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Article

Whose Money Is It: Does the Forfeiture of Voluntary Educational Benefit Contributions Raise Fifth Amendment Concerns?

Major Charles C. Poché

Legal Assistance Practice Note

Update to Army Regulation 27-55, Notarial Services

Major Evan M. Stone, The Judge Advocate General's Legal Center & School

Center for Law & Military Operations (CLAMO) Report

The Judge Advocate General's Legal Center & School

The Judge Advocate's Role in Information Operations

Lieutenant Colonel Pamela M. Stahl & Captain Toby Harryman

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Editor's Note

Please note that we have made some minor corrections since publication to the following article: Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1. These changes can be found on LEXIS as well as on our website at www.jagcnet.army.mil/ArmyLawyer. The only substantive change is that the statutory cite in footnote 104 is 2011 not 201.

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Whose Money Is It: Does the Forfeiture of Voluntary Educational Benefit Contributions Raise Fifth Amendment Concerns?

Major Charles C. Poché

Introduction

*The Montgomery GI Bill and Army College Fund are ways to get part of your college education paid for just by enlisting in the U.S. Army. You contribute a small sum of money every month and can receive something that's beyond value—a college education.*¹

A college education may be beyond value, but the value of Montgomery GI Bill benefits is easy to quantify.² The maximum current value of Montgomery GI Bill benefits is \$40,860.³ A soldier who leaves the Army with an honorable discharge is typically eligible to receive the full amount in educational assistance.⁴ If the same soldier leaves with a general discharge under honorable conditions, he or she receives nothing.⁵ The soldier also forfeits his or her voluntary contributions to the program.⁶ Moreover, those soldiers with less than six years of service who receive a general discharge under honorable conditions may forfeit their voluntary contributions without the benefit of a formal hearing.⁷

This article argues that the policy concerning educational benefit forfeitures as currently implemented needlessly gives rise to cognizable claims under the Fifth Amendment.⁸ Specifically, modern changes allowing voluntary contributions to the Montgomery GI Bill program⁹ raise a serious new concern. The concern is that the automatic forfeitures by some soldiers separating with a general discharge violate the Fifth Amendment's Due Process and Takings Clauses.¹⁰ These new constitutional claims open the door to previously unwarranted judicial review.

First, this article details the evolution of the Army's current Montgomery GI Bill benefits program and explains how the Army administers the program today. Second, it explores the threshold matter of whether the courts would even entertain a challenge to the program's current implementation. The article reaches the preliminary conclusion the courts could hear a claim raising constitutional concerns about the program. Third, after discussing possible contractual justifications for educational benefit forfeitures, the article details the current state of the constitutional law regarding due process and takings. Fourth, following this explanation, the article applies this law to the forfeiture of today's educational benefits and illustrates how the current implementation invites judicial scrutiny.

1. U.S. Army Recruiting Command, *Army Benefits*, available at <http://www.goarmy.com/army101/benefits.htm> (last visited Mar. 10, 2004) (listing benefits available to Army soldiers).

2. The Army College Fund mentioned in the opening quotation is a program for payment of further educational benefits beyond those provided by the Montgomery GI Bill. See 38 U.S.C. § 3015(d)(1) (2000) (authorizing additional benefits "in the case of an individual who has a skill or specialty designated by the Secretary concerned as a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit"); U.S. DEP'T OF ARMY, REG. 621-202, ARMY EDUCATIONAL INCENTIVES AND ENTITLEMENTS paras. 2-12, 2-19 (3 Feb. 1992) (implementing the Army College Fund program). For the sake of brevity, this paper does not address the Army College Fund program in any detail. Note, however, while the Army College Fund and Montgomery GI Bill programs are distinct, they do have one significant thing in common—their eligibility requirements. See *id.* para. 2-15 (mandating soldiers remain eligible for Montgomery GI Bill benefits to receive Army College Fund benefits).

3. See discussion *infra*. The \$40,860 amount assumes a three-year enlistment with the maximum allowable participation and contributions by the soldier.

4. 38 U.S.C. § 3011(a)(3)(B) (requiring discharge "from active duty with an honorable discharge").

5. *Carr v. Brown*, 5 Vet. App. 2, 3 (Vet. App. 1993) (affirming a Board of Veterans' Appeals decision that a general discharge under honorable conditions was not "the requisite character of discharge to establish basic eligibility for . . . educational benefits").

6. See 38 U.S.C. § 3011(e)(4) (requiring the "Secretary [to] deposit any amounts received as contributions under this subsection into the Treasury as miscellaneous receipts"); see also 38 U.S.C. § 3011(b) (providing that "[a]ny amount by which the basic pay of an individual is reduced under this chapter . . . shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual").

7. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 2-2 (1 Nov. 2000) [hereinafter AR 635-200].

8. U.S. CONST. amend. V.

9. 38 U.S.C. § 3011(e) (originally enacted in the Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, § 105, 114 Stat. 1822, 1828-29 (2000)) (allowing, for the first time, soldiers to make voluntary contributions to the educational benefits program).

10. U.S. CONST. amend. V.

Finally, the article concludes with a simple suggestion to minimize the possibility of judicial review.

The Montgomery GI Bill

Precursor to the Montgomery GI Bill

Persons who entered military service on or after 1 January 1977 and before 1 July 1985 were eligible for the educational benefits provided by the Post-Vietnam Era Veterans' Educational Assistance Program (VEAP).¹¹ Under VEAP, service members voluntarily contributed funds to the program in return for matching funds from the Department of Veterans Affairs. The matching fund rate was two dollars for every dollar contributed.¹² The maximum voluntary contribution allowed was \$2,700.¹³ Congress simultaneously created "a deposit fund account entitled the 'Post-Vietnam Era Veterans Education Account'" to hold the contributions and matching funds.¹⁴ The Department of Veterans Affairs administered this educational assistance program with funds "deposited into and disbursed from the fund for the purposes of such program."¹⁵ If a service member received a dishonorable discharge, the member received a refund of his or her contributions, but no other benefit from the program.¹⁶

The VEAP "was generally considered to be a failure"¹⁷ because it proved ineffective as a recruiting tool. During the time VEAP was available between 1977 and 1979, the Army did not meet its recruiting objectives.¹⁸ Only about a third of enlisting recruits signed up for the program, prompting one sen-

ator to characterize it as "largely ignored."¹⁹ In response to the program's unpopularity and failure as a recruiting tool, lawmakers sought to establish a more effective education assistance program.

The Montgomery GI Bill

The solution that Congress enacted was the Veterans' Educational Assistance Act of 1984.²⁰ It contains provisions for education assistance to members of both the active and reserve components and does not differentiate between the services.²¹ The active component program and, specifically, the Army's implementation of the program is the focus of this article. The article does not contain a separate analysis of the reserve program, nor does it explore how other services implement the Montgomery GI Bill program.

Congress originally intended the Veterans' Education Assistance Act of 1984 to be a temporary program. It became effective on 1 July 1985 and was to expire on 30 June 30 1988.²² The stated purpose of the program was "to provide a new educational assistance program to assist in the readjustment of members of the Armed Forces to civilian life."²³ If a soldier served three years, this original assistance consisted of \$300 per month for thirty-six months for full-time schooling.²⁴ This \$10,800 represented an increase of \$4,200 over VEAP's benefits after subtracting out the soldier's contributions or forbearance of pay under each plan.²⁵

11. 38 U.S.C. § 3221(a).

12. *Id.* § 3222(b).

13. *Id.* § 3222(a).

14. *Id.*

15. *Id.* § 3222(e).

16. *Id.* § 3225.

17. 132 CONG. REC. S5982 (daily ed. May 15, 1986) (statement of Sen. Murkowski).

18. *Id.*

19. 133 CONG. REC. S6200 (daily ed. Apr. 21, 1987) (statement of Sen. Daschle).

20. Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2553-64 (codified as amended in scattered sections of 38 U.S.C. (2000)).

21. *Id.* at 2555.

22. *Id.* at 2554.

23. *Id.* at 2553.

24. *Id.* at 2557.

25. The VEAP's maximum contribution was \$2,700. Its maximum benefit was \$8,100 after two-for-one matching. This benefit equated to the soldier receiving \$5,400 in assistance from the government. Under the new program, the soldier received \$9,600 in assistance.

Under the new program, the soldier's enrollment obligation originally consisted solely of \$100 per month withheld from the soldier's basic pay for the first twelve months of service.²⁶ Representative Sonny Montgomery, who would eventually lend his name to the permanent title of the program, later stressed that these enrollment costs were not analogous to the contributions made under the unpopular VEAP.²⁷ He stated, "[T]he Montgomery GI Bill is not a contributory program. Participants agree to a lower rate of basic pay than that paid to nonparticipating service members and taxes are paid on the reduced pay level."²⁸ In other words, the soldier concerned never saw a deduction from his or her pay. The service simply paid the soldier less than it paid soldiers of the same grade and time in service that chose not to participate. Also contrary to VEAP, the original law did not establish a specific fund to receive the monies withheld from the pay of military members. These "[a]mounts withheld from basic pay . . . revert[ed] to the Treasury."²⁹

In 1986, Congress took a preliminary step to establish a fund to receive the New GI Bill payroll deductions by amending the act to clarify the nature of the \$1,200 cost of enrollment. According to the clarification, "Any amount by which the basic pay of an individual is reduced . . . shall not, for the purposes of any Federal law, be considered to have been received by or be within the control of such individual."³⁰ This amendment was originally "derived from section 103 of H.R. 3747, relating to the establishment of a New GI Bill Educational Assistance Fund, as ordered reported by the House Committee on Veterans' Affairs on July 29, 1986."³¹ This fund would have presumably played the role of the Post-Vietnam Era Veterans

Education Account under VEAP and held the funds freed by the payroll deduction.³² Congress, however, never established the envisioned New GI Bill Educational Assistance Fund. To this day, the Department of Veterans Affairs administers the GI Bill from funds "appropriated to, or otherwise available to" it for the payment of the entitlements.³³ Because the pay reductions revert to the Treasury, there is no direct link between the pay reductions and the funding of the benefits program.³⁴

Once the soldier enrolled in the program by accepting the reduction of basic pay, he or she had to meet three basic requirements to earn educational benefits upon leaving active duty. These requirements are nearly the same today.³⁵ They involve time in service, educational status, and characterization of discharge.³⁶

First, the soldier had to serve the required amount of time. This required period could be twenty, twenty-four, thirty, or thirty-six months. If the soldier's initial obligation was less than three years, twenty-four months of service qualified him or her for the program. Soldiers with an initial obligation to serve less than three years needed to serve only twenty months if the government separated him or her for its convenience before their term of service expired. A three-year initial obligation required thirty months of service if separation was for the convenience of the government. A full three years of service was sufficient in all instances.³⁷ The second requirement demanded the soldier have a "secondary school diploma (or equivalency certificate)" at the completion of his or her service.³⁸ The third and final qualifying condition required that the soldier receive an honorable discharge.³⁹ These seemingly low threshold

26. Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2555 (1984).

27. New GI Bill Continuation Act, Pub. L. No. 100-48, 101 Stat. 331 (1987) (codified as amended in scattered sections of 38 U.S.C. § 3011 (2000)) (changing the short title of the section to the "Montgomery GI Bill Act of 1984").

28. 134 CONG. REC. 7,506 (1988).

29. Veterans' Educational Assistance Act § 1411(b).

30. Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, 100 Stat. 3268 (1986) (codified as amended at 38 U.S.C. § 3011(b)).

31. 132 CONG. REC. S15589 (daily ed. Oct. 8, 1986) (Explanatory Statement on the Proposed Compromise Agreement on H.R. 5299, the Proposed "Veterans' Benefits Improvement and Health-Care Authorization Act of 1986").

32. See 38 U.S.C. § 3222(e).

33. *Id.* § 3035.

34. See *id.* § 3011(b).

35. See *id.* § 3011(a).

36. See Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2554-55 (1984).

37. *Id.*

38. *Id.* at 2555.

39. *Id.*

requirements, coupled with the invisible nature of the enrollment cost, proved extremely attractive to those considering enlisting in the military.

The program was a highly effective recruiting tool. It was so successful one senator went so far as to credit it with “playing a major role in saving the All-Volunteer Force.”⁴⁰ Furthermore, Representative Montgomery observed:

Since the implementation of the New GI Bill on July 1, 1985, the ability of the Army to attract high quality graduates has improved. The average monthly percentage of high quality graduate contracts written increased to 57.9 percent during the first 12 months under the new program compared to the 50.8 percent for the final 12 months under VEAP An impressive 80 percent of new soldiers are presently participating in the New GI Bill—double the rate under VEAP.⁴¹

The program was also a fiscal success. Less than one year after its implementation, the program had already placed “approximately \$75 million in revenues [in the Federal Treasury] as a result of the reduction in basic military pay.”⁴² The projected total revenue saved over the original three-year span of the program was \$500 million.⁴³ The Congressional Budget Office estimated the reductions in pay would offset the cost of the program to the government until 1992 and thereafter only cost \$50 million to \$75 million a year.⁴⁴ Additionally, the Army

estimated it was saving “\$234 million annually due to reduced attrition” credited to the higher quality of recruits brought in under the program.⁴⁵

In response to these successes, the New GI Bill Continuation Act of 1987 made the GI Bill program permanent and gave it the now-familiar name of the Montgomery GI Bill.⁴⁶ For the next thirteen years, Congress adjusted the program slightly at least every other year.⁴⁷ These adjustments made only minor changes.⁴⁸ The next significant change would not occur until 2000.

The Veterans Benefits and Health Care Improvement Act of 2000 allowed voluntary contributions to the program for the first time.⁴⁹ Under the Act, service members could voluntarily contribute up to \$600 to the program. The soldier received an increased monthly benefit of one dollar for every four dollars contributed.⁵⁰ Once again, however, the statute did not provide for the placement of these contributed funds into any distinct account. Rather, the law stated, “The Secretary shall deposit any amounts received by the Secretary as contributions under this subsection into the Treasury as miscellaneous receipts.”⁵¹

With the enactment of this law, Representative Montgomery’s prior statement concerning the non-contributory nature of the program⁵² became inapplicable as the service member could now contribute discretionary money to the program. As discussed earlier, voluntary contributions were the sole means of enrollment and participation in the unpopular VEAP before the Montgomery GI Bill.⁵³ Because a service member made VEAP

40. 133 CONG. REC. S6200 (daily ed. May 8, 1987) (statement of Sen. Cranston).

41. 132 CONG. REC. E3608 (daily ed. Oct. 14, 1986) (insertion by Rep. Montgomery).

42. 132 CONG. REC. E1423 (daily ed. Apr. 29, 1986) (letter to Rep. Montgomery from the Director of the Office of Veterans Affairs).

43. *Id.*

44. 133 CONG. REC. S6200 (daily ed. May 8, 1987) (statement of Sen. Cranston).

45. *Id.*

46. New GI Bill Continuation Act, Pub. L. No. 100-48, 101 Stat. 331 (1987) (codified as amended in scattered sections of 38 U.S.C. (2000)).

47. See 38 U.S.C. § 3011 (2000) (detailing the history of the amendments to the section and indicating no amendments occurred in 1993, 1995, or 1997).

48. See, e.g., Veterans Benefits and Programs Improvement Act of 1988, Pub. L. No. 100-689, §§ 102, 104, 102 Stat. 4161, 4162, 4166 (1988) (allowing eligibility for those completing twelve semester hours towards a college degree and allowing eligibility for those separated due to preexisting medical conditions or as the result of a reduction in force); Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 207, 112 Stat. 3315, 3328 (1998) (requiring services to provide information on the minimum requirements for education benefits to those separating early for the convenience of the government).

49. Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, § 105, 114 Stat. 1822, 1828-29 (codified as amended at 38 U.S.C §§ 3011(e), 3012(f), 3015 (LEXIS 2003)).

50. *Id.* at 1829 (codified as amended at 38 U.S.C. § 3015(g)).

51. 38 U.S.C. § 3011(e)(4).

52. 134 CONG. REC. 7,506 (1988).

53. See discussion *infra*.

contributions from his or her discretionary income, Congress apparently deemed it necessary to include provisions for refunding the contributions in the event a service member became ineligible for the program. The statute even authorizes refunds in instances when the service member receives a dishonorable discharge.⁵⁴ Because pay reductions—not contributions—form the basis of enrollment in the Montgomery GI Bill program, it seems that Congress determined there was less of a need for a refund provision. The law stated the enrollment funds were never the soldiers' money,⁵⁵ so a refund seemed unnecessary. With voluntary contributions now authorized, a reimbursement provision appears more necessary; but one still does not exist. Additionally, the level of benefits a qualifying soldier may receive in exchange for these nonrefundable deductions and voluntary contributions is substantial.

The current level of benefits payable under the basic Montgomery GI Bill is \$985 per month for fiscal year 2004.⁵⁶ A former soldier is entitled to a maximum of thirty-six months of benefits.⁵⁷ Voluntary contributions entitle the soldier to an additional monthly benefit equal to one dollar for every four dollars contributed.⁵⁸ For example, by contributing the maximum voluntary amount of \$600,⁵⁹ the monthly benefit increases an additional \$150 per month.⁶⁰ Over the course of the entire four years, basic Montgomery GI Bill benefits can total \$40,860.⁶¹ This is a significant return on the soldier's \$1,200 enrollment and \$600 contribution investment.

Easy Come, Easy Go—Signing Up For and Losing Montgomery GI Bill Benefits

Enrolling in the Montgomery GI Bill

Basic enrollment in the Montgomery GI Bill program occurs at enlistment. As part of the enlistment contract, the soldier may sign two forms. The first form is the Department of Defense (DD) Form 2366, Montgomery GI Bill Act of 1984 – Basic Enrollment.⁶² The form contains a section titled, “Statement of Understanding for All Eligible Members,” which notifies the soldier of some of the conditions of the program.⁶³ The form also indicates failure to complete the form “will result in the individual being automatically enrolled” in the program.⁶⁴ Strangely, while the form is designed to provide necessary information to the soldier, enrollment occurs even if the soldier never sees the form.

