A. *Breathalyzer Test Results Are Admissible in Texas Federal Courts Pursuant to the Federal Rules of Evidence*

Pursuant to Texas regulations, any "breath specimen taken at the request or order of a peace officer must be taken and analyzed under rules of the department by an individual possessing a certificate issued by the department certifying that the individual is qualified to perform the analysis."[177] In order to be admissible in a Texas criminal proceeding, "a breath test analysis must be performed according to the rules of the Texas Department of Public Safety."[178] Accordingly, at trial, the prosecution must establish that the breathalyzer machine was used in a manner consistent with the regulation and proper technique.[179]

In *Blackmon v. United States*,[180] the defendant was arrested for

174. *Teran*, 98 F.3d at 834.

175. Blackmon v. United States, No. EP-07-CR-1085-PRM, 2007 WL 2962790, at *3 (W.D. Tex. Sept. 28, 2007).

176. *Id.*

177. TEX. TRANSP. CODE ANN. § 724.016(a) (West 2007).

178. Howes v. State, 120 S.W.3d 903, 907 (Tex. App.—Texarkana 2003, pet. ref'd) (citing TEX. TRANSP. CODE ANN. § 724.016 (West 1999); Atkinson v. State, 923 S.W.2d 21, 23 (Tex. Crim. App. 1996)); *accord* Adams v. State, 67 S.W.3d 450, 452 (Tex. App.—Fort Worth 2002, pet. ref'd) (asserting that a breath test must follow the rules of the Texas Department of Public Safety to be admissible).

179. *See* Stevenson v. State, 895 S.W.2d 694, 695 (Tex. Crim. App. 1995) (en banc) (acknowledging the trial court's determination that the State met its burden for admission of the intoxilyzer test results); Henderson v. State, 14 S.W.3d 409, 411–12 (Tex. App.—Austin 2000, no pet.) ("The State must: (1) show the machine functioned properly on the day of the test . . .; (2) show the existence of periodic supervision over the machine and its operation . . .; and (3) prove the result of the test through a witness qualified to translate and interpret the result.").

180. Blackmon v. United States, No. EP-07-CR-1085-PRM, 2007 WL 2962790 (W.D.

driving while intoxicated at Fort Bliss in El Paso, Texas.[181] Her criminal information charged her pursuant to the Assimilative Crimes Act under section 49.04 of the Texas Penal Code.[182] An officer detected alcohol on Blackmon when he stopped her vehicle at the gate of the base.[183] Subsequently, the defendant failed several field sobriety tests and was placed under arrest.[184] Blackmon was then transferred to the police station, and a trained officer administered the Intoxilyzer 5000 to test the blood alcohol content on her breath.[185] Her samples registered above the legal limit.[186] At trial before a magistrate judge, the results of the Intoxilyzer 5000 were admitted over the defendant's objection. After her conviction, she appealed.[187]

On appeal, the defendant "argue[d] that the Intoxilyzer results [were] inadmissible because the Government failed to comply with a Texas statutory provision requiring proof that a certified operator utilized a certified machine in conducting the breath test."[188] The Government responded that Texas evidentiary rules did not apply, but rather, the court was to apply federal evidentiary rules.[189] The magistrate judge agreed with the Government, finding that the Intoxilyzer 5000 results were reliable evidence.[190]

First, the *Blackmon* court noted that the Assimilative Crimes Act is silent regarding the applicability of state procedural law, including the evidentiary rules.[191] Citing to *Johnson v. Yellow Cab Transit Co.* and *United States v. Webb*,[192] the court explained that federal courts are not bound by state substantive law.[193] In *Webb*, the Fifth Circuit "explained that because ACA prosecutions are meant to enforce federal law, only federal judicial

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Tex. Sept. 28, 2007).

181. *Id.* at *1.

182. *Id.*

183. *Id.* at *2.

184. *Id.*

185. *Blackmon*, 2007 WL 2962790, at *2.

186. *Id.*

187. *Id.*

188. *Id.* at *1.

189. *Id.* at *1, *3.

190. Blackmon v. United States, No. EP-07-CR-1085-PRM, 2007 WL 2962790, at *3–4 (W.D. Tex. Sept. 28, 2007).

191. *Id.* at *3.

