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The Military Whistleblower Protection Act and The Military Mental Health Evaluation Protection Act

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Introduction

The Military Whistleblower Protection Act[1] (MWPA) and the Military Mental Health Evaluation Protection Act[2] (MMHEPA) attempt to balance command authority with new due process rights for service members. The MWPA encourages service members to report unlawful conduct within the military in exchange for swift redress in the event of reprisal. The MMHEPA requires that commanders and mental health care providers (MHCPs) comply with several procedural requirements before subjecting a service member to a mental health evaluation, treatment or hospitalization. The purpose of the MMHEPA is to protect service members from unwarranted mental health evaluations, treatment, and hospitalization.

To ensure compliance with these statutes, Congress has made violations of the MWPA and certain provisions of the MMHEPA punitive.[3] In addition, the Department of Defense (DOD) has mandated training on the provisions of these statutes for all DOD personnel, especially commanders and MHCPs.[4]

This article provides a comprehensive analysis of the MWPA and the MMHEPA to aid judge advocates in meeting their DOD training requirements. First, it examines the origins, purpose, and legislative amendments to these statutes. Second, the article provides a clear understanding of the current provisions of the MWPA, the MMHEPA and implementing DOD and Army guidance. Third, it provides practical guidance to aid judge advocates in training commanders and MHCPs on the MMHEPA, and implementing DOD and Army guidance. The article also provides practical guidance to defense counsel and legal assistance attorneys who are representing service members. Fourth, it analyzes and discusses the MWPA's and the MMHEPA's shortcomings. Finally, it discusses possible legislative changes to the MWPA in the near future.

The Military Whistleblower Protection Act

Origins, Purpose, and Legislative Amendments to the MWPA

The origins of the MWPA trace back to 1951.[5] While Congress was debating the amendments to the Universal Military Training and Service Act of 1951 (UMTSA),[6] Representative John W. Byrnes received a letter from a constituent. The parents of a sailor asked Representative Byrne for help in acquiring a hardship discharge for their son.[7] When Representative

1. 10 U.S.C.A. § 1034 (West 1998). *See infra* Appendix I for a complete version of 10 U.S.C.A. § 1034.

2. National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992) (certain provisions codified at 10 U.S.C.A. § 1074). *See infra* Appendix J for a complete version of Pub. L. No. 102-484, § 546.

3. *See* 10 U.S.C.A. § 1034(f)(6); *see also* National Defense Authorization Act of 1993 § 546(f).

4. *See* U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION, para. E.3.d (12 Aug. 1995) [hereinafter DOD DIR. 7050.6]; U.S. DEP'T OF DEFENSE, DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, paras. A.2, E.3 (1 Oct. 1997) [hereinafter DOD DIR. 6490.1].

5. Pub. L. No. 51-144, § 1(d), 65 Stat. 73, 75-76.

6. *Id.*

7. *See* 97 CONG. REC. 3775, 3776 (1951).

Byrnes discovered that a Navy regulation prohibited sailors from communicating with members of Congress without first going through the chain of command,[8] he proposed an amendment to the UMTSA.[9] That same year, Congress passed the Byrnes Amendment, which allowed service members to have direct and unrestricted communication with members of Congress.[10] Although communications with members of Congress had to be lawful, the subject matter could include grievances against commanders.[11] In 1956, Congress codified the Byrnes Amendment at 10 U.S.C.A. § 1034.[12] It was almost four decades later,[13] however, that Congress first considered expanding 10 U.S.C.A. § 1034 by proposing military whistleblower legislation.[14] After the House bill failed to win Senate approval in 1986,[15] the House re-introduced the military whistleblower legislation the next year (House Bill 1394) and held hearings.[16] After hearing strong and emotional testimony by both proponents[17] and opponents[18] of whistleblower protection, in 1988, Congress enacted the Military Whistleblower Protection Act (MWPA of 1988).[19] The purpose of the MWPA of 1988 was to balance the commander's authority to preserve discipline with

8. *Id.* The sailor's commander threatened to court-martial the sailor if he disobeyed a Navy regulation that required all verbal and written communication from Navy personnel to Congress to go first through "official channels." *Id*. at 3776-77.

9. *Id*. at 3776-77. During floor debate over the amendment, Representative Byrnes informed members of Congress that he wrote to the services to inquire whether they had prohibited service members from directly communicating with members of Congress. The Navy responded by citing a Navy regulation that prohibited "any communication intended or designed to influence Congress or a member of Congress to favor or oppose any legislation or appropriations affecting the naval establishment, whether pending, proposed, or suggested." *Id*. at 3776. The Judge Advocate General of the Navy interpreted the Navy regulation as requiring "any letter from a member of the naval service to Congress or a representative which affects the naval establishment to be sent through official channels." *Id*. The Army had no similar prohibition and opined that such a prohibition "would be abridging the rights and privileges of a soldier as a citizen were he prevented from expressing his views to his elected members of Congress." *Id*. The Air Force also had no prohibition against direct communications with Congress. *Id.* at 3776-77.

10. 97 CONG. REC. 3775, 3883-84 (1951). The Byrnes Amendment provided, "No member of the Armed Forces shall be restricted or prevented from communicating directly or indirectly with any member of Congress concerning any subject unless such communication is in violation of the law, or in violation of regulations necessary to the security and safety of the United States." Universal Military Training and Service Act of 1951 § 1(d). Curiously, Congress passed the Byrnes Amendment soon after President Truman relieved General MacArthur for communicating with Congress outside of "official channels." *Id.*

11. 97 CONG. REC. 3777 (1951). The purpose of the Byrnes Amendment was "to permit any man . . . to sit down and take pencil and paper and write to his Congressman or Senator." *Id.* Representative Richard Vinson summarized the legislative intent behind the Byrnes Amendment as permitting "every man in the armed services to have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter." *Id*. at 3877.

12. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 80 (1956). In 1956, Congress made minor changes to 10 U.S.C.A. § 1034. For example, Congress deleted the words "prevented," "directly or indirectly," "concerning any subject," "or members," and "and safety" as surplus words. *Id.* In addition, Congress substituted the word "unlawful" for "in violation of law." *Id*.

13. Although in 1978 Congress enacted the Inspector General (IG) Act that provides indirect protections for military whistleblowers, the 1986 proposed legislation would provide direct and greater protections. *See* The Inspector General Act of 1978, Pub. L. No. 94-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C.A. app. (West 1998)). The IG Act made all federal agency IGs (including DOD and service IGs) responsible for investigating violations of law or allegations of fraud, waste, and abuse from federal employees (including service members). *Id.* § 7(a)-(c). The IG Act prohibited reprisals against federal employees who report violations of law or allegations of fraud, waste, and abuse. *Id.* The DOD and Service IGs investigated the first military whistleblower cases in the mid 1980s. *Whistleblower Protection in the Military, 1987-88: Hearings on H.R. 1394 Before the Acquisition Policy Panel of the House Comm. on Armed Services*, 100th Cong. 141-42 (1988) [hereinafter *Hearings on H.R. 1394*].

14. 132 CONG. REC. 19,012, 19,068-85 (1986). In 1986, Representatives Barbara Boxer, Patricia Schroeder, John Bryant, and others co-sponsored an amendment to the National Defense Authorization Act of Fiscal Year 1987 (House Bill 4428) to provide for sweeping protections for military whistleblowers. *Id*. The purpose of the amendment was to encourage military whistleblowers to report fraud, waste, and abuse to Congress without fear of reprisal. *Id*. at 19,073. The amendment would have prohibited reprisals against service members for "making or preparing a communication to a member of Congress or an Inspector General making a complaint or disclosing information evidencing . . . a violation of law, rule, regulation, mismanagement, a gross waste of funds, abuse of authority or substantial and specific danger to public health or safety." *Id.* at 19073-74. The amendment would have also provided service members with the right to a "de novo judicial review" of their cases if they are not satisfied with the administrative review process. *Id*. at 19,068.

15. 132 CONG. REC. 31,219, 31,526 (1986).

16. *Hearings on H.R. 1394*, *supra* note 13. During her opening remarks, Representative Boxer stated that the purpose of the military whistleblower hearings was to "to review protections, if any, in place for service members that blow the whistle on fraud, waste, and abuse with regards to defense procurement." *Id.* at 2-3. Defense procurement fraud being investigated at that time included allegations of overpriced spare parts, cheating by defense contractors during the testing of the DIVAD gun, and faulty manufacturing of the Bradley fighting vehicle. *Id*. at 3.

the service member's duty to report illegal conduct "without fear of retaliation."[20] The MWPA of 1988 mandated unrestricted and reprisal-free communication between service members and Congress or an inspector general (IG).[21] The communication, however, had to be lawful[22] and involve "a violation of law or regulation," mismanagement, fraud, waste, abuse, or a "substantial and specific danger to public health or safety."[23] In 1989 and 1991, Congress amended the MWPA by expanding the class of persons that could make[24] and receive[25]

17. *Id.* at 2-95. On November 19, 1987, the first two witnesses to testify in support of House Bill 1394 were Major Peter Cole, a National Guard officer, and Chief Petty Officer Michael R. Tufarielo, a retired sailor. Major Cole testified that he was the victim of reprisal on three separate occasions after he reported violations of law and mismanagement. Major Cole testified that while he was a cadet at West Point, he witnessed and reported "widespread drug abuse" within the school. After reporting the drug abuse, Major Cole testified that his commander involuntarily hospitalized him in a psychiatric ward. In a second reprisal incident, Major Cole claimed his commander had relieved him for cause after he reported losses of Army combat equipment due to wide spread mismanagement and fraud. Finally, while in the National Guard, Major Cole claimed that his commander relieved him for cause after he reported "flawed accountability and mismanagement of property" at a National Guard Armory. *Id.* at 4-19. Chief Tufarielo testified that while assigned to the Naval Air Station in Dallas, Texas, he reported several acts of fraud that involved payment to reservists for drills that they never performed. After reporting the pay fraud, Mr. Tufarielo testified that his commander involuntarily hospitalized him in a psychiatric ward, gave him a poor performance evaluation, and forced him to retire. Mr. Tufarielo testified that, although he reported the alleged fraud to his superiors, the Navy Inspector General, and the Naval Investigative Service, no investigation ever took place. *Id.* at 19-33.

Two experts in the field of private sector whistleblowers also testified in support of House Bill 1394 Thomas Devine, Legal Director of the Government Accountability Project, testified in support of House Bill 1394 because it would create real protections for military whistleblowers. Mr. Devine testified that the existing avenues of redress for military whistleblowers were inadequate. In particular, he alleged that the services' Boards of Correction for Military Records [BCMR] lacked independence. He attacked the complaint system under Article 138 of the Uniform Code of Military Justice (UCMJ) because commanders controlled the process and there was no right to judicial review. Finally, Mr. Devine argued that IG investigations that were conducted by either the service or installation IGs were inadequate because the investigated officers sometimes rated the IG investigators. *Id.* at 34-49.

Eugene R. Fidell, a Washington D.C. attorney and an expert in the field of private sector whistleblowers, also testified that protections and redress available to military whistleblowers were inadequate. In particular, he testified about one member of the Coast Guard who was a victim of a reprisal after he provided testimony to the Coast Guard IG regarding the improper use of government resources. Mr. Fidell also criticized the services' BCMRs and IGs because they lacked independence and were slow to investigate and provide redress to service members. *Id.* at 50-68.

18. *Id.* at 98-123. On 16 March 1988, Mr. Derek Vander Schaaf, Deputy Inspector General of the Department of Defense; and Mr. Robert L. Gilliat, Assistant General Counsel for the DOD testified in opposition to House Bill 1394. Mr. Vander Schaaf argued against House Bill 1394 for several reasons. First, he felt that the passage of House Bill 1394 could lead to "spurious and haphazard" allegations by disgruntled service members. *Id.* at 99. Second, he believed that the passage of House Bill 1394 would require the DOD IG to give reprisal investigations priority over other important matters. Third, he believed that House Bill 1394 would lessen the DOD IG's authority by making it "a fact gatherer" for the BCMRs. *Id.* Finally, he believed that House Bill 1394 was unnecessary because service members already had a right to unrestricted lawful communication with Congress, and the DOD IG was already investigating reprisal cases. Mr. Vander Schaaf testified that it was the DOD's policy to encourage whistleblowers to report misconduct to the DOD hotline. According to Mr. Vander Schaaf, the DOD Hotline received more than 1,200 cases in 1987 from DOD personnel, including the general public and defense contractor employees. Mr. Vander Schaaf believed that this was proof that the hotline was working. The DOD IG also pursued anonymous complaints, and in certain cases awarded money to whistleblowers. *Id.* at 98-110.

Mr. Gilliat also testified in opposition to House Bill 1394 because he believed that "existing protections for military personnel were already elaborate and sufficient." *Id.* at 110. In particular, Mr. Gilliat testified that military whistleblowers already had sufficient redress from reprisals. For example, service members could seek redress from the DOD or service IGs, the BCMR, the discharge review boards, or use the Article 138, UCMJ complaint process. *Id.* at 110-11. Mr. Gilliat further believed that the provision within House Bill 1394 that allows a de novo review of whistleblower cases in federal court was dangerous. Under House Bill 1394 dissatisfied service members would be allowed to seek judicial review either in the court of appeals in the area they reside, or in the District of Columbia. *Id.* 111-12.

19. National Defense Authorization Act of 1989, Pub. L. No. 100-456, § 846, 102 Stat. 1918, 2027-30 (1988). Although Representative Boxer and others supported a provision within House Bill 1394 that provided for a de novo judicial review of the service member's complaint, due to opposition, the final version of House Bill 1394 excluded that provision. *Id.* Over 100 members of the House, however, co-sponsored House Bill 1394. 134 CONG. REC. 3129, 3165 (1988). The senate had no similar bill and "receded" to the House Bill *See* 134 CONG. REC. 2503, 2567-68 (1988).

20. In establishing this section, the committee carefully balanced two factors:

> [T]he need to maintain appropriate military discipline and the responsibility of military personnel to step forward (at times outside the chain of command) with information on activities that may be improper or illegal without fear of retaliation for that communication.

H.R. REP. NO. 100-563, at 282-3 (1988).

21. National Defense Authorization Act of 1989 § 846(b). This section provides:

> No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted. Any action prohibited by the preceding sentence (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

Id. See also H.R. REP. NO. 100-563, at 283 (1988) (providing, "The prohibition against an unfavorable personnel action is intended to include *any action that has the effect or intended effect* of harassment or discrimination against a member of the military" (emphasis added)).

protected communications, and making violations of the MWPA punitive.[26] In 1994, Congress again amended the MWPA and widened both the class of persons that can receive protected communications[27] and the categories of protected communications that a person can make.[28] Additionally, in 1994, Congress made several procedural changes to the MWPA.[29]

The Current Military Whistleblower Protection Act

The MWPA allows service members to make or prepare protected communications to certain statutorily defined recipients about unlawful conduct.[30] In exchange for blowing the whistle on unlawful conduct, the MWPA provides service members with remedies and a swift investigation of any reprisal.[31]

22. If the information involved national security or its disclosure would violate national security or other laws, then the MWPA would not protect the service member if he or she disclosed the information. National Defense Authorization Act of 1989 § 846(a)(2).

23. The MWPA of 1988 defined a protected communication as:

> A communication described in this paragraph is a communication to a member of Congress or an IG that (under subsection (a)) may not be restricted in which the member of the armed forces makes a complaint or discloses information that the member reasonably believes constitutes evidence of: (A) a violation of law or regulation; or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

National Defense Authorization Act of 1989 § 846(c)(2). The MWPA of 1988 had a combat exception that authorized the DOD IG to overlook allegations of "wrongdoing" that occurred in a combat setting. *Id.* § 846(c)(4). The MWPA of 1988 also gave complainants the right to appeal the DOD IG's findings and recommendations to their service's BCMR and finally to the Secretary of Defense *Id.* § 846(d)(1) and (e). *See also* 32 C.F.R. pt. 92 (1998). ("In deciding a service member's appeal of the service secretary's final decision, the Defense Secretary's decision to uphold or reverse the decision . . . is final.")

24. Congress added members of the Coast Guard, when they are operating under the Navy, as "persons" who could invoke the protections of the MWPA. Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, § 202, 103 Stat. 1908, 1910-11.

25.

> The Secretary of Defense shall prescribe regulations prohibiting members of the Armed Forces from taking or threatening to take any unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, as a reprisal against any member of the Armed Forces for making or preparing a lawful communication *to any employee of the Department of Defense or any member of the Armed Forces who is assigned to or belongs to an organization which has as its primary responsibility audit, inspection, investigation, or enforcement of any law or regulation* (emphasis added).

National Defense Authorization Act of 1992 and 1993, Pub. L. No. 102-190, § 843(a), 105 Stat. 1290, 1449 (1991).

26. *Id*. § 843(b). The Act provided, "The Secretary shall provide in the regulations that a violation of the prohibition by a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice) [sections 801-940 of this title], is *punishable as a violation of section 892 of such title (Article 92 of the Uniform Code of Military Justice)* [section 892 of this title]" (emphasis added). *Id.*

27. National Defense Authorization Act of 1995, Pub. L. No. 103-337, § 531(a)(2)(B)(iv), 108 Stat. 2663, 2756 (1994). The Act provided, "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications." *Id*.

28. *See id.* § 531(b)(2):

> A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following: (A) a violation of a law or regulation, *including a law or regulation prohibiting sexual harassment or unlawful discrimination*; or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety (emphasis added).

Id.

29. *See id.* § 531(b)(1). Congress authorized the DOD IG to delegate reprisal investigations to impartial service IGs:

> If, in the case of an allegation submitted to the IG of the DOD, the IG delegates the conduct of the investigation of the allegation to the inspector general of one of the armed forces, the IG of the DOD shall ensure that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

Id. Congress also eliminated the combat exception. *See id.* § 531(c)(2).

30. 10 U.S.C.A. § 1034(a), (b).

31. *Id*. § 1034(c)-(f).

The General Rule—Protected Communications

The MWPA protects two categories of communications. First, the MWPA protects individual, rather than collective,[32] lawful communications between a service member and a member of Congress or an IG.[33] The lawful communication does not have to involve an allegation of illegal conduct.[34] In addition, one federal case suggests that a service member must communicate in his unofficial capacity to receive the protection.[35] Second, the MWPA protects only those communications that a service member reasonably believes allege illegal conduct.[36] These include violations of law or regulation, reports of sexual harassment or discrimination, mismanagement,[37] or gross waste of funds.[38] They also include abuse of authority or actions that involve "a substantial and specific danger to public health or safety."[39] The DOD IG guide that covers the investigation of reprisal cases expands the scope of protected communications to include those that are made by third parties on behalf of service members.[40]

Making or Preparing a Communication

The MWPA prohibits retaliation against a service member for "making or preparing" protected communications to a statutorily recognized recipient.[41] Although the MWPA, the DOD, and the Army have not specifically defined what act would qualify as "preparing a communication,"[42] the legislative his-

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32. Prior to the 1988 amendments to 10 U.S.C.A. § 1034, the United States Supreme Court interpreted this section as protecting individual communications and not collective or group communications with Congress. *See* Brown v. Glines, 444 U.S. 348, 361 (1980) (upholding an Air Force regulation that required service members to obtain approval before circulating petitions on an air base). The Court did not believe that the regulation violated 10 U.S.C.A. § 1034 because it believed that Congress enacted 10 U.S.C.A. § 1034 "to ensure that an individual member of the armed services could write to his elected representative without sending his communication through official channels." *Id.* at 359. *See also* Secretary of Navy v. Huff, 444 U.S. 453, 458 (1980) (upholding a Navy regulation requiring service members to receive approval before circulating petitions within a Navy base). These two United States Supreme Court cases overturned several lower court holdings which opined that 10 U.S.C.A. § 1034 did protect collective communications. These courts opined that military regulations that require prior command approval before service members could circulate petitions within military bases violated 10 U.S.C.A. § 1034. *See, e.g.*, Huff v. Secretary of Navy, 575 F.2d 907, 915-16 (D.C. Cir. 1978); Allen v. Monger, 583 F.2d 438, 442 (9th Cir. 1978); Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978); Carlson v. Schlesinger, 364 F. Supp. 626, 640-41 (D. D.C. 1973).

33. Unlawful communications involve those communications that disclose information that is in violation of national security or other laws. 10 U.S.C.A. § 1034(a) provides, "(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an IG (2) Paragraph (1) does not apply to a communication that is unlawful." *Id.*

34. "A communication made to a member of Congress or an IG does not necessarily have to disclose information that evidences wrongdoing, it simply has to be a lawful communication." U.S. DEP'T OF DEFENSE, IGDG 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS, para. 2.3.b (6 Feb. 1996) [hereinafter DOD GUIDE 7050.6].

35. *See* Banks v. Garrett, 901 F.2d 1084, 1088-89 (Fed. Cir. 1990) (upholding a 1984 Navy regulation restricting a commander from communicating with Congress in his official capacity). Navy service members, consequently, could only communicate with Congress solely in their private capacity. The 1988 amendments to 10 U.S.C.A. § 1034 eliminated the provision that restricted communications between service members and members of Congress when it violated "a regulation necessary to the security of the United States." *See* National Defense Authorization Act of 1989 § 846(a), 102 Stat. 1918, 2027 (1988). Since the court found the statute was not retroactive, it did not address whether the Navy regulation would violate the amended version of 10 U.S.C.A. § 1034. *See Banks*, 901 F.2d at 1089.

36. *See* 10 U.S.C.A. § 1034(c)(2).

> A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of . . . a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Id.

37. The DOD defines "mismanagement" as "a collective term that covers acts of waste and abuse. [It also includes] [e]xtravagant, careless, or needless expenditure of government funds or consumption or misuse of government property or resources, that results from deficient practices, systems, controls, or decisions. Abuse of authority or similar actions that do not involve criminal fraud." U.S. DEP'T OF DEFENSE, DIR. 7050.1, DEFENSE HOTLINE PROGRAM, para. 1-1 (20 Mar. 1987) [hereinafter DOD DIR. 7050.1]. *See also* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, para. 8-2a (3 Feb. 1995) [hereinafter AR 27-1], which defines mismanagement as "any action or omission, either intentional or negligent, which adversely affects the efficient and effective delivery of legal services, any misuse of government resources (personnel or material), or any activity contrary to operating principles established by Army regulations or TJAG policy memoranda." *Id.*

38. The DOD defines "waste" as "the extravagant, careless, or needless expenditure of government funds or consumption of government property that results from deficient practices, systems, controls, or decisions. The term also includes improper practices not involving prosecutable fraud." DOD DIR. 7050.1, *supra* note 37, para. 1-1.

39. 10 U.S.C.A. § 1034(c)(2).

40. For example, assume that the spouse of a service member reports the service member's commander to the installation IG for fraud. If the commander retaliates against the service member because of a report that the service member's spouse made, the DOD IG will treat the communication as a protected communication by the service member. *See* DOD GUIDE 7050.6, *supra* note 34, para. 2.3.b.

tory to the MWPA suggests that it would include any reasonable attempt to communicate.[43] This includes any good faith act by a service member to communicate with a statutorily recognized recipient that is short of actual communication.[44]

To Whom Does the MWPA Apply?

The MWPA prohibits any "person" from restricting or retaliating against a service member who lawfully communicates with Congress or an IG.[45] The MWPA also prohibits any "person" from restricting or retaliating against a service member who communicates with statutorily recognized recipients about illegal activities.[46] The legislative history of the MWPA and the implementing DOD directive, however, make the MWPA applicable only to DOD personnel.[47]

Whom Does the MWPA Protect?

Although the MWPA protects all "members of the armed forces" who make or prepare a protected communication, it does not define "members of the armed forces."[48] The DOD directive, however, defines "members of the armed forces" as all commissioned and warrant officers, and all enlisted members in all services in any Regular, Reserve or National Guard organization or unit.[49] It also includes all members of the Coast Guard when they are operating under the Navy.[50]

41. *See* 10 U.S.C.A. § 1034(b).

> No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a member of Congress or an [IG] that (under subsection (a)) or preparing-(A) a communication to a member of Congress or an [IG] that (under subsection (a)) may not be restricted; or (B) a communication that is described in subsection (c) (2) and that is made (or prepared to be made) to-(i) a Member of Congress; (ii) an [IG] (as defined in subsection (j)); (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or (iv) any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.
> . . . .
> (2) Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

Id.

42. 10 U.S.C.A. § 1034 does not define the term "preparing a communication." The DOD directive defines a "whistleblower" as one who "makes or prepares to make a protected communication, "but does not define "prepares to make." DOD DIR. 7050.6, *supra* note 4, para. 2-2. Although the Army is in the process of revising applicable regulations that implement 10 U.S.C.A. § 1034, it has not formally defined "preparing a communication." Telephone Interview with Lieutenant Colonel Edith M. Rob, Legal Advisor, U.S. Army Inspector General Agency, Washington, D.C. (29 Jan. 1998) [hereinafter Rob Interview].

43. The floor debate over the intent behind the Byrnes Amendment was "to permit any man . . . to sit down and take pencil and paper and write to his Congressman or Senator." 97 CONG. REC. 3775, 3776 (1951).

44. This would include setting up an appointment with or preparing a letter to any statutorily recognized recipient such as a service IG or Congress. The DOD IG's guide to reprisal investigations suggests a broad interpretation of the term "protected communication." It provides, "If the complainant did not make or prepare a protected communication, but has believed to have done so, you must proceed with the investigation. If you are unable to establish with certainty that the complainant made or prepared a protected communication, give the whistleblower the benefit of the doubt and proceed with the investigation." *Id.* DOD GUIDE 7050.6, *supra* note 34, para. 2.3b.

45. 10 U.S.C.A. § 1034(b).

46. *Id.*

47. The DOD has defined "any person" as all civilian and military DOD personnel and components. DOD DIR. 7050.6, *supra* note 4, paras. B.1 and B.2. The directive applies to all DOD personnel, including:

> The Office of the Secretary of Defense, the military departments (Army, Navy, Air Force, Marine Corps, including the Coast Guard when it is operating as a military service in the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the [DOD IG], the defense agencies, and the DOD field activities, including nonappropriated fund activities.

Id. The legislative history indicates that Congress was primarily concerned with DOD service departments restricting communication between service members and members of Congress. *See* 97 CONG. REC. 3775, 3776, 3883 (1951); *see also Hearings on H.R. 1394*, *supra* note 13, para. 2-3.

48. 10 U.S.C.A. § 1034(a).

49. DOD DIR. 7050.6, *supra* note 4, para. 2-1.

50. *Id.*

Statutory Recipients of Protected Communications

The MWPA protects lawful communications that are made by service members to all members of Congress[51] and any IG.[52] It also protects communications about illegal activities that are made by a service member to all audit, inspection, investigation, or law enforcement personnel within the DOD.[53] Service members may also report illegal activities to "any person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communication."[54] The MWPA, the DOD, and the Army have not specified exactly who falls within the purview of "any person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communication."[55] This broad language, however, seems to include a variety of individuals. For example, all DOD and service equal opportunity (EO) advisors,[56] and all investigating officers that are appointed by law[57] or regulation fall within this language.[58] The language also includes all DOD, service, major command, or installation level hotlines, including sexual harassment or discrimination hotlines. In addition, the term "statutory recipients" includes all DOD component agencies or employees that are designated to investigate sexual harassment or discrimination. Finally, "statutory recipients" arguably include all supervisory attorneys,[59] commanders,[60] and all civilian or military supervisors who receive protected communications from their subordinates.[61]

Prohibited Personnel Actions as Reprisals

51. 10 U.S.C.A. § 1034(b)(1)(A), (B)(i). Members of Congress include any "representative, senator, delegate, or resident commissioner." *Id*. § 1034(j)(1).

52. *Id*. § 1034(b)(1)(A), (B)(ii). An IG includes any person that is appointed under the Inspector General Act of 1978. *See* The Inspector General Act of 1978, 92 Stat. 1101 (codified as amended at 5 U.S.C.A. app. (West 1998)). An IG also includes any military officer or civilian employee "assigned, detailed, or employed as an IG at any command level in one of the DOD Components." 10 U.S.C.A. § 1034(j)(2). *See also* DOD DIR. 7050.6, *supra* note 4, para. 2-1; U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, para. 6-6 (15 Mar. 1994) [hereinafter AR 20-1]. The MWPAs definition of an IG allows service members to make protected communications to any IG within any federal agency. *Id*. para. 6-6i.

53. 10 U.S.C.A. § 1034(b)(1)(B)(iii). Employees of any audit, inspection investigation, or law enforcement organization include "the law enforcement organizations at any command level in any of the DOD components." DOD DIR. 7050.6, *supra* note 4, para. 2-1. This includes the "Defense Criminal Investigative Service, the United States Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, the U.S. Army Audit Agency, the Naval Audit Service, the Air Force Audit Agency, and the Defense Contract Audit Agency." *Id.*

54. 10 U.S.C.A. § 1034(b)(1)(B)(iv).

55. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (30 Mar. 1988) (I04, 17 Sep. 1993) [hereinafter AR 600-20] (This regulation is currently being revised by the Army.). The new changes to *AR 600-20* will address the Army's implementation of the MWPA. The proposed changes to *AR 600-20*, *chapter 5*, initially included a draft provision specifying who may be a recipient of protected communications. The initial draft proposal would have limited recipients of protected communications to IGs; members of Congress; and any audit, inspection, investigation, or law enforcement organization; military or civilian supervisors in the grade of 0-4 or GS-12 and above; all EO advisors; and all commanders of any unit or installation. In addition the initial draft proposal would have included safety officers. *See* U.S. DEP'T OF ARMY, REG. 385-10, SAFETY—THE ARMY SAFETY PROGRAM, para. 5-2 (23 May 1988) [hereinafter AR 385-10]. Finally, the initial draft proposal would have included personnel who are designated as quality assurance medical officers pursuant to *Army Regulation 40-5*. U.S. DEP'T OF ARMY, REG. 40-5, MEDICAL SERVICES—PREVENTIVE MEDICINE, paras. 1-4, 2-2 (15 Oct. 1990) [hereinafter AR 40-5]. Rather than specify who may be a recipient of protected communications, the proponent to *AR 600-20* will simply add a provision to chapter 5 that states complaints or accusations that fall within the Military Whistleblower Protection Act, are addressed in DOD DIR. 7050.6 and *AR 600-20*. The appendix to *AR 600-20* contains a complete copy of the DOD directive that implements the MWPA. *See* AR 600-20 app., *supra.* The proponent to *AR 600-20* expects to release the new changes later this year. Telephone Interview with Major Lindsey Arnold, Chaplain, Department of the Army, Human Relations Branch, Washington, D.C. (30 Mar.1998) [hereinafter Arnold Interview]; Telephone Interview with Lieutenant Colonel Edith M. Rob, Legal Advisor, U.S. Army Inspector General Agency, Washington, D.C. (29 Jan. 1998, 30 Mar. 1998) [hereinafter Rob Interviews].

56. *See, e.g.*, AR 600-20, *supra* note 55. Equal opportunity (EO) advisors (staff sergeant and above) are "designated pursuant to regulation" to receive statements and investigate allegations of discrimination and sexual harassment. *Army Regulation 600-20* also prohibits reprisals against soldiers reporting discrimination or sexual harassment to EO personnel. *Id.* paras. 6-6, 6-8p.

57. *See, e.g.*, UCMJ art. 32 (West 1997). Commanders appoint investigating officers (IOs) "pursuant to established procedures" to perform a complete and thorough investigation of all of the facts that surround the preferral of charges against an accused. The IOs must also consider matters in defense or mitigation. *Id*. art. 32(a), (b). An IO could become a statutory recipient of a protected communication under the MWPA. For example, assume that a witness testifies before an IO that his commander violated a law or regulation. If the commander then takes an unfavorable personnel action because of the witness' testimony, the commander has taken a reprisal in violation of the MWPA.

58. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (C1, 15 Apr. 1994) [hereinafter AR 15-6]. Commanders who appoint investigating officers (IOs) under *AR 15-6* are "designated pursuant to regulation" to receive statements and investigate allegations of wrongdoing by soldiers. *Id*. para. 2-1. An *AR 15-6* IO could become a statutory recipient of a protected communication that falls within the provisions of the MWPA. For example, assume that a witness provides a statement to an IO that his commander abused his authority. If the commander then takes an unfavorable personnel action because of the witness' statement, the commander has committed a reprisal in violation of the MWPA. *See also* DOD GUIDE 7050.6, *supra* note 34, para 2.3.b (providing that "participation as a witness during an official investigation may also qualify as a protected communication").