Part of the information provided by the form addresses the soldiers' lack of control over the \$1,200 enrollment cost. The “Statement of Understanding” section declares, “[T]his basic pay reduction CANNOT be REFUNDED, SUSPENDED OR STOPPED, this is an IRREVOCABLE DECISION.”⁶⁵ The form seeks to be equally unambiguous in addressing the characterization of discharge requirement. It states the soldier “must receive an HONORABLE discharge” and “[t]his DOES NOT include ‘under honorable conditions.’”⁶⁶ Notwithstanding the form's use of capitals, it is unlikely a new enlistee would grasp the difference between an honorable discharge and a discharge “under honorable conditions.” The soldier's signature also acknowledges he or she “must complete 36 months of active duty service (24 months if [their] enlistment is for less than 36 months)” before becoming eligible for Montgomery GI Bill benefits.⁶⁷

54. 38 U.S.C. § 3225 (2000).

55. *Id.* § 3011(b).

56. *Id.* § 3015(a).

57. *Id.* § 3013(a).

58. *Id.* § 3015(g).

59. *Id.* § 3011(e)(3).

60. *Id.* § 3015(g)(1) (increasing “the monthly rate otherwise provided for . . . by . . . an amount equal to \$5 for each \$20 contributed by such individual”).

61. This amount is derived from the following formula: (\$985 Basic GI Bill Benefit per month) + (\$150 Voluntary Contribution Benefit per month) x (36 months) = \$40,860.

62. U.S. Dep't of Defense, DD Form 2366, Montgomery GI Bill Act of 1984 (MGIB) – Basic Enrollment (June 2002).

63. *Id.* sec. 3.

64. *Id.* Privacy Act Statement Section.

65. *Id.* sec. 3.

66. *Id.*

The second form signed by the soldier explains his or her eligibility to increase Montgomery GI Bill benefits by making additional contributions while on active duty.⁶⁸ This form, the DD Form 2366-1, also includes a “Statement of Understanding.”⁶⁹ The soldier’s signature acknowledges he or she “understand[s] that MGIB increased benefit option contributions are non-refundable.”⁷⁰

Failing to Qualify for Educational Benefits

Soldiers typically fail to qualify for educational benefits (and forfeit their pay reductions and voluntary contributions) in one of two ways. They fail to meet the length of service requirements or they fail to leave the service with an honorable discharge. Generally, a soldier’s failure to meet the length of service requirement precludes receiving educational benefits; but the statute does contain several exceptions to the length of service requirements.⁷¹ The law contains no exceptions, however, to the honorable discharge requirement.

Surprisingly, a soldier may completely fulfill his or her initial enlistment obligation, leave the Army under honorable conditions, and still receive no benefits. This situation occurs if the soldier receives a general discharge under honorable conditions.⁷² Even if the general discharge under honorable conditions comes after the soldier otherwise fully qualifies for

benefits, he or she is still ineligible.⁷³ For example, a soldier may serve an original three-year enlistment (fulfilling the contractual obligation and qualifying for all benefits) and choose to extend his or her enlistment for one year.⁷⁴ If, at the end of the fourth year, the soldier receives a general discharge under honorable conditions, he or she is ineligible for educational benefits and forfeits all pay reductions and contributions.⁷⁵

Moreover, the Army’s regulation governing enlisted separations states, “Both honorable and general discharges entitle a soldier to full Federal rights and benefits provided by law.”⁷⁶ This assertion was true under VEAP, when the soldier bore the lighter burden of simply avoiding a dishonorable discharge.⁷⁷ Currently, however, the assertion is categorically incorrect when applied to the eligibility determination for today’s educational benefits. Under the Montgomery GI Bill, the burden on the soldier is greater.⁷⁸ The soldier must receive an “honorable” discharge to qualify for educational benefits.⁷⁹ Service under honorable conditions is not sufficient.

The Army’s enlisted separation regulation states, “A general discharge is a separation from the Army under honorable conditions.”⁸⁰ The Army issues such discharges to soldiers “whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.”⁸¹ The Army may issue a characterization of under honorable conditions only when the reason for separation specifically allows such characterization.⁸²

67. *Id.*

68. U.S. Dep’t of Defense, DD Form 2366-1, Montgomery GI Bill Act of 1984 (MGIB) – Increased Benefit Contribution Program (June 2002).

69. *Id.* sec. 2.

70. *Id.*

71. 38 U.S.C. § 3011(a)(1)(A)(ii) (2000) (authorizing length of service exceptions for the following early separation reasons: service-connected disabilities; non-service connected, preexisting medical conditions; non-disabling physical or mental conditions that interfere with duty performance; convenience of the government as a result of a reduction in force; and, other convenience of the government separations, provided the soldier served twenty months of a twenty-four month enlistment or thirty months of a thirty-six month enlistment).

72. Carr v. Brown, 5 Vet. App. 2, 3 (Vet. App. 1993) (affirming a Board of Veterans’ Appeals decision a general discharge under honorable conditions was not “the requisite character of discharge to establish basic eligibility for . . . educational benefits”).

73. No. 91-16 592, 1994 BVA LEXIS 7272, at *6 (Bd. of Vet. App. Feb. 7, 1994). The Board of Veteran’s Appeals denied the educational benefits while stating,

[T]he Board observes that the veteran did serve for three continuous years on active duty after 30 June 1985, and was probably entitled to receive educational benefits under Chapter 30 from 30 June 1988 until his discharge on 26 January 1989. However, on 26 January 1989, the veteran was given a general discharge.

Id.

74. See U.S. DEP’T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 4-9 (31 Mar. 1999) (listing reasons for extensions of enlistments).

75. *But see id.* para. 3-5 (requiring a determination of eligibility of discharge before determining eligibility for reenlistment). If a soldier eligible for education benefits reenlists rather than extending the original enlistment and if the pre-reenlistment discharge was honorable, a subsequent non-qualifying discharge under honorable conditions does not nullify the already earned eligibility. See *id.*

76. AR 635-200, *supra* note 7, para. 3-6.

77. 38 U.S.C. § 3225 (2000).

78. See *id.* § 3011(a)(3)(B).

Nearly every regulatory chapter authorizing a separation before a soldier's expiration of term of service, however, also authorizes a general discharge under honorable conditions in certain circumstances.⁸³ The regulation also states, "It is a pattern of behavior and not the isolated incident that should be considered the governing factor in determination of character of service."⁸⁴ Nevertheless, the regulation allows for exceptions to this principle by indicating, "There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization."⁸⁵ This exception often swallows the rule. A common example is the case of a soldier who tests positive for an illegal substance during unit urinalysis testing.

The Army Substance Abuse Program requires commands to process for separation those soldiers who test positive for illegal drugs.⁸⁶ The separation regulation characterizes abuse of illegal drugs as "serious misconduct" which may warrant separation.⁸⁷ Although the separation authority has the discretion to disapprove the separation, he or she may exercise this discretion only at the very end of the process.⁸⁸

By the end of the process, the soldier's unit may have already completed the time-consuming preliminary work a separation requires.⁸⁹ The only step needed to complete separation

of the potential drug offender is the separation authority's signature.⁹⁰ In this case, the separation authority may be more likely to err on the side of caution and separate the soldier. Absent very strong extenuating or mitigating circumstances, retaining the soldier may send the wrong message about the command's willingness to tolerate drug abuse. Even worse, if the soldier does have a drug problem, his or her retention may endanger other members of the command or unit readiness.

In addition, the separation authority may be under pressure to characterize the discharge as "general under honorable conditions." To do otherwise provides no disincentive to drug use. An honorable discharge would allow the soldier to exit the service early with all of his or her benefits intact, including the Montgomery GI Bill, provided he or she served the required time. Drug abuse becomes a painless way to leave the service early if the command characterizes the soldier's service as honorable. Awarding an honorable discharge in these cases also cheapens the value of such a discharge for those soldiers who actually complete their term of service without engaging in misconduct. Consequently, based on this single incident, it is likely the soldier exits the service with a general discharge and no education benefits. For example, in calendar year 2002, one U.S. Army brigade had fifty-six first-term soldiers test positive for illegal substances.⁹¹ The brigade retained five of the sol-

79. No. 91-16 592, 1994 BVA LEXIS 7272, at *6 (Bd. Vet. App. Feb. 7, 1994). The Board of Veteran's Appeals stated:

The Board has considered the veteran's argument that since a general discharge under honorable conditions was sufficient to establish eligibility under previous educational programs, it should also be considered as sufficient to establish eligibility for [Montgomery GI Bill] benefits. While it is true that a general discharge under honorable conditions is sufficient to establish eligibility for some benefits, the . . . law makes it absolutely clear that only an honorable discharge will establish eligibility under the [Montgomery GI Bill] program. Therefore, a general, bad conduct, undesirable, or dishonorable discharge does not satisfy that requirement. Consequently, insofar as the veteran only received a general discharge, even though it was under honorable conditions, he does not have basic eligibility for [Montgomery GI Bill] educational benefits.

Id.

80. AR 635-200, *supra* note 7, para. 3-7.

81. *Id.*

82. *Id.*

83. *Id.* chaps. 5-10, 13, 14. These chapters include separations for the convenience of the government, dependency or hardship, fraudulent enlistment, pregnancy, alcohol or drug abuse rehabilitation failure, discharge in lieu of trial by court martial, unsatisfactory performance, and misconduct.

84. *Id.* para. 3-7.

85. *Id.* para. 3-6.

86. See U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM para. 1-35 (1 Oct. 2001) (providing that "[a]ll soldiers . . . who are identified as drug abusers, without exception, will . . . [b]e processed for administrative separation").

87. AR 635-200, *supra* note 7, para. 14-12.

88. *Id.* para. 2-3.

89. See *id.* para. 1-32 (requiring both a medical examination and a mental status evaluation for soldiers separating due to misconduct).

90. *Id.* para. 2-3.

91. E-mail from SSG Guadelupe Sorola, Noncommissioned Officer-in-Charge, Military Justice, Baumholder Branch Office, 1st Armored Division, to author (21 Mar. 2003) (on file with author).

diers. The brigade separated the other fifty-one soldiers using the notification procedures discussed below. All fifty-one received a general discharge under honorable conditions.⁹²

The soldier's ability to influence this process varies based on his or her time in service. The Army can separate soldiers with less than six years of service through "notification procedures." Soldiers with six or more years of service may have their case heard before a formal administrative board.⁹³ Under notification procedures, however, there is no board or formal hearing. The soldier receives written notice of the recommendation for separation. The notice relates several facts. It includes the specific allegations forming the basis for the separation action and the specific provisions of the regulation authorizing separation. The notice also includes whether the proposed action could result in discharge from the Army. It also states the least favorable characterization of service or description of separation the soldier could receive. Finally, the notice describes the type of discharge and character of service recommended by the initiating commander and explains the higher commander may recommend a less favorable type of discharge and characterization of service.⁹⁴

Under the notification procedures, the soldier's response rights once he or she receives the notice are very limited. He or she may submit written statements in his or her own behalf. The soldier may also obtain copies of documents sent to the separation authority supporting the proposed separation.⁹⁵ There is no right to demand a trial by court-martial or even a personal appearance before the separation authority.⁹⁶ If the separation authority decides to separate the soldier with a general discharge under honorable conditions, there is no additional process before \$40,860 in Montgomery GI Bill benefits (including the soldier's \$600 in voluntary contributions) disap-

pears. There is no right to demand any additional process because the separation is an administrative matter and not punishment.⁹⁷

In addition, the regulations do not allow for an administrative appeal before separation.⁹⁸ Furthermore, post-separation administrative appeal authorities cannot fashion a suitable remedy for the monetary loss suffered by the soldier. The Army Discharge Review Board can review the characterization of the discharge.⁹⁹ If the Discharge Review Board upgrades the discharge to honorable, the soldier receives the benefits and there is no loss. The Army Board for the Correction of Military Records can do the same.¹⁰⁰ Such an upgrade, however, is unlikely. In the urinalysis illustration, for example, the Army separated the soldier for "serious misconduct" because the facts of the case warranted a general discharge. Finally, while the Board of Veteran's Appeals has addressed the issue of refunding educational benefit contributions, it has repeatedly stated it lacks the statutory authority to actually award the refund.¹⁰¹ This exhaustion of administrative measures makes the courts the soldier's final recourse. The question is whether the courts will hear the case.

The Threshold Matter of Justiciability

The courts will examine the loss of military educational benefits only if the claim rises to the level of a constitutional issue. Courts have long given great deference to decisions by military commanders.¹⁰² Because they recognize military decision-making requires a special expertise, courts are loath to substitute their judgment for the judgment of military commanders.¹⁰³ Consequently, decisions by commanders often enjoy an added layer of protection from judicial scrutiny in many courts.¹⁰⁴

92. *Id.*

93. AR 635-200, *supra* note 7, para. 2-2(c)(3) (detailing the right "[t]o a hearing before an administrative separation board . . . if he/she had 6 or more years of total active and reserve service on the date of initiation of recommendation for separation").

94. *Id.* fig. 2-1.

95. *Id.* para. 2-2.

96. *Id.*

97. See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶¶ 3, 4 (2002) (detailing the process provided for imposing nonjudicial punishment, including the right to demand trial by court-martial before imposition of punishment).

98. AR 635-200, *supra* note 7, para. 2-2.

99. 10 U.S.C. § 1553(b) (2000) ("A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.").

100. 32 C.F.R. § 581.3 (b)(4)(ii) (2003) ("If persuaded that material error or injustice exists, and that sufficient evidence exists on the record, [the board members may] direct or recommend changes in military records to correct the error or injustice.").

101. See No. 97-06 933, 2000 BVA LEXIS 8321, at *10 (Bd. Vet. App. Mar. 28, 2000) ("[T]he VA has not been granted legal authority to refund the veteran's contributions. Moreover, VA's General Counsel has indicated that any recourse for refund of such funds would in any event not be with VA, but with each specific branch of the Armed Forces."); No. 96-37 340, 1998 BVA LEXIS 10271, at *9 (Bd. Vet. App. Apr. 2, 1998) ("[W]hile the Board sympathizes with the veteran, it has no legal authority to refund the veterans contributions. Therefore, it appears more appropriate for the veteran to address his dispute directly to the Department of the Army, an entity separate from the VA, and to request a refund therefrom.").

This deference, however, is not absolute.¹⁰⁵ Under appropriate circumstances, courts will review decisions by commanders.¹⁰⁶ A soldier's forfeiture of the new voluntary contributions may raise the constitutional question necessary to place notification procedure separations before the court. Consequently, the forfeitures may clear the first hurdle for a potential plaintiff—the *Mindes* test.¹⁰⁷

The Mindes Test

Several Federal Circuits have applied the test from *Mindes v. Seaman* or a modified version of it to determine the justiciability of an internal military matter.¹⁰⁸ The test begins with two threshold determinations and then lays out four factors for the court to balance. As an initial threshold matter, “A court should not review internal military affairs in the absence of an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or

its own regulations.”¹⁰⁹ The second threshold requirement mandates the “exhaustion of available intraservice corrective measures.”¹¹⁰ Even after an allegation meets these threshold requirements, there is no guarantee that the court will review it. Instead, the court next applies the four *Mindes* balancing factors.¹¹¹

The most important balancing factor considers “[t]he nature and strength of the plaintiff's challenge to the military determination.”¹¹² In explaining this factor, the court noted, “Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values.”¹¹³ Clearly, a constitutional issue standing alone may outweigh the remaining factors and tip the scales towards justiciability. The lesser balancing factors include an examination of “[t]he potential injury to the plaintiff if review is refused.”¹¹⁴ The court then considers “[t]he type and degree of anticipated interference with the military function.”¹¹⁵ The final lesser factor the court balances is “[t]he extent to which

102. See *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”).

103. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments”); C.J. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962) (“The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.”).

104. See, e.g., *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971) (setting out a four-factor balancing test to be applied before examining an otherwise sufficient allegation concerning an internal military matter).

105. See, e.g., *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) (“Men and women in the Armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service.”).

106. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”).

107. *Mindes*, 453 F.2d at 201.

108. See, e.g., *Wenger v. Monroe*, 282 F.3d 1068, 1072-73 (9th Cir. 2002) (applying a modified version of the *Mindes* test); *Meister v. Tex. Adjutant General's Dep't*, 233 F.3d 332, 333 (5th Cir. 2000) (remanding case for evaluation under *Mindes* test); *Robertson v. United States*, No. 97-5183, 1998 U.S. App. LEXIS 8499, at *7 (10th Cir. 1998) (holding the district court erred in not applying *Mindes* test); *Scott v. Rice*, No. 92-2463, 1993 U.S. App. LEXIS 24641, at *6 (4th Cir. 1993) (noting prior endorsement of *Mindes* test in *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) and applying it in the instant case); *Doe v. Garrett*, 903 F.2d 1455, 1463 (11th Cir. 1990) (finding nothing objectionable in the application of *Mindes* but noting *Mindes* analysis not always required); *Jones v. New York State Div. of Military & Naval Affairs and New York State Army Nat'l Guard*, No. 93-CV-0862, 1997 U.S. Dist. LEXIS 21387, at *25, *30-31 (N.D.N.Y. May 7, 1997) (applying *Mindes* test while noting “[t]he Second Circuit has never expressly adopted or rejected the *Mindes* test”); *Shuman v. Celeste*, No. C-87-7702, 1989 U.S. Dist. LEXIS 16390, at *3 (N.D. Oh. Apr. 12, 1989) (holding application of *Mindes* test proper and noting the 6th Circuit has never expressly adopted *Mindes*). *Contra* *Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993) (abandoning *Mindes* in civil rights claims arising incident to service); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 768 (7th Cir. 1993) (declining *Mindes* in favor of a “determination of whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree”); *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1010 (8th Cir. 1989) (stating “*Mindes* is not a viable statement of the law”); *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989) (declining to adopt *Mindes* test); *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981) (declining to adopt the *Mindes* balancing test); Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 389 (1984) (arguing “the use of a balancing test to determine a court's power to review a constitutional claim against the military is not justified”).

109. *Mindes*, 453 F.2d at 201.

110. *Id.*

111. *Id.* at 201-02.

112. *Id.* at 201.

113. *Id.*

114. *Id.*

the exercise of military expertise or discretion is involved.”¹¹⁶ The opinion explained, “Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.”¹¹⁷ An application of *Mindes* to the forfeiture of Army educational benefits appears to indicate the door is now open to judicial review.

