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ADMINISTRATIVE & CIVIL LAW EDITION

New Developments

Articles

Freedom of Information Act Access to Personal Information Contained in Government Records: Public Property or Protected Information?
Colonel (Ret.) Richard L. Huff & Lieutenant Colonel Craig E. Merutka

The Limits of