Although the MWPA prohibits the "taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication," it fails to define "personnel action."[62] The MWPA's legislative history, however, suggests a broad interpretation of this term. This would include any act or omission that has "the effect or intended effect of harassment or discrimination against a member of the military."[63] In addition, the DOD also follows a broad interpreta

tion of "personnel action." It includes "any action taken on a military member that affects or has the potential to affect the military member's current position or career."[64]

Whistleblower Investigations

Although the DOD IG oversees all reprisal investigations, it delegates most reprisal investigations to the respective service IGs.[65] The investigator, however, must be independent and outside the chain of command of both the complaining service member [hereinafter complainant] or the responsible management official (RMO).[66] Since violations of the MWPA are punitive in nature, judge advocates and commanders should refer suspects[67] or RMOs to the United States Army Trial Defense Service (USATDS) for advice and representation.[68]

59. Since an Army regulation designates all "supervisory lawyers at all levels" to receive and review complaints of mismanagement or professional misconduct, supervisory attorneys could be statutory recipients of protected communications. *See* AR 27-1, *supra* note 37, chs. 7, 8. In addition, *AR 27-1* further provides, "No [staff judge advocate] SJA, deputy, supervisor, or other official may take or fail to take any action in regard to a complainant *as a reprisal* for a complaint of mismanagement" (emphasis added). *Id*. para. 8-5. Similarly, medical professionals who are designated by Army regulation to investigate professional misconduct by health care professionals are arguably statutory recipients of protected communications. *See* U.S. DEP'T OF ARMY, REG. 40-68, QUALITY ASSURANCE ADMINISTRATION, paras. 2-1, 4-2, 4-9 (20 Dec. 1989) (IO1 26 Jun. 1991) (IO2 14 May 1993) [hereinafter AR 40-68].

60. Army regulations require commanders who are within the chain of command to receive and act on requests for redress. *See* UCMJ art. 138 (1997). *See also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 20-6 (24 Jun. 1996) [hereinafter AR 27-10]; DOD GUIDE 7050.6, *supra* note 34, para. 2.3.b (providing that "complaints to the chain of command may include, but are not limited to those presented during request for mast or commander's office hours and open door policies"). Arguably, the broad language "including any person or organization in the chain of command" makes any commissioned officer or noncommissioned officer a statutory recipient.

61. Pursuant to *AR 600-20*, service members are protected from disciplinary or adverse action when "registering a complaint . . . with a member of the person's chain of command or supervisor." AR 600-20, *supra* note 55, para. 5-8.c(2).

62. 10 U.S.C.A. § 1034(b).

63. H.R. REP. NO. 100-563, at 282 (1988) (providing that "the prohibition against an unfavorable personnel action is intended to include *any action that has the effect or intended effect* of harassment or discrimination against a member of the military") (emphasis added).

64. DOD DIR. 7050.6, *supra* note 4, at 2-1. The DOD defines a personnel action as:

> Any action taken on a military member that affects or has the potential to affect the military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DOD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's rank.

Id. See also DOD GUIDE 7050.6, *supra* note 34, para. 2.4. The DOD guide provides:

> The definition of personnel action is very broad . . . but not every action cited by a complainant is considered to be a personnel action . . . . While we do not consider the initiation of an investigation to be a personnel action, any personnel action taken as the result of an investigation must be considered if they occur after the complainant made or prepared a protected communication. *Id.*

65. 10 U.S.C.A. § 1034(c)(1). *See* DOD GUIDE 7050.6, *supra* note 34, para. 2-16. According to the Army IG, the DOD IG delegates most reprisal investigations involving Army personnel to the Army IG for investigation. Rob Interview, *supra* note 42; Telephone Interview with Lieutenant Colonel Robert Plummer, Assistant Inspector General, U.S. Army Inspector General Agency, Washington, D.C. (28 Jan. 1998) [hereinafter Plummer Interview]; Telephone Interview with Lieutenant Colonel Curtis Diggs, Assistant Inspector General, U.S. Army Inspector General Agency, Washington, D.C. (28 January 1998) [hereinafter Diggs Interview].

66. 10 U.S.C.A. § 1034(c)(1). The DOD IG guide defines an RMO as "the official(s) who influenced or recommended to the deciding official that he take, withhold, or threaten the action, the official(s) who decided to take, withhold, or threaten the personnel action, and any other official(s) who approved, reviewed, or endorsed the action." DOD GUIDE 7050.6, *supra* note 34, para. 2-7. The author is also drawing from his experience as a senior defense counsel at Fort Gordon, Georgia from 1995-1997.

67. Army IG investigators place personnel who are involved in whistleblower cases into the following three categories: witnesses, subjects, and suspects. Witnesses and subjects may not refuse to answer IG investigators' questions, unless it will incriminate them. Suspects or RMOs, however, may refuse to answer questions altogether, or selectively answer certain questions with counsel present. AR 20-1, *supra* note 52, para. 7-5.

To resolve reprisal allegations, IGs follow an investigator's checklist that focuses on answering three questions.[69] First, whether the complainant made or prepared a protected communication.[70] Second, whether the complainant suffered an "unfavorable personnel action," or whether an RMO deprived the complainant of a "favorable personnel action" after the complainant made or prepared the protected communication.[71] Third, whether the RMO knew of the protected communication before he took or threatened an unfavorable personnel action or withheld a favorable personnel action.[72] If the answer to any of these questions is "no," the investigation generally concludes with a finding of no reprisal.[73] If the answer to all of the questions is "yes," the complainant has established a prima facie case of reprisal. The burden then shifts to the RMO to establish that the taking, threatening, or withholding of the personnel action was not done in reprisal.[74] The service IG may recommend that disciplinary action be taken against the RMO if the IG investigator finds that the RMO took the personnel action in reprisal for the protected communication.[75] The DOD IG will then review the investigation and either follow the service IGs recommendation, replace it with its own recommendation, or return it for further investigation.[76]

Remedies

The MWPA provides complainants with several remedies that include the correction of records,[77] disciplinary action against the offender,[78] compensation,[79] and clemency on a court-martial sentence.[80] The DOD directive that implements the MWPA defines whistleblower remedies as "any action deemed necessary to make the complainant whole."[81] This includes changing "agency regulations or practices," imposing administrative or criminal sanctions against the RMO, or "referral to the United States Attorney or courts-martial convening authority any evidence of criminal violation."[82] Congress initially entertained a provision within the MWPA that would have specifically authorized judicial review of reprisal cases, however, it was excluded due to opposition from DOD officials and other legislators.[83] Despite complainants' attempts to seek judicial review of their whistleblower cases, recent federal court decisions have held that the MWPA only grants "administrative remedies" rather than "private causes of action."[84]

The Military Mental Health Evaluation Protection Act

Origins of the Military Mental Health Evaluation

68. The USATDS routinely provides advice and assistance to RMOs before Army IG investigations. Telephone Interview with Major Joe Swetnam, Operations Officer, Headquarters, United States Army Trial Defense Service, Falls Church, Virginia, (27 Jan., 11 Feb. 1998) [hereinafter Swetnam Interviews].

69. DOD GUIDE 7050.6, *supra* note 34, paras. 2-3 to 2-14.

70. *Id.* para. 2-3.

71. *Id.* para. 2-5.

72. *Id.* para. 2-7.

73. *Id.* para. 2-1.

74. *Id.* para. 2-9. In answering the third question, the IG investigator will consider five factors. First, the RMO's reasons for taking, threatening or withholding the personnel action. Second, whether the RMO's actions were reasonable given the soldier's performance and conduct. Third, whether the RMO treated soldiers similarly under similar circumstances. Fourth, whether the RMO had a motive to retaliate. Finally, whether the RMO took or withheld personnel action pursuant to regulation and policy. *Id.* paras. 2-9 to 2-12.

75. 10 U.S.C.A. § 1034(e)(4) (West 1998).

76. Rob Interview, *supra* note 42; Diggs Interview, *supra* note 65.

77. 10 U.S.C.A. § 1034(f)(5) (providing that, "the Secretary shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited"). *Id.*

78. *Id.* § 1034(f)(6).

79. 10 U.S.C.A. § 1552(c) (authorizing payment of a claim "for the loss of pay, allowances, compensation, emoluments, other pecuniary benefits, or for the repayment of a fine or forfeiture . . .").

80. *Id.* § 1552(f).

81. DOD DIR. 7050.6, *supra* note 4, para. 2-1.

82. *Id.*

Protection Act

The origins of the MMHEPA trace back to the 1987-88 congressional hearings on military whistleblower legislation.[85] During these hearings, Congress heard from several witnesses who claimed that their commanders involuntarily confined them in military psychiatric wards without providing them with any due process.[86] During the hearings, Congress also discovered that commanders had no established criteria for assessing when to refer soldiers for mental health evaluations.[87] Consequently, Congress enacted legislation that required the DOD to create an advisory panel to review the mental health evaluation process within the DOD.[88] In addition, the advisory panel was to develop safeguards for service members, and guidelines for commanders and MHCPs to follow, before mental health evaluations, treatment, or hospitalization of service members occurred.[89]

Current Law

The DOD advisory committee made its recommendations to the Secretary of Defense and to Congress on how the DOD should conduct mental health evaluations, treatment, and hospitalization of service members. As a result, in 1992 Congress enacted the MMHEPA.[90] The MMHEPA requires commanders to notify service members of the referral and several rights before a MHCP may perform the mental health evaluation.[91] The MMHEPA also has specific rules for emergency evaluations, treatment, and hospitalization of service members.[92] Finally, the MMHEPA makes punitive any mental health referrals that are made against military whistleblowers in reprisal.[93]

83. The original military whistleblower legislation contained a provision that allowed service members to seek a de novo judicial review de novo of their complaints by the Court of Federal Appeals. *See* 132 CONG. REC. 19012, 19068-85 (1986); *Hearings on H.R. 1394*, *supra* note 13, at 142-43. During the hearings on House Bill 1394 Representative Boxer stated, "The notion of judicial review . . . is a very important part of my legislation. It may not survive this bill. I am going to fight for it, because I think the important thing is to have—is to exert some pressure on the system, some check and balance on the system, and I think judicial review de novo does just that." *Id. See also* 134 CONG. REC. 181, 190-91 (1988). Robert L. Gilliat, DOD Assistant General Counsel and Derek Vander Schaaf, DOD Deputy Inspector General both opposed House Bill 1394. In particular, they opposed the provision within House Bill 1394 that would authorize service members the right to seek a de novo review of their cases in federal court if dissatisfied with the administrative review process. *See Hearings on H.R. 1394*, *supra* note 13, at 98-100, 120-121. *See also supra* note 18 and accompanying text.

84. Several complainants have unsuccessfully used a provision within the MWPA to argue that a private right of action exists. Specifically, 10 U.S.C.A. § 1034(f)(4) provides that, "if the Secretary fails to issue a final decision . . . the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under Section 1552 of this title." *See* Hernandez v. United States, 38 Fed. Cl. 532, 534 (1997); Acquisto v. United States, 70 F.3d 1010, 1011 (8th Cir. 1995); Alasevich v. United States Air Force Reserve, No. 95-CV-2572, 1997 WL 152816 (E.D. Pa. Mar. 26, 1997). In *Alasevich*, the court dismissed an airman's suit that sought monetary damages for reprisals. The court held that 10 U.S.C.A. § 1034 did not provide a private cause of action. *Alasevich*, 1997WL 152816 at *10. Although these cases were filed after the DOD issued a final decision, complainants may have a federal cause of action where the agency fails to issue a final decision.

85. *Hearings on H.R. 1394*, *supra* note 13.

86. *Id*. at 5-6, 11-12, 22-23. One prior service member, Major Cole, testified that his commander involuntarily confined him in a mental ward as a reprisal for reporting widespread drug abuse within West Point. While confined, he met other service members who were confined by their commanders for objecting to Army policy. He testified that the mental health care providers forcibly administered incapacitating drugs and electric shock treatment to several patients. *Id*. at 5-6.

87. *Id*. at 76-77. In a letter dated 19 January 1988, the Assistant Secretary of Defense for Health Affairs (ASDHA) informed Congress that no procedures existed concerning how commanders and mental health professionals processed mental health referrals within the DOD. The ASDHA wrote "[T]he decision to refer a service member for psychiatric evaluation is within the sound discretion of a medical officer or the commander on a case by case basis. The commander is expected to use his best judgment in making such a decision." *Id.* at 77.

88. National Defense Authorization Act of 1991, Pub. L. No. 101-510, § 554(d), 104 Stat. 1485, 1568 (1990). The Act provides:

> The advisory committee shall develop and recommend to the Secretary [of Defense] regulations on procedural protections that should be afforded to any member of the Armed Forces who is referred by a commanding officer for a mental health evaluation by a mental health professional. The recommended regulations shall apply uniformly throughout the DOD and shall include appropriate procedural protections according to whether the evaluations are to be carried out on an outpatient or inpatient basis and whether, based on the results of the evaluation, the member is to be involuntarily hospitalized in a mental health treatment facility. In developing the regulations with respe ct to procedural protections for evaluations conducted on an inpatient basis, the committee shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian mental health organizations.

Id.

89. *Id*. Congress required the advisory panel to "recommend procedural protections for members of the armed forces referred for mental health evaluation or involuntary psychiatric hospitalization." H.R. CONF. REP. NO. 101-923, at 608 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3165.

90. National Defense Authorization Act of 1993 § 546, 106 Stat. at 2416-19 (1992).

91. *Id.* § 546(b).

92. *Id*. § 546(d).

Protected Persons

The MMHEPA applies to all active duty and reserve[94] service members in the Army, Navy, Air Force, and Marine Corps.[95] It also applies to all active and reserve service members in the Coast Guard when they are operating under the Navy.[96]

Mental Health Referrals within the MMHEPA

The legislative history[97] and the MMHEPA suggest that the procedural protections that are afforded to service members should apply to all involuntary mental health referrals.[98] The scope of the procedural protections depends on whether the referral is for an outpatient or an inpatient evaluation, an emergency evaluation, or an involuntary hospitalization.[99] Although the MMHEPA defines a "mental health evaluation,"[100] it makes no distinction between routine, non-routine, discretionary, or non-discretionary referrals.[101] The MMHEPA also fails to provide any guidance on whether there are certain types of mental health evaluations that fall outside of its coverage.[102]

The DOD directive that implements the MMHEPA, however, has exempted all non-discretionary referrals from the procedural requirements of the MMHEPA.[103] The directive only requires commanders to apply the MMHEPA's procedural requirements to referrals that are made as part of their "discretionary authority."[104] The DOD directive considers six catego-

93. *Id.* § 546(f).

94. U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, para. 2-3 (28 Aug. 1997) [hereinafter DOD INSTR. 6490.4]. Although the DOD Instruction does not include members of the National Guard within its definition of "members," the MMHEPA's broad definition would likely include them.

95. National Defense Authorization Act of 1993 § 546(g)(1) (1992).

96. DOD INSTR. 6490.4, *supra* note 94, at 2-3.

97. There is little legislative history behind the enactment of the MMHEPA. This suggests that the MMHEPA applies to all involuntary mental health referrals. For example, during the whistleblower hearings when the issue of psychiatric evaluations arose, the discussions focused on protecting service members from involuntary evaluations. Legislators made no distinctions between routine, non-routine, command discretionary, or non-discretionary evaluations. *See generally Hearings on H.R. 1394*, *supra* note 13. *See also* H.R. CONF. REP. 102-966, at 710 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1636, 1801 ("The regulations shall cover procedures for outpatient and inpatient evaluations, member rights, procedures for out patient and inpatient evaluations, and a prohibition against the use of referrals . . . to retaliate against whistleblowers.").

98. National Defense Authorization Act of 1993 § 546(a), (b) and (d), 106 Stat. at 2416-17 (1992).

The MMHEPA provides:

> Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise applicable regulations to incorporate the requirements set forth in subsections (b), (c), and (d). In revising such regulations, the Secretary shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian health organizations. The revisions required by subsection (a) shall provide that, except as provided in paragraph (4), *a commanding officer shall consult with a mental health professional prior to referring a member of the armed forces for a mental health evaluation to be conducted on an outpatient basis* (emphasis added). (d)(1) The revisions required by subsection (a) shall provide that a member of the Armed Forces may be admitted, under criteria for admission set forth in such regulations, to a treatment facility for an emergency or involuntary mental health evaluation when there is reasonable cause to believe that the member may be suffering from a mental disorder.

Id.

99. *Id.* § 546(b)(1), (d)(1).

100. The MMHEPA defines "mental health evaluations" as "a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing a member's state of mental health." *Id*. § 546(g)(4). The DOD has a broader definition of "mental health evaluations" and defines it as:

> A clinical assessment of a service member for a mental, physical, or personality disorder, the purpose of which is to determine a service member's clinical mental health status and/or fitness and/or suitability for service. The mental health evaluation shall consist of, at a minimum, a clinical interview and mental status examination and may include, additionally: a review of medical records; a review of other records, such as the service personnel record; information forwarded by the service member's commanding officer; psychological testing; physical examination; and laboratory and/or other specialized testing. Interviews conducted by the family advocacy program or service drug and alcohol abuse rehabilitation program personnel are not considered mental health evaluations.

DOD DIR. 6490.1, *supra* note 4, paras. 2-1, 2-2.

101. National Defense Authorization Act of 1993 § 546.

102. *Id. See* H.R. CONF. REP. NO. 102-966, at 710 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1636, 1801.

103. *See* DOD DIR. 6490.1, *supra* note 4, para. D.3.

ries of mental health referrals as non-discretionary and inapplicable to the MMHEPA.[105] They are: voluntary self-referrals, mental capacity and mental responsibility inquiries,[106] referrals to family advocacy programs,[107] referrals to drug and alcohol abuse rehabilitation programs,[108] voluntary diagnostic referrals that are made by non-MHCPs, and non-discretionary evaluations that are required by a "service regulation for special duties or occupational classifications."[109] The Army has also exempted the above listed evaluations.[110]

Commander's Responsibilities

Non-Emergency Outpatient and Inpatient Evaluations

Before referring a service member to a MHCP for a non-emergency outpatient mental health evaluation or treatment, commanders must consult[111] with a MHCP,[112] or equivalent.[113] Although the MMHEPA is unclear on the extent of the consultation requirement, the DOD requires that commanders discuss the service member's "actions and behaviors" and the reasons for the referral with the MHCP.[114] Finally, commanders must

104. *Id.* Referrals that are made as part of the commander's discretionary authority must comply with the MMHEPA and DOD procedural requirements. DOD DIR. 6490.1, *supra* note 4, para. D.3.e. *See* Message, 080700Z Mar 96, Headquarters, Dep't of Army, DAPE-HR-L, subject: Mental Health Evaluations (Clarification) (ALARACT 21/96) (8 Mar. 1996), para. 6 [hereinafter Mental Health Evaluations].

There are several routine evaluations that a commander may direct as part of his discretionary authority (See Appendix F and G). *See generally,* U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS— ENLISTED PERSONNEL, para. 5-13 (30 Mar. 1988) (C15, 26 Jun. 1996) [hereinafter AR 635-200]. Although *AR 635-200* requires commanders to refer soldiers for mental health evaluations during the processing for elimination for personality disorders, to the extent that commanders refer soldiers to MHCPs to determine whether the soldier has a personality disorder, the referral is to be discretionary. *See* AR 635-200, *supra* paras. 1-34b. 5-13. Consequently, commanders must comply with the DOD and the MMHEPA procedural requirements prior to a referral under *AR 635-200, para. 5-13. See* DOD DIR. 6490.1, *supra* note 4, para. D.3.e. Telephone Interview with Commander Mark Paris, Office of the Assistant Secretary of Defense for Health Affairs, Department of Defense, Washington, D.C. (24 February 1998) [hereinafter Paris Interview]. Commander Paris is the DOD action officer for mental health evaluation issues. He opined that any referral that allows the commander to use discretion requires compliance with the MMHEPA and the DOD procedural requirements. *Id.*

105. DOD DIR. 6490.1, *supra* note 4, para. D.3.e. *See also* ALARACT 21/96, *supra* note 104, para. 6.

106. Prior to the beginning of a court-martial, the convening authority or the military judge may order an inquiry into an accused's mental capacity or mental responsibility. If any commander, investigating officer, trial or defense counsel believes that an accused service member lacks either the mental capacity or the mental responsibility for trial by courts-martial, that person may request that the service member undergo a mental inquiry. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (a), (b) (1995).

107. Family advocacy interviews involve medical assessments and treatment of family members. *See* U.S. DEP'T OF DEFENSE, DIR. 6400.1, FAMILY ADVOCACY PROGRAM, para. 6.1 (23 Jun. 1997). *See also* U.S. DEP'T OF ARMY, REG. 608-18, FAMILY ADVOCACY PROGRAM, paras. 3-27 to 3-30 (26 Oct. 1995).

108. DOD DIR. 6490.1, *supra* note 4, para. D.3.e. *See also* ALARACT 21/96, *supra* note 104, para. 6. Drug and alcohol abuse interviews normally take place during the "intake procedures." Intake procedures require a mental health evaluation to determine the service member's need for "detoxification and potential for rehabilitation." *See* U.S. DEP'T OF DEFENSE, DIR. 1010.4, ALCOHOL AND DRUG ABUSE BY DOD PERSONNEL, para. E.3.b(2)(a) (25 Aug. 1980); U.S. DEP'T OF DEFENSE, INSTR. 1010.6, REHABILITATION REFERRAL SERVICES FOR ALCOHOL AND DRUG ABUSERS (13 Mar. 1985). *See also* U.S. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 3-10 (21 Oct. 1988).

109. Evaluations that are made as part of "special duties or occupational classifications" include security clearance evaluations, recruiter evaluations, and evaluations for soldiers who enter the personnel reliability program. DOD DIR. 6490.1, *supra* note 4, para. D.3.e. *See also* Mental Health Evaluations Message, *supra* note 104, para. 6.

110. In 1996, the Army, in coordination with the DOD, issued a message that exempted several types of routine referrals from compliance with the DOD and the MMHEPA procedural requirements. The Army message exempted all "voluntary self-referrals," routine diagnostic evaluations that are made by health care providers outside the soldier's chain of command, referrals to family advocacy or alcohol and drug abuse programs, competency inquiries, and referrals that are made for certain duties. The Army also exempted routine evaluations that are required by regulation, for example, those conducted under *AR 635-200*. Mental Health Evaluations Message, *supra* note 104, para. 6. *See* AR 635-200, *supra* note 104. When the DOD issued its new DOD directive and instruction in 1997, however, it did not specifically exempt all routine evaluations required by regulation from compliance with the DOD and the MMHEPAs procedural requirements. DOD DIR. 6490.1, *supra* note 4, para. D.3.e. The DOD, however, considers routine evaluations that are required by service regulations to be non-discretionary evaluations and outside of the DOD and the MMHEPA procedural requirements. Paris Interview, *supra* note 104.

111. National Defense Authorization Act of 1993 § 546(b)(1), 106 Stat. at 2416-17 (providing that "a commanding officer shall consult with a mental health professional prior to referring a member of the armed forces for a mental health evaluation to be conducted on an outpatient basis"). *Id. See* DOD DIR. 6490.1, *supra* note 4, at D.2.b; DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(2).

consider the MHCP's "advice and recommendations" before going forward with the referral.[115]

After consulting with a MHCP, commanders must provide written notice of the referral to the service member at least two business days before making a non-emergency referral.[116] The written notice must include the date, time, place, and name of the MHCP who will perform the evaluation.[117] It must list the commander's reasons for the referral and the name of the MHCP when the commander consulted.[118] It must include an explanation if the commander was unable to consult with a MHCP prior to the referral.[119] The notice must also inform the service member of the names and phone numbers of local individuals who can assist the service member rebut the referral.[120]

Commanders must also notify the service member of several non-waivable rights.[121] First, a commander must notify the service member of his right to speak to an attorney at least two business days before the scheduled evaluation.[122] Second, a commander must notify the service member of the right to speak to the IG and to file a complaint with the IG if the service member believes that the referral is improper.[123] Third, a commander must notify the service member of his right to have an independent MHCP evaluate him at his own expense.[124] Finally, a commander must notify the service member of his right to communicate with Congress or an IG about the referral.[125] After the commander and the service member sign the

112. The MMHEPA uses the term "mental health professional" and defines it as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." National Defense Authorization Act of 1993 § 546(g)(3). The DOD follows the MMHEPA's definition but labels "mental health professionals," as "mental health care providers." DOD DIR. 6490.1, *supra* note 4, para. 2-2. *See* DOD INSTR. 6490.4, *supra* note 94, para. 2-2. For purposes of clarity, the term "mental health care provider" (MHCP) is used throughout this paper.

113. The DOD instruction requires that commanders first consult with a MHCP before the referral. If no MHCP is available, then the commander may consult with a physician or the "senior privileged non-physician provider present." DOD DIR. 6490.1, *supra* note 4, para. D.2.b; DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(2). The DOD defines a "senior privileged non-physician provider present" " . . . the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, " in the absence of a physician. DOD DIR. 6490.1, *supra* note 4, para. 2-2; DOD INSTR. 6490.4, *supra* note 94, para. 2-2. *See* Major Christopher M. Garcia, Administrative Law Note, *Mental Health Evaluations*, ARMY LAW., Dec. 1997, at 32-34 (providing a summary of the commander's responsibilities under the MMHEPA and DOD directive and instruction).

114. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(2).

> Whenever a commanding officer determines it is necessary in his opinion to refer a service member for [a] mental health evaluation, the commanding officer first shall consult with a mental healthcare provider to discuss the service member's actions and behaviors that the commanding officer believes warrant the evaluation. The mental healthcare provider shall provide advice and recommendations about whether the evaluation should be conducted routinely or on an emergency basis.

Id.

115. *Id.*

116. *Id.* para. F.1.a(4). *See infra* Appendix A.

117. National Defense Authorization Act of 1993 § 546(b)(3)(A), 106 Stat. at 2416. *See* DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(a)(4).

118. National Defense Authorization Act of 1993 § 546(b)(3)(B), (C). *See* DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(a)1 and 2.

119. National Defense Authorization Act of 1993 § 546(b)(3)(C). *See* DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(a)2.

120. National Defense Authorization Act of 1993 § 546(b)(3)(D). *See* DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(a)5.

121. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(d) (providing that "commanding officers shall not offer service members an opportunity to waive his or her right to receive the written memorandum and statement of rights . . . "). *Id. See infra* Appendix A.

122. National Defense Authorization Act of 1993 § 546(c)(a)(1).

> Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the [DOD] and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section.

Id. See DOD INSTR. 6490.4, *supra* note 94, enclosure 4.

123. National Defense Authorization Act of 1993 § 546(c)(a)(2). *See* DOD INSTR. 6490.4, *supra* note 94.

124. National Defense Authorization Act of 1993 § 546(c)(a)(3). *See* DOD INSTR. 6490.4, *supra* note 94.

notification memorandum, the commander must provide the service member with a copy.[126]

After complying with the consultation and notice requirements, commanders must request the mental health evaluation in writing.[127] The MMHEPA authorizes the inpatient evaluations of service members only when an outpatient evaluation is inappropriate under the "least restrictive alternative principle,"[128] and a "qualified professional"[129] makes the admission.[130]

Consideration of the MHCP's Recommendations

After receiving the MHCP's recommendations, following the service member's evaluation, the commander must document any action that is taken and the reasons for taking the action.[131] For example, if a commander retains a soldier despite the MHCP's recommendation to separate the soldier, the commander must document his reasons for retaining the service member.[132] The commander then has two days to forward a memorandum to his superior explaining his decision to retain the soldier.[133]

125. National Defense Authorization Act of 1993 § 546(c)(a)(4)(A) (providing that the right to communicate only extends to lawful communications). *See* DOD INSTR. 6490.4, *supra* note 94.

126. National Defense Authorization Act of 1993 § 546(b)(3)(F). *See also* DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(4)(a)(6).

127. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(3). *See infra* Appendix B.

128. The MMHEPA defines the "least restrictive alternative principle" as:

> A principle under which a member of the armed forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment. National Defense Authorization Act of 1993 § 546(g)(5). The DOD directive expands this definition to include, "such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotheraphy, as clinically indicated." DOD DIR. 6490.1, *supra* note 4, para. 2-1.

See DOD INSTR. 6490.4, *supra* note 94, para. 2-1.

129. "A qualified professional is a psychiatrist, or when one is not available, a mental health professional or a physician." National Defense Authorization Act of 1993 § 546(b)(2)(B).

130. *Id.* § 546(b)(2).

131. DOD DIR. 6490.1, *supra* note 4, para. D.8.

132. *Id.*

133. *Id.* para. D.8.b.

Emergency Evaluations

Commanders must make a "clear and reasoned judgment"[134] before making an emergency mental health referral.[135] The "clear and reasoned judgment" standard requires commanders to carefully consider the facts and circumstances of each case before making an emergency referral.[136] In addition, commanders may only make emergency referrals if there is no time to comply with all of the MMHEPA's procedural requirements before the referral.[137] An example of a proper emergency referral is one that is made after a commander discovers that one of his soldiers is about to seriously injure another person.[138] Another example is a referral that is made for a service member who is unable to take care of himself.[139]

Even if an emergency referral is proper, commanders must still "make every effort to consult" with a MHCP prior to the referral.[140] While consulting with MHCPs, commanders must explain why they believe an emergency referral is appropriate.[141] Commanders must also consider the MHCP's advice and recommendations prior to making the emergency referral.[142] If prior consultation with a MHCP is impossible, the commander must consult with a MHCP at the location of the service member's evaluation.[143] After they have consulted with the MHCP, commanders must document what was discussed, including the reasons for the referral.[144] Commanders must then forward a copy of this memorandum to the MHCP.[145] If commanders are unable to consult with MHCPs either prior to or at the location of the evaluation, they must document their reasons for the emergency referral and immediately forward a copy of this memorandum to the MHCP.[146] In addition, commanders must,

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134. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(a).

135. The MMHEPA does not define the term "emergency." The DOD directive and instruction define "emergency" as:

> A situation in which a service member is threatening imminently, by words or actions, to harm himself, herself or others, or to destroy property under circumstances likely to lead to serious personal injury or death, and to delay a mental health evaluation to complete administrative requirements in accordance with *DOD Directive 6490.1* or this Instruction could further endanger the service member's life or well-being, or the well-being of potential victims. An emergency with respect to oneself may also be construed to mean an incapacity by the individual to care for him or herself, such as not eating or drinking; sleeping in inappropriate places or not maintaining a regular sleep schedule; not bathing; defecating or urinating in inappropriate places, etc. While the service member retains the rights as described in [the DOD directive] and this Instruction in cases of emergency, notification to the service member of his or her rights shall not take precedence over ensuring the service member's or other's safety and may be delayed until it is practical to do so.

Id. para. 2-1. *See* DOD DIR. 6490.1, *supra* note 4, para. 2-1.

136. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(a).

137. *Id.*

138. *Id.* para. 2-1.

139. *Id.*

140. *Id.* para. F.1.a.(5)(b). The MMHEPA and the DOD directive and instruction do not specify whether the consultation must be in person. If the commander is unable to consult in person, there is nothing that prohibits the commander from consulting by phone.

141. DOD DIR. 6490.1, *supra* note 4, para. D.2.c.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id. See infra* Appendix C.

146. *See infra* Appendix C. The DOD instruction suggests that the commander send the memorandum to the MHCP "by facsimile, overnight mail, or courier." DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(e). There is a discrepancy between the DOD directive and the DOD instruction regarding the commander's consultation requirement. The DOD directive requires that commanders consult with MHCPs prior to the emergency referral or immediately thereafter at the location of the service member's evaluation. The directive then requires the commander to document the contents of the consultation and the commander's reasons for the emergency referral. The commander must then send a copy of the memorandum to the MHCP. The DOD directive appears to mandate either a prior consultation or a consultation at the location of the evaluation. DOD DIR. 6490.1, *supra* note 4, para. D.2.c(2). The DOD instruction, however, suggests that if the commander is unable to consult with a MHCP prior to the referral or at the location of the evaluation, immediately sending a memorandum to the MHCP, which contains the commander's reasons, would suffice. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(e). Mr. Herb Harvell, who is the DOD official responsible for drafting the DOD directive and the DOD instruction, suggests that commanders follow the language within the instruction. In other words, in those *limited circumstances* where the commander is unable to consult with a MHCP prior to or at the location of the evaluation, a memorandum that details the commander's reasons for the emergency referral would suffice. Commanders must still send the memorandum to the MHCP by "facsimile, overnight mail or courier." Telephone Interview with Mr. Herb Harvell, Office of Special Inquiries, Department of Defense Inspector General's Office, Washington, D.C. (Feb. 2, 1998) [hereinafter Harvell Interview].

as soon as possible, provide the service member with the same referral and rights notice that is required for non-emergency evaluations[147] If a MHCP decides to involuntarily hospitalize a service member, commanders must further inform the service member of the "reasons for and the likely consequences of the admission."[148] Finally, a commander must advise the service member of his right to contact "a family member, friend, chaplain, attorney, or IG."[149]

Whenever a commander believes that a service member is "likely" to harm himself or others, and he is suffering from a "severe mental disorder,"[150]the commander must refer him for an emergency evaluation.[151] Despite this affirmative duty, commanders must still comply with the consultation and notice requirements that are required for emergency referrals.[152]

Mental Health Care Provider Responsibilities

Before a MHCP performs a non-emergency mental health evaluation on a service member, he must ensure that the commander has complied with the consultation, notice, and formal request requirements.[153] If a MHCP suspects that a referral is improper, the MHCP must first "confer"[154] with the commander before he conducts the evaluation.[155] If, after conferring with the commander, the MHCP discovers that the mental health referral was made in violation of the MMHEPA, the MHCP

147. *Id.* para. F.1.a(5)(d). *See infra* Appendix D.