Applying the Mindes Test to Educational Benefit Forfeitures

It is impossible to illustrate the application of the *Mindes* factors in a vacuum. The test requires a set of facts to form the basis of the application. Assume these hypothetical facts expanding on the urinalysis example used earlier. A soldier initially enlists for three years. She participates in the Montgomery GI Bill. She has already paid the maximum \$600 voluntary contribution to increase her benefit level when she leaves the service. Towards the end of her original enlistment, she extends her enlistment for one year to remain overseas (she is not yet done traveling around Europe). After three years of service, she has met her length of service requirements. Unfortunately, after serving forty-five months, she tests positive for an illegal substance. She maintains her innocence. Rather than seeking a court-martial, the command elects to expeditiously separate her. Following all the applicable regulations and laws, the command separates her for misconduct using notification procedures and characterizes her service as general under honorable conditions. The general discharge disqualifies her from receiving educational benefits. After seeking unsuccessfully to have her discharge upgraded, she decides to take the matter to court.

Making the Threshold Determinations

The initial threshold determination for the court under *Mindes* concerns the nature of the allegation. The former soldier must allege the deprivation of a constitutional right or allege the Army acted in violation of applicable statutes or its

own regulations.¹¹⁸ The command in this case followed the separation procedures found in the Army regulation implementing the Department of Defense (DOD) directive concerning enlisted separations¹¹⁹ and there are no applicable statutory requirements. Therefore, the question is whether the Army has deprived her of a constitutional right. For reasons fully explained later, the former soldier points to her \$600 in forfeited voluntary contributions as proof she has suffered a constitutional deprivation.¹²⁰ The court may well agree.

The second threshold determination centers on the necessity of exhaustion of available intraservice corrective measures.¹²¹ For reasons touched on earlier and more fully described later, the former soldier’s attempts to use intra-service corrective measures are unsuccessful.¹²² She exhausts her administrative remedies to no avail. Having met the threshold requirements, the former soldier will next argue the *Mindes* balancing factors also weigh in favor of allowing judicial review.¹²³

Balancing the Mindes Factors

Putting aside until later the question of the primary balancing factor concerning the nature and strength of the claim,¹²⁴ one of the lesser balancing factors of the *Mindes* test is an examination of the potential injury to the plaintiff. On a practical and emotional level, most would agree the loss of \$40,860 in educational benefits represents a significant potential injury to a person recently discharged from the military. Reintegration into civilian life may be difficult without these benefits. It is possible a court might see it as significant, especially in cases such as this example when the government received the benefit of its bargain by having the soldier serve beyond the initially required time in service. On the other hand, these educational benefits are exactly that—benefits paid to qualifying soldiers. The soldier failed to qualify. Of the other amounts involved, the \$1,200 enrollment deduction statutorily was never the property of the soldier.¹²⁵ The Army cannot injure the plaintiff by withholding something in which she never had an interest. That

115. *Id.*

116. *Id.*

117. *Id.* at 201-02.

118. See U.S. DEP’T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (21 Dec. 1993) [hereinafter DOD DIR. 1332.14]; AR 635-200, *supra* note 7, chap. 2.

119. AR 635-200, *supra* note 7, chap. 2.

120. See discussion *infra*.

121. See generally Guerra v. Scruggs, 942 F.2d 270, 272 (4th Cir. 1991) (describing the post-separation procedures available to upgrade a discharge).

122. See discussion *infra*.

123. See *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

124. See discussion *infra*.

leaves only the recently authorized \$600 in voluntarily contributions as a potential monetary injury.

The loss of \$600 does not appear nearly as dramatic as the loss of \$40,860. The size of the loss, however, is not always the determinative factor. The court may choose to focus on the nature of the funds or the hardship involved.¹²⁶ In *Sniadach v. Family Finance Corporation*, the Supreme Court focused on these issues in striking down a Wisconsin statute allowing the pre-notice and pre-judgment garnishment of wages¹²⁷ as violating the Fourteenth Amendment's Due Process clause.¹²⁸ In this case involving \$63.18,¹²⁹ the Court noted:

We deal here with wages -- a specialized type of property We turn then to the nature of that property and problems of procedural due process. A prejudgment garnishment of [this] type is a taking which may impose tremendous hardship on wage earners with families to support.¹³⁰

One federal court has concluded this "specialized type of property" warranting due process protection includes funds set aside for college tuition.¹³¹ In *Aaron v. Clark*, Clark filed a bond for garnishment against Aaron in anticipation of a civil suit arising from a mutual automobile accident.¹³² In response to the summons for garnishment, Aaron's bank turned over to the Fulton County Civil Court the \$145 Aaron had deposited in the bank. The federal court noted, "Aaron is now, and was at the

time of the garnishment, a full-time student at DeKalb County Junior College, and the funds on deposit at the . . . bank were to have been used to pay tuition for the upcoming quarter at that college."¹³³ The court stated, "[P]roperty garnished in this case—funds set aside for college tuition—is a 'specialized type,' the summary seizure of which could and did impose a *great hardship* on an alleged debtor."¹³⁴ The court overturned the law permitting this pre-judgment garnishment.¹³⁵

While not a Montgomery GI Bill case, the federal court in *Aaron v. Clark* does concern itself with funds for education and a seemingly small garnishment amounting to the loss of only \$145.¹³⁶ In 2003 dollars, the \$145 of the 1972 case equates to \$637.58.¹³⁷ This is very close to the \$600 in voluntary contributions set aside for education the soldier forfeits if ineligible for educational benefits upon discharge. Additionally, it is hard to imagine a more difficult position than that of the discharged soldier in the example. She has soldiered for over three years with the expectation she will attend college using her educational benefits on discharge. Now ineligible for those benefits, she faces a considerable hardship the court may decide to examine.

In addition to the nature of the potential injury, the court must balance whether hearing the case will interfere with military functions.¹³⁸ Determining the composition of the service is undoubtedly a military function.¹³⁹ A court questioning whether the command should have separated a soldier runs a significant risk of interfering with that function. Generally, the

125. Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, 100 Stat. 3268 (1986) (codified as amended at 38 U.S.C. § 3011(b) (2000)).

126. See, e.g., *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

127. *Id.* at 340.

128. U.S. CONST. amend. XIV.

129. *Sniadach*, 395 U.S. at 337.

130. *Id.* at 340.

131. *Aaron v. Clark*, 342 F. Supp. 898, 899-900 (N.D. Ga. 1972).

132. *Id.*

133. *Id.* at 899.

134. *Id.* at 900 (emphasis added).

135. *Id.* at 901-02.

136. *Id.* at 899.

137. Federal Reserve Bank of Minneapolis, *What Is a Dollar Worth?*, available at <http://www.minneapolisfed.org/Research/data/us/calc/> (last visited Jan. 6, 2004) (providing a Consumer Price Index-based calculator for determining relative worth).

138. See *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

139. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (stating that "it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the *composition*, training, equipping, and control of a military force are essentially professional military judgments . . .") (emphasis added).

command's ability to separate a soldier should remain largely free from judicial scrutiny so long as it comports with the law and regulations. The question here, however, is much narrower. It concerns the forfeiture of the soldier's educational benefits contributions, which the Veterans Administration administers and not the DOD. The court could avoid substituting its judgment for that of the commander on the essential military function question of the composition of the force. In other words, the court could address the issue of whether the Army deprived the soldier of a property right when she forfeited her educational benefit contributions without having to address the appropriateness of her discharge. Therefore, a court may feel justified in addressing this issue. One reaches a similar conclusion when weighing the third lesser prong of the balancing test.

The third lesser prong of the balancing test relates to the level of the military's expertise or discretion concerning the issue. A commander's expertise is certainly significant as to the characterization of discharge the soldier deserves. Commanders, much more than courts ever could, know what separates an "honorable" soldier from one who served "under honorable conditions." Regulation does limit the commander's discretion in this regard.¹⁴⁰ When the commander does have discretion, however, as in the example, the discretion is considerable. These factors, on the surface, weigh against review. Once again, though, a properly tailored question removes much of the possible deference provided under this prong. The narrow question centers on the forfeiture of the voluntary contributions, not the actual characterization of the discharge. Commanders have much less expertise when it comes to weighing the after-service effects of monetary losses suffered by former service members. This prong and the two preceding ones appear to weigh in favor of judicial review. The next prong, however, makes review overwhelmingly likely.

The last and most important factor the court must balance is the "nature and strength" of the challenge.¹⁴¹ A constitutional challenge is not only "normally more important," but it is "unequal in the whole scale of values."¹⁴² Regardless of how heavily or lightly one weighs the previous factors, it seems doubtless the court will address an issue of a constitutional nature.¹⁴³ The foregoing three lesser factors already tip the scales in favor of review. It is clear *Mindes* will not stand as a

bar to review if the forfeiture of educational benefits also raises constitutional questions. It does. The forfeiture of the voluntary contributions raises significant constitutional issues centered on a lack of due process and uncompensated takings prohibited by the Fifth Amendment.¹⁴⁴ Before turning to those constitutional concerns, it is helpful to first dispel the notion that purely contractual principles justify the forfeiture of the soldier's voluntary contributions.

Application of Contractual Law Principles to Voluntary Contribution Forfeitures

Contractually, the soldier did agree to serve a certain term and earn a certain characterization of discharge in return for certain benefits. In spite of the Army initiating the separation, it is arguable the example soldier breached the agreement by misconduct and did not meet her end of the bargain. It is certainly reasonable to believe the soldier should not expect to receive educational benefits if she did not qualify for them. It is not reasonable to believe the soldier should expect the government to retain her property in the form of her voluntary contributions in the event she failed to qualify for the benefits. The Restatement (Second) of the Law of Contracts states:

Damages for a breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.¹⁴⁵

There are no contractual terms indicating an agreement on the part of the soldier to treat the voluntary contributions as liquidated damages. The forms simply indicate the contributions are nonrefundable.¹⁴⁶ Moreover, the loss of the \$600 is, at best, an unenforceable penalty.

The Restatement (Second) of the Law of Contracts further explains, "[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system

140. AR 635-200, *supra* note 7, para. 3-7 (indicating "[o]nly the honorable characterization may be awarded a soldier upon completion of his/her period of enlistment . . ." and "[a] characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization").

141. *Mindes*, 453 F.2d at 201.

142. *Id.*

143. *See, e.g.,* *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Men and women in the Armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service."); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.").

144. U.S. CONST. amend. V.

145. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

146. *See* discussion *infra*.

of contract remedies is compensatory, not punitive.”¹⁴⁷ The test for an unenforceable penalty consists of the following two parts:

The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable.¹⁴⁸

The automatic forfeiture of the full amount of the voluntary contributions is obviously an unenforceable penalty. First, the government retains the full amount of the contributions in every case, regardless of the actual loss that resulted from the breach. In the example case, the soldier served the full term of her original enlistment. The government received exactly what it bargained for at the time of contract formation. The government suffered no actual loss due to the soldier’s separation during her enlistment’s extension period. Second, there is very little difficulty in any case in proving the loss. It is quite easy to calculate how much of the benefit of its bargain the government received in terms of service by the soldier. If the soldier served thirty months of a thirty-six month enlistment, the soldier served eighty-three per cent of the required time.

It would be difficult, however, to establish the dollar value of the loss to the government with certainty. Nevertheless, it appears certain the arbitrary \$600 is not appropriate as liquidated damages in most cases. In fact, it would be fair to argue it is unreasonably small in the cases of soldiers the Army separates early in their enlistment periods. This clearly mitigates against an assertion that the Army ever intended the forfeiture of voluntary contributions to act as a liquidated damages provision. Consequently, there is no contractual justification for the

automatic forfeiture of the voluntary contributions. It is, therefore, appropriate to return to the constitutional concerns the forfeitures raise.

Review of Fifth Amendment Law

*No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*¹⁴⁹

Substantive Due Process

The constitutional nature of the concerns raised by the forfeiture is important. As discussed earlier, the constitutional nature of the claim is the most important balancing factor under the *Mindes* test.¹⁵⁰ In the case of voluntary contribution forfeitures, the constitutional concerns arise from the Fifth Amendment. The phrase “due process of the law” in the Fifth Amendment encompasses two separate protections. The first is a bar against “certain government actions regardless of the fairness of the procedures used to implement them.”¹⁵¹ This is the “substantive” component of the Due Process Clause.¹⁵² It “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”¹⁵³ The courts reserve this extremely high level of protection to “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”¹⁵⁴ Among the rights warranting such protection are the rights to marry, to procreate, to direct the upbringing of children, to marital privacy, to contraception, to bodily integrity, and to abortion.¹⁵⁵ Notwithstanding some very small indications to the contrary,¹⁵⁶ it is highly unlikely courts would extend this level of protection to Army educational benefits.¹⁵⁷ Even so, “when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.”¹⁵⁸ This second form of

147. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (1981).

148. *Id.* § 356 cmt. b.

149. U.S. CONST. amend. V.

150. *See* discussion *infra*.

151. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

152. U.S. CONST. amend. V.

153. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

154. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

155. *Id.* at 721.

156. *See Cleland v. Nat’l Coll. of Bus.*, 435 U.S. 213, 220 (1978) (“The District Court’s error was not its recognition of the importance of veterans’ benefits . . .” in concluding “that veterans’ educational benefits approach ‘fundamental and personal rights’ and therefore a more ‘elevated standard of review’ was appropriate.”).

protection “has traditionally been referred to as ‘procedural’ due process.”¹⁵⁹

Procedural Due Process

Not every government action must comply with the requirements of procedural due process. “[T]o determine whether due process requirements apply in the first place, . . . [courts should] look not to the ‘weight’ but to the nature of the interest at stake.”¹⁶⁰ The forfeiture of Army educational benefits certainly does not implicate life—the third constitutionally named interest. Nonetheless, procedural due process also imposes constraints on “governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause.”¹⁶¹ Educational benefits forfeitures implicate these two interests.

Liberty Interest

A soldier typically loses educational benefits concurrently with his or her discharge. Courts have generally found that a discharge, in and of itself, does not implicate any liberty interest.¹⁶² Moreover, there is no right to serve in the armed forces.¹⁶³ Nevertheless, “where the State attaches ‘a badge of infamy’ to the citizen, due process comes into play.”¹⁶⁴ Yet, a badge of infamy is not sufficient to guarantee procedural due process protection, because “injury to reputation by itself [is]

not a ‘liberty’ interest”¹⁶⁵ To implicate a liberty interest, there must be stigmatizing damage to reputation plus something more.¹⁶⁶ This additional factor could be a property interest.

Property Interest

In *Board of Regents v. Roth*,¹⁶⁷ the Court detailed some of the attributes of “property” protected by the Due Process Clause. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”¹⁶⁸ The Court further elaborated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.¹⁶⁹

In *Perry v. Sindermann*, the Court further explained this “independent source” did not have to be explicit.¹⁷⁰ At issue in the case was the question of whether the lack of an explicit tenure provision foreclosed the possibility a teacher had a property

157. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Id.

158. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

159. *Id.*

160. *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

161. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

162. *See, e.g., Beller v. Middendorf*, 632 F.2d 788, 806 (9th Cir. 1980) (“The mere fact of discharge from a government position does not deprive a person of a liberty interest.”).

163. *See, e.g., Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981) (“It is well established that there is no right to enlist in this country’s armed services.”).

164. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

165. *Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

166. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (“This line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.”).

167. 408 U.S. 564 (1972).

168. *Id.* at 577.

169. *Id.*

interest in re-employment.¹⁷¹ The Court held a property interest could exist in the absence of an overt legal provision.¹⁷² Finally, in *Cleveland Board of Education v. Loudermill*, the Court held that, while a legislature may well be the source of a property interest, “it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”¹⁷³ State law or some other source may create the right, but constitutional law determines the acceptable level of due process. “Once it is determined that due process applies, the question remains what process is due.”¹⁷⁴

Amount of Process Due

The Court has never adopted a rigid approach to questions of adequacy in the realm of due process.¹⁷⁵ Instead, the Court has adopted a balancing test. The test consists of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷⁶

By weighing each of these factors, the courts try to reach equilibrium between the rights of the individual concerned and the requirements of the government.

In addition to the due process protections described above, the Fifth Amendment also guards against unjust takings.¹⁷⁷ The two concepts are somewhat linked.¹⁷⁸ The definition of property certainly is central to each. Analysis under the Takings Clause, however, differs from that used in Due Process Clause cases.

Takings

The Takings Clause forbids the uncompensated taking of private property for public use. Its purpose is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁷⁹ In making this determination, the courts have once again “eschewed the development of any set formula for identifying a ‘taking’ forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case.”¹⁸⁰

When conducting these factual inquiries, three factors have “particular significance” in determining if something rises to the level of an unjust taking.¹⁸¹ The first factor is “the economic impact of the regulation on the claimant.”¹⁸² The second factor is “the extent to which the regulation has interfered with distinct investment-backed expectations.”¹⁸³ The final factor is

170. 408 U.S. 593 (1972).

171. *Id.* at 601.

172. *Id.* (holding “absence of such an explicit contractual provision may not always foreclose the possibility that [an individual] has a ‘property’ interest”).

173. 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

174. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

175. *See, e.g., id.* (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”).

176. *Gilbert v. Homar*, 520 U.S. 924, 931-32 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

177. U.S. CONST. amend. V.

178. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 641 (1993) (“Given that [the plaintiff’s] due process arguments are unavailing, ‘it would be surprising indeed to discover’ the challenged statute nonetheless violating the Takings Clause.” (quoting *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 223 (1986))).

179. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

180. *See, e.g., Connolly*, 475 U.S. at 224; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (“As has been admitted on numerous occasions, ‘this Court has generally’ been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action must be deemed a compensable taking.”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

181. *Connolly*, 475 U.S. at 225.

182. *Id.*

“the character of the governmental action.”¹⁸⁴ Of these three factors, only the meaning of the third is not largely self-evident.

