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**From West Point to Michigan to China:
The Remarkable Career of Edward Hamilton Young (1897–1987)**

*Fred L. Borch
Regimental Historian & Archivist*

Prior to World War II, there was no such thing as military legal education, and uniformed lawyers serving in The Judge Advocate General's Department (JAGD) learned "on the job." The rapid expansion of the Army after the Japanese attack on Pearl Harbor—from 1.6 million Soldiers to a force of 8 million men and women—caused a complementary explosion in the number of Army judge advocates, and a realization that "on the job" legal education was too slow and inconsistent for wartime. As a result, Major General (MG) Myron C. Cramer, who had assumed duties as The Judge Advocate General (TJAG) just one week prior to the Pearl Harbor Attack, established a Judge Advocate General's School, U.S. Army (TJAGSA) at the University of Michigan. Cramer also selected Colonel (COL) Edward "Ham" Young, who had previously taught law at West Point, to take charge of this first-ever school for the education and training of Army lawyers. This is the story of Young's remarkable three year tour as the first TJAGSA Commandant, and his equally remarkable follow-on assignment as the theater judge advocate for all U.S. military personnel in China.

Born in Milwaukee, Wisconsin on 16 June 1897, Edward Hamilton "Ham" Young spent a few years in San Francisco before moving with his parents to Washington, D.C. After attending elementary and high school in D.C., Young wanted to follow his older brother, Cassin, to the U.S. Naval Academy (USNA).¹ He applied for an

appointment as a midshipman but was rejected "because he had flat feet and wouldn't be able to stand watch."² As a result, Ham Young applied to the U.S. Military Academy (USMA) at West Point. Apparently the Navy's view on Young's feet was not dispositive, since he was admitted as a cadet in June 1917. When he was later commissioned as an infantry second lieutenant, Young's naval officer brothers (a younger sibling also was a USNA graduate) teased him about being unfit to stand watch on a ship's bridge but nonetheless sufficiently healthy to go to the field.³

Upon graduating from West Point, then-Second Lieutenant Young deployed to Europe, where "he served as an observer of Belgian, French and Italian battle fronts and visited the Army of Occupation in Germany."⁴ When he returned from Europe, Young completed the Basic Infantry Officers Course at Fort Benning, Georgia, and then served in a variety of company, battalion, and regimental assignments in the Philippines and the United States.

In 1929, Young was given command of the Army War College Detachment in Washington, D.C., with the additional duty of White House aide. After serving in the White House in both Calvin Coolidge's and Herbert Hoover's administrations, Young was sent to Governors Island, New York, where he was the aide-de-camp to MG Dennis E. Nolan, the commanding general of First Army.

In 1933, the same year that he married Ellen Nolan, his boss's daughter, Young was sent to New York University School of Law, where he took a course in law and then went to West Point to be an instructor. As Brigadier General (Retired) Patrick Finnegan explains in his study of USMA's legal education, not all Law Department instructors were lawyers. On the contrary, some were line officers like Young. But, to "ensure high standards of teaching, the Law Department began sending its officers who were not lawyers to receive training at law schools."⁵ This explains why

¹ Cassin Young had a distinguished career as a naval officer and was awarded the Medal of Honor for his "distinguished conduct in action, outstanding heroism and utter disregard of his own safety" while commanding officer of the U.S. Ship (USS) *Vestal* at Pearl Harbor on 7 December 1941. His citation reads, in part:

Commander Young proceeded to the bridge and later took personal command of the three-inch antiaircraft gun. When blown overboard by the blast of the forward magazine explosion of the USS *Arizona*, to which the USS *Vestal* was moored, he swam back to his ship. The entire forward part of the USS *Arizona* was a blazing inferno with oil afire on the water between the two ships; as a result of several bomb hits, the USS *Vestal* was afire in several places, was settling and taking on a list. Despite severe enemy bombing and strafing at the time, and his shocking experience of having been blown overboard, Commander Young, with extreme coolness and calmness, moved his ship to an anchorage distant from the USS *Arizona*, and subsequently beached the USS *Vestal* upon determining that such action was required to save his ship. Although he survived the Japanese attack on Hawaii, Cassin Young was killed in action at Guadalcanal less than a year later, in November 1942.

Medal of Honor Recipients, World War II (T–Z), Ctr. of Military History, available at <http://www.history.army.mil/html/moh/wwII-t-z.html> (last visited Aug. 14, 2012).

² M.S. Young, *Edward Hamilton Young*, ASSEMBLY, Sept. 1990, at 154.

³ *Id.*

⁴ *Id.*

⁵ Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 120 (2004).

Young took a course of law in New York City before joining the Law Department faculty. While at West Point, Young showed a keen interest in legal research and writing, and authored two textbooks on constitutional law. His *Constitutional Powers and Limitations* was later adopted as “the official text on constitutional law at the Academy.”⁶

In 1936, Young was detailed to the JAGD and sent to New York to complete his law degree. After graduating in 1938, and passing the New York bar, Young returned to West Point’s Law Department to resume his duties as an Assistant Professor of Law. At the conclusion of his USMA tour of duty, now–Lieutenant Colonel Young was reassigned to Washington, D.C., where he joined The Judge Advocate General’s Office as the deputy chief of the Military Affairs Division.⁷ He was promoted to COL in early 1942.

With the entry of the United States into World War II, and the expansion of the JAGD, the Army approved the opening of TJAGSA on the campus of the National University School of Law located on Thirteenth Street, Washington, D.C. Given COL Young’s recent teaching experiences at West Point, and his presence in Washington, it made perfect sense for MG Cramer⁸ to select Young to be the first commandant of the school.

While TJAGSA opened on 9 February 1942, MG Cramer and others soon realized that D.C. “was not an ideal wartime location” for “basic, specialized and refresher training for active duty military personnel. . . .”⁹ The chief problem was insufficient classroom space and, as a result, TJAGSA moved to the University of Michigan’s “Law Quadrangle” in September 1942. Colonel Young went with it and now was consumed with setting up a “regular program of instruction . . . to train attorneys in all areas of military law and to introduce those who were coming directly from their civilian professions to military life.”¹⁰ Since no school for Army lawyers had existed previously, Young had no standards or precedents to guide him. Yet he successfully planned, organized and administered a comprehensive course of instruction. Between February 1942, when COL Young arrived in Ann Arbor, and December 1944, when he turned over the school to a new commandant, Young and his faculty trained more than 1,700 officers and officer candidates to be judge advocates. As this constituted two-

thirds of the active duty strength of the JAGD,¹¹ it was a remarkable achievement by any measure and explains, at least in part, why the news media referred to TJAGSA as the “Lawyers’ West Point.”¹² The legal profession also recognized COL Young’s contribution to the law, as evidenced by his being awarded the honorary degree of Doctor of Laws by the University of Miami (Coral Gables, Florida).¹³

While serving as the commandant, COL Young was also appointed Professor of Military Science and Tactics at the University of Michigan by the commanding general of the Sixth Service Command. As a result, Young “enjoyed the distinction of being one of the few officers in the JAGD to exercise functions of command over troops other than those of the Department.”¹⁴

In December 1944, COL Young left Michigan for Nanking, China, where he assumed duties as the theater judge advocate for the U.S. Forces in China and legal advisor to the U.S. Embassy. As the United States and its Pacific allies began investigating Japanese civilian and military personnel for war crimes, COL Young also became the legal advisor to the Far East United Nations War Crimes Commissions. Young remained in China until November 1947, when he returned to the United States. His tenure in China had been unique in the history of the Corps, as no other judge advocate had served as theater judge advocate before Young—and no one followed him in the assignment. When he left China, COL Young made history again as the only Army lawyer to be awarded three Chinese decorations: the Special Collar of the Order of Brilliant Star, Special Breast Order of the Cloud and Banner, and Special Breast Order of Pao Ting.¹⁵ Young’s report on his experiences in China remains the only official record of Army legal operations in the Far East during this turbulent period in history.¹⁶

Assigned to the Office of The Judge Advocate General in the Pentagon, Young served first as Chief, War Crimes Branch, Civil Affairs Division. Slightly more than a year later, in January 1949, Young left the Pentagon for Fort Meade, Maryland, where he was assigned as the Staff Judge Advocate (SJA), Second Army. He picked up an additional

⁶ Young, *supra* note 2, at 154.

⁷ Captain George P. Forbes, Jr., *The Judge Advocate General’s School*, JUDGE ADVOCATE J., Mar. 1945, at 48.

⁸ JUDGE ADVOCATE GENERAL’S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 161 (1975) (providing more information on Major General Myron C. Cramer).

⁹ *Id.* at 186.

¹⁰ *Id.* at 187.

¹¹ *Id.*

¹² Forbes, *supra* note 7, at 48.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Young, *supra* note 2, at 155.

¹⁶ EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, 1 JANUARY 1945 TO 10 JUNE 1947 (1948).

duty the following year, when TJAGSA was re-activated at Fort Myer, Virginia. TJAGSA had closed its doors in Ann Arbor in 1946, but with the outbreak of the Korean War, MG Ernest M. “Mike” Brannon, then serving as TJAG, decided to re-start the school and asked COL Young to serve as its commandant.

Colonel Ham Young retired as Second Army SJA in August 1954. Given that he had graduated from USMA in November 1918, he had served more than thirty-five years on active duty—an unusual length of service for an officer who did not reach flag rank.

In retirement, Young served as the secretary to the Board of Commissioners, U.S. Soldiers Home, Washington, D.C. After leaving this position in 1965 and enjoying his

retirement in Virginia until 1972, COL Young and his wife moved to Vero Beach, Florida. He died at his home there in November 1987 and is interred in Arlington National Cemetery.¹⁷ Today, Young has not been forgotten and his vision of an educational curriculum that transforms civilian attorneys into officers and military lawyers continues at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

<https://www.jagcnet.army.mil/8525736A005BE1BE>

¹⁷ Young, *supra* note 2, at 155.

A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations

Major Aimee M. Bateman*

*This is about our claims to moral leadership in the world. We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.*¹

—Barack Obama

I. Introduction

Civilians on the battlefield are not a new phenomenon. Contractors have accompanied our troops in the field since the Revolutionary War, helping them fight and win our nation's wars.² What has changed in recent years is the staggering number of civilians, from both the United States and other countries, who support the U.S. Department of Defense (DoD) mission as contract personnel. Historically, contractors made up a small percentage of the deployed force, generally between five and twenty-five percent.³ As of March 31, 2011, contractors made up fifty-two percent of the DoD workforce in Iraq and Afghanistan.⁴

Despite the historical presence and growing number of civilians accompanying U.S. forces overseas, there has not always been a complete jurisdictional net to capture these civilians' crimes. Until 2000, there was a jurisdictional gap allowing some civilians sent overseas as a result of their employment or association with the military to get away with murder—literally, in some cases.⁵

When Congress passed the much-anticipated Military Extraterritorial Jurisdiction Act of 2000⁶ (MEJA), the jurisdictional net expanded vastly with regard to civilians accompanying American troops overseas.⁷ As of February 2, 2012, more than fifty individuals have been prosecuted under MEJA, to include twenty-five contractors.⁸ All twenty-five of the contractor prosecutions have occurred since 2007.⁹ Commanders and their legal advisors need to understand this tool for holding contractors and DoD employees accountable for serious criminal acts. They must be familiar with the process and understand the respective roles of commanders, lawyers, and law enforcement.

This primer addresses the unique challenges of referring a case for prosecution under MEJA from an area of contingency operations. After a brief discussion of the history of MEJA in Part II and of the legislation itself in Part III, Parts IV and V discuss MEJA's relevance and applicability and answer common questions from the

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¹ Then-Senator Barack Obama, Remarks at Foreign Policy Town Hall Meeting, Iowa City, Iowa (Oct. 3, 2007).

² MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 1 (May 13, 2011) ("During the Revolutionary War, the Continental Army relied on contractors to provide such goods and services as transportation and engineering services, construction, clothing, and weapons. Since then, advances in warfare and technology have expanded the functions and responsibilities of contractors in military operations.") (citations omitted).

³ Colonel Steven J. Zamparelli, *Contractors on the Battlefield: What Have We Signed Up For?*, AIR FORCE J. LOGISTICS, vol. 23, no. 3, Fall 1999, at 11, 12.

⁴ SCHWARTZ & SWAIN, *supra* note 2, at 6 (154,592 contractor personnel in Iraq and Afghanistan, compared to 145,460 uniformed personnel).

⁵ See *Reid v. Covert*, 354 U.S. 1 (1957) (ordering the release of Mrs. Clarice Covert and Mrs. Dorothy Smith, both whom were convicted at court-martial of murdering their servicemember husbands). See discussion *infra* Part II.A.

⁶ 18 U.S.C. §§ 3261–3267 (2011).

⁷ *Id.*

⁸ Interview with Christine Duey, Senior Trial Att'y, Human Rights & Special Prosecutions Section, Crim. Law Div., U.S. Dep't of Justice, in Wash., D.C. (Feb. 2, 2012) [hereinafter Duey Interview].

⁹ *Id.* Prior to 2007, there was only one post-9/11 prosecution of a contractor accompanying troops in contingency operations, *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009) (conviction for 2003 assault upheld) (assault with a dangerous weapon in Afghanistan). But, this was not a Military Extraterritorial Jurisdiction Act (MEJA) prosecution. Duey Interview, *supra* note 8. Therefore, there are some, even very recent, published reports that MEJA is hardly ever used to prosecute contractors. See, e.g., LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS 55 (2011) ("To date, very few contractors have faced criminal proceedings of any kind, despite numerous incidents of reported abuse."). See also discussion *infra*, Part IV.A and text accompanying notes 61–64 (perceptions about "unaccountable" contractors).

perspective of a military practitioner. Part VI analyzes the interplay between MEJA and Article 2(a)(10), Uniform Code of Military Justice (UCMJ),¹⁰ as well as the jurisdictional gap that still exists for civilians working for the U.S. government overseas. The timeline in Appendix A offers a linear perspective of the evolution of the law and policy discussed in this article.

II. Before MEJA¹¹

*If th' assassination
Could trammel up the consequence, and catch
With his surcease success—that but this blow
Might be the be-all and the end-all!*¹²

Getting away with murder is not just a story line of British theater, but was once a reality in overseas military communities. There was no trammel in U.S. law by which to catch and punish civilians who committed crimes while living overseas due to their association with the U.S. military.¹³ Attempts to prosecute such civilians in both military courts and U.S. federal courts developed a clear body of law delineating the limits of military courts and extraterritorial civilian jurisdiction and shaping the legislation that would become MEJA.

A. Civilians in Military Courts

The seminal Supreme Court opinion in this area decided two cases together at a rehearing in 1957.¹⁴ The first case was *Reid v. Covert* in which Mrs. Clarice Covert killed her husband, a sergeant in the Air Force, at an airbase in England.¹⁵ In the second case, *Kinsella v. Kruger*, Mrs. Dorothy Smith killed her husband, an Army officer, at a post

in Japan.¹⁶ Although both convictions were initially upheld,¹⁷ at the rehearing the Court decided that “Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities.”¹⁸ The Court stated, “The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them.”¹⁹ The Court ordered both women released from custody.²⁰

In *Reid*, the Court also mentions *United States ex rel. Toth v. Quarles*, decided by the Court two years earlier.²¹ Not only were civilian family members overseas during peacetime outside court-martial jurisdiction, but, as *Toth* states, former servicemembers who committed crimes during their terms of service and then left the service were also outside court-martial jurisdiction.²²

Notwithstanding these decisions, Congress retained some authority to subject civilians to prosecution under the UCMJ. Since its inception in 1950,²³ UCMJ jurisdiction has included, “[i]n time of war, all persons serving with or accompanying an armed force in the field.”²⁴ But, in 1970, the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held that for the purpose of exerting UCMJ jurisdiction over civilians, “in time of war” means “a war formally declared by Congress.”²⁵ With this decision, court-martial jurisdiction over civilians was effectively eliminated.

B. Overseas-Civilians in U.S. Federal Courts

1. Extraterritorial Application of the Law

The reach of U.S. law is, in general, limited to the territorial boundaries of the United States.²⁶ But, “Congress has the authority to enforce its laws beyond the territorial

¹⁰ 10 U.S.C. § 802(a)(10) (2011) (amended to extend Uniform Code of Military Justice (UCMJ) jurisdiction to “persons serving with or accompanying an armed force in the field” during “a contingency operations,” not just “in a time of declared war,” resulting in an increased jurisdictional overlap with MEJA).

¹¹ See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (Fall 2001) (providing a complete and thorough historical look at the legal landscape in the decades leading up to MEJA). Mr. Schmitt had a role in crafting MEJA and provides an in-depth discussion of the jurisdictional gap that preceded its enactment. *Id.* at 56.

¹² WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 7.

¹³ While overseas sovereigns may have had jurisdiction, they often declined prosecution. See discussion *infra* Part II.C.

¹⁴ *Reid v. Covert*, 354 U.S. 1, 3–4 (1957).

¹⁵ 351 U.S. 487 (1956).

¹⁶ 351 U.S. 470 (1956).

¹⁷ *Reid*, 354 U.S. at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 33.

²⁰ *Id.* at 40.

²¹ 350 U.S. 11 (1955).

²² *Id.* at 23 (“We hold that Congress cannot subject [ex-servicemen] to trial by [military] court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.”).

²³ Uniform Code of Military Justice, 64 Stat. 107 (1950) (current version at 10 U.S.C. ch. 47 (2011)).

²⁴ *Id.* at 109.

²⁵ *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970).

²⁶ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993).

boundaries of the United States.”²⁷ To overcome the presumption against extraterritoriality, this authority must be asserted explicitly in the law²⁸ or else the congressional intent must be inferable because “limiting the locus of [the] statute to U.S. territory would greatly curtail the scope and usefulness of the statute.”²⁹ When neither of these things is true, personal crimes such as “assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government” in order to be prosecuted.³⁰

2. Special and Maritime Territorial Jurisdiction

The “territorial jurisdiction of the government” is referred to as “Special Maritime and Territorial Jurisdiction of the United States” (SMTJ) under the Federal Criminal Code.³¹ Included in SMTJ are

[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.³²

In 1999, the U.S. Attorney’s Office in the Eastern District of New York relied on this jurisdictional provision to prosecute James Gatlin, a civilian, who was living on property leased by the U.S. military in Germany.³³ In *United States v. Gatlin*, which served as the final salvo to Congress from the judiciary regarding the prosecution of civilians accompanying the military overseas,³⁴ the Second Circuit

concluded that this provision does not apply extraterritorially.³⁵ Although Mr. Gatlin pled guilty to having sex with his 13-year-old stepdaughter,³⁶ his conviction did not stand. Mr. Gatlin’s crimes were outside the jurisdiction of the U.S. federal courts and, as the court stated, “Our decision today is only the latest consequence of Congress’s failure to close this jurisdictional gap.”³⁷

C. United States Civilians in Foreign Courts

*All that remains is for the dependents of our soldiers to be prosecuted in foreign courts, an unhappy prospect not only for them but for all of us.*³⁸

Even more than an “unhappy prospect,”³⁹ prosecution in foreign courts has proved to be an unlikely one. Even if it were in the sovereign interest of the United States to allow the prosecution of American citizens accompanying troops overseas in foreign courts,⁴⁰ foreign countries are generally not interested in prosecuting Americans when the victims or damaged property are not of the host country.⁴¹ Additionally, some countries in which the United States military and accompanying civilian contractors operate, such as Somalia,

³⁵ *Id.* at 210.

³⁶ *Id.*

³⁷ *Id.* at 223.

³⁸ *Reid v. Covert*, 354 U.S. 1, 90 (1957).

³⁹ *Id.*

⁴⁰ The United States generally retains jurisdiction over its citizens through a Status of Forces Agreement (SOFA) with every nation in which U.S. troops are present. The United States is currently a party to more than 100 agreements that may be considered SOFAs. R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (Jan. 5, 2011). For example, in Afghanistan, jurisdiction over U.S. personnel under NATO authority is dictated by a “Military Technical Agreement,” which states: “The ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan.” Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Afg.-ISAF, Jan. 4, 2002, 41 I.L.M. 1032.

⁴¹ The General Accounting Office made this clear in a 1979 report to Congress. This report revealed that in 1977, host nations waived their right to prosecute American civilians who were accompanying U.S. Forces overseas in fifty-nine serious cases (to include rape, manslaughter, arson, robbery, and burglary), and in fifty-four less serious cases (involving simple assault, drug abuse, and drunkenness). U.S. GOV’T ACCOUNTABILITY OFFICE, FPCD 79-45, SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DoD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED 11 (1979).

²⁷ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

²⁸ *Id.* (“[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

²⁹ *United States v. Villanueva*, 408 F.3d 193, 197–98 (5th Cir. 2005).

³⁰ *United States v. Bowman*, 260 U.S. 94, 98 (1922).

³¹ 18 U.S.C. § 7 (2011).

³² *Id.* § 7(3).

³³ *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000).

³⁴ *Id.* at 208 (“With regret . . . we reverse the judgment of conviction and dismiss the indictment. At the same time, because the existence of this jurisdictional gap is an issue that we believe warrants serious congressional consideration, we direct the Clerk of Court to forward a copy of this opinion to the Chairmen of the House and Senate Armed Services and Judiciary Committees.”).

have no functioning government.⁴² The same was the case in the Balkans in the late 1990s.⁴³

This issue was highlighted by an incident that occurred in the Balkans in 1999. One of the biggest participants in DoD operations in the region was DynCorp International.⁴⁴ Some DynCorp contractors were buying and trading young women, some as young as twelve years old.⁴⁵ One DynCorp supervisor even videotaped himself raping a woman.⁴⁶ No one was ever prosecuted for these crimes. *Gatlin* and the non-prosecution of DynCorp personnel were soon followed by MEJA, closing a jurisdictional gap that had existed for forty-three years.⁴⁷

III. The Military Extraterritorial Jurisdiction Act of 2000 and Subsequent Amendment

*The inability of the United States to appropriately pursue the interests of justice and hold its citizens criminally accountable for offenses committed overseas has undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas.*⁴⁸

Congress finally answered the call to close this jurisdictional gap when it passed MEJA on November 22,

2000.⁴⁹ Congressional debate on MEJA included the assertion that the act would cover *all* individuals who were overseas because of their connection with the military, and make them accountable for criminal acts committed during that time of association.⁵⁰ After the act was passed, however, it became clear that the trammel was not complete—there were still holes in the jurisdictional net. These became apparent in the aftermath of the Abu Ghraib detainee abuse scandal.⁵¹

After the U.S. Attorney General announced that the Department of Justice (DOJ) was considering prosecuting contractors under MEJA for allegedly abusing detainees at Abu Ghraib,⁵² reports emerged that the Central Intelligence Agency (CIA) and Department of Interior employed the contractors in question.⁵³ Because the contractors were not employees “of a Department of Defense contractor,”⁵⁴ MEJA did not apply.⁵⁵

The fix to this jurisdictional hole came in the Fiscal Year 2005 National Defense Authorization Act (NDAA), in the unambiguously titled section, “Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas.”⁵⁶ President George W. Bush signed the bill into law on October 28, 2004, and MEJA was amended to its current form. This amendment broadened the definition of “employed by the Armed Forces outside the United States” to include contractors who are employees of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”⁵⁷

⁴² *Somalia Profile*, BBC NEWS AFRICA, <http://www.bbc.co.uk/news/world-africa-14094503> (last updated Apr. 17, 2013) (“Somalia has been without an effective central government since President Siad Barre was overthrown in 1991.”).

⁴³ John Kifner, *Crisis in the Balkans: Government; Kosovo Rebels Move Into Towns; Violence Is Reported*, N.Y. TIMES, June 19, 1999, <http://www.nytimes.com/1999/06/19/world/crisis-balkans-government-kosovo-rebels-move-into-towns-violence-reported.html> (“‘Of course we don’t have laws, we don’t have written norms,’ [a Kosovo Liberation Army member] said, ‘but we have enthusiasm for building a new state.’”).

⁴⁴ Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 326 (2006) (DynCorp employees were in the Balkans on a fifteen-million-dollar-a-year Department of Defense (DoD) contract to assist with peacekeeping).

⁴⁵ K. Elizabeth Waits, *Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT’L & COMP. L. 493 (2006).

⁴⁶ P.W. Singer, *Peacekeepers, Inc.*, POL’Y REV., no. 119 (Jun. 1, 2003), available at <http://www.hoover.org/publications/policy-review/article/7437>.

⁴⁷ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

⁴⁸ *Hearing on H.R. 3380 Before the H. Subcomm. on Crime*, 106th Cong. 17 (2000) [hereinafter *MEJA Hearing*] (statement of Robert E. Reed, Esq., Assoc. Deputy Gen. Counsel, U.S. Dep’t of Def.).