148. *Id.* para. F.2.b(1).

149. *Id.* para. F.2.b(2).

150. The MMHEPA does not define "mental disorder." The DOD defines a "mental disorder" as:

> A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress ([for example], a painful symptom) or disability ([for example], impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event; for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior ([for example], political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.

Id. para. 2-1.

151. The DOD directive that implements the MMHEPA provides:

> The commanding officer shall refer a service member for an emergency mental health evaluation as soon as practicable whenever a service member, by actions or words, such as actual, attempted or threatened violence, intends to cause serious injury to himself, herself or others and when the facts and circumstances indicate that the service member's intent to cause such injury is likely and when the commanding officer believes that the service member may be suffering from a severe mental disorder.

DOD DIR. 6490.1, *supra* note 4, para. D.2.c(1).

152. DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(d).

153. DOD INSTR. 6490.4, *supra* note 94, para. F.1.c(1). The instruction provides:

> Before a non-emergency mental health evaluation occurs, the mental healthcare provider shall determine if procedures for referral for mental health evaluation have been followed in accordance with *DOD Directive 6490*.1 and [*DOD* Instruction *6490.4*] . . . Specifically, the mental healthcare provider shall review the signed memorandum including the Statement of service member's Rights forwarded by the Service member's commanding officer in accordance with subparagraph F.1.a(4)(a).

Id. See infra Appendices A and B.

154. It does not appear that the DOD considered how this "confer" requirement should interact with the suspect rights advisement requirement of Article 31(b), UCMJ. Judge advocates should instruct MHCPs to consult their legal advisor before questioning a commander suspected of violating the Uniform Code of MilitaryJustice.

155. The instruction provides:

> Whenever there is evidence, which indicates that the mental health evaluation may have been requested improperly, the mental healthcare provider shall first confer with the referring command to clarify issues about the process or procedures used in referring the service member. If, after such discussion, the mental healthcare provider believes the referral may have been conducted improperly per DOD Directive 6490.1 . . . or DOD Directive 7050.6 . . . the mental healthcare provider shall report such evidence through his or her chain of command to the next higher level of the referring commanding officer.

DOD INSTR. 6490.4, *supra* note 94, para. F.1.c(2).

must report the violation to the commander's superior.[156] In an emergency referral, the MHCP must ensure that the commander consulted with a MHCP prior to the referral.[157] In addition, the MHCP must review the commander's documented reasons for the referral.[158]

Once the MHCP determines that the commander complied with the procedural requirements, prior to the evaluation, the MHCP must inform the service member of the "purpose, nature, and likely consequences" of the evaluation.[159] In addition, the MHCP must inform the service member that the evaluation is not confidential.[160] Soon after the evaluation, the MHCP must advise the service member's commander of the results of the evaluation and any recommendation.[161]

If the MHCP decides to involuntarily hospitalize a service member, he must first notify the service member "orally and in writing" of the reasons for the hospitalization.[162] Within twenty-four hours of admission,[163] the attending "privileged psychiatrist" must evaluate the service member and assess whether continued hospitalization is necessary.[164]

Whenever a service member both intends to and has an ability to seriously injure himself or others, the MHCP must take precautions.[165] These precautions may include, but are not limited to, notifying the service member's commander, military or civilian police, or "potential victims."[166] Upon taking these precautions, the MHCP must also notify the service member of the precautions that were taken and document them in his medical records.[167] Finally, prior to discharging the service member, the MHCP must inform the service member's commander and "potential victims" of the discharge.[168]

Independent Review of Admission and Continued Hospitalization

Within seventy-two hours of a service member's involuntarily hospitalization, the medical facility commander must appoint an impartial field grade medical officer to review the propriety of the admission.[169] The reviewing officer (RO) will then conduct an informal investigation and interview the service member within seventy-two hours after the admission.[170] Prior to interviewing the service member, however, the RO must inform him of the purpose of the interview.[171] The RO

156. *Id.* Soldiers have filed IG complaints with the DOD and Army IGs accusing commanders of violating the procedural requirements of the MMHEPA. The Army IG normally investigates procedural violations that come to his attention. Plummer Interview, *supra* note 65.

157. *Id.* para. F.1.c(1).

158. DOD INSTR. 6490.4, *supra* note 94, para. F.1.c(1). *See infra* Appendix C.

159. *Id.* para. F.1.c(3).

160. *Id.*

161. *Id.* para. F.1.c(5). "Mental healthcare providers shall provide information to commanding officers about service members referred for mental health evaluations about diagnosis, treatment, and prognosis and shall make recommendations about administrative management, which commanding officers shall consider." *Id*. para D.6. *See infra* Appendix E.

162. National Defense Authorization Act of 1993 § 546(d)(2)(D), 106 Stat. at 2419 (1992).

163. Although the MMHEPA requires the MTF or clinic to review the necessity of continued hospitalization within two days of the admission, the DOD has lowered this time period to twenty-four hours. National Defense Authorization Act of 1993 § 546(d)(2)(C); DOD INSTR. 6490.4, *supra* note 94, para. F.2.b(3).

164. DOD INSTR. 6490.4, *supra* note 94, para. F.2.b(3). If a privileged psychiatrist is not available, a privileged physician may perform the evaluation. *Id.* A privileged psychiatrist has "the authority and responsibility for making independent decisions to diagnose, initiate, alter, or terminate a regime of medical care." U.S. DEP'T OF ARMY, REG. 40-68, QUALITY ASSURANCE ADMINISTRATION, para. 4-1b (20 Dec. 1989).

165. *Id*. para. F.3.f.

166. Precautions that the MHCPs must take include: (1) notifying the service member's commander about the service member's dangerousness; (2) notifying military or civilian police; (3) notifying "potential victims;" (4) requesting that the service member's commander take safety precautions such as, treatment or administrative elimination for personality disorder; and (5) referring the service member to a physical evaluation board. *Id*. para. F.3.f(1)(a) - (g).

167. *Id.* para. F.3.f(3) - (4).

168. *Id.* para. F.3.f (2).

169. If a privileged psychiatrist is not available to perform the review a medical officer will suffice. *Id*. para. F.2.c(1).

170. DOD INSTR. 6490.4, *supra* note 94, para. F.2.c(1).

171. *Id.* para. F.2.c(3), (4).

must also inform the service member of his right to counsel.[172] After he completes the investigation, the RO must determine whether the admission was appropriate and whether the hospitalization should continue.[173] If the RO believes that the service member should remain hospitalized, the RO must notify the service member when the next review will occur.[174] If the RO determines that the service member's admission or continued hospitalization violated the MMHEPA or a DOD procedural requirement, the RO must "confer"[175] with the responsible party,[176] who is either the commander or a MHCP.[177] The RO will then report the violation to the responsible party's next higher commander.[178]

Army Investigations of Improper Referrals and Evaluations

The DOD IG generally delegates the investigation of unlawful or improper mental health referrals to the service IGs.[179] If a soldier alleges that the referral was made in reprisal for a protected communication, the IG will investigate the allegation as a reprisal complaint.[180] If the soldier alleges that the referral or the evaluation was procedurally improper, the Army IG will review whether the commander complied with the required consultation, referral, and notice requirements.[181] The Army IG will also review whether the MHCP has properly performed the evaluation.[182] Additionally, the Army IG will review whether a MHCP reviewed the propriety of continued hospitalization.[183] If the Army IG determines that the referral was improper or procedurally incorrect, the Army IG may recommend that "appropriate corrective action" be taken to make the soldier "whole" or to punish the responsible official.[184] For minor procedural violations, the Army IG forwards its report, which reflects the investigator's findings and recommendations, to the responsible official's commander for appropriate action.[185] The

172. *Id.*

173. *Id.* para. F.2.c(5).

174. Independent reviews must occur within five business days of each other. *Id.* para. F.2.c(5).

175. *See supra* note 154 and accompanying text.

176. *Id.* para. F.1.c(6).

177. DOD INSTR. 6490.4, *supra* note 94, para. F.1.c(6).

178. *Id.*

179. DOD GUIDE 7050.6, *supra* note 34, para. 3-2. Plummer Interview, *supra* note 65; Diggs Interview, *supra* note 65.

180. DOD GUIDE 7050.6, *supra* note 34, para. 3-2.

181. *Id.* The guide is currently being revised to reflect the new guidance that has been issued in the new directive and instruction implementing the MMHEPA. The DOD IG will issue the new guide later this year. Harvell Interview, *supra* note 146. The Army IG will inquire into four areas. First, whether the commander consulted with a MHCP and when the consultation took place. Second, if the commander did not consult with a MHCP, whether the commander informed the soldier of the reasons thereof. Third, whether the referral memorandum included: the date and time of the evaluation, and a "factual description of the behavior and/or verbal expressions" that formed the basis for the referral. Fourth, whether the commander provided the soldier with a list of individuals (IG, JAG, chaplain) and phone numbers that the soldier can use to seek assistance to rebut the referral. DOD GUIDE 7050.6, *supra* note 34, paras. 3-1 to 3-3. When the referral involves an improper emergency or involuntary evaluation, treatment or hospitalization, the Army IG will normally inquire into the following issues. First, whether the commander made a "clear and reasoned judgment" before the referral. Second, whether the commander, despite believing that an emergency referral was proper, made "every effort to consult" with a MHCP prior to the referral. If the commander was unable to consult with a MHCP, the investigator will inquire into whether the commander documented his reasons for the emergency referral and forwarded a copy of the memorandum to the MHCP. *Id.* para. 3-4.

182. DOD GUIDE 7050.6, *supra* note 34, paras. 3-3 to 3-4. The Army IG will inquire into whether the MHCP ensured that the referral was not a reprisal or procedurally improper prior to performing the evaluation. If the referral was improper, the investigator will inquire into whether the MHCP reported the improper referral violation to the "superior of the referring commander." *Id.*

183. *Id.* para. 3-4. The Army IG will inquire into whether a MHCP admitted the soldier and whether the admitting MHCP determined that an outpatient evaluation was unreasonable. The Army IG will also inquire whether the soldier was notified soon after the admittance of "the reasons for the evaluation, the nature and consequences of the evaluation, any treatment recommended or required." The Army IG will examine whether the MHCP informed the soldier of his or her right to contact "a friend, relative, attorney, or IG." If the soldier is involuntarily hospitalized, the Army IG will determine whether a review of the admission was performed within twenty-four hours, and whether the soldier was notified both "orally and in writing" of the decision. In addition, the Army IG will inquire into whether an impartial medical officer performed a review of continued hospitalization within seventy-two hours. The Army IG will also determine whether the medical officer advised the soldier of the "reasons for the interview," and of the right to legal representation at the interview. Finally, the Army IG will inquire into whether the medical officer made a finding to either release or keep the soldier hospitalized, reviewed the initial review, and made a finding of whether it was proper. DOD GUIDE 7050.6, *supra* note 34, paras. 3-4 and 3-5.

184. *Id.* para. 3-1. *See also* DOD DIR. 6490.1, *supra* note 4, para. E.2.

185. Plummer Interview, *supra* note 65; Diggs Interview, *supra* note 65.

soldier's remedies are identical to those that exist for reprisal violations.[186]

Army Implementation of the MWPA and the MMHEPA

The MWPA is primarily a DOD program that delegates investigations of reprisal allegations to the service IGs. Since the DOD has provided detailed guidance in its implementing directive, the Army will not substantially add to or revise its own implementing regulation.[187] Likewise, since the DOD has provided detailed guidance on implementing the MMHEPA, the Army will not substantially add to or revise its implementing regulation.[188] The Army expects to issue the new *AR 600-20* that reflects the Army's implementation of the MWPA, the MMHEPA, and the implementing DOD directives and instruction later this year.[189]

The United States Army Trial Defense Service (USATDS) regarding training initiatives, is at the forefront in training defense counsel on the provisions of the MWPA and the MMHEPA. The USATDS has also trained counsel on how to represent complainants and RMOs.[190] The USATDS policy is to advise and represent soldiers whenever a reprisal or an improper referral is part of a pending or recently completed criminal proceeding.[191] Legal assistance attorneys handle all other reprisal or improper referral cases.[192] In addition, the United States Army Medical Command (MEDCOM) has issued written guidance to MHCPs on how to comply with the procedural requirements of the MMHEPA.[193] All Army medical centers are aware of the MMHEPAs procedural requirements and some have implemented their own local procedures.[194]

Practical Guidance on Implementing the MMHEPA

Advising Commanders and Mental Health Care Providers

The DOD directive and instruction that implement the MMHEPA mandate training for all commanders and MHCPs on the proper referral and evaluation of service members.[195] The DOD also mandates training for all service members in identifying and reporting "imminently or potentially danger-

186. DOD GUIDE 7050.6, *supra* note 34, paras. 3-4, 3-5. *See* DOD DIR. 6490.1, *supra* note 4, para. E.2.

187. AR 600-20, *supra* note 55, para. 5-2. *See also* AR 20-1, *supra* note 52, paras. 1-10a, 6-6I. *See* Arnold Interview, *supra* note 55; Rob Interviews *supra* note 55.

188. Telephone Interview with Major Lindsey Arnold, Chaplain, Department of the Army, Human Relations Branch, Washington, D.C. (8 September 1997, 20 February 1998) [hereinafter Arnold Interviews].

189. The proponent expects to issue the new version of *AR 600-20* that reflects the Army's implementation of the MWPA and the MMHEPA later this year. Arnold Interviews, *supra* note 188; Rob Interview, *supra* note 55.

190. The USATDS trains its counsel on the provisions of the MWPA and the MMHEPA at regional defense counsel workshops. For several years now, Army defense counsel have advised and represented complainants and RMOs who are accused of violating the MWPA and the MMHEPA. Swetnam Interview, *supra* note 68.

191. For example, if a USATDS counsel represents a soldier at a court-martial, and the alleged reprisal is related to the court-martial, the USATDS counsel may assist the in soldier challenging the reprisal. Swetnam Interview, *supra* note 68. *See also* U.S. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES—THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6g (2) (10 Sept. 1995) [hereinafter AR 27-3].

192. AR 27-3, *supra* note 191, para. 3-6g(1) (providing that "legal assistance attorneys are required to provide advice on Article 138, UCMJ complaints, IG investigations, and *AR 15-6* investigations"). *Id*. para. 3-6g(4)(k), (4)(l), (4)(m).

193. In 1995, the MEDCOM required that all MHCPs and medical personnel comply with the MMHEPA and the implementing DOD directive. Letter, Headquarters, United States Army Medical Command, MEDCOM Commanding General, subject: Department of Defense Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (18 May 1995) [hereinafter MEDCOM Mental Health Letter]. In the summer of 1997, the MEDCOM issued further guidance to MHCPs on how to comply with the MMHEPA. Bulletin Number 6/7-97, Commander, United States Army Medical Command, Fort Sam Houston, Texas, subject: Command Directed Mental Health Evaluations, § III (June/July 1997) [hereinafter MEDCOM Mental Health Bulletin]. In particular, MEDCOM instructed the MHCPs not to perform mental health evaluations if commanders failed to advise soldiers of their rights in accordance with the MMHEPA. The MEDCOM also instructed MHCPs to report any violations of the MMHEPA or the MWPA to the referring commander's superior. Finally, the MEDCOM instructed all mental health activities to formulate procedures to ensure mental health evaluations complied with the MMHEPA and the DOD directive. MEDCOM Mental Health Bulletin, *supra*.

194. Telephone Interview with Lieutenant Colonel Rodney E. Hudson, Deputy Staff Judge Advocate, United States Medical Command, Fort Sam Houston, Texas (10 Sept.1997) [hereinafter Hudson Interview]; Telephone Interview with Major Robert L. Charles, Command Judge Advocate, William Beaumont Army Medical Center, El Paso, Texas (27 Jan. 1998) [hereinafter Charles Interview].

195. DOD INSTR. 6490.4, *supra* note 94, para. D.2.d. *See* DOD DIR. 6490.1, *supra* note 4, para. D.1.

> The secretaries of the military departments shall . . . Provide appropriate periodic training for all service members and DOD civilian employees in the initial management and referral of service members who are believed to be imminently dangerous. Such training shall include the recognition of potentially dangerous behavior, appropriate security responses to emergency situations, and administrative management of such cases. Training shall be specific to the needs, rank, and level of responsibility and assignment of the service member or civilian employee.

Id.

ous"[196] service members.[197] The purpose of this training requirement is to protect "potential victims" and to ensure that "imminently or potentially dangerous" service members receive prompt treatment.[198] To ensure proper compliance by all DOD personnel, judge advocates must ensure that all service members, especially commanders and MHCPs, receive training on the MMHEPA and the DODs procedural requirements. Judge advocates must also ensure that commanders coordinate and schedule training sessions with MHCPs or other qualified professionals to train service personnel to identify and to properly report "imminently or potentially dangerous" service members.

To assist judge advocates in training commanders and MHCPs, and to ensure compliance with all procedural requirements, newly generated and modified DOD form memoranda are attached at Appendices A-E. Appendices F-G are quick reference checklists that can be used by judge advocates, commanders, and MHCPs.

Advising the Service Member

The MMHEPA and the implementing DOD instruction require commanders to provide counsel to service members who seek to rebut their mental health evaluation, treatment or hospitalization.[199] The MMHEPA mandates that judge advocates competently advise and represent service members on all mental health issues.[200] Accordingly, judge advocates must thoroughly familiarize themselves with the MMHEPA, and the DOD procedural requirements. In addition, judge advocates must familiarize themselves with the *Guidelines for Involuntary Civil Commitment*.[201] Although the *Guidelines* are not entirely applicable to the military, they do provide a good reference point for counsel who are involved in representing clients in the mental health arena. The *Guidelines* suggest that attorneys who practice in this area be thoroughly familiar with the legal and practical consequences and alternatives to mental health evaluations, treatment, and hospitalization.[202] To assist legal assistance attorneys and defense counsel, a detailed checklist is attached at Appendix H. Counsel should follow this checklist when they are representing service members in this area.

A Critique of the MWPA and the MMHEPA

The MWPA's Shortcomings

Protecting military whistleblowers, and punishing those that take reprisals against them, are necessary to prevent and deter illegal activities within the DOD. Congress, however, should either revise or eliminate some of the MWPAs provisions because they are too broad, ill defined, and invite abuse.

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196. The DOD instruction defines an "imminently or potentially dangerous" service member as one who has:

> [a] substantial risk of committing an act or acts in the near future which would result in serious personal injury or death to himself, herself, or another person or persons, or of destroying property under circumstances likely to lead to serious personal injury, or death, and that the individual manifests the intent and ability to carry out that action. A violent act of a sexual nature is considered an act that would result in serious personal injury.

DOD INSTR. 6490.4, *supra* note 94, para. 2-1.

197. The DOD instruction provides:

> The secretaries of the military departments shall . . . ensure that commanding officers (1) are familiar with DOD and service directives, instructions and regulations for the management of imminently or potentially dangerous service members and of procedures for referral for mental health evaluations in accordance with *DOD Directive 6490.1* and [DOD Instruction 6490.4]; (2) Consider recommendations made by mental healthcare providers and take necessary precautions in the management of imminently or potentially dangerous service members. Ensure that mental healthcare providers conduct thorough evaluations, take precautions and make written recommendations to commanding officers in cases of service members who are judged clinically to be imminently or potentially dangerous.

DOD INSTR. 6490.4, *supra* note 94, para. D.2.b, c.

198. *Id.* para. A; DOD DIR. 6490.1, *supra* note 4, para. A.2.

199. DOD INSTR. 6490.4, *supra* note 94, para. F.1.b.

200. National Defense Authorization Act of 1993 § 546(h), 106 Stat. at 2419 (1992); DOD INSTR. 6490.4, *supra* note 94, reference (d).

201. The MMHEPA and the implementing DOD instruction suggest that legal assistance attorneys and defense counsel should become familiar with these guidelines before representing service members in the mental health arena. JOSEPH SCHNEIDER ET AL., NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (1986) [hereinafter GUIDELINES]. National Defense Authorization Act of 1993 § 546(h); DOD INSTR. 6490.4, *supra* note 94, reference (d). *See also* Virginia Aldige Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. REV. 1027 (1982) (discussing the lawyer's role in the mental health arena).

202. GUIDELINES, *supra* note 201, para. E2.

First, as one opponent to the MWPA observed, the MWPA fails to define what "preparing to make" means.[203] The DOD IG further complicates the term "preparing to make" by unnecessarily broadening its meaning.[204] For example, as long as service members allege that they made or prepared a protected communication, even if it was never actually made or prepared, the DOD IG will investigate their reprisal complaints.[205] This fluid interpretation of "preparing to make" is too broad and invites abuse. It allows service members who justifiably receive unfavorable actions to invoke the MWPAs protections by simply claiming that they were preparing a protected communication. Although the amount of reprisal complaints that have been filed with the DOD[206] and the Army IGs[207] has been manageable, unless Congress reasonably defines and limits the scope of "preparing to make " protected communications, service members will continue to misuse the MWPA.[208]

Second, the definition of "reprisal" is dangerously broad because it covers all aspects of the military's management of its force, and could be disruptive to unit readiness.[209] For example, assume that a commander selects a service member for an undesirable duty. By simply alleging that his selection (a personnel action) was made in reprisal, the service member could delay or avoid the undesirable duty. Congress should limit the term reprisal to cover solely unfavorable personnel actions such as negative evaluation reports, negative counselings, and letters of reprimand.

Third, the broad inclusion of "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures"[210] as recipients of protected communications is troublesome. This language is so broad that it technically includes almost every commissioned officer, noncommissioned officer, and military and civilian supervisor in any military unit or organization.[211] Congress should amend the MWPA by removing the language "including any person or organization in the chain of command" and replacing it with "including commanders and equal opportunity advisors." This change would accurately reflect the legislative intent behind

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203. *See* 10 U.S.C.A. § 1034(b) (West 1998); DOD DIR. 7050.6, *supra* note 4, para. D.3. One witness who opposed the MWPA testified before a congressional panel that the language "preparing to make" was not appropriately defined and was too broad. He also believed that it could encourage "spurious claims of harassment or retaliation by individuals who are unhappy with some aspect of military life." *Hearings on H.R. 1394*, *supra* note 13, at 104-05 (Testimony of Derek J. Vander Schaaf, DOD Deputy Inspector General).

204. DOD GUIDE 7050.6, *supra* note 34, para. 2-4.

205. *Id.*

206. Ms. Marsha Campbell, Director of Special Inquiries at the DOD IG's office, indicated that after the MWPA was enacted, for fiscal year 1990 her office received approximately ten reprisal cases and completed the investigation of those cases during the same year. Since then, and until fiscal year 1996, her office received 180 cases of reprisal and closed approximately 130-150 cases. Ms. Campbell indicated that the numbers of reprisal complaints that have been received to date are manageable. Telephone Interview with Ms. Marsha Campbell, Director of Special Inquiries, Department of Defense Inspector General's Office, Washington, D.C. (19 Sept. 1997) [hereinafter Campbell Interview]. Ms. Jane Deese, the new Director of Special Inquiries has been with the DOD IG since 1994, and she has witnessed a steady increase of reprisal complaints since 1994. As of 23 February 1998, the DOD IG has approximately 350 open cases. Telephone Interview with Ms. Jane Deese, Director of Special Inquiries, Department of Defense Inspector General's Office, Washington, D.C. (23 Feb. 1998) [hereinafter Deese Interview].

207. Reprisal and improper referral cases that are submitted to the Army IG for investigation have been manageable, but they are steadily increasing. Although the Army IG has not kept a yearly statistical record of all reprisal cases that have been investigated the Army IG has substantiated approximately twenty-five percent of all reprisal cases to date. A third of all the complaints that have been filed by soldiers who alleged violations of the MMHEPA that involved allegations of improper mental health referrals that were made in reprisal for protected communications. The Army IG, however, did not substantiate any of these allegations. The remaining two-thirds of the MMHEPA cases involved procedural violations (for example, a commander failed to provide a referral notice and rights advice). The MMHEPA complaints alleging procedural violations that the Army IG substantiated, the Army IG returned to the command for their disposition. Both Lieutenant Colonel Plummer and Lieutenant Colonel Rob believe the MWPA is being misused by soldiers. Rob Interview, *supra* note 42; Plummer Interview, *supra* note 65. *See* Telephone Interview with Mrs. Sue Nelson, Chief, Records Branch, Department of the Army, Inspector General's Office, Washington, D.C. (28 Jan. 1998) [hereinafter Nelson Interview] (Mrs. Nelson worked for DOD IG Records Branch from 1986 through 1996, and has personally dealt with whistleblower complaints. She transferred to DA IG in September 1996 to become the Chief, Records Branch).

208. Campbell Interview, *supra* note 206. The DOD IG has substantiated between fifteen to twenty percent of all reprisal cases that have been submitted to it for investigation. The remaining eighty to eighty-five percent were unsubstantiated. Approximately ten percent of the unsubstantiated reprisal cases were frivolous or "cover your behind" cases. In these cases, the DOD IG found that the service members filed frivolous reprisal allegations upon learning that some unfavorable personnel action was imminent. *Id.* Although the number of reprisal complaints increased, the substantiation rate since 1994 has remained constant. Deese Interview, *supra* note 206.

209. *See* 10 U.S.C.A. § 1034(b) (West 1998); DOD DIR. 7050.6, *supra* note 4, paras. 2-1, 2-2. *See also* H.R. REP. NO. 100-563, at 282 (1988) (noting that the prohibition against an unfavorable personnel action is intended to include any "action that has the effect or intended effect of harassment or discrimination against a member of the military").

210. 10 U.S.C.A. § 1034(b)(1)(B)(iv).

211. Because the term "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures" is so broad, the Army initially considered a draft proposal to *AR 600-20* that would have specified certain individuals who may be the recipients of protected communications. Arnold Interview *supra* note 55; Rob Interviews, *supra* note 55.

this provision and eliminate unnecessary confusion over whom within the chain of command may receive protected communications.[212] Congress should also consider adding the words "to investigate allegations of discrimination or sexual harassment" after the words "any other person or organization . . . designated pursuant to regulations or other established administrative procedures." This revision would clarify the provision and more accurately comply with its legislative intent and purpose.[213] Allowing service members to make protected communications to almost anyone encourages abuse and misuse of the MWPA.

Fourth, adequate remedies are, and have been, in place prior to the enactment of the MWPA for service members who allege a reprisal. For example, the DOD IG investigated reprisal complaints through the DOD hotline since the early 1980s.[214] Other remedies that service members have successfully used prior to the MWPA include service and installation IG complaints, Article 138 complaints,[215] review before the board for correction of military records, [216] discharge review boards,[217] and congressionals.[218]

Fifth, once the service member establishes a "low-threshold" prima facie case of reprisal,[219] the investigations unnecessarily place the burden on the RMOs to prove that they took no reprisal. Since violations of the MWPA and the DOD directive are punitive, the MWPA should not force RMOs who are accused of a criminal offense to prove their innocence.[220] Placing this burden on the RMOs is contrary to the constitutional notions of fairness and due process, and strikes against the presumption of innocence. Since the burdens of persuasion and proof in reprisal investigations favor complainants, this factor alone may be disruptive to unit readiness. Commanders may unnecessarily hesitate before making important personnel and managerial decisions that affect subordinates to avoid an IG investigation and its punitive consequences.

The MMHEPA's Shortcomings

Prohibiting inappropriate mental health evaluations, treatment, and hospitalization, and punishing those that make referrals in reprisal are necessary to protect service members from abusive commanders. Congress, however, should revise or eliminate some of the MMHEPA provisions because they are too broad and invite abuse.

First, requiring commanders to follow stringent procedural requirements and to apply technical terms before they refer service members for emergency evaluations is unwise. For example, the MMHEPA and the DOD procedural requirements

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212.

> Based on testimony that was received by the committee during fiscal year 1995 hearings and from interviews with military personnel during staff visits of the House Armed Services Committee (this is now called the House National Security Committee) Task Force on Equality of Treatment and Opportunity in the Armed Services, the committee concluded that the DOD had no effective system to protect individuals who report sexual harassment or unlawful discrimination from reprisal. This section would amend title 10, U.S.C.A., to provide those who report sexual harassment or unlawful discrimination (including discrimination on the basis of race, color, religion, sex, or national origin) with protections from retaliatory adverse personnel actions similar to those that currently exist in statute for military whistleblowers, which is codified at 10 U.S.C.A. § 1034. In particular this section would: (1) Prohibit retaliatory personnel actions against members *who report sexual harassment or unlawful discrimination through established procedures, including the chain of command* (emphasis added).

H.R. REP. NO. 103-499, at 243 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2091, 2113-14.

213. *Id.*

214. Prior to the enactment of the MWPA, the defense hotline program received, investigated, and oversaw (when delegated to service IGs) the investigation of anonymous reprisal complaints that were made by military whistleblowers and witnesses. *Hearings on H.R. 1394*, *supra* note 13, at 116 (Testimony of Robert L. Gilliat, DOD Assistant General Counsel). U.S. DEP'T OF DEFENSE, DIR. 5106.1, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE (14 Mar. 1983) [hereinafter DOD DIR. 5106.1].

215. UCMJ art. 138.

216. 10 U.S.C.A. § 1552 (West 1998). Prior to the enactment of the MWPA, service BCMRs provided full or partial relief in 21,108 cases out of 34,304 cases that were reviewed. *See Hearings on H.R. 1394*, *supra* note 13, at 116 (Testimony of Robert L. Gilliat, DOD Assistant General Counsel).

217. 10 U.S.C.A. § 1553.

218. Prior to the enactment of the MWPA, DOD service members filed over 108,000 congressionals. The services responded to all of them. This is clear evidence that service members will communicate with members of Congress despite the MWPA. *See Hearings on H.R. 1394*, *supra* note 13, at 117 (Testimony of Robert L. Gilliat, DOD Assistant General Counsel).

219. Once the complainant establishes that a service member has has made or prepared a communication (or subjectively believes he made or prepared, although never made or prepared) and an unfavorable personnel action was taken, threatened, or a favorable personnel action was withheld, "the responsible management officials must establish that they would have decided, taken, or withheld the same personnel action(s) even if the complainant had not made or prepared a protected communication." *See* DOD GUIDE 7050.6, *supra* note 34, para. 2-6.

220. DOD DIR. 7050.6, *supra* note 4, para. D.5.

require commanders to "make every effort" to consult with a MHCP prior to an emergency referral.[221] The MMHEPA and the DOD procedural requirements fail to provide adequate guidance on what "make every effort" means. The MMHEPA and DOD procedural requirements also fail to specify what circumstances would allow commanders to simply forward a memorandum that details their reasons for the emergency referral. These procedural steps may cause commanders to place unnecessary time and effort on emergency referrals simply to avoid the potential consequences of a MMHEPA violation.

In addition, the language and terms within the MMHEPA and the DOD guidance create unnecessary burdens on commanders who are already encumbered with meeting training and mission requirements. Congress should eliminate the consultation requirement for emergency evaluations and establish bright-line rules that do not require commanders to determine whether technical terms apply to a particular service member.[222] A wiser approach may be to allow commanders to submit their reasoning for emergency referrals by memoranda, and require MHCPs to determine whether emergency evaluations are necessary. This approach makes sense and allows commanders to dedicate their limited time to more important command missions.

Second, despite the MMHEPA's potential punitive nature, it fails to distinguish between major and minor, or intentional and non-intentional violations.[223] Because the MMHEPA fails to make these distinctions, commanders might second guess themselves before they make proper referrals simply to avoid possible IG investigations and resulting penalties. The MMHEPA's punitive aspect could cause unnecessary delays in emergency situations, which may result in harm to potential victims or service members who require immediate treatment. Congress and the DOD should limit investigations to major and intentional violations of the MMHEPA. Minor procedural and non-intentional violations of the MMHEPA will likely occur, especially since the services are only in the training and implementing stages of this complex area of law.