The Court enumerated and applied these factors in the case of *Connolly v. Pension Benefit Guaranty Corporation*.¹⁸⁵ In *Connolly*, the appellant argued the withdrawal liability the Multiemployer Pension Plan Amendments Act of 1980¹⁸⁶ imposed on employers withdrawing from pension plans constituted a governmental taking of property in violation of the Fifth Amendment.¹⁸⁷ The Court disagreed. Applying the third factor of the takings analysis, the Court found the character of the governmental action did not amount to a taking when “[t]he Government does not physically invade or permanently appropriate any of the [plaintiff’s] assets for its own use.”¹⁸⁸ In this case, withdrawing employers paid the penalty to the plan, not to the government. Consequently, there was no taking on the government’s part.

The Court has given the government’s use of “taken” property significance beyond that of even the government’s destruction of the property. In *United States v. Causby*, the appellant owned a chicken farm near a municipal airport.¹⁸⁹ When military aircraft began using the airport, the ensuing disruption agitated the appellant’s poultry to such an extent it destroyed the property’s use as a chicken farm.¹⁹⁰ In holding the government’s action was a taking in violation of the Fifth Amendment, the Court emphasized, “This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes.”¹⁹¹ The Court clearly considered the government’s on-going use of the property significant.

In addition, the property covered by the Takings Clause is not limited to physical property such as chicken farms. The clause also protects funds under government control. In *Webb’s*

Fabulous Pharmacies, Incorporated v. Beckwith, the Court addressed the propriety of a state statute permitting a clerk of courts to retain the interest on monies deposited in the registry of the state court.¹⁹² The statute allowed the state to consider the funds public money while on deposit.¹⁹³ The Court struck down the law, holding:

[The government] may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.¹⁹⁴

Thus, the state’s use of the funds was unconstitutional because the “exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.”¹⁹⁵

Other courts have been similarly unsympathetic to the practice of denying benefits while retaining contributions made in expectation of those benefits. For example, in *Lucas v. Seagrave Corporation*, one company merged with another and dismissed some employees as a result.¹⁹⁶ The Minnesota Federal District Court held that it was a triable issue of fact whether the dismissed employees were entitled to recover money contributed to the company’s on-going pension fund based on the contractual principle of unjust enrichment.¹⁹⁷ In *Knoll v. Phoenix Steel Corporation*, the Third Circuit Court of Appeals used *Lucas* as an illustration of a case of a “company [] using the premiums, contributed by the dismissed employees, to meet future obligations owed by the company to the pension fund; yet,

183. *Id.*

184. *Id.*

185. *Id.* at 224-27.

186. 29 U.S.C. §§ 1381, 1391 (2000).

187. U.S. CONST. amend. V.

188. *Connolly*, 475 U.S. at 225.

189. 328 U.S. 256 (1946).

190. *Id.* at 259.

191. *Id.* at 263.

192. 449 U.S. 155 (1980).

193. *Id.* at 158.

194. *Id.* at 164.

195. *Id.* at 163.

196. 277 F. Supp. 338 (D. Minn. 1967).

simultaneously, the company was denying pension benefits to those employees it had dismissed.¹⁹⁸ The Third Circuit Court of Appeals applied the *Lucas* reasoning, but did not allow for the recovery of funds by former employees from the pension fund at issue because the fund no longer existed and the former employer was deriving no benefit from it.¹⁹⁹ Other courts have also referred to *Lucas* when examining cases concerning the recovery of benefits by terminated employees.²⁰⁰

The *Lucas* reasoning is contractual, not constitutional, in nature. For reasons described earlier, a purely contractual Montgomery GI Bill case without constitutional implications is unlikely to pass the *Mindes* test.²⁰¹ The *Lucas* unjust enrichment reasoning is important only to the extent it indicates terminated employees may have a property interest in funds they contributed to a benefit plan, even if there are no specific contractual provisions providing one. This is significant in light of the Court's holding in *Perry v. Sindermann*²⁰² that property interests need not be explicit to exist²⁰³ and qualify for protection under the Fifth Amendment.²⁰⁴

The question remains whether Army educational benefits are a property interest that qualifies for Fifth Amendment²⁰⁵ protection. Applying the above constitutional law to the program indicates the benefits warrant protection, at least in part. The Army's current implementation of the program raises constitutional concerns that revolve largely around the soldier's voluntary additional contributions.

Application of Constitutional Law to Army Educational Benefits

Due Process

The application of the Due Process method of analysis is a two-step process. The first question is whether there is an interest warranting protection under the Due Process Clause. In the case of Army educational benefits, both liberty and property interests are at risk. For reasons fully detailed later, only the threatened property interest truly implicates due process concerns.²⁰⁶ If a threatened interest does warrant due process protection, the second question is what amount of process is sufficient. In applying the law to the loss of Montgomery GI Bill benefits, it becomes obvious the current level of process provided in separations under notification procedures is not sufficient to extinguish soldiers' property interest in their voluntary educational benefits contributions.

Is It a Protected Interest?

The first interest that may give rise to due process protection is that of liberty. The loss of educational benefits usually occurs concurrently with the discharge of the soldier. Furthermore, the loss may result because the characterization of the discharge was less than honorable. Although the discharge, standing alone, does not implicate a liberty interest,²⁰⁷ the stigmatizing nature of the less than honorable nature of the discharge does bring it closer to implicating a liberty interest.

197. *Id.* at 344-45.

198. 465 F.2d 1128, 1131 (3d Cir. 1972).

199. *Id.*

200. *See, e.g.,* Kolentus v. Avco Corp., 798 F.2d 949, 959 (7th Cir. 1986) (applying *Lucas*, but distinguishing the instant case as one in which the employees agreed to the termination provisions); United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289, 1298 (3d Cir. 1983) (citing *Lucas v. Seagrave Corp.*, 277 F. Supp. at 338, with approval); Craig v. Bemis Co., 517 F.2d 677, 683-84 (5th Cir. 1975) (noting the *Lucas* rationale as appealing, but rejecting it in the instant case as incompatible with state law); Adams v. Catalyst Research, Div. of Mine Safety Appliances Co., 659 F. Supp. 163, 165-66 (D. Md. 1987) (applying *Lucas*, but ruling on pre-emption grounds); Piech v. Midvale-Heppenstall Co., 594 F. Supp. 290, 297-98 (E.D. Pa. 1984) (applying *Lucas*, but dismissing an unjust enrichment claim because the terminations did not benefit the company); Shaw v. Kruidenier, 470 F. Supp. 1375, 1388 (S.D. Iowa 1979) (applying *Lucas*, but finding it inapplicable because the company did not benefit from employee forfeitures); Connell v. United States Steel Corp., 371 F. Supp. 991, 1001 (N.D. Ala. 1974) (citing *Lucas* with approval); Fredericks v. Georgia-Pacific Corp., 331 F. Supp. 422, 430 (E.D. Pa. 1971) (citing *Lucas* to support the denial of a motion to dismiss claim based on the theory of unjust enrichment). *Compare* Moore v. Home Ins. Co., 601 F.2d 1072, 1075 (9th Cir. 1979) (distinguishing *Lucas* as the result of extraordinary circumstances) with Rothlein v. Armour & Co., 377 F. Supp. 506, 511 (W.D. Pa. 1974) (distinguishing *Lucas* as requiring bad faith on the part of the terminating employer).

201. *See* discussion *infra*.

202. 408 U.S. 593, 601 (1972) (holding the "absence of such an explicit contractual provision may not always foreclose the possibility that [an individual] has a 'property' interest").

203. *See* discussion *infra*.

204. U.S. CONST. amend. V.

205. *Id.*

206. *See* discussion *infra*.

Even a general discharge under honorable conditions carries stigma.²⁰⁸ In fact, under notification procedures, the Army requires the separating soldier to acknowledge she “may expect to encounter substantial prejudice in civilian life if [she receives] a general discharge under honorable conditions.”²⁰⁹ The Court has held, however, that this stigma or damage to reputation alone is also not enough.²¹⁰ Likewise, other courts have found notification-type procedures to be sufficient due process in these instances.²¹¹

[W]hen the elements of a stigmatizing discharge are present, the remedy mandated by the Due Process Clause . . . is an opportunity to refute the charge, but that in the absence of evidence that the derogatory information about the affected party is false, the nature of the interest to be protected is not one that requires a hearing.²¹²

The soldier receives this required opportunity to refute the charge by submitting written matters to the separation authority.²¹³ A liberty interest of this nature apparently needs no further due process protection.

Because of the voluntary contributions, the liberty interest is no longer the only interest implicated in cases concerning military discharges. The soldier may now also have a property interest in jeopardy. And, as the Court has noted, “The types of ‘liberty’ and ‘property’ protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.”²¹⁴

A property interest in educational benefits cases has three possible sources. The first possible source is the benefits themselves. While \$40,860 is a significant amount of money, it is not property. The soldier must “have a legitimate claim of entitlement” before the benefits become property.²¹⁵ This is not the case when the soldier fails to qualify for the benefits. The soldier either did not serve long enough or did not receive the necessary honorable discharge. The soldier is not entitled to what she failed to earn.

The second possible source of a property interest is the \$1,200 enrollment pay reduction. Yet, it also fails to qualify as a property interest. Although a statute can act as the necessary independent source of a property interest,²¹⁶ in this case, Congress went out of its way to statutorily prevent the creation of a property interest in the enrollment funds.²¹⁷ This is not an appli-

207. *See, e.g., Beller v. Middendorf*, 632 F.2d 788, 806 (9th Cir. 1980) (“The mere fact of discharge from a government position does not deprive a person of a liberty interest.”).

208. *Holley v. United States*, 124 F.3d 1462, 1470 (Fed. Cir. 1997) (stating in the context of a case concerning a general discharge, “[S]tigma can not be imposed by government without due process of law.”); *United States v. Rice*, 109 F.3d 151, 156 (3d Cir. 1997) (“There may be some stigma imposed by this [general discharge under honorable conditions] form of discharge, but it is significantly less than that associated with a dishonorable discharge”); *Bland v. Connally*, 293 F.2d 852, 858 (D.C. Cir. 1961) (“We think it must be conceded that any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma”).

209. AR 635-200, *supra* note 7, fig. 2-4 (providing a sample format for receipt of notification of separation initiation, acknowledgment, and election of rights).

210. *Paul v. Davis*, 424 U.S. 693, 701 (1976) (“This line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.”).

211. *See, e.g., Holley*, 124 F.3d at 1470-71.

The Regulation requires notice of the reasons for the proposed action and the opportunity to respond and to rebut the charges. Legal counsel was offered, and the opportunity to resign. As we have discussed, minimum due process was met by this procedure, and stigma based on truth, when accompanied by due process, cannot be avoided.

Id.; *see also Roetenberg v. Sec’y of the Air Force*, 73 F. Supp. 2d 631, 637 (E.D. Va. 1999) (holding that a stigmatizing discharge does not necessarily require a hearing); *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991) (holding a service member who had served less than six years and received a General Discharge without a hearing did not have a Due Process claim since “he had no liberty interest because while he had an interest in his good name, this interest was not infringed upon by the Army’s proposed discharge for cocaine use”).

212. *Roetenberg*, 73 F. Supp. 2d at 637.

213. AR 635-200, *supra* note 7, para. 2-2.

214. *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974).

215. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

216. *Id.*

217. 38 U.S.C. § 3011(b) (2000) (“Any amount by which the basic pay of an individual is reduced . . . shall revert to the Treasury and shall not, for the purposes of any Federal law, be considered to have been received by or be within the control of such individual.”).

cation of the now discredited “bitter with the sweet” approach to due process.²¹⁸ This former approach²¹⁹ posited the legislature could define the procedures for denying an interest because the legislature created the interest.²²⁰ In this instance, Congress specifically chose not to create a property interest from the outset. The pay reductions for enrollment are not property. The only remaining possible property interest source is the recent option to make voluntary contributions to the plan.

The statute is silent as to the nature of the soldier’s voluntary contributions. It is not a payroll deduction.²²¹ The soldier simply pays the contributions out of his or her pocket. The funds certainly are the soldier’s property before she contributes them. The question is whether the soldier retains a protected property interest in the funds after the deposit. Applying contractual principles solely to determine if a property interest exists seems to indicate she does.

The soldier at least retains a restitution interest in the property.²²² To conclude otherwise ignores the possible unjust enrichment to the government. In the *Lucas* case²²³ concerning employee contributions made to pension plans discussed earlier,²²⁴ the court noted:

It would seem equitable that employees, who failed to perform the conditions of the pension plan (continued employment until retirement) because of a group termination, should be entitled to an amount equal to the benefit conferred on an employer. The employees’ failure to fulfill the conditions of the pension contract is not wilful [sic], indeed, it is quite

involuntary. The employer is not in a position to argue that he is harmed by a non-performance of the pension conditions, in fact, he causes it. Yet the employer retains the full benefit of the employee’s past service and secures favorable income tax treatment as well as the recapture of the accumulated pension credits created by forfeitures.²²⁵

In the case of educational benefit contributions, the soldier’s separation is also typically involuntary. It is arguable the alleged misconduct that may form the basis for the separation is a willful act. A soldier with less than six years of service, however, is not entitled to a hearing to address the allegations, no matter how strongly he or she may deny them.²²⁶ At separation, the government retains the soldier’s forfeited contributions for its own use. The soldier receives absolutely no benefit of her bargain because she is now ineligible for benefits, yet the government retains the benefit of her past service and her \$600 in contributions. At a time when the Army separates nearly twenty percent of its soldiers before their first enlistment expires,²²⁷ the aggregate gain to the government is significant, whether intentional or not.

Consequently, contractual principles indicate an entitlement to the voluntary contributions. Such an entitlement is a possible source of property interests protected by the Due Process Clause of the Fifth Amendment.²²⁸ Because the \$600 in voluntary contributions is a protected interest, the question becomes whether the current process is constitutionally sufficient to extinguish that interest.

218. *Arnett*, 416 U.S. at 153-54 (indicating one was only entitled to the process granted by the statute that conferred the interest—“where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet”).

219. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

[I]t is settled that the “bitter with the sweet” approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures.

Id.

220. See generally Major Richard D. Rosen, *Thinking About Due Process*, ARMY LAW., Mar. 1988, at 5-6 (describing the development and eventual rejection of the “bitter with the sweet” approach).

221. 38 U.S.C. § 3011(e).

222. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (defining “restitution interest” as the interest in having restored any benefit conferred on the other party).

223. *Lucas v. Seagrave Corp.*, 277 F. Supp. 338, 344-45 (D. Minn. 1967).

224. See discussion *infra*.

225. *Lucas*, 277 F. Supp. at 344-45.

226. AR 635-200, *supra* note 7, para. 2-2(c)(3).

227. Information Paper, U.S. Army Personnel Command, subject: Manning the Force Update (Mar. 4, 2002) (“During FY01, training base attrition ranged from 13.5% to 14.5% and unit attrition ranged from 6.0% to 6.5%. It remains within these ranges for FY02.”) (on file with author).

Is the Current Process Sufficient?

There is no question the current notification procedures are generally sufficient for separating a soldier from the service.²²⁹ The question is whether the same procedures are adequate for depriving a soldier of her property. In upholding notification procedures as sufficient for separation, the Fourth Circuit Court of Appeals found it necessary to spell out these findings:

To summarize, [the plaintiff] would not likely succeed on the merits of his Due Process claim for two reasons. First, *he has no property interest*. Second, he had no liberty interest because while he had an interest in his good name, this interest was not infringed upon by the Army's proposed discharge for cocaine use.²³⁰

The court clearly indicates the presence of a property interest may alter the analysis. Furthermore, application of the due process balancing test indicates notification procedures are most likely insufficient to deprive a soldier of her property.

The first balancing factor involves the private interest affected by the official action. The total loss of \$40,860 in educational benefits appears to be a significant interest. For reasons already detailed, however, they are not a property interest of the soldier.²³¹ The only private interest warranting consideration is the voluntary contributions. Some may not consider the loss of \$600 overwhelmingly significant. Few, however, would consider it acceptable for the government to demand \$600 of them with their only recourse being the right to submit a letter in protest. Regardless of amount, the soldier has a legitimate property interest in these funds. This factor weighs in favor of requiring more process than notification procedures provide.

The next factor considers the risk of an erroneous deprivation of the interest through the procedures used. Notification procedures exist to separate soldiers from the service. The effect of the separation on educational benefits is only a collateral consequence. The process does not concern itself with whether the loss of educational contributions is appropriate in a certain case. In fact, separation authorities considering the soldier's loss of educational benefits as a motivation for awarding a general discharge do so in bad faith. A commander cannot seek to punish a soldier by awarding a general discharge to ensure the soldier is ineligible for benefits. Administrative separations are not punishment. A commander wishing to punish a soldier has the options of nonjudicial punishment or court martial. Those systems contain the extensive due process protections punishment requires.²³² Notification procedures do not have these protections. The risk of erroneous or unintentional deprivation of the property interest under notification procedures is, therefore, quite high. Not only is it possible a commander will not consider the loss of the contributions in a particular case, but there is a strong argument the commander should not consider it.

Nor is the risk of erroneous deprivation lessened through the soldier's possible recourse to the Army Discharge Review Board and Army Board for the Correction of Military Records. It is true the former soldier can receive considerable due process through Discharge Review Board proceedings. "A person who requests a review . . . may appear before the board in person or by counsel . . . [and] . . . witness[es] may present evidence to the board in person or by affidavit."²³³ The fault in the Discharge Review Board process is its limited scope of authority. The board only "has authority to change a discharge or to issue a new discharge . . . [and] the [board] has no authority to rule on constitutional challenges to the Army's regulations."²³⁴

228. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

"[P]roperty" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id. (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

229. *See, e.g., Guerra v. Scruggs*, 942 F.2d 270, 277 (4th Cir. 1991) (quoting favorably an Army Board for the Correction of Military Records finding that "the separation of soldiers with less than six years of service under the notification procedure of AR 635-200 and DOD Directive 1332.14 has not been held to be unconstitutional"); *see also* DOD DIR. 1332.14, *supra* note 118; AR 635-200, *supra* note 7. *Contra* *May v. Gray*, 708 F. Supp. 716, 723 (E.D. N.C. 1988) ("[I]n the context of a General Discharge under Honorable Conditions, the protection of plaintiff's liberty and property interests demands an opportunity to be heard before separation. Accordingly, insofar as Army Regulation 635-200 (2-2)(d) denies plaintiff this opportunity, the regulation violates the minimum concepts of basic fairness."). *But see* Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 21 (analyzing the *May* decision and concluding "the value of the *May* decision apparently is limited to those cases in which the Army violates its own rules and procedures").