⁴⁹ Pub. L. No. 106-523, 114 Stat. 2488 (2000).

⁵⁰ *MEJA Hearing*, *supra* note 48, at 5–6 (statement of Rep. Bill McCollum) (“The bill . . . would amend the Federal criminal code to apply it to persons who commit criminal acts while employed by or otherwise accompanying the U.S. Armed Forces outside of the United States. . . . Many of these civilians are nonmilitary employees of the Defense Department and contractors working on behalf of DOD.”) (emphasis added).

⁵¹ Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

⁵² Dan Eggen & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18. Senator Jeff Sessions, who proposed MEJA, also believed that contractors accused of crimes at Abu Ghraib could be prosecuted under MEJA. Mary Orndorff, *Law May Help Prosecute Civilians in Abuse Case*, BIRMINGHAM NEWS, May 5, 2004, available at 2004 WLNR 20550756.

⁵³ Alan F. Williams, *The Case For Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 61 (2010).

⁵⁴ Pub. L. No. 106-523, § 3267(1)(A), 114 Stat. 2488 (2000).

⁵⁵ 18 U.S.C. § 3261 (2011).

⁵⁶ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004).

⁵⁷ 18 U.S.C. § 3267(1)(A)(ii)(II).

With this amendment, federal prosecutors were now equipped with a jurisdictional net more extensive than ever before, one that finally captured *all* persons “employed by,” “otherwise accompanying,” or “working on behalf of DoD.”⁵⁸

IV. MEJA’s Current Relevance and Applicability

A. Contractor Presence Overseas

*[Afghan Minister of Interior Hanif] Atmar said there was a larger issue to consider. He understood that within DynCorp there were many “wonderful” people working hard, and he was keen to see proper action taken to protect them; but, these contractor companies do not have many friends. . . . [I]n Afghanistan, there is increasing public skepticism about contractors.*⁵⁹

As mentioned in Part I, contractors make up a bigger percentage of our forward deployed force than ever before.⁶⁰ Unfortunately, no matter how many “wonderful” contractors there are, the “bad” ones will draw attention of the media and international community, sometimes for years.⁶¹

“Unaccountable” has become a buzzword for commentators⁶² and government officials⁶³ who have been

critical of the so-called “outsourcing” of the U.S. mission overseas. In a world where perception is reality,⁶⁴ the only way to combat this perception is through consistent and vigorous enforcement of the law.⁶⁵

B. Isn’t MEJA a “DOJ Thing”? Why Should I or My Commander Care?

While DOJ prosecutes MEJA cases, DoD commanders, attorneys, and law enforcement play an important and prominent role in the process. As the DoD Associate Deputy General Counsel for Military Justice and Personnel Policy testified before the Senate in 2008, “The [DoD] has been instrumental in supporting past legislation and Federal district court prosecution of [DoD] civilian employees, [DoD] contractors, and their dependents who commit felony-level crimes when serving with or accompanying our Armed Forces outside the United States.”⁶⁶ Not only is the involvement of DoD personnel important, it is mandatory. The DoD has a thirty-three-page instruction that serves as regulatory guidance regarding criminal jurisdiction over those individuals who may be prosecuted under MEJA.⁶⁷ Commanders, judge advocates, and DoD law enforcement have mandatory reporting requirements and responsibilities

⁵⁸ See *supra* note 50 and accompanying text.

⁵⁹ *US Embassy Cables: Afghan Government Asks US to Quash “Dancing Boys” Scandal*, GUARDIAN (London), Dec. 2, 2010, <http://www.guardian.co.uk/world/us-embassy-cables-documents/213720>.

⁶⁰ See *supra* text accompanying note 4.

⁶¹ Stephen Lendman, *Unaccountable: Private Military Contractor Abuses*, THEPEOPLESVOICE.ORG (Jan. 18, 2012), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2012/01/18/unaccountable-private-military-contractor> (mentioning the Balkan DynCorp incident from 1999, discussion *supra* Part II.C, and the Abu Ghraib incident from 2003, discussion *supra* Part III).

⁶² See, e.g., DonnaMarie McKinnon, *Federal Civilian Criminal Prosecutions of Private Military Contractors: Inherent Legal Ethics Issues*, 24 GEO. J. LEGAL ETHICS 695, 711 (2011) (“Accountability [of contractors] through the United States criminal justice system, however, has been difficult to obtain.”); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 47 (2010) (“[W]e can conservatively estimate that nearly 500,000 civilian employees, dependents, and contractors of the U.S. government currently enjoy de facto immunity from meaningful criminal accountability. . . .”); Huma T. Yasin, *Playing Catch-Up: Proposing Status-Based Regulations to Bring Contractors Within the Purview of International and Domestic Law*, 25 EMORY INTL L. REV. 411, 464 (2011) (“[T]o date, no theory comprehensively addresses the legal accountability gap.”).

⁶³ See, e.g., Daniel I. Gordon, Adm’r, Office of Fed. Procurement Policy, Office of Mgmt. & Budget, *Holding Contractors Accountable*, OFFICE OF MGMT. & BUDGET (Nov. 15, 2011, 5:08 PM EDT),

<http://www.whitehouse.gov/blog/2011/11/15/holding-contractors-accountable>; Obama Quote, *supra* note 1; *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas By American Civilians in a Combat Environment: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 67 (2008) [hereinafter *Sexual Assault Hearing*] (statement of Rep. Ted Poe) (“While the Federal Government figures out who is responsible and who has jurisdiction, the assailants remain free and unaccountable for their crimes.”).

⁶⁴ Angela Snell, *The Absence of Justice: Private Military Contractors, Sexual Assault, and the U.S. Policy of Indifference*, 2011 U. ILL. L. REV. 1125, 1128 (2011) (“Stationed throughout the world, PMCs [Private Military Contractors] now operate, in effect, with legal immunity while the U.S. government sits idly by.”). Ms. Snell asserts, “The United States has sought to ensure PMC immunity from prosecution under international law, rather than imposing obligations on them.” *Id.* at 1147.

⁶⁵ *Holding Criminals Accountable: Extending Criminal Jurisdiction for Gov’t Contractors and Employees Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *CEJA Hearing*] (statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Crim. Div., U.S. Dep’t of Justice) (“[T]he Justice Department has successfully prosecuted numerous MEJA cases involving former [DoD] employees or individuals accompanying them overseas. . . . The Justice Department has also successfully prosecuted Defense Department contractors employed overseas. . . . The Justice Department also successfully and aggressively uses every other tool now available to us to prosecute crimes committed abroad by U.S. Government personnel and U.S. Government contractors (which can include both U.S. citizens and citizens of other countries).”).

⁶⁶ *Sexual Assault Hearing*, *supra* note 63, at 34 (prepared statement of Robert E. Reed, Esq., Assoc. Deputy Gen. Counsel, U.S. Dep’t of Def.).

⁶⁷ U.S. DEP’T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005) [hereinafter DoDI 5525.11].

with regard to gathering the necessary information for a MEJA prosecution.⁶⁸ If attorneys and investigators are not properly trained on the application of MEJA, the case will never make it to DOJ, the system will fail, and the perception of effective immunity for military contractors will continue to thrive.⁶⁹

C. Relevance Outside of Contingency Operations

The practice points in this article focus on prosecuting contractors who are employed by or supporting the mission of DoD in contingency operation. As noted in Part II, however, jurisdiction over family members is an important part of the history of MEJA. Jurisdiction over former servicemembers may be an important part of the future use of MEJA.

Many servicemembers could, due to normal attrition and the planned contraction of DoD, leave combat zones or overseas duty stations and enter civilian life almost immediately.⁷⁰ Therefore, the potential for former-servicemember prosecution is significant, and judge advocates should be mindful that they may be called upon to assist in such prosecutions by producing investigations, finding witnesses, or otherwise assisting DOJ in gathering information. While the application of MEJA to former servicemembers has been the subject of significant controversy,⁷¹ thus far, this application of MEJA has avoided judicial scrutiny.⁷²

⁶⁸ *Id.* para. 5. See also *infra* Appendix C.

⁶⁹ DoDI 5525.11, *supra* note 67, at 4 (“Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Department of Defense, the [Department of Justice], and the [Department of State].”).

⁷⁰ Chris Carroll, *Budget Ax falls On Army, Marines: DOD to Cut 100,000 Ground Troops But Protect Military Pay For Now*, STARS & STRIPES, Jan. 26, 2012, at 1, 4 (“Army end strength would fall over the next five years from roughly 562,000 to 490,000 soldiers while the Marine Corps would shrink from just more than 202,000 to 182,000 troops. In the process, the Army would cut at least eight of 45 brigade combat teams.”). Part of this plan is to deactivate two brigades that are currently stationed in Germany. Gen. Raymond Odierno, Army Chief of Staff, Remarks on Budget Impact to Army, Pentagon Press Conf. (Jan. 27, 2012) (transcript available at <http://www.army.mil/article/72688/Jan272012CSAremarksbudgetimpacttoArmybriefingatPentagon/>) (“They will come out of the force; they will not be restationed back in the United States.”).

⁷¹ See, e.g., First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT’L L. 2 (2009–2010) (“MEJA was never intended to be used [to prosecute former servicemembers].”); Olivia Zimmerman Miller, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court Is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOY. L. REV. 447 (2010).

⁷² See *United States v. Green*, 654 F.3d 637 (6th Cir. 2011), *cert. denied*, 2012 WL 33631 (U.S. Jan. 9, 2012) (No. 11-7511) (holding that prosecution of defendant in civilian justice system while coconspirators

V. MEJA in Practice

A. Before You Deploy: Read the Law, Understand the Process

Every judge advocate who expects to work overseas in the areas of military justice, trial defense, or contract law, or to supervise those who do, should read the full text of both MEJA⁷³ and DoD Instruction (DoDI) 5525.11.⁷⁴ The most important thing for judge advocates to understand is the referral process.⁷⁵ Appendices D and E of this article contain products and links to resources to assist a deployed legal office in developing internal MEJA case-processing system. Parts V.B and V.C will answer questions about the practical application of MEJA for a military practitioner.

B. The Basics

1. How Does MEJA Work?

No criminal acts are listed in MEJA. The applicable “bad acts” are found in Title 18, U.S. Code, Part I (Crimes).⁷⁶ Military Extraterritorial Jurisdiction Act simply says it is a crime for certain people to commit certain acts while outside the United States, if the act or acts they committed would have been a crime inside the United States.⁷⁷

An excellent explanation of how MEJA works, especially for judge advocates familiar with the Federal Assimilative Crimes Act⁷⁸ as a result of serving as special assistant U.S. attorneys (SAUSAs)⁷⁹ or from charging an

were prosecuted in military justice system did not offend equal protection and prosecution under the MEJA did not violate the Due Process clause).

⁷³ 18 U.S.C. §§ 3261–3267 (2011). See Appendix B (providing the full text of MEJA).

⁷⁴ DoDI 5525.11, *supra* note 67.

⁷⁵ This assertion is based on the author’s recent professional experience as Chief, Military Justice, for a deployed U.S. Army division headquarters [hereinafter Professional Experience].

⁷⁶ 18 U.S.C. pt. I (2011).

⁷⁷ *Id.* § 3261(a).

⁷⁸ *Id.* § 13.

⁷⁹ 28 U.S.C. § 543(a) (2011) (“The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires . . .”). See also U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-4.a (3 Oct. 2011) [hereinafter AR 27-10] (“Prosecutions in Federal court are a DOJ responsibility. Staff judge advocates or legal advisors often find it beneficial, however, to have one or more JA or DA civilian attorneys appointed as SAUSA under 28 USC 543 to prosecute crimes in which the Army has an interest.”).

offense under clause 3 of Article 134, UCMJ,⁸⁰ is contained in the House Judiciary Committee report that accompanied MEJA:

In many respects, a prosecution under section 3261 is similar to a prosecution under the Federal Assimilative Crimes Act (18 U.S.C. § 13). That statute makes it a Federal crime to commit an act on lands not within the jurisdiction of a state, commonwealth, territory, possession, or district of the United States that, while not expressly a Federal crime (i.e., made punishable by an act of Congress), would be punishable if committed within the jurisdiction of a state, commonwealth, territory, possession, or district. Persons who commit such acts can be prosecuted under 18 U.S.C. § 13 and, if found guilty in Federal court, are punished under Federal law. While no State law has been violated in such case, the elements of the State offense become part of the elements of the Federal crime charged. Indeed, in nearly all cases, Federal prosecutors reference the State statute in the document that charges the defendant with a violation of section 13. In a prosecution under section 3261, therefore, the elements of the crime that the defendant would have committed had the conduct occurred within the special maritime and territorial jurisdiction of the United States also would be elements of the crime under section 3261.⁸¹

As an example, count 1 of the indictment in *United States v. Brehm*⁸² reads,

On or about November 25, 2010, at Kandahar Airfield, Afghanistan, the defendant, SEAN THEODORE BREHM, did assault “J.O.” with a dangerous weapon, that is, a knife, with intent to do bodily harm, and without just cause or excuse. (In violation of Title 18, United States Code, Sections 113(a)(3) and 3261(a).)⁸³

⁸⁰ 10 U.S.C. § 934 (2011) (“crimes and offenses not capital, of which persons subject to this chapter may be guilty”).

⁸¹ H.R. REP NO. 106-778, pt. 1, at 15 (2000).

⁸² No. 1:11-CR-11 (E.D. Va. Mar. 30, 2011) (order denying motions to dismiss).

⁸³ Indictment at 2, *Brehm*, No. 1:11-CR-11.

While it is not necessary to charge a violation of the underlying offense (such as Section 113(a)(3), Assault, in the above example) along with Section 3261(a), doing so does “put the defendant on notice of the elements of the crime that the Government will attempt to prove and the maximum punishment that may be imposed for the violation of Section 3261.”⁸⁴

2. Proper Person

To prosecute any person under MEJA, the government must establish that the subject is “employed by or accompanying the Armed Forces outside the United States.” This is an element of the crime that must be proved beyond a reasonable doubt.⁸⁵ Proving this element is often very fact-intensive, especially if the subject is employed by some “other Federal agency”⁸⁶ and not by the DoD.⁸⁷ Therefore, the investigation should focus not only on proving the underlying criminal act, but also on establishing this vital jurisdictional element.⁸⁸

All contract personnel working overseas in an operational area (whether employed by the DoD or some other Federal agency) will be there pursuant to a Letter of Authorization (LOA).⁸⁹ The LOA, along with every contract within the chain of employment (i.e., between the employee and the subcontractor, the subcontractor and contractor, and the contractor and the DoD) should be obtained.⁹⁰ Obtaining these documents is essential to the prosecution because “[t]he contract is the only legal basis for the relationship between the [DoD] and the contractor.”⁹¹

⁸⁴ H.R. REP NO. 106-778, pt. 1, at 15 n.29 (2000), quoted in Schmitt, *supra* note 11, at 4 (the House report noted that it might be “helpful” to refer to the underlying crime in the indictment for this purpose).

⁸⁵ 18 U.S.C. § 3261(a)(1) (2011).

⁸⁶ *Id.* § 3267(1)(A)(ii)(II) and (iii)(II).

⁸⁷ Interview with Micah Pharris, Senior Trial Att’y, Human Rights and Special Prosecutions Sec., Crim. Law Div., Dep’t of Justice, in Wash., D.C. (Feb. 2, 2012) [hereinafter Pharris Interview].

⁸⁸ *Id.*

⁸⁹ 32 C.F.R. § 158.3 (2012) (“Letter of authorization (LOA). A document issued by a procuring contracting officer or designee that authorizes contractor personnel to accompany the force to travel to, from, and within an operational area, and outlines Government-furnished support authorizations within the operational area, as agreed to under the terms and conditions of the contract.”).

⁹⁰ Pharris Interview, *supra* note 87.

⁹¹ 32 C.F.R. § 158.6(a)(4).

a. Non-U.S. Citizens

The subject need not be a U.S. citizen to fall within MEJA's jurisdictional net. The only non-U.S. citizens who are explicitly excluded from the application of MEJA are persons employed by or supporting the DoD mission who are nationals of or ordinarily live in the country in which the crime occurs.⁹²

Including third-country nationals (TCNs) within the jurisdictional reach of MEJA for crimes committed outside the United States was a huge expansion of the reach of American criminal law. As Glenn R. Schmitt, one of the authors of the legislation remarked:

[T]he act does not require an American person or property be involved at all. For example, if a third-country national accompanying the United States Armed Forces, such as a contract employee, commits a crime against another third-country national, the Act gives United States courts subject matter jurisdiction over the crime even though no American was involved in any way. This portion of the Act will likely be subjected to a court challenge.⁹³

This is precisely what happened following the assault of a citizen of the United Kingdom by a South African national who was a DoD contractor,⁹⁴ resulting in the indictment mentioned in Part V.B.1. The District Court upheld the applicability of MEJA in this case, stating that the defendant,

[V]oluntarily and knowingly entered into a relationship so related to the United States and its military mission in Afghanistan that [he] should have reasonably anticipated being haled into court in the

⁹² 18 U.S.C. § 3267(1)(B), (C). This provision was included for two reasons:

[I]n part out of a belief that host nations would likely take an interest in punishing the criminal acts of their own citizens, even if they were committed only against Americans or American-owned property. In addition, this exception was included to address concerns that host nations might resist the presence of American troops in their countries if allowing such presence might subject its own citizens to trial in the United States.

Schmitt, *supra* note 11, at 131.

⁹³ Schmitt, *supra* note 11, at 132.

⁹⁴ *United States v. Brehm*, No. 1:11-CR-11, at 1 (E.D. Va. Mar. 30, 2011) (order denying motions to dismiss).

United States as a result of his alleged conduct, particularly in light of the notices,⁹⁵ privileges and benefits he received because of this employment.⁹⁶

b. Non-DoD Employees

The most fact-intensive personal jurisdiction litigation in a MEJA case occurs when the subject is employed by another federal agency and is supporting DoD missions.⁹⁷ Because the underlying employment contract is with an agency other than DoD, additional information is required to show the nexus with DoD to establish the jurisdictional element beyond a reasonable doubt.⁹⁸ Therefore, investigators must obtain more than an employment paper trail. To show that the subject's "employment relates to supporting the mission of the Department of Defense overseas," the prosecution will need such things as memoranda of understanding or contracts between the subject's employer and the DoD commander with which the subject was working; witness statements that the subject was a part of missions supporting the DoD; and statements explaining exactly what the contractor was doing on these missions, e.g., providing security for DoD personnel.⁹⁹

3. Proper Act

To establish an act as a crime under MEJA, the prosecution must establish that: (1) it is punishable by more than one year of confinement¹⁰⁰ (i.e., is a felony);¹⁰¹ and (2)

⁹⁵ Included in Mr. Brehm's contract was the following notice:

Employee hereby acknowledges that Employee has been informed of, understands and accepts that Employee may be subject to U.S.: i) military criminal jurisdiction under the Uniform Code of Military Justice when, in time of declared war or contingency operation, Employee is serving with or accompanying an armed force in the field; ii) federal civilian criminal jurisdiction under the Military Extraterritorial Jurisdiction Act by accompanying U.S. Armed Forces outside the United States; and iii) federal civilian criminal jurisdiction for war crimes and for crimes committed within the special territorial and maritime jurisdiction of the United States.

Contract Between DynCorp International LLC ("Employer") and Sean Brehm ("Employee"), dated July 25, 2010 (on file with author).

⁹⁶ *Brehm*, No. 1:11-CR-11, at 6.

⁹⁷ Pharris Interview, *supra* note 87.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 18 U.S.C. § 3261(a) (2011).

it is a crime under U.S. Code if committed within the SMTJ of the United States.¹⁰² Therefore, although MEJA has the word “extraterritorial” in its name, the only crimes prosecuted under MEJA are “territorial” crimes, that is, crimes that the U.S. government normally cannot prosecute unless committed on American soil, such as rape, murder, and assault.¹⁰³

Some crimes under Title 18 are explicitly extraterritorial, for example, torture.¹⁰⁴ In such cases, MEJA is *not* applicable. The individual should be charged only with the extraterritorial crime, and not under Section 3261. However, initial notifications, discussed in Part C.1 and Appendix E below, are the same. The Human Rights and Special Prosecutions Section (HRSP) of DOJ handles both MEJA cases and other extraterritorial crime prosecutions.¹⁰⁵

4. Proper Place

As long as the status of the person and crime comply with MEJA, anywhere outside of the territorial boundaries of the United States is a proper “place” under the Act. Therefore, a civilian spouse living in Germany and a civilian contractor deployed in Afghanistan supporting combat operations both are in locations where MEJA applies. If the location is within the United States, MEJA is neither applicable nor necessary. MEJA does not create any new crimes under Title 18.¹⁰⁶ It simply provides a net to capture the criminal acts of those outside the territorial jurisdiction of the United States.

However, following *Gatlin*,¹⁰⁷ Congress expanded SMTJ¹⁰⁸ to include,

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.¹⁰⁹

Therefore, there may be situations overseas where a crime actually occurs within the territorial jurisdiction of the United States, even when the military and accompanying civilians are on “borrowed” land.

The practice point for reporting is the same—the DOJ HRSP prosecutes SMTJ crimes also.¹¹⁰ There is one limitation to this definition of SMTJ: only “offenses committed by or against a national of the United States” are crimes under that definition of SMTJ.¹¹¹

C. Processing a MEJA Referral to DOJ

1. Initial Notifications

The MEJA referral process and checklist contained in Appendix E provide the necessary guidance for properly referring a case through DoD channels to DOJ for a MEJA prosecution.¹¹² The first step is to notify the DoD’s General Counsel designee for MEJA cases immediately,¹¹³ along with the attorneys at the DOJ HRSP.¹¹⁴ The HRSP is “the

¹⁰¹ *Id.* § 3559(a)(1)–(5) (every crime that is classified as having an authorized punishment of a term of imprisonment of more than one year is classified as a felony).

¹⁰² *Id.* § 3261(a).

¹⁰³ See *infra* Appendix D (providing common offense that could be charged under MEJA).

¹⁰⁴ 18 U.S.C. § 2340A.

¹⁰⁵ Human Rights & Special Prosecution Section (HRSP), *About the Section*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/hrsp/about> (last visited Mar. 4, 2012) [hereinafter *About the HRSP*] (“Where U.S. federal jurisdiction exists, HRSP seeks to prosecute human rights violators under the federal criminal statutes proscribing torture, war crimes, genocide, and recruitment or use of child soldiers. . . . In addition, HRSP prosecutes certain other cases of crimes of violence committed abroad, particularly crimes that fall under MEJA.”).

¹⁰⁶ See discussion *supra* Part V.B.1.

¹⁰⁷ *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); see discussion *supra* Part II.B.2.

¹⁰⁸ See discussion *supra* Part II.B.2.

¹⁰⁹ 18 U.S.C. § 7(9).

¹¹⁰ *About the HRSP*, *supra* note 105 (“Similarly, HRSP investigates and prosecutes cases involving violent crimes that fall under the special maritime and territorial jurisdiction of the United States.”).

¹¹¹ 18 U.S.C. § 7(9).

¹¹² See *infra* Appendix E.

¹¹³ DoDI 5525.11, *supra* note 67, para. 5.3.1. See *infra* Appendix E (providing DoD GC contact information).

¹¹⁴ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87; see *infra* Appendix E (providing HRSP section contact information).

primary point of contact for [DoD] personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters”¹¹⁵ Additionally, a MEJA referral memo should be sent to the Department of State (DOS) through the local embassy.¹¹⁶ The involvement of DOS is especially important when the subject is a TCN.¹¹⁷ Diplomatic communications with the nation of which the TCN is a citizen should begin immediately when the subject is arrested or investigation begins.¹¹⁸

In areas of contingency operations, there is now another legal mechanism at play that could result in concurrent jurisdiction over an offense. As a part of the 2007 NDAA, Article 2(a)(10) of the UCMJ was amended to expand court-martial jurisdiction over civilians.¹¹⁹ In 2008, the DoD published guidance regarding such prosecutions,¹²⁰ and in 2011 the Army published regulatory guidance to include initial reporting procedures.¹²¹ Therefore, Army practitioners must also use the flowchart in Chapter 27 of Army Regulation 27-10 (Appendix G to this article), during the “initial notification” process.¹²²

If there is uncertainty as to whether the crime or the location of the crime falls under the jurisdiction of MEJA, UCMJ Article 2(a)(10), or both, without delay, the incident should be reported in accordance with Article 2(a)(10) processing (as described in Appendix G of this article) and to the DOJ HRSP.¹²³ While it is helpful to include any information about the crime from the initial report, an in-depth legal analysis of the jurisdiction is not required and

could be counterproductive in establishing jurisdiction. Correspondences of this sort would likely have an impact on any subsequent prosecution as they would have to be turned over to attorneys for the defendant as *Brady* material.¹²⁴ Any analysis stating MEJA does not apply, possibly based on incomplete information at the beginning of the investigation, could then be used by the defense to challenge jurisdiction.¹²⁵

2. How Likely Is It That DOJ Will Accept the Case?

Even if an incident meets all the jurisdictional requirements of MEJA, DOJ will not automatically accept every case referred from DoD. The implementing guidance for MEJA states only “serious misconduct” will be prosecuted under MEJA.¹²⁶ This does not mean DOJ is biased against taking cases,¹²⁷ only that they have the discretion in whether to do so, and there are things DoD attorneys and investigators can do to increase the likelihood that a case will be accepted for prosecution.