Third, the MMHEPA requires commanders to provide free legal counsel, upon request, to service members who are being referred for mental health evaluations. The MMHEPA requires that commanders immediately comply with the right to counsel requirement and also requires that DOD attorneys provide competent representation, similar to that provided by civilian attorneys who represent clients during civil commitments.[224] Not all DOD attorneys, however, are experienced in this area of practice. The MMHEPA fails to provide guidance on the exact "role" that DOD and service attorneys should play in these cases or how much training they should receive. For example, the *Guidelines*[225] suggest that before civilian attorneys are eligible to represent clients at civil commitment hearings, they must receive specialized training in representing civil commitment clients.[226] The *Guidelines* also suggest that before attorneys can provide effective representation, they must have "access to information and expertise that most attorneys do not have."[227] If DOD and service attorneys are to competently advise and represent clients in this area, Congress must allocate sufficient time and resources for the training of these attorneys.

Proposed Legislative Changes to the MWPA

Although the DOD does not expect any legislative changes to the MMHEPA in the near future,[228] some procedural and substantive changes may occur to the MWPA by fiscal year 1999.[229] The DOD will propose to Congress one substantive

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221. DOD DIR. 6490.1, *supra* note 4, para. D.2.c(2); DOD INSTR. 6490.4, *supra* note 94, para. F.1.a(5)(b).

222. National Defense Authorization Act of 1993 § 546(b) and (d), 106 Stat. at 2419-20 (1992). *See also* DOD DIR. 6490.1, *supra* note 4, 2-1 and 2-2; DOD INSTR. 6490.4, *supra* note 94, 2-1 and 2-2. For example, commanders must adhere to the "least restrictive alternative principle" and recognize when a service member is suffering from a "mental disorder" prior to referring the service member for an emergency evaluation. A better approach might be for the commander simply to refer a service member to a MHCP anytime the commander believes it is appropriate. This places the responsibility with the MHCP to decide whether the service member is suffering from a "mental disorder" and whether an inpatient evaluation complies with the "least restrictive alternative principle."

223. National Defense Authorization Act of 1993 § 546(h); DOD INSTR. 6490.4, *supra* note 94, reference (d) ; and DOD DIR. 6490.1, *supra* note 4, paras. D.3.d, E.2.

224. National Defense Authorization Act of 1993 § 546(f)(2). *See* DOD INSTR. 6490.4, *supra* note 94, para. F.1.d.

225. GUIDELINES, *supra* note 201.

226. *Id.* para. E1(a).

227. *Id.* para. E1.

228. Telephone Interview with Mr. Herb Harvell, Office of Special Inquiries, Department of Defense Inspector General's Office, Washington, D.C. (27 Oct. 1997), Mr. Harvell does not expect any legislative changes to MMHEPA in the near future. *Id.*

229. Campbell Interview, *supra* note 206; Deese Interview, *supra* note 206.

and four procedural changes to the MWPA.[230] The first procedural change would allow IGs to perform an initial screening of all reprisal complaints. The change would not require service IGs to conduct an investigation once they determine that the complaint is frivolous.[231] The second change would eliminate mandatory post-disposition interviews.[232] The third change would give IGs more time to investigate reprisal complaints.[233] The final procedural change would eliminate the requirement to provide the complainant with a copy of the IG report even if the complainant does not want a copy.[234] The substantive change that the DOD proposed would clarify and limit the class of persons who qualify as recipients of protected communications.[235]

Despite the DOD proposals, which appear to limit or restrict the MWPA authority, Congress is considering increasing military whistleblower protections. In April 1997, Representative Carolyn Maloney (New York) introduced a bill, the Maloney Amendment, that would mandate the appointment of a judge advocate to any service member who files a reprisal complaint.[236] The service member would receive representation by a judge advocate during all proceedings or investigations.[237] It would expand the service member's time for filing a reprisal complaint from sixty days to one hundred and twenty days.[238] The Maloney Amendment would also expand statutory recipients that could receive protected communications by adding "equal employment opportunity officers."[239] Finally, the Maloney Amendment would require commanders to display the MWPAs rights and protections "in prominent locations" in every military installation containing more than one hundred service members.[240] The Maloney Amendment is currently pending a review before the House Subcommittee on Military Personnel.[241]

Conclusion

This paper provides judge advocates with a comprehensive understanding of the MWPA and the MMHEPA by examining their origins, purpose, legislative amendments, and the current law.

The MWPA attempts to encourage service members to report illegal conduct to statutorily recognized recipients. It also promises swift redress in the event that superiors subject

230. *Id.*

231. *Id.* The MWPA currently requires the DOD IG to investigate or delegate down to the service IGs all reprisal complaints. The MWPA requires the DOD or service IGs to investigate the reprisal complaint even if the IG is able to determine during either the initial screening or the interview of the service member that the complaint is frivolous. The change will allow IG investigators to decide not to investigate if the file indicates, for example, that the RMO would have taken the prohibited personnel action despite the protected communication. In addition, the changes may allow investigators to investigate certain cases by phone. The DOD IG wants the ability to be able to dismiss cases once the DOD IG determines that no formal investigation is necessary. *Id.*

232. *Id.* The MWPA requires the DOD IG to conduct a "post-disposition interview" with all complainants regardless of whether the service member wants one. 10 U.S.C.A. § 1034(h) (West 1998). According to Mrs. Campbell, eliminating "compelled post-disposition interviews" will save the DOD time, effort, and resources. Campbell Interview, *supra* note 206.

233. This procedural change would expand the amount of time that IG investigators have to investigate reprisal complaints from 90 days to approximately 180 days. Deese Interview, *supra* note 206.

234. The MWPA requires the DOD IG to provide a copy of the results of the reprisal investigation to the complainant even if the complainant does not want a copy or already has one. *See* 10 U.S.C.A. § 1034(e)(1). This takes too much time and can be costly because it requires manual redaction of certain information. Campbell Interview, *supra* note 206. Eliminating this requirement makes sense and will allow the DOD to save time, effort, and resources. The DOD IG expects the new directive that reflects these changes to be issued and effective later this year. *Id.*

235. One substantive proposal that is being considered involves redefining who may receive protected communications. *See* Deese Interview, *supra* note 206. For example, the MWPA provision in 10 U.S.C.A. § 1034(b)(1)(B)(iv) of the MWPA "any other person or organization (including any person or organization in the chain of command) who is designated pursuant to regulations or other established administrative procedures," is too broad. This language complicates matters and causes complainants to argue that any person (officer or noncommissioned officer) within the chain of command should be able to receive a protected communication. Deese Interview, *supra* note 206.

236. H.R. 1482, 105th Cong. (1997).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. The Maloney Amendment is currently before the House Subcommittee on Military Personnel. Bill Summary & Status for H.R. 1482, 105th Cong. (1997) (visited Feb. 17, 1998) <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR01482>; Telephone Interview with Mr. Eric Stamets, Legislation Branch, Office of the Judge Advocate General, 2200 Army Pentagon, Washington, D.C. (24 Feb. 1998).

them to reprisals. Judge advocates must be prepared to advise and to represent both complainants and RMOs. Judge advocates must also take a proactive approach to the MWPA by ensuring that commanders and other supervisory officials are aware of and comply with the MWPA and the implementing DOD directive.

The MMHEPA creates several statutory responsibilities for DOD personnel. First, commanders must comply with the consultation, notice and formal request requirements before subjecting a service member to a discretionary mental health evaluation, treatment or hospitalization. Second, MHCPs must also comply with certain notice requirements. They must ensure that commanders comply with their procedural requirements before performing a discretionary mental health evaluation administering, treatment or hospitalizing a service member. Third, commanders must ensure that service members are trained to identify and report "imminently or potentially dangerous" military personnel. The purpose of this "identify and report" requirement is to protect potential victims and to provide prompt treatment to individuals who are mentally unstable. Finally, judge advocates must be ready to provide competent advice and representation to service members who have been subjected to improper mental health evaluations, treatment, or hospitalization.

As this paper has demonstrated, the MWPA and the MMHEPA are two complex statutes that attempt to balance soldier's due process with command authority. Congress must revise both statutes in order to simplify compliance and reduce, if not eliminate, abuse. Despite the shortcomings of the statutes, judge advocates must be proactive, train, and ensure that all DOD personnel comply with the provisions of the MWPA and the MMHEPA.

APPENDIX A[1]

SAMPLE COMMANDER'S NOTICE
TO SOLDIER OF REFERRAL AND RIGHTS

(Office Symbol) (Date)

MEMORANDUM FOR _____ (Soldier's name, rank, and SSN)

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

1. References:

(a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

2. In accordance with paragraph F.1.a(4) of reference (b), I am referring you to a mental health care provider for a mental health evaluation.

3. I direct you to meet with _____(name & rank of mental health care provider(s) at _____(MTF or clinic) on _____(date) at _____hours.

4. I am referring you for a mental health evaluation because of your behavior and/or statements on _____(date(s)). On the stated date(s), you (brief description of behaviors and statements): _____ _____.

5. In accordance with paragraph F.1.a(2) of the DOD Instruction 6490.4, before the referral, **(**on _____ (date) I consulted with _____(name, rank, branch of each mental health care provider consulted) from the _____(MTF or clinic) about your recent behavior and/or statements and _____ _____ (name and rank of each mental health care provider) (did) (did not) concur(s) that a mental health evaluation is necessary**)** or **(**I was unable to consult with a mental health care provider because _____ _____ _____**)**.

6. In accordance with paragraph F.1.a(4) of reference (b), and reference (a) and (c), you have the following rights:

a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.

b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.

c. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DOD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.

d. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a

1. This sample form was adapted from enclosure 4 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997) and modified for Army use.

f. The right to communicate, provided the communication is lawful, with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation.

g. If applicable, in accordance with 4-2 of the DOD Instruction 6490.4, since you are (deployed) (in a geographically isolated area) because of circumstances related to, military duties, compliance with the following procedures _____are impractical for the following reasons_____ _____.

h. The right, except in emergencies, to have at least two business days before the scheduled mental health evaluation to meet with an attorney, IG, chaplain, friend or family member.

7. You may seek assistance from a military or Army employed civilian attorney assigned to the **Legal Assistance Office** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____ (phone number).

8. You may seek assistance from the **installation IG** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may call for assistance at _____(phone number). You may also seek assistance from the **DOD IG** at 1-800-424-9098.

9. You may seek assistance from the **Chaplain** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____(phone number).

_____
(Name)

_____
(Rank/Branch)

_____
Commanding

I have read, understood and received a copy of this memorandum.

Soldier's signature_____. Date_____.

IF SOLDIER DECLINES TO SIGN

The soldier declined to sign this memorandum containing the notice of referral and notice of soldier's rights because_____ _____(e.g., gave no reason, quote reason or otherwise). After the witness signed this memorandum, I provided a copy of this memorandum to the soldier.

Witness's signature_____. Date_____.

Print witness's rank and name_____.

NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (Joseph Schneider, et al. eds., 1986). For more information or to order copies of the Guidelines call 1-800-877-1233.

APPENDIX B[1]

SAMPLE REQUEST FOR NON EMERGENCY
MENTAL HEALTH EVALUATION

(Office Symbol) (Date)

MEMORANDUM FOR Commander, (MTF or Clinic) _____

SUBJECT: Command Referral of _____(Name, Rank, SS#) for a Mental Health Evaluation

1. References:

(a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

2. In accordance with paragraph F.1.a.(3) of reference (b), and references (a) through (c), I request a mental health evaluation for the above named soldier.

3. In accordance with paragraph F.1.a.(2) of reference (b), **(**on _____(date), I consulted with _____**)** or **(**I was unable to consult with a mental health care provider because_____
_____**)**.

4. The above named soldier has __ years and __ months active duty service and has been assigned to my command since _____(date). The soldier's ASVAB scores upon enlistment were_____. Past average performance marks have ranged from _____ to _____ (give numerical scores). Legal Action (is)(is not) currently pending against the soldier. Past legal actions include:_____
_____ (list dates, charges, nonjudicial punishment and convictions, if any).

5. I have given the soldier a memorandum that advises the soldier of (his)(her) rights, and explains my reasons for the referral. I have also informed the soldier of the name of the mental health care provider I consulted, and the names and telephone numbers of persons who may advise the soldier. I have attached a copy of the soldier's memorandum.

6. I directed the soldier to meet with _____ (mental health care provider) at _____(MTF or clinic) on _____(date) at _____hours.

7. If you need additional information you may contact me or _____(POC) at _____.

8. Please provide a summary of your findings and recommendations to me as soon as possible.

Encl

_____
(Name)

_____
(Rank/Branch)

_____
Commanding

1. This sample form was adapted from enclosure 4 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997) and modified for Army use.

APPENDIX C[1]

SAMPLE REQUEST FOR **EMERGENCY**
MENTAL HEALTH EVALUATION

(Office Symbol) (Date)

MEMORANDUM FOR _____(mental health care provider).

SUBJECT: **Emergency** Command Referral of _____(Name, Rank, SSN) for a Mental Health Evaluation (Send by facsimile, courier or overnight mail)

1. References:

(a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

2. In accordance withparagraph F.1.a.(3) of reference (b), and references (b) through (d), I request an **emergency** mental health evaluation for the above named soldier.

3. In accordance with paragraph F.1.a.(2) and (5) of reference (b), **(**I consulted with a mental health care provider**)** or **(**I have **made every effort** to consult with a mental health care provider and was unable to because_____**)**.

4. In accordance with paragraph F.1.a.(5) of reference (b), my decision to refer the above named soldier for an **emergency** mental health evaluation is based on the following behaviors, actions and/or verbal expressions (dates & brief description:
_____
_____.

5. The above named soldier has __ years and __ months active duty service and has been assigned to my command since _____(date). The soldier's ASVAB scores upon enlistment were_____. Past average performance marks have ranged from _____ to _____ (give numerical scores). Legal Action (is)(is not) currently pending against the soldier. Past legal actions include:_____
(list dates, charges, nonjudicial punishment and convictions, if any).

6. I (have) (will) inform(ed) the soldier of (his)(her) rights. If applicable, I have informed the soldier of my reasons for this referral, and of the name of the mental health care provider I consulted. I have also informed the soldier of the names and telephone numbers of persons who may advise the soldier. I (have attached) (will provide) a copy of the soldier's memorandum.

7. If you need additional information you may contact me or _____(POC) at _____.

1. The author created this form for Army use based on the provisions of U.S. Dep't of Defense, Instr. 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 3-1 (28 Aug. 1997).

XXX-XXXX
SUBJECT: **Emergency** Command Referral of _____(Name, Rank, SSN) for a Mental Health Evaluation (Send by facsimile, courier or overnight mail)

8. Please provide a summary of your findings and recommendations to me as soon as possible.

Encl

_____
(Name)

_____
(Rank/Branch)

_____
Commanding

APPENDIX D[1]

EMERGENCY EVALUATIONS

SAMPLE COMMANDER'S NOTICE
TO SOLDIER OF REFERRAL AND RIGHTS

(Office Symbol)(Date)

MEMORANDUM FOR _____ (Soldier's name, rank, and SS#)

SUBJECT: Commander's Notice of **Emergency Referral** for a Mental Health Evaluation and Notice of Soldier's Rights

1. References:

(a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

2. In accordance with paragraph F.1.a(5) of reference (b), I referred you to a mental health care provider for an **emergency** mental health evaluation. I based my decision to refer you for an emergency evaluation based on your behavior and/or verbal statements (dates & brief description): _____
_____
_____
_____.

3. In accordance with paragraph F.1.a(2) of reference (b), before I referred you, **(**on _____ (date) I consulted with _____(name, rank, branch of each mental health care provider consulted) from the _____(MTF or clinic) about your recent behavior and/or statements and _____ (name and rank of each mental health care provider) (did)(did not) concur(s) that a mental health evaluation is necessary**) or (**I **made every effort** to consult with a mental health care provider about this emergency referral and was unable to because
_____
_____**_)**.

4. In accordance with paragraph F.1.a(4) of reference (b), and reference (a) and (c), you have the following rights:

a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.

b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.

c. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DOD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.

d. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

1. The author created this form for Army use based on the provisions of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997).

e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a DOD mental health care provider.

f. The right to communicate, provided the communication is lawful, with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation.

5. I direct you to meet with _____(name & rank of mental health care provider(s) at _____(MTF or clinic) on _____(date) at _____hours.

6. You may seek assistance from a military or an Army employed civilian attorney assigned to the **Legal Assistance Office** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____(phone number).

7. You may seek assistance from the **installation IG** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may call for assistance at _____(phone number). You may also seek assistance from the **IG, DOD** at 1-800-424-9098.

8. You may seek assistance from the **Chaplain** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____(phone number).

_____
(Name)
_____
(Rank/Branch)
_____
Commanding

I have read, understood and received a copy of this memorandum.

Soldier's signature_____. Date_____.

IF SOLDIER DECLINES TO SIGN

The soldier declined to sign this memorandum containing the notice of referral and notice of soldier's rights because_____
_____(e.g., gave no reason, quote reason or otherwise). The commander gave a copy of this memorandum to the soldier.

Witness signature_____. Date_____.

Witness (print) rank and name_____.

APPENDIX E

SAMPLE MHCP MENTAL HEALTH EVALUATION
MEMORANDUM TO COMMANDER

(Office Symbol) (Date)

MEMORANDUM THRU Commander, (MTF or Clinic)_____

FOR Commander, (Referred soldiers commander)_____

SUBJECT: Command Referral of _____(Name, Rank, SS#) for a Mental Health Evaluation

1. References:

(a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

2. In accordance with reference (a) and (b), I saw the above named soldier on _____ (date) at _____(location).

3. My evaluation of the soldier revealed (summary of findings) _____
_____
_____.

4. I made the following diagnosis(es) (Axis I, II and III)_____
_____
_____
_____
_____
_____
_____
_____.

5. The soldier's diagnosis (do) (do not) meet retention standards for continued military service and the soldier's case (will) (will not) be referred to the Physical Evaluation Board for administrative adjudication.

OR

6. The soldier is unsuitable for continued service because of the above diagnosis for the following reasons: (e.g., soldier's personality disorder or substance abuse is maladaptive to continued service)_____
_____
_____
_____
_____.

7. The soldier (is) (is not) considered (imminently dangerous) (potentially dangerous) based upon the following clinical data:
_____
_____
_____
_____
_____.

8. I have admitted the soldier to _____ (ward & name of MTF or clinic) for further (evaluation) (observation) (treatment). The soldier's physician is _____(rank/title & name) and you may reach the physician at the following phone number_____.

OR

9. I have scheduled the soldier for (outpatient follow-up) (treatment) on _____(date) at _____hours at _____(name of MTF or clinic) with _____(rank/title & name) who may reach the MHCP at the following phone number_____.

XXXX-XX
SUBJECT: Command Referral of _____(Name, Rank, SS#) for a Mental Health Evaluation[1]

10. Recommendations. I return the soldier to you with the following recommendations:

a. I consider the soldier potentially dangerous to himself and others, consequently, I suggest the following precautions (e.g., order soldier to move into barracks; order soldier to stay away from a specific person, prevent access to weapons, consider liberty/leave restriction (consult legal), etc.,)_____
_____
_____
_____
_____

AND/OR

b. Process the soldier for expeditious administrative separation per Army Regulation _____ (e.g., AR 635-200, para 5-13.). Although the soldier does not have a severe mental disorder, the soldier manifests a long-standing personality disorder that precluding (him)(her) from continuing military service.

Although not currently at significant suicide or homicide risk, due to the soldier's pattern of maladaptive responses to routine personal and/or work-related stressors, the soldier may become dangerous to (himself) (herself) and/or others in the future.

AND/OR

c. The soldier (is) (is not) suitable for continued access to classified material and the soldier's security clearance should be (retained) (rescinded).

AND/OR

d. Other.
_____
_____
_____
_____
_____
_____.

11. I (have) (have not) discussed the above findings and recommendations with the soldier who **(**did acknowledged and understood them**)** or **(**did not acknowledge them because the soldier's diagnosis prevented (him) (her) from understanding them**)**.

12. If you disagree with my recommendations, reference (a) and (b) require you to notify your immediate superior within two business days of receiving my memorandum explaining your decision to act against my medical advice.

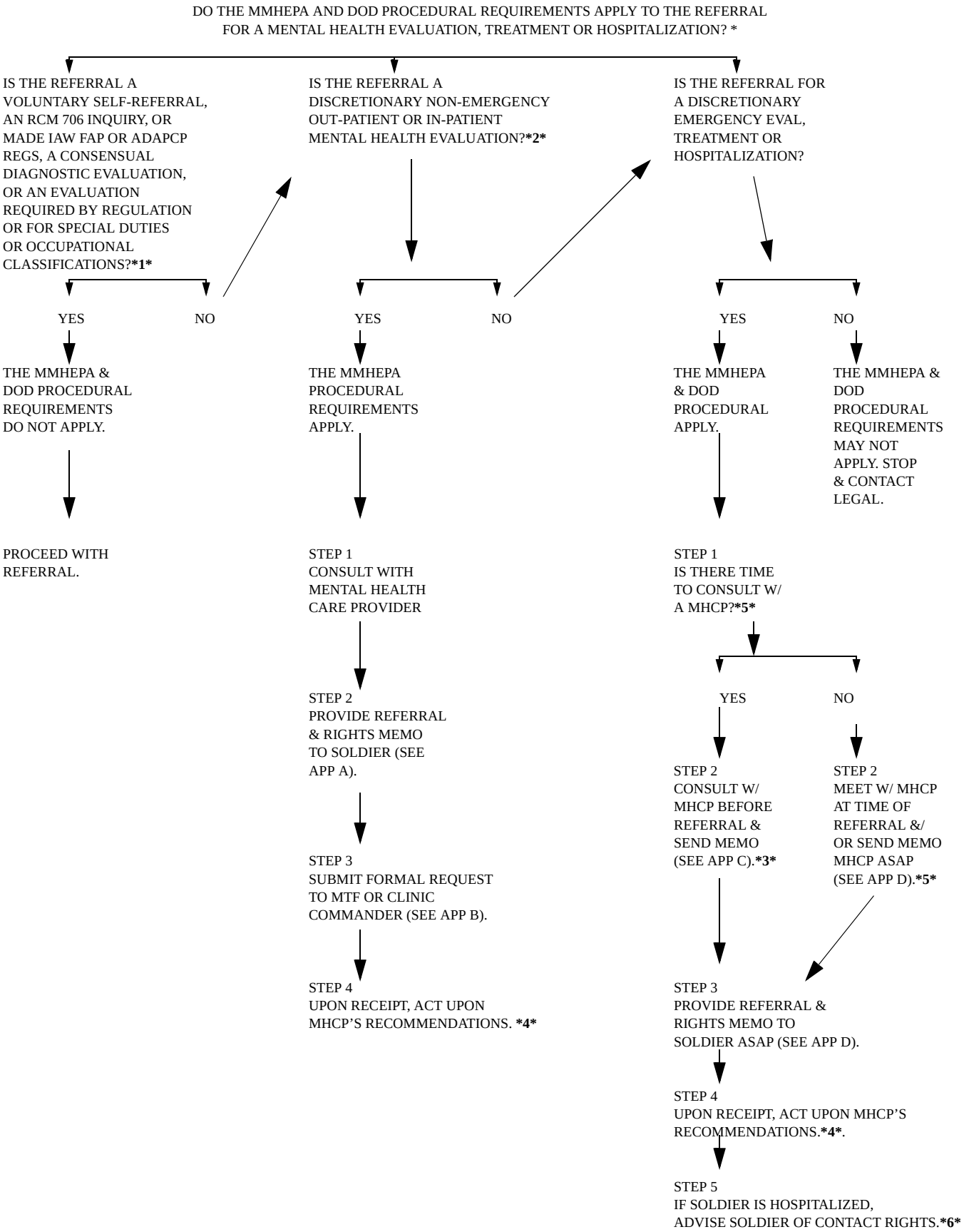
13. If you need additional information you may contact me or _____ (POC) at _____.

_____
(MHP's name)
_____
(Rank/Branch)
_____
(Title)

1. This sample form was adapted from enclosure 5 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 5-1 (28 Aug. 1997) and modified for Army use.

APPENDIX F

CHECKLIST FOR COMMANDERS



CHECKLIST TABLE FOR APPENDIX F

***** = The Military Mental Health Evaluation Protection Act (MMHEPA), National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992); DOD Instruction (DODI) 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, (28 Aug. 1997); and DOD Directive (DODD) 6490.1, Mental Health Evaluations of Members of the Armed Forces, (1 Oct. 1997). *See also* DA Message, 080700Z Mar 96, DAPE-HR-L, subject: Mental Health Evaluations (Clarification)(ALARACT 21/96)(8 Mar. 1996).

1 = Paragraph D.3.e. of the DODD, excludes the following referrals, evaluations and interviews from the procedural requirements of the MMHEPA:

Voluntary self-referrals.

Sanity & competency inquiries in accordance with (IAW) Rules for Courts-Martial 706.

Referrals to Family Advocacy Programs (these normally involve medical assessments and treatment of family members by trained personnel). See DOD Directive 6400.1, Family Advocacy Program, 6.1 (23 Jun. 1997) and Army Regulation 608-18.

Referrals to drug and alcohol abuse rehabilitation programs. These normally take place during the "intake procedures." Intake procedures require a psychological evaluation to assess the soldier's need for detoxification and potential for rehabilitation. See DOD Directive 1010.4, Alcohol and Drug Abuse by DOD Personnel, E.3.b(2)(a) (25 Aug. 1980); DOD Instruction 1010.6, Rehabilitation Referral Services for Alcohol and Drug Abusers (13 Mar. 1985); and Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 3-10 (21 Oct. 1988).

Referrals for diagnostic evaluations made by non-command and non-mental health care providers, and with soldier's consent.

Non-discretionary evaluations required by regulation or for special duties or occupational classifications. According to para. D.3.e of the DODD, if a regulation requires a commander to refer a soldier for a mental health evaluation, the referral is not discretionary. **Examples of non-discretionary referrals** not falling within the DOD procedural requirements and made IAW Army Regulations:

Security Clearance Evaluations IAW Army Regulation 380-67;
Personnel Reliability Program Evaluations IAW Army Regulation 380-67;
Evaluations made IAW Army Regulation 135-178;
Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;
Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;
Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;
Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

Examples of discretionary command referrals falling within the DOD procedural requirements when made as part of an administrative elimination are:

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.
Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;
Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;
Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;
Fight training disqualification IAW Army Regulation 635-200, paras. 1-34b and 5-12;
Separations IAW Army Regulation 635-200, paras. 1-34b, 5-16 and 5-17;
Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;
Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;
Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;
Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;
Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and
Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

2 = According to Section 546(b)(2)(A) of the MMHEPA, you may only refer a soldier for an inpatient mental health evaluation if an outpatient evaluation is not reasonable IAW the "least restrictive alternative principle." Section 546(g)(5) of the MMHEPA defines "least restrictive alternative principle" as:

A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment,

and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

Page 2-1 of the DODD expands this definition to include, "Such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotheraphy, as clinically indicated." A mental health care provider should advise you on the appropriate "therapeutic setting and treatment." IF IN DOUBT, PRIOR TO MAKING A NON-EMERGENCY INPATIENT REFERRAL, CONSULT YOUR LEGAL ADVISOR.

3 = Page 2-2 of the DODD and the DODI define a "mental health care provider" (MHCP) as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." The DODD and DODI require commander's to consult with an MHCP before referring a soldier for a mental health evaluation, treatment, or hospitalization falling within the DOD procedural requirements. If no MHCPs are available, the commander must consult with a physician or the "senior privileged non-physician provider present." Page 2-3 of the DODI defines a "senior privileged non-physician provider present" as "in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc." You must then document the results of your consultation and provide a copy to the MHCP performing the evaluation.

4 = Paragraph D.8. of the DODD requires you, upon receiving the MHCP's recommendations, to "make a written record of the actions taken and reasons thereof." If the MHCP recommends that your soldier be separated from the service and you elect to retain the soldier, you must document your reasons and forward a memorandum to your superior within two business days of receiving the MHCP's recommendations.

5 = Paragraph D.2.c. of the DODD requires you to refer soldiers for emergency mental health evaluations when one of your soldiers, by acts or words, is likely to cause injury to himself or herself, or others. You must also make an emergency referral whenever you believe your soldier is suffering from a mental disorder. Before making the emergency referral, you must make every effort to consult with an MHCP. If time and the nature of the emergency do not permit you to consult with an MHCP, you must consult with an MHCP at the MTF or clinic where the MHCP will evaluate your soldier. You must explain to the MHCP your reasons justifying the emergency evaluation. You must then document your conversation with the MHCP and forward a copy of the memorandum to the MHCP. If you are unable to consult with an MHCP prior to or at the MTF or clinic, para. F.1.a(5)(e) of the DODI, allows you to document your reasons for the emergency evaluation and then forward a copy of the memorandum (via facsimile, overnight mail or courier) to the MHCP. This exception is a limited one.

6 = If after the emergency evaluation, an MHCP involuntarily hospitalizes your soldier, in addition to providing the soldier notice of the referral and his or her rights, para. F.2.b(1) of the DODI requires you to inform the soldier of the "reasons for and the likely consequences of the admission." Para. F.2.b(2) also requires you to advise your soldier that he or she may call a family member,

APPENDIX G

CHECKLIST FOR MENTAL HEALTH CARE PROVIDERS

DO THE MMHEPA AND DOD PROCEDURAL REQUIREMENTS APPLY TO THE REFERRAL FOR A MENTAL HEALTH EVALUATION, TREATMENT OR HOSPITALIZATION?**

IS THE REFERRAL A VOLUNTARY SELF-REFERRAL, AN RCM 706 INQUIRY, OR MADE IAW FAP OR ADAPCP REGS, A CONSENSUAL DIAGNOSTIC EVALUATION, OR AN EVALUATION REQUIRED BY REGULATION OR FOR SPECIAL DUTIES OR OCCUPATIONAL CLASSIFICATIONS?***1***

YES

THE MMHEPA & DOD PROCEDURAL REQUIREMENTS DO NOT APPLY.

PROCEED WITH REFERRAL.

NO

IS THE REFERRAL A DISCRETIONARY NON-EMERGENCY OUT-PATIENT OR IN-PATIENT MENTAL HEALTH EVALUATION?***2***

YES

THE MMHEPA PROCEDURAL REQUIREMENTS APPLY.

STEP 1
PRIOR TO PERFORMING EVAL, DID CDR CONSULT W/ MENTAL HEALTH CARE?***3***

YES-PROCEED W/ STEP 2.
NO-"CONFER & CLARIFY" WITH CDR. ***4***

STEP 2
WAS SOLDIER PROVIDED PROPER REFERRAL & RIGHTS MEMO (SEE APP A)? ***5***

YES-PROCEED TO STEP 3.
NO-"CONFER & RESCHEDULE." ***6***

STEP 3
WAS A FORMAL REQUEST FOR EVAL SUBMITTED TO MTF OR CLINIC COMMANDER (SEE APP B)? ***7***

YES-PROCEED W/ STEP 4
NO-"CONFER & RESCHEDULE." ***8***

STEP 4
ADVISE SOLDIER OF PURPOSE, NATURE & CONSEQUENCES OF EVAL & EVAL NOT CONFIDENTIAL.***9***

STEP 5
AFTER EVAL, PROVIDE CDR RESULTS & RECOMMENDATION IAW APP E. ***10***

NO

IS THE REFERRAL FOR A DISCRETIONARY EMERGENCY EVAL, TREATMENT OR HOSPITALIZATION?

YES

THE MMHEPA & DOD PROCEDURAL APPLY.

STEP 1
PRIOR TO EVAL, DID CDR CONSULT W/ A MHCP?***11***

YES

STEP 2
DID MHCP CONCUR W/ REFERRAL?
YES-PROCEED.
NO-STOP & CONSULT LEGAL.
12

STEP 3
ADVISE SOLDIER OF PURPOSE, NATURE & CONSEQUENCES OF EVAL & EVAL NOT CONFIDENTIAL. ***12***

STEP 4
PERFORM TIMELY EVAL.***15***

STEP 5
REVIEW W/ SOLDIER & PROVIDE CDR RESULTS & RECOM MEMO IAW APP E.***10***

NO

THE MMHEPA & DOD PROCEDURAL REQUIREMENTS MAY NOT APPLY. STOP & CONTACT LEGAL.

STEP 2
DID CDR DOCUMENT REASONS & PROVIDE MHCP A COPY PRIOR TO EVAL?
(SEE APP C ***13***
YES-SEE STEP 3
NO-CONTACT LEGAL. ***14***

CHECKLIST TABLE FOR APPENDIX G

***** = Page 2-2 of the DOD Directive (DODD) and DOD Instruction (DODI) define a "mental health care provider" (MHCP) as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." The DODD and DODI require commander's to consult with an MHCP before referring a soldier for a discretionary mental health evaluation, treatment, or hospitalization. If no MHCPs are available, the commander must consult with a physician or the "senior privileged non-physician provider present." Page 2-3 of the DODI defines a "senior privileged non-physician provider present" as "in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc."