192. United States v. Webb, 747 F.2d 278 (5th Cir. 1984).

193. *Blackmon*, 2007 WL 2962790, at *3 (citing Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 391 (1944); *Webb*, 747 F.2d at 284).

interpretations of that law are binding."[194] Nonetheless, the *Blackmon* court determined this case law did not "directly address what evidentiary law a federal court should apply in an ACA prosecution."[195] Relying on decisions from other circuits as well as the reasoning from *Webb*, the court concluded that the Federal Rules of Evidence applied to the admissibility of the Intoxilyzer 5000 results.[196]

Next, because the defendant did not challenge the relevance of the results, the *Blackmon* court addressed the reliability of the evidence presented to the magistrate judge.[197] As an initial matter, the court noted that the Supreme Court has found breathalyzers that measure blood alcohol content to be reliable.[198] At the defendant's bench trial, a technician who maintained the Intoxilyzer 5000 testified about the various tests he regularly performed to ensure its accuracy.[199] Additionally, the officer who administered the defendant's test testified regarding the measures he took to ensure that the machine was functioning properly.[200] Based on all of the evidence, the district court concluded that the results were sufficiently reliable and affirmed the conviction.[201]

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194. *Id.* (citing *Webb*, 747 F.2d at 284).

195. *Id.*

196. *Id.* at *4; *see also* United States v. Berry, 866 F.2d 887, 890 (6th Cir. 1989) ("[Section 4.23] does not contemplate or call for the incorporation of state DUI statutes into a federal DUI charge."); United States v. Farmer, 820 F. Supp. 259, 263, 266–67 (W.D. Va. 1993) (concluding federal law governs the procedures and procurement of blood samples in driving while intoxicated cases on federal lands); United States v. Coleman, 750 F. Supp. 191, 193 (W.D. Va. 1990) ("[F]ederal law preempts state law on the issue of intoxicated motor-vehicle operators within national park areas."); United States v. Hambsch, 748 F. Supp. 343, 344 (D. Md. 1990) (holding that Maryland state evidentiary rules were inapplicable to the admissibility of alcohol test results in federal court).

197. *Blackmon*, 2007 WL 2962790, at *4.

198. *Id.* (citing California v. Trombetta, 467 U.S. 479, 489 n.9 (1984)); *see also* United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (noting Intoxilyzer results were admissible pursuant to the Federal Rules of Evidence as opposed to Hawaii law and that reliability was not questioned since admission was based on the public-record exception to hearsay); *see also* United States v. McMillan, 820 F.2d 251, 254–55 (8th Cir. 1987) (affirming the admission of Intoxilyzer results based on federal standards as opposed to South Dakota law and based on the use of correct procedures to support the reliability of results); United States v. Smith, 776 F.2d 892, 898 (10th Cir. 1985) ("We hold that the court did not abuse its discretion in admitting the test results. The technique of testing breath samples for blood alcohol content has general acceptance in the scientific community.").

199. *Blackmon*, 2007 WL 2962790, at *4.

200. *Id.*

201. *Id.* at *4–5.

Similarly, in *United States v. Jackson*,[202] the defendant was pulled over for speeding on the Natchez Trace Parkway in Mississippi.[203] Based on the odor of alcohol and Jackson's admissions about consuming malt beer, he was asked to perform several field sobriety tests, which he failed.[204] After failing a portable breathalyzer test, he was taken to the local sheriff's department where he was given two tests with an Intoxilyzer 8000.[205] He registered 0.099 and 0.084 blood alcohol content on the two tests.[206] Consequently, he was charged with "driving under the influence of alcohol in violation of 36 C.F.R. § 4.23."[207]

Jackson had a bench trial before a magistrate judge.[208] At trial, he did not object to the admission of the Intoxilyzer 8000 results.[209] The park ranger testified that he had been formally trained and certified to use the Intoxilyzer 8000, that he knew the standard operating procedure for using the machine, and that the machine initiated a self-calibration check following each test and was designed not to function if it was not working properly.[210] The magistrate judge found that the officer's observations constituted probable cause to perform a breathalyzer.[211] Based on the results of the breathalyzer, Jackson was found "guilty of operating a motor vehicle under the influence of alcohol."[212]