Among the most important things DoD attorneys can do is immediately notify the DOJ, through the HRSP that a crime under their jurisdiction has occurred.¹²⁸ While immediate reporting is imperative, it is better to report to the HRSP than to the U.S. Attorney’s office where a prosecution might occur.¹²⁹ While it may take some time to route the referral through the HRSP, this section is responsible for tracking all MEJA cases, has a better understanding of MEJA and its applicability, and has a vested interest in

¹¹⁵ DoDI 5525.11, *supra* note 67, para. 5.4.4.

¹¹⁶ See *infra* Appendix E (providing DOS contact information).

¹¹⁷ DoDI 5525.11, *supra* note 67, para. 6.1.9.

¹¹⁸ *Id.* The Department of State may also send a diplomatic note to the host nation government notifying them of the incident, even if the applicable MTA or SOFA preclude host-nation jurisdiction in the case. Professional Experience, *supra* note 75.

¹¹⁹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109–164, § 552, 119 Stat. 3136 (2006).

¹²⁰ Memorandum from Sec’y of Def., to Secretaries of the Mil. Dep’ts et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008). See also Memorandum from Gen. Counsel of the Dep’t of Def., to Secretaries of the Mil. Dep’ts et al., subject: Policies and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operations (20 Jan. 2012).

¹²¹ AR 27-10, *supra* note 79, ch. 27. See also Appendix G (Article 2(a)(10) notification flow chart).

¹²² See Part VI.A (providing further discussion on the interplay between MEJA and Article 2(a)(10) jurisdiction and the future of UCMJ jurisdiction over civilians).

¹²³ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹²⁴ *Brady v. Maryland*, 373 U.S. 83 (1963) (evidence in the hands of the government that is material to either guilt or punishment must be provided to the defendant).

¹²⁵ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹²⁶ 32 C.F.R. pt. 153 (2012).

¹²⁷ *CEJA Hearing*, *supra* note 65 (“We have had great success in bringing cases under MEJA and are committed to continuing to enforce MEJA vigorously.”) (Statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Criminal Div., U.S. Dep’t of Justice).

¹²⁸ Duey Interview, *supra* note 8.

¹²⁹ The proper venue for a criminal case in U.S. federal court when the crime does not happen in a U.S. territory is governed by 18 U.S.C. Section 3238:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

ensuring cases of serious criminal misconduct are tried under MEJA if the law applies.¹³⁰ It is also important to build a continuity file on the case to be kept in the local staff judge advocate's (SJA) office overseas and to be retained upon redeployment. Some cases may take months or years from initiation to indictment and the judge advocates and DoD investigators who worked on the case may have moved on in the interim.¹³¹

Finally, judge advocates who work with contract personnel overseas should be mindful of their interactions with these individuals, both before and after a criminal act by a civilian occurs. Judge advocates and DoD law enforcement should not be facilitating or commenting on any internal company investigations that may occur following an incident.¹³² As with correspondences about jurisdiction, correspondences of this sort might also qualify as *Brady* material and would likely be required to be disclosed to the contractor's defense counsel.¹³³

3. Can the Suspect be Arrested or Detained? If So, Where and for How Long?

When a person has committed an offense under MEJA, DoD law enforcement personnel are authorized to arrest a person outside the United States.¹³⁴ The decision to detain should be made on a case-by-case basis, and ordered by the combatant commander only when "a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing, or trial proceeding, or the person may engage in serious criminal misconduct"¹³⁵

4. What Is the Initial or Preliminary Hearing?

These hearings only occur when a person has been arrested or temporarily detained by U.S. military authorities overseas.¹³⁶ In this situation, an initial hearing must happen "without unnecessary delay."¹³⁷ This can occur by phone or

by video teleconference.¹³⁸ The purpose of the hearing is for a federal magistrate judge to make a determination as to whether or not there is probable cause to believe that the detained subject committed a crime in violation of MEJA, and can therefore be detained.¹³⁹

5. Does the Subject Have the Right to a Military Lawyer?

In the very limited situation described above, in which a subject has been detained and is awaiting an initial proceeding, he is entitled to "qualified military counsel" to represent him at such a hearing.¹⁴⁰ This representation is limited solely to the initial legal proceeding.¹⁴¹ Since these hearings happen very quickly after arrest, deployed Trial Defense Service (TDS) offices must be prepared to respond quickly to a request for "qualified military counsel" for a person who has been arrested or charged under MEJA¹⁴² and understand the limitations of such representation.

VI. An Evolving Area of the Law—The Future of Criminal Prosecutions for Civilians Overseas¹⁴³

A. Article 2(a)(10), UCMJ

*Then, like a bolt out of the blue in October
2006, the UCMJ was amended to resurrect
military-criminal jurisdiction of these
civilian augmentees.*¹⁴⁴

¹³⁰ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³¹ Duey Interview, *supra* note 8; ; Pharris Interview, *supra* note 87.

¹³² Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³³ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³⁴ DoDI 5525.11, *supra* note 67, paras. 6.2.4.4, 6.2.4.5 (law enforcement personnel include Defense Criminal Investigative Service, U.S. Army Criminal Investigation Command, Air Force Office of Special Investigations, Naval Criminal Investigative Service, security forces, military police, and shore patrol).

¹³⁵ *Id.* para 6.2.5.2.1.

¹³⁶ *Id.* para 6.4.

¹³⁷ *Id.* para. 6.4.3.

¹³⁸ *Id.* para. 6.4.4.

¹³⁹ *Id.* para. 6.4.5.

¹⁴⁰ *Id.* para. 6.3.2.3.

¹⁴¹ *Id.* at enclosure 4.

¹⁴² See AR 27-10, *supra* note 79, para. 26-2.b ("Any judge advocate assigned to [U.S. Army Trial Defense Service] USATDS and certified under UCMJ, Art. 27(b), may be considered qualified military counsel under DoDI 5525.11.").

¹⁴³ For a frequently updated repository of press releases, trial documents, congressional hearings, and other news-worthy items on the topics of the Civilian Extraterritorial Jurisdiction Act (CEJA), MEJA, and Article 2(a)(10), see CAAflog, a web log that reports on these topics. CAAflog Category: MEJA, <http://www.caaflog.com/category/meja/> (last visited Jan. 29, 2012) (which also contains CEJA commentary); CAAflog Category: Art. 2(a)(10), <http://www.caaflog.com/category/art-2a10/> (last visited Jan. 29, 2012).

¹⁴⁴ Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach To Resurrecting Military Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008).

As discussed in Part V.C.1, the “new” Article 2(a)(10)¹⁴⁵ changed the legal landscape with regard to prosecution of civilians in areas of contingency operations. However, as the above quote implies, and in contrast to the expansive discussion on the congressional floor about MEJA,¹⁴⁶ there was no debate or congressional hearing regarding whether or not to expand the very limited¹⁴⁷ UCMJ jurisdiction over civilians.¹⁴⁸ The military was apparently not on notice of or prepared for this development because while the new law went into effect on October 17, 2006,¹⁴⁹ the DoD’s implementing instructions were not published until March 10, 2008.¹⁵⁰ On June 22, 2008, in Baghdad, Iraq, the first and only case under this expanded jurisdiction was tried.¹⁵¹ The constitutionality of Article 2(a)(10) as applied in this case remains an open question.¹⁵²

B. The Resurgent Importance of MEJA

Even if the expanded UCMJ jurisdiction survives judicial scrutiny, very few civilians in the near future may be caught in this jurisdictional net. Combat operations in Iraq have ended,¹⁵³ and a drawdown in Afghanistan is set to follow.¹⁵⁴ While Article 2(a)(10) jurisdiction over civilians

was expanded to include “contingency operations,” the force these civilians are accompanying must still be “in the field.”¹⁵⁵ For a force to be “in the field,” it must be conducting operations in areas of “actual fighting.”¹⁵⁶ In the recent contingency operation in Iraq, factors supporting a finding of “in the field” for the purpose of UCMJ jurisdiction included: the country was specifically designated as a combat zone in which Soldiers were authorized hazardous duty pay; the offenses in question occurred on a combat outpost where there was “actual fighting” against enemy insurgent groups; and “the accused and the troops he supported were under a constant threat of attack by small arms fire, indirect fire, improvised explosive devices, and vehicle-borne explosive devices.”¹⁵⁷

While the U.S. military will still have a forward-projected force worldwide, these forces will most likely no longer be operating in conditions with a defined and declared enemy.¹⁵⁸ Therefore, Article 2(a)(10) will go back to being a dormant jurisdictional provision.

On the other hand, MEJA “applies during periods of armed conflict, contingency operations, and in times of peace.”¹⁵⁹ MEJA will again become the essential piece of legislation for filling the jurisdictional gap and holding civilians who accompany the force overseas accountable.¹⁶⁰

C. Still A Gap?

*As much as we have been able to
accomplish under existing law, however,
MEJA leaves significant gaps in our
enforcement capability.*¹⁶¹

¹⁴⁵ 10 U.S.C. § 802(a)(10) (2011).

¹⁴⁶ *MEJA Hearing*, *supra* note 48.

¹⁴⁷ *See discussion supra* Part II.A.

¹⁴⁸ Had there been input solicited from DoD, it may not have been favorable based on previous testimony on the topic. At the MEJA hearing on March 30, 2000, Mr. Reed said, “For several reasons, the Department of Defense then [referring to the Defense Department’s Overseas Jurisdiction Advisory Committee] then and now supports only the extension of title 18 jurisdiction. The expansion of UCMJ jurisdiction presents unique constitutional questions.” *MEJA Hearing*, *supra* note 48, at 12.

¹⁴⁹ Pub. L. No. 109-364, 120 Stat. 2083 (2006).

¹⁵⁰ Memorandum from the Sec’y of Def., for Sec’y of the Military Dep’t et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008).

¹⁵¹ *United States v. Ali*, 70 M.J. 514 (A. Ct. Crim. App. 2011) (holding a court-martial held during Operation Iraqi Freedom had both personal and subject matter jurisdiction over the civilian accused who was serving with and accompanying combat units “in the field” at time of the offenses, and the exercise of court-martial jurisdiction over the accused did not violate the Fifth or Sixth Amendment).

¹⁵² The Court of Appeals for the Armed Forces upheld the application of the statute on constitutional grounds in July 2012. *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *petition for cert. filed*, 2012 WL 6759750 (U.S. Dec. 27, 2012) (No. 12-805). Whether the U.S. Supreme Court will grant certiorari and hold the same is not yet known.

¹⁵³ *Foreign Policy*, WHITE HOUSE, <http://www.whitehouse.gov/issues/foreign-policy> (last visited Apr. 24, 2013) (“In December of 2011, the final U.S. troops left Iraq, ending America’s war there.”).

¹⁵⁴ President Barack Obama, State of the Union Address, in Wash., D.C. (Feb. 12, 2013), *available at* [http://www.whitehouse.gov/the-press-](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address)

[office/2013/02/12/remarks-president-state-union-address](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address) (“Tonight, I can announce that over the next year, another 34,000 American troops will come home from Afghanistan. This drawdown will continue and by the end of next year [2014], our war in Afghanistan will be over.”).

¹⁵⁵ 10 U.S.C. § 802(a)(10) (2011).

¹⁵⁶ *Ali*, 71 M.J. at 264 (citing *Reid v. Covert*, 354 U.S. 1, 34 n.61 (1957)), *petition for cert. filed*, 2012 WL 6759750 (U.S. Dec. 27, 2012) (No. 12-805).

¹⁵⁷ *United States v. Ali*, 70 M.J. 514, 518 (A. Ct. Crim. App. 2011), *aff’d*, 71 M.J. 256 (C.A.A.F. 2012).

¹⁵⁸ *See, e.g.*, Craig Whitlock, *Philippines May Allow Greater U.S. Military Presence in Reaction to China’s Rise*, WASH. POST, Jan. 25, 2012, http://www.washingtonpost.com/world/national-security/philippines-may-allow-greater-us-presence-in-latest-reaction-to-chinas-rise/2012/01/24/gIQAfFlyQQ_story.html.

¹⁵⁹ *MEJA Hearing*, *supra* note 48, at 12.

¹⁶⁰ 10 U.S.C. § 802(a)(10).

¹⁶¹ *CEJA Hearing*, *supra* note 65 (statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Criminal Div., U.S. Dep’t of Justice).

Despite the 2004 amendment to MEJA and the 2006 amendment to the UCMJ, there is still a jurisdictional gap over civilians who are overseas working on behalf of the U.S. government. For example, if a DoD employee were to murder his colleague today in Iraq, he could be prosecuted under MEJA; a DOS employee who commits the same crime will likely not be covered by MEJA.¹⁶² The gap is becoming more pronounced for the same reasons Article 2(a)(10) jurisdiction no longer applies—there is no longer a DoD mission in Iraq.¹⁶³ Therefore, employees or contractors of “other Federal agencies” cannot possibly be “supporting the mission” of DoD there, and MEJA does not apply.¹⁶⁴

The proposed fix is for Congress to again use its authority to extend the reach of U.S. laws extraterritorially¹⁶⁵ and create a jurisdictional net for all U.S. civilians working for the government who commit felonies overseas by passing the Civilian Extraterritorial Jurisdiction Act (CEJA).¹⁶⁶ Along with allowing for more accountability under U.S. law for civilian contractors, no matter what their mission overseas,

[F]illing in the gaps in existing law is in the interests of the United States and our personnel and contractors abroad. The absence of U.S. jurisdiction to prosecute serious crimes creates legal uncertainty and can expose American civilians to prosecution by nations whose laws and judicial systems are less transparent and offer fewer legal protections than our own.¹⁶⁷

VII. Conclusion

[T]oday we find our very preservation as a nation inexorably intertwined with the maintenance of large overseas contingents, composed of both military and civilian personnel. These groups are so closely related, in all aspects of the venture, that discipline and success will be affected adversely if one segment of the

*force is free to operate outside the law and the other is restricted to obedience. And this has always been true of armed forces being trained for or held in readiness for combat.*¹⁶⁸

Jurisdiction over civilians serving with or accompanying U.S. troops abroad has been a contentious and evolving area of the law for more than fifty years. While the law and the operational landscape continue to change, one thing is likely to stay the same: civilian employees and contractors will continue to serve alongside U.S. servicemembers overseas. It is important for commanders to understand that civilian misconduct, especially if mishandled, can have a palpable impact on their mission, and for judge advocates to understand every tool at their disposal for dealing with such misconduct. While it is difficult to prepare for every contingency a military practitioner might face in a deployed environment, being prepared to deal with civilian misconduct is both possible and essential to the mission.

¹⁶² *Id.*

¹⁶³ See *supra* text accompanying note 153.

¹⁶⁴ 18 U.S.C. § 3267(1) (2011).

¹⁶⁵ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

¹⁶⁶ S. 1145, 112th Cong (2011).

¹⁶⁷ Letter from Ronald Weich, Ass’t Att’y Gen., to Hon. Patrick J. Leahy and Hon. Dianne Feinstein (Oct. 7, 2011), *available at* <http://www.justice.gov/ola/views-letters/112/100711-ltr-re-s1145-civilian-extraterritorial-jurisdiction-act.pdf>.

¹⁶⁸ *United States v. Burney*, 21 C.M.R. 98, 120 (C.M.A. 1956).

Appendix A

U.S. Criminal Jurisdiction Over Civilians Overseas

1950 – UCMJ Enacted – Civilians accompanying the force, in the field, may be prosecuted by military court-martial during a time of war

Holes in the jurisdictional net revealed



Fixing the net



New holes revealed



New legislation



Testing UCMJ jurisdiction; The changing face of DoD operations; The need for more legislation

1955 – *United States ex rel Toth v. Quarles*: former servicemembers are not subject to UCMJ jurisdiction

1957 – *Reid v. Covert*: Military dependents overseas with the military are not subject to UCMJ jurisdiction

1970 – *United States v. Avarette*: Civilians serving overseas “in the field” with the military are not subject to UCMJ jurisdiction absent a congressional declaration of war

1999 – *United States v. Gatlin*: Federal criminal jurisdiction does not extend to land overseas where military dependents are living with servicemembers

2000 – **Congress passes MEJA** – former servicemembers, DoD employees/contractors, and DoD dependents are subject to federal criminal prosecution for crimes committed overseas

2003-2004 – Abu Ghraib – CIA and Dep’t of Interior employees who committed crimes at the Iraqi prison are not subject to MEJA jurisdiction

2004 – **MEJA Amended** – Civilians who are not employed by DoD, but are acting in direct support of the DoD mission are also subject to MEJA jurisdiction

2006 – **UCMJ Amended** – Now also during “contingency operations,” civilians accompanying the force, in the field, are subject to UCMJ

2008 – *United States v. Ali* – Civilian (Iraqi-Canadian citizen) prosecuted at a trial by court-martial, in Baghdad, Iraq

2011 – Combat operations end in Iraq

-DoD mission ends in Iraq

-**CEJA proposed**

2012 – *United States v. Ali* – The legality of UCMJ jurisdiction over civilians is again being reviewed in the appellate courts

Appendix B

The Military Extraterritorial Jurisdiction Act of 2000

(current as of April 29, 2013)¹⁶⁹

§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

(1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

§ 3262. Arrest and commitment

(a) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person described in section 3261(a) if there is probable cause to believe that such person violated section 3261(a).

(b) Except as provided in sections 3263 and 3264, a person arrested under subsection (a) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

¹⁶⁹ 18 U.S.C.A. §§ 3261–3267 (West 2013).

§ 3263. Delivery to authorities of foreign countries

(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—

(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

§ 3264. Limitation on removal

(a) Except as provided in subsection (b), and except for a person delivered to authorities of a foreign country under section 3263, a person arrested for or charged with a violation of section 3261(a) shall not be removed—

(1) to the United States; or

(2) to any foreign country other than a country in which such person is believed to have violated section 3261(a).

(b) The limitation in subsection (a) does not apply if—

(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in section 3265(a).

§ 3265. Initial proceedings

(a)(1) In the case of any person arrested for or charged with a violation of section 3261(a) who is not delivered to authorities of a foreign country under section 3263, the initial appearance of that person under the Federal Rules of Criminal Procedure—

(A) shall be conducted by a Federal magistrate judge; and

(B) may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(2) In conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.

(3) If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person's detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person's release before trial under chapter 207 of this title.

(b) In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)—

(1) shall be conducted by a Federal magistrate judge; and

(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(c)(1) If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.

(2) For purposes of this subsection, the term “qualified military counsel” means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who—

(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

§ 3266. Regulations

(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.

(b)(1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or provide a defense in any judicial proceeding arising under this chapter.

(c) The regulations prescribed under this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary of Defense submits a report containing those regulations or amendments (as the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

§ 3267. Definitions

As used in this chapter:

- (1) The term “employed by the Armed Forces outside the United States” means—
 - (A) employed as—
 - (i) a civilian employee of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
 - (ii) a contractor (including a subcontractor at any tier) of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or
 - (iii) an employee of a contractor (or subcontractor at any tier) of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
 - (B) present or residing outside the United States in connection with such employment; and
 - (C) not a national of or ordinarily resident in the host nation.
- (2) The term “accompanying the Armed Forces outside the United States” means—
 - (A) A dependent of—
 - (i) a member of the Armed Forces;
 - (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
 - (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
 - (C) not a national of or ordinarily resident in the host nation.
- (3) The term “Armed Forces” has the meaning given the term “armed forces” in section 101(a)(4) of title 10.
- (4) The terms “Judge Advocate General” and “judge advocate” have the meanings given such terms in section 801 of title 10.

Appendix C

DoDI 5525.11 (March 3, 2005) – Selected Sections Referencing DoD Responsibilities

5.3 (page 4): The Heads of the Military Law Enforcement Organizations and the Defense Criminal Investigative Organizations, or their Designees, shall:

5.3.1. Advise the applicable Commander of the Combatant Command and Staff Judge Advocate (or Legal Advisor), or designees, of an investigation of an alleged violation of the Act that may lead to arrest or criminal prosecution under the Act. Such notice shall be provided as soon as practicable. In turn, the [General Counsel (GC)], DoD, or designee, shall be advised to ensure notification of and consultation with the DOJ and the DoS regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Department of Defense, the DOJ, and the DoS.

5.5 (page 5-6): The Commanders of the Combatant Commands, through the Chairman of the Joint Chiefs of Staff, shall:

5.5.1. Assist the [Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ)] on specific cases occurring within the Commander of the Combatant Command's area of responsibility that may lead to arrest or criminal prosecution under the Act. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

5.5.2. Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this Instruction.

5.5.3. Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in Section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U.S. military installation outside the United States that is able to adequately detain the person and facilitate the initial proceedings prescribed in Section 3265(a) of the Act and this Instruction. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces; and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of Section 3265 of the Act governing initial proceedings.

Appendix D

MEJA Toolkit

1. Department of Defense Policy and Consolidated Resources. As of April 26, 2013, the following resources can be found at the DoD's Joint Service Committee on Military Justice online repository at http://www.dod.mil/dodgc/jsc_business.html. The hyperlinks below are the direct links to each individual document.

a. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 8 U.S.C. §§ 3261–3267 (2012)), *available at* http://www.dod.mil/dodgc/images/meja_3261.pdf

b. 18 U.S.C.S. §7 (LexisNexis 2010), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107-56, § 804, 115 Stat. 272 (adding § 7(9) to the definition of Special Maritime and Territorial Jurisdiction of the United States), *available at* http://www.dod.mil/dodgc/images/meja_patriot_act.pdf

c. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1088, 118 Stat. 1811, 2066 (2004), *available at* http://www.dod.mil/dodgc/images/2004_section1088.pdf (expanding MEJA jurisdiction to include non-DoD federal employees and contractors supporting DoD missions abroad).

d. 150 Cong. Rec. S6863–01 (daily ed. June 16, 2004) (statements of Sen. Jeff Sessions, Sen. Charles E. Schumer, and Sen. Carl Levin), *available at* http://www.dod.mil/dodgc/images/leg_history.pdf (explaining the congressional intent behind the 2004 amendment to expand the MEJA jurisdiction).

e. U.S. DEP'T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 05), *available at* <http://www.dod.mil/dodgc/images/dodi552511.pdf>.¹⁷⁰

f. Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Service Members, and Former Service Members, 71 Fed. Reg. 8946 (Mar. 3, 2005) (codified at 32 C.F.R. pt. 153 (2012)), *available at* <http://www.dod.mil/dodgc/images/part153title32.pdf>.

g. Memorandum from the Deputy Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007), *available at* http://www.dod.mil/dodgc/images/management_of_contractors.pdf.

h. Memorandum from the Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008) (C1, 23 Sept. 2010), *available at* http://www.dod.mil/dodgc/images/ucmj_art2.pdf.

i. Memorandum from the Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: Responsibility for Response to Reports of Alleged Criminal Activity Involving Contractors and Civilians Serving with or Accompanying the Armed Forces Overseas (10 Sept. 2008), *available at* http://www.dod.mil/dodgc/images/meja911_criminal.pdf.

¹⁷⁰ This regulation is in the process of being revised and updated, and will be posted to the main resource site when published. E-mail from Mr. Robert Reed, Office of Gen. Counsel., U.S. Dep't of Def., to author (Jan. 27, 2012, 15:30 EST) (on file with author).

j. Memorandum from Shay D. Assad, Dir., Def. Procurement & Acquisition Policy, to Commander, U.S. Special Operations Command, et al., subject: Class Deviation, Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan (14 Dec. 2009), *available at* http://www.dod.mil/dodgc/images/contractor_meja_ucmj.pdf.

k. Memorandum from Gen. Counsel, U.S. Dep't of Def., Sec'ys of Military Dep'ts et al., subject: Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation (20 Jan. 2012), *available at* http://www.dod.mil/dodgc/images/ucmj_art2_jurisdiction.pdf.

l. Data spreadsheet from U.S. Dep't of Def. on MEJA (18 U.S.C. §§ 3261–3267), Federal Prosecutions, and Alternative Article 2, UCMJ Dispositions (30 June 2010), *available at* http://www.dod.mil/dodgc/images/meja_statistics.pdf.