****** = The Military Mental Health Evaluation Protection Act (MMHEPA), National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992); DODI 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, (28 Aug. 1997); and DODD 6490.1, Mental Health Evaluations of Members of the Armed Forces, (1 Oct. 1997). *See also* DA Message, 080700Z Mar 96, DAPE-HR-L, subject: Mental Health Evaluations (Clarification)(ALARACT 21/96)(8 Mar. 1996).

1 = Paragraph D.3.e. of the DODD, excludes the following referrals, evaluations and interviews from the procedural requirements of the MMHEPA:

Voluntary self-referrals.

Sanity & competency inquiries in accordance with (IAW) Rules for Courts-Martial 706.

Referrals to Family Advocacy Programs (these normally involve medical assessments and treatment of family members by trained personnel. See DOD Directive 6400.1, Family Advocacy Program, 6.1 (23 Jun. 1997) and Army Regulation 608-18.

Referrals to drug and alcohol abuse rehabilitation programs. These normally take place during the "intake procedures." Intake procedures require a psychological evaluation to assess the soldier's need for detoxification and potential for rehabilitation. See DOD Directive 1010.4, Alcohol and Drug Abuse by DOD Personnel, E.3.b(2)(a) (25 Aug. 1980); DOD Instruction 1010.6, Rehabilitation Referral Services for Alcohol and Drug Abusers (13 Mar. 1985); and Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 3-10 (21 Oct. 1988).

Referrals for diagnostic evaluations made by non-command and non-mental health care providers, and with soldier's consent.

Non-discretionary evaluations required by regulation or for special duties or occupational classifications. According to para. D.3.e of the DODD, if a regulation requires a commander to refer a soldier for a mental health evaluation, the referral is not discretionary. **Examples of non-discretionary referrals** not falling within the DOD procedural requirements and made IAW Army Regulations are:

Security Clearance Evaluations IAW Army Regulation 380-67;
Personnel Reliability Program Evaluations IAW Army Regulation 380-67;
Evaluations made IAW Army Regulation 135-178;
Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;
Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;
Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;
Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

Examples of discretionary command referrals falling within the DOD procedural requirements when made as part of an administrative elimination are:

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.
Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;
Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;
Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;

Fight training disqualification IAW Army Regulation 635-200, paras. 1-34b and 5-12;
Separations IAW Army Regulation 635-200, paras. 1-34b, 5-16 and 5-17;

Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;
Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;
Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;
Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;
Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and
Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

2 = According to Section 546(b)(2)(A) of the MMHEPA, an MHCP may only perform an inpatient mental health evaluation if an outpatient evaluation is not reasonable IAW the "least restrictive alternative principle." Section 546(g)(5) of the MMHEPA defines "least restrictive alternative principle" as:

A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

Page 2-1 of the DODD expands this definition to include, "Such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotheraphy, as clinically indicated." A mental health care provider should advise the commander on the appropriate "therapeutic setting and treatment."

3 = IAW paragraph F.1.c of DODI, before you can perform a non-emergency mental health evaluation within the MMHEPA and DOD procedural requirements, you must ensure the commander consulted with an MHCP (see Appendix A).

4 = If the commander failed to consult with an MHCP prior to the referral IAW paragraph F.1.a(2) of DODI, "confer and clarify" any outstanding issues with the commander (e.g., reasons for referral and whether evaluation is necessary) prior to the evaluation. If the commander insists on an evaluation and you or another MHCP determine one is not necessary, CONTACT YOUR SUPERIORS OR LEGAL FOR GUIDANCE PRIOR TO PROCEEDING WITH THE EVALUATION.

5 = IAW paragraph F.1.c of DODI, before you can perform a non-emergency mental health evaluation within the MMHEPA and DOD procedural requirements, you must ensure the commander followed proper referral procedures. This requires you or another MHCP to review the "referral and rights memorandum" (see Appendix A) and ensure it complies with paragraph F.1.a(3) of the DODI (e.g., right to confer with counsel at least two business days before the evaluation, etc.).

6 = If the commander failed to provide the soldier a proper "referral and rights" memorandum IAW Appendix A, you must confer with the commander and reschedule the evaluation. The commander must give the soldier proper "referral and rights" notice at least two business days before the evaluation occurs. If necessary, contact the hospital JAG for legal guidance.

7 = IAW paragraph F.1.c of DODI, before you can perform a non-emergency mental health evaluation falling within the MMHEPA and DOD procedural requirements, you must ensure the commander followed proper referral procedures. IAW paragraph F.1.a(3) of the DODI, commanders must forward a formal request for a non emergency mental health evaluation to the MTF or Clinic commander IAW Appendix B.

8 = If the commander failed to do this, you must "confer and reschedule" the evaluation after the commander has submitted the formal request IAW Appendix B.

9 = Before you can perform a non-emergency mental health evaluation falling within the MMHEPA and DOD procedural requirements, IAW paragraph F.1.c(3) of the DODI, you must inform the soldier of "the purpose, nature and consequences" of the mental health evaluation. In addition, you must inform the soldier that the evaluation is not confidential. IAW paragraph F.1.c(4) of DODI, in non-emergency evaluations, if the same MHCP performed the evaluation and will provide treatment, the MHCP must explain to the soldier "possible conflict of duties" IAW medical and psychiatric ethics. In addition, you must advise the soldier that he or she may call a family member, friend, chaplain, attorney, or an IG.

10 = After performing a non-emergency mental health evaluation falling within the MMHEPA and DOD procedural requirements, IAW paragraph F.1.c(5) of the DODI, MHCPs must inform the soldier's commander of the results of the evaluation and recommendations IAW enclosure E. If you or another MHCP determine that a soldier should be hospitalized, IAW paragraph F.2.b(4) of the DODI, the MHCP must inform the soldier both orally and in writing of the reasons for the hospitalization.

11 = IAW paragraph F.1.a(5)(b) of DODI, commanders must "make every effort" to consult an MHCP before referring a soldier for an emergency mental health evaluation falling within the MMHEPA and DOD procedural requirements. IAW Paragraph D.2.c of the DODD, if "time and the nature of the emergency" do not allow the commander to consult with an MHCP prior to the referral, the commander must consult with a MHCP at the MTF or clinic the soldier will receive the evaluation.

12 = If the commander conferred with an MHCP prior to the emergency referral IAW paragraph F.1.a(5)(b) of DODI, and the commander insists on an evaluation despite the MHCP's determination that one is not necessary, CONTACT YOUR SUPERIORS OR LEGAL FOR GUIDANCE PRIOR TO PROCEEDING WITH THE EVALUATION.

13 = IAW paragraph F.1.a. (5) (e) of the DODI, if the commander is unable to consult with an MHCP prior to the referral, or at the MTF or clinic the soldier is taken to, the commander must document his or her reasons for the referral, and forward a copy of the memorandum (via "facsimile, overnight mail or courier") to the MHCP.

14 = If the commander failed to memorialize the commander's reasons in a memorandum and forward it to the MHCP (via "facsimile, overnight mail or courier") IAW paragraph F.1.a(5)(b) of DODI, "confer," if possible, with the commander or CONTACT YOUR SUPERIORS OR LEGAL FOR GUIDANCE PRIOR TO PROCEEDING WITH THE EVALUATION.

15 = IAW paragraph F.2.b(3) of the DODI, if an MHCP admits a soldier for inpatient evaluation or treatment, an MHCP must evaluate the soldier within 24 hours of admission to determine whether continued inpatient evaluation or treatment is appropriate.

APPENDIX H

SOLDIER'S COUNSEL CHECKLIST

I. The DOD Directive implementing the Military Mental Health Evaluation Protection Act (MMHEPA) references the Guidelines For Involuntary Civil Commitment[1] (Guidelines) as one source attorneys should use when representing soldiers pending mental health evaluations, treatment or hospitalization. Paragraph E.2 of the Guidelines provides, "for attorneys to assume the proper advocacy role, the attorney must advise the respondent of all available options, as well as the practical consequences of those options . . . the attorney should advocate the position that best safeguards and advances the client's interest." In order to best represent the interests of your client, counsel should use the following suggested approach in accordance with paragraph E1-E7 of the Guidelines.

II. Review of Non-emergency Outpatient and Inpatient Referral Procedural Requirements.

A. In order to determine whether the commander complied with the procedural requirements of the MMHEPA and the DOD Directive and Instruction:

First, meet with your client and determine whether the commander informed your client of the reasons for the referral. You can do this by reviewing the "referral and rights" memorandum provided to the soldier (see Appendix A). Ensure your client understands the commander's reasons for the referral.

Second, assess whether the commander based the referral on the immediate facts and circumstances of the case (e.g., client's behavior, client's statements, witness statements, mental health care provider's (MHCP) assessment, etc.). If the commander based the referral on facts and circumstances occurring several days or weeks ago, the referral may be stale and improper. In addition, assess whether the information the commander provided to the MHCP is accurate and complete.

Third, determine whether the commander complied with the consultation requirement. If the commander consulted with an MHCP, contact the MHCP and ensure he or she agreed with the referral. If the commander did not consult with an MHCP, review the "referral and rights" memorandum and determine whether the commander explains his or her reasons for not consulting an MHCP. If the commander failed to comply with the consultation requirement, the referral is procedurally improper.

Fourth, if the referral is for inpatient evaluation, ensure it complies with the "least restrictive alternative principle" (LRAP). The MMHEPA defines the LRAP as:

A principle under which a member of the Armed Forces committed for hospitalizationand treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

See National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546(g)(5), 106 Stat. 2315, 2419 (1992).

Fifth, assess whether the commander informed your client of the following rights (see Appendix A):

The right to speak with a legal assistance attorney about the propriety of the referral;

The right to speak to a civilian attorney of the client's own choosing and expense, about the propriety of the referral;

The right to file a complaint with either the DOD or Army IG alleging that the referral was in reprisal for making or preparing a protected communication.

The right to file a complaint with either the DOD or Army IG alleging that the referral for a mental health evaluation was improper.

The right to be evaluated by an MHCP of the client's own choosing and expense.

The right to discuss the referral with an IG, attorney, member of Congress, or others.

The right to seek assistance from the IG, legal assistance office or the chaplain on rebutting the referral.

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1. NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (Joseph Schneider, et al. eds., 1986). For more information or to order copies of the Guidelines call 1-800-877-1233.

If the commander failed to notify your client of the above rights, the referral is procedurally improper.

Sixth, determine whether the commander formally requested the evaluation (see Appendix B). If the commander failed to formally request the evaluation, the referral is procedurally improper.

III. Review Client's History and Explore Alternatives.

A. After assessing whether the commander complied with the procedural requirements for the referral, review your clients psychiatric history and explore alternative resolutions to the referral.

First, discuss with your client the facts and circumstances of the referral. While discussing the facts and circumstances of the referral with your client, you should keep in mind that your client may be suffering from a mental disorder or disability. You should, consequently, evaluate your client's information objectively for accuracy and completeness. Ask your client to provide you with names of MHCPs, that have dealt with your client in the past. In addition, ask your client to provide you with names of co-workers, friends, family and other character witnesses.

Second, review your client's medical and any psychiatric records (outpatient and inpatient). In particular, review the client's past psychiatric counselings, treatment and hospitalization.

Third, interview all MHCPs, if any, that examined or treated your client in the past. These MHCPs may provide you insight on possible alternatives to the command referral (e.g., outpatient vs. an inpatient evaluation).

Fourth, interview all witnesses involved with the referral. If the facts and circumstances suggest that the referral is improper, consider presenting these witnesses to the commander, the MHCP, or the reviewing officer to rebut or prevent the referral.

Finally, use information gathered from records, witnesses, MHCPs and your client to explore alternative resolutions to the referral. For example, a counseling session with a chaplain may suffice rather than an outpatient mental health evaluation. Likewise, an outpatient mental health evaluation may be more appropriate than an inpatient evaluation, treatment or hospitalization. Before recommending that your client follow an alternative option, counsel should discuss all alternatives with either the MHCP the commander consulted, or an independent MHCP.

B. After reviewing your client's psychiatric history and exploring alternative resolutions to the referral, explain the effect and any stigma any alternative resolution may have on your client once he or she leaves the Army. For example, the MHCPs negative findings may affect soldier's ability to acquire future employment.

C. If the client consents, discuss the alternative options with the commander and the MHCP consulted, and negotiate an appropriate resolution for your client.

IV. Emergency Evaluations, Treatment and Hospitalization.

If your client is being referred for an emergency evaluation, treatment or hospitalization, in addition to taking the above steps, counsel should consider the following issues.

First, determine whether the commander informed your client of the reasons for the emergency referral (see Appendix D).

Second, determine whether the commander based his or her reasoning for the emergency referral on the DOD's "clear and reasoned judgment" standard.

Third, if the commander did not consult with an MHCP prior to the referral, determine whether the commander "made every effort" to do so. In addition, was the reason for not consulting with an MHCP documented and a copy provided to the MHCP that performed the evaluation (see Appendix C). If the commander did consult with an MHCP, ensure the MHCP concurred with the referral.

Finally, if the MHCP hospitalizes your client, ensure an MHCP reviews the propriety of continued hospitalization within twenty-four hours after admittance.

V. Review of Referral, Evaluation and Continued Hospitalization.

A. If an MHCP decides to hospitalize your client, the medical treatment facility (MTF) or clinic commander must appoint an independent medical reviewing officer (RO) within seventy-two hours.

B. Once appointed, the RO must review the propriety of the referral, evaluation and hospitalization. The RO must also assess the propriety of continued hospitalization. Finally, the DOD Directive requires the RO to speak to your client during the review.

C. Since your client has the right to have counsel present and assist the client in the review, counsel should use this opportunity to advance the best interests of the client.
Counsel should consider:

1. Presenting witnesses and documentary evidence to the RO suggesting that continued hospitalization is unnecessary.

2. If the RO decides to keep your client hospitalized, ensure the RO specifies when the next review will occur. The MMHEPA and the DOD Directive mandate that the next review occur within five business days.

APPENDIX I

10 U.S.C.A. § 1034. Protected communications; prohibition of retaliatory personnel actions

(a) Restricting communications with Members of Congress and Inspector General prohibited.--(1) **No person may restrict a member of the armed forces in** communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of retaliatory personnel actions.--(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) or preparing--

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to--

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (j));

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or

(iv) any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.

(2) Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General investigation of allegations of prohibited personnel actions.--(1) **If a member of the armed forces submits to the Inspector General** of the Department of Defense (or the Inspector General of the Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall expeditiously investigate the allegation. If, in the case of an allegation submitted to the Inspector General of the Department of Defense, the Inspector General delegates the conduct of the investigation of the allegation to the inspector general of one of the armed forces, the Inspector General of the Department of Defense shall ensure that the inspector general conducting the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(B) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3) The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

(d) Inspector General investigation of underlying allegations.--Upon receiving an allegation under subsection (c), the Inspector General shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate.

(e) Reports on investigations.--(1) Not later than 30 days after completion of an investigation under subsection (c) or (d), the Inspector General shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and the member of the armed forces who made the allegation investigated.

(2) In the copy of the report submitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 90 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice--

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(f) Correction of records when prohibited action taken.--(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board--

(A) shall review the report of the Inspector General submitted under subsection (e)(1);

(B) may request the Inspector General to gather further evidence; and

(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)--

(A) may be provided with representation by a judge advocate if--

(i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).

(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(g) Review by Secretary of Defense.--Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(h) Post-disposition interviews.--After disposition of any case under this section, the Inspector General shall, whenever possible, conduct an interview with the person making the allegation to determine the views of that person on the disposition of the matter.

(i) Regulations.--The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.

(j) Definitions.--In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.

(3) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

APPENDIX J

PL 102-484, 1992 HR 5006

<< 10 USCA § 1074 NOTE >>

SEC. 546. MENTAL HEALTH EVALUATIONS OF MEMBERS OF ARMED FORCES.

(a) REGULATIONS.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise applicable regulations to incorporate the requirements set forth in subsections (b), (c), and (d). In revising such regulations, the Secretary shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian health organizations.

(b) PROCEDURES FOR OUTPATIENT AND INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4), a commanding officer shall consult with a mental health professional prior to referring a member of the Armed Forces for a mental health evaluation to be conducted on an outpatient basis.

(2) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4)--

(A) a mental health evaluation of a member of the Armed Forces conducted on an inpatient basis shall be used only if and when such an evaluation cannot appropriately or reasonably be conducted on an outpatient basis, in accordance with the least restrictive alternative principle; and

(B) only a psychiatrist, or, in cases in which a psychiatrist is not available, another mental health professional or a physician, may admit a member of the Armed Forces for a mental health evaluation to be conducted on an inpatient basis.

(3) The revisions required by subsection (a) shall provide that, when a commanding officer determines it is necessary to refer a member of the Armed Forces for a mental health evaluation, the commanding officer shall ensure that, except as provided in paragraph (4), the member is provided with a written notice of the referral. The notice shall, at a minimum, include the following:

(A) The date and time the mental health evaluation is scheduled.

(B) A brief explanation of why the referral is considered necessary.

(C) The name or names of the mental health professionals with whom the commanding officer has consulted prior to making the referral. If such consultation is not possible, the notice shall include the reasons why.

(D) The positions and telephone numbers of authorities, including attorneys and inspectors general, who can assist a member who wishes to question the referral.

(E) The rights of the member under the revisions required by subsection (a).

(F) The member's signature attesting to having received the information described in subparagraphs (A) through (E). If the member refuses to sign the attestation, the commanding officer shall so indicate in the notice.

(4) The revisions required by subsection (a) shall provide that, during emergencies, the procedures described in subsection (d) shall be followed in lieu of the procedures required by this subsection.

(c) RIGHTS OF MEMBERS.--The revisions required by subsection (a) shall provide that, in any case in which a member of the Armed Forces is referred for a mental health evaluation other than in an emergency, the following provisions apply:

(1) Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section.

(2) If a member of the Armed Forces submits to an Inspector General an allegation that the member was referred for a mental health evaluation in violation of the revised regulations, the Inspector General of the Department of Defense shall conduct or oversee an investigation of the allegation.

(3) The member shall have the right to also be evaluated by a mental health professional of the member's own choosing, if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department

of Defense, shall be conducted within a reasonable period of time after the member is referred for an evaluation and shall be at the member's own expense.

(4)(A) No person may restrict the member in communicating with an Inspector General, attorney, member of Congress, or others about the member's referral for a mental health evaluation.

(B) Subparagraph (A) does not apply to a communication that is unlawful.

(4) In situations other than emergencies, the member shall have at least two business days before a scheduled mental health evaluation to meet with an attorney, Inspector General, chaplain, or other appropriate party. If a commanding officer believes the condition of the member requires that such evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the personnel record of the member.

(5) In the event the member is aboard a naval vessel or in a circumstance related to the member's military duties which makes compliance with any of the procedures in subsection (b) impractical, the commanding officer seeking the referral shall prepare a memorandum setting forth the reasons for the inability to comply with such procedures.

(d) ADDITIONAL RIGHTS OF MEMBERS AND PROCEDURES FOR EMERGENCY OR INVOLUNTARY INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that a member of the Armed Forces may be admitted, under criteria for admission set forth in such regulations, to a treatment facility for an emergency or involuntary mental health evaluation when there is reasonable cause to believe that the member may be suffering from a mental disorder. The revised regulations shall include definitions of the terms "emergency" and "mental disorder".

(2) The revised regulations shall provide that, in any case in which a member of the Armed Forces is admitted to a treatment facility for an emergency or involuntary mental health evaluation, the following provisions apply:

(A) Reasonable efforts shall be made, as soon after admission as the member's condition permits, to inform the member of the reasons for the evaluation, the nature and consequences of the evaluation and any treatment, and the member's rights under this section.

(B) The member shall have the right to contact, as soon after admission as the member's condition permits, a friend, relative, attorney, or Inspector General.

(C) The member shall be evaluated by a psychiatrist or a physician within two business days after admittance, to determine if continued hospitalization and treatment is justified or if the member should be released from the facility.

(D) If a determination is made that continued hospitalization and treatment is justified, the member must be notified orally and in writing of the reasons for such determination.

(E) A review of the admission of the member and the appropriateness of continued hospitalization and treatment shall be conducted in accordance with procedures set forth in the regulations as required under paragraph (3).

(3) The revised regulations shall include procedures for the review referred to in paragraph (2)(E). Such procedures shall--

(A) specify the appropriate party (or parties) who is outside the individual's immediate chain of command and who is neutral and disinterested to conduct the review;

(B) specify the appropriate procedure for conducting the review;

(C) require that the member have the right to representation in such review by an attorney of the member's choosing at the member's expense, or by a judge advocate;

(D) specify the periods of time within which the review and any subsequent reviews should be conducted;

(E) specify the criteria to be used to determine whether continued treatment or discharge from the facility is appropriate;

(F) require the party or parties conducting the review to assess whether or not the mental health evaluation was used in an inappropriate, punitive, or retributive manner in violation of this section; and

(G) require that an assessment made pursuant to subparagraph (F) that the mental health evaluation was used in a manner in violation of this section shall be reported to the Inspector General of the Department of Defense and included by the Inspector General as part of the Inspector General's annual report.

(e) CONSTRUCTION.--Nothing in the regulations prescribed under this section shall be construed to discourage referrals for appropriate mental health evaluations when circumstances suggest the need for such action.

(f) PROHIBITION AGAINST THE USE OF REFERRALS FOR MENTAL HEALTH EVALUATIONS TO RETALIATE AGAINST WHISTLEBLOWERS.--(1) The revised regulations required by subsection (a) shall provide that no person may refer a member of the Armed Forces for a mental health evaluation as a reprisal for making or preparing a lawful communication of the type described in section 1034(c)(2) of title 10, United States Code, and applicable regulations. For purposes of this subsection, such communication also shall include a communication to any appropriate authority in the chain of command of the member.

(2) Such revisions shall provide that an inappropriate referral for a mental health evaluation, when taken as a reprisal for a communication referred to in paragraph (1), may be the basis for a proceeding under section 892 of title 10, United States Code. Persons not subject to the Uniform Code of Military Justice who fail to comply with the provisions of this section are subject to adverse administrative action.

(g) DEFINITIONS.--In this section:

(1) The term "member" means any member of the Army, Navy, Air Force, or Marine Corps.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the Armed Forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the Armed Forces.

(3) The term "mental health professional" means a psychiatrist or clinical psychologist, a person with a doctorate in clinical social work or a psychiatric clinical nurse specialist.

(4) The term "mental health evaluation" means a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing a member's state of mental health.

(5) The term "least restrictive alternative principle" means a principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate and therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such placement are warranted by the proposed plan of treatment.

(h) REPORT.--At the same time as the regulations required by this section are revised, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report describing the process of preparing the regulations, including--

(1) an explanation of the degree to which any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian mental health organizations were considered;

(2) the manner in which the regulations differ from any such civilian guidelines; and

(3) the reasons for such differences.

(j) CONFORMING REPEAL.--Subsection (g) of section 554 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510) is hereby repealed.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Notes

Parents Delinquent in Child Support Across State Lines May Face Felony Charges

On 24 June 1998, President Clinton signed the Deadbeat Parents Punishment Act of 1998 (DPPA).[1] This act toughens the previous statute known as the Child Support Recovery Act.[2] Under the DPPA, any person who travels across state lines with the intent to evade a child support obligation that is over $5000 or that has remained unpaid for longer than one year can be charged with a federal felony.[3] The DPPA also makes it a felony for any person to willfully fail to pay support for a child living in a different state if that obligation is greater than $10,000 or if it remains unpaid for more than two years.[4] The DPPA also requires courts, when adjudging a sentence, to include restitution of unpaid child support that is due under the order that led to the indictment or information.[5] Major Fenton.

Payment of College Expenses for Children of Divorce

When a couple with children divorces, one of the most important decisions that a court makes is the award of child support. All states have guidelines that set the amount of money that is due monthly for child support.[6] An increasingly litigated issue is whether a parent must provide post-minority support for a child to attend college. Two recent decisions highlight the disparate approaches that courts have taken on this issue.

Texas enforces post-minority awards of college expenses if there is a contractual basis for payment of those expenses between the parties. In *Burtch v. Burtch*,[7] the Texas Court of Appeals held that Mr. Burtch breached a contractual obligation to pay the college expenses of his children. In their divorce decree, the Burtchs agreed to split the costs of college, including a provision that obligated Mr. Burtch to pay fifty percent of the tuition, books, and room and board costs associated with college.[8] The decree also imposed some conditions on this obligation. For example, the children had to attend full-time and maintain a "C" grade-point average.[9] Mrs. Burtch brought a breach of contract suit when Mr. Burtch failed to pay his share of the college expenses.

Mr. Burtch argued that the provision was unenforceable because it was in the portion of the decree that dealt with child custody, visitation, and child support. In addition, he claimed that under existing state law the obligation to pay support ends when the child reaches age eighteen.[10] He further argued that the court could not enforce the language of the provision because it was vague and ambiguous.[11] The Texas Court of Appeals rejected all of Mr. Burtch's arguments. The court stated that there is no independent right to child support for college, or for any child, beyond the age of eighteen.[12] The parties, however, may, contractually agree to extend child support

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1. Pub. L. No. 105-187 (codified at 18 U.S.C.A. § 228 (West 1998)).

2. 18 U.S.C.A. § 228 (West 1998). The DPPA amends the Child Support Recovery Act. The underlying rules and application remain the same. For a more detailed explanation of this statute see Family Law Note, *The Child Support Recovery Act: Criminalization of Interstate Nonsupport,* ARMY LAW., Dec. 1997, at 26.

3. 18 U.S.C.A. § 228(a)(2).

4. *Id.* § 228(a)(3).

5. *Id.* § 228(d).

6. The Family Support Act of 1998, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C.A. §§ 654, 666-67 (West 1998)). The Family Support Act of 1988 mandated that all states enact child support guidelines by 1994. All states complied with this mandate. For a detailed review of all states child support guidelines and statutes, including worksheets for the guidelines, *see* LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (1998).

7. 972 S.W.2d 882 (Tex. App. 1998).

8. *Id.* at 885.

9. *Id.* at 887.

10. *Id.* at 886.

11. *Id.*

12. *Id.* at 885.

beyond the age of eighteen.[13] The court found that the language of the Burtch's decree, while not a model of clarity, was not so ambiguous and unclear as to make it unenforceable.[14] Consequently, the court awarded Mrs. Burtch a judgment for $12,016.79 for college expenses.[15]

North Dakota recently took a different and more dramatic approach to this issue. In *Donarski v. Donarski*,[16] the North Dakota Supreme Court held that a divorce court could impose an award of post-minority support, including college expenses, under appropriate circumstances.[17] North Dakota's child support statute terminates support at age nineteen.[18] The court cautioned trial court judges that the authority to impose post-minority support is not absolute. The court set out twelve factors to consider before making such an award:

> (1) [W]hether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.[19]

The most significant of these factors is the parent's ability to pay.[20] The law on college expenses is, like most family law issues, one that varies from state to state.[21] The safest way to ensure support for future college expenses is to negotiate it in the divorce decree. While some states may allow for post-minority support by statute, few impose this obligation absent some contractual provision. Legal assistance attorneys need to raise the issue with clients and help them think through the various options. In drafting a college expense provision, attorneys should be careful to define terms and conditions and make sure that the document clearly indicates the contractual intent of the parties. Major Fenton.

Survivor Benefits Notes

Dependency and Indemnity Compensation Restoration

One of the major benefits that is available to the survivors of service members whose death is service-connected[22] is Dependency and Indemnity Compensation (DIC).[23] This is a monthly payment from the Department of Veterans Affairs (VA) that is

13. *Id.* at 886.

14. *Id.* at 888.

15. *Id.* at 891.

16. 581 N.W.2d 130 (N.D. 1998).

17. *Id.* at 136.

18. N.D. CENT. CODE § 14-09-08.2(1) (1997) (terminating child support at the end of the month during which the child graduated from high school or attains age nineteen if still in high school).

19. *Donarski*, 581 N.W.2d 130, 136 (N.D. 1998) (quoting Newburgh v. Arrigo, 443 A.2d 1031, 1038-39 (N.J. 1982)).

20. *Id.*

21. *See* MORGAN, *supra* note 6, at 4-33 (summarizing state treatment of post-minority college expenses).

22. The term "service-connected" means, with respect to disability or death, that the disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in the line of duty while on active duty. 38 U.S.C.A. § 101(16) (West 1998). If death occurs while a service member is on active duty, a presumption arises that death was service connected if it was not due to the service member's willful misconduct. An injury or disease will be deemed to have been incurred in the line of duty and not the result of the service member's own misconduct when at the time of the injury or disease contracted, the person was on active duty (even if on authorized leave). *Id.* § 105(a). "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action. Pensions, Bonuses, and Veterans Relief, 38 C.F.R. §§ 3.1(n), 3.301 (1998).

23. 38 U.S.C.A. §§ 1301–1322.

made to eligible persons.[24] A base amount is paid together with other allowances that may be added under certain circumstances. For example, the VA adds allowances for additional dependents,[25] as well as for children over the age of eighteen and permanently incapable of self-support,[26] and surviving spouses who are so severely disabled as to be house bound or in need of regular aid and attendance.[27] Currently, the base amount for surviving spouses is $850 per month for life, unless they remarry. Previously, surviving spouses would lose their entitlements to DIC if they remarried, regardless of their age. The VA would not reinstate the payment, even if the marriage was terminated through divorce or death.[28]

As of 1 October 1998, new legislation restored the eligibility of certain remarried surviving spouses for DIC upon termination of the remarriage.[29] The remarriage of a surviving spouse of a veteran will not bar DIC payments to the surviving spouse if the remarriage is terminated by death, divorce, or annulment unless it is determined that the marriage was secured through fraud or collusion.[30] Historically, another bar to the payment of DIC applied to surviving spouses who lived with another person and held themselves out openly to the public as that person's spouse.[31] Under the new legislation, if a surviving spouse of a veteran stops living with the other person and does not hold himself out openly to the public as that person's spouse, the statutory bar to the granting of DIC as the surviving spouse does not apply.[32] The legislation is retroactive and restores prior eligibility, but no payment will be made for any month prior to October 1998.[33]

The VA is attempting to contact eligible spouses by direct mail and publicity to inform them of this restored benefit. Legal assistance offices should publicize this recent legislative change and instruct former surviving spouses to contact their local VA regional office.[34] Major Rousseau.

SGLI Dividend Hoax

Recently, on some military installations, flyers have appeared that indicate that Congress passed legislation that allows veterans to claim a dividend on Servicemembers' Group Life Insurance (SGLI).[35] Similar memoranda have come across military fax machines and appeared on the Internet. The message indicates that veterans must send personal information (such as a Department of Defense Form 214) regarding their military service to a "veteran's center" in order to claim the dividend. These offers are hoaxes that are aimed at acquiring personal information about the service member. Some versions of the hoax offer to assist the veteran in obtaining the dividend for a fee.

These hoaxes have their origins in a special dividend that the Department of Veterans Affairs (VA) paid to World War II veterans who had National Service Life Insurance policies.[36] This particular group of veterans had to apply for the payment. In 1950, many veterans were paid under the "1948 special dividend," and by the 1960's the VA had already paid out the special dividend to virtually all eligible policyholders.[37] In 1965, inaccurate newspaper reports surfaced that the VA was paying

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24. 38 U.S.C.A. § 1304; *id.* § 1311 (discussing children); *id.* § 1313 (discussing parents); *id.* § 1315 (discussing benefits for survivors of certain veterans rated totally disabled at the time of death); *id.* § 1318 .

25. *Id.* § 1313.

26. *Id.* § 1314.

27. *Id.* § 1311.

28. For purposes of DIC, the term "surviving spouse" is defined in pertinent part as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death . . . and who has not remarried." *Id.* § 101(3). Should the surviving spouse remarry, DIC shall be discontinued effective on the last day of the month before such remarriage. *Id.* § 5112(b)(1); s*ee also*, 38 C.F.R. § 3.500(n) (1998).

29. On 9 June 1998, the President signed the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 8207, 112 Stat. 107 (1998) (codified as amended at 38 U.S.C.A. § 1311(e) (West 1998)).

30. 38 U.S.C.A. § 1311(e)(1).

31. 38 C.F.R. § 3.50(b) (1998).

32. 38 U.S.C.A. § 1311(e)(2).

33. Transportation Equity Act for the 21st Century § 8207(b).

34. Department of Veterans Affairs, News Release, *VA Announces Restoration of Benefits for Spouses* (visited Aug. 31, 1998) http://www.va.gov/pressrel/98dic.htm.

35. 38 U.S.C.A. §§ 1965-1976.

36. Department of Veterans Affairs, *VA Insurance Hoax Resurfaces on the Internet* (visited Aug. 28, 1998) http://www.va.gov/benefits/hoax.htm.

37. *Id.*

a special dividend to all veterans (not just those who served in World War II).[38] Many of the recent hoaxes are aimed at active duty personnel, reservists, and personnel who retired or separated from the military in the last few years.