230. *Guerra*, 942 F.2d at 279 (emphasis added).

231. *See* discussion *infra*.

232. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES pts. II, V (2002) (detailing the extensive procedural rules for courts-martial and the procedures for imposing nonjudicial punishment, including the right to demand trial by court-martial in lieu of the imposition of nonjudicial punishment).

233. 10 U.S.C. § 1553(c) (2000).

The Discharge Review Board has no authority to rule on the Fifth Amendment argument, nor can it order the refund of the soldier's voluntary contributions. It is true the Discharge Review Board can return the lost benefit by upgrading the characterization of the discharge to "honorable" and thus restore Montgomery GI Bill eligibility. Even then, however, it is significant that there is very little process before the deprivation of the property. Additionally, there is nothing objectionable about the original characterization of the discharge in the example case. It was appropriate. It appears disingenuous for the board to use its limited power to review discharges or change a discharge based on an examination of constitutional matters beyond the scope of its statutory authority. Recourse to the Army Board for the Correction of Military records is similarly flawed.

The Board for the Correction of Military Records has much more far-reaching powers. It can "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."²³⁵ This board also "has authority to consider claims of constitutional, statutory, and regulatory violations."²³⁶ Additionally, it has the following statutory authority:

The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section the amount is found to be due the claimant on account of his or another's service in the Army.²³⁷

At first glance, the Board for the Correction of Military Records appears capable of addressing the issue at hand. Unfortunately, it is not. Any repayment of a forfeiture must be the result of a military record correction. For example, if the board determines the service unjustly delayed a soldier's promotion, it may correct the record to reflect the proper date of the promotion. The new date of promotion entitles the soldier to the applicable back pay. The trouble in the example case is there is no erroneous record to correct. The soldier properly received a general discharge. Therefore, the board should not upgrade the discharge simply to return the lost educational benefits. This would be an unearned windfall for a soldier who properly received a general discharge. As a result, this board is

also powerless to prevent or correct the erroneous deprivation of the voluntary contributions.

The second part of this balancing factor centers around the probable value, if any, additional or substitute procedural safeguards may have. Notification procedures afford the soldier notice and an opportunity to submit matters. Additional safeguards are not necessary and may not add value with regard to the separation process. Nevertheless, the intent of those procedures is to remove the soldier from the military, not deprive her of a protected interest. The Court noted:

While "many controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.²³⁸

A key phrase in the above is "appropriate to the nature of the case." What is fine for terminating a soldier's service may not be adequate for terminating her property interest. Additional procedural safeguards have value in that they could meet the requirements for the termination of a property interest. The current automatic, unintended nature of the deprivation heightens the need for additional process. The Court stated, "[An] employee's ability to foresee the deprivation is 'of no consequence,' because the proper inquiry . . . is 'whether the state is in a position to provide for *predeprivation* process.'"²³⁹ There must be some consideration of the property interest at stake before termination and the current process provides none. The question is then what process, if any, is the government in a position to provide.

This question leads to the third balancing factor. It involves the government's interest, including the function involved and the fiscal and administrative burdens the additional or substitute procedural requirement would entail. There is no doubt the government's interest in separating soldiers quickly is great. Its interest in the soldier's \$600 in voluntary contributions is not. There is no compelling government interest in the \$600 warranting failure to comply with the due process requirements necessary to terminate a property interest. As for the fiscal and

234. *Guerra*, 942 F.2d at 272-73.

235. 10 U.S.C. § 1552(a)(1).

236. *Guerra*, 942 F.2d at 273.

237. 10 U.S.C. § 1552(c).

238. *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972) (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971)).

239. *Zinerman v. Burch*, 494 U.S. 113, 130 (1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 534 (1981)).

administrative burdens of any additional process, the Army already has in place a process meeting the requirements.

The Army provides a hearing before an administrative board in the case of soldiers who have served for more than six years or for soldiers the Army wishes to separate with an other than honorable discharge.²⁴⁰ Respondents before this board receive the full range of due process protections. They have a right to appear, call witnesses, cross-examine witnesses, and be represented by counsel.²⁴¹ In spite of the increased administrative burden it entails, regulations already require the Army to provide this process in applicable cases. It is very likely these more formal procedures would be sufficient to terminate a soldier's property interests.

As discussed earlier, courts have found that discharging soldiers through notification procedures generally passes constitutional muster.²⁴² But, are these procedures sufficient to deprive a soldier of her property? The balancing test appears to indicate notification procedures are not adequate for terminating property interests. Property interests require additional due process protection. Because a property interest is in jeopardy, the forfeiture of the voluntary contributions to the government also raises Takings Clause concerns.²⁴³

Takings Clause

The first factual inquiry under the Takings Clause analysis involves the character of the governmental action. In the case of the forfeiture of voluntary contributions, the government has taken the money for its own use. The law requires the deposit of the money in the general treasury as a miscellaneous receipt.²⁴⁴ There are no provisions for the segregation or return of these funds. Consequently, this is a permanent government appropriation of a personal asset for its own use. The placement of the funds in the general Treasury allows the govern-

ment to use the funds however it pleases. This is precisely the type of governmental action against which the Takings Clause provides protection.

The second factual inquiry centers on the economic impact on the plaintiff. The question is not one of amount. The Court has recognized that not every assessment of a liability by the government constitutes a taking. In the *Connolly v. Pension Benefit Guaranty Corporation* case mentioned earlier,²⁴⁵ the Court addressed whether a federal law "requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's 'unfunded vested benefits'" constituted a violation of the Takings Clause of the Fifth Amendment.²⁴⁶ Congress enacted this law to prevent employers from withdrawing from multiemployer pension plans and leaving fewer and fewer employers to bear the costs of the plan. Congress considered this unfair when some of those costs consisted of payments to former employees of the very employers withdrawing from the plan.²⁴⁷ As in the case of educational benefits, the Takings Clause issue was the automatic loss of private funds mandated by the law.

The Court found the law did not violate the Takings Clause.²⁴⁸ The Court reasoned, "The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the [plaintiff] and the plan to which [he] had made contributions."²⁴⁹ The Court found no taking because the law contained "provisions . . . that moderate and mitigate the economic impact of . . . liability."²⁵⁰ In the case of educational benefit contributions, there are no moderating or mitigating features. The soldier will always lose the full amount of her contributions, regardless of whether she served the entire enlistment term originally contracted for or not.

The Court also reasoned in *Connolly* that it weighs against a finding of a taking when "[t]here is nothing to show that the lia-

240. AR 635-200, *supra* note 7, paras. 2-2 ("The soldier will be further advised of the following rights: . . . To a hearing before an administrative separation board under section III if he/she had 6 or more years of total active and reserve service on the date of initiation of recommendation for separation."), 3-7 ("No soldier will be discharged per this regulation under other than honorable conditions unless afforded the right to present his/her case before an administrative discharge board.").

241. *Id.* para. 2-4.

242. *See* discussion *infra*.

243. U.S. CONST. amend. V.

244. 38 U.S.C. § 3011(e) (2000).

245. *See* discussion *infra*.

246. 475 U.S. 211, 211 (1986).

247. *Id.* at 215-16.

248. *Id.* at 227-28.

249. *Id.* at 225-26.

250. *Id.*

bility actually imposed . . . will always be out of proportion to [the] experience with the plan.”²⁵¹ In the case of the voluntary contributions, this showing is obvious. No soldier who suffers this loss will ever have any experience whatsoever with the educational benefits scheme, beneficial or not. The nonqualified soldier cannot participate at all. In this respect, the aggrieved soldier never has even the potential for any past or future gain under the plan to balance her loss.

Finally, the Court also noted the law at issue in *Connolly* contained provisions exempting certain transactions from characterization as liability-inducing “withdrawals” and provided for the reduction of financial liability in certain instances, such as the liquidation of the business.²⁵² There are no such safeguards or partial protection for the forfeiture of educational benefit contributions—it is an all-or-nothing proposition. It appears the factors the Court considered important in concluding there was no taking in *Connolly* indicate the opposite conclusion is appropriate regarding the forfeiture of voluntary educational benefit contributions.

The third and final factual inquiry in taking cases concerns whether the government’s actions interfere with expectations. The soldier involved certainly had notice that funds voluntarily contributed were not refundable. The forms she signed at enlistment state exactly that. Conversely, just because the forms said so does not make it so. In the *Webb’s Fabulous Pharmacies, Incorporated v. Beckwith* case described earlier,²⁵³ the Court concluded on constitutional grounds it was improper for the government to treat funds temporarily deposited with a state court as “public money.”²⁵⁴ The Court declared, the government, “by *ipse dixit*, may not transform private property into public property without compensation.”²⁵⁵

All three of these factors point to the conclusion that the forfeiture of voluntary contributions to the educational benefits

program is a taking. To paraphrase a court finding quoted earlier,²⁵⁶ it would seem equitable that soldiers who failed to perform the conditions of their original enlistment (continued service until enlistment expiration) because of separation under honorable conditions should be entitled to an amount equal to the benefit conferred on the government. It seems unfair the government retains the full benefit of the soldier’s past service as well as the funds created by forfeitures. The government has clearly taken something of value when it retains the soldier’s \$600 in voluntary contributions. The Takings Clause stands as a barrier against precisely this type of unjust appropriation by the government.

The Problem and the Solution

The forfeiture of voluntary contributions is troublesome under both the Due Process and Takings Clauses of the Fifth Amendment.²⁵⁷ Consequently, it has the potential to become a legal problem for the Army. It may appear unlikely anyone would hire a lawyer over \$600. As indicated by previous cases,²⁵⁸ however, suits surrounding discharges are common. Additionally, while an individual plaintiff may not wish to hire an attorney over such a small amount, the possibility of a class action suit involving similarly situated plaintiffs exists.

As indicated earlier, available post-separation administrative remedies are ineffective. In addition, as previously noted, challenges to the forfeiture would probably pass the *Mindes* test.²⁵⁹ The door to judicial review in federal district court is open.²⁶⁰ The danger of this review, however, may not be readily apparent.

The Army certainly has no reason for concern if the issue was only the return of a former soldier’s \$600 in contributions. The real danger lies in the possible holding a judge may pro-

251. *Id.* at 226.

252. *Id.*

253. *See* discussion *infra*.

254. 449 U.S. 155, 164 (1980).

255. *Id.*

256. *Lucas v. Seagrave Corp.*, 277 F. Supp. 338, 344-45 (D. Minn. 1967).

257. U.S. CONST. amend. V.

258. *See, e.g.*, discussion *infra*.

259. *See Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

260. 28 U.S.C. § 1346a(2) (2000).

The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of: . . . Any other civil action or claim against the United States, not exceeding \$ 10,000 in amount, founded . . . upon the Constitution . . .

Id.

nounce leading to that result. Based on the preceding analysis, a judge may declare notification procedures are constitutionally insufficient to form the basis for voluntary contribution forfeitures. Such a holding would preclude the Army from using notification procedures in the cases of soldiers who have such contributions at risk. A large number of soldiers participate in the educational benefits program. The Army would lose a valuable tool for separating many unworthy soldiers quickly and efficiently. While it is uncertain exactly how much additional process would be sufficient, it would certainly be more than currently provided under notification procedures. The Army might even face a future when a contribution of \$600 or less buys a soldier the right to a full administrative board hearing before separation.

This open door to review does not have to remain open. All of the constitutional issues center on the voluntary contributions made by the soldier. The other associated forfeitures easily pass constitutional muster. Soldiers have forfeited these funds through discharge under notification procedures for years. Those separations have survived court challenges. The voluntary contributions, however, are a new wrinkle. The Army should return to the status quo ante by simply refunding the \$600 to soldiers separating under notification procedures. It is not a significant amount of money. Separating soldiers already undergo a final pay accounting. Consequently, the administrative burden of the refund would not be very great.

In the event there is a judicial determination that voluntary contributions entitle soldiers to a full administrative board or if the Army wishes to preclude such a determination, there is another possible solution. The Army could offer a board to soldiers with voluntary contributions at risk. This additional process, however, requires greater time and effort on the part of the command to separate the soldier. The command could make a soldier's demand for a board less likely by offering a general

discharge under honorable conditions in exchange for the soldier explicitly waiving the board and any claim to a return of the voluntary contributions. A full administrative board is not without hazards for the soldier. While the soldier would receive more process, a board has the authority to recommend a discharge under other than honorable conditions.²⁶¹ It is likely many soldiers would waive the board and any claim to the contributions rather than risk such a discharge. This solution still provides the possibility of a board, however small, to soldiers who did not previously have that right.

Conclusion

Assuming commanders prefer to conduct their business with as little intrusion by the courts as possible, it is in their best interest to avoid issuing unintended invitations for judicial review. The Army's current policy concerning the total forfeiture of monies contributed to educational benefit programs by soldiers who receive a general discharge under honorable conditions through notification procedures is one such open invitation to the courts. The forfeitures raise significant Fifth Amendment concerns. The Army is unnecessarily holding open the courtroom door to persons adversely affected by decisions that could and should be impervious to judicial review. The cost of shutting the door is negligible. Upon issuing a general discharge under honorable conditions using notification procedures, the Army should repay any voluntary educational benefit contributions made by the soldier. This is the best solution because it does not necessitate providing possible additional due process to any soldier. The maximum refund of \$600 would be money well spent to preclude a subsequent court challenge. The cost to the Army in time and effort to provide additional process that comports with the heightened constitutional standards a judge might impose would be far greater.

261. AR 635-200, *supra* note 7, para. 2-12.b.(1)(a).

Legal Assistance Practice Note

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Update to Army Regulation (AR) 27-55, Notarial Services¹

Introduction

Army soldiers and civilians administer oaths, notarize documents and take various kinds of statements under 10 U.S.C. §§ 936 and 1044a.² *Army Regulation (AR) 27-55, Notarial Services*, implements this federal authority and remains the Army's primary source for policy guidance concerning notarial services.³ The Army published a new *AR 27-55* which took effect 17 December 2003.⁴ Legal professionals will find several significant changes in the latest version of *AR 27-55*. For example, the new regulation: (1) requires military notaries to keep a notary log;⁵ (2) implements new federal authority for Department of the Army (DA) civilian notaries overseas;⁶ and (3) removes the requirement for witness's social security numbers (SSN).⁷

The majority of the regulation remains the same. The regulation continues to prescribe the rules for military and civilian notaries who perform notarial services as members of the Army.⁸ This note discusses the significant changes contained in *AR 27-55* and reviews the basic rules pertaining to notarial services. The note concludes with a short summary explaining who may receive notarial services.

Significant Changes to AR 27-55⁹

Notary Log

The most striking change for military notaries is the new command to keep a notary log. The regulation now says, "Military notaries will maintain a notary log."¹⁰ The rule is direct and without exception. Moreover, commanders and staff judge advocates (SJAs) may revoke or suspend notary authority should a person fail to comply with the notary log requirement or any other provision of *AR 27-55*.¹¹ The regulation further warns, "Military members may be punished under the Uniform Code of Military Justice (UCMJ), Article 92, for dereliction of duty, or Article 107 for a false official statement. Military and civilian personnel are also subject to adverse administrative or adverse personnel actions."¹²

Some may notice that the criminal and administrative liability warning directly follows the new notary log requirement.¹³ This placement highlights how important it is to raise the standard of military notary practice. The purpose of a notary log is to memorialize a notary's activities should the notary need to recall a given act later in time.¹⁴ Therefore, the notary log must contain the name and signature of the client who sought the notarization, the general nature of the document, the date, and the location of the notarial service performed.¹⁵ While one

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1. U.S. DEP'T OF ARMY, REG. 27-55, NOTARIAL SERVICES (17 Nov. 2003) [hereinafter *AR 27-55*].
 2. 10 U.S.C. § 936 (2000) (providing oath taking authority); *id.* § 1044a (providing notarial authority); *see also* *AR 27-55, supra* note 1, para. 1-5 (noting that state and foreign law may also confer authority for Army personnel to perform notarial functions).
 3. *AR 27-55, supra* note 1.
 4. *Id.*
 5. *Id.* para. 3-5b.
 6. *Id.* paras. 1-7b, 2-2a(5).
 7. *Id.* fig. 4-1.
 8. *Id.* at i (explaining that the regulation applies to Active Army, The Army National Guard (ARNG), The Army National Guard of the United States (ARNGUS), The U.S. Army Reserve (USAR), and all Department of the Army civilians during periods of peace and war during partial and full mobilization).
 9. Other changes include: (1) changing the military occupational specialties 71D to 27D, and 55OA to 27OA; (2) changing the Legal Assistance Policy Division address; and (3) adding Appendix B summarizing notarial authority, duties and guiding principles for military notaries. *See id.* paras. 1-7a, 1-7c, 2-2a(1); *id.* app. B.
 10. *Id.* para. 3-5b.
 11. *Id.* para. 3-6a.
 12. *Id.* para. 3-6b.
 13. *Id.* para. 3-6.
 14. *See id.* para. 3-5a; *see also id.* para. 3-4 (discussing the various techniques to verify an identity).

could create a notary log with a pen and paper, *QuickScribe*, contains a sample log.¹⁶

Military notaries must create a personal notary log and use it for every notarial action they perform. Notaries are well advised to retain personal possession of their own logs and avoid filing the log within a government filing system; otherwise, the notary could inadvertently subject the log to Privacy Act protections. For example, when a record¹⁷ is maintained in a system of records,¹⁸ statutory rights and limitations inure.¹⁹ The notary must not become ensnared in a Privacy Act analysis over his or her notary log whether from a subject or a third party. In order to avoid the Privacy Act issues and potential criminal and civil liability,²⁰ the notary must keep the log as a private personal document.

Overseas Military Notary Authority for Civilians

Another dramatic change affects DA civilians overseas. Congress recently amended 10 U.S.C. § 1044a.²¹ The statute now allows military secretaries to designate certain civilians

overseas to act as military notaries.²² Consequently, SJAs may now “appoint, in writing, non-attorney U.S. citizen employees located outside the United States to perform as military notaries.”²³ The SJA, however, must ensure those appointees have the proper judgment, supervision, and training.²⁴

No SSN for Witnesses

The third significant change recognizes the proliferation of identity theft.²⁵ Under the new regulation, a witness need only provide his or her name, signature, rank, and branch.²⁶ Prior versions of the regulation required all witnesses to provide their SSNs.