2. Department of Justice Resources:

a. U.S. ATTORNEYS' MANUAL para. 9-20.116 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm#9-20.116 (guiding U.S. DOJ attorneys on DOJ policies and procedures for prosecution under MEJA).

b. *Military Extra Territorial [sic] Jurisdiction Act*, U.S. DEP'T OF JUST., <http://www.justice.gov/criminal/hrsp/statutes/meja.html> (last visited Apr. 30, 2013) (providing HRSP resources for MEJA as well as HRSP's contact information).

3. Additional Resources, by Service Departments:

a. U.S. Department of Army:

(1) U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011), *available at* http://www.apd.army.mil/jw2/xmldemo/r27_10/head.asp.

(a) Chapter 26 (Prosecution of Criminal Offenses under the Military Extraterritorial Jurisdiction Act of 2000)

(b) Chapter 27 (Procedures Related to Civilians Subject to Uniform Code of Military Justice Jurisdiction under Article 2(a)(10))

(2) All Army Activities (ALARACT) Message, 096/05, 131953Z MAY 05, subject: Foreign Nationals Employed by or Accompanying Army Forces OCONUS May Be Subject To U.S. Criminal Jurisdiction, *available at* <https://www.us.army.mil> (requires AKO login; search for "ALARACT"; then follow "Army ALARACTs Home" hyperlink; then follow "2005 ALARACTS" folder; then follow "ALARACT_096_2005" hyperlink) (on file with author).

(3) Information Paper, Criminal Law Div., Office of The Judge Advocate Gen., U.S. Army, subject: Military Extraterritorial Judicial [sic] Act (MEJA) (24 May 2005), *available at* [https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/\(JAGCNetDocID\)/65482092EFCDB157852579B500587996/\\$FILE/MEJA%20INFORMATION%20PAPER.doc](https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGCNetDocID)/65482092EFCDB157852579B500587996/$FILE/MEJA%20INFORMATION%20PAPER.doc).

b. U.S. Department of Navy:

(1) All Navy Message 059/05, 081949Z AUG 05, subject: Interim Policy and Training Requirements For Criminal Jurisdiction Over Certain Current and Former Members of the U.S. Army Forces, and Over Civilians Employed By or Accompanying the U.S. Armed Forces Outside the United States, *available at* <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/ALNAVS/ALN2005/ALN05059.txt>.

(2) Information Paper, U.S. Marine Corps, subject: Military Extraterritorial Judicial [sic] Act (MEJA) (22 Aug. 2005), *available at* <http://www.hqmc.marines.mil/Portals/135/MEJAinfo-paper-web-22Aug05.doc>.

c. U.S. Department of Air Force:

(1) U.S. DEP'T OF AIR FORCE INSTR. 51-1001, DELIVERY OF PERSONNEL TO UNITED STATES CIVILIAN AUTHORITIES FOR TRIAL sec. B (20 Oct. 2006) (C2, 17 Dec. 2012), *available at* http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-1001/afi51-1001.pdf.

(2) U.S. DEP'T OF AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE secs. 2.7.3, 2.12.2, 13.24, 13.27.3 (21 Dec. 2007) (C2, 3 Feb. 2010), *available at* http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-201/afi51-201.pdf.

Appendix E

MEJA Referral Procedures, Checklist, and Templates¹⁷¹

Referral Procedures for Military Extraterritorial Jurisdiction Act and Other Crimes

Upon receiving a report of potential criminal misconduct by a contractor or U.S. government (USG) civilian employee, the appropriate military and/or civilian law enforcement agency should IMMEDIATELY be notified and requested to investigate.

Military commander's authority to investigate is not limited to military personnel. For example, military investigators may investigate any crime allegedly committed by persons subject to MEJA (DoDI 5525.11; DoDI 5525.07¹⁷²; Rules for Court Martial 303¹⁷³).

Federal civilian law enforcement officials also have independent authority to investigate crimes and apprehend persons to the extent their authority is permitted by applicable statutes or other legal authority.

The law enforcement agency should examine whether federal jurisdiction exist under MEJA (18 U.S.C. § 3261(a)) or under statutes applicable to the Special Maritime & Territorial Jurisdiction (SMTJ) (18 U.S.C. § 7(9)) or under other extraterritorial statutes.

The Department of Justice can provide assistance in determining whether federal jurisdiction may exist. IF THERE IS A QUESTION REGARDING WHETHER FEDERAL JURISDICTION EXISTS, PARTICULARLY IN VIOLENT CRIME MATTERS OR MEJA MATTERS, CONTACT THE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION (HRSP). HRSP POCs include the following:

Micah Pharris, Trial Attorney: 202-353-3639; micah.pharris@usdoj.gov

Jay Bauer, Trial Attorney: 202-353-0228; jay.bauer@usdoj.gov

The HRSP general number is 202-616-2492 and the DOJ Command Center, which has 24 hour capability to locate persons, is 202-514-5000.

MEJA

Jurisdiction under MEJA exists when the person is:

- 1) a civilian directly employed by DoD; or
- 2) a civilian contractor (or subcontractor) of DoD; or

¹⁷¹ Current as of Mar. 2, 2012. E-mail from Micah Pharris, Trial Attorney, Human Rights & Special Prosecutions Section, Criminal Law Div., U.S. Dep't of Justice, to author (Mar. 2, 2012, 10:17 EST) (on file with author).

¹⁷² U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DOJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (18 June 2007) [hereinafter DoDI 5525.07].

¹⁷³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012).

- 3) a civilian contractor of another U.S. agency (DOS, CIA, etc.) or a civilian employed by another U.S. agency whose employment relates to supporting the mission of DoD; or
- 4) a family member or dependent who is accompanying a member of the armed forces, a civilian employee of DoD, or a DoD contractor; or
- 5) a member of the Armed Forces. (18 U.S.C. § 3267(1) and (2))

MEJA applies no matter what the nationality of the person is, unless the person is a citizen or “ordinarily resident” of the country where the offense occurred.

MEJA has very specific arrest, detention, and removal requirements that must be followed. Various international agreements, including applicable Status of Forces Agreement (SOFAs) and USG law and policies, may apply and limit when and how MEJA may be used. Investigators should attempt to determine whether the host nation government has prosecuted or is prosecuting the case, as this may impact MEJA application.

SMTJ and Other Statutes

The SMTJ of the United States can include U.S. military bases, embassy property, residences of USG personnel, property controlled by the USG, and surrounding property (18 U.S.C. § 7(3) and § 7(9)). A number of federal statutes, including those dealing with homicide, rape, assault, child pornography, and drug offenses, apply to conduct that occurred in the special maritime and territorial jurisdiction of the United States.

There are also a number of federal statutes that have extraterritorial application independent of MEJA and SMTJ. As just one example, 18 U.S.C. § 1119 prohibits the extraterritorial murder of a U.S. national by another U.S. national no matter where it occurs outside the United States. A case of this nature can be prosecuted by the Department of Justice even if there is no MEJA or SMTJ jurisdiction.

Referrals

MEJA referrals must be made formally. Before making a formal MEJA referral to DoD headquarters, the appropriate military legal or law enforcement agency should confer with the Human Rights and Special Prosecutions Section (HRSP), which can provide a MEJA referral checklist, information on preparing draft affidavits to support the referral, etc.

Formal MEJA referrals are made from DoD headquarters to HRSP. A draft affidavit and MEJA referral memorandum should be sent to Mr. Robert Reed, the Associate Deputy General Counsel for Military Justice and Personnel Affairs for the Department of Defense, at (703) 695-1055/reedr@dodgc.osd.mil.

Referrals of non-MEJA cases may be made directly to HRSP. (If the matter is not a HRSP matter, HRSP may provide assistance in locating the appropriate prosecuting office.) In addition to basic information about the crime, referrals should include information about the last known residence of the subject, since that may determine where in the United States the case will be prosecuted.

Template for Affidavit to be Completed by DoD Law Enforcement

AFFIDAVIT in the matter of (SUBJECT NAME HERE)

I. Purpose of this Affidavit

1. This affidavit is provided to support a referral of law enforcement information to the United States Department of Justice (DOJ) and the United States Department of Defense (DoD) for prosecutorial action under the Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261, et al.) and/or the Uniform Code of Military Justice (10 U.S.C. § 801, et al.). The subject of this referral is (SUBJECT NAME HERE).

II. Affiant

2. I, _____ (AGENT NAME HERE) _____, the affiant, am a Special Agent with the United States Army Criminal Investigation Division (CID) and during my tenure as a Special Agent, I have conducted and participated in numerous investigations of criminal activity, including, but not limited to, the investigation of illegal controlled substances, larceny, fraud, and sexual assaults. During the investigation of these cases, your affiant has executed, or participated in the execution of, numerous search warrants, and seized evidence of these violations. In addition, I have received formal training from both the U.S. Army and other law enforcement agencies in the area of sexual assault investigations. I graduated as the honor graduate of the Apprentice Special Agent Course, a U.S. Army criminal investigation course, on 3 June 2008. I have attended the U.S. Army Military Police School, One Station Unit Training, in Fort Leonard Wood, MO, in March of 2000. I am currently assigned to _____ CID Office in _____, Iraq. I am the lead investigator in this investigation.

3. The facts and information contained in this affidavit are based upon my personal observations and knowledge of this investigation to include the taking and reviewing of witness statements and the observations of other officers and agents involved in this investigation as related to me in their official capacity.

4. This affidavit contains information necessary to support a referral of this case to [DOJ and/or DoD]. It is not intended to include each and every fact and matter observed by me or known to CID.

III. Background

5. Mr. _____ (SUBJECT NAME HERE) is an American Citizen, born in [city, state], United States, on or about _____. His residence is located at _____, _____, [state, zip code].

6. Mr. _____ (SUBJECT NAME HERE) is a contract employee of _____ (Contractor Name) as a _____ assigned to the _____ via contract number _____, issued by CDR, HQ-U.S. Army Material Command Logistic Support Element. He was working under a Letter of Authorization (LOA) issued on ____ (date), by _____ (Contractor Name).

7. Mr. _____ (SUBJECT NAME HERE) entered the Iraq Theater of Operations on or around __, (date) by traveling, upon information and belief, from the United States to Kuwait and into Iraq. Mr. _____ was assigned to the _____ in the _____ Area of Operations (AO) and began working at the _____ located on the _____.

IV. Nature of the Offense

8. On _____ (Date), Mr. John Q. Public, a friend of Mr. _____ (SUBJECT NAME HERE), reported to CID Agents that Mr. _____ (SUBJECT) confided in him that he was with a female (victim) on _____ and said they "took advantage of her." Mr. _____ (SUBJECT) stated the victim said she did not think this was a good idea and Mr. _____ (SUBJECT), stated, "_____" and then (facts of sexual assault here). Additionally, Mr. _____ (SUBJECT) stated he attempted to rape another female in New York City, but the "logistics did not work out." Mr. Public did not know the name of the female Soldier that Mr. _____ (SUBJECT) was referring to, but said he remembered she worked at the _____ and was an Army officer with the rank of _____.

9. On _____, CID Agents interviewed the victim, who stated she was with Mr. _____ (SUBJECT) only one time around the middle to end of _____ at their containerized housing unit (CHU) on _____. Another male, Mr. John Q. Friend, was present for most of the night and they all talked and listened to music.

10. On _____, CID Agents interviewed the victim, under a testimonial immunity memorandum, who rendered a sworn statement, wherein she detailed she was intoxicated and sexually assaulted by Mr. _____ (SUBJECT). She stated she remembered Mr. _____ (SUBJECT) saying _____. She remembers Mr. _____ (SUBJECT) putting his penis in her without her consent. The victim stated she blacked out shortly afterwards, unable to remember further details of the incident. The victim provided buccal swabs for identification of a DNA profile for later comparison.

11. On _____, CID Agents executed a search authorization for the room of Mr. _____ (SUBJECT) and collected, as evidence, bedding from the room of Mr. _____ (SUBJECT) and buccal swabs from Mr. _____ (SUBJECT) for identification of a DNA profile for later comparison.

12. On _____, CID Agents interviewed Mr. _____ (SUBJECT), who initially agreed to speak with CID, but subsequently requested legal counsel after being asked if he knew the victim.

13. The bedding collected as evidence is currently pending examination by the United States Army Criminal Investigation Laboratory (USACIL). Anticipated completion date is _____, 2009.

14. The computer systems seized as evidence is currently pending examination by the _____, Camp _____, Iraq. Anticipated completion date is _____, 2009.

Agent Name

Special Agent, Seq # 0000

U.S. Army CID

Camp _____ CID, _____, Iraq

Subscribed and Sworn Before Me, A Person Authorized By Law to Administer Oaths,

This ____ Day of _____, 2009, at: _____

Signature of Person Administering

Date

Name of Person Administering

Authority to Administer Oath: 10 U.S.C. § 936

Template for Memorandum to be Completed by Judge Advocate

MEMORANDUM

TO: COL _____, _____, Staff Judge Advocate, UNIT
LTC _____, _____ Staff Judge Advocate, UNIT
Ms. _____, Department of State, Baghdad
Mr. Robert Reed, Department of Defense, Office of General Counsel
Mr. Micah Pharris, Department of Justice
Mr. Jay Bauer, Department of Justice

CC: CPT _____, _____, Chief of Justice, UNIT
Mr. _____, Justice Attaché, AG's Office
SA _____, Camp _____ CID Office

FROM: CPT _____, _____, Senior Trial Counsel
(UNIT NAME HERE) OSJA POC

DATE: _____ 2009

RE: Mr. SUBJECT NAME HERE, Case No. 1234-56
CIVILIAN MISCONDUCT Iraq Theater of Operations

RECOMMENDATION: MEJA REFERRAL

ALCON:

(1) SHORT STATEMENT OF FACTS

Provide statement of facts consistent with affidavit.

(2) REQUESTS FOR ACTION/NOTIFICATION

UNIT NAME HERE Military Justice is requesting U.S. Department of Justice action under MEJA.

(a) UNIT NAME HERE: OSJA is making notification to UNIT NAME HERE and requesting a MEJA referral.

(b) CENTCOM: UNIT NAME HERE, OSJA is making notification to CENTCOM and requesting a MEJA referral.

(c) DoD: UNIT NAME HERE, OSJA is making notification to DoD and requesting a MEJA referral.

(d) DOJ: UNIT NAME HERE, OSJA is requesting acceptance or declination of this case as a MEJA referral.

(3) IDENTIFICATION OF SUBJECTS

Mr. SUBJECT NAME HERE. D.O.B., Address, Citizen of United States, employed by (Contractor), Inc. as an _____, as part of contract _____, no task order. He was a _____ case manager embedded with a military unit, _____, _____. His employer point of contact was Ms. _____, phone: DSN 123-456-7890. Mr. SUBJECT resigned his position following his implication in this matter.

IDENTIFICATION OF VICTIM: Identity Withheld

(4) LOCATION OF SUBJECTS, BASIS FOR HOLDING

Mr. SUBJECT currently resides at _____, Camp _____, Iraq. Subject resigned his position at Contractor, Inc. and is currently unemployed. He has been restricted by the _____ Base Garrison Commander to the _____ Base Complex due to this investigation.

(5) VIOLATION OF US CODE

18 U.S.C. § 2242: Sexual Abuse. Zero to life.

(6) VENUE/NEXUS INFORMATION

Mr. SUBJECT is a citizen of the United States. Mr. SUBJECT was employed by (Contractor), Inc., a company that performs various services for the United States as contractors, as an _____ under government contract number _____. Mr. SUBJECT was a case manager for a team that did _____. Mr. SUBJECT's address in the United States is _____, _____, NY 12345. He is subject to MEJA jurisdiction pursuant to 18 U.S.C. § 3261(a)(1). Pursuant to 18 U.S.C. § 3238 venue for the subject under MEJA may be the federal district court of the district of Mr. SUBJECT's residence in _____, NY.

(7) SHORT LEGAL ANALYSIS

Mr. SUBJECT was employed as a civilian contractor accompanying the force and embedded with a military unit. Mr. SUBJECT's statement to his friend that he intended to rape and did rape the victim in this case is the strongest evidence of the crime. Mr. SUBJECT's friend is willing to testify despite his close relationship to Mr. SUBJECT. The victim's testimony of her level of intoxication is the next best evidence. The defense will attempt to establish that her motive for the rape allegation is to deflect attention from her General Order No. 1 violation. In person, the victim has a good presence and comes across well. After CID interviewed Mr. SUBJECT, he told a co-worker, Mr. Bystander, that he had a threesome with the victim that got taken out of context before a supervisor instructed them not to ask about the issue. The victim is sure of sexual penetration despite her level of intoxication. This is a difficult case, as are most cases involving possibly incapacitated victims. MEJA jurisdiction applies to Mr. SUBJECT.

(8) LAW ENFORCEMENT MATERIALS:

- (a) Agent's supporting affidavit for SUBJECT
- (b) CID report to date
- (c) Offer letter for SUBJECT
- (d) LOA for SUBJECT
- (e) Statements of victim, Mr. Public, Mr. Friend, and Mr. Bystander

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist¹⁷⁴

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Please provide the following information to assist the Department of Justice in making a determination regarding MEJA jurisdiction
All MEJA referrals from DoD to DoJ must comply with DoDI 5525.11

DoJ: Domestic Security Section - Phone: (202) 616-5731, E-Mail: MEJA@usdoj.gov

DoD: General Counsel's Office (Mr. Robert Reed) - Phone: (703) 695-1055, E-Mail: reedr@dodgc.osd.mil

DoS: Diplomatic Security Service (Special Agent Scott Banker) - Phone: (571) 345-2270, E-Mail: bankers@state.gov

Part I - Investigator's Information

Due to frequent duty station transfers of overseas investigators, please provide complete information. Military investigators may be required to draft and swear to affidavits in front of U.S. based magistrate judges and testify at grand jury proceedings. Due to the overseas location of primary agents in MEJA cases, a U.S. based law enforcement agent should be assigned to assist federal prosecutors in the district with appropriate venue.

Case Agent:	_____	Agency:	_____
Phone Number:	_____	E-Mail Address:	_____
Alternate P.O.C.:	_____	Agency:	_____
Phone Number:	_____	E-Mail Address:	_____
JAG P.O.C.:	_____	Command:	_____
Phone Number:	_____	E-Mail Address:	_____

Part II - Subject's Information

Venue is established pursuant to 18 USC § 3238. Generally, appropriate venue is the in the U.S. district of the subject's last known residence. However, in some instances, venue is perfected in the venue where the subject is "first brought" under law enforcement custody. Prior coordination with DoJ is required to determine venue in each MEJA referral.

Name: _____ Status: (at time of offense)

Date of Birth: _____ SSN: _____ Citizenship: _____

Last Known U.S. Residence: _____

How was last known address obtained? (provide a copy of source document) _____

If Active Duty Military:

Branch: _____ Command/Unit: _____

Rank/Rate: _____ Command/Unit Phone Number: _____

If Contractor or U.S. Government Civilian Employee: (provide copy of employment contract and termination paperwork, if applicable)

Employer: _____ Position: _____

Dates of Employment: _____ Supervisor's Name: _____ Supervisor's Phone: _____

If Dependent:

Sponsor's Name: _____ Sponsor's Unit/P.O.C.: _____

Part III - Host Nation Information

Status of host nation investigation/prosecution:

¹⁷⁴ This document was created in August 2008, prior to the creation of the Human Rights and Special Prosecutions (HRSP). Office of Pub. Affairs, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division (Mar. 30, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-347.html>. The contact information in the "Referral Procedures," *supra* Appendix E, or at the HRSP website, *supra* Appendix D, should be used rather than the contact information listed for "DSS" in this form.

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Name of U.S. official coordinating with host nation: _____ Phone: _____

Name of host nation official involved in coordination: _____ Phone: _____

Part IV - MEJA / UCMJ Matters

Matters subject to both federal statute and UCMJ Art. 2 must be processed pursuant to DOD Memorandum (March 2008)

If the offense is subject to MEJA and UCMJ Article 2(a), does the appropriate command seek alternative UCMJ authority? ☐

Describe the subject's current arrest/detention/restriction status or current location: _____

Location of Arrest: _____ Date of Arrest: _____

If the subject is being removed from the foreign country to the U.S. for prosecution pursuant to MEJA removal procedures (18 USC §§ 3142, 3264-3265), has the subject been medically cleared to travel? (If yes, attach copy of clearance) ☐

Provide subject's travel itinerary: (if applicable) _____

Part V - Documents Enclosed

Department of Defense Instruction 5525.11 provides guidance on the investigative material required to be provided to DoJ during the MEJA referral process. Required documents and investigative materials can be submitted via email.

- ☐ All documents requested in Parts I-IV (as applicable)
- ☐ Preliminary reports of investigation (including a copy of any military police blotter)
- ☐ Witness statements (including biographical and current CONUS and OCONUS contact information for each witness)
- ☐ Statement(s) of the accused and rights advisal form(s) (if available)
- ☐ Photographs taken of injuries/crime scene
- ☐ Crime scene sketch/evaluations
- ☐ Description of physical evidence obtained, current location of all evidence, and contact information for laboratory/storage facilities where evidence was submitted
- ☐ Itemized chain of custody documentation regarding all physical evidence
- ☐ Medical records (with appropriate release documentation for the medical records)
- ☐ Addendum listing all law enforcement personnel involved and current CONUS and OCONUS contact information
- ☐ DRAFT, UNSIGNED affidavit or declaration, prepared by the investigating agent, setting forth the probable cause basis for believing that a violation of MEJA occurred and that the person identified has committed the violation (per DoDI 5525.11, paragraph 6.2.2)

Upon completion of this form:

- E-mail this form and all applicable documents to: MEJA@usdoj.gov, or
- Print and mail this form and all documents to: U.S. Department of Justice, Criminal Division - Domestic Security Section, Attn: MEJA Coordinator, 950 Pennsylvania Ave. NW, Washington, DC 20530

Note: Unless a civilian law enforcement agency formally assumes sole investigative authority regarding an overseas investigation, military investigative agencies are required to continue to investigate and assist DoJ prosecutors with the investigation and prosecution of MEJA referrals.

Signature: _____ Date: _____

Appendix F

Selected Felony Offenses Under Title 18, U.S. Code¹⁷⁵

Section 113 – Assaults

- (a)(1) – With intent to commit murder
 - (a)(2) – With intent to commit any felony, except murder
 - (a)(3) – With a dangerous weapon, with intent to do bodily harm, and without just cause or excuse
 - (a)(6) – Resulting in serious bodily injury
 - (a)(7) – Resulting in substantial bodily injury to an individual who has not attained the age of 16 years
- **Assault by striking, beating, or wounding (a)(4) and simple assault (a)(5) are not felonies.**

Section 661 – Theft

- Felony if the property value exceeds \$1,000 or is taken from another person

Section 1111 – Murder

Section 1112 – Manslaughter

- The unlawful killing of a human being without malice
- Voluntary and involuntary

Section 1113 – Attempt to Commit Murder or Manslaughter

Section 1117 – Conspiracy to Commit Murder

Section 2111 – Robbery and Burglary

- by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value

Section 2241 – Aggravated Sexual Abuse (by force, or threatening or placing in fear of death, serious bodily injury, or kidnapping; includes attempts)

Section 2242 – Sexual Abuse (threats made (other than above) or victim unable to consent)

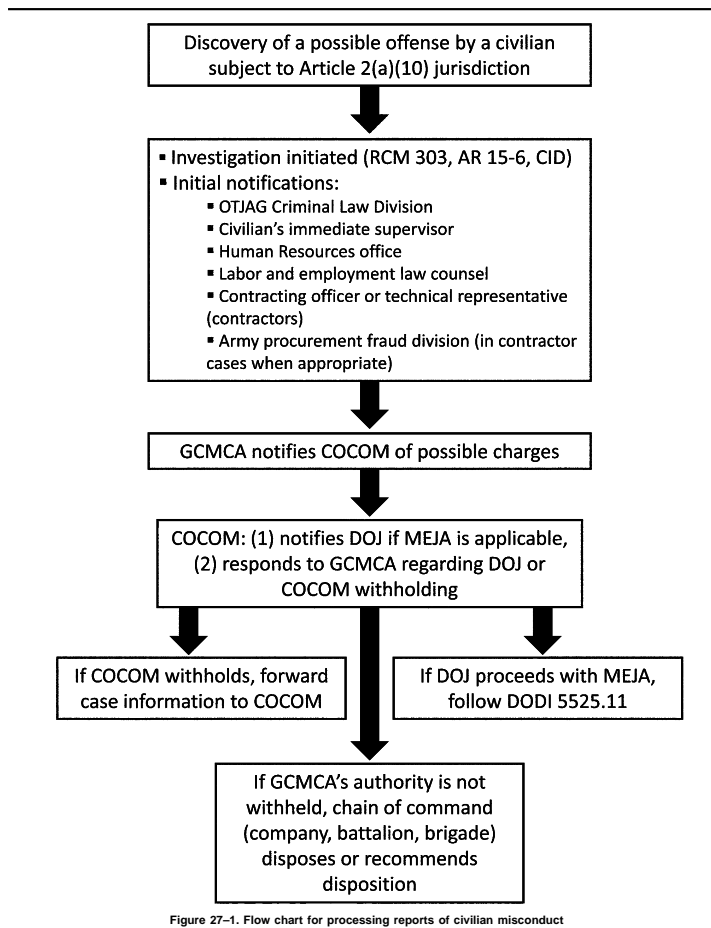
Section 2243 – Sexual Abuse of a minor or ward

Section 2252A – Certain Activities Relating to Material Constituting or Containing Child Pornography

¹⁷⁵ A complete list of all Title 18 offenses can be found at Title 18, U.S. Code, Part I. 18 U.S.C. pt. I (2011), *available at* <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI.pdf>.