Any dividends that are derived from the SGLI are deposited to the credit of a revolving fund to meet costs of the program.[39] There has not been any recent legislation that authorizes special dividends for SGLI. Dividends are not payable to current service members who are insured under SGLI or Veterans' Group Life Insurance.[40] The VA does pay routine dividends on several policies, but only to veterans who have kept their policies in force. These dividends are paid automatically on the anniversary date of the individual policy and the veteran does not have to apply for them.[41]

The VA Office of the Inspector General (VAOIG) is attempting to put an end to these insurance hoaxes. If you are aware of such solicitations report them immediately to the VAOIG at 1-800-827-1000.[42] Major Rousseau.

Reserve Component Note

New TJAGSA Legal Assistance Publications

Recently, The Judge Advocate General's School, Army (TJAGSA) published two new legal assistance publications. They are *JA 260: The Soldiers' and Sailor's Civil Relief Act (SSCRA) Guide* [43] and *JA 270*: *The Uniformed Services Employment and Reemployment Rights Act (USERRA) Guide*.[44] The SSCRA guide was thoroughly updated and revised to reflect all the changes in case law since 1996.

The USERRA guide, a new publication, outlines the law, regulations, and practice concerns raised by the USERRA for both private and public employers and employees. This publication replaces the 1991 TJAGSA pamphlet entitled *Materials on the Veterans Reemployment Rights Law*, which was written before the enactment of the USERRA.[45]

As reservists continue to be activated for military duty on a regular basis, protections for such service members and their families are crucial to making today's Army an effective fighting force. As Secretary of Defense William Cohen recently observed, the days of "the weekend warrior" are over. "Strike that term from your lexicon. Today, we simply cannot maintain our military commitments without the Guard and Reserve. We can't do it in Bosnia, we can't do it in the [Persian Gulf], we can't do it anywhere."[46]

The protections that are provided in the SSCRA and the USERRA are crucial to reserve component recruitment, retention, and good unit morale.

These guides are relevant to judge advocates of all components. Whether you conduct mobilization and demobilization briefings for reserve component soldiers at a power projection platform installation such as Fort Benning, Fort Dix, or Fort Bragg, or provide legal assistance in Bosnia, issues that are impacted by the USERRA and SSCRA will arise. Judge advocates who are working in other areas of the law cannot ignore these statutes either. For example, labor counsel who advise civilian personnel managers on military leave policies for Department of the Army civilians must understand the ramifications of the USERRA on military leave policy and benefits such as pensions, the Federal Thrift Savings Plan, and reduction in force actions. Legal assistance attorneys who provide pre-

38. *Id.*

39. 38 U.S.C.A. § 1969(d)(1).

40. *Id.* §§ 1977-1979.

41. *See, e.g., VA Announces 1998 Insurance Dividends*, PR News wire, Jan. 26, 1998, *available in* WESTLAW, MILNEWS Database.

42. Department of Veterans Affairs, *News About the Servicemembers' Group Life Insurance Hoax*, (visited Aug. 28, 1998) <http://www.va.gov/oig/hotline/news1.htm>.

43. Administrative & Civil L. Dep't., The Judge Advocate General's School, U. S. Army, JA-260, Legal Assistance Guide: The Soldiers' And Sailors Civil Relief Act (Apr. 1998).

44. Administrative & Civil L. Dep't., The Judge Advocate General's School, U. S. Army, JA-270, Legal Assistance Guide: The Uniformed Services Employment And Reemployment Rights Act (June 1998) [hereinafter JA 270].

45. Administrative & Civil L. Dep't., The Judge Advocate General's School, U.S. Army, Materials On The Veteran's Reemployment Rights Law (Mar. 1991). The USERRA was signed into law on 13 October 1994. In a recent after action report, the Center for Law and Military Operations stated that active component judge advocates in Bosnia erroneously briefed activated reservists on the former Veterans' Reemployment Rights Act (VRRA), formerly codified at 38 U.S.C.A. §§ 2021-2026. Beware of teaching materials prepared on the prior VRRA, *e.g., Department of the Army Pamphlet 135-2-R, Briefing on Reemployment Rights of Members of the Army National Guard and U.S. Army Reserve* (May 1982); Major Bernard P. Ingold and Captain Lynn Dunlap, *When Johnny (Joanny) Comes Marching Home: Job Security for the Returning Service Member Under the Veterans' Reemployment Rights Act*, 132 Mil. L. Rev. 175 (1991). Good current teaching materials are included in JA 270 and may be obtained from world wide websites for the Department of Defense National Committee for Employer Support of the Guard and Reserve NCESGR at http://www.ncesgr.osd.mil and the Department of Labor at <http://www.dol.gov/dol/vets/.

46. Major Donna Miles, *U.S. Chamber of Commerce Signs Pledge*, The Officer [ROA], Aug. 1998, at 18.

retirement briefings and counseling should understand the USERRA's protections that extend to veterans who seek employment.[47] Both guides, which are disseminated through multiple channels, provide a valuable resource to assist both new and experienced judge advocates in meeting their obligations to their clients.[48] Lieutenant Colonel Conrad.

International and Operational Law Note

Principle 3: Endeavor to Prevent or Minimize Harm to Civilians

The following note is the fourth in a series of practice notes[49] that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense Law of War Program.[50]

The law of war principle discussed in this note encompasses rules intended to prevent or minimize harm to civilians. This is proposed as a cord "principle" of the law of war falling with the scope of *Chairman, Joint Chiefs of Staff Instruction 5810.01*. By compelling commanders to consider implementing measures to avoid or minimize such harm, this principle compliments the principles of "distinction" and "military objective." *Field Manual (FM) 27-10* expresses this basic principle as follows:

> Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.[51]

The law of war includes a comprehensive body of rules designed to implement this basic principle. These rules are found in law of war treaties that are intended to protect civilians from the effects of hostilities. The most notable rule is the 1977 Protocol I Additional to the Geneva Conventions of 1949.[52] Many of these detailed provisions may appear "aspirational" in nature because they are often qualified with caveats such as "when possible," or "as feasible." These caveats, however, must be understood within the context of the basic rule – endeavor to minimize civilian suffering. Against this backdrop, the practitioner should recognize that these detailed provisions are neither irrelevant because of the application caveats nor absolutely mandatory because of what they seek to achieve. Instead, the provisions should be understood as mechanisms for achieving compliance with the basic principle; therefore, they must be considered in the planning and execution of military operations.

The legal advisor is responsible for ensuring that these mechanisms are considered. This responsibility is heightened by the context in which these rules become relevant: restraining commanders tasked with accomplishing a combat mission. While our commanders should be expected to approach their duties with a good faith recognition of the need to minimize harm to civilians, it is unlikely that they will make this principle a paramount priority during mission planning and execution. Whether in the context of a high intensity conflict, or a non-conflict operation other than war, what will be paramount in the commander's mind is mission accomplishment. Because of this, this principle and the rules designed for its implementation reflect a fundamental tension within the law of war. The law of war is founded in part on the recognition that minimizing non-combatant suffering will ultimately aid in mission accomplishment. Destruction of the enemy, however, is the likely key aspect of mission accomplishment in the mind of the commander. Because of this reality, the judge advocate command advisor must understand the imperative of balancing these potentially competing interests. During the planning and execution process, this imperative should translate into input to the commander that is based on the law of war provisions discussed in this note.

Feasibility is the key component in determining when many of these detailed rules must be implemented. Feasibility provides a limited mechanism to bypass applying certain rules

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47. The USERRA includes a provision that prohibits employer discrimination in hiring, retention, promotions, or any benefits of employment because of the employee's prior military status. *See* 38 U.S.C.A. § 4311 (1998). *See* Petersen v. Dep't of Interior, 71 M.S.P.R. 227 (1996).

48. These publications may be obtained through a Defense Technical Information Center account, downloaded in electronic file format via the Legal Automation Army-Wide System electronic bulletin board service as TJAGSA publication library files, or downloaded as electronic files via Lotus Notes on the Internet through the Army Judge Advocate General's Corps World Wide Web site at http://www.jagcnet.army.mil. Further information on obtaining these publications may be found in the back of the September 1998 edition of *The Army Lawyer.*

49. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., JUNE 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., JULY 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug.1998, at 35.

50. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *See also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

51. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 5 (July 1956) [hereinafter FM 27-10].

52. 16 I.L.M. 1391 [hereinafter GP I].

related to minimizing civilian harm when application would be harmful to the force. Ironically, concern over the perceived negative ramifications from causing harm to civilians during an operation may lead to "extra" compliance with these law of war rules, leading commanders to be overly cautious. In both scenarios, the commander is ultimately responsible to decide when, where, and how to apply destructive force. But it is the responsibility of the judge advocate to ensure that such decisions are based on an understanding of not only the "must do's" of the law of war, but also the "should do's." To this end, the law of war embraces the notion that by endeavoring to implement the detailed rules discussed in this note, civilian suffering that could and should be avoided, will be avoided.

The Allied bombardment of the city of Caen in July 1944 provides a good template to illustrate the complex nature of these rules as they relate to minimizing civilian harm. Although other contemporary examples exist, the stark facts of Caen make it especially relevant. Field Marshall Montgomery's decision to launch the operation highlights the intense "non-legal" pressures that confront commanders during combat operations. Far behind schedule, suffering unacceptable losses, and facing damage to his prestige, Field Marshall Montgomery had to achieve the long overdue "breakout." The Caen operation illustrates the impact of considering this law of war principle, and the rules intended to implement it, into targeting decisions.

In July 1944, British and Canadian forces in Normandy faced a dilemma. For over one month they had been battling the German defenders of the area surrounding the French city of Caen. Allied plans called for the capture of Caen within days of the 6 June D-Day landings. Unfortunately, as of 18 July, the Germans still held this urban center in the path of the planned Allied "encirclement" route. The war of movement that the Allies anticipated had become a war of attrition, a war that the British could ill afford. This was emphasized to Montgomery in mid-July when the British Adjutant-General visited him to "warn him about the shortage of replacements."[53]

Against this backdrop, Montgomery planned a major operation to finally capture Caen. Nothing indicates that Montgomery considered bypassing the city.[54] Instead, his plans called for employing 450 heavy aircraft from the Bomber Command to attack the city in order to reduce enemy defenses and to facilitate the corps-strength ground assault. The ensuing bombardment virtually destroyed the city. Hundreds of civilians were killed or wounded. Most civilians had elected to remain in the city rather than heed the German suggestion that they evacuate the area. In spite of the massive scale of the bombardment, Allied ground forces still faced determined resistance.

The tactical result of the bombardment was negligible. Most German forces were not even in the city, but in surrounding areas. The small portion of German defenders in the city conducted defensive operations after the bombing. Consequently, although the bombing boosted the morale of the Allied forces entering the ground offensive, it provided virtually no other benefit. The Allies suffered substantial losses, and did not capture the city until 20 July, nearly two weeks after the bombardment.[55] Even at that point, the Germans continued to hold defensive positions behind the city, preventing the Allied breakout that the fall of Caen was expected to unleash.[56]

Montgomery was under intense pressure to achieve the long overdue breakout from Normandy. Accomplishing this mission was likely his primary concern when he decided to bomb Caen. Nothing indicates that protecting the French population of the city was a significant competing interest. Might the outcome of his decision making process have been different if he had the benefit of contemporary law of war advice? Although we can only speculate, it is this might that is significant for the law of war practitioner to consider, because it illustrates the value of injecting such consideration into the planning and execution of any future military operation.

The battle for Caen demonstrates the troubling dilemma posed by the intersection of the law of war intended to minimize harm to civilians and the realities of military operations. It highlights the difficulty of balancing the need to minimize harm to civilians and the needs of the mission. The improvement in the technology and lethality of warfare makes this dilemma arguably more profound today than in 1944. Unlike in 1944, however, the law of war explicitly requires commanders and their planners to consider measures that are intended to shield civilians from the harmful effects of combat during the planning and execution process. The source of this obligation is the 1977 Protocol I Additional to the Geneva Conventions of 1949.[57] This is not an obligation that is exclusive to the attack-

53. MAX HASTINGS, OVERLORD: D-DAY AND THE BATTLE FOR NORMANDY 221 (1984).

54. *Id.*

55. *Id.* at 236-37.

56. *Id.* at 223-39.

57. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 615 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (indicating that the rule that related to the protection of civilians from the harmful effects of hostilities "explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities").

ing force.[58] It extends to all combatants during international armed conflict, and arguably to combatants during internal armed conflict as a matter of customary international law. The focus of this note, however, is the impact on a force that is planning an attack, and not in the defense.

Article 51 of Protocol I establishes the rule that civilians "shall enjoy general protection against dangers arising from military operations . . . ."[59] Article 51 also includes specific provisions of law that are intended to give effect to this general rule.[60] Although the United States never ratified Protocol I, the provisions discussed in this note, which implement this "general rule" of minimizing harm to civilians, were considered by the United States as codifying customary international law obligations.[61]

Any intentional targeting of persons who qualify for status as civilians would clearly violate the customary international law obligation to distinguish between lawful and unlawful targets which lies at the heart of the law of war.[62] While Article 51 prohibits making civilians "the object of attack,"[63] it also prohibits the unintended harm to civilians when the extent of that harm is so significant that it is tantamount to intentional harm. Thus, the principle of minimizing harm to civilians is based on the premise that civilians may never be the lawful object of intentional attack. The law of war, however, also accepts as reality that "armed conflicts entail dangers for the civilian population,"[64] and aims to limit the *unintentionally* inflicted harm to civilians during hostilities.[65]

The need for such a principle is amply demonstrated by the facts surrounding the bombardment of Caen. No evidence indicates that Field Marshall Montgomery ever *intended* to inflict suffering on the civilian population of the city. This, however, did not prevent extensive harm to civilians and their property as a result of the bombardment. While such suffering is almost certainly the unavoidable product of armed conflict, the key issue related to protecting civilians is whether everything "feasible"[66] was done to prevent or minimize this suffering. The law of war principle of protecting civilians from the harmful effects of warfare can therefore best be understood by recognizing the underlying purpose of the principle: to prohibit those acts that, although in no way intended to cause civilian suffering, are so wanton or reckless that they should be prohibited as if such an intent did exist.[67]

A series of detailed articles contained in Protocol I codified this principle. While there is no substitute for turning to these provisions when analyzing a targeting decision, a judge advocate can facilitate his understanding of the provisions by thinking in terms of three primary sub-components:

> 1. The absolute prohibition against any "indiscriminate" attack;
> 2. The obligation to take certain precautions to protect non-combatants; and
> 3. The obligation to refrain from any attack that "may be expected to cause incidental injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and

58. GP I, *supra* note 52.

59. *Id.* art. 51.

60. *Id.*

61. *See Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, in The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law,* 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

62. *See* International and Operational Law Note, ARMY LAW., Aug. 1998, at 35 (discussing of the principle of distinction).

63. *See* GP I, *supra* note 52, art. 51(2).

64. COMMENTARY, *supra* note 57, at 617.

65. *Id.*

66. The law of war practitioner must understand the complexity of the meaning of this term. What is "feasible" in any given situation is a fact intensive issue. Factors such as force protection, security, logistics, intelligence, and personnel resources all must be considered. *It should not* be read to assume that the technological ability to use precision targeting, *standing alone,* automatically makes use of such technology "feasible." *See, e.g.,* Danielle L. Infeld, Note, *Precision-Guided Munitions Demonstrated their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to use Precision Guided Technology to Minimize Collateral Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 109 (1992) (concluding that use of available precision-guided munitions is not mandated by the law of war).

67. This analogy is not offered by the Commentary. It may, however, be useful for facilitating an understanding of the objective of the rules intended to implement the imperative to minimize civilian suffering.

> direct military advantage anticipated,"[68] commonly referred to as the "proportionality" test.

Each of these sub-components shares the same objective but achieves it differently. Of the three, the absolute prohibition against indiscriminate attacks is most obviously related to the principle of distinction. No member of the military profession should object to the absolute prohibition of *intentionally* launching an indiscriminate attack. It is the extension of this prohibition to the *unintentional* violation of the distinction between lawful and unlawful targets that poses the greatest dilemma in application.

In order to achieve this extension, Protocol I defines prohibited indiscriminate attacks as:

> (a) those which are not directed at a specific military objective;
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; and,
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol*; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction*.[69]

As the emphasis indicates, this provision does not mean that the mere presence of civilians or civilian objects makes any planned attack "indiscriminate." Instead, it reinforces the principle of distinction by capturing the definition of indiscriminate targeting decisions, which by their nature cannot distinguish between military objectives and the civilian population. The Official Commentary reinforces this conclusion:

> [T]he provision begins with a general prohibition on indiscriminate attacks, i.e., attacks in which no distinction is made. Some may think that this general rule should have sufficed, but the conference considered that it should define the three types of attack covered by the general expression "indiscriminate attacks."[70]

Applying this rule to the Caen targeting decision illustrates its impact. The bombardment of Caen would have arguably violated Article 51, had it been in force at the time. Whether the attack was directed against a "specific military objective" is debatable. Although there was intelligence indicating the presence of German defensive positions in the city, the bombardment was general, and does not appear to have been directed at any specific defensive position. How, if at all, should the sophistication of weapons technology that was available to the Allies impact this analysis? The method employed would appear justified if then existing weapon systems did not allow for more precise targeting of the enemy position within the city. This consideration, however, illustrates why the definition of "indiscriminate" in Article 51 includes attacks with weaponry that cannot be directed against, or destructiveness limited to, specific military objectives.[71]

As with virtually all law of war provisions that relate to targeting decisions, application of this rule is fact intensive. The law of war is intentionally designed to provide general guidance to combatants. Commanders retain a great deal of flexibility when analyzing the legality of targeting decisions. Article 51 should not be read to categorically prohibit any employment of non precision-guided munitions.

The facts of the Caen bombardment, however, suggest that the target was the city itself, with little or no effort made to identify and target specific emplacements within the city. Article 51 is clearly intended to prohibit such weapon employment. Had the Allies identified enemy defensive positions co-mingled with the civilian population in the city, Article 51(5)(a) might have impacted the target selection. This provision of Protocol I adds to the category of "indiscriminate attacks":

> [A]n attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects . . . .[72]

The Official Commentary indicates that this provision was a direct response to the devastation caused by the type of area or

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68. This "proportionality" test is used in Protocol I to define the meaning of an indiscriminate attack. *See* GP I, *supra* note 50, art. 51(5)(b). It is also stated as a component of the Article 57 precautions in the attack obligations, *see id.* art. 57(2)(a), (b). In *FM 27-10* it is a "stand-alone" provision which indicates that "loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage to be gained." FM 27-10, *supra* note 49, at 5 .

69. GP I, *supra* note 52, art. 51(4) (emphasis added).

70. COMMENTARY, *supra* note 57, at 620.

71. *Id.*

72. GP I, *supra* note 52, art. 51(5).

"carpet" bombing exemplified by the Caen operation.[73] Although the devastation caused by such bombing may in no way be intended, it is considered an indiscriminate employment of a method of warfare, and therefore prohibited.

The next sub-component of the principle of protecting the civilian population from the harmful effects of hostilities is the obligation to take certain precautions during combat operations. Article 57 of Protocol I is devoted to implementing this requirement. Entitled "precautions in attack,"[74] it establishes the general rule, applicable to *both* the attacking and defending force. Article 57 provides that, "[I]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects."[75] The following summary illustrates the nature of the specific provisions of Article 57 that are intended to implement this general rule:

> • The parties to the conflict must do everything feasible to verify that targets of attack are valid military objectives;
> • The parties to the conflict must do everything feasible to choose means and methods of combat which will avoid or minimize harm to civilians or their property;
> • *when circumstances permit*, the parties to the conflict must provide advance warnings for attacks which may affect the civilian population;
> • when choosing among several military objectives for obtaining a similar military advantage, the parties to the conflict must select the objective with the least likelihood of causing civilian casualties; and,
> • The parties to the conflict must suspend, cancel, or refrain from launching any attack which may be expected to cause incidental harm to civilians or their property that would be excessive in relation to the concrete and direct military advantage anticipated.[76]

Had either Protocol I or the current version of *FM 27-10* been in effect at the time of the bombardment of Caen, the Allies should have done "everything feasible to verify that the objectives to be attacked [were] neither civilians or civilian objects . . . but [were] military objectives . . . ."[77] Although German defensive positions did exist within the city, *FM 27-10* and Protocol I would have prohibited treating distinct military objectives within a civilian population area as one overall military objective. Thus, the presence of defensive positions within the city arguably would not have justified treating the entire city as a single objective. If the Allies had targeted the individual defensive positions within the city separately, the method or means of combat that was employed should have been such that the effects could be relatively limited to these objectives.[78] Carpet bombing of a city does not appear to comport with this restriction.

An advance warning requirement is a component of Article 57. It appears that the Germans actually took measures to this end. They advised the local population to flee the city. Nothing, however, indicates that the Allies attempted a similar warning. No such warning would be required if Allied planners believed that it would compromise the mission. Under such circumstances, the commander may reasonably conclude that the warning would not be feasible or permitted by the circumstances. This is a key caveat to the duties imposed by Article 57.[79] This conclusion must be made in good faith, based on all the information available to the commander at the time. In the example of Caen, enemy expectation of a continued attack is not the exclusive factor in assessing the feasibility of a warning. Multiple factors impact this decision. The record is insufficient to make a clear retrospective assessment. What is clear, however, is that in such circumstances, a warning should at least be considered. In contemporary practice, implementing this provision requires close coordination with psychological operations assets within the command.

Another issue that is related to Article 57 is whether other similar objectives could have been selected to achieve a similar advantage while reducing harm to civilians. This raises the difficult issue of what constitutes a "similar military advantage."[80] Discussion of this provision in the Official Commentary focuses on civilian objects that are used to support the enemy war effort, such as transportation facilities and economic tar

73. "It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts . . . ." COMMENTARY, *supra* note 55, at 624.

74. GP I, *supra* note 52, art. 57.

75. *Id.*

76. *See id.*

77. *See* FM 27-10, *supra* note 51, at 5; *see also* GP I, *supra* note 52, art. 57(2)(a).

78. *See* FM 27-10, *supra* note 51, at 5; *see also* GP I, *supra* note 52, art. 57(2)(a).

79. *See e.g.*, GP I, *supra* note 52, art. 57(2).

80. GP I, *supra* note 52, art. 57(3).

gets.[81] The Official Commentary indicates that such targets can often be disabled without totally devastating the civilian infrastructure. The Commentary then indicates that Article 57 requires this course of action. The more difficult aspect of this provision, however, is determining how increased risk or cost to the attacker factors into this equation. Does the increased risk or cost related to attacking an alternate target justify the conclusion that the ultimate military advantage is no longer the same or similar? Although not addressed in the Official Commentary, it seems logical that considering the increased "cost" of attacking an alternate target is legitimate. Denying the commander the right to factor friendly "cost" into the equation of what constitutes a similar military advantage would always require him to sacrifice his force to protect civilians. This result is contrary to the basic concepts of the law of war, which balances the needs of the force with the dictates of humanity.

In the Caen example, the Allies arguably may have reduced the city's defenses by bypassing the city. This may also have been achieved by attacking other enemy concentrations outside the city, rendering the Caen's defenders unsupported. What is impossible to analyze is the anticipated cost to the Allies of such alternate courses of action. If the anticipated cost would have been greater than that of the course of action selected, the military advantage should not have been considered the same or similar. Although the resulting harm to civilians might have been reduced, the alternate target selection requirement of Article 57 would have been inapplicable.

The final aspect of the precautionary obligations as codified in Article 57 is the requirement to suspend, cancel, or refrain from launching, or suspend any attack that may cause incidental harm to civilians or their property which would be excessive in relation to the concrete and direct military advantage anticipated.

This rule is a sub-component of the rule that prohibits "indiscriminate" attacks in Article 51, and the "precautionary measures" rule of Article 57. It is commonly treated as a stand-alone "test" for analyzing the legality of targeting decisions. While *FM 27-10* incorporates language similar to that in Article 51, it also utilizes the term "disproportionate" in defining "unnecessary killing and devastation."[82] Specifically, *FM 27-10* provides that:

> [L]oss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure . . . that these objectives may be attacked without probable losses in lives and damage to property *disproportionate to the military advantage anticipated.*[83]

This prohibition of attacks that would cause civilian harm that is excessive in relation to the "concrete and direct military advantage to be gained"[84] is perhaps the most challenging aspect of the law related to employment of methods and means of warfare. According to the Official Commentary, there was a great deal of debate related to these provisions and much criticism aimed at the imprecise nature of the language used in the "test."[85] This test, however, is based on a presumption that the basic rule of minimizing civilian harm should always be a guide for military planners,[86] that the rule will be applied in good faith by military commanders who are cognizant of this imperative,[87] and that it is the last step in an analytical process intended to ensure the destructive effects of combat are minimized.

The Official Commentary indicates that this "proportionality" test is only one aspect of a larger analytical process intended to protect civilians. In response to the argument that the "proportionality" rule of Protocol I legalizes *any* attack, so long as the loss of civilian life or damage to civilian property is not excessive in relation to the concrete and direct military advantage anticipated, the Commentary states:

> This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; *moreover,* even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive.[88]

81. COMMENTARY, *supra* note 57, at 687.

82. FM 27-10, *supra* note 51, at 5.

83. *Id.* (emphasis added).

84. GP I, *supra* note 52, art. 51(5)(b).

85. COMMENTARY, *supra* note 57, at 625.

86. *See id.*

87. *See* Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare,* 98 MIL. L. REV. 91 (1982).

88. COMMENTARY, *supra* note 57, at 625-26.

Thus, although imprecise, the "proportionality" test embodied in both Article 51 and Article 57 of Protocol I can be viewed as the critical "last line of defense" against inflicting unintended civilian harm on such a scale that is tantamount to being "indiscriminate."

This "proportionality test" is perhaps the most difficult obstacle to overcome when attempting to justify the legality of the Caen bombardment within the context of Protocol I. Was there a military objective? Certainly the presence of German defenses within the city satisfied this test. What was the concrete and direct military advantage to be gained? Assuming that the Allies believed that the bombardment would substantially aid the ground offensive, there is some evidence that the city was not bombed because of the decisive effect that was anticipated, but because it was well behind the main battle area, thereby limiting the risk of friendly casualties. Max Hastings highlights the overall negligible military advantage of the bombardment:

> The use of the heavy bombers reflected the belief of Montgomery and the Allied high command that they must now resort to desperate measures to pave the way for a ground assault. With hindsight, this action came to be regarded as one of the most futile air attacks of the war. Through no fault of their own, the airmen bombed well back from the forward line to avoid the risk of hitting British troops, and inflicted negligible damage upon the German defences. Only the old city of Caen paid the full price.[89]

Even Hastings, however, acknowledges that the futility of the attack is a matter of hindsight. In analyzing compliance with the "proportionality" standard of Protocol I, it is not hindsight that is determinative, but the facts that are available to the commander at the time of the targeting decision.[90] Whether Montgomery and the Allied planners believed that there would be a positive effect on the operation is doubtful. This, however, does not end the analysis. Even if it can be argued that, from Montgomery's perspective, there was some military advantage to be gained by the bombardment, that advantage would not justify the attack *if* the anticipated harm to civilians or their property would be excessive in relation to that advantage. Factors that weigh against the legality of the Caen bombardment include: bombing the center of a city, without any advance warning, deliberately well behind the main area of enemy resistance in order to avoid friendly casualties, and knowledge that only a small portion of the overall enemy defenses were located within the city.

Whether the bombardment of Caen would have violated the contemporary law of war principle of minimizing harm to civilians is less relevant than the value that the operation provides in illustrating the need for such a principle. Many other examples exist in the history of modern warfare. Recent history also illustrates that situations implicating this principle are in no way limited to international armed conflict. Operations other than war, which are replete with complex force protection and distinction issues, also involve the imperative to minimize the harm caused to civilians. One need only reflect upon the battles in the "mean streets of Mogadishu" to understand how complex the implementation of this principle becomes in such confused environments. Yet to the great distinction of the armed forces of the United States, this principle has been, and continues to be, a key component to mission success.

Conduct-based rules of engagement clearly manifest how this principle is transmitted to the lowest levels of mission execution. These rules call upon the skills of the American soldier in limiting the use of deadly force to those situations that are warranted by all of the available facts. This principle must also permeate the planning and targeting process at all levels of command. To this end, judge advocates must be thoroughly familiar with the details of the law of war that implement this principle, and totally integrated in the planning process, particularly the targeting process. Understanding the underlying purposes of these rules will enhance the ability to effectively apply them during this process. Major Corn.

89. *Id.* at 222.

90. COMMENTARY, *supra* note 57, at 681. *See also* Fenrick, *supra* note 87, at 108 (indicating that the United States delegation to the Protocol I drafting conference stated: "Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time," citing 3 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTIONS 334, 336 (H. Levie ed., 1980)).

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Instructions—An Often Overlooked Advocacy Tool

Introduction

You have just questioned the last witness in your first court-martial, a hotly contested case. As you sink into your seat, you find yourself mentally and physically exhausted, but pleased with yourself for surviving the two-day ordeal. You now start thinking about the spectacular closing argument that you have rehearsed and refined over the past month. Suddenly, the judge's voice brings you back to reality when she says, "Counsel, after a short recess let's discuss any proposed instructions that you have." You remember something about instructions from the basic course, but you thought that preparing instructions was the judge's job. To make matters worse, the opposing counsel walks over and drops a thirty-page packet of his proposed instructions on your desk. Suddenly you get a pounding headache and curse yourself for not thinking about instructions during your trial preparation.

All too often counsel neglect the instructions phase of trial preparation until very late in the process. In so doing, they fail to use a valuable advocacy tool to help them prepare their case and focus panel members on the weaknesses of the opponent's case. During the instructions phase of a trial, the military judge advises the members on the relevant points of law that apply to the case and other issues that have been raised by the evidence.[1] Prepared counsel can reference these instructions at key points of the trial to enhance the credibility of their position. Counsel can also draft and propose instructions to the military judge that will be helpful to their case. This, however, requires prior planning.

Time to Prepare

As the above scenario illustrates, the end of the trial is not the time to start thinking about instructions. Effective use of instructions requires backward planning. Just as it is a good practice to begin your case preparation by writing a closing argument,[2] it is also important to look at potential instructions early in the case. After analyzing the strengths and weaknesses of your case and your opponent's case, start looking at the instructions that may apply. This includes instructions on the charged offenses, lesser-included offenses that may be raised by the evidence, special defenses, and evidentiary instructions. If you do this early in the process, you will have a better grasp of the legal concepts that apply to your case. You will also know what issues you will need to raise to get favorable instructions, and how to prepare your case to avoid unfavorable instructions.

Sources of Instructions

There are several sources to look to for instructions. The first source should always be the *Military Judge's Benchbook* (*Benchbook*).[3] The *Benchbook* sets out the instructions that judges must give on the elements of the charged offenses and any lesser-included offenses that are raised by the evidence. It also contains detailed instructions on special defenses and other evidentiary instructions. To see what instructions may apply to your case, look at the list of instructions at Appendix J of the *Benchbook.*

Advocates can also look to other sources for instructions not contained in the *Benchbook*. Military and federal cases are an excellent source for this information. Another good source is *Federal Jury Practice and Instructions.*[4]

Prepare a Packet

Counsel can also draft a set of proposed instructions for the military judge in advance. This is more effective than simply asking the judge to give an instruction and relying on the judge to do all the drafting. If you can present the judge and opposing counsel with a draft that the judge can modify, you will save time and make the judge's job much easier. You will also be able to craft the instruction in a light that is most favorable to your position. While the judge may modify your proposals, at least you have provided him with a starting point. With the advent of the *Computerized Benchbook*,[5] counsel should have little difficulty drafting instructions to fit the facts of their case.

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1. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920 (1995).

2. *See* Lieutenant Colonel James L. Pohl, *Trial Plan . . . From the Rear March*, ARMY LAW., June 1998, at 21.

3. U. S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK (30 Sept. 1996).

4. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS (1992).

5. The *Computerized Benchbook* is found in the Benchbook Download Library in the Files section on the BBS main menu.

Incorporate Instructions

Thinking about instructions in advance of trial also allows you to incorporate important instructions into portions of your case. For example, if you know that your case will involve issues of self-defense, you can refer to the instructions in voir dire and elicit a promise from the panel members that they will follow the judge's instructions when deciding if self-defense exists. Closing argument is another opportunity to incorporate instructions. If you impeached a key witness by demonstrating his character for untruthfulness, referring members to the instruction the judge gave on witness credibility will strengthen your presentation because you are associating your position with information that the judge provided.