The revisions are few but significant. All military notaries must now keep a log.²⁷ The SJA can now appoint civilian non-attorneys to act as military notaries overseas. Witnesses no longer must provide SSNs on other people’s documents.²⁸ These changes are easy to understand and are needed to elevate the level of military notary practice to its civilian counterpart. The basic underlying rules about who can notarize and under

15. *Id.* para. 3-5b.

16. *Id.* (recommending “*QuickScribe*, the Army Judge Advocate General’s Corps’ approved legal assistance document assembly software”).

17. The Privacy Act defines a record as “any item, collection, or grouping of information about an individual that is maintained by an agency” 5 U.S.C § 552s(a)(4) (2000).

18. The Privacy Act defines a system of records as “a group of any records under the control of any agency from which information is retrieved by the name of the individual” *Id.* § 552a(5).

19. A subject of a Privacy Act protected record has the right to request access and amendment of the record unless the agency determines the record at issue is exempt from disclosure to the subject. *Id.* § 552a (d)(1), (2). The agency itself is bound by a rule that prevents it from disclosing the Privacy Act protected record to all third parties unless the subject consents or the agency determines the disclosure fits an exception. *Id.* § 552a (b).

20. *Id.* §§ 522a (g) (explaining the four different civil causes of action), (i) (explaining the criminal penalties for willful violations).

21. 10 U.S.C. § 1044a. The statute now reads:

The persons named in subsection (b) have the general powers of a notary . . . (b) (5)[f]or the performance of notarial acts at locations outside the United States, all employees of a military department or the Coast Guard who are designated by regulation of the Secretary concerned or by statute to have those powers for exercise outside the United States.

Id. § 1044a(b).

22. AR 27-55, *supra* note 1, paras. 1-7b, 2-2a(5). It is important to remember that the new authority allows the SJA to confer “military” notary status to civilians serving overseas. *Id.* The SJA authority to authorize a civilian stateside or overseas to become a civil notary under the laws of the jurisdiction is different. This authority always existed and the policy is contained in AR 27-55, *supra* note 1, para. 2-3.

23. *Id.* para. 1-7b.

24. *Id.* Once a SJA determines a person possesses the proper judgment, the SJA must train the individual in accordance with AR 27-55, *supra* note 1, para. 1-8. Once trained, AR 27-55 requires that the overseas civilian employee serve under the immediate supervision of a judge advocate or DA civilian attorney. *Id.* para. 2-2a(5).

25. See Federal Trade Commission, *Identity Theft Survey* (2003), available at <http://www.consumer.gov/idtheft> (documenting 9.9 million identity theft victims in calendar year 2003).

26. AR 27-55, *supra* note 1, fig. 4-1.

27. *Id.* para. 3-5b.

28. *Id.* fig. 4-1.

what circumstances can be a vexing maze to navigate even for the veteran judge advocate (JA). With that in mind, this note next reviews these rules.

Who Can Notarize? Who Can Administer an Oath?

Every person who may notarize can also administer an oath.²⁹ Therefore, this section first explains notary authority by category. The three main groups of people authorized to perform notarial services are: (1) attorneys and officers; (2) Active duty enlisted soldiers; and (3) Reserve enlisted soldiers.³⁰

Category One

General Notary Authority: Attorneys and Officers

Attorneys and certain military officers are military notaries regardless of duty status.³¹ This category covers all attorneys and those military officers in the personnel field. For example, any DA civilian or legal assistance attorney can notarize. All officers holding the Military Occupational Specialty (MOS) 27A (commissioned or warrant, active or reserve) can notarize. Finally, all adjutants, assistant adjutants, and personnel adjutants can notarize. Status alone confers authority under this category. The SJA need not grant further permission, provide further training, or create further supervision outside the normal legal supervisory scheme.³² The next category discusses the additional requirements for active duty enlisted soldiers.

Category Two

General Notary Authority: Active Duty Enlisted Soldiers

As a general rule, all active duty enlisted soldiers must hold a 27D MOS, receive written appointment by their supervising SJA, and serve under immediate supervision of a JA or DA civilian attorney. This basic rule relaxes for NCOs who are E6 and above. In those cases, if the E6 or above is serving as a legal NCO for a brigade level unit or higher; then that NCO need not serve under the direct supervision of a JA or civilian attorney. The basic rule tightens for E3s and E4s. In those

29. *Id.* para. 3-1b(1).

30. *Id.* paras. 2-1, 2-2.

31. *Id.* para. 2-2a.

32. *See id.*

33. *Id.* para. 1-8.

34. *Id.* para. 2-2.

35. *Id.*

36. *Id.* para. 3-1b(1).

cases, the SJA must also determine that the soldier possesses the proper judgment and maturity. If the SJA determines the soldier meets the judgment and maturity criteria, the SJA must then provide notary training in accordance with AR 27-55, para. 1-8, before the soldier may notarize.³³

Category Three

General Notary Authority: Reserve Enlisted Personnel

The same rules that apply to active duty enlisted personnel apply to reserve enlisted personnel; additionally, all reserve enlisted personnel must be in a duty status in order to lawfully perform a notarial act. For instance, the reserve enlisted soldier must be performing Inactive Duty for Training (IDT) or any other recognized reserve duty. A Reserve Component (RC) SJA can grant an exception to the duty status requirement.³⁴

Categories one through three summarize the authority, supervision, and training requirements concerning the kinds of people who may notarize under AR 27-55. Generally, officers and attorneys can notarize based on their status; active duty enlisted soldiers may notarize with additional training, supervision, and authorization. Reserve enlisted soldiers are treated similarly to active duty enlisted soldiers but they must be in a recognized duty status unless their RC SJA grants an exception.³⁵

Oath giving authority builds on notary authority. As mentioned, all those persons granted authority as military notaries (categories one through three), may also administer oaths.³⁶ The next three categories explain the kinds of oath giving authority under AR 27-55.

Category Four

Oath Giving Authority by Position

An overarching purpose of oath giving authority is to further military administration. The summary court-martial is a low-level court that adjudicates minor criminal offenses as well as disposition of property.³⁷ Therefore, all officers appointed as

summary courts-martial may administer oaths.³⁸ Likewise, any person who can authorize a search under Military Rule of Evidence 315(d)³⁹ may also administer an oath.⁴⁰

Category Five

Oath Giving Based on Duties

Commanders often assign additional duties to their soldiers. Frequently, a soldier must administer an oath related to the additional duty. For example, investigating officers, officers appointed to take depositions, and certain parties to a court of inquiry may also administer oaths in conjunction with and related to these duties.⁴¹ Courts-martial duties also give rise to oath giving authority. For example, the president, military judge, trial counsel and assistant trial counsel may administer oaths relating to a court-martial.⁴² Finally, all recruiting officers may administer an oath; and all civilian personnel officers (and their designated representatives) may administer an oath.⁴³

Category Six

Oath Giving Not Based on the Kind of Oath

The final category of oath giving authority derives its authority from the oath itself. The army regularly enlists and appoints civilians. Soldiers already serving often reenlist or gain an appointment. To further military administration, any commissioned officer (active or reserve) can administer oaths relating to enlistments or appointments.⁴⁴

Categories four through six summarize the authority to administer oaths. Starting from the presumption that all notaries may administer oaths, the regulation builds on this presumption by granting oath giving authority to those who hold

certain positions, to those who perform certain duties, and for certain types of oaths relating to enlistments.

This note discussed significant changes to AR 27-55 and reviewed the authorities and conditions under which army soldiers and civilians may administer notary services and oaths. The note concludes with a summary of who may receive notarial services.

Who May Receive Notarial Services?

Notarization is primarily a legal assistance service.⁴⁵ As such, a military law practitioner should always consult AR 27-3, *Legal Assistance*, when determining client eligibility.⁴⁶ In addition to those persons authorized to receive legal assistance under AR 27-3,⁴⁷ the notary regulation expands notarial services eligibility to include the following:

- All members of the United States Armed Forces.⁴⁸
- All individuals serving with, employed by, or accompanying the Armed Forces outside the United States.⁴⁹
- All other individuals subject to the Uniform Code of Military Justice (UCMJ) outside the United States.⁵⁰
- DOD civilian employees on matters relating to their official duties.⁵¹

37. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-9 (6 Sept. 2002); U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS paras. 18-1 – 18-10 (22 Dec. 2000).

38. *Id.* para. 3-1b(2).

39. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(d) (2002).

40. AR 27-55, *supra* note 1, para. 3-1b(3).

41. *Id.* para. 3-1c(2)-(4).

42. *Id.* para. 3-1c(1).

43. *Id.* paras. 3-1c(5), (6).

44. *Id.* para. 3-1d.

45. U.S. DEP'T OF ARMY, REG. 27-3, LEGAL ASSISTANCE para. 3-7a (21 Feb. 1996).

46. *Id.*

Conclusion

Army soldiers and civilians performed almost 418,000 notarizations in 2003.⁵² The new AR 27-55 introduces some significant changes to upgrade military notary practice—requiring a notary log, expanding notary authority to include overseas civilians, and eliminating SSNs.⁵³ The basic policy, however, remains the same. Civilian attorneys, JAs, and enlisted 27D

soldiers all have notary and oath giving authority under certain prescribed circumstances explained above. The practitioner must always keep in mind the various authorities and limitations involved with federal notary practice. Often overlooked but just as important, the practitioner must ensure that each client is screened for eligibility. In the end, all of these rules and procedures exist to deliver quality notarial services to eligible beneficiaries.

47. The following persons are eligible to receive legal assistance:

- Active Component members and their families. *Id.* para. 2-5a(1)
- Reserve Component members. *Id.* para. 2-5a(2) (noting that reserve legal assistance attorneys must provide the service unless the reservists is activated for more than twenty-nine days).
- AC/RC members who are receiving retired or disability pay and their families. *Id.* para. 2-5a(4).
- Surviving family members of AC/RC and retired members who would be eligible for legal assistance if the service or retired member were alive. *Id.* para. 2-5a(5).
- DOD civilian employees. *Id.* para. 2-5a(6) (noting that the service must relate to certain individual liability matters).
- Civilian contractors accompanying the Armed Forces outside the U.S. and their families. *Id.* para. 2-5a(7).
- Primary Next of Kin (PNOK). *Id.* para. 2-5a(8).
- Fiduciaries. *Id.* para. 2-5a(9).
- Members of other military forces while serving in the United States and their accompanying family members. *Id.* para. 2-5a(10).
- Prisoners confined within a U.S. military confinement facility. *Id.* para. 2-5a(11).

48. *Id.* para. 2-2b(1).

49. *Id.* para. 2-2b(3).

50. *Id.* para. 2-2b(4).

51. *Id.* para. 2-2b(5).

52. Statistical Report for Calendar Year 2003, Office of The Judge Advocate General Legal Assistance Policy Division (on file with author).

53. AR 27-55, *supra* note 1, at summary of change.

Center for Law and Military Operations (CLAMO) Report

The Judge Advocate General's Legal Center & School

The Judge Advocate's Role in Information Operations

Lieutenant Colonel Pamela M. Stahl
&
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Information is at the very heart of many stability operations These operations are often sensitive and politically charged where perception and public support may be centers of gravity. In stability operations, IO [information operations] may be the most critical and acceptable means of achieving stated objectives consistent with the ROE.¹

Judge advocates at all levels of command play an important role in advising commanders and their staffs on information operations (IO) during the full spectrum of military operations—from offensive and defensive operations to stability and support operations.² In Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF), judge advocates are participating in IO cells and IO working groups (IOWG), effects-coordination cells, and targeting meetings. During past field training exercises at home station and at the combat training centers, units often practiced offensive and defensive operations, and related IO. Few units conducted stability operations³ exercises, unless as part of mission rehearsals for deployments to Bosnia or Kosovo. In current operations, however, units are conducting the full spectrum of military operations simultaneously, from offensive operations against suspected terrorist cells, to civil affairs projects rebuilding local communities. Developing and implementing IO themes and objectives throughout this spectrum of military operations can be quite complex.

This report provides a broad overview of Army IO doctrine and the judge advocate's role in the IO campaign, in particular in stability operations. Here, IO may become the center of gravity in "winning the hearts and minds" of the local population. Judge advocates assigned as operational law attorneys and those who deploy as part of a brigade operational law team (BOLT) must understand IO and their role in these operations. This report addresses IO at the operational and tactical levels. It does not, however, address specific domestic and international laws relating to IO.

Joint and Army Doctrine on Information Operations

First, judge advocates must understand IO in the context of military operations. Army doctrine, consistent with Joint doctrine, defines IO as:

[T]he employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception, and operations security, in concert with specified supporting and related capabilities, to affect or defend information and information systems, and to influence decisionmaking IO related activities include, but are not limited to public affairs (PA) and CMO [Civil Military Operations].⁴

These activities help the commander gain information superiority.⁵ Information superiority is an "enabling operation" that assists the commander in winning the fight.⁶ Although this report discusses only IO, there are two related disciplines that also assist the commander in gaining information superiority:

1. U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS para. 2-72 (20 Feb. 2003) [hereinafter FM 3-07]. Joint doctrine defines "centers of gravity" as "[t]hose characteristics, capabilities, or sources of power from which a military force derives its freedom of action, physical strength, or will to fight." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS chap. C (12 Apr. 2001, as amended thru 17 Dec. 2003).
2. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 1-48 (14 June 2001) [hereinafter FM 3-0] (discussing full spectrum operations).
3. *Id.* Stability operations "promote and protect U.S. national interests by influencing the threat, political, and information dimensions of the operational environment through a combination of peacetime development, cooperative activities, and coercive actions in response to crises." *Id.*
4. U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES paras. 1-53, 1-58 (28 Nov. 2003) [hereinafter FM 3-13]. This IO definition supercedes the one in FM 3-0, *supra* note 2, ch. 11. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS para. 1 (9 Oct. 1998) [hereinafter JOINT PUB. 3-13] (providing the joint definition of IO).
5. FM 3-13, *supra* note 4, para. 1-37. The information environment includes individuals, organizations, and systems that collect, process, store, display, and disseminate information. Not only does the military use this environment, but national, international, and nonstate actors use it to collect, process, and disseminate information, as well. *Id.*; see also JOINT PUB 3-13, *supra* note 4, ch. 1, para. 3.h.
6. FM 3-0, *supra* note 2, pt. IV. Commanders direct enabling operations to support offensive, defensive, stability, and support operations. They are usually shaping or sustaining; they may be decisive in some military operations other than war. *Id.*

intelligence, surveillance, and reconnaissance (ISR)⁷ and information management (IM).⁸ Specific objectives that contribute to information superiority include the following:

- Develop and maintain a comprehensive picture of enemies and adversaries; forecast their likely actions.
- Deny enemies and adversaries information about friendly forces and operations.
- Influence enemy and adversary leader perceptions, plans, actions, and will to oppose friendly forces.
- Influence noncombatants and neutrals to support friendly missions or not to resist friendly activities.
- Inform noncombatant and neutral organizations so they can better support friendly policies, activities, and intentions.
- Protect friendly decision making processes, information, and information systems.
- Continually provide relevant information (including intelligence) to the commander and staff in a useable form.

- Destroy, degrade, disrupt, deny, deceive, and exploit enemy decision making processes, information, and information systems, and influence those of adversaries and others.⁹

There are two types of IO—offensive and defensive. During operations, commanders synchronize offensive and defensive IO to produce complementary and reinforcing effects. Under Army doctrine, “[o]ffensive IO supports the decisive operations, while defensive IO protects friendly force critical assets and centers of gravity.”¹⁰ Offensive IO includes psychological operations (PSYOP), operational security (OPSEC), and military deception and may apply attack options such as electronic warfare (EW) and physical attack to produce the desired effect against an adversary’s information systems.¹¹ United States forces conduct defensive IO through information assurance,¹² information security, physical security, OPSEC, counterdeception, counterpropaganda, counterintelligence, EW, and special information operations.¹³ Additionally, IO requires integration with several other processes, to include intelligence preparation of the battlefield and targeting.¹⁴

In stability operations, which are often sensitive and politically charged, information may be the decisive operation.¹⁵ As reflected in current operations, they require a great deal of attention to civil considerations, such as political, social, economic, and cultural factors. Unlike combat operations, the center of gravity is likely not a particular military unit or terrain feature, rather it is restoring basic services and influencing public support.¹⁶ Military forces can expect that adversaries and

7. Intelligence supports planning, decision-making, target development, targeting, and protecting the force. Surveillance and reconnaissance are the means to collect information that is used to produce intelligence; these assets focus primarily on collecting information about the enemy and the environment for the priority intelligence requirements. *Id.* para. 11-17.

8. *Id.* para. 11-28. *Field Manual 3-0* defines IM as:

[T]he provision of relevant information to the right person at the right time in a usable form to facilitate situational understanding and decision-making. It uses procedures and information systems to collect, process, store, display, and disseminate information (*see* FM 6-0). IM is far more than technical control of data flowing across networks. It communicates decisions that initiate effective actions to accomplish missions and fuses information from many sources. Successful IM adds meaning to information as it is processed, so decision makers can focus on achieving understanding instead of processing or evaluating information. IM consists of two supporting components: information systems and relevant information.

Id. para. 11-28. *See* U.S. DEP’T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES (11 Aug. 2003) [hereinafter FM 6-0].

9. *Id.* para. 11-11.

10. FM 3-13, *supra* note 4, para. 1-70.

11. JOINT PUB. 3-13, *supra* note 4, ch. 2, para. 1.b.

12. *Id.* glossary. Information assurance operations are those operations that protect and defend information and information systems. *Id.*

13. *Id.* ch. 3, para 1.a.