Appendix G

Article 2(a)(10) Chart¹⁷⁶



¹⁷⁶ AR 27-10, *supra* note 79, fig.27-1, at 130.

Advising Military Families with Special Needs Children: A Legal Primer

Major Mary E. Meek*

It is in the whole process of meeting and solving problems that life has meaning. Problems are the cutting edge that distinguishes between success and failure. Problems call forth our courage and our wisdom; indeed, they create our courage and our wisdom. It is only because of problems that we grow mentally and spiritually. It is through the pain of confronting and resolving problems that we learn.¹

I. Introduction

The alarming rise in the rate of diagnoses of children with autism has garnered worldwide attention. According to researchers at the Centers for Disease Control and Prevention, between 2007 and 2009, America experienced a fifty percent increase in the number of children diagnosed with autism spectrum disorder.² Whereas the government estimated the rate of children with autism to be one in 150 of America's eight-year-olds in 2007, by 2009 the reported diagnosis rate rose to one in 100 for this same age group.³ A 2013 government study now reveals that the rate of autism diagnosis among schoolchildren has doubled since 2009 to the record rate of one in fifty.⁴ Children with autism, however, remain only one component of the special needs⁵ community, which includes children who are mentally, physically, or emotionally disabled.

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¹ M. Scott Peck, *Adversity, in THE TREASURE CHEST: MEMORABLE WORDS OF WISDOM AND INSPIRATION* (HarperCollins 1995) (1965).

² Trine Tsouderos, *1% of 8-year-olds Diagnosed as Autistic*, L.A. TIMES, Oct. 5, 2009, at A10 (detailing the results of a survey conducted by the Centers for Disease Control and Prevention and the Health Resources and Services Administration).

³ *Id.*

⁴ Alan Zarembo, *Autism Diagnoses on the Rise, Study Finds*, L.A. TIMES, Mar. 20, 2013, <http://articles.latimes.com/2013/mar/20/science/la-sci-autism-20130321> (quoting Stephen Blumberg, lead author of the Centers for Disease Control and Prevention study, for the proposition that the increased rate of autism diagnosis is "most likely due to better ascertainment").

⁵ See *infra* Part III.B (providing a discussion of the definition of "special needs" as used in this primer).

Disabilities are non-discriminatory, can occur at birth or any time thereafter, and are found in all nationalities, race, and economic categories. According to the 2000 Census, approximately 3.9% of American families are raising at least one child between the ages of five to seventeen with a disability.⁶ For reasons that remain unclear, military families experience an even higher rate of incidence of disabilities among their children than exists among civilian families.⁷

In addition to the normal challenges of raising a special needs child, mobile military families face numerous additional issues. For instance, the transitory nature of military service requires military families to secure services and support not just one time, but to reapply for state benefits and negotiate education plans every time they move. Congress has even recognized the growing need for additional support for military families with special needs. Under the National Defense Authorization Act for Fiscal Year 2010, Congress established the Office of Community Support for Military Families with Special Needs (the "Office").⁸ The Office has the mission to "enhance and improve Department of Defense support around the world for military families with special needs (whether medical or educational needs)."⁹ However, the legislation does not address the legal needs of military families with special needs.

⁶ QI WANG, U.S. CENSUS BUREAU, *DISABILITY AND AMERICAN FAMILIES*: 2000, at 3–4 (2005) (reporting that approximately twenty-nine percent of the 72.3 million families in the 2000 Census have at least one family member with a disability); see also *Study Finds Rate of Birth Defects Higher in Older Women, Hispanics Mass. Statistics Compared for '99*, BOSTON GLOBE, Mar. 26, 2002, at B7, available at 2002 WLNR 2566906 (noting that rate of birth defects for America's children comprises between 3 to 5% of all children born).

⁷ The rate of autism spectrum disorder in particular has increased among military families. See, e.g., Assemb. J. Res. 46, 2009–10 Leg., Reg. Sess. (Cal. 2010) (noting that "for reasons . . . unknown, the incidence for autism spectrum disorders among military families is higher than among civilian families"). But cf., e.g., Gregory H. Gorman et al., *Wartime Military Deployment and Increased Pediatric Mental and Behavioral Health Complaints*, 126 PEDIATRICS 1058 (2010) (concluding after surveying the fiscal year 2006 and 2007 military treatment records of children aged three to eight years that mental and behavioral health visits increased by 11% for these children when a military parent deployed).

⁸ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 563, 123 Stat. 2190, 2304–08 (2009) (codified as amended at 10 U.S.C. § 1781c (2011)).

⁹ § 563, 123 Stat. at 2304.

Clients often call upon legal assistance attorneys to address very complex issues, even though the military legal assistance attorneys may lack experience or training related to these matters. As the diagnosed rate of children with special needs increases among military families, it is imperative that legal assistance attorneys become familiar with their common legal concerns. This primer provides an overview of three key areas a legal assistance attorney is likely to encounter when advising military families with special needs. First, it will focus on assisting the client identify and secure available services and support, to include Supplemental Security Income and Medicaid. Second, the article will provide an overview of special education benefits and protections. Finally, it will outline long-term considerations for special needs families, to include guardianship planning and special needs trusts.

II. Background

The mission of the Army legal assistance program is to assist clients with their personal legal affairs in both a timely and effective manner.¹⁰ Although the assistance provided to clients is personal in nature, the program recognizes the necessity of personal legal readiness in maintaining a fighting force. Specifically, the legal assistance program, established by Army Regulation (AR) 27-3, serves the following military needs: improving Soldier readiness for immediate mobilization and deployment; fostering high morale among Soldiers; ensuring discipline in the ranks, given the strong correlation between unresolved legal difficulties and discipline problems; and recruiting and retaining a quality force.¹¹

Legal matters within the scope of the program include family law, estates, real property, personal property, economic, civilian administrative matters, military administrative matters, torts, taxes, and civilian criminal matters.¹² The AR further specifies which categories of cases are “optional” in nature, as well as the types of cases and services that fall outside the scope of the legal assistance program.¹³ Generally, provision of “optional” legal services

or assistance with “optional” categories of cases is subject to the availability of expertise and resources at a particular legal office.¹⁴

Eligible legal assistance clients include active duty and retired servicemembers and their families.¹⁵ This client population, accordingly, includes a wide variety of individuals as reflected by age and employment status, ranging, for example, from eighteen-year-old high school graduates to eighty-eight-year-old retirees. Although limited information is available regarding the special needs of retired servicemembers or their dependents, the eligible client population includes at least 72,454 active duty military dependents with special needs as reflected by their enrollment in the Army’s Exceptional Family Member Program.¹⁶

Given the diverse client base, the legal issues and needs encountered by military special needs families vary widely. The variable nature of the child’s disability itself impacts a military family’s legal concerns and may drive the family’s requests for assistance. For example, the military parents whose child has an acute, life-threatening medical condition may seek immediate help obtaining medical or financial assistance in order to cope in a time of crisis. By contrast, the parents of a child with chronic developmental disorders or physical disabilities may be struggling with how to plan for the child’s future or prepare an estate plan. Even for a particular family, individual legal needs change over time depending on the life stage of the child and the parents.

Despite the significant number of military families whose children have special needs, the Army does not possess or

¹⁰ U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-1a. (21 Feb. 1996) (RAR, 13 Sept. 2011) [hereinafter AR 27-3] (detailing that, pursuant to the mission of the program, legal assistance attorneys are to meet their clients’ need for “information on personal legal matters,” and “resolv[e] their personal legal problems whenever possible”).

¹¹ *Id.* para. 2-1b.

¹² *Id.* para. 3-6.

¹³ *Id.* paras. 3-6 to 3-8 (specifying limitations on the type of assistance and kinds of cases regarding which services which may be provided under the legal assistance program as excluding, for example, legal advice on military justice matters, private business activities, litigation against the United States, or employment matters). Specified, limited legal assistance may be provided regarding the following types of cases: claims or civil lawsuits against the United States; contingent legal fee cases; prepaid-legal-representation cases; standards of conduct issues; and service as a victim or witness liaison for a particular criminal case. *Id.* para. 3-8b.

¹⁴ Even for the types of cases identified as within the scope of the program, supervisory attorneys may refuse eligible clients certain optional legal services when they determine that “available resources, personnel, or expertise are insufficient to provide the legal assistance needed.” *Id.* para. 3-5c(2). In the event an eligible client is refused optional legal services, however, a legal office should make every effort to refer this client to attorneys capable of providing the needed assistance. *Id.*

¹⁵ *Id.* para. 1-1 (listing two statutory authorizations for receipt of legal assistance, 10 U.S.C. §§ 1044, 3013g, which further permit the provision of assistance to Reserve component Soldiers and Department of Defense civilian employees in certain situations).

¹⁶ E-mail from Marcia O’Connor, Exceptional Family Member Program (EFMP) Manager, Joint Base Myer-Henderson Hall, to author (May 10, 2013, 09:30 EST) (on file with author). Enrollment in the Army’s EFMP is mandatory for active Army, Army Reserve Soldiers in the USAR Active Guard Reserve Program, and Army National Guard personnel serving under authority of Title 10 or Title 32 of the U.S. Code. U.S. DEP’T OF ARMY, REG. 608-75, EXCEPTIONAL FAMILY MEMBER PROGRAM para. 1-7 (22 Nov. 2006) (RAR, 24 Feb. 2011) [hereinafter AR 608-75]. As of August 2007, there were 87,516 military families with special needs as represented by the respective services as follows: 50,006 Army, 17,500 Navy, 6,272 Marine Corps, and 13,738 Air Force. U.S. Dep’t of Def., *Special Needs Brief*, MILITARY ONESOURCE http://www.militaryonesource.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Troops%20and%20Families/Special%20Needs%20EFMP/Facilitator%20Guide/Special_Needs_Brief_PPT.pdf (last visited Apr. 20, 2013) [hereinafter DoD *Special Needs Brief*] (supplementing U.S. DEP’T OF DEF., FACILITATOR’S GUIDE TO THE DoD SPECIAL NEEDS PARENT TOOL KIT (n.d.)).

provide any specialized training or resources to prepare its legal assistance attorneys to help these clients.¹⁷ Topics such as disability planning, special education law, and special needs trusts are lacking in the curriculum for the Judge Advocate Officer Basic Course, the Legal Assistance Course, or the Graduate Course.¹⁸ With the exception of guardianship and estate planning, for which provision of legal services is mandated under AR 27-3, the common legal concerns of military families with special needs children are most readily categorized as “optional” and thus subject to the availability of expertise and resources.¹⁹ To address this deficit, this primer is designed to enhance the resources available to the legal assistance practitioner, and thus augment the otherwise “optional” legal assistance provided to eligible clients.

III. Client Consultation

Generally, no parent plans to have a child with special mental, physical, or emotional needs. The stress of diagnosis, challenge of trying to treat the condition, and struggle of balancing competing life concerns place tremendous demands upon the family. It is little wonder that divorce rates in families with special needs children are extremely high.²⁰ Consequently, at the time the client comes to the legal assistance office seeking help, it is often a time of tremendous personal crisis. Sensitivity on the part of the legal assistance practitioner to the client’s experience is a key component to the establishment of rapport.

A. Establishing Rapport

Author Emily Perl Kingsley famously described the experience of learning that her child had a disability as analogous to taking a much-anticipated vacation to Italy. After planning and packing with great excitement and care,

learning important Italian phrases and purchasing guidebooks, the parent boards a plane bound for Italy. When the parent’s plane lands, however, the pilot announces, “Welcome to Holland.” The parent reels, shocked with surprise and disappointment. Italy was where she always wanted and expected to go. Italy is where she planned for and prepared to go. But, when the parent departs the plane, she sees that although Holland does not have the historic landmarks and bustling cities she sought, it is not a terrible place filled with pestilence or disease. It is just a different place. Holland may not be as glamorous or fast-paced, but it has windmills, tulips, and even Rembrandts.²¹

Like the lost trip to Italy, the legal assistance client may have experienced the loss of a lifelong dream upon receiving the diagnosis of his or her child’s special needs. Simultaneous to this loss, however, the parent may be fiercely protective of the special child and respond very poorly to pity or perceived slights. Legal assistance attorneys should take great care to remain positive at all times when welcoming and consulting with their clients. If the child with special needs is present, the attorney should greet the child as well unless instructed otherwise by the parent. Similarly, although acknowledgment of the client’s challenges may be appropriate, do not offer an apology or expression of sympathy regarding the child’s condition.²²

²¹ Abigail Van Buren, *Dear Abby*, WASH. POST, Oct. 28 2003, at C11 (reprinting in full Emily Perl Kingsley’s essay “Welcome to Holland” due to frequent reader request). The well-published essay, “Welcome to Holland,” is often disseminated by organizations to new parents of children with special needs. In light of its power, an excerpt is provided below:

They’ve landed in Holland and there you must stay. The important thing is that they haven’t taken you to a horrible, disgusting, filthy place full of pestilence, famine, and disease. It’s just a different place. So, you must go out and buy new guidebooks. And you must learn a whole new language. And you will meet a whole new group of people you would never have met. It’s just a different place. It’s slower paced than Italy, less flashy than Italy. But after you’ve been there for a while and you catch your breath, you look around. You begin to notice that Holland has windmills. Holland has tulips. And Holland even has Rembrandts. . . . And the pain of that [lost] experience [of going to Italy] will never, ever, ever, go away. The loss of that dream is a very significant loss. But if you spend your life mourning the fact that you didn’t get to Italy, you may never be free to enjoy the very special, the very lovely things about Holland.

Id. Emily Kingsley’s son, Jason Kingsley, was diagnosed as having Down syndrome following his birth in 1974. Jacques Steinberg, *Opening a Window Despite a Disability*, N.Y. TIMES, Mar. 20, 1994, <http://www.nytimes.com/1994/03/20/nyregion/opening-a-window-despite-a-disability.html>.

²² An expression of sympathy that the client’s living child has certain medical conditions or disorders is generally inappropriate and clients may find such expression to be offensive. The preferred practice is to congratulate the parent on the child’s birth, if a newborn, and affirm

¹⁷ The U.S. Marine Corps, by contrast, employs several attorneys to assist and support families belonging to the EFMP. U.S. MARINE CORPS, ORDER 1754.4B, EXCEPTIONAL FAMILY MEMBER PROGRAM (EFMP) ch. 4 (20 Sept. 2010) [hereinafter MCO 1754.4B] (“EFMP attorneys support EFMP by providing individual attorney-client representation for EFMP families, primarily to obtain benefits and services for the EFM under state and federal education laws, including the IDEA and related disability laws and regulations benefiting individuals with disabilities.”).

¹⁸ Interview with Lieutenant Colonel John Ohlweiler, Chair, Admin. & Civil Law Dep’t, The Judge Advocate Gen.’s Legal Ctr. & Sch., in Charlottesville, Va. (Mar. 1, 2011).

¹⁹ Whereas AR 27-3, paragraph 3-6b provides that legal assistance “will” be provided on, *inter alia*, wills and guardianships, it contrarily provides in subparagraph 3-6g that legal assistance “may” be provided for civilian administrative matters within the “primary jurisdiction of a municipal, state, Federal, or foreign agency.” AR 27-3, *supra* note 10, paras. 3-6b, 3-6g.

²⁰ See, e.g., Judith L. Poller & Alicia Fabe, *Legal and Financial Issues in a Divorce When There Is a “Special Needs” Child*, 22 AM. J. FAM. L. 192, 192 (2009) (claiming that whereas the divorce rate in the United States is “between 40 and 50 percent,” the divorce rate rises to “between 85 and 90 percent” for parents of a child with special needs).

B. Defining “Special Needs”

The U.S. Department of Health and Human Service’s Maternal and Child Health Bureau defines children with special health care needs as being “children who have or are at risk for chronic physical, developmental, behavioral, or emotional conditions and who also require health and related services of a type or amount beyond that required by children generally.”²³ Since 2001, the U.S. Department of Health and Human Services has repeatedly increased its estimates regarding the number of U.S. children younger than eighteen years of age who are estimated to have a special health care needs from 12.8% in 2001, to 13.9% during 2005 to 2006, to 15.1% during 2009 to 2010²⁴ Generally, “special needs” fall into one of three major categories: (1) medical conditions which are acute or life-threatening (e.g. severe asthma or Type I diabetes); (2) developmental disorders which are chronic or pervasive (e.g. learning disabilities or pervasive developmental spectrum disorders); and (3) disorders that are psychological or behavioral (e.g. anxiety or depressive disorders).²⁵

The Department of Defense (DoD), by contrast, has established a functional definition of “special needs”: an individual has “special needs” if diagnosed with a qualifying medical condition, or is in receipt of state special education or early intervention services.²⁶ Department of Defense

positive attributes or actions as appropriate. Remain cognizant that the child’s condition does not define that individual. Utilize “people first” language by describing the individual first, then naming his or her condition. For example, describe a person with Down syndrome as being a “child with Down syndrome,” rather than a “Down syndrome child.” See, e.g., Ruth Torkelson Lynch et al., *Person-First Disability Language: A Pilot Analysis of Public Perceptions*, 60 J. REHAB. 18, 18 (1994) (“A focus on people first puts the focus on the individual, not on the particular functional limitation. Therefore, the use of people-first language has been promoted as the preferred terminology.”).

²³ Merle McPherson et al., *A New Definition of Children with Special Health Care Needs*, 102 PEDIATRICS 137, 138 (1998).

²⁴ U.S. DEP’T OF HEALTH & HUMAN SRVS., HEALTH RESOURCES AND SERVICES ADMINISTRATION, 2009–2010 NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS, <http://childhealthdata.org/browse/survey/results?q=1792&r=1> (15.1%); U.S. DEP’T OF HEALTH & HUMAN SRVS., HEALTH RESOURCES AND SERVICES ADMINISTRATION, THE NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS CHARTBOOK 2005–2006 (13.9%); U.S. DEP’T OF HEALTH & HUMAN SRVS., HEALTH RESOURCES AND SERVICES ADMINISTRATION, THE NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS CHARTBOOK 2001, <http://mchb.hrsa.gov/chscn/pages/prevalence.htm> (12.8%).

²⁵ Poller & Fabe, *supra* note 20, at 193. Although it is beyond the scope of this primer to provide a comprehensive list of specific conditions that a special needs child might have, the National Dissemination Center for Children with Disabilities provides contact information for national and state organizations and programs pertaining to particular disabilities. NAT’L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, <http://nichcy.org/> (last visited on May 6, 2013). Additionally, websites for a particular disability are often extremely informative and serve as abundant resources of information for both advocates and parents.

²⁶ See U.S. DEP’T OF DEF., INSTR. 1315.19, AUTHORIZING SPECIAL NEEDS FAMILY MEMBERS TRAVEL OVERSEAS AT GOVERNMENT EXPENSE 12-13 (20 Dec. 2005) (C1, 16 Feb. 2011) [hereinafter DODI 1315.19]; see also U.S. Dep’t of Def., DD Form 2792, Exceptional Family Member Medical

Instruction 1315.19 specifically provides a list of qualifying medical and educational needs.²⁷ In order to address the special needs of military families, the DoD created the Exceptional Family Member Program (EFMP). All active duty personnel and active duty reservists in the Army, Marines Corps, Navy, and Air Force are required to enroll their “exceptional” dependent children or other family members in their respective service’s EFMP.²⁸ The servicemember’s command is to take “appropriate” disciplinary action, moreover, should a Soldier refuse to or knowingly fail to enroll a family member in the EFMP.²⁹

The EFMP serves two primary functions: a mandatory personnel function employing consideration of noted needs in assignments processes; and an optional family support function providing services to EFMP members.³⁰ First, military personnel agencies are to consider the medical and special education needs of the exceptional family member (EFM) and “assign Soldiers to an area where the EFM’s medical and special education needs can be accommodated.”³¹ Second, family support centers can offer assistance to enrolled military families by providing information and referral to medical, educational, and community resources to assist in caring for the family

Summary (Apr. 2011); U.S. Dep’t of Def., DD Form 2792-1, Exceptional Family Member Special Education/Early Intervention Summary (Apr. 2011).

²⁷ DODI 1315.19, *supra* note 26, at 12–13. Qualifying medical conditions for EFMP enrollment include, for example, asthma, autism, the need to use adaptive equipment, and certain mental health conditions. *Id.*

²⁸ AR 608-75, *supra* note 16, paras. 1-7a. (stating that certain categories of “Soldiers with exceptional Family members (EFMs) (children and adults) will enroll in the EFMP”) (emphasis added); U.S. DEP’T OF AIR FORCE, INSTR. 40-701, MEDICAL SUPPORT TO FAMILY MEMBER RELOCATION AND EXCEPTIONAL FAMILY MEMBER PROGRAM (EFMP) para. 1.1 (15 Feb. 2012); U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 1754.5B, EXCEPTIONAL FAMILY MEMBER PROGRAM para. 5.b. (14 Dec. 2005); U.S. NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1754.2D, EXCEPTIONAL FAMILY MEMBER PROGRAM para. 4.b. (3 Nov. 2010); MCO P1754.4B, *supra* note 17, at 2-3. Once enrolled in the EFMP, the family member remains enrolled permanently unless the Soldier is separated from the Army or “medical or special education needs warrant closure.” AR 608-75, *supra* note 16, para. 1-7c.

²⁹ AR 608-75, *supra* note 16, para. 1-8.b (noting that “knowing that failure or refusal to enroll in the EFMP or willfully disregarding the mandatory update review of the EFM condition may constitute a dereliction of duty in violation of UCMJ, Art. 92”). The regulation specifies that appropriate disciplinary action is to include, “at a minimum a general officer letter of reprimand” if supported by the evidence. *Id.* Once a dependent is enrolled in the EFMP, Soldiers must provide an update review of the EFM condition at least once every three years. *Id.*

³⁰ See *id.* para. 1-9. The stated “concept” of the EFMP is to work together with other military and civilian agencies to provide “a comprehensive, coordinated, multiagency approach for community support, housing, medical, educational, and personnel services to families with special needs.” *Id.* para. 1-6. Clients may express concern that enrollment in the EFMP may hurt their career. However, enrollment in the EFMP does not affect selection for promotion or schools and selection boards receive no information regarding EFMP enrollment status or data. See *id.* para. 1-24f.

³¹ *Id.* para. 1-9c.

member with special needs.³²

The fact that a child is enrolled in the EFMP does not necessarily mean the EFM has a qualifying disability for purposes of Social Security benefit programs, accommodations, services, or other legal protections. The definition of an EFM is quite broad.³³ Contrarily, the definition of a person with a “qualifying disability” for purposes of a particular state or federal program is generally statute-specific and far more restrictive. In evaluating the potential legal protections of a client’s child, take care first to ascertain whether an evaluation or eligibility assessment of the special needs child has or should be made.³⁴ To assist in this process, provided in the next two sections are synopses of several key public benefit programs.³⁵

IV. Maximizing a Client’s Current Resources

Providing care for a child with special needs can prove emotionally, physically, and financially draining with each new life stage posing new challenges (see Appendix A). Families often require medical, financial, or other assistance from multiple sources to provide adequate care for their disabled child.³⁶ Servicemembers and their families can not

only utilize the DoD’s healthcare system, TRICARE,³⁷ but may also qualify for additional benefits for their special children under federal and state programs. Assisting such clients in maximizing the resources available for the care of their children requires knowledge of entitlement programs, federal and state laws concerning eligibility, and other potential resources. An overview of two of the most important federal and state programs from which many military families receive assistance follows.

A. Supplemental Security Income

The Supplemental Security Income (SSI) is federally funded and administered program designed to provide monthly income assistance for the purpose of helping aged, blind, and disabled individuals who have limited income and resources pay for food, clothing, and shelter.³⁸ SSI payments are not to be used for the payment of medical care, however, as Medicaid or Medicare provide for these expenses.³⁹ To qualify for this entitlement, applicants must establish the existence of a disability, as defined by SSI, and limited income and assets.⁴⁰ Complex rules govern what income is to be attributed to the disabled individual, which may include the income of the disabled child’s parents and work to reduce or eliminate the child’s eligibility for SSI.⁴¹ With respect to assets, the resource limit for eligibility is \$2,000.⁴²

³² See *id.* para. 1-9e.