Conclusion

Counsel who wait until the end of the trial to start thinking about instructions ignore a powerful advocacy tool. The effective use of instructions will enable counsel to reinforce the theory of the case, associate arguments with statements made by the judge, and focus panel members on the weaknesses of the opposing counsel's position. The key is to think ahead and to prepare instructions early in the process. Major Hansen.

USALSA Report

United States Army Legal Services Agency

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 9, is reproduced in part below.

Supreme Court Clarifies Corporate Liability for Parent Corporations

On 8 June 1998, the United States Supreme Court issued an opinion in the case of *United States v. Bestfoods*,[1] in which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. United States Department of Commerce*,[2] which has been used to impose liability on federal agencies as an operator.

In *Bestfoods*, the Environmental Protection Agency (EPA) brought an action under CERCLA Section 107 for cleanup costs at the site of Ott Chemical Company near Muskegon, Michigan. Ott Chemical Company began operations on this site in 1957.[3] In 1965, Ott Chemical became a subsidiary of CPC International Corporation. CPC sold Ott Chemical Company to Story Chemical Company in 1972. Story operated the chemical plant until its bankruptcy in 1977.[4] By 1981, the EPA had started a cleanup of the site, with a total cost that was estimated to be "well into the tens of millions of dollars."[5] The EPA filed the suit in 1989 and named CPC International and Arnold Ott (owner of the now defunct Ott Chemical Company), among others, as potentially responsible parties.[6]

The district court found CPC liable as an operator. In doing so, the court applied the "actual control" test that was used in *FMC Corp.*,[7] and focused on CPC's control over Ott Chemical Company.[8] The Court of Appeals for the Sixth Circuit reversed the district court and ruled that a parent corporation could only be liable as an operator when the corporate form has been misused and the corporate veil can be pierced.[9]

The United States Supreme Court analyzed parent corporation liability under two distinct legal theories: the derivative liability of a parent corporation for the activities of a subsidiary, and the direct liability of a parent corporation for its own activities toward the facility in question. Regarding derivative liability, the Court determined that the CERCLA did nothing to disturb the well-established principle of corporate law that a parent is not generally liable for the actions of its subsidiary unless the corporate form is misused. Under those circumstances, the corporate veil can be pierced and the parent can be held liable.[10]

The Court went on to address what is a separate issue – the extent to which a parent corporation might be directly liable as an operator for its activities at a facility. The Court first provided the following interpretation of the term "operator" under the CERCLA:

1. 118 S. Ct. 1876 (1998). *See* 42 U.S.C.A. §§ 9601-9675 (West 1998) (providing information on the Comprehensive Environmental Response Compensation and Liability Act).

2. 29 F.3d 833 (3rd Cir. 1994).

3. *Bestfoods*, 118 S. Ct. at 1882.

4. *See id.*

5. *Id.* at 1882.

6. *See id.* During the course of the appellate process of this case, CPC changed its name to Bestfoods. *Id.* at n.3.

7. *See generally FMC Corp.*, 29 F.3rd at 843-46.

8. United States v. Bestfoods et al., 118 S. Ct. 1876, 1882 (1998).

9. *Id.* at 1885. Some circuits follow the rationale that parent corporations can only be liable when the corporate veil can be pierced, while other circuits have held that a parent that is actively involved in the affairs of a subsidiary can be liable as an operator (the "actual control" test) without regard for whether the corporate veil can be pierced. *See id.* at n.8.

10. *Id.* at 1884-85. The Court discussed, but did not resolve, the issue of which law courts should use to decide veil-piercing, state law or federal common law. *See id.* at n.9.

> [An] operator must manage, direct, or conduct operations *specifically related to pollution*, that is, operations having to do with the *leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations*.[11]

The Court then rejected the district court's use of the "actual control" test to determine liability. Under this test, which had been adopted by many circuits,[12] a parent corporation could be liable under the Superfund if it exerted actual control over the subsidiary that was responsible for the operation of the facility.[13] The Court objected to the use of that test because it confused direct and derivative liability by focusing on the relationship between the parent corporation and the subsidiary corporation. According to the Court, the correct focus is the relationship between the parent corporation and the facility, as evidenced by the parent's participation in the activities of the facility.[14] In *Bestfoods*, the evidence indicated that an individual who was an officer of CPC, but who was not an officer or employee of Ott Chemical, played a significant role in the environmental compliance policy of the Muskegon facility.[15] The Court remanded the case to the district court for further inquiry into this CPC employee's role in light of the guidance that was provided in its opinion.[16]

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the "actual control" test, that was used by the Third Circuit in *FMC Corp.*[17] to find the federal government liable as an operator. It is unclear how the Court's focus on the relationship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation. Significantly, the Court sharpened the definition of "operator" to include only those activities that are specifically related to the disposal of hazardous waste and environmental compliance.[18] This definition presumes that many of the factors that the Third Circuit found to be relevant to an agency's control, such as the government's ability to direct raw materials to the plant and the government's involvement in labor issues at the plant, would not play a role in any new analysis of a federal agency's operator status.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability. Major Romans.

New Executive Order on Native American Consultation

On 14 May 1998, President Clinton signed Executive Order 13,084, Consultation and Coordination with Indian Tribal Governments.[19] Executive Order 13,084 should not impose any new compliance requirements on individual installations.[20] When read together with Executive Memorandum of April 29, 1994 on Government-to-Government Relations with Native American Tribal Governments,[21] however, Executive Order 13,084 underscores the need for installations to develop proper consulting and coordinating procedures. These procedures should assist the installation to communicate with federally recognized Indian tribes on issues and activities that affect their land, resources, and governmental processes.

Executive Order 13,084 and the executive memorandum draw upon the United States Constitution, treaties, federal statutes, and case law to establish the following principles:

> (1) Tribes are domestic dependent Nations. As such, tribes remain sovereign nations, exercising inherent sovereign powers over tribal members and territory.
> (2) Tribes have the right to self-government. The federal government must recognize tribal sovereignty and should carry out its

11. *Id.* at 1887 (emphasis added).

12. *See supra* note 9 and accompanying text.

13. *Bestfoods*, 118 S. Ct. at 1887.

14. *Id.* at 1889.

15. *Id.* at 1890.

16. *Id.*

17. FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843-46 (3rd Cir. 1994).

18. *Bestfoods*, 118 S. Ct. at 1887.

19. 63 Fed. Reg. 27,655 (1998), *available at* 1998 WL 248884 (Pres.).

20. Executive Order 13,084 is primarily concerned with agency development of regulations and regulatory practices and policies that affect tribal communities in a significant or unique manner. It is not clear whether the development of integrated cultural resource management plans or similar installation planning and management documents fall within the scope of agency policy.

21. 59 Fed. Reg. 22,951 (1994), *available at* 1994 WL 163120 (Pres.).

activities in a manner that is protective of tribal self-government, trust resources, and the full spectrum of tribal legal rights, including those provided by treaty.
(3) Federal agencies ensure compliance with the foregoing legal mandates by establishing relationships with appropriate tribes on a government-to-government basis and consulting with such tribes in accordance with that relationship.

Additional information and guidance on tribal consultation can be found in the *Army Guidelines for Consultation with Native Americans*. These guidelines are included as Appendix G in the draft of *Department of Army Pamphlet 200-4* and at the U.S. Army Environmental Center web page, conservation section, at http://aec-www.apgea.army.mil:8080. Mr. Farley.

Proposed Lead-Based Paint (LBP) Rule

On 3 June 1998, the EPA issued a proposed rule[22] under the authority of Section 403 of the Toxic Substances Control Act (TSCA).[23] Under this section, the EPA is required to identify lead-based paint hazards. This identification is crucial because federal facilities are obligated to abate, prior to transfer, hazards that are present in target housing built before 1960.[24] The proposed rule establishes numeric levels to identify hazards. In the soil context, hazard levels are established as 2000 parts per million.[25] This level is considerably more stringent than current guidelines, which establish 5000 parts per million as the hazard level.[26] Adoption of the more stringent level could have important fiscal ramifications for installations that are transferring property, particularly in the base closure and realignment scenario. Any environmental law specialist (ELS) who wishes to provide comments to this proposed rule should coordinate through this office. Lieutenant Colonel Polchek.

Proposed Executive Order on Alien Species

The Department of the Interior has proposed an executive order, entitled "Invasive Alien Species." This proposed executive order defines "alien species" as any species or viable biological material derived from a species that is not a native species in that ecosystem. The definition of "invasive alien species" is an alien species that does or could harm the economy, ecology, or human health of the United States if it is introduced. If adopted, the executive order will require federal agencies to implement measures to prevent the introduction and to control the spread of invasive alien species into the ecosystems. Information regarding the final adoption of this executive order will be published in future ELD Bulletins. Major Shields.

Colorado Clean Air Bill Goes Up In Smoke

The Governor of Colorado recently vetoed an attempt by the Colorado State Legislature to discriminate against federal agencies under its Clean Air Act (CAA)[27] authority. The governor acted to strike down Senate Bill 98-004[28] at the urging of Ms. Sherri Goodman, Deputy Undersecretary of Defense for Environmental Security (DUSD-ES), the Department of Agriculture, and the Department of the Interior. The process whereby this result came about serves as a good example of how Army regional environmental coordinators (RECs) and their staffs can be effective advocates for Department of Defense (DOD) interests.

In early 1998, state senators began to push for the passage of Senate Bill 98-004, a measure that would direct the Colorado Air Quality Control Commission to ensure that all federal facilities minimize air emissions to the maximum extent practicable. This requirement was intended to reduce the impacts of federal facilities on both the attainment and maintenance of national ambient air quality standards and the achievement of federal and state visibility goals. The bill requires that each federal

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22. Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,302 (1998) (to be codified at 40 C.F.R. pt. 745) (proposed June 3, 1998).

23. 15 U.S.C.A. § 403 (West 1998). Section 403 was actually created by Title X of the Residential Lead-Based Paint Hazard Reduction Act as an amendment to TSCA. *See* The Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021(a), 106 Stat. 3916 (1992).

24. 42 U.S.C.A. § 4822(a)(3) (West 1998). While the problem that is faced by most installations is primarily with lead-based paints in the soil, this rule will also cover hazards that are associated with dust.

25. Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,353.

26. *See* U.S. Dep't of Housing and Urban Dev., Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (1995). Although this source is only guidance, it has served as the unofficial standard within most military departments.

27. 42 U.S.C.A. §§ 7401-7671 (West 1998).

28. S. 98-004, 61st Leg., 2d Sess. (Colo. 1998).

agency submit its land management plans to the commission for review and, after a public hearing, make any changes to the land management plans that are required by the commission. As there is no similar set of requirements that applies to non-federal entities, Senate Bill 98-004 exceeds the limited waiver of sovereign immunity in the CAA.

The bill claims that significant contributions to regional haze and visibility impairment emanate from federal lands, particularly smoke from prescribed burning activities. A potentially adverse impact from the bill, however, is that it allows direct state regulation of virtually every source of airborne emissions at a federal facility. Such regulation would extend into areas such as grounds maintenance, the timing and manner of DOD training operations (including obscurant use), weapons firing, and aircraft flights.

Throughout the limited lifetime of Senate Bill 98-004, the staff in the Army's Western Regional Environmental Office (also the DOD REC for EPA Region VIII) was vigilant in representing the interests of the Army and DOD, and in keeping higher headquarters and interested parties within the region informed. The REC ensured that the Army's concerns about the legal authority for Senate Bill 98-004 and the severe impacts on military services were communicated to the Colorado State Legislature and the Governor of Colorado. In addition, close coordination with the Governor's Office, after passage of the bill, was instrumental in facilitating a timely request from the DUSD-ES for the Governor to veto the bill.

While the Governor of Colorado did not explicitly credit his decision to veto Senate Bill 98-004 to the letters that he received from DOD and other federal agencies, his public statements clearly echoed the concerns set out in the federal agencies' letters. Certainly the input from the REC's staff throughout the legislative process and the letter from the DUSD-ES were part of an important effort to influence the process as well as make DOD's concerns a part of the record. In contrast, failure to have participated in this process would have clearly indicated a lack of interest in the outcome. The REC's efforts in this case illustrate how essential it is to have REC staffs throughout the Army identify thorny regional issues and facilitate their diplomatic resolution. This REC's "ounce of prevention" is sure to net many "pounds of cure." Lieutenant Colonel Jaynes.

Call for Input to Civil/Criminal Liability Handbook

Last year, environmental law specialists (ELSs) published the first edition of its *Environmental Criminal and Civil Liability Handbook* after many months of effort. Our intention was to create a resource for ELSs to use when dealing with difficult enforcement issues. The *Handbook* gave ELSs a kit containing the basic tools that are needed for successful negotiations of enforcement actions. We hope that it has become an important resource in your efforts to advocate your command's interests in this complex and sometimes contentious arena. If you do not already have the *Handbook*, you can download it from the Environmental Law Library on the LAAWS BBS.

Last summer ELD employed the talents of a reserve component judge advocate to help us update and revise the *Handbook*. We would appreciate your assistance to ensure that the *Handbook* remains relevant and responsive to your needs. This includes: identifying topics that should be addressed, pointing out unclear statements or policies, and challenging the wisdom of recommendations or policies that are now in the *Handbook*.

We also hope to focus on the *Handbook's* appendix portion, which is not presently located with the on-line version. To solve this problem, the next edition of the *Handbook* and its appendix will be on the BBS and e-mailed out to the major command and installation ELSs. When revising the appendix, we intend to trim out items that are not essential to your practice and may include references to internet web sites.

We expect to limit the revised *Handbook* to about one hundred pages and will try to keep the appendix material to about the same size. Because you will be part of the revision process, we would like for you to think about the sorts of issues that need to be addressed. To help get you started, we have listed several topics that will be added or updated in the revised *Handbook*:

—EPA's new policy on supplemental environmental projects;
—EPA's policy (revised in October 1997) on use of RCRA §7003 orders;
—EPA's use of RCRA §6003 authority to make onerous information requests;
—EPA's authority to issue punitive administrative fines under the Clean Air Act;
—EPA's efforts to issue punitive fines for underground storage tank violations; and,
—Regulator attempts to bring media enforcement actions for CERCLA operations.

If you have run into particularly helpful resources on enforcement actions, please e-mail or fax them in. Please e-mail me (jaynera@hqda.army.mil), write, or phone (703-696-1569; fax -2940) with your ideas on any aspects of the *Handbook* that could be strengthened. Lieutenant Colonel Richard Jaynes.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Inclusion of Proper Forms in Claims Files

The United States Army Claims Service (USARCS) has received several requests for reconsideration from field claims offices that do not include a U.S. Department of Defense (DD) Form 1842[1] or a DD Form 1844[2] in the file. Typically, the field office recommends that the USARCS deny the request. However, if the USARCS decides to pay the claim, it is impossible to determine the amount to pay without one of these forms.

Paragraph 11-9b of *Department of the Army Pamphlet 27-162* states: "Initially, the claim does not need to be submitted on DD Forms 1842 and 1844; however, these forms must be submitted before the claim may be paid."[3] It goes on to provide that claimants who submit such claims should be informed in writing that they must submit properly completed forms within a fixed period of time (normally thirty days). This requirement pertains to all chapter 11[4] claims (regardless of the date filed) in order to be considered properly presented claims.

This reminder will allow the USARCS to take immediate action on reconsideration requests and will avoid the need to return claims to the originating office for inclusion of claims forms. Ms. Shollenberger.

Staff Judge Advocates Must Personally Approve and Disapprove Waivers of Maximums

The new version of *Army Regulation (AR) 27-20* gives staff judge advocates the authority to waive the maximum amounts allowable contained in the Allowance List-Depreciation Guide.[5] This new authority must be exercised personally by the staff judge advocate; it cannot be delegated.[6] Because the staff judge advocate is the only individual who can waive the maximums, he is also the only person who can disapprove such waivers. Therefore, if the issue of waiver is reasonably raised in a personnel claim, the claim should be forwarded to the staff judge advocate to decide whether waiver is appropriate.

For example, suppose a claimant requests waiver of the $3000 maximum amount allowable for an item of furniture. If the claimant provides adequate evidence that the piece of furniture is worth $5000 and it has been completely destroyed (it cannot be economically repaired), the claim should be forwarded to the staff judge advocate. It would not be appropriate for a claims judge advocate to settle the claim by limiting payment to the maximum amount allowable ($3000), because the staff judge advocate is the only person who can decide whether or not to waive the maximum. On the other hand, if the claimant has not submitted adequate evidence that the piece of furniture is currently worth over $3000 (after taking appropriate deductions for depreciation), the claim need not be forwarded to the staff judge advocate. In this case, it is appropriate for a claims judge advocate to settle the claim by paying the claimant the depreciated value of the piece of furniture. Such a claim need not be forwarded to the staff judge advocate unless the claimant submits a proper request for reconsideration.

It is important for staff judge advocates to remember that strict requirements must be met before maximum amounts allowable can be waived. The claimant must demonstrate good cause for the waiver and provide clear and convincing evidence that (1) the property was not held for use in a business, (2) the property was owned by the claimant, (3) the property had the value claimed, and (4) the property was lost or damaged in the manner that was alleged by the claimant.[7] The staff judge advo-

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1. U.S. Dep't of Defense, DD Form 1842, Claim for Loss or Damage to Personal Property Incident to Service (Dec. 1988).

2. U.S. Dep't of Defense, DD Form 1844, List of Property and Claims Analysis Chart (Feb. 1989).

3. U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES (1 Apr. 1998) [hereinafter DA PAM 27-162].

4. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, ch. 11 (31 Dec. 1997) [hereinafter AR 27-20].

5. The new version of *AR 27-20* delegates the authority to waive maximum amounts allowable to the heads of area claims offices. *Id.* para. 11-14b. The heads of area claims offices are generally staff judge advocates. *Id.* para. 1-5e(1). The Allowance List-Depreciation Guide is reproduced in DA PAM 27-162, *supra* note 3, tbl. 11-1.

6. AR 27-20, *supra* note 4, para. 11-14b.

7. *Id.*

cate must personally sign a memorandum certifying this information.[8]

Good cause for waiver of a maximum amount allowable can consist of various justifications. One example is evidence that a claimant was unaware of the value of the item that he possessed and, therefore, did not obtain insurance or other protection. Another example is where a claimant was not reasonably able to obtain insurance protection because it was not available in the area where he was stationed. The evidence that supports "good cause" need not be clear and convincing;[9] this standard only applies to the four factors listed above (non-business nature of the property, ownership, value, and manner of loss). Lieutenant Colonel Masterton.

Tort Claims Note

Foreign Claims—Not Just for Overseas Offices

Foreign claims are often thought of by most claims offices within the United States as just that—claims that are foreign to them. However, many claims offices within the United States receive foreign claims. These offices need to recognize foreign claims, know the proper method of processing these claims, and advise the claimant or his attorney on how to properly present the claim. Recently, the USARCS received several foreign claims that were improperly processed at installation claims offices. The attorneys who represented many of these claimants were given incorrect advice. This note will assist claims personnel identify foreign claims and process them properly.

Foreign claims are handled under one of three statutes or under an international agreement. They may fall under the Military Claims Act (MCA),[10] a Status of Forces Agreement (SOFA), the Foreign Claims Act (FCA),[11] or another international agreement between the United States and a foreign nation.[12] The rules that govern the processing of claims under the three statutes or agreements may be found in *AR 27-20*, chapters 3, 7, and 10 respectively.[13] These statutes or agreements generally create a process for adjudicating claims that is much different from that required by the Federal Tort Claims Act (FTCA).[14] Therefore, it is imperative that the claimant and the government properly handle these claims. After receiving a foreign claim, the claims office should first determine the location where the tort is alleged to have occurred.

Claims for Actions Within the United States

If the action that gave rise to the claim occurred within the United States, its commonwealths, or possessions, the claims attorney must determine whether the tortfeasor is a foreign military member who is in the United States on official duty under a SOFA,[15] an American military member, or a civilian federal employee. If the tortfeasor is a foreign military member, the SOFA applies and the claim should be forwarded to the Foreign Torts Branch (FTB) at the USARCS, as the receiving state office (RSO).[16] If the tortfeasor is an American military member or a civilian federal employee, either the MCA or the FTCA applies and your office should process the claim in the manner that is dictated by those provisions.

Claims for Actions Arising Outside of the United States

If, however, the action that gave rise to the claim occurred outside of the United States and its territories, the claims attorney must determine whether the country in which it occurred has enacted a SOFA with the United States.[17] If a SOFA exists, it controls the processing of the claim. Within the claims arena, SOFAs divide the world into two types of claimants: "third par-

8. *Id.*

9. *Id.*

10. 10 U.S.C.A. § 2734a, b (West 1998).

11. *Id.* § 2736.

12. *Id.* § 2734.

13. AR 27-20, *supra* note 4, chs. 3,7,10.

14. *Id.* §§ 2671-2680.

15. AR 27-20, *supra* note 4, para. 7-1c.

16. SOFAs refer to the country in which foreign troops are present as the "receiving state" and the country that provided those troops as the "sending state." Thus, the United States is referred to as the receiving state when foreign troops are present within it.

17. Countries that have entered into SOFAs with the United States include members of North Atlantic Treaty Organization (NATO) (Belgium, Canada, Denmark, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, Spain, and Supreme Headquarters Allied Powers Europe (SHAPE)), Iceland (although a member of NATO, Iceland has not subscribed to the North Atlantic Treaty Organization (NATO) SOFA but has executed a bilateral agreement with the United States which applies only to United States forces in Iceland, but not Icelandic forces in the United States), Japan, Korea, the People's Republic of China (Taiwan), and Australia. AR 27-20, *supra* note 4, para. 7-1c; DA PAM. 27-162, *supra* note 3.

ties" and "all others."[18] The term "third party" is defined by each individual signatory to a SOFA,[19] but generally includes anyone who is not a member of the force, a civilian component of the force, or a dependent of a member of the force or civilian component of the force. Thus, "third parties" are typically tourists, business travelers, or inhabitants of foreign nations who are present within the receiving state.

Claims Arising in Nations with a SOFA

If the claimant is a "third party" under the SOFA as defined by the receiving state, the claimant must file his claim against a member of the sending state with the RSO that is designated under that nation's laws.[20] (See Appendix A for a listing of RSOs in Germany and Korea.) The U.S. District Court for the District of Columbia has held that claims provisions under a SOFA are the exclusive remedy for claims against the United States arising overseas.[21] Some receiving states, such as Germany, impose a shorter period in which to file claims than do the FTCA or MCA.[22] Thus, it is imperative that a United States claims office that receives such a claim immediately inform the claimant or his attorney of the requirement to file under the SOFA. Claims offices that receive a SOFA claim should not accept the claim, but should prepare a memorandum for record that the claim was presented. The memorandum should include the date that the claim was presented; many RSOs accept that date to toll their statute of limitations.

If the claimant is not a "third party," the claim is not cognizable under the applicable SOFA. In this case, the claimant must file his claim with the United States under the MCA. Claims offices that receive such claims should accept them and immediately forward the claim file to the FTB at the USARCS for processing. Claims personnel should inform the claimant of the transfer in writing, and provide him the address of the FTB.

Claims Arising in Nations without a SOFA

If the claim arises in a nation that does not have a SOFA with the United States, the issue focuses on the domicile of the claimant. The FCA applies to claimants who are "inhabitants of foreign countries."[23] "Inhabitant" is not defined by the FCA, however, under *DA Pam. 27-162* the term "inhabitant" does not refer to citizenship or nationality. Rather, the definition of "inhabitant" depends upon "whether the claimant dwells in and has assumed a definite place in the economic and social life of the foreign country."[24] Thus, an American citizen who permanently resides in a foreign country may be an "inhabitant" of that foreign country. However, soldiers or civilian federal employees who are stationed in the foreign country on military orders, their dependents, and American citizens who are in a foreign country as tourists or business travelers are not "inhabitants."[25] A claimant need not be an inhabitant of the country in which the tort occurred for the FCA to apply. Thus, an inhabitant of Bolivia who is injured by the negligent act of a United States government official in Columbia may file a claim under the FCA.

Claims that arise under the FCA are processed by Foreign Claims Commissions (FCCs).[26] If a United States claims office within the United States receives an FCA claim and has a FCC with sufficient financial authority[27] to process the claim, the claim should be referred to that FCC; otherwise, the claim should be forwarded to the FTB at the USARCS. In these situations, claims personnel should inform the claimant of the transfer in writing, and provide him with the address of either the FCC or the FTB.

If the claimant is not an inhabitant of a foreign country, the claim is cognizable under the MCA. Claims offices that receive such claims should accept them and immediately forward the claim file to the FTB at the USARCS for processing. Claims

18. *See, e.g.*, Agreement under Article IV of the Mutual Defense Treaty Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966 (1966 Part 2), U.S.-ROK, art. XXIII, 17 U.S.T. 1677.

19. Thus, each member nation of NATO could define third parties differently from the other member nations. AR 27-20, *supra* note 4, para. 7-10b.

20. NATO SOFA, June 19, 1951 (1953 Part 2), 4 U.S.T. 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953).

21. *See* Aaskov v. Aldridge, 695 F. Supp. 595 (D. D.C. 1988).

22. The German defense cost offices require that claimants file their SOFA claims within 90 days of the date the claim accrued. AR 27-20, *supra* note 4, para. 7-10c.

23. AR 27-20, *supra* note 4, para. 10-2a.

24. DA PAM. 27-162, *supra* note 3, para. 10-2a(1)(a).

25. *Id.*

26. AR 27-20, *supra* note 4, para. 10-6.

27. One-member non-attorney FCCs may disapprove or settle claims up to $2500, one-member judge advocate or claims attorney FCCs may disapprove or settle claims up to $15,000, and three-member FCCs may disapprove claims in any amount and may settle claims up to $50,000. AR 27-20, *supra* note 4, para. 10-9c, d.

personnel should inform the claimant of the transfer in writing and provide him with the address of the FTB.

Appendix B contains a decision tree that graphically illustrates these issues and the statutes that are applicable to foreign torts.

Practical Examples

1. A claimant alleges that he, a family member son of an American soldier, received negligent medical care in Germany. What statute applies?

Using the decision tree, the tort occurred outside the United States in a SOFA country and the claimant, a dependent, is NOT a third party. Thus, the MCA applies.

2. A claimant alleges that she, while visiting her daughter, a American soldier stationed in Belgium, slipped and fell in a United States commissary. What statute applies?

Using the decision tree, the tort occurred outside of the United States in a SOFA country but the claimant IS a third party. Thus, the NATO SOFA applies, and the claim must be filed with the Belgium Defense Cost Office.

3. A claimant alleges that he was involved in an auto accident with a United States Army vehicle at Fort Bragg. Which statute applies?

Using the decision tree, the tort occurred inside the United States and the tortfeasor is not a foreign military member. Thus, the FTCA (or MCA) applies.

4. A claimant alleges that he was involved in an auto accident with a British soldier as part of a joint operation in California. Which statute applies?

Using the decision tree, the tort occurred inside the United States and the tortfeasor IS a foreign NATO military member. Thus, the NATO SOFA applies, and the FTB at the USARCS processes the claim.

5. A claimant alleges that she, an American retiree who permanently resides in Panama, was injured in an auto accident in Panama with a United States Army vehicle. Which statute applies?

Using the decision tree, the tort occurred outside the United States in a non-SOFA country and the claimant is an inhabitant of a foreign nation (even though an American citizen). Thus, the FCA applies. Major Dribben.

Appendix A

Receiving State Offices for SOFA claims:

GERMANY

State (City)	Address
Baden-Württemberg Karlsruhe	Amt für Verteidigungslasten Vorholzstr. 25 76137 Karlsruhe Tel: 0721-133-2416
Baden-Württemberg Schwäbisch Gmuend	Amt für Verteidigungslasten Haussmannstr. 29 73525 Schwäbisch Gmuend Tel: 07171-32258
Bayern Nürnberg	Amt für Verteidigungslasten Kobergstr. 62 90408 Nürnberg Tel: 0911-376-0 (operator)
Bayern Würzburg	Amt für Verteidigungslasten Kroatengasse 4-8 97070 Würzburg Tel: 0931-392-202
Berlin	Amt für Verteidigungslasten Klosterstr. 59 10179 Berlin Tel: 030-24322789
Bremen	Freie Hansestadt Bremen Der Senator Für Finanzen Richtweg 14 28195 Bremen Tel: 0421-361-1 (operator)
Hamburg	Freie und Hansestadt Hamburg Verteidigungslasten Am Gänsemarkt 36 20354 Hamburg Tel: 040-3598-1 (operator)
Hessen	Amt für Verteidigungslasten Lutherberg 3 35394 Giessen Tel: 0641-40004-0 (operator)
Niedersachsen Osnabrück	Stadt Osnabrück Amt für Verteidigungslasten Wittekindstr. 15 49074 Osnabrück Tel: 0541-3231
Niedersachsen Soltau	Amt für Verteidigungslasten Scheibenstr. 1 29614 Soltau Tel: 05191-85-1 (operator)

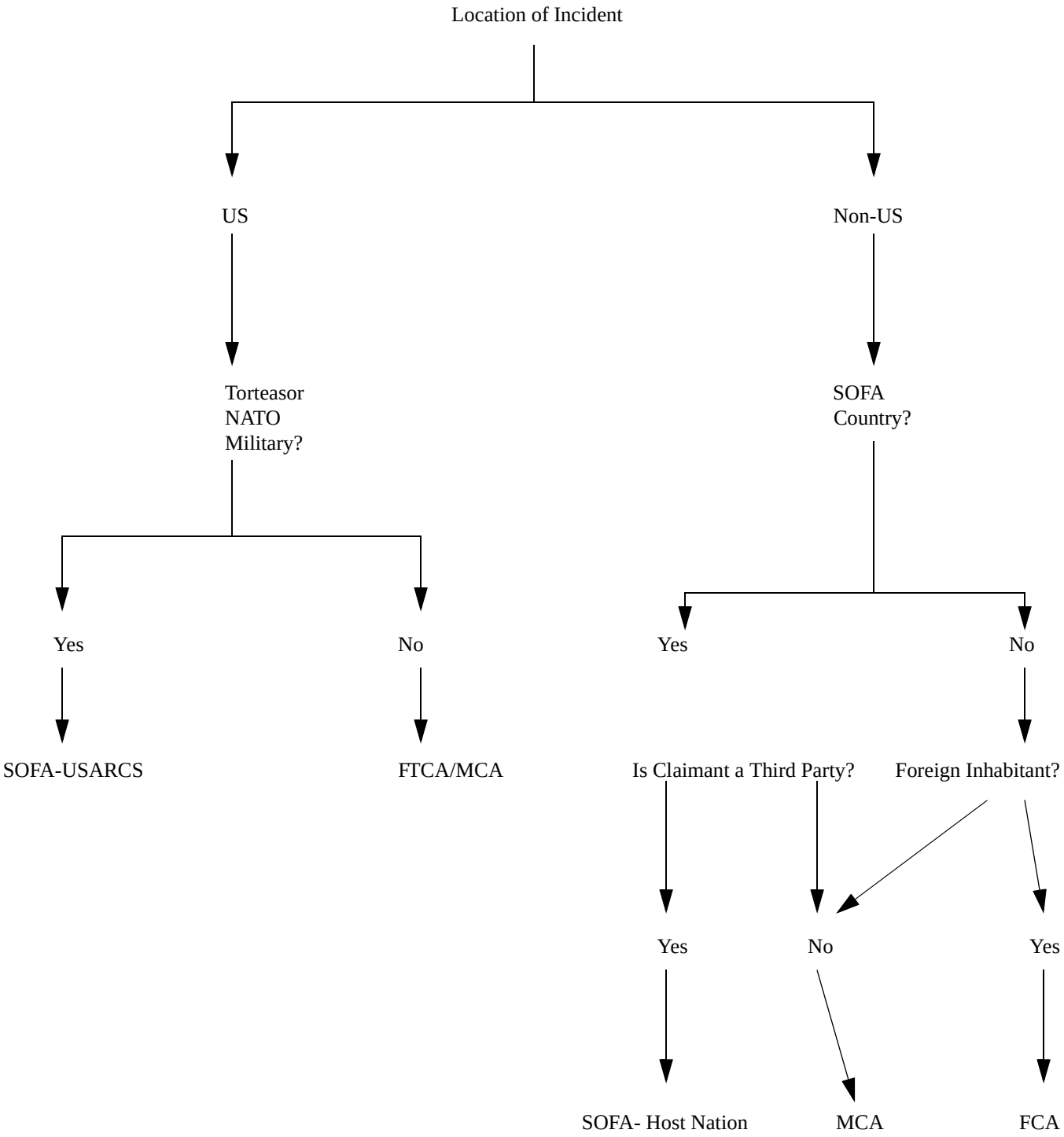
Nordrhein-Westfalen Detmold	Oberkreisdirektor des Kreises Lippe Amt für Verteidigungslasten Leopoldstr. 15 32756 Detmold Tel: 030-24322789
Nordrhein-Westfalen Soest/Westfalen	Amt für Verteidigungslasten Nellmannwall 4 59494 Soest/Westfalen Tel: 02921-30-0 (operator)
Rheinland-Pfalz	Amt für Verteidigungslasten Rudolf-Virchow-Str. 11 56073 Koblenz Tel: 0261-94703 105
Saarland	Der Minister des Innern des Saarlandes Referat Verteidigungslasten Mainzer Str. 109-111 66121 Saarbrücken Tel: 0681-3000-184
Schleswig-Holstein	Oberfinanzdirektion LV 5 Adolfstr. 14-28 24105 Kiel Tel: 0431-595-4014

KOREA

Central Compensation Committee
Room 320, 2d Unified Government Building #1
Chungang-dong, Kwachon-city, Kyonggi-do
Tel: 503-7041/7042

Appendix B

Determination of Statute



CLAMO Report

Center for Law and Military Operations (CLAMO), The Judge Advocate General's School

Combat Maneuver Training Center (CMTC): Training in Transition

This is the fourth in a series of five CLAMO articles that address the combat training centers and the judge advocates who support them.[1] The judge advocate-observer-controller at the Combat Maneuver Training Area (CMTC), Captain Eric T. Jensen, contributed substantially to this article. This series will be complemented by periodic update articles entitled *Combat Training Centers (CTCs): Lessons Learned for the Judge Advocate*.