14. FM 3-13, *supra* note 4, para. 5-1.

15. FM 3-07, *supra* note 1, para. 2-72.

16. *Id.* paras. 2-72, 2-73.

other organizations will use propaganda and disinformation against coalition forces to influence the public. Therefore, in stability operations, offensive IO is very important to promote legitimacy and reduce bias and confusion. Everyone must understand the objectives and motives of friendly forces, including the scope and duration of friendly action. Offensive IO can persuade, educate, coordinate, and influence.¹⁷ Of course, coalition forces must also practice defensive IO to protect the force and the mission.¹⁸

The Judge Advocate's Role in Information Operations

Once judge advocates understand basic IO doctrine and how it contributes to the unit mission, they must learn their role in supporting the commander's IO campaign. To begin, judge advocates should consult *Field Manual 27-100, Legal Support to Operations*,¹⁹ for the Judge Advocate General's Corps (JAGC's) doctrine on IO support. Under the JAGC doctrine, IO is part of the operational law support to commanders.²⁰ Not only do staff judge advocates (SJAs) and their deputies provide legal advice regarding IO, but operational law attorneys and those assigned to BOLTs do so as well. At division and above, SJAs should consider assigning a separate judge advocate to the IO cell, because meetings may be conducted simultaneously with other G-3 (assistant chief of staff, operations) meetings that an operational law attorney must attend.²¹

Army IO doctrine specifically tasks the SJA to advise the G-3 and the G-7 (assistant chief of staff, information operations) on legal aspects of IO.²² The SJA's IO-related responsibilities include the following:

- Advise the G-7 on the legality of IO actions being considered during planning.
- Include IO instructions in the legal appendix to the service support annex.

- Provide an SJA representative to the IO cell.
- Provide legal advice on IO rules of engagement (ROE).
- Review IO plans, policies, directives, and ROE issued by the command to ensure their consistency with *DOD Directive 5100.77*²³ and the law of war.
- Ensure that IO law of war training and dissemination programs are consistent with *DOD Directive 5100.77* and the law of war obligations of the [United States].
- Advise the [deception working group] on the legality of [military deception] operations and the possible implications of treaty obligations and international agreements on it.²⁴

In addition, through participation in IO planning, judge advocates gain visibility over their unit's intelligence collection efforts such as computer network exploitation. Therefore, judge advocates also must be familiar with the laws relating to intelligence collection operations.²⁵

To properly advise the command, judge advocates must understand the legal issues associated with IO. As recognized in joint doctrine, "IO may involve complex legal . . . issues Information operations planners must understand the different legal limitations that may be placed on IO across the range of military operations."²⁶ Because of these legal considerations, the judge advocate must be an integral part of the planning and execution of IO to provide proper legal advice. This advice includes: the legal limitations placed on IO in peacetime, crisis, and conflict; a law of war analysis of the intended wartime targets; special protection for international civil aviation, international banking, and cultural or historical property;

17. *Id.* paras. 2-75, 2-76.

18. *Id.* para. 2-77.

19. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) [hereinafter FM 27-100].

20. *Id.* paras. 2.4.1, 3.2.

21. *See generally id.* para. 5.5.4.

22. *See* FM 3-13, *supra* note 4, para. F-32.

23. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, LAW OF WAR PROGRAM (9 Dec. 1988).

24. FM 3-13, *supra* note 4, para. F-32 (emphasis added).

25. *See generally* FM 27-100, *supra* note 19, para. 6.6.7; INT'L. & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch.14 (2004) [hereinafter OPLAW HANDBOOK] (outlining the legal considerations related to intelligence collection).

26. JOINT PUB. 3-13, *supra* note 4, ch. 1, para. 1.a.

and actions expressly prohibited by international law or convention.²⁷

Judge advocates should review the *Operational Law Handbook, Information Operations*, chapter 19,²⁸ for the specific legal aspects of IO. That chapter summarizes the applicable laws relating to IO and is an excellent starting point for researching legal issues. It also contains an explanation of the elements of offensive and defensive IO and related activities, outlines the international legal considerations in IO, and discusses foreign and domestic law, and law enforcement aspects of IO. For example, during an IOWG meeting, participants may discuss conducting an offensive PSYOP mission against the local populace. Judge advocates must analyze the legal constraints of conducting these missions. Once they understand the legal issues associated with IO, judge advocates must then understand where they fit into the IO process—normally through participation in an IO cell.

The Information Operations Process

Generally, an IO cell coordinates objectives and tasks with their counterparts at higher and lower echelons and identifies IO targets, which are then nominated at separate targeting meetings.²⁹ The IO cell states objectives in terms of the commander's desired effect. Normally, objectives are written in terms of causing an adversary or other group to do or not to do something. An example would be to deny the insurgents' ability to create civil unrest to maintain a safe and secure environment for reestablishing civilian control in Iraq.³⁰ Information operations tasks are developed to support or accomplish an IO objective; they tell a unit to do something, such as use PSYOP assets to broadcast certain information to the local populace.³¹

The IO cell uses the military decision-making process (MDMP) to plan and synchronize IO. Judge advocates need to be thoroughly familiar with the MDMP to effectively participate in IO cells and working groups.³² In addition, units in both OIF and OEF generally conduct effects-based planning using the doctrinal targeting process of decide, detect, deliver, and assess (D3A). To participate in IO planning, judge advocates need to be familiar with Joint and Army doctrine on the targeting process.³³

27. *Id.* chap. 1, para. 4.a.

28. OPLAW HANDBOOK, *supra* note 25, ch. 19.

29. FM 3-13, *supra* note 4, para. 1-87. *See also* FM 6-0, *supra* note 8, para. 6-105 (providing that "[t]argeting is a logical process that synchronizes lethal and non-lethal fires . . . includ[ing] offensive information operations effects").

30. FM 3-13, *supra* note 4, paras. 5-90, 5-92.

31. *Id.* paras. 5-94, 5-95.

32. *See id.* paras. 5-1 – 5-8. To describe and direct IO, commanders use the mission statement, concept of support, objectives, and tasks. The IO mission statement is a short paragraph or sentence describing what the commander wants IO to accomplish and its purpose; the concept of support is a statement of where, when, and how the commander intends to focus the IO element of combat power to accomplish the mission; the objectives are defined and obtainable aims that the commander intends to achieve using IO; and the IO tasks are developed to support accomplishment of one or more objectives. *See id.* Using the MDMP process, the IO cell conducts mission analysis to define the tactical problem and determine feasible solutions. During mission analysis the staff: analyzes the higher headquarters order; conducts the intelligence preparation of the battlefield; determines specified, implied, and essential tasks; reviews available assets; determines constraints; identifies critical facts and assumptions; conducts a risk assessment; determines initial commander's critical information requirements; determines the initial ISR annex; plans use of available time; writes the restated mission; conducts a mission analysis briefing; approves the restated mission; develops the initial commander's intent; issues the commander's guidance and warning order (WARNO); and reviews facts and assumptions. *Id.* para. 5-31. After the mission analysis briefing, the staff develops courses of action (COAs) for analysis and comparison based on the restated mission, commander's intent, and planning guidance. During the COA analysis, the G-7 develops or refines the following IO products to support each COA: concept of support; objectives; tasks to support each objective; input work sheets; synchronization matrix; IO-related target nominations; and critical asset list. The staff then conducts a COA-analysis (war-gaming) comparison. Next, in a COA decision briefing, the staff makes a recommendation to the commander. The IO concept of support for the approved COA becomes the IO concept of support for the operation. The G-3 then issues a WARNO, which contains the IO's contributions to the commander's intent and concept of operations; IO tasks requiring early initiation; and a summary of the IO concept of support and IO objectives. Finally, the staff refines the approved COA and issues an operations plan or operations order. *See generally id.* paras. 5-12 – 5-130.

33. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-20-10, THE TARGETING PROCESS ch. 2 (8 May 1996). In the decide phase, the staff addresses targeting priorities and briefs high-pay-off target lists, the intelligence collection plan, target selection standards, and the attack guidance matrix to the commander for decision. *Id.* In the detect phase, the targeting team develops the information needs for target detection. These needs are expressed as priority intelligence requirements (PIR) and intelligence requirements (IR). *Id.* Targets and suspected targets are then passed to the targeting team by a number of means, to include intelligence from subordinate units, IOWG, etc. *Id.* The deliver function of the targeting process executes the target attack guidance and supports the commander's battle plan once the staff locates and identifies the high pay-off targets. *Id.* Tactical decisions that must be made in this phase include when to attack, the desired effect, degree of damage, or both, and the attack system to be used. Based on these decisions, a unit is then assigned to conduct the attack. Finally, to complete the targeting cycle, a combat assessment is made of the executed mission, to include a battle damage assessment, munitions effect assessment, and a reattack recommendation. *See id.*

The IO cells include representatives from PSYOP, Public Affairs (PA), and Civil Affairs (CA). The PSYOP representative integrates, coordinates, deconflicts, and synchronizes the use of PSYOP with other IO tools and missions. These PSYOP missions may include operations planned to convey selected information to the local population to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals.³⁴

A PA representative is also a member of the IO cell. Public Affairs supports IO through print and electronic products, news releases, press conferences and media facilitation.³⁵ Although PA does not shape the beliefs and attitudes of a population, it assists IO by providing factual information that enables the staff to make informed decisions.³⁶ Finally, the CA representative to the IO cell synchronizes CA activities with the IO themes and mission.³⁷ In stability operations, CA and IO work hand-in-hand to ensure that CA projects support IO themes, such as the United States restoring a safe and secure environment for the local population.

As reflected in the above examples, IO campaign objectives include many disciplines. For example, information about a weapons turn-in policy and collection sites may be disseminated through a variety of means, to include direct contact by CA personnel with the local population; PSYOP print and broadcast products; or PA news releases or press conferences.³⁸

Information operational planning is conducted at all levels of command. At the Joint Forces Command (JFC), an IO cell develops and promulgates IO guidance and plans, and then passes them to the components and supporting organizations and agencies for mission planning and execution. At the JFC, the operations officer (J-3) usually has responsibility for IO. The J-3 normally designates an IO officer to supervise the IO cell. The IO officer also serves as the IO representative to the

Joint Targeting Coordination Board.³⁹ The IO cell contains select representatives from each staff element, component, and supporting agency responsible for integrating IO capabilities and related activities, including a judge advocate.⁴⁰

The Joint Task Force (JTF) also conducts IO. An excellent example of this process and how it nests with effects-based operations at the JTF level of command is Combined Joint Task Force 180 (CJTF-180) in Afghanistan. At CJTF-180, IOWG meetings plan and synchronize all IO components two weeks out, to include PAO, combat camera, PSYOP and EW. The operational law planner attends these meetings and both the chief, operational law and the fiscal law attorney review the recommended tasks, including PSYOP products such as posters, handbills, and leaflets.⁴¹

Combined JTF-180 uses the Joint and Army doctrinal targeting concepts of D3A to conduct joint targeting and the effects process. As such, the IOWG is just one group that contributes to effects-based mission planning through the joint effects working group (JEWG). Others include the operational effects working group (EWG), the operations planning group (OPG), and the assessment working group (AWG).⁴²

First, in the *decide phase* of the targeting process the EWG meets to determine any changes to operational guidance, as interpreted from U.S. Central Command and Joint Chiefs of Staff planning orders, and to define the effects that the CJTF would like to achieve in their area of operation (AO) from both lethal and nonlethal fires. The resulting guidance is published in an effects tasking order (ETO). The ETO is then used in the *detect phase* to develop, validate, nominate, and prioritize targets. The OPG uses the ETO in the tactical MDMP to plan tactical operations three weeks out. The operational law planner's focus at these meetings is on the impact of the ROE on the tactical combat operations.⁴³ Also based on receipt of the ETO, the

34. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS paras. 8-5 – 8-8 (19 June 2000).

35. U.S. DEP'T OF ARMY, FIELD MANUAL 3-61.1, PUBLIC AFFAIRS TACTICS, TECHNIQUES AND PROCEDURES para. 9-14 (1 Oct. 2000) [hereinafter FM 3-61.1].

36. *Id.* para. 9-24.

37. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.401, CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES para. 1-28 (23 Sept. 2003).

38. FM 3-61.1, *supra* note 35, para. 9-3.

39. JOINT PUB. 3-13, *supra* note 4, ch. IV, paras. 1, 2.

40. *Id.* The following staff elements are generally represented in the IO cell: intelligence (J-2), logistics (J-4), plans (J-5), command, control, communications, and computer systems (C4) (J-6), operational plans and interoperability (J-7), PSYOP, EW, OPSEC, military deception representative, special technical operations, counterintelligence, PAO, SJA, CA, SOF, and a targeting representative. Other potential representatives include the Defense Information Systems Agency (DISA), the Information Operations Technology Center, and the National Security Agency. *Id.* chap. 4, para. 2.c.

41. See E-mail from CPT Marie Anderson, CJTF-180 Operational Law Attorney, to the author, subject: IOWG (1 Jan. 2004) [hereinafter E-mail from CPT Anderson] (on file with CLAMO). CJTF-180 has found that IO planners must have a sound historical and cultural perspective of Afghanistan to make sound recommendations on IO objectives and tasks. Planners must understand the religion (Islam), tribal social hierarchy, diverse ethnic demographics, warlords, the drug trade, and the shattered economy. See CJTF-180 Presentation to the 2003 Senior Fires Conference (21-24 Oct. 2003), available at <http://sill-www.army.mil/conf/briefings/> (last visited Mar. 9, 2004) [hereinafter CJTF-180 briefing] (Powerpoint slides on file with CLAMO).

42. See E-mail from CPT Anderson, *supra* note 41.

IOWG begins planning two weeks out to identify operational and tactical requirements and targets. As part of the targeting process, the IOWG nominates targets and recommends particular weapons to engage the targets. In this sense, weaponeering is not limited to lethal platforms, but may include the production of leaflets, stories, radio messages, etc.⁴⁴

The OPG and IOWG nominated targets are then forwarded to the JEWG. The JEWG integrates the operational and tactical priorities into one consolidated briefing to the Director of the Combined/Joint Staff at the Joint Effects Coordination Board, which is similar to a targeting board. The relevant elements of the IOWG, EWG, AWG, and OPG are integrated into the JEWG for de-confliction and synchronization.⁴⁵ The director typically approves several targeting missions, which are integrated into the following day's fragmentary order (FRAGO). The FRAGO contains information on targeting priorities and high payoff targets, priority PSYOP missions, PA and CMO recommendations, and specific ROE.⁴⁶ Subordinate units then conduct mission planning and force execution in the *deliver phase* to engage these targets. Once engaged, the AWG works in the *assess phase* of the targeting process to measure the success of the mission, including both lethal and nonlethal effects missions.⁴⁷ At the tactical level, the missions are tracked on an effects synchronization matrix to capture all lethal and nonlethal assets across the battlefield in priority.⁴⁸

At the corps and division levels, the G-7 has coordinating staff responsibility for IO through the G-7 section or the IO cell. The IO cell is located in the main command post and is comprised of representatives of organizations responsible for all IO elements and related activities. The following representatives normally participate in the IO cell: G-1/AG (personnel), G-2

(intelligence), G-3 (operations), G-4 (logistics), G-6 (command, control, communications, and computer operations), chemical officer, space operations officer, fire support officer, and engineer.⁴⁹ In addition, the IO cell includes representatives from PA, CMO, and the SJA.

The primary function of the cell is to synchronize IO throughout the operations process. The cell members may coordinate during meetings (such as an IOWG meetings) or over a local area network.⁵⁰ Currently, divisions deployed in support of OIF typically conduct IOWG meetings, the products of which are briefed at subsequent targeting or effects coordination cell meetings. The operational law attorneys attend these meetings and provide advice on legal issues that arise and review IO products, tasks, and objectives.⁵¹ One of the greatest challenges is getting information out to the local population on the multitudes of projects being conducted by the divisions. Judge advocates may assist in this process by suggesting alternative forums, such as local newspapers with different target audiences.⁵²

At the brigade level, each type of maneuver brigade has its own IO capabilities. These brigades include: the Stryker brigade combat team (SBCT), the Army National Guard enhanced separate brigade (ESB), and the division maneuver brigade. The SBCT includes an IO element embedded within the Fire and Effects Coordination Cell (FECC).⁵³ An IO coordinator (IOCOORD) supervises the IO section, which acts as the principal staff element for all civil-military operations, and includes IO, CA, and PSYOP personnel.⁵⁴ In the SBCT, the BOLT is also located in the IO section.⁵⁵ The second type of brigade, the ESB, has an S-7 who plans the brigade's IO efforts.⁵⁶ The S-7 assists in developing target lists, estimates, and assessments;

43. *Id.*

44. See CJTF-180 briefing, *supra* note 41.

45. *Id.*

46. *Id.* The FRAGO integrates any new requirements identified in the subordinate maneuver brigade's targeting meeting, which is held the same day. *Id.*

47. For example, a decision may be made to gain the support of key friendly leaders in a particular town. A unit or agency is selected in the detect phase, and that unit conducts operations to influence and gain support in the deliver phase. These operations could include dropping leaflets and transmitting radio broadcasts to inform the townspeople of the coalition's friendly intent, and providing humanitarian assistance. In the assess phase, the unit's missions are measured by the nonlethal effects, such as leaders and townspeople that have reported weapons caches or turned-over guerilla leaders to coalition forces.

48. See CJTF-180 briefing, *supra* note 41.

49. FM 3-13, *supra* note 4, paras. F-19 – F-32.

50. *Id.* para. 1-86.

51. See, e.g., E-mail from LTC Sharon Riley, Staff Judge Advocate, 1st Armored Division, to the author, subject: IO (24 Dec. 2003) (copy on file with CLAMO); E-mail from LTC Richard Whitaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), to the author, subject: lessons learned (8 Jan. 2004) [hereinafter E-mail from LTC Whitaker] (copy on file with CLAMO).

52. E-mail from LTC Whitaker, *supra* note 51.

53. U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.31, THE STRYKER BRIGADE COMBAT TEAM para.1-28c(2)(F) (13 Mar. 2003) [hereinafter FM 3-21.31].

54. *Id.* Civil-military operations include the civilian impact on military operations and the impact of military operations on the local population. *Id.*

directs, manages and controls all IO assets and performs IO tasks; recommends IO priorities; and coordinates offensive and defensive IO.⁵⁷

Unlike the SBCT and ESB Brigades, division maneuver brigades are not doctrinally staffed with organic IO assets such as an IOCOORD or S-7. In today's full spectrum operations, however, maneuver brigades must also plan and execute IO, and IO-related tasks. Instead of an IO cell, the executive officer (XO) or fire support officer (FSO) generally coordinates IO; the S-2 conducts physical security operations and executes counter-intelligence operations; the S-3 conducts OPSEC operations, executes counter-deception operations, and directs and monitors PSYOP; the S-5 monitors CMO and ensures attached CA teams support brigade and division CA missions; the S-6 is responsible for information assurance; and the fire support officer plans and executes IO-related physical destruction targets.⁵⁸ As these brigades transform into the unit of action model, IO planning may change, as well.