³³ Major Michael R. Renz, *The Special Needs Trust and the Military Client: The Critical Issue-Spotting Role of the Legal Assistance Attorney*, 59 NAVAL L. REV. 45, 48 (2010) (noting that an exceptional family member “can be an individual with a food allergy or mild learning disability” whereas a person with a qualifying disability for purposes of the Supplemental Security Income program must have “marked and severe functional limitations for a period of 12 months”).

³⁴ Ordinarily, the determination of whether an individual has a qualifying disability is “made by the state in which the dependent lives.” *Id.* Diagnosis of a child as having particular special needs is of critical importance to securing both treatment and legal protections. In addition to establishing potential eligibility for special medical or educational services and legal protection from discrimination, an individual’s disability diagnosis may serve as evidence explaining or excusing misconduct should the individual engage in violent and disruptive conduct related to the individual’s disability. See, e.g., *Timothy B. ex rel. J.B. v. Neshaminy Sch. Dist.*, 153 F. Supp. 2d 621 (E.D. Pa. 2001) (finding plaintiff stated claim of procedural violation of the Individuals with Disabilities in Education Act and Section 504 of the Rehabilitation Act sufficient to deny defendant’s motion to dismiss when defendant had no determination as to whether the plaintiff’s behavior in making threatening remarks was a manifestation of his Tourette’s Syndrome prior to suspending him).

³⁵ The information contained in this primer is intended to serve as a checklist, counseling guide, and starting place for further research. A discussion all the government benefit programs that may be available for special needs families is beyond the scope of this article.

³⁶ In addition to the website listing disability-specific contact information provided, *supra*, in note 25, two resources available to military families warrant particular mention. First, military families may draw upon the invaluable resources available at a local installation’s EFMP Office. Additionally, Military OneSource provides free Special Needs Assistance through telephonic consultations at (800) 342-9647, and user-friendly materials that can be ordered online at www.militaryonesource.com.

³⁷ TRICARE offers multiple healthcare plans and programs which may benefit military families with special needs. For further information, direct clients to the installation TRICARE or EFMP office. Confirmation of eligibility for TRICARE benefits can, similarly, be made at the nearest uniformed services identification card center. If an unmarried adult child of a military sponsor is disabled due to a condition that existed prior to the child’s 21st birthday, the child may be entitled to TRICARE benefits and other identification card privileges. Army personnel can inquire further regarding the Incapacitated Children Over 21 program by calling (317) 510-2772. The Navy and Marine Corps refer to the program as the Incapacitated Dependents Program and can call (910) 874-3360, or (703) 784-9529, respectively. Air Force families can call (210) 565-2089 for more information. Additional information is also available on the TRICARE website at www.tricare.osd.mil.

³⁸ 42 U.S.C. §§ 1381–1385 (2011).

³⁹ Sebastian V. Grassi, Jr., *Special Needs Requires Special Attention: Estate Planning for a Family with a Special Needs Child*, 43 INST. ON EST. PLAN. ¶ 903.2 (2009).

⁴⁰ See 42 U.S.C. § 1381a. Disability for the purposes of SSI is defined differently for adults and children under eighteen. See *id.* § 1382c(a)(3).

⁴¹ 20 C.F.R. § 416.1165 (2012); Renz, *supra* note 33, at 50. Pursuant to the Heroes Earnings Assistance and Relief Tax Act (HEART Act), military families who receive SSI from the Social Security Administration for a special-needs family member receive no reduction of assistance due to receipt of cash payments for housing, AmeriCorps benefits, or certain State annuity payments paid to veterans who are blind, disabled, or aged. Heroes Earnings Assistance and Relief Tax Act of 2008 §§ 201–203, 42 U.S.C. §§ 1382a, 1382b (2011). Other regulations exclude from countable income combat-related pay. See 20 C.F.R. §§ 416.1124(c)(19), 416.1161(a)(28).

⁴² 42 U.S.C. § 1382(a)(3)(B). The Social Security Administration defines “resources” as “cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.” 20 C.F.R. § 416.1201(a).

In most states, children who qualify for SSI also qualify for Medicaid.⁴³

B. Medicaid

Medicaid is a federally sponsored, state-administered program that pays for medical treatment and assisted living costs for eligible beneficiaries.⁴⁴ Because the program is administered by each individual state, its specific eligibility requirements vary. Nevertheless, each state program has disability, asset, and income qualification requirements.⁴⁵ The asset restrictions differ slightly among the states, permitting beneficiaries to have only a very limited asset allowance ranging from \$999 to \$2,000 in order to remain eligible.⁴⁶ Although some military families with special needs children may be financially ineligible for regular state Medicaid programs, not all programs are based on the parents' income.

Pursuant to section 1915(c) of the Social Security Act, for example, states can provide a broad array of home and community-based services (HCBS) through Medicaid waivers.⁴⁷ Medicaid waivers vary from state to state and serve as an alternative to institutionalization, which the family is "waiving" in order to provide care in community settings. With a waiver, states can base eligibility for

⁴³ In thirty-nine states, receipt of SSI automatically qualifies the SSI recipient for Medicaid benefits. Grassi, *supra* note 39, ¶ 903.2. (noting that the eleven states for which receipt of SSI does not result in Medicaid benefits are known as "209(b) states" and include Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia). Consequently, establishing and maintaining SSI eligibility is crucial for most clients as it facilitates access to Medicaid and the myriad health care and other benefits Medicaid provides. *Id.*

⁴⁴ 42 U.S.C. §§ 1396–1396w-5.

⁴⁵ With the exception of "209(b) states," the state guidelines for Medicaid eligibility and services can be broader but not more restrictive than the federal minimum guidelines. *See* Grassi, *supra* note 39, ¶ 903.3.

⁴⁶ To find more information on Medicare and Medicaid, visit the U.S. Department of Health & Human Services web site at www.cms.gov.

⁴⁷ 42 U.S.C. § 1396n(c). With the home and community-based (HCB) waiver, Congress allowed states to use Medicaid funds in order to pay for services not otherwise allowed by the Medicaid Act so long as the services are necessary to keep a person from being institutionalized and no more expensive than institutional care. *See id.*; 42 C.F.R. § 441.300 (2012). The HCB waiver allows a state to decide not to count the family's income for children who otherwise meet SSI disability criteria and would be eligible for Medicaid if they were in an institutional setting, and further allows states to pay for care and services that do not fall within other Medicaid categories such as respite care, transportation, and home modifications. *See* Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History*, 26 GA. ST. U. L. REV. 937, 963 (2010). Currently, forty-six states and the District of Columbia offer services through HCB (1915(c)) waivers, and there are approximately 291 current HCB waiver programs nation-wide. MEDICAID.GOV, *Waivers*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html> (last visited Apr. 30, 2013) (once on the site, under "Filter by Status," select "Current." Then in the table below, sort by the "Waiver Authority" category to find the states and programs with 1915(c) waivers).

Medicaid on the disabled individual's income and assets and not on the disabled person's age or the parents' income or assets.⁴⁸ As a consequence, the disabled child may be eligible for a Medicaid even if the parents' income is too high to qualify for the family for Medicaid.

Offering a significant additional benefit, individuals receiving waiver services are also entitled to all other services available to regular Medicaid recipients. Posing a distinct disadvantage to the military client, however, Medicaid services do not "transfer" between states when a servicemember is reassigned to a new state because the services are state-specific. Instead, the disabled beneficiary must reapply for Medicaid services in the new state and risks a reduction or termination of Medicaid benefits.⁴⁹ As is outlined in the next section, relocation also complicates the preservation of special education public benefits.

V. Advocating for a Client's Educational Needs

Even for military children without special needs, the negative educational impacts caused by frequent relocations have recently received much-needed attention. In a 2010 presidential directive, President Obama challenged all cabinet secretaries and agency heads to discover improved ways by which to provide military families with help.⁵⁰ In their response, approved by President Obama on 8 December 2010, the federal executive departments and agencies identified four strategic priorities to provide care and support for military families.⁵¹ One of the four identified presidential-approved priorities addressed education and detailed the goal to "[e]nsure excellence in military children's education" with an identified need to "[r]educe negative impacts of frequent relocations and absences."⁵²

⁴⁸ *See* 42 U.S.C. § 1396n(c)(3).

⁴⁹ George France, *The Form and Context of Federalism: Meanings for Health Care Financing*, 33 J. HEALTH POL. POL'Y & L. 649, 663 (2008) ("Given the substantial interstate differences in eligibility rules and benefit packages under [Medicaid], persons changing state risk seeing their benefit package curtailed, possibly quite drastically, and they could even lose the right to Medicaid completely.").

⁵⁰ *See* Press Release, The White House Office of the Press Sec'y, First Lady Michelle Obama Announces Presidential Directive on Military Families (May 12, 2010), *available at* <http://www.whitehouse.gov/the-press-office/first-lady-michelle-obama-announces-presidential-directive-military-families>.

⁵¹ U.S. DEP'T OF DEF. ET AL., *STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT* (2011), *available at* http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf (describing the following primary, government-wide initiatives: (1) "Enhance the well-being and psychological health of the military family;" (2) "Ensure excellence in military children's education and their development;" (3) "Develop career and educational opportunities for military spouses;" and (4) "Increase child care availability and quality for the Armed Forces").

⁵² *Id.* at 2.

For children with special needs, the devastating impacts of frequently changing schools are profound. As a threshold matter, all children crave routine; the need for a predictable routine is even more pronounced for a child who has difficulty understanding or navigating a new environment.⁵³ Further complicating the child's transition to a new school, the school and parents may have different views regarding what constitutes "comparable services" under an existing special education individualized education program.⁵⁴ As a consequence, the new school might provide a different level of assistance than what the child had previously received. Therefore, advocates for a special needs child, including legal assistance attorneys and parents, need to have a working knowledge of the major federal statutes and legal benefits and protections governing special education.⁵⁵

A. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

Section 504 of the 1973 Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) of 1990 have significantly impacted the availability of education for individuals with disabilities through their prohibition of discrimination on the basis of disability.⁵⁶ Section 504

generally adopts the definition "disability," as set forth in the ADA, and protects students if they have a physical or mental impairment that substantially limits a major life activity, have a record of such impairment, or are regarded as having such impairment.⁵⁷ Once an otherwise qualified student is identified as having a disability under Section 504 or the ADA's expansive definition, the student is entitled to access to an "appropriate public education" and permitted "reasonable accommodation"⁵⁸ to participate in its programs or activities.⁵⁹

In application, both Section 504 and the ADA's definition of "disability" are broader than the definition under the Individuals with Disabilities Education Act (IDEA) because they encompass the concept of "impairment." By contrast, to qualify for protection under the IDEA, an individual must need special education and related services.⁶⁰ Consequently, some children who do not qualify for special education under IDEA may qualify for special accommodations and modifications under Section 504 or the ADA.⁶¹ As a corollary, however, neither Section 504 nor the ADA require schools to provide a special education program to meet the specific needs of a disabled child, and thus provides fewer legal protections than are available to a child under the IDEA.⁶²

⁵³ See, e.g., Thomas Knestrict & Debora Kuchey, *Welcome to Holland: Characteristics of Resilient Families Raising Children with Severe Disabilities*, 15 J. FAM. STUD. 227, 234-35 (2009) (observing in a study examining resiliency factors that families developed in response to the challenges of raising a disabled child that for all of the more resilient families "[r]outines were seen as crucial in the family's pursuit of resilience" and "seem[ed] to benefit all of the family members"). This assertion is also based on the author's experiences as the mother of three children, one of whom is a child with Down syndrome.

⁵⁴ Under the Individuals with Disabilities in Education Act, a receiving school must provide a child who transfers schools with comparable services to the sending school's individualized education program (IEP) until it develops and implements a new IEP. 20 U.S.C. § 1414(d)(2)(C)(i) (2011).

⁵⁵ In the United States, special education is regulated by four major federal statutes: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2011), the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2011), the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, and the No Child Left Behind Act, 20 U.S.C. §§ 6301-6578. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS* 9 (2d ed. 2006). Although for purposes of brevity this primer does not include a discussion of the No Child Left Behind Act (NCLB), the NCLB promises to have a great effect on education in America though its requirements that schools be accountable for achieving academic results, provide scientifically-based instruction, and utilize highly qualified teachers and paraprofessionals. See 20 U.S.C. § 6301. Of note, schools are to hold students with disabilities to the standards for the grade in which the child is enrolled and provide students with appropriate accommodations, if needed, to take the statewide assessment. MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 188-90 (2d ed. 2006).

⁵⁶ Although Section 504's applicability to a particular school is predicated on its receipt of "federal financial assistance," it has been expansively interpreted to apply to practically all schools. OSBORNE & RUSSO, *supra* note 55, at 10. "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a) (2011). It is Section 504, rather than the ADA, that is applicable to

the Department of Defense, to include DoD schools. See *id.*; 42 U.S.C. § 12111(5)(B)(i). The ADA applies to elementary and secondary education at public schools and similarly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132; 28 C.F.R. § 36.104 (2012).

⁵⁷ 29 U.S.C. § 705(9).

⁵⁸ "In making modifications for students, educators must provide aid, benefits, and/or services that are comparable to those available to children who do not have impairments." OSBORNE & RUSSO, *supra* note 55, at 12. Determination of whether a school has provided a student with a "reasonable accommodation" is fact-specific, and may involve environmental or academic modifications. *Id.* Schools are not required to grant all requests for accommodations, however, and need not provide accommodations beyond that which are considered "reasonable" in terms of cost, risk to school staff, or modification of a program's purpose. *Id.* at 12, 15-16.

⁵⁹ See 34 C.F.R. §§ 104.33, 104.39 (2012).

⁶⁰ OSBORNE & RUSSO, *supra* note 55, at 9-10.

⁶¹ Students who might be protected under Section 504 or the ADA, but not the Disabilities Education Act (IDEA), include, for example, students with attention deficit disorder. See, e.g., Lyons v. Smith, 829 F. Supp. 414, 415-16 (D.D.C. 1993) (finding that a child with attention deficit and hyperactivity disorder was not "other health impaired" under the IDEA, but might be covered under the definition of disabled under the Rehabilitation Act). The Supreme Court clarified in *Smith v. Robinson* that a student could use Section 504 of the Rehabilitation Act to redress wrongful treatment by schools if the Education of the Handicapped Act, now the Individuals with Disabilities Education Act, failed to provide a remedy. *Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984) (stating that where the Education of the Handicapped Act provides a remedy to a student, it is the exclusive avenue for redress).

⁶² See PETER W. D. WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSLAW: SPECIAL EDUCATION LAW* 291 (2d ed. 2007) (noting that school personnel often erroneously advise parents that their children will be "better served

If a family disputes the school's evaluation or placement of a child, both Section 504 and ADA regulations permit due process procedures similar to but less robust than those under the IDEA.⁶³ Parents are entitled, for example, to impartial hearings should parents disagree with a child's identification, evaluation, or placement; however, these statutes do not include such safeguards as a written notice before a change of placement such as provided under the IDEA.⁶⁴ Nevertheless, a key benefit under Section 504 and the ADA is that they provide a legal remedy should a school retaliate against individuals for exercising their rights.⁶⁵

B. The Individuals with Disabilities Education Act

In 1975, Congress enacted the Education for All Handicapped Children Act that, over the years, was both renamed and amended.⁶⁶ Now, the Act is known as the "Individuals with Disabilities Education Act."⁶⁷ By its stated purpose, the IDEA provides an expansive mission statement: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living," and "to ensure that the rights of children with disabilities and parents of such children are protected"⁶⁸ Understanding of the IDEA's purpose is particularly important when interpreting its provisions.

with a 504 Plan, not an IEP" under the IDEA when in fact the opposite is true). In explaining the differing protections available for students under Section 504, as opposed to IDEA, authors Peter and Pamela Wright explain that Section 504 provides "access to an education," such as accomplished by making a building accessible for a child who uses a wheelchair. Unlike the IDEA, however, Section 504 does not entitle the child to an education "from which the child receives an educational benefit" such as would be needed if the child had a problem affecting the ability to learn. *Id.* at 293.

⁶³ 29 U.S.C. § 794a (2011); 42 U.S.C. § 12133 (2011); 34 C.F.R. § 104.36 (2012); PAM WRIGHT & PETE WRIGHT, *WRIGHTSLAW: FROM EMOTIONS TO ADVOCACY* 196 (2d ed. 2006). In contrast to the IDEA, which recognizes no defenses for noncompliance, under Section 504, school officials can posit three defenses to excuse a failure to accommodate an otherwise qualified student: (1) making the accommodation would result in a "fundamental alteration in the nature of [a] program;" (2) the accommodation would impose an "undue financial burden;" and (3) inclusion of the otherwise qualified student in a program poses a "substantial risk of injury to himself, herself, or others." OSBORNE & RUSSO, *supra* note 55, at 13 (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979), in describing the first two defenses and citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), regarding as authority for the third defense).

⁶⁴ WRIGHT & WRIGHT, *supra* note 63, at 196.

⁶⁵ WRIGHT & WRIGHT, *supra* note 62, at 291.

⁶⁶ *Id.* at 7. Prior to its enactment, school boards routinely excluded students with disabilities. OSBORNE & RUSSO, *supra* note 55, at 6.

⁶⁷ 20 U.S.C. ch. 33 (2011); *see also id.* § 1400(a).

⁶⁸ *Id.* § 1400(d).

The IDEA now mandates that all American school systems provide each qualifying child with a free appropriate public education (FAPE).⁶⁹ The Act, codified in Chapter 33 of the Title 20, U.S. Code, is divided into four parts: General Provisions under Subchapter I;⁷⁰ Assistance for Education of All Children with Disabilities under Subchapter II;⁷¹ Infants and Toddlers with Disabilities under Subchapter III;⁷² and National Activities to Improve Education of Children with Disabilities under Subchapter IV.⁷³ IDEA Subchapters II and III are of particular interest to special needs families and thus discussed below.

1. Early Intervention

In 1986 and again in the 2004 amendments to the IDEA,⁷⁴ Congress enacted legislation to provide a program of early intervention services to ensure that children with disabilities would not be required to wait until they were school age to receive services. Early intervention is designed to lessen the effect of a disabling condition.⁷⁵ Under Subchapter III of the IDEA, states are now required to provide early intervention services for all children with disabilities from birth until the child attains the age of three years.⁷⁶ At the state's discretion, children qualifying for early intervention services may also include "at-risk" infants and toddlers.⁷⁷

States vary, however, in their implementation of early intervention services. Although most services are free, states may charge fees to a child's family.⁷⁸ If charged for early intervention services, military families can seek coverage for such fees under TRICARE, private insurance, or Medicaid.

⁶⁹ *Id.* § 1401(9).

⁷⁰ *Id.* §§ 1400–1409.

⁷¹ *Id.* §§ 1411–1419.

⁷² *Id.* §§ 1431–1444.

⁷³ *Id.* §§ 1450–1482.

⁷⁴ Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (1986); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

⁷⁵ 20 U.S.C. § 1431(a) (recognizing that "significant brain development . . . occurs during a child's first 3 years of life" and finding a need to "enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay").

⁷⁶ *Id.* §§ 1413(f), 1432–1443. The IDEA defines an "infant or toddler with a disability" to include, at a minimum, a child "under 3 years of age who needs early intervention services because the individual— (i) is experiencing developmental delays . . . ; or (ii) has a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay." *Id.* § 1432(5)(A).

⁷⁷ *Id.* § 1432(5)(B); *see also id.* § 1432(1) (defining "at risk infant or toddler" as being a child "under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual").

⁷⁸ *Id.* § 1432(4)(B).

In advising a client, do not neglect to consider the potential role of a military treatment facility or TRICARE to supplement services a parent deems necessary to address a child's particular needs but a state fails to provide.⁷⁹

2. School Age Children

In contrast to Section 504, which has fairly broad standards, qualification for services under IDEA Subchapter II requires demonstration of three statutory requirements: the child must be between the ages of three and twenty-one; the child must have a disability which is specifically identified; and finally, the child must require a specially designed instruction in order to receive a FAPE in the least restrictive environment (LRE).⁸⁰ For qualifying students, in turn, the school is charged with providing a free individualized education that is designed to take into account the child's unique needs and confer a meaningful educational benefit in the LRE.⁸¹ In establishing the child's education plans in the child's individualized education program (IEP), which details the placement and services provided, the school and parents must work together.⁸²

⁷⁹ Unlike Subchapter II of the IDEA related to Individualized Education Programs, Subchapter III does not require that receiving states provide "comparable services" to an infant or toddler with an individualized family service plan (IFSP) who transfers to another state. *Id.* §§ 1414(d)(2)(C)(i), 1436. Nevertheless, military families may discuss their concerns regarding services they feel the child needs but is not receiving with the child's primary care manager (PCM) at a local military treatment facility (MTF). In turn, the child's PCM may provide a referral for the child to receive needed treatment or therapy. For example, hypothetical family Smith moved from Hawaii to Virginia. Although the Smith's two-year old child with special needs received physical, occupational, and speech therapy through early intervention services in Hawaii, Virginia informed the Smiths that it would only provide speech therapy to the child and that receipt of such services was indefinitely delayed due to a long waiting list. Rather than rely only on the delayed, reduced early intervention services, the Smith family might consult with the child's PCM regarding a referral for physical and occupational therapy to obtain these services either at a MTF or from a TRICARE-approved provider.

⁸⁰ *Id.* §§ 1401(3), 1401(9), 1412(a)(1)(A), 1412(a)(5).

⁸¹ *Id.* § 1401(9). The IDEA defines free and appropriate public education as:

special education and related services that—
(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the individualized education program . . .

Id.

⁸² *Id.* § 1412(a)(4). IDEA defines an IEP as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the procedures spelled out in a later section of the title. *Id.* § 1401(14).

Although FAPE is now statutorily defined,⁸³ its definition remains open to interpretation as it fails to establish substantive standards by which to assess services provided.⁸⁴ The IDEA leaves undefined the meaning of the phrases "least restrictive environment," "meaningful benefit," and what is "appropriate" for the child.⁸⁵ Fortunately, the IDEA provides students with disabilities and their families with procedural safeguards designed to ensure parents are able to participate in their child's education. Nevertheless, parents and schools often disagree about the meaning of these phrases because parents ordinarily want more for their child than the school is either willing or able to provide.⁸⁶

3. IDEA Due Process Procedures

Parents are the primary enforcement mechanism of the IDEA.⁸⁷ The law affords them the opportunity to interface with and challenge educators regarding the identification, evaluation, development of IEPs, and placement of their children in special education and related services.⁸⁸ As such, it is particularly important that parents understand that the IDEA does not guarantee their child the very best educational services possible; instead, it requires schools to provide an appropriate IEP that is designed to confer a meaningful educational benefit to the child.⁸⁹ In the event of a disagreement with the school system regarding the education program for the child, there are generally three mechanisms to resolve this discord.

Within the limits set by the IDEA, specific procedures for the resolution of disputes vary from state to state but generally include a resolution session, mediation, and due process hearing.⁹⁰ Once the parents file a complaint, the IDEA first requires the parents and local educational agency to hold a resolution session unless both parties agree either to waive such meeting or to pursue mediation.⁹¹ In

⁸³ *Id.* § 1401(9).

⁸⁴ OSBORNE & RUSSO, *supra* note 55, at 23.

⁸⁵ Dorene J. Philpot, *Special Education Law Primer*, RES GESTAE, Mar. 2004, at 24, 24.

⁸⁶ *Id.*

⁸⁷ Appendix B provides an information paper to help parents understand the special education processes and procedural safeguards set forth in federal law. Parents may also find the DoD Special Needs Parent Tool Kit to be a particularly helpful guide in accessing and advocating for special education services. Available for download on the internet, the Tool Kit contains six modules addressing many topics of interest to military special needs families. Its practical guidance and sample letters to schools are especially useful. U.S. DEP'T OF DEF, DOD SPECIAL NEEDS PARENT TOOL KIT (3d ed. 2011), available at http://www.militaryonesource.mil/efmp/parent-tool-kit?content_id=268726.

⁸⁸ 20 U.S.C. §§ 1414(a)(1), 1414(b), 1414(d), 1415.

⁸⁹ *Id.* § 1401(9); Philpot, *supra* note 85, at 24.

⁹⁰ 20 U.S.C. §§ 1415(e), 1415(f)(1)(A), 1415(f)(1)(B); Philpot, *supra* note 85, at 24.