Introduction and History

The CMTC is the premier maneuver training area in United States Army Europe (USAREUR). It combines state-of-the-art technology, experienced observer-controllers, and intensive battlefield effects to create the most realistic training offered to military units that train in the European Theater. It provides force-on-force maneuver training for armored and mechanized infantry battalions, company level situational training exercises (STXs), and individual replacement training for forces that are entering the Bosnia theater of operations. Most recently, its focus has shifted back to high intensity conflict in an effort to reorient units that have undergone months, even years, of peace support operations in Bosnia.

The CMTC is located near Hohenfels, Germany, in the heart of Bavaria, between Nuremburg and Regensburg. It was first used as a military training area by the Wehrmacht in 1937. From 1939 until 1945, the area was a POW camp and later it was used as a camp for displaced persons until 1949. The United States first used it as a training area in 1951, and the CMTC was opened in 1989.

The CMTC is a 10 km x 20 km rectangular box consisting of 43,985 acres or 68.73 square miles. Appendix A depicts its size in comparison to the National Training Center (NTC). The training area is hilly and densely wooded.

Because of the CMTC's limited size, units often take advantage of local training areas all of which are within seventy kilometers of the CMTC: Roth, Neumark, Lauterhofen, Grafenwoher, Amberg, Schwandorf, Bodenweher, Regensburg, and Hemau. (See Appendix B). The battalion or brigade support areas are regularly established in Amberg, and aviation units stage from Grafenwohr.

The Players (CMTC Organization)

The CMTC personnel, referred to as the operations group (OPSGRP), consist of a headquarters, an exercise control cell, opposition forces (OPFOR), and eight teams of observer-controllers (O/Cs). The headquarters provides command and control. Exercise Control consists of the Operations Center, the CMTC-Instrumentation System, and the Training and Analysis Feedback Section. The OPFOR consists of three infantry companies and one tank company, with equipment that includes tanks, BMPs, anti-tank BRDMs, and Hind helicopters. The OPFOR augmentees include two additional infantry companies, an engineer company, an electronic warfare team, approximately thirty role players, and linguists. The OPFOR may be configured into regular and irregular forces, depending upon the scenario.

The Scenario

The Army established the CMTC in the midst of the Cold War to train units in high intensity combat operations (HIC). However, as the world situation changed, the role of the CMTC changed. In 1995, the CMTC accepted the mission of training units for peace support operations and embarked on a major training shift. Instead of units setting up a defense and conducting offensive operations and a movement to contact, the CMTC began training units to operate in base camps, conduct meetings with local mayors, work within a joint military commission (JMC) to deal with former warring factions, and inspect warring faction forces, cantonments, and weapons sites.

The shift in training emphasis from HIC to peace support operations, brought on by Bosnia, provided a unique opportunity for judge advocates (JAs). As the role of the JA increased in peace support operations, the training opportunities for the JA increased in peace support exercises. When division and brigade headquarters deployed to the CMTC to conduct mission rehearsal exercises (MRE), they were presented with a Bosnia-type scenario and forced to change their mode of operation to comply with a low intensity or peace enforcement environment. This required greater reliance on the JAs by division and brigade commanders and necessitated that JAs be highly

1. The first three articles were published in the February, March, and June 1998 editions of *The Army Lawyer* and addressed the Joint Readiness Training Center (JRTC), the National Training Center (NTC), and the Battle Command Training Program (BCTP), respectively. The last article in this series will address the Joint Training Analysis and Simulation Center (JTASC).

trained and ready to advise the commander on a broad spectrum of issues. Many of the issues were new even to seasoned JAs.

The CMTC responded to this increased need for JA training by creating a permanent brigade JA O/C on *Mustang Team*. The role of the *Mustang* O/C has expanded over the past three years. *Mustang 05*, as this position is called, is now not only a fully integrated part of *Mustang Team*, but provides assistance to the other O/C teams in developing effective training events that involve potential legal issues. The CMTC JA O/C and the JA O/Cs at the other CTCs[2] are also spearheading an effort by CLAMO to synthesize the lessons learned at all the CTCs. This will allow the training centers to coordinate training issues, training approaches, and suggested solutions (tactics, techniques, and procedures) to uniformly apply the best training methods.

The CMTC trend of training units in peace support operations (PSO) continued through 1997. However, as the troop support for Operation Joint Forge[3] moves to CONUS-based units, USAREUR units are again focusing on HIC training. As reflected in the training letters that were provided by USAREUR unit commanders to the CMTC, and in the numbers below, many units are now specifically asking *not* to be presented with typical PSO scenarios. These units now wish to concentrate on staff functions in a HIC environment.

Training Scenario Trend

	FY94	FY95	FY96	FY97	FY98
HIC	13	17	3	7	13
PSO	0	0	9	5	3

Number of Battalions trained at the CMTC in High Intensity Conflict (HIC) and Peace Support Operations (PSO).

Method of Training

The CMTC method of training has developed over time. It now includes the latest in technological advances, combined with trained and experienced O/Cs who serve as coaches and mentors through the training process. It played an important role in preparing units for deployments to Desert Shield/Storm and to Bosnia for Operations Joint Endeavor/Guard/Forge. The success of the CMTC-trained units has validated the CMTC methods and approach.

The CMTC uses technology to create, see, and monitor the battlefield. Part of the technology is an instrumentation system that simulates the battlefield environment (as does the system at the NTC). This system is comprised of Multiple Integrated Laser Engagement System (MILES) and MILES II for all vehicles and personnel, satellite monitoring of significant vehicle movements in "the box," and a computer application of all of this data in order to provide a real time "ground truth" picture to analysts and O/Cs. With this system, the O/C can show a rotational unit where its vehicles and personnel were at a particular time on the battlefield. It also provides data on kills (including who was killed and when) and allows the O/C to recreate the battlefield at the after action review (AAR).

Complementary to the instrumentation system are the eight O/C teams, each with a different mission and responsibility to assist the unit in its training objectives. They "cover" the spectrum of deploying units, from brigade headquarters to the dismounted scout team conducting infiltration. In doing so, the O/C teams shadow their maneuver unit counterparts from start to finish, teaching, coaching, and mentoring as they go. *Mustang Team* covers the brigade staff and commander, while the *Timberwolf* and *Grizzly Teams* work with the maneuver battalions. *Falcon Team* covers Army Aviation, while *Bullseye Team* covers the Air Force. *Vampire Team* creates battlefield effects through indirect fire and oversees the artillery assets, while the *Adlers* cover the Battalion Support Area, and the *Warhogs* serve as the live fire O/Cs. Augmentee O/Cs may assist teams as necessary to provide necessary coverage to the lowest required level and to provide a unique training opportunity for the augmentees.

The culmination of the unit's training exercise is the AAR and take home package (THP), which combine the technologi-

2. The JRTC, the NTC, and the BCTP.

3. The third and ongoing operation in the series of Balkan operations focused on Bosnia. Operation Joint Endeavor spanned from approximately 20 December 1995 to 20 December 1996; Operation Joint Guard spanned from approximately 20 December 1996 to 20 June 1998; Operation Joint Forge began approximately 20 June 1998 and continues to date.

cal resources and the O/Cs observations to create an opportunity for the unit to learn from events which occurred on the battlefield. The AAR is facilitated by the O/C and allows each unit to talk openly about what went right, what went wrong, what they would do again, and what they would do differently. All of this is done with the aid of the computer images created and stored by the instrumentation system.

The THP reflects the O/Cs observations, portrayed against the backdrop of the instrumented images. This gives units a tangible product to take back to their home stations. This can be used as a reference as it addresses operational deficiencies and endeavors to become proficient in every aspect of military operations.

The Judge Advocate Focus

The size limitations of "the box" at the CMTC makes it ideal for a battalion task force size element. However, the brigade headquarters will typically deploy to the CMTC and serve as the higher headquarters as each of its battalions rotate through their training exercise, one at a time. Within this brigade headquarters is the JA. As a member of the brigade staff, the JA has the opportunity to participate in the military decision making process as the staff receives and executes several missions from its higher headquarters. The JA will advise the commander on legal issues presented by the scenarios, as prepared by the CMTC or requested by the training unit. These issues include, but are not limited to, rules of engagement; targeting; international agreements and law of war; enemy prisoners of war (EPWs); interaction with host nation civilians, local government officials, representatives from the United Nations, and other international and non-governmental organizations; fiscal law; and administrative law matters. A well prepared and fully integrated brigade JA will not only learn a great deal as he deals with difficult legal issues, but will also benefit greatly from interaction with other staff members who gain a greater appreciation for the JA's role on a brigade staff.

The CMTC shift of focus from HIC to PSO focused attention on legal issues and the importance of the JA. Fortunately, a return to an emphasis on HIC has not diminished the role of the JA. The JAs who come to the CMTC must adjust to the change in legal issues that arises with the change in mission. Unlike the sterile battlefield that existed at the CMTC in 1989, HIC rotations include numerous complex battlefield scenarios. The JA can continue to expect to see issues involving interaction with local civilians such as refugees, local officials, hostile civilians, and paramilitary forces, as well as a broad mixture other typical PSO issues. However, now the brigade JA must also focus on law of war violations, targeting issues, fratricides and ensuing investigations, development of displaced civilians and refugees plans, EPW care, evacuation of the sick and wounded, and a host of other issues that directly impact command and control. Some issues will not be traditional "lawyer" issues; however, the brigade staff will be better prepared to deal with such issues if the JA is proactive and well integrated into the brigade staff team.

Judge Advocate Preparation

All judge advocates must maintain a "go to war" state of mind. The variety of legal issues encountered in a CTC training box and on the battlefield, as described above, require an effort to become proficient in areas of the law that exceed the bounds of one's normal daily duties. To professionally and proficiently provide legal support to the commander on the battlefield, JAs must also dedicate the necessary time to understanding the commander, his staff, the battlefield operating systems (BOSs), the operators, and their weapons systems.

All of the training centers offer the JA the prime opportunity to integrate with the staff and to learn the military decision making process during the preparation stages prior to an exercise. The CMTC, NTC and JRTC refer to this as the leadership training program (LTP). The BCTP's equivalent of this program is the battle command seminar. All are conducted approximately three months prior to an actual rotation. All JAs and their legal noncommissioned officers or specialists must attend the LTP. The three-day CMTC LTP walks the commander and his staff through past lessons learned, the various BOS systems, the military decision making process, operations orders, intelligence preparation of the battlefield, reconnaissance and surveillance planning, fire support, battle and maneuver synchronization, and then ends by focusing on the process of planning and executing a mission. This instruction and experience is invaluable to a JA and cannot be obtained in such a condensed mode elsewhere.

Another key step in preparing for a rotation to CMTC or one of the other training centers is to contact the CLAMO and the O/C team. The CLAMO can provide judge advocates a training guide,[4] lessons learned, and other preparatory materials. Early contact with the O/Cs tells them the JA is "leaning forward in the foxhole." The O/Cs can answer questions and provide a full picture of what the JA can expect to encounter.

Conclusion

As the CMTC transitions from peace support operations to high intensity conflict training for deploying USAREUR units, deploying JAs must also make a transition. The JA must now not only be an expert on the two ends of the spectrum—PSO operations and HIC, but must also be able to apply the principles of both types of operations on a complex battlefield designed to test his full integration within the brigade staff. The CMTC continues to provide excellent training for all soldiers,

4. To date there are training guides published for JRTC and BCTP. In the future, a guide for NTC will be developed and the JRTC Guide will be revised.

including JAs. As the JA departs the CMTC after the rotation, he will have worked hard, learned much, become a better soldier, better lawyer, and a more valuable asset to the commander. Captains Eric T. Jensen and Tyler L. Randolph.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 48th Judge Advocate Officer Graduate Course have been set aside for Reserve Component Judge Advocate General's Corps (JAGC) officers. The forty-two week graduate level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 16 August 1999 to 26 May 2000. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 16 August 1999 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, home, and e-mail).

Military experience: Chronological list of reserve and active duty assignments; include **all** OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

Letter of Recommendation: Include a letter of recommendation from one of the judge advocate leaders listed below:

United States Army Reserve (USAR) TPU: Legal Support Organization (LSO) Commander

Command or Staff Judge Advocate

Army National Guard (ARNG): Staff Judge Advocate.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): The DA Form 1058 or NGB Form 64 must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels (indicated below) and must be received at GRA no later than 15 December 1998.

ARNG: Forward the packet through the state chain of command to Office of The Chief Counsel, National Guard Bureau, 2500 Army, Pentagon, Washington, DC 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through chain of command, to Commander, AR-PERSCOM, ATTN: ARPC-OPB, 9700 Page Avenue, St. Louis, MO 63132-5200. (800) 325-4916

OTJAG, Guard and Reserve Affairs: Dr. Mark Foley, Ed.D, (804)972-6382/Fax (804)972-6386 E-Mail foleyms@hqda.army.mil. Dr. Foley.

The Army Judge Advocate General's Corps Application Procedure for Guard and Reserve

Mailing address:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA-PA
600 Massie Road
Charlottesville, VA 22903-1781

e-mail address: Gra-pa@hqda.army.mil
(800) 552-3978 ext. 388
(804) 972-6388

Applications will be forwarded to the JAGC appointment board by the unit to which you are applying for a position. National Guard applications will be forwarded through the National Guard Bureau by the state. Individuals who are currently members of the military in other branches (Navy, Air Force, Marines) must request a conditional release from their service prior to applying for an Army JAGC position. *Army Regulation (AR) 135-100* and *National Guard Regulation (NGR) 600-100* are the controlling regulations for appointment in the reserve component Army JAGC. Applications are reviewed by a board of Army active duty and reserve component judge advocates. The board is a standing board, in place for one year. Complete applications are processed and sent to the board as they are received. The approval or disapproval process is usually sixty days. Communications with board members is not permitted. Applicants will be notified when their application arrives and when a decision is reached. Approved applications are sent to the Army's Personnel Com-

mand for completion and actual appointment as an Army officer.

Required Materials

Applications that are missing items will be delayed until they are complete. Law school students may apply in their final semester of school, however, if approved, they cannot be appointed until they have passed a state bar exam.

(1) DA Form 61 (USAR) or NG Form 62 (ARNG), application for appointment in the USAR or ARNG.

(2) Transcripts of all undergraduate and law school studies, prepared by the school where the work was completed. A student copy of the transcript is acceptable if it is complete. You should be prepared to provide an official transcript if approved for appointment.

(3) Questionnaire for National Security (SF86). All officers must obtain a security clearance. If final clearance is denied after appointment, the officer will be discharged. In lieu of SF 86, current military personnel may submit a letter from their organization security manager stating that you have a current security clearance, including level of clearance and agency granting the clearance.

(4) Chronological listing of civilian employment.

(5) Detailed description of legal experience.

(6) Statement from the clerk of highest court of a state showing admission and current standing before the bar and any disciplinary action. This certificate must be less than a year old. If disciplinary action has been taken against you, explain circumstances in a separate letter and submit it with the application.

(7) Three letters from lawyers, judges, or military officers (in the grade of captain or above) attesting to applicant's reputation and professional standing.

(8) Two recent photographs (full length military photos or head and shoulder type, 3" x 5") on separate sheet of paper.

(9) Interview report (DA Form 5000-R). You must arrange a local interview with a judge advocate (in the grade of major or above, or any official Army JAGC Field Screening Officer). Check the list of JAG units in your area. This report should not be returned to you when completed. The report may be mailed or e-mailed to this office, or included by the unit when they forward your application. You should include a statement with your application that you were interviewed on a specific date, and by whom.

(10) Assignment request. For unit assignment, include a statement from the unit holding the position for you (the specific position must be stated as shown in the sample provided).

(11) Acknowledgment of service requirement. DA Form 3574 or DA Form 3575.

(12) Copy of your birth certificate.

(13) Statement acknowledging accommodation of religious practices.

(14) Military service record for current or former military personnel. A copy of your OMPF (Official Military Personnel File) on microfiche. Former military personnel can obtain copies of their records from the National Personnel Records Center www.nara.gov/regional/mpr.html. E-mail inquires can be made to center@stlouis.nara.gov.

(15) Physical examination. This exam must be taken at an official Armed Forces examination station. The physical examination may be taken prior to submitting the application or after approval. However, the examination must be completed and approved before appointment to the Army. Individuals currently in the military must submit a military physical examination taken within the last two years.

(16) Request for age waiver. If you cannot complete 20 years of service prior to age 60 and/or are 33 or older, with no prior commissioned military service, you must request an age waiver. The letter should contain positive statements concerning your potential value to the JAGC, for example, your legal experience and/or other military service.

(17) Conditional release from other branches of the Armed Services.

(18) DA Form 145, Army Correspondence Course Enrollment Application.

(19) Civilian or military resume (optional).

Dr. Foley.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

IMA Positions in Criminal Law Department, TJAGSA

The Judge Advocate General's School, U.S. Army, Criminal Law Department, has two positions open now for Individual Mobilization Augmentees. The positions are specified as follows:

two major (O-4) positions to conduct trial advocacy training during the two-week criminal law advocacy course, held twice annually; trial experience required.

Each application packet must include the following materials:

Personal data: Full name, grade, date of rank, age, address, and telephone number (business, fax, home, and e-mail).

Military experience: Chronological list of reserve and active duty assignments; include all OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript. Also, include any continuing legal education primarily devoted to advocacy training.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you are particularly qualified to train young judge advocates in trial advocacy.

Routing of application packet: Each packet shall be forwarded to LTC Kevin Lovejoy, Chair, Criminal Law Department, The Judge Advocate General's School, U.S. Army, 600 Massie Road, Charlottesville, VA 22903-1781.

Inquiries: For questions regarding the above positions, requirements or eligibility, contact either LTC Lovejoy (804-972-6341; lovejjk@hqda.army.mil); or MAJ Norman Allen III (804-972-6349; allennf@hqda.army.mil).

U.S. ARMY RESERVE COMPONENTS JUDGE ADVOCATE GENERAL'S CORPS

FACT SHEET

Judge advocates have provided professional legal service to the Army for over 200 years. Since that time the Corps has grown dramatically to meet the Army's increased need for legal expertise. Today, approximately 1500 attorneys serve on active duty while more than 2800 Judge Advocates find rewarding part-time careers as members of the U.S. Army Reserve and Army National Guard. Service as a Reserve Component Judge Advocate is available to all qualified attorneys. Those who are selected have the opportunity to practice in areas as diverse as the field of law itself. For example, JAGC officers prosecute, defend, and judge courts-martial; negotiate and review government contracts; act as counsel at administrative hearings; and provide legal advice in such specialized areas as international, regulatory, labor, patent, and tax law, while effectively maintaining their civilian careers.

APPOINTMENT ELIGIBILITY AND GRADE: In general, applicants must meet the following qualifications:

(1) Be at least 21 years old and able to complete 20 years of creditable service prior to reaching age 60. In addition, for appointment as a first lieutenant, be less than 33, and for appointment to captain, be less than 39 (waivers for those exceeding age limitations are available in exceptional cases).

(2) Be a graduate of an ABA-approved law school.

(3) Be a member in good standing of the bar of the highest court of a state or federal court.

(4) Be of good moral character and possess leadership qualities.

(5) Be physically fit.

Grade of rank at the time of appointment is determined by the number of years of constructive service credit to which an individual is entitled. As a general rule, an approved applicant receives three years credit from graduation from law school plus any prior active or reserve commissioned service. Any time period is counted only once (i.e., three years of commissioned service while attending law school entitles a person to only three years constructive service credit, not six years). Once the total credit is calculated, the entry grade is awarded as follows:

(1) 2 or more but less than 7 years	First Lieutenant
(2) 7 or more but less than 14 years	Captain
(3) 14 or more but less than 21 years	Major

An applicant who has had no previous military commissioned service, therefore, can expect to be commissioned as a first lieutenant with one years service credit towards promotion.

PAY AND BENEFITS: Basic pay varies depending on grade, length of service, and degree of participation. Reserve officers are eligible for numerous federal benefits including full-time Servicemen's Group Life Insurance; limited access to post exchanges, commissaries, theaters and available transient billets; space-available travel on military aircraft within the continental United States, if on reserve duty; authorized survivor benefits; and generous retirement benefits. When performing active duty or active duty for training, reservists may use military recreation, entertainment and other post facilities, and receive limited medical and dental care.

PARTICIPATION REQUIREMENTS: The JAGC Reserve Program is multifaceted, with the degree of participation determined largely by the individual. Officers are originally assigned to a Troop Program Unit (TPU). Follow on assignments may include service as an Individual Mobilization Augmentee (IMA). TPU officers attend monthly drills and perform two weeks of annual training a year. Upon mobilization, they deploy with their unit and provide legal services commensurate with their duty positions.

Individual mobilization augmentee officers are assigned to active duty agencies or installations where they perform two weeks of on-the-job training each year. During the remainder of the year, they do legal assistance, take correspondence courses, or do project work at their own convenience in order to earn points towards retirement. Upon mobilization, these officers go to their assigned positions and augment the legal services provided by that office. Officers may also transfer from one unit to another or between units

and IMA positions depending upon the availability of vacancies. This flexibility permits the Reserve Judge Advocate to tailor his or her participation to meet personal and professional needs. Newly appointed officers will usually serve in TPU assignments.

SCHOOLING: New officers are required to complete the Judge Advocate Officer's Basic Course within twenty-four months of commissioning as a condition of appointment. Once enrolled in the Basic Course, new officers must complete Phase I in twelve months. This course consists of two phases: Phase I is a two-week resident course in general military subjects at Fort Lee, Virginia. Phase II, military law, may be completed in residence at Charlottesville, Virginia or by correspondence. In addition to the basic course, various other legal and military courses are available to the reservist and may be taken either by correspondence or in residence at The Judge Advocate General's School in Charlottesville, Virginia.

SERVICE OBLIGATION: In general, new appointees incur a statutory service obligation of eight years. Individuals who have previous military service do not incur an additional obligation as a result of a new appointment.

RETIREMENT BENEFITS: Eligibility for retirement pay and other benefits is granted to members who have completed 20 years of qualifying federal military service. With a few exceptions, the extent of these benefits is the same for both the reservist and the service member who retires from active duty. The major difference in the two retirement programs is that the reservist does not begin receiving most of the retirement benefits, including pay, until reaching age 60. The amount of monthly retirement income depends upon the grade and total number of qualifying points earned during the course of the individual's career. Along with the pension, the retired reservist is entitled to shop in military exchanges and commissaries, use most post facilities, travel space-available on military aircraft worldwide, and utilize some medical facilities.

U.S. ARMY RESERVE COMPONENT INFORMATION: Further information, application forms, and instructions may be obtained by calling **1-800-552-3978, ext. 388,** e-mail gra-pa@hqda.army.mil or writing:

Office of The Judge Advocate General
Guard and Reserve Affairs
ATTN: JAGS-GRA
600 Massie Road
Charlottesville, VA 22903-1781.

Intenet Links

National Guard: www.ngb.dtic.mil
US Army Reserve: www.army.mil/usar/ar-perscom/atoc.htm
Reserve Pay: www.dfas.mil/money/milpay/98pay/index.htm

Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,.....foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,.....riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostesl@hqda.army.mil
IMA Assistant

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
7-8 Nov	Minneapolis, MN 214th LSO Thunderbird Hotel & Convention Center 2201 East 78th Street Bloomington, MN 55452 (612) 854-3411	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	BG Michael J. Marchand BG John F. DePue MAJ Geoffrey Corn MAJ Greg Coe MAJ Juan J. Rivera	MAJ John Kingrey 214th LSO 505 88th Division Rd Fort Snelling, MN 55111 (612) 713-3234
21-22 Nov	New York, NY 4th LSO/77th RSC Fort Hamilton Adams Guest House Brooklyn, NY 10023 (718) 630-4052/4892	AC GO RC GO Int'l Ops Law Criminal Law GRA Rep	MG John D. Altenburg BG Richard M. O'Meara MAJ Michael Newton MAJ Jack Einwechter COL Keith Hamack	LTC Donald Lynde HQ, 77th RSC ATTN: AFRC-CMY-JA) Bldg. 200 Fort Totten, NY 11359-1016 (718) 352-5703/5720 (Lynde@usarc-emh2.army.mil)
9-10 Jan 99	Long Beach, CA 78th MSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Stephanie Stephens MAJ M. B. Harney COL Keith Hamack	MAJ Christopher Kneib 5129 Vail Creek Court San Diego, CA 92130 (work) (619) 553-6045 (unit) (714) 229-7300
30-31 Jan	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Harrold McCracken LTC Tony Helm COL Thomas Tromey	LTC Frederick S. Feller 7023, 95th Avenue, SW Tacoma, WA 98498 (work) (360) 753-6824 (home) (253-582-6486 (fax) (360) 664-9444
6-7 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	BG Thomas J. Romig BG Richard M. O'Meara MAJ Victor Hansen LTC Karl Goetzke COL Keith Hamack	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: Tdonne2947@aol.com

20-21 Feb	Denver, CO 87th MSO	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Jody Hehr MAJ Michael Smidt COL Thomas N. Tromey	MAJ Paul Crane DCMC Denver Office of Counsel Orchard Place 2, Suite 200 5975 Greenwood Plaza Blvd. Englewood, CO 80111 (303) 843-4300 (108) e-mail:pcrane@ogc.dla.mil
27-28 Feb	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG John F. DePue LTC Jackie R. Little MAJ Michael Newton MAJ Juan J. Rivera	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
6-7 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
13-14 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG John F. DePue MAJ Mike Berrigan MAJ Dave Freeman COL Keith Hamack	COL Robert P. Johnston Office of the SJA, 12th LSO Building 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
13-14 Mar	San Francisco, CA 75th LSO	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres LTC Manuel Supervielle MAJ Edye Moran Dr. Mark Foley	MAJ Douglas T. Gneiser Hancock, Rothert & Bunshoft Four Embarcadero Center Suite 1000 San Francisco, CA 94111 (415) 981-5550
20-21 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John F. DePue LTC Paul Conrad MAJ Norm Allen Dr. Mark Foley	CPT Ted Gauza 2636 Chapel Hill Dr. Arlington Heights, IL 60004 (312) 443-1600 (312) 443-1600
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Marty Sitler LTC Richard Barfield Dr. Mark Foley	MAJ Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com

23-25 Apr	Little Rock, AR 90th RSC/1st LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigant@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Beth Berrigan COL Keith Hamack	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556

*Topics and attendees listed are subject to change without notice.

Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

October 1998

1-14 October	147th Basic Course (Phase I-Fort Lee) (5-27-C20).
5-9 October	1998 JAG Annual CLE Workshop (5F-JAG).
14 October-18 December	147th Basic Course (Phase II-Fort Lee) (5-27-C20).
19-23 October	43rd Legal Assistance Course (5F-F23).
26-30 October	52nd Fiscal Law Course (5F-F12).

November 1998

2-6 November	150th Senior Officers Legal Orientation Course (5F-F1).
16-20 November	22nd Criminal Law New Developments Course (5F-F35).
16-20 November	52nd Federal Labor Relations Course (5F-F22).
30 November-4 December	1998 USAREUR Operational Law CLE (5F-F47E).
30 November - 4 December	151st Senior Officers Legal Orientation Course (5F-F1).

December 1998

7-11 December	1998 Government Contract Law Symposium (5F-F11).
7-11 December	1998 USAREUR Criminal Law Advocacy CLE (5F-F35E).
14-16 December	2nd Tax Law for Attorneys Course (5F-F28).

1999

January 1999

4-15 January	1999 JAOAC (Phase II) (5F-F55).
5-8 January	1999 USAREUR Tax CLE (5F-F28E).
11-15 January	1999 PACOM Tax CLE (5F-F28P).

11-15 January	1999 USAREUR Contract and Fiscal Law CLE (5F-F15E).
11-22 January	148th Basic Course (Phase I-Fort Lee) (5-27-C20).
20-22 January	5th RC General Officers Legal Orientation Course (5F-F3).
22 January-2 April	148th Basic Course (Phase II-TJAGSA) (5-27-C20).
25-29 January	152nd Senior Officers Legal Orientation Course (5F-F1).

February 1999

8-12 February	70th Law of War Workshop (5F-F42).
8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).
8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).

March 1999

1-12 March	31st Operational Law Seminar (5F-F47).
1-12 March	142nd Contract Attorneys Course (5F-F10).
15-19 March	44th Legal Assistance Course (5F-F23).
22-26 March	2d Advanced Contract Law Course (5F-F103).
22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
14-18 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
14-18 June	29th Staff Judge Advocate Course (5F-F52).
21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
28-30 June	Professional Recruiting Training Seminar

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).

6-9 July	30th Methods of Instruction Course (5F-F70).
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).
21-23 July	Career Services Directors Conference

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999-26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August-3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October-22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).

18-21 January	2000 PACOM Tax CLE (5F-F28P).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Basic Course (Phase II-TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).

June 2000

5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1998

October

2 October ICLE	Guardianship Swissotel Atlanta, Georgia

15 October	ICLE	Effective Legal Negotiations and Settlement Atlanta, Georgia
16 October	ICLE	Adoption Law Terrace Garden Hotel Atlanta, Georgia
16 October	ICLE	Winning Trial Techniques Marriott Gwinnett Place Hotel Atlanta, Georgia
16 October	ICLE	Criminal Law Swissotel Atlanta, Georgia
23 October	ICLE	Professional and Ethical Dilemmas Atlanta, Georgia
29 October	ICLE	Microsoft Word for Attorneys Marriott Gwinnett Place Hotel Atlanta, Georgia

November

5 November	ICLE	Professionalism, Ethics and Malpractice Kennesaw State University Marietta, Georgia
6 November	ICLE	Bankruptcy Law Marriott Marquis Hotel Atlanta, Georgia
6-7 November	ICLE	ADR Institute Swissotel Atlanta, Georgia
13 November	ICLE	RICO Swissotel Atlanta, Georgia
13-14 November	ICLE	Intellectual Property Law Institute Brasstown Valley Resort Young Harris, Georgia

December

3 December	ICLE	Environmental Matters Atlanta, Georgia
4 December	ICLE	Employment Law Marriott Gwinnett Place Hotel Atlanta, Georgia
18 December	ICLE	Labor Law Swissotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

New York has implemented biennial CLE requirements for all New York attorneys that become effective 31 December 1998. These requirements differ for new attorneys, admitted after 1 October 1997, and for more senior attorneys. Reporting and certification of CLE requirments will begin with the biennial attorney registration statements filed on or after 1 January 2000. Approved CLE courses that were taken on or after 1 January 1998 may be applied toward the initial reporting cycle. There is an exemption for full-time active duty military attorneys. Presently, The Judge Advocate General's School, U.S. Army (TJAGSA) is not an approved CLE provider. Additional information can be obtained at <http://www.ucs.ljx.com>. The CLE Board also has an e-mail address for direct questions: cle@courts.state.ny.us.

For detailed information on mandatory continuing legal eduction jurisdiction and reporting dates for other states, see the September 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

Legal Assistance

*AD A353921/PAA Consumer Law Guide, JA 265-98 (440 pgs).

* Indicates new publication or revised edition.

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1998 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer*.
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3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer*.

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer*.

5. Articles

The following information may be useful to judge advocates:

Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57 (1998).

Thomas L. Shaffer, *On Teaching Legal Ethics With Stories About Clients*, 39 WM. & MARY L. REV. 421 (1998).

Teresa Stanton Collett, *Teaching Professional Responsibility in the Future: Continuing the Discussion*, 39 WM. & MARY L. REV. 439 (1998).

Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457 (1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.