Today, at the Army's Combat Training Centers, maneuver brigades practice planning and executing IO and IO-related tasks. Without organic IO and IO-related assets, traditional maneuver brigades must build their own IO staff. These brigades practice a wide range of staff structures to accomplish necessary IO missions. Some brigades use the S-5 as the IO director. This director coordinates all non-lethal effects at daily IOWG meetings using the D3A targeting methodology. Other brigades use the FSO as the IO director who coordinates non-lethal effects at daily non-lethal fires meetings. In both instances, the judge advocate serves as a critical advisor, providing guidance on a wide-range of IO-related issues.

In current real-world operations, division maneuver brigades often conduct weekly meetings to coordinate IO tasks and objectives into overall brigade operations. For example, one brigade in Iraq conducts weekly IO targeting meetings focused on effects-based operations. Representatives from each of the battalions attend, as well as the XO, S-2, and S-3. In addition, the brigade commander conducts weekly IO strategy meetings to ensure that the brigade's tactical IO missions are nested with the higher command's strategic objectives. The XO, S-2, S-3, public affairs officer (PAO), and political advisor attend the strategy meetings. The brigade also conducts daily lethal targeting meetings; the IO representative attends these meetings to ensure unity of effort, but the effects-based and lethal targeting meetings are not combined.⁵⁹ A brigade in Afghanistan does not conduct a separate IOWG, but integrates IO objectives and tasks into FECC meetings, which synchronize all brigade lethal and nonlethal fires.⁶⁰

Another brigade deployed to Iraq uses its FSO to perform duties as both the IO officer and the PAO. The brigade synchronizes effects through their "team village" coordination cell meetings, which the judge advocate attends.⁶¹ The IO officer integrates all command information, PA, and PSYOP into the brigade IO campaign. For instance, the command publishes a brigade newspaper containing stories on positive activities within the brigade area of operation and other topics of interest to the civilian population.⁶² The IO officer, acting as the PAO, has built friendly working relationships with several U.S. journalists. In exchange for information on impending operations that may be of interest, the journalists provide the PAO with the opportunity to respond to negative stories. The brigade has found that these journalists are often more apt to cover positive news stories, such as the opening of schools, when they already have good relationships.⁶³ The brigade also uses face-to-face communications through the Neighborhood and District Advisory Councils and key leader meetings to disseminate their command message.⁶⁴ An attached PSYOP team broadcasts their messages via loudspeaker systems and handbills.⁶⁵

55. *Id.* para. 1-28(a)(3).

56. FM 3-13, *supra* note 4, para. F-38.

57. *Id.*

58. *Id.* paras. F-39, F-40.

59. See E-mail from MAJ Laura Klein, Advanced Operational Law Studies Fellow, to author, subject: IOWG (23 Dec. 2003) (on file with CLAMO) (discussing how the 173d Airborne Brigade conducted IO in OIF).

60. See E-mail from CPT Marie Anderson, Operational Law Attorney, CJTF-180, to author, subject: IOWG (6 Jan. 2004) (on file with CLAMO).

61. See Memorandum from CPT Jeffrey A. Miller for Staff Judge Advocate, 1st Armored Division, Baghdad, Iraq, subject: IO in the 3rd Brigade Combat Team, para. 6.a. (30 Dec. 2003) [hereinafter CPT Miller memo] (on file with CLAMO).

62. *Id.* paras. 2, 3. The IO officer has established a relationship with the professor at the Baghdad University, who edits newspaper articles in a manner consistent with Iraqi dialect. The IO officer also consults with the editor of a large Iraqi newspaper. *Id.* para. 3.

63. *Id.* para. 6.a.

64. *Id.* para. 4.

Finally, the brigade has been very successful in using their PSYOP and CA teams to quell protestors and disperse crowds. In these cases, they dispatch team members to the scene of disturbances to provide information and counter the usual inaccurate anti-Coalition message that initially incited the crowd.⁶⁶

Regardless of the theater of operation, at the brigade level, IO can be confusing to more junior judge advocates. During IO planning, brigade judge advocates should understand that they are expected to provide general advice on production of IO messages and ideas, and look for potential unintended consequences to U.S. forces of IO messages.⁶⁷ Additionally, judge advocates frequently review PSYOP products, although most products are generally created above the brigade level. Judge advocates also review suggested CA projects, such as those to rebuild schools and hospitals. Fiscal law and contracting advice are critical when targeting these projects.

Brigade judge advocates, and those at higher echelons of command, can also contribute to the IO campaign by ensuring that their own missions are woven into IO themes and objectives. A claims scenario illustrates this point. A brigade judge advocate learns that a tank from her unit on a routine night patrol, not related to combat activities, fails to stop at a stop sign crashing into a small tractor being driven by a farmer and his wife. The tractor is destroyed and the farmer's wife is killed. Local leaders and the press immediately denounce the incident and local friends and family stir up unrest in the brigade sector based on this incident. The farmer personally (accompanied by a local reporter) lodges a complaint with the local commander regarding the loss of his tractor and his wife's death. The commander dispatches his judge advocate, who has been appointed as a Foreign Claims Commission, to investigate the incident and determine what, if any, payments are appropriate based on the farmer's claim. The farmer and the local press are detected targets at this stage of the non-lethal targeting process and added to the IO target synchronization matrix. The judge advocate determines the claim may be paid under the Foreign Claims Act, and delivers an offer to the farmer. The farmer accepts and tells his friend that the U.S. made him whole again (as best it could) with a claims payment. Brigade patrols meeting and talking to the local population assess the public reaction to the United States' actions. What a judge advocate regards as a routine claim, is an integral part of the IO targeting process and campaign.

Another example of how judge advocates can contribute to IO is the *Army Regulation (AR) 15-6*⁶⁸ investigatory process. The following scenario illustrates this contribution. A U.S.

Soldier fires into a vehicle at a checkpoint killing its allegedly innocent occupants—two local teenage males. Local leaders and the press immediately denounce the United States' action and the local media publish negative reports in the brigade AO. The brigade adds the leaders and media (because of their influence on the local populace) to the IO targeting synchronization matrix. This is the detect phase of D3A targeting. The brigade commander immediately initiates, with guidance from his judge advocate, an *AR 15-6* investigation. The investigation reveals the car's teenage occupants were known members of a local paramilitary organization and the car trunk contained an unexploded improvised explosive device. The judge advocate reviews the *AR 15-6* report of investigation and finds it to be legally sufficient. The judge advocate then advises the brigade PAO to publish the results of the investigation in the locally produced brigade newsletter, which is delivered to brigade Soldiers, CA, and PSYOP teams (after the judge advocate reviews it). This is the deliver phase of targeting, and the delivery platforms are Soldiers, CA, and PSYOP. Brigade patrols and local bilateral meetings then assess whether the local population accepts the results of the investigation, or whether the leaders and press need to be re-engaged to further reduce the tensions created by the shooting incident. What a judge advocate may initially view as a routine investigation is actually an integral IO function.

Other JAGC disciplines fall into the same category. Rules of engagement drafting, cards, and training protect not only U.S. Soldiers, but also reduce the number of potentially negative ROE incidents involving locals (*e.g.*, checkpoint shootings and operations in religious buildings and areas). A reduction in negative ROE incidents through judge advocate drafting, education, and training directly affects a brigade's ability to win the hearts and mind of the local population. It also satisfies a likely IO targeting objective aimed at influencing the populace to support the United States and not paramilitaries.

Once brigade judge advocates understand targeting, IO, and how their missions relates to IO, they can use this common language to communicate effectively with commanders and staff. A large portion of the judge advocates' tasks at the brigade level can be packaged within the IO targeting process and campaign. The above explanation of IO in relation to brigade legal functions should help junior judge advocates understand IO. Also, packaging legal skills to a commander and staff using the D3A and IO targeting methodology lends additional credibility to an already trusted advisor.

65. *Id.* para. 5.

66. *Id.* para. 6.b.

67. *Id.* para. 7.a.

68. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICER AND BOARDS OF OFFICERS (30 Sept. 1996).

Conclusion

Joint and Army doctrine recognizes that IO involves complex legal considerations that require the advice of judge advocates. To properly provide this advice, judge advocates not only must understand legal issues that impact IO, but must be familiar with IO planning and execution and how they fit into

the process. To effectively participate in IOWGs and other effects-based mission planning, they need to understand the MDMP process and doctrinal targeting concepts. As reflected in current full-spectrum operations, IO is integral to winning the hearts and minds of the local population. Once judge advocates understand IO and the planning process, they can play a very important role in accomplishing their unit's mission.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. 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 non-unit reservists, through the U.S. Army Personnel Center (ARPER-CEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA 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, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2003 - September 2005)

Course Title	Dates	ATRRS No.
GENERAL		
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 8 October 04 (Phase I - Ft. Lee) 8 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 28 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
168th Basic Course	13 September - thru TBD (Phase I - Ft. Lee) TBD (Phase II - TJAGSA)	(5-27-C20)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)

14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
182d Senior Officers Legal Orientation Course	17 - 21 May 04	(5F-F1)
183d Senior Officers Legal Orientation Course	13 - 17 September 04	(5F-F1)
184th Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185th Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186th Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187th Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)
188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2004 Reserve Component Judge Advocate Workshop	19 - 22 April 04	(5F-F56)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)

2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)
15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOC	25 October - 10 November 04	
5th 27D ANCOC	10 - 28 January 05	
6th 27D ANCOC	25 April - 13 May 05	
7th 27D ANCOC	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)

JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)
54th Legal Assistance Course	10 - 14 May 04	(5F-F23)
55th Legal Assistance Course	1 - 5 November 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2004 USAREUR Administrative Law CLE	13 - 17 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 16 September 05	(5F-F24E)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2005 PACOM Income Tax CLE	3 - 7 January 05	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
2d Ethics Counselors Course	12 - 16 April 04	(5F-F202)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
154th Contract Attorneys Course	28 February - 11 March 05	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2004 Government Contract Law Symposium	7 - 10 December 04	(5F-F11)
68th Fiscal Law Course	26 - 30 April 04	(5F-F12)
69th Fiscal Law Course	3 - 7 May 04	(5F-F12)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	2 - 4 June 04	(5F-F101)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	

CRIMINAL LAW

10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
47th Military Judge Course	26 April - 14 May 04	(5F-F33)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24th Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)

28th Criminal Law New Developments Course	15 - 18 November 04	(5F-F35)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL LAW

4th Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
1st Basic Intelligence Law Course (TJAGSA)	28 - 29 June 04	(5F-F41)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)
1st Advanced Intelligence Law (National Ground Intelligence Center)	30 June - 2 July 04	(5F-F43)
2d Advanced Intelligence Law	29 June - 1 July 04	(5F-F43)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84th Law of War Course	11 - 15 July 05	(5F-F42)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44th Operational Law Course	8 - 19 August 05	(5F-F47)
2005 USAREUR Operational Law CLE	10 - 14 January 05	(5F-F47E)

3. Civilian-Sponsored CLE Courses

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys
in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar
Association
Committee on Continuing Professional
Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990	IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973	LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747	LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662	MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of
Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2004**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2005 ("2005 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2005 JAOAC will be held in January 2005, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2004). If the student receives notice of the need to re-do any examination or exercise after 1 October 2004, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2004 will not be cleared to attend the 2005 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerkules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years, four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 00 - 31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 02 - 31 Jan 05 and every thirty-six months thereafter).
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.

Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.	Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/new-flabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.	Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.	Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_XXX.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.	Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: July.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.	Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.	Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.

Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobaracle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.	New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana-bar.org/	-Fifteen hours per year. -Reporting date: 1 March.			
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org/	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.	North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.			
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.	North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
			Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
			Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.

Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.	Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not practicing in state. -Reporting date: 31 January.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec.	Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.	Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 31 October.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.	Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.	West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http://www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.	Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http://www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.

Wyoming

CLE Program Director
WY State Board of CLE
WY State Bar
P.O. Box 109
Cheyenne, WY 82003-0109
(307) 632-9061
<http://www.wyomingbar.org>

-Fifteen hours per year,
one hour in ethics.
-Reporting date: 30 January.

* Military exempt (exemption must be declared with state)
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2003-2004 Academic Year)

<u>DATE</u>	<u>TRNG SITE/HOST UNIT</u>	<u>GENERAL OFFICER AC/RC</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
17-18 Apr 04	Indianapolis, IN INARNG		Administrative Law, Criminal Law	COL George C. Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
24-25 Apr 04	Boston, MA 94th RSC		Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil

* Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Cur-

rent Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703) 767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

	Contract Law	AD A255346	Reports of Survey and Line of Duty Determinations, JA-231 (2002).
AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.	AD A347157	Environmental Law Deskbook, JA-234 (2002).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.	AD A377491	Government Information Practices, JA-235 (2000).
AD A265777	Fiscal Law Course Deskbook, JA-506-93.	AD A377563	Federal Tort Claims Act, JA 241 (2000).
	Legal Assistance	AD A332865	AR 15-6 Investigations, JA-281 (1997).
AD A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).		Labor Law
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).	AD A360707	The Law of Federal Employment, JA-210 (1998).
AD A326002	Wills Guide, JA-262 (1997).	AD A360707	The Law of Federal Labor-Management Relations, JA-211 (1999).
AD A346757	Family Law Guide, JA 263 (1998).		Professional Publications
AD A384376	Consumer Law Guide, JA 265 (2000).		
AD A372624	Uniformed Services Worldwide Legal Assistance Directory, JA-267 (1999).	AD A332958	Military Citation, 8th ed. 2003.
AD A360700	Tax Information Series, JA 269 (2002).		Criminal Law
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).	AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).	AD A303842	Trial Counsel and Defense Counsel Handbook, JA-310 (1995).
AD A329216	Legal Assistance Office Administration Guide, JA 271 (1997).	AD A302445	Nonjudicial Punishment, JA-330 (1995).
AD A276984	Deployment Guide, JA-272 (1994).	AD A302674	Crimes and Defenses Deskbook, JA-337 (1994).
AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274 (2002).	AD A274413	United States Attorney Prosecutions, JA-338 (1994).
			International and Operational Law
AD A326316	Model Income Tax Assistance Guide, JA 275 (2001).	AD A377522	Operational Law Handbook, JA-422 (2003).
AD A282033	Preventive Law, JA-276 (1994).		

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200 (2000).
AD A327379	Military Personnel Law, JA 215 (1997).

3. Regulations and Pamphlets

The following provides information on how to obtain *Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars*.

(1) The United States Army Publications Distribution

Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. Consult *Department of the Army (DOA) Regulation 25-30, The Army Publishing Program* (15 Jan. 2004). The U.S. Army Publishing Agency web site provides administrative departmental publications and forms to include Army regulations, circulars, pamphlets, optional forms, standard forms, Department of Defense (DOD) forms and Department of the Army forms. The web site to access the departmental publications and forms is <http://www.apd.army.mil/>. Consult Table 5-1, *AR 25-30*, for official departmental publications web sites.

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(b) Follow the link that reads “Enter JAGCNet.”

(c) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(d) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(e) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(f) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(g) Once granted access to JAGCNet, follow step (c), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The following is a current list of TJAGSA publications available in various file formats for downloading from the LAAWS XXI JAGCNet at www.jagcnet.army.mil. These publications are available also on the LAAWS XXI CD-ROM set in PDF, only.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA 200	June 2000	Defensive Federal Litigation, January 2000.
JA 210	October 2000	Law of Federal Employment, September 2000.
JA 211	August 2001	The Law of Federal Labor-Management Relations, August 2001.

JA 215	September 2000	Military Personnel Law, June 1997.	JA 274	November 2002	Uniformed Services Former Spouses' Protection Act, August 2002.
JA 221	June 2000	Law of Military Installations Deskbook, September 1996.	JA 275	June 2001	Tax Assistance Program Management Guide, June 2001.
JA 230	June 2000	Morale, Welfare, Recreation Operations, January 1998.	JA 280	April 2002	Administrative & Civil Law Basic Course Deskbook, (Vols. I & II), March 2002.
JA 231	November 2002	Reports of Survey and Line of Duty Determinations Guide, September 1992.	JA 281	June 2000	AR 15-6 Investigations, December 1998.
JA 234	October 2002	Environmental Law Deskbook, June 2002.	JA 320	May 2000	Senior Officer's Legal Orientation Criminal Law Text, November 1995.
JA 235	May 2000	Government Information Practices, March 2000.	JA 301	May 2000	Unauthorized Absences, August 1995.
JA 241	October 2000	Federal Tort Claims Act, May 2000.	JA 330	May 2000	Nonjudicial Punishment Programmed Text, August 1995.
JA 250	September 2000	Readings in Hospital Law, May 1998.	JA 337	May 2000	Crimes and Defenses Deskbook, July 1994.
JA 260	August 2000	Soldiers' and Sailors' Civil Relief Act Guide, July 2000.	JA 422	October 2002	Operational Law Handbook, June 2002.
JA 261	September 2000	Real Property Guide, December 1997.	JA 501	July 2003	151st Contract Attorneys Course Deskbook, Vols. I & II, August 2003.
JA 263	August 2000	Family Law Guide, May 1998.	JA 506	March 2002	62nd & 63rd Fiscal Law Course Deskbook, March 2002.
JA 265	October 2000	Consumer Law Guides, September 2000.			
JA 267	May 2000	Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory, November 1999.			
JA 269	February 2003	Tax Information Series, December 2002.			
JA 270	August 2000	The Uniformed Services Employment and Reemployment Rights Act Guide, June 1998.			
JA 271	August 2000	Legal Assistance Office Administration Guide, August 1997.			
JA 272	November 2001	Legal Assistance Deployment Guide, February 1994.			

6. TJAGSA Legal Technology Management Office (LTMO)

The LTMO continues to improve capabilities for faculty and staff. We have installed new computers throughout the School, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, 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 Legal Technology Management Office at (434) 971-3264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribu-

tion of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.Lavering@hqda.army.mil.

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US Army
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