Jackson then appealed to the district court, challenging the sufficiency of the evidence.[213] As in *Blackmon*, the district court found "that the Intoxilyzer tests administered to [the defendant] were conducted 'using accepted scientific methods and equipment of proven accuracy and reliability' for the purposes of 36 C.F.R. § 4.23(c)(4)."[214] Jackson also argued that "the Government failed

202. United States v. Jackson, 470 F. Supp. 2d 654 (S.D. Miss. 2007), *aff'd*, 273 F. App'x 372 (5th Cir. 2008) (per curiam).

203. *Id.* at 655.

204. *Id.* at 655–56.

205. *Id.* at 656.

206. *Id.*

207. *Jackson*, 470 F. Supp. 2d at 656.

208. *Id.*

209. *Id.*

210. *Id.* at 657.

211. *Id.* at 656.

212. United States v. Jackson, 470 F. Supp. 2d 654, 656–57 (S.D. Miss. 2007), *aff'd*, 273 F. App'x 372 (5th Cir. 2008) (per curiam).

213. *Id.* at 656.

214. *Id.* at 657 (quoting California v. Trombetta, 467 U.S. 479, 489 n.9); *see also* Blackmon v. United States, No. EP-07-CR-1085-PRM, 2007 WL 2962790, at *4 (W.D.

to produce a document certifying that the subject Intoxilyzer was accurate, as required under Mississippi law."[215] The district court rejected this argument because the defendant was charged and convicted pursuant to federal law as opposed to Mississippi law, and then found that the Government satisfied the accuracy and reliability requirement established in § 4.23.[216] The Fifth Circuit, in turn, affirmed the district court's finding that the evidence presented to the magistrate judge was sufficient to satisfy § 4.23.[217]

Thus, although the Fifth Circuit has not determined that the Texas statute regarding standards for introducing breathalyzer evidence does not apply in Texas federal courts, the *Jackson* decision reached the same conclusion addressing a similar Mississippi statutory requirement.[218] Moreover, such standards are not applicable in prosecutions arising from federal property where agency regulations criminalize driving while intoxicated or from federal enclaves covered by the Assimilative Crimes Act.[219]

B. *Texas State Courts Suspend State-Issued Driver's Licenses*

In Texas, when a defendant is convicted of driving while intoxicated, that person's driver's license is automatically suspended.[220] Typically, the suspension "begins on a date set by the court that is not earlier than the date of the conviction or later than the 30th day after the date of the conviction, as determined by the

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Tex. Sept. 28, 2007) ("The reliability of the technique by which breathalyzers measure [blood alcohol content] is well established.").

215. *Jackson*, 470 F. Supp. 2d at 658 (discussing Mississippi Code Annotated section 63-11-19).

216. *Id.* at 658–59.

217. United States v. Jackson, 273 F. App'x 372, 374 (5th Cir. 2008) (per curiam).

218. *See id.* (disregarding the use of a state statute in favor of a federal statute).

219. *See* United States v. Farmer, 820 F. Supp. 259, 263 (W.D. Va. 1993) (indicating that when federal regulations specifically address procedures to follow in cases on federal property, federal rules of evidence are applied).

220. TEX. TRANSP. CODE ANN. § 521.341(3) (West 2007 & Supp. 2010); *see also* Stoker v. State, 886 S.W.2d 443, 444 (Tex. App.—Eastland 1994, no pet.) (noting suspension is not discretionary for the court); Lugo v. Tagle, 783 S.W.2d 815, 816 (Tex. App.—Corpus Christi 1990, no writ) ("The driver's license of a person convicted of driving while intoxicated is suspended automatically." (citations omitted)). Additionally, a driver's license shall be suspended for 180 days for refusal to provide a breath or blood specimen. *See* TEX. TRANSP. CODE ANN. § 724.035 (West Supp. 2010) (lengthening the suspension from 90 days in the previous version of the statute to 180 days in the current version).