⁹¹ 20 U.S.C. § 1415(f)(1)(B)(i).

recognition of the potential harm to the student and benefits of alternate dispute resolution, schools must offer mediation procedures to resolve disputes.⁹² If the parents and educational agency forgo mediation, waive or hold a resolution session, or the parents' complaint remains unresolved thirty days after received by the educational agency, parents are entitled to a due process hearing.⁹³

C. Interstate Compact on Educational Opportunity for Military Children

Military attorneys should be aware of one additional special education resource that may be uniquely available to their clients. The DoD and the Council of State Governments collaborated to develop the Interstate Compact on Educational Opportunity for Military Children to addresses relocation-related challenges facing military families relating to education.⁹⁴ Although the Compact does not expand the special education services or protections beyond those under existing federal law, it is possible that the Compact may provide additional remedies.⁹⁵ By its own terms, provisions of the Compact are to be enforced by the "executive, legislative, and judicial branches of state government in each member state," or by the Interstate Commission acting in its discretion against a defaulting state.⁹⁶

⁹² *Id.* § 1415(e)(1).

⁹³ *Id.* § 1415(f)(1)(B). Under the IDEA, the parties are accorded the following hearing rights: (1) right to be accompanied and advised by counsel and experts on child disabilities; (2) right to present evidence and confront, cross-examine, and compel attendance of witnesses; (3) right to obtain a verbatim record of the hearing; and (4) right to written findings of fact and decisions. *Id.* § 1415(h).

⁹⁴ MODEL LANGUAGE OF INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITY FOR MILITARY CHILDREN (2007) [hereinafter COMPACT], available at <http://mic3.net/pages/resources/documents/InterstateCompactonEducationalOpportunityforMilitaryChildren-ModelLanguage.pdf>. As of 9 April 2013, forty-five states and the District of Columbia have signed the Compact into law. Press Release, Military Interstate Children's Compact Comm'n, Idaho Adopts the Interstate Compact on Educational Opportunity for Military Children (Apr. 12, 2013), available at <http://mic3.net/documents/MIC3PressRelease-Idaho.pdf>. A current list of states that have enacted the Compact and the status of any pending legislation may be accessed at the website for the Military Interstate Children's Compact Commission, <http://mic3.net/>. The Compact addresses the following relocation concerns: transfer of records; course placement; graduation requirements; exclusion from extra-curricular activities; redundant or missed entrance or exit testing; kindergarten or first grade entrance age variations; graduation requirements; and support for children of deployed servicemembers.

⁹⁵ Article V of the Compact recites but does not expand upon the protections required under the Individuals with Disabilities Act (IDEA), Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act. COMPACT, *supra* note 94.

⁹⁶ *Id.*

Should the continued development, implementation, and enforcement of the Compact give rise to an alternate grievance procedure, such change stands to benefit military children significantly. Given the lengthy duration of IDEA's due process procedures, military families may be required to relocate prior to a conflict's resolution. If the Compact were to facilitate a faster resolution of grievances, as a legal assistance attorney might advocate, schools would have less incentive to draw out the process waiting for military families to move. Maximizing educational opportunities for the special needs child is only one aspect of preparing for the child's future, however. As detailed in the next section, parents must also evaluate the child's anticipated capabilities and needs, and plan accordingly.

VI. Planning for the Child's Future

In order to help clients prepare for the future of the special needs child, legal assistance attorneys should inquire regarding the nature of the child's disability and level of capacity. Obtain details regarding the disability to include whether it is progressive, how long it is anticipated to last, and its impact on the functional abilities of the child. Of particular importance, ascertain the anticipated future needs of the special needs child: whether the child can manage personal affairs and live independently, whether the child receives government benefits such as SSI or Medicaid, and whether the child will receive an inheritance or family assistance. Answers to these questions will help determine whether the clients should seek guardianship of their adult child, or execute a special needs trust to safeguard receipt of public benefits.⁹⁷

A. Adult Guardianship⁹⁸

A critical component of planning for the future of the special needs child is to assess whether the child will be able to live independently and, if not, make arrangements for the future. Ordinarily, when a child attains the legal age of majority, eighteen years of age in most states, it is assumed that the child is capable of making personal health, finance, and other planning decisions. If doubt exists as to whether the child will be capable of making these decisions responsibly, however, it may be appropriate and necessary for the client to secure legal guardianship of the special needs child after the child reaches majority.

⁹⁷ See, e.g., Anthony J. Enea, *The ABC's of SNTs (Special Needs Trust)*, 35 WESTCHESTER B.J. 25, 25-26 (2008) (detailing a sample checklist of questions for attorneys preparing to draft a special needs trust).

⁹⁸ Some states use the term "conservatorship" instead. See, e.g., CAL. PROB. CODE div. 4, pt. 3 (West 2013) (Conservatorship); CONN. GEN. STAT. ANN. tit. 45a, ch. 802H, pt. IV (West 2013) (Conservators).

Although parents of special needs children are not legally required to become their adult child's guardian, if no affirmative action is taken when the child reaches the age of majority, the child will be considered an autonomous adult regardless of the child's disabilities. As a consequence, the parents would be excluded from financial or medical information or decisions relating to the adult child.⁹⁹ Simultaneously, the adult child could enter into contracts or be deemed by medical personnel to be incompetent to approve needed but non-emergent medical services.

The procedure by which to obtain legal guardianship varies from state to state by statute.¹⁰⁰ Typically, a guardianship petition requires an evaluation by a physician as well as a psychologist or psychiatrist showing that the child is not mentally capable of operating independently. The court will also appoint a guardian ad litem to protect the interest of the disabled individual who is the subject of the petition. If the client moves to a new state after establishing guardianship, the client must reapply for guardianship of the special needs child in the new state.¹⁰¹

B. Special Needs Trust

For the client whose child qualifies for receipt of Medicaid, SSI, or other public programs, future planning must also address methods to safeguard receipt of these benefits.¹⁰² In light of how limited the child's resources can be to establish and maintain eligibility for such benefits, attorneys should exercise great care to help the client avoid a variety of potential estate planning pitfalls. Of particular concern is the client who gives no thought to what happens to her assets when she dies, fails to re-visit her estate plan despite the onset of the dependent child's disability, or requests a "simple" will leaving all her assets first to her spouse and next to her children.

⁹⁹ In the absence established guardianship or valid general durable power of attorney, the impact of the privacy rules of the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d (2011), can prove particularly disastrous for an adult special needs child requiring medical treatment who is unable to give informed consent. See Sebastian V. Grassi, Jr., *Estate Planning for a Family with a Special Needs Child*, PROBATE & PROP., July–Aug. 2009, at 14, 20. Under HIPAA, which applies to all patients over the age of 18, medical personnel would not be able to discuss the adult child's medical condition with the parents without the child's consent upon penalty of being fined or jailed. *Id.*

¹⁰⁰ See *Guardianship Information by State*, BRIDGING REFUGEE YOUTH & CHILDREN'S SERVS., <http://www.brycs.org/guardianship/guardianship-information-by-state.cfm> (last visited May 15, 2013) (providing state by state information on minor guardianship, which can be used as a starting point for finding information on adult guardianships/conservatorships).

¹⁰¹ See Sally Balch Hurme, *Crossing State Lines: Issues and Solutions in Interstate Guardianships*, 37 STETSON L. REV. 87, 110–12 (2007).

¹⁰² The knowledge of estate planning techniques needed to safeguard receipt of public assistance is more complex than simple will or trust planning. It is beyond the scope of this primer to address property transfers or asset reduction techniques utilized for or by disabled individuals to qualify for Medicaid subsidization of long-term care needs.

Generally, there are four estate planning options available to special needs families.¹⁰³ However, significant risk is associated with three of these options: giving assets directly to the special needs child; disinheriting the special needs child by specifically excluding him by name in the will; and distributing property by the will to a client's relative or friend with the expectation or understanding that the property will be used for the special needs child. Only the fourth option ensures that the special needs child remains eligible for basic government subsidies while making assets available to enhance the child's standard of living: establishing a Special Needs Trust (SNT), either through a will ("testamentary")¹⁰⁴ or during the client's lifetime ("inter vivos").¹⁰⁵

The Omnibus Budget Reconciliation Act of 1993 (OBRA 93) defines two categories of SNTs funded by the assets of the individual with special needs, known as "self-settled trusts," that allow the beneficiary to receive benefits from public programs.¹⁰⁶ First, a self-settled "(d)(4)(A)" trust,

¹⁰³ See Grassi, *supra* note 39, ¶ 907; Grassi, *supra* note 99, at 16. Mr. Grassi describes five estate planning options including not only the four set out in this primer, but also the possible creation of a third-party discretionary support trust for the special needs child; Mr. Grassi does not, however, recommend this option as it may serve to disqualify the child from receiving certain government benefits and it is not further discussed herein. Appendix C provides an information paper to help parents understand the four estate planning options for a special needs child as discussed in this primer.

¹⁰⁴ Although the Army does not specifically prohibit legal assistance attorneys from drafting testamentary SNTs, unlike the Navy and Marine Corps, Army practitioners may lack the necessary experience or training to become competent to do so. See, e.g., *supra* note 18 and accompanying text; Renz, *supra* note 33, at 46 (noting that Navy and Marine Corps legal assistance attorneys "are not authorized to draft SNTs"). For a more in-depth discussion regarding counseling legal assistance clients about SNTs, see Renz, *supra* note 33. Nevertheless, consultation and client pro bono referral information is available to enrolled, military attorneys through the American Bar Association's Military Pro Bono Project, available at www.militaryprobono.org. This invaluable and likely underutilized resource makes it possible for military attorneys to connect with subject matter experts the Army lacks, yet which are needed to understand and assist their clients. Although it is the author's recommendation that the Army follow the example set by the Marine Corps through the hire of attorneys dedicated to the provision of legal support to special needs families, in the absence of such change, legal assistance attorneys should utilize all available resources to assist their clients with this critical legal assistance mission. See AR 27-3, *supra* note 10, para. 3-6b (noting that "[l]egal assistance will be provided on wills"); *supra* note 17 (discussing Marine Corps EFMP attorneys).

¹⁰⁵ Inter-vivos SNTs are beyond the scope of the legal assistance program, but are generally preferred by practitioners as they provide the trustee with the "maximum flexibility to meet the beneficiary's needs and maintain the beneficiary's eligibility for government benefits." Grassi, *supra* note 99, at 16–17 (noting that the third-party created and funded special needs trust can, for example, be structured to receive gifts, bequests, and inheritances from other relatives or friends in addition to the parents and obviate the need for separate third-party created and funded SNTs).

¹⁰⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622 (1993) (amending 42 U.S.C. § 1396p (2011)). The Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 205, 113 Stat. 1822, 1833–34 (1999) (codified at 42 U.S.C. 1382b(e) (2011)), clarified the use of these trusts to preserve SSI eligibility. See Grassi, *supra* note 39, ¶ 911.1; see also Gail C. Eichstadt, *Essay: Using Trusts to Provide for the Needs of an Adult Child with a Disability: An Introduction to Family*

named for the applicable subsection number in the U.S. Code, may be used to qualify a Medicaid applicant otherwise disqualified due to having assets or income in excess of state restrictions.¹⁰⁷ The “(d)(4)(A)” SNT is subject to a Medicaid payback requirement upon the death of the beneficiary, however.¹⁰⁸ Second, “pooled” or cooperative master trust (“(d)(4)(C)” trust) combines together the assets of multiple beneficiaries and are managed by a nonprofit association.¹⁰⁹ When the beneficiary dies, the balance of the “pooled” SNT is retained for the benefit of other trust beneficiaries.¹¹⁰

Whereas self-settled SNTs, above, find their origin in federal statutes, trusts funded with the assets of third-parties (“non-self-settled trusts”) should originate in state common law.¹¹¹ Although it is possible to draft a non-self-settled SNT funded with the assets of parents or grandparents under OBRA 93,¹¹² this practice is not recommended in order to avoid the requirement of a Medicaid payback when the beneficiary dies.¹¹³ Whatever the origin of the SNT, such trusts are designed to supplement funds available for discretionary expenses without displacing receipt of public benefits for people with disabilities.¹¹⁴ Whereas SSI provides cash payments for food and shelter and Medicaid pays for medical bills, trust proceeds can be used for all other needs identified in the trust document, such as special equipment,

vacations, or a personal attendant.¹¹⁵

VII. Conclusion

Legal assistance attorneys should be aware of the life-long needs of clients with special needs children and be prepared to provide counsel regarding available benefits, special education law, guardianships, and wills. The consequences of unresolved legal problems for these families demand that attorneys develop a working knowledge of the applicable legal concerns, rights, and remedies in order to advise them competently. Similarly, the incalculable negative impact on a child’s potential and wellbeing if not connected with all available resources inspires the practitioner to address not only the client’s stated concerns, but also the legal needs of which the client might be unaware.

For the growing number of families who find themselves in “Holland” raising a child with special needs, the myriad legal issues that present themselves come without a passport or guidebook.¹¹⁶ The stress and difficulties inherent in raising a child with a physical, developmental, or behavioral impairments increase exponentially for mobile, military families that must secure anew needed services and support every time they move. In addressing these challenges, legal assistance attorneys may serve as navigators by working to illuminate and resolve for their clients problems both seen and unforeseen.

Concerns for Lawyers and a Primer on Trusts for Parents, 45 S.D. L. REV. 622, 630–34 (2000).

¹⁰⁷ 42 U.S.C. § 1396p(d)(4)(A).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 1396p(d)(4)(C).

¹¹⁰ *Id.* “Pooled” trusts have not gained widespread use. April Caudill, *Special Needs Trusts and Retirement Benefits*, 34 TAX MGMT EST., GIFTS & TR. J. 257, 257 (2009).

¹¹¹ MARGARET “PEGI” S. PRICE, *THE SPECIAL NEEDS CHILD AND DIVORCE* 192 (2009) (reproducing a section on estate planning for a special needs child written by Joseph A. Burcke, a Missouri estate planning attorney). Estate planning attorney Joseph Burcke identifies eight provisions either a testamentary or inter-vivos non-self-settled SNT should contain: (1) a statement that the trust is irrevocable, as required by SSI; (2) a “spendthrift” provision, to exempt inclusion of trust assets for public benefit eligibility; (3) the trust should *not* contain any provision that provides the child a “power of appointment” over any of the trust’s principal or income; (4) a statement that the trustee’s discretion in making distribution is absolute and the special needs child is not entitled to any distribution “as a matter of right;” (5) a statement of trust purpose, the purpose being “to provide for the disabled beneficiary’s needs that are *not provided by public benefits*;” (6) if the child owns assets, a statement that precludes the trustee from including such property in the SNT; (7) a provision allowing the trustee to use trust funds to defend claims by federal or state officials seeking to count trust assets as resources of the special needs child; and, finally, (8) a “savings” clause. *Id.* at 194–95 (emphasis in original); *see also* Caudill, *supra* note 110 (discussing drafting challenges for funding special needs trusts with retirement benefits).

¹¹² *See* 42 U.S.C. § 1396p(c)(2)(B)(iii).

¹¹³ Grassi, *supra* note 99, at 16.

¹¹⁴ Patricia Tobin, *20/20 Foresight: Planning Ahead for Special Needs Trusts*, PROBATE & PROP., May–June 1997, at 56, 57–58.

¹¹⁵ *Id.*; *see also*, e.g., Andrew H. Hook, *Special Needs Trusts*, ALI-ABA COURSE OF STUDY MATERIALS: COURSE no. SM054 (Sept. 2006).

¹¹⁶ *See*, e.g., Van Buren, *supra* note 21 (reprinting in full Emily Perl Kingsley’s essay, *Welcome to Holland*).

Appendix A

Checklist of Life-Stage Special Needs Planning Considerations

Stage I: Birth to Age 3 of Child

- **Diagnosis**
 - What is the child's current prognosis, treatment, and life expectancy?
 - Is the child enrolled in the Exceptional Family Member Program (EFMP)?
 - Is the child eligible for assistance under public benefit programs such as Supplemental Security Income (SSI), Medicaid, or Medicaid waivers?
 - Are the parents connected to recent and relevant information regarding their child's disability?
- **Education.** Is the child receiving early intervention services pursuant to an individual family service plan (IFSP) under the Individuals with Disabilities Education Act (IDEA)?
 - If the state fails to provide early intervention services or they are inadequate, is the child receiving needed services or therapy under TRICARE?
 - Have the parents consulted the local EFMP manager regarding other potential medical, educational, and community resources?
- **Estate Planning.** Have the parents updated their wills subsequent to the child's diagnosis as having special needs? (See Appendix C). If so, do the wills contain Special Needs Trusts (SNT)? If not or if existing wills do not contain a SNT, is a SNT needed? Sample factors and questions to help determine whether a SNT is required and, if so, what it should contain include the following:¹¹⁷
 - (1) What is the nature of child's disability and level of capacity? If incapacitated, is the incapacity mental or physical? How long has the child been disabled? Is the underlying illness progressive? What is the expected duration of the disability?
 - (2) What are the functional limitations and capabilities of the child?
 - (a) Can the child attend to personal hygiene, cook, or clean? Can the child handle finances and live independently?
 - (b) Can the child participate in decisions?
 - (c) Is the child employed? If so, what kind of job does the child have and how much does it pay?
 - (d) What is the child's educational level? Does the child have any special training or skills?
 - (3) Where does the child currently reside? What housing will the child need in the future: apartment rental; living with family; group home; institutional? Is the anticipated housing subsidized by the federal government?
 - (4) What government benefits is the child receiving: SSI; community-based Medicaid benefits; institutional benefits?
 - (5) What are the anticipated needs of the child?
 - (6) What potential sources of assets does the child have?

Stage II: Age 3 to Age 18 of Child

- **Education.** Is the child receiving special education services pursuant to an individualized education program (IEP) under the IDEA? (See Appendix B).
- **Estate Planning.** Have the parents reviewed their child's finances and parental estate plan consistent with the child's capabilities and needs? (See "Estate Planning," above, and Appendix C). If the child were to acquire named as a beneficiary under, for example, a Uniform Gift to Minors Act account, this might jeopardize the child's eligibility for government benefits when the trust terminates at age 18 or 21. Parents should take care to evaluate the following common assets and beneficiary designations to ensure that they will not be paid directly to the special needs child receiving government benefits:¹¹⁸
 - (1) retirement benefits including IRAs, 401(k)s;
 - (2) life insurance;
 - (3) insurance benefits provided through credit cards for accidental death and travel insurance;
 - (4) annuities;
 - (5) savings bonds;

¹¹⁷ Enea, *supra* note 97, at 25–26 (listing sample questions for client assessment from which this excerpt is derived).

¹¹⁸ Grassi, *supra* note 99, at 18–19.

- (6) any non-probate or non-trust property;
- (7) Uniform Gifts to Minors Act (UGMA), or Uniform Transfers to Minors Act (UTMA) accounts;
- (8) designations on accounts, savings bonds, or securities which are Transfer on Death (TOD), Pay on Death (POD), or In Trust For (ITF);
- (9) any inheritance, gift, or bequest to the child through another person's will or trust;
- (10) deeds;
- (11) joint accounts;
- (12) an jointly owned property including real estate;
- (13) final paycheck;
- (14) any collectibles, antiques, or family heirlooms;
- (15) personal injury and wrongful death proceeds payable to the parent's estate; and
- (16) homestead laws, such as contained in Florida law, that give the surviving spouse a life estate in real property and minor children a vested remainder interest in the property.
- **Transition Planning.** Have the parents begun to plan for when the child turns 18?

Stage III: Adult Child

- **Education.** Is the adult child still receiving special education services pursuant to an IEP under the IDEA? The child remains eligible for special education services until he or she turns 21. (*See* Appendix B)
- **Estate Planning.** Have the parents reviewed their estate plan consistent with the child's capabilities and needs? (*See* "Estate Planning," Stages I-II above, and Appendix C).
 - Who will act as advocate for the adult child once parents die?
 - Letter of intent: guide for a future caregiver regarding parent's wishes for child and child's medical, social, and personal information
 - Child's likes and dislikes: food, clothes, doctors, music, therapy, medications, religious wishes
- **Transition Planning.**
 - Self-sufficiency versus Guardianship/Conservatorship?¹¹⁹
 - Is the adult child is capable of making personal health, finance, and other planning decisions? (This decision may need to be made by an appropriate medical professional). If so, should the child name an agent through a Power of Attorney to make decisions or assist with certain tasks such as handling financial or medical decisions?
 - Does the adult child lack the capacity to name agents to act on his or her behalf? If so, parents may need to secure legal guardianship.
 - Is the adult child eligible for SSI? The test of disability is different for children and adults, and turning 18 requires review of SSI eligibility. Living arrangements?
 - Social Support?
 - Medical Support? Health care and health insurance:
 - If an unmarried adult child of a military sponsor is disabled due to a condition that existed prior to the child's 21st birthday, the child may be entitled to TRICARE benefits and other identification card privileges.
 - Is the adult child eligible for Medicaid?
 - Transportation?
 - Daily activities?
 - Job?
 - Day program?
 - Sheltered workshop?

Stage IV: Retirement, Disability, or Death of a Parent

- Is a parent eligible for Medicare? If so, the parent's spouse, minor children, and disabled adult children may also qualify for Medicare benefits.
- Is a parent of the child disabled, retired, or deceased? If so, it is possible for a dependent special needs child who was disabled before the age of 22, and not a worker, to qualify for Social Security Disability payments based on the parent's past earnings record.
- Have the parents reviewed their estate plan recently consistent with the child's capabilities and needs?

¹¹⁹ Nicole Vandiver Bryan, *Planning Ahead for When Your Special Child Turns 18*, EXCEPTIONAL PARENT, Mar. 2010, at 57–58.

Appendix B

Sample Special Education Information Paper

The information contained below is suitable for use in an information paper provided to a client in a Legal Assistance Office either upon consultation with a legal assistance attorney, or for “self-service” with other preventative law materials. As laws and regulations in this area can change, always ensure the information is still accurate before providing to clients.

1. Purpose. To inform special needs families regarding critical special education services, processes, and procedural safeguards set forth in federal law.

2. References.

a. Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–1482.

b. Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g

c. NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, QUESTIONS OFTEN ASKED BY PARENTS ABOUT SPECIAL EDUCATION SERVICES (2009), *available at* <http://nichcy.org/wp-content/uploads/docs/lgl.pdf>.

3. Discussion. Special education is instruction that is specially designed to meet the unique needs of children who have disabilities. Special education and related services are provided in public schools at no cost to the parents and can include special instruction in the classroom, at home, in hospitals or institutions, or in other settings. This definition of special education comes from the Individuals with Disabilities Education Act (IDEA). This law gives eligible children with disabilities the right to receive special services and assistance in school.

a. Eligibility. Children with disabilities are eligible for special education and related services when they meet IDEA’s definition of a “child with a disability” in combination with state and local policies. IDEA’s definition of a “child with a disability” lists 13 different disability categories under which a child may be found eligible for special education and related services:

- (1) Autism;
- (2) Deafness;
- (3) Deaf-blindness;
- (4) Hearing impairment;
- (5) Mental retardation;
- (6) Multiple disabilities;
- (7) Orthopedic impairment;
- (8) Other health impairment;
- (9) Serious emotional disturbance;
- (10) Specific learning disability;
- (11) Speech or language impairment;
- (12) Traumatic brain injury;
- (13) Visual impairment, including blindness.

b. Determination of Eligibility. You can ask the school to *evaluate* your child. Call or write the director of special education or the principal of your child’s school. Describe your concerns with your child’s educational performance and request an evaluation under IDEA, to see if a disability is involved. The school does not *have* to evaluate your child just because you have asked, however. Alternatively, the public school may also be concerned about how your child is learning and developing. If the school thinks that your child may have a disability, then it *must evaluate your child at no cost to you*. The school must ask your permission and receive your written consent before it may evaluate your child. The evaluation and placement process is as follows:

(1) Parent, teacher, or other knowledgeable person refers student who is suspected of having a disability and needing special education to school officials.

(2) School officials notify student’s parents or caregivers that the student has been referred for evaluation, and provide the reasons for the referral.

(3) School official request parental consent to evaluate the student.

(4) Within 60 days of obtaining parental consent, the multidisciplinary team completes an evaluation of student which addresses all areas of suspected disability.

(5) School officials meet to discuss the results of the evaluation and determine whether special education services are needed by the student and, if so, develop an individualized education program (IEP).

(6) Educators draft and present an IEP to the student's parents. The parents may accept, reject, negotiate an alternative IEP, or delay making a decision regarding the IEP to seek an independent evaluation. If accepted, the IEP is implemented immediately. If rejected, the IDEA's dispute resolution procedures are triggered.