court."[221] "When a person appeals a DWI conviction, the period of suspension begins when the appellate court's mandate is received by the trial court."[222] For a first-time Class B misdemeanor conviction, the suspension will be for "not less than 90 days or more than one year."[223] However, if the conviction is for a Class A misdemeanor or a third-degree felony offense, then the suspension will be for "not less than 180 days or more than two years."[224] Texas courts have determined that there is no right to appeal the suspension because "a driver's license is not a right but a privilege."[225]

The Fifth Circuit has not explicitly addressed the issue of suspension of drivers' licenses for driving while intoxicated on federal lands in Texas. Similarly, none of the Texas federal district courts have addressed this issue. There are no federal statutes or regulations authorizing the suspension of drivers' licenses for persons convicted in federal court of driving while intoxicated.[226] As a general rule, the suspension of a driver's license involves a state action.[227]

C. *Several Federal Courts Have Determined That Federal Courts Cannot Suspend a State-Issued Driver's License*

Although not directly addressed in Texas federal courts, various other courts have addressed suspension of state-issued drivers' licenses by federal judges. For example, in *United States v. Best*,[228] the defendant was charged pursuant to the Assimilative Crimes Act with driving while intoxicated at McClellan Air Force

221. TEX. TRANSP. CODE ANN. § 521.344(a)(1) (West 2007 & Supp. 2010).

222. *Lugo*, 783 S.W.2d at 816 (citations omitted); *accord* Supernaw v. State, No. 14-02-00110-CR, 2002 WL 31769400, at *1 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet.) (mem. op., not designated for publication) ("[W]hen a defendant appeals a DWI conviction, the period of automatic license suspension does not begin until the mandate is received by the trial court.").

223. TEX. TRANSP. CODE ANN. § 521.344(a)(2)(A) (West 2007 & Supp. 2010).

224. *Id.* § 521.344(a)(2)(B); *see also* Yost v. State, No. 04-00-00229-CR, 2001 WL 747236, at *2 (Tex. App.—San Antonio July 5, 2001, no pet.) (not designated for publication) (affirming a one-year ban on driving).

225. *Stoker*, 886 S.W.2d at 444 (citing Tex. Dep't of Pub. Safety v. Schaejbe, 687 S.W.2d 727, 728 (Tex. 1985)).

226. United States v. Knott, 722 F. Supp. 1365, 1366–67 (E.D. Va. 1989).

227. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) ("Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees.").

228. United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

Base in California.[229] He pled guilty before a magistrate judge and was sentenced to ten days in jail and a $350 fine.[230] "The magistrate further ordered that appellant's driver's license be suspended for six months pursuant to" California statute.[231]

The defendant first petitioned the magistrate judge to correct the sentence, arguing that the judge lacked the power to suspend his license.[232] After the magistrate judge denied the motion, the district judge affirmed the denial on appeal.[233] The defendant then appealed to the Ninth Circuit and argued the following:

> [T]he portions of the California Vehicle Code providing for suspension of driver's licenses are not incorporated into federal law by virtue of the Assimilative Crimes Act, and that the suspension of his California driver's license by a federal magistrate is an impermissible interference with that state's regulation of its highways.[234]

Based on the Assimilative Crimes Act, the Ninth Circuit looked to the state statute that criminalized driving while intoxicated to determine the specific punishments available to the sentencing judge.[235] In California, either the state courts or the Department of Motor Vehicles may suspend a license.[236] Moreover, "it is well established that such departmental suspensions are regulatory and not penal."[237] Thus, the Ninth Circuit reversed, holding that a federal court is not authorized to require the California Department of Motor Vehicles to suspend drivers' licenses.[238]

Additionally, in *United States v. Snyder*,[239] the defendant was convicted pursuant to the Assimilative Crimes Act of driving while

229. *Id.* at 1097.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Best*, 573 F.2d at 1097.
234. *Id.* at 1098.
235. *Id.* at 1099–1100.
236. *Id.* at 1099 ("[A]uthority to suspend is vested both in the courts and in the Department of Motor Vehicles (DMV) under certain circumstances.").
237. *Id.* (citing Beamon v. Dep't of Motor Vehicles, 4 Cal. Rptr. 396, 400 (Cal. Dist. Ct. App. 1960)).
238. United States v. Best, 573 F.2d 1095, 1102–03 (9th Cir. 1978); *accord* United States v. Lincoln, 581 F.2d 200, 202 (9th Cir. 1978) ("In light of *Best*, it was error to revoke appellant's driver's permit for three years, as required by Alaska law."). *See generally* Wesley M. Oliver, *A Round Peg in a Square Hole: Federal Forfeiture of State Professional Licenses*, 28 AM. J. CRIM. L. 179, 186 (2001) (discussing the holding in *Best*).
239. United States v. Snyder, 852 F.2d 471 (9th Cir. 1988).

under the influence and causing bodily injury at the Presidio in San Francisco, California.[240] The district judge suspended Snyder's license for one year as part of his sentence.[241] On appeal to the Ninth Circuit, the Government defended the license suspension as a punishment not only available in California law, but mandatory and thus available to the district court through the Assimilative Crimes Act.[242] The defendant argued "that license suspension is not punishment within the meaning of the Assimilative Crimes Act, and that ... federal courts lack the power to suspend a driver's license issued by a state."[243]

Relying on *Best*, the *Snyder* court explained "that the federal courts could not directly suspend a state license, because this would violate fundamental principles of federalism."[244] It further noted that "[e]ven if the Assimilative Crimes Act could be read to incorporate license suspensions as an additional form of punishment, the federal courts would be powerless to issue suspension orders" because the issuance of driver's licenses is a state police power with which the federal government does not have constitutional authority to interfere.[245] Consequently, the Ninth Circuit vacated the defendant's entire sentence and remanded the action to the district court for resentencing.[246]

Similarly, in *United States v. Knott*,[247] the defendant was charged with several offenses in the Eastern District of Virginia, including "driving while intoxicated in violation of 36 C.F.R. § 4.23(a)(2)" on the George Washington Memorial Parkway in Virginia.[248] After Knott plead guilty to driving while intoxicated in exchange for dismissal of the other charges, a magistrate judge

240. *Id.* at 472.

241. *Id.* at 472–73.

242. *Id.* at 474.

243. *Id.*

244. *Snyder*, 852 F.2d at 474; *see also* United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978) ("[W]here not required for protection of the federal interest, [a federal court] may neither suspend a state driver's license nor order the state to do so, any more than it could dissolve a state-chartered corporation in federal *quo warranto* proceedings or sentence criminals convicted in federal court to terms in the state prison.").

245. *Snyder*, 852 F.2d at 475 (citing *Best*, 573 F.2d at 1102 & n.12); *see also* Wesley M. Oliver, *A Round Peg in a Square Hole: Federal Forfeiture of State Professional Licenses*, 28 AM. J. CRIM. L. 179, 186 (2001) (referencing the holding in *Snyder*).

246. *Snyder*, 852 F.2d at 475.

247. United States v. Knott, 722 F. Supp. 1365 (E.D. Va. 1989).

248. *Id.* at 1366.

sentenced her to one year of probation and "revoked her privilege to operate a motor vehicle in Virginia for six months."[249]

On appeal to the district court, Knott challenged the suspension of her driver's license.[250] The Government raised several arguments, but all failed. First, it argued that the Assimilative Crimes Act demonstrated congressional intent to allow such suspensions.[251] Of course, this argument is problematic because the defendant was charged with a violation of a Department of the Interior regulation as opposed to the Assimilative Crimes Act.[252] Moreover, in 1988, Congress amended the Assimilative Crimes Act to dispel any confusion as to whether a federal court could revoke a driver's license after a conviction for driving while intoxicated.[253] As amended, the Assimilative Crimes Act "explicitly authorizes federal judges and magistrates, when sentencing a defendant convicted pursuant to an assimilated state drunk driving law, to revoke driving privileges on the federal enclave if revocation is an authorized state sanction."[254] Thus, there is no statutory basis for a suspension.

Next, citing 36 C.F.R. § 4.2(a), the Government argued that the assimilation of a Virginia license revocation penalty was permissible pursuant to Department of the Interior regulations that provide for assimilation.[255] Specifically, it asserted that because the regulations were silent regarding license revocation, the Virginia revocation statute was assimilated through § 4.2(a).[256] This position ignored the regulations and potential penalties related to driving while intoxicated on national park lands that the

249. *Id.*

250. *Id.*

251. *Id.* at 1367.