(7) School officials ensure that the IEP is reviewed annually, and the student is re-evaluated at least once every three years.

c. Required Elements of an IEP: After a child has been found eligible for special education services, the next step is to write and implement an IEP. After an eligibility determination, educators and parents must hold a meeting within 30 days to develop the IEP. The IEP has two general purposes: to set learning goals for your child; and to state the supports and services that the school district will provide for your child. Required elements of the IEP include the following:

- (1) Statement of a child's current level of academic and functional performance;
- (2) Measurable, annual academic and functional goals for the child;
- (3) Description of how school officials will measure the child's progress towards meeting annual goals, and when periodic reports will be provided;
- (4) Statement of special education and related services or aids the child will receive;
- (5) Explanation of the extent to which child will not participate in regular classes with non-disabled peers;
- (6) Statement of the accommodations necessary to assess the child's academic achievement and functional performance on state and district assessments;
- (7) Anticipated date of initiation and duration of special education services the child will receive;
- (8) For an IEP to be in effect for a student who is 16 years old or older, a statement of measurable post-secondary education goals and transition services;
- (9) For an IEP for a child who will reach the age of majority in no less than one year, a statement that the student has been informed of his or her rights, if any, which will transfer at the age of majority.

d. IEP Meeting. The law is very clear that parents have the right to participate in developing their child's IEP. In fact, your input is invaluable. You know your child so very well, and the school needs to know your insights and concerns. That's why IDEA makes parents equal members on the IEP team. Parents can prepare for this meeting by:

- (1) Making a list of your child's strengths and needs;
- (2) Talking to teachers and/or therapists and getting their thoughts about your child;
- (3) Visiting your child's class and perhaps other classes that may be helpful to him or her;
- (4) Talking to your child about his or her feelings toward school;
- (5) Writing down what you think your child can accomplish during the school year;
- (6) Looking at your state's standards for your child's grade level;
- (7) Making notes about what you would like to say during the meeting.

e. IDEA Related Services. The IEP team will also talk about the *related services* your child may need to benefit from his or her special education. Review of these services prior to an IEP meeting may prove beneficial. The IDEA lists many related services that schools must provide if eligible children need them, including the following:

- (1) Audiology;
- (2) Counseling services (including rehabilitation counseling);
- (3) Interpreting services;
- (4) Medical services for diagnostic or evaluation purposes;
- (5) Occupational therapy;
- (6) Orientation & mobility services;
- (7) Parent counseling and training;
- (8) Physical therapy;
- (9) Psychological services;
- (10) Recreation (including therapeutic recreation);
- (11) Speech-language pathology services;
- (12) School health services and school nurse services;
- (13) Social work services in schools; and
- (14) Transportation.

f. Parental Rights. You have the right to disagree with the school's decisions concerning your child. This includes decisions about: your child's identification as a "child with a disability;" his or her evaluation; his or her educational placement; and the special education and related services that the school provides to your child. IDEA provides parents with many due process safeguards:

- (1) Opportunity to examine all of the child's records;
- (2) Opportunity to participate in all meetings related to the identification, evaluation, and educational placement of child;
- (3) Receipt of a free appropriate education for the child;
- (4) Opportunity to obtain an independent educational evaluation of child at own expense. An independent evaluation of the child at public expense is only permissible if the parents demonstrate that the school board's evaluation was inappropriate.
- (5) Notification in writing of any proposed change in child's placement and an opportunity to contest the change. The notification should include the following: a description of the proposed change; if other options were considered, an explanation as to why they were rejected; a description of any assessments or relevant factors used in determining the proposed change; and an explanation of IDEA's due process safeguards.
- (6) A due process hearing regarding proposed change in the child's placement to which the parents object.

Appendix C

Sample Supplemental Information Paper Regarding Estate Planning for Special Needs Children

The information contained below is suitable for use as a supplement to an estate planning information paper provided to a client in a Legal Assistance Office either upon consultation with a legal assistance attorney, for preparation in anticipation with consulting with an estate planning attorney, or for “self-service” with other preventative law materials. As laws and regulations in this area can change, always ensure the information is still accurate before providing to clients.

1. Purpose. To provide special needs families basic information regarding estate planning considerations either in preparation for, or as a supplementation to consultation with an attorney.

2. References.

a. Omnibus Budget Reconciliation Act of 1993 (“OBRA 93”), 42 U.S.C. §§ 1382b(e)(5), 42 U.S.C.A. § 1396p(d)(4).

b. Sebastian V. Grassi, Jr., *Special Needs Requires Special Attention: Estate Planning for a Family with a Special Needs Child*, 43 INST. ON EST. PLAN. ¶ 907 (2009).

3. Discussion.

a. In preparing for the future needs of your child with a disability, you must first determine your goals for the child and what living arrangements you want for your child during adulthood. You should make a conservative assessment regarding whether you expect that your child will continue to require lifetime care or oversight to manage his personal affairs. For purposes of this information paper, it is assumed that your special needs child is not capable of living autonomously.

b. Even if you want to support your special needs child for the child’s entire life, this arrangement may not be feasible financially or practically with expected life spans even for children with disabilities expanding with advancements in medical care. Although planning for your death and your child’s adult years may be difficult or even depressing, delaying this process is fraught with risk to our child. The alternative to full parental support is public assistance programs such as Medicaid and Supplemental Security Income (SSI). Receipt of public benefits contingent on the applicant having total assets of less than \$2,000, however. Should you fail to take action to ensure your child will not inherit assets or property directly from you so as to jeopardize receipt of public benefits, you may significantly compromise and impoverish your child’s quality of life.

c. Establishing an estate plan for your special needs child requires careful consideration of your goals, resources, and consultation with an attorney. Nevertheless and as a starting point for consideration or consultation, listed below are four potential estate planning options.

- (1) Giving assets directly to the special needs child. This option is not recommended because receiving the assets would likely disqualify the child from public benefits. Be advised that your failure to “choose” an estate planning option would likely result by default in the execution of this option. In other words, should you fail to establish an alternate estate plan, upon your death your child would likely inherit property from you outright under state law.
- (2) Disinheriting the special needs child by specifically excluding him by name in your will. Although this arrangement might maintain your child’s financial eligibility for Medicaid and SSI, it is not recommended. First, disinheriting your child would render him dependent on Medicaid and SSI for all support needs. Second, your child would have nothing to fall back on should government benefits later be reduced or eliminated.
- (3) Distributing property by your will to a relative or friend with the expectation or “understanding” that the property will be used for the special needs child, whom you have excluded by name in your will. As appealing as this option might appear because it is simpler than a trust, it is also not recommended. First, the arrangement would not be legally enforceable. You would have no way to insure that the recipient of the property would fulfill your wishes after you die; the recipient would be the legal owner of the property and could sell or squander the assets as the recipient desires. Second, even assuming the recipient desires to give effect to your wishes to use the property for your child, the assets might nevertheless be taken (“seized”) by the recipient’s creditors or ex-spouse.

- (4) Establishing a Special Needs Trust (SNT) either through your will (“testamentary”), or during your lifetime (“inter vivos”). Establishing a SNT is highly recommended because the funds in the trust would not be counted as assets of the child so that the child could continue to receive Medicaid and SSI for basic support needs. The SNT is designed to supplement but not replace the proceeds provided by Medicaid and SSI. Consequently, the law requires that the proceeds from the SNT cannot be used for the child’s food, shelter and clothing because these benefits are provided by Medicaid and SSI. Nevertheless, money from the trust can be used for things that may improve the child’s quality of life including such items as recreation and transportation, telephone and television services, mobility aids, prescription medications, and periodic outings and vacations.

The Lucifer Effect¹

Reviewed by Major Joon K. Hong*

*This behavior lies just under the surface of any of us. The simplified accounts of genocide allow distance between us and the perpetrators of genocide. They are so evil we couldn't ever see ourselves doing the same thing. But if you consider the terrible pressure under which people were operating, then you automatically reassert their humanity—and that becomes alarming. You are forced to look at the situation and say "What would I have done?" Sometimes the answer is not encouraging.*²

I. Introduction

On 11 May 2009, Sergeant (SGT) John M. Russell of the U.S. Army shot five American Soldiers while he was undergoing treatment at a military mental stress clinic in Baghdad, Iraq.³ In the days and months following the shootings, more information regarding SGT Russell's background surfaced.⁴ He had been in the military for over twenty years, and believed that the military was "the most wonderful thing that ever happened to him."⁵ He was serving his third deployment in six years without prior incident.⁶ However, more than a week before the shootings, SGT Russell had expressed suicidal wishes as his colleagues became more alarmed by his behavior.⁷ He had visited the mental health clinic four times before the shootings.⁸ During those visits, SGT Russell stated that he had seen several doctors, who had made him angry while one particular doctor mocked him.⁹ On 11 May 2013, nearly three weeks after SGT Russell pled guilty to the shootings,¹⁰ more

information about his mental conditions emerged.¹¹ The Army's mental health board had discovered that SGT Russell suffered from severe depression with psychotic features and post-combat stress.¹² A brain scan also showed damage to the part of his brain that affected his impulse control.¹³ Other than these shootings, it appeared that SGT Russell lived a rather mundane life. So how could such a person who had been in the military for over twenty years commit such a heinous act? Did he act out on his latent sadistic impulses, or were there other environmental forces at work? *The Lucifer Effect*, authored by Philip Zimbardo, may provide an explanation as to how a seemingly ordinary man could commit such a crime of extraordinary moral magnitude.

In *The Lucifer Effect*, Philip Zimbardo clearly explains at the outset that his intent is to "understand the processes of transformation at work when good or ordinary people do bad or evil things."¹⁴ Specifically, he aims "to understand the nature of their character transformations when they are faced with powerful situational forces."¹⁵ Zimbardo is the original creator of the Stanford Prison Experiment (SPE), which was conducted in a university campus basement back in 1971. For this experiment, paid student volunteers assumed the roles of prisoners and prison guards in an attempt to simulate a realistic prison environment for the purposes of determining the degree to which a person adapts to their new roles.¹⁶ Zimbardo then recounts what he observed during the SPE and compares his findings with those findings uncovered during the investigation of the abuses at Abu Ghraib, Iraq, to show the extent to which situational forces could, in fact, transform ordinary human beings. Although some of the conclusions drawn from the SPE are not entirely convincing, Zimbardo does accomplish what he sets out to do in his book, which is to show that everyone of us is susceptible to the powers of situation. And unless we learn

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¹ PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007).

² *Id.* at 15 (quoting Alison Des Forges of Human Rights Watch).

³ Timothy Williams, *U.S. Soldier Kills 5 of His Comrades in Iraq*, N.Y. TIMES, May 11, 2009, <http://www.nytimes.com/2009/05/12/world/middle-east/12iraq.html?ref=global-home>.

⁴ *Army 'Broke' Soldier Held in Killings, Dad Says*, ASSOCIATED PRESS, May 13, 2009, http://www.nbcnews.com/id/30678715/ns/world_news-mid-east_n_africa/t/army-broke-soldier-held-killings-dad-says/.

⁵ Jomana Karadsheh et al., *U.S. Soldier Charged with Murder in Iraq Shooting Deaths*, CNN.COM, May 12, 2009, <http://www.cnn.com/2009/WORLD/meast/05/12/iraq.soldiers.killed/>.

⁶ *Id.*

⁷ Rod Nordland, *Report Finds Lapses in Handling of G.I. Accused of Murders in Iraq*, N.Y. TIMES, Oct. 20, 2009, http://www.nytimes.com/2009/10/21/world/middleeast/21iraq.html?_r=0.

⁸ *Id.*

⁹ *Id.*

¹⁰ Eric M. Johnson, *U.S. Soldier Pleads Guilty to Murdering Fellow Servicemen in Iraq*, REUTERS, Apr. 22, 2013, <http://www.reuters.com/article/2013/04/22/us-usa-iraq-court-martial-idUSBRE93L0EL20130422>.

¹¹ Kim Murphy, *Five Killings at Camp Liberty in Iraq: Calculation or Despair*, L.A. TIMES, May 11, 2013, <http://www.latimes.com/news/nation/nationnow/la-na-nn-camp-liberty-russell-20130511,0,7643590.story>.

¹² *Id.*

¹³ *Id.*

¹⁴ ZIMBARDO, *supra* note 1, at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 20, 31–32.

to recognize how vulnerable we really are, we could at any point find ourselves SGT Russell.

II. The Stanford Prison Experiment

One of the purposes of the SPE was to find out what would happen when good people are placed in a bad situation.¹⁷ Do good people resist corruption and the temptation to inflict pain, or do they become corrupt themselves?¹⁸ Would the violence that is endemic to most prisons be present in a simulated prison run by normal law-abiding citizens?¹⁹ To test his theory, Zimbardo hired normal, healthy, intelligent, male college students, who agreed to participate for \$15 per day, to become a prisoner or prison guard for two weeks.²⁰ Six were randomly assigned as guards, while nine were assigned as prisoners.²¹ The guards were given minimal instructions and training on how to run the simulated prison. Zimbardo provided the guards with a general overview of what he was hoping to accomplish. Specifically, Zimbardo informed the guards that he wanted to create a sense of powerlessness among the prisoners to see what the prisoners would do to regain power, degree of individuality, freedom, and privacy.²² The guards were given permission to create boredom, a sense of frustration, fear to some degree, and a notion of arbitrariness.²³ The guards were allowed to “produce the required psychological state in the prisoners for as long as the study lasted.”²⁴ The prisoners, themselves, were provided very little guidance as well; however, they were notified that they had the option of quitting the experiment at any time.²⁵

According to Zimbardo, an experiment that started off as a prospective lesson on how normal law-abiding citizens adjust to a prison-like environment transitioned into a lesson on how people could undergo powerful character transformation given the right conditions.²⁶ From the moment the guards took control, they humiliated the prisoners, enforced arbitrary rules, forced prisoners to play meaningless games for their amusement, and inflicted punishments short of physical assault.²⁷ One particular guard employed sadistic tactics, including compelling a prisoner to

pantomime sexual acts towards another prisoner without provocation. The abuses became so violent that Zimbardo had to stop the experiment a week early. Zimbardo observed how the guards became “totally absorbed in their illusory prison.”²⁸ Zimbardo also observed how the prisoners themselves had begun “to focus inward to selfishly consider what they had to do singly to survive” rather than teaming up with other inmates to protest their inhumane and deteriorating conditions.²⁹ The important lesson to be drawn from the SPE, according to the author, is that not only do people internalize the roles that they have accepted but that “most of us can undergo significant character transformations when we are caught up in the crucible of social forces.”³⁰ Unfortunately, this conclusion is not entirely convincing.

In his attempt to legitimize his experiment as a representation of a real prison capable of producing realistic responses, the author fails to account for the extent to which the prison guards were fully conscious of the artificiality of their environment, and explain how such knowledge could have affected their roles as prison guards. Did the prison guards truly undergo a character transformation, or were they merely doing their best to effectuate the intent of the experiment, one of which was to produce a sense of powerlessness?³¹ In fact, one prison guard informed Zimbardo that the experiment was important to him in order to find out how people would react to oppression.³² This revelation is consistent with one of the reasons why some of the student volunteers had agreed to participate in the first place, which was “to learn something about how they [would] handle themselves” in the event they became prisoners for evading the draft or protesting for civil rights.³³ In his scathing critique of the SPE, Erich Fromm writes:

The difference between behavior and character matters very much in this context. It is one thing to behave according

¹⁷ *Id.* at 20.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 20, 30, 32.

²¹ *Id.* at 56.

²² *Id.* at 31, 55–56.

²³ *Id.* at 55.

²⁴ *Id.*

²⁵ *Id.* at 48, 222.

²⁶ *Id.* at 55.

²⁷ *Id.* at 46–50.

²⁸ *Id.* at 86, 116.

²⁹ *Id.* at 110, 161.

³⁰ *Id.* at 211.

³¹ Compare the Stanford Prison Experiment with the Milgram experiment, where participants (the teachers) were requested to send electric shocks to punish another set of participants (the learners) whenever they failed to answer questions correctly. *Id.* at 266–72. From the standpoint of the teachers, the object of the Milgram experiment was to improve people’s learning and memory through the use of punishment. *Id.* The teachers were informed that they could send varying degrees of shock to the learners. *Id.* Unbeknownst to the teachers, the learners were not connected to any device where they could have actually felt pain. *Id.* The learners, however, were instructed to play-act according to the level of shock the teachers administered. *Id.* During the experiment, two out of every three teachers administered the maximum voltage allowed knowing full well that such shock could produce fatal results. *Id.* What makes the Milgram experiment particularly useful is that the realism the teachers operated under created a real conflict in which they had to make real choices. *Id.*

³² *Id.* at 188.

³³ *Id.* at 30–31.

to sadistic rules and another thing to want to be and to enjoy being cruel to people. The failure to make this distinction deprives this experiment of much of its value.³⁴

In the case of the SPE, it is unclear whether the guards resorted to sadistic behaviors knowing full well that they were operating in a plastic environment that was moderated by professionals who had the power to safeguard the interests of the prisoners. Furthermore, Zimbardo deprived the guards of the option to act humanely towards the prisoners when he informed them of the objectives of the experiment. Under such artificial circumstances, the guards were never confronted with a true dilemma that required them to choose between different courses of action.

Despite the concerns, above, the SPE does provide valuable insights into how ordinary people could readily assume sadistic roles provided that the system under which they operate sanction their behavior. Zimbardo states:

The most important lesson to be derived from the SPE is that Situations are created by Systems. Systems provide the institutional support, authority, and resources that allow Situations to operate as they do. After we have outlined all the situational features of the SPE, we discover that a key question is rarely posed: “Who or what made it happen that way?” Who had the power to design the behavioral setting and to maintain its operation in particular ways? Therefore, who should be held responsible for its consequences and outcomes? . . . The simple answer in the case of the SPE is—me!³⁵

This revelation is important because it provides a framework through which the abuses at Abu Ghraib could be explained and understood.

III. Why We Support Systems

The natural question that arises from Zimbardo’s revelation, above, is why we choose to support such systems that perpetuate evil in the first place. Zimbardo attempts to answer this question by providing the results of prior psychological tests and historical accounts of atrocities committed by ordinary people while framing these accounts in the context of sociological and psychological principles. In one example, Zimbardo describes an experiment in which

twelve nurses were asked whether they would follow a doctor’s order to administer twice the maximum dosage—four times the usual dosage—of a particular drug to patients.³⁶ Ten of the nurses said they would decline; however, when a new set of ten nurses were placed in a situation where the doctor actually ordered them to administer the double maximum dose, almost all of the nurses complied.³⁷ According to Zimbardo, these results reveal not only our willingness to blindly obey authority, but they also reveal our tendencies to overestimate our own virtues and adherence to ethical standards. Zimbardo warns against the danger of overestimating our own qualities for the following reason:

[T]hese biases can be maladaptive as well by blinding us to our similarity to others and distancing us from the reality that people just like us behave badly in certain toxic situations. Such biases also mean that we don’t take basic precautions to avoid the undesired consequences of our behavior, assuming it won’t happen to us.³⁸

So why do we blindly follow authority? Although Zimbardo offers the idea that we conform due to our inherent desire to belong,³⁹ his explanation does not adequately address the source of these inherent desires and how these desires relate to our relationship to authority. The following explanation from William J. Goode may provide an answer: “The individual’s emotional commitment to an adequate discharge of his role duties, and thus his behavioral consistency, derives ultimately from his experiences of censure and reward in his role relationships.”⁴⁰ Since a child in his earlier years is more likely to be punished for failure in his role performance towards a person, that deviation from the norm becomes censured.⁴¹ Therefore, since a vast majority of people have been reared to respect the role of authority, or else suffer the unpleasant consequences of not complying, the desire to follow authority is permanently wired into all of us.

IV. Abu Ghraib

It is not until Zimbardo explores the phenomenon in Abu Ghraib that the reader can appreciate the findings produced in the SPE and the manner in which he organizes

³⁶ *Id.* at 277.

³⁷ *Id.*

³⁸ *Id.* at 261.

³⁹ *Id.* at 258–60.

⁴⁰ William J. Goode, *Norm Commitment and Conformity to Role-Status Obligations*, in *ROLE THEORY: CONCEPTS AND RESEARCH* 313, 314 (1966).

⁴¹ *Id.* at 313.

³⁴ ERICH FROMM, *THE ANATOMY OF HUMAN DESTRUCTIVENESS* 81 (1973).

³⁵ ZIMBARDO, *supra* note 1, at 226.

his book into topically logical order. Zimbardo starts off in this section stating the official military position—that the abuses were the isolated work of a few rogue Soldiers and not indicative of any systemic failure⁴²—and challenges this position by adeptly using various reports produced as a result of the fallout from the Abu Ghraib scandal. As Zimbardo delineates the findings from these official investigations, it becomes clear that whatever forces were working in the SPE were similarly present at Abu Ghraib. The prison guards at Abu Ghraib engaged in similar types of abuse as those inflicted in the SPE.⁴³ The prison guards were provided with minimal to no guidance on how to treat their prisoners.⁴⁴ The abuse at Abu Ghraib was sanctioned at the highest levels.⁴⁵ And most frightening of all, Abu Ghraib was not an isolated incident, but rather a small sample of the systematic tactics employed worldwide by the United States against detainees.⁴⁶ As a result of such systemic failures, those who were merely following orders were punished severely while those responsible for sanctioning the abuse got away.⁴⁷

V. Creating the Right System

Although Zimbardo successfully delineates the extent to which we can all fall prey to the whims of a system, he fails to capitalize on his findings by offering a solution consistent with the theme of his book. Instead, Zimbardo concludes his book by requesting his readers to remind themselves constantly of their individuality,⁴⁸ and to follow the examples of men and women who stood up against tyrannies of evil.

However noble these aspirations are, they undermine the very premise of the book by focusing on the power of the individual. One of the biggest lessons that Zimbardo relays is that it is extremely difficult, if not impossible, to quit a role within a system. The better solution, consistent with the themes of *The Lucifer Effect*, would be to encourage leaders to create systems aimed at preventing people from reaching the tipping point of evil. In fact, Zimbardo offers a perfect example of how creating the right system could prevent

abuse. In a letter to Zimbardo, Terrence Plakias, a former Soldier in Iraq, states the following:

[U]nlike the soldiers at Abu Ghraib our unit had very competent leadership and things never got anywhere near the level as at Abu Ghraib. Our leaders knew the rules, set the standards, and supervised to ensure that the rules were followed. Infractions of the rules were investigated and when appropriate, violators were punished. Detention missions are dehumanizing for everyone involved. I think I went numb after the first two weeks. Active involvement by our leaders kept us from forgetting who we were and why we were there.⁴⁹

Mr. Plakias could not have stated better the role that leaders should aspire to assume. As legal advisors, we must assume the role of assisting our commanders with creating such ethical environments. We must also create a system within our own legal profession that will ensure that we do not lose sight of our own moral integrity and fall into the trap of providing advice aimed solely to appease the command or our own superiors. Furthermore, we must remain vigilant against social forces that have the potential to corrupt our moral fiber, and rid ourselves of any delusion that we are immune to such social forces.

VI. Conclusion

The Lucifer Effect is a terrifying reminder of how any one of us can fall prey to the whims of a system; and unless we recognize and understand the social forces that guide our behavior, we may become even more vulnerable to its whims. Sergeant Russell is a reminder of how fragile we all are. And although SGT Russell pled guilty to the shootings, Zimbardo forces us, at the very least, to inquire into the social forces that may have contributed to SGT Russell's demise.

⁴² *Id.* at 325.

⁴³ See generally ZIMBARDO, *supra* note 1, at 324–79.

⁴⁴ *Id.* at 387 (“Contributing factors were lack of comprehensive training of guards, poor or non-existent SOPs, . . . ROE [rules of engagement] not posted and not understood, overcrowding, uniform not standardized, and poor communication between the command and Soldiers.”).

⁴⁵ *Id.* at 383 (stating that the Military Police Company, responsible for running the Abu Ghraib facility, were “directed to change facility procedures to ‘set the conditions’ for [Military Intelligence] Interrogations”); see also *id.* at 393 (“Local CIA officers convinced COL Pappas and LTC Jordan that they should be allowed to *operate outside the established local rules and procedures.*”) (emphasis added).

⁴⁶ *Id.* at 398.

⁴⁷ See generally *id.* at 324–79.

⁴⁸ *Id.* at 453.

⁴⁹ *Id.* at 354–55.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. 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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional 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
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900

FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000

NDAА: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

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. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
31 May – 2 Jun 13	Northeast Region 4th LOD Focus: Client Services	Philadelphia, PA	LTC Leonard Jones ltcleonardjones@gmail.com SSG James Griffin james.griffin15@usar.army.mil CWO Chris Reyes chris.reyes@usar.army.mil
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

2. 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:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) 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.

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

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) 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.

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

a. The Judge Advocate General's School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. 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.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

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

b. Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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