252. *See Knott*, 722 F. Supp. at 1366 & n.1, 1367 (noting that the government's position failed because Knott "was not charged under the ACA").

253. *Id.* at 1368.

254. *Id.*; *see also* 18 U.S.C. § 13(b)(1) (2006) ("Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection *shall apply only* to the special maritime and territorial jurisdiction of the United States." (emphasis added)); 134 CONG. REC. 32,700 (1988) ("The amendment would close a loophole in the law which now prevents federal judges from imposing license suspensions, alcohol education programs, and other non-jail term sanctions on persons convicted of driving under the influence.").

255. *Knott*, 722 F. Supp. at 1369; *see also* 36 C.F.R. § 4.2(a) (2010) ("Unless specifically addressed by regulations in this chapter, traffic and the use of vehicles within a park area are governed by State law. State law that is now or may later be in effect is adopted and made a part of the regulations in this part.").

256. *Knott*, 722 F. Supp. at 1369.

Secretary of the Interior already explicitly addressed.[257]

Finally, the Government posited that revocation was a valid condition of probation.[258] However, Congress limited the potential penalties that the Secretary's regulations could impose, and license revocation was not included.[259] Noting that "[t]he government has not cited, nor has the Court found, any statute or precedent suggesting that revocation of driving privileges within a sovereign state is an appropriate condition of federal probation," the *Knott* court reversed the magistrate judge's revocation of the defendant's license.[260]

D. *Federal Court Judges May Fashion Sanctions That Limit a Defendant's Driving Privileges*

Although Texas federal judges do not have the power to dictate sanctions, such as the loss of a state-issued driver's license, there are options that are still available. In *United States v. Tonry*,[261] the defendant pled guilty to violations of the Federal Election Campaign Act.[262] As part of his sentence, the trial judge required the defendant to refrain from running for any local, state, or federal office, or engaging in any political activity while he was on probation.[263] The defendant challenged this condition, arguing that it violated the statute as well as his constitutional rights.[264] Specifically, he argued "that the tenth amendment prohibits the district court from imposing a condition of probation that intrudes

257. *See* United States v. Knott, 722 F. Supp. 1365, 1369 (E.D. Va. 1989) (noting that driving while intoxicated and accompanying penalties are "specifically addressed" in the regulations).

258. *Id.*

259. *Id.*

260. *Id.*; *see also* United States v. Knott, 726 F. Supp. 1042, 1045 (E.D. Va. 1989) (denying the Government's motion for reconsideration that the license revocation was not a valid probation condition).

261. United States v. Tonry, 605 F.2d 144 (5th Cir. 1979), *abrogated on other grounds by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998), *as recognized in* United States v. Tex. Tech Univ., 171 F.3d 279, 287 (5th Cir.) ("[Tonry] assumed, usually for the sake of simplicity, that [it] possessed jurisdictional authority over the case, and then decided whether the relevant statute created a cause of action. As the Supreme Court has decided, however, this approach is flawed, for '[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction.'" (alteration in original) (citations omitted)).

262. *Id.* at 145.

263. *Id.* at 145–46.

264. *Id.*

on the state's prerogative to supervise its own elections."[265]

In addressing the constitutional issue, the Fifth Circuit explained that a court must first determine whether the probation condition "was either an unreasonable sanction as to [the defendant] or an encroachment on the scheme of state regulation."[266] The court discussed several circuit decisions, including the Ninth Circuit's decision in *Best*, noting that, with the exception of *Best*, most decisions did not invalidate the trial court's sentence.[267] Distinguishing *Best*, the Fifth Circuit announced a rule to address whether a probation condition affecting a state-regulated activity is constitutional:

> A condition of probation that does not extend beyond the term of probation, depends solely on the probationer's conduct and does not rely upon state enforcement or action does not offend the tenth amendment even though it may forbid or restrict the probationer's ability to engage in an activity regulated by the state.[268]

Based on this test, the *Tonry* court affirmed the condition barring the defendant from engaging in state or local politics.[269]

The Fifth Circuit has also determined that a defendant pleading guilty to driving while intoxicated need not be informed that the suspension of the driver's license is a collateral consequence to the conviction.[270] Based on *Moore v. Hinton*,[271] it stands to reason that a federal defendant charged with driving while intoxicated need not be advised that driving privileges may be adversely impacted based on any conviction.[272] Thus, based on the *Tonry* test, Texas federal courts may fashion probation conditions in driving while intoxicated cases that impinge on a defendant's driving privileges.[273]

For example, in *United States v. Martinez*,[274] a magistrate judge

265. *Id.* at 149.

266. *Tonry*, 605 F.2d at 149.

267. *Id.*

268. *Id.* at 150.

269. *Id.* at 152.

270. *See* Moore v. Hinton, 513 F.2d 781, 782–83 (5th Cir. 1975) ("Numerous cases establish that defendants need not be informed of such collateral consequences in order to voluntarily and intelligently plead guilty.").

271. Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975).

272. *Id.* at 782–83.

273. *See Tonry*, 605 F.2d at 150 (establishing the test for when a condition of probation can restrict a probationer's activities that are normally regulated by the state).

274. United States v. Martinez, 988 F. Supp. 975 (E.D. Va. 1998).

in the Eastern District of Virginia sentenced the defendant to a probation condition restricting his operation of motor vehicles.[275] The defendant was charged with driving while intoxicated, driving under the influence, and improper parking on the George Washington Memorial Parkway.[276] Ultimately, "defendant pled guilty to the improper parking charge in exchange for the" dismissal of the other two charges.[277] At sentencing, there was evidence that indicated the defendant was intoxicated, including his failure of several field sobriety tests and two breath tests.[278] The condition specifically allowed the defendant "to drive during the course of his employment as required by his job, and to drive to and from the court, the probation office, and the alcohol education program."[279]

On appeal to the district court, the defendant, relying on *Knott*, argued "that a federal magistrate judge does not have the authority to revoke or suspend a state-issued driver's license."[280] The district judge distinguished *Knott* because that case involved a revocation of a state-issued driver's license as opposed to the sanction in *Martinez*, which simply restricted the defendant's driving activities.[281] Citing the standard enunciated in *Tonry*, the *Martinez* court affirmed the probation condition, stating that it was limited in scope, temporary in duration, and reasonably related to the convicted offense.[282]

Similarly, in *United States v. Crawford*,[283] the defendant was charged with driving while intoxicated on Fort Eustis in Virginia after being stopped for driving erratically.[284] The military policeman detected alcohol on the defendant's breath.[285] The

275. *Id.* at 976.
276. *Id.* at 977.
277. *Id.* at 977 n.1.
278. *Id.* at 977.
279. *Martinez*, 988 F. Supp. at 977 n.3.
280. *Id.* at 978.
281. *Id.*
282. *Id.* at 978–79; *see also* United States v. Webster, No. RWT 08-397, 2009 WL 2366292, at *6 (D. Md. July 30, 2009) ("[A] federal judge may suspend a defendant's state-issued driver's license or restrict driving privileges for the duration of the probationary period." (citing *Martinez*, 988 F. Supp. at 978–79)).
283. United States v. Crawford, 166 F.3d 335, No. 98-4135, 1998 WL 879036 (4th Cir. July 31, 1998) (per curiam).
284. *Id.* at *1.
285. *Id.*

defendant failed three field sobriety tests before refusing both a breath test and a blood test.[286] After a bench trial in front of a magis-trate judge, Crawford was convicted, sentenced to probation, and fined $500.[287] "As a special condition of probation, Crawford was prohibited from operating a motor vehicle on a public highway for a period of three years."[288] The Fourth Circuit affirmed the sentence because the condition was reasonably related to the offense charged and not in excess of the probationary period.[289]

Moreover, although a federal court might not be permitted to suspend a state-issued driver's license for a driving while intoxicated conviction, a court could bar a convicted defendant from driving on federal enclaves.[290] Indeed, such a sanction is explicitly authorized by a federal implied consent statute when a driver simply refuses to be tested for alcohol by way of blood, breath, or urine.[291] On military bases, there is implied consent to such tests by drivers pursuant to federal regulation.[292] Moreover, on such installations an arrest for driving while intoxicated may lead to the

286. *Id.*

287. *Id.*

288. *Crawford*, 1998 WL 879036, at *1.

289. *See id.* at *1, *2 & n.2 ("[W]hile the restriction seems harsh on the surface, the magistrate court was faced with an individual who had had four convictions for driving under the influence in the last six years and was on probation for one of those convictions at the time of the instant offense."); *see also* United States v. Webster, No. RWT 08-397, 2009 WL 2366292, at *1, *6 (D. Md. July 30, 2009) (concluding that a prohibition on driving for five years was reasonable where the defendant's poor driving caused an accident leaving another driver in a vegetative state).

290. *See* United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988) ("[A] federal court [has] the power to limit a defendant's driving privileges within federal enclaves . . . ."); United States v. Lincoln, 581 F.2d 200, 202 (9th Cir. 1978) (noting that a court may "limit the suspension to driving activity on federal enclaves"); United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978) ("[T]he magistrate's court might properly limit the driving privileges of convicted drunk drivers on McClellan Air Force Base or other federal enclaves.").

291. 18 U.S.C. § 3118(b) (2006) (referencing 18 U.S.C. § 3118(a) and declaring that anyone who refuses to submit to a blood, breath, or urine test after a driving under the influence arrest on federal territory "shall be denied the privilege of operating a motor vehicle" in federal enclaves).

292. 32 C.F.R. § 634.8(a) (2009) ("Persons who drive on the installation shall be deemed to have given their consent to evidential tests for alcohol or other drug content of their blood, breath, or urine when lawfully stopped, apprehended, or cited for any offense allegedly committed while driving or in physical control of a motor vehicle on military installations to determine the influence of intoxicants.").

suspension of driving privileges.[293] Thus, such a sanction is available for a defendant who is actually convicted of driving while intoxicated.[294]

Additionally, a federal court may also provide the relevant information relating to a charge of driving while intoxicated to a state's department of motor vehicles so that the state agency may take any appropriate action that is available by statute.[295] When the violation occurs on a military installation, it may be reported to the driver's state department of motor vehicles.[296] Moreover, a federal judge lacks the authority to prohibit a United States Attorney's Office and the Clerk's Office from reporting a federal conviction for driving while intoxicated to the appropriate state motor vehicle department officials.[297] Currently, none of the four Texas federal judicial districts are reporting convictions for driving while intoxicated to the Department of Public Safety, but there are plans to enable the reporting of such federal convictions electronically.

VI. CONCLUSION

The prosecution of a charge for driving while intoxicated or a conviction for the same offense in Texas federal court is very similar to that in Texas state court. However, the slight differences in pursuing these criminal actions can have significant con-sequences, such as the different sentence a defendant faces or the rules and laws that apply to a given case. Having a firm grasp on these differences is essential to a party's success in the criminal matter.

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293. *Id.* § 634.9(a) (stating that it is possible to "administratively suspend or revoke driving privileges on the installation" for cause).

294. *Id.* § 634.9(b)(3)(ii).

295. *See Lincoln*, 581 F.2d at 202 ("The court below may . . . direct that a copy of the judgment and sentence be sent to the Alaska Department of Safety."); *Best*, 573 F.2d at 1102 (suggesting that a federal magistrate's court might forward notice of a drunk driving conviction to the California Department of Motor Vehicles, which is authorized to suspend a driver's license based on a conviction in another jurisdiction).

296. 32 C.F.R. § 634.8(c) ("Any person who operates, registers, or who is in control of a motor vehicle on a military installation involved in a motor vehicle or criminal infraction shall be informed that notice of the violation of law or regulation will be forwarded to the Department of Motor Vehicles (DMV) of the host state and/or home of record for the individual, and to the National Register, when applicable.").

297. United States v. Sweeney, 914 F.2d 1260, 1263–65 (9th Cir. 1990) (noting that "the magistrate's power also grant[s] no authority to direct the Clerk not to report a conviction to California authorities or anyone else entitled to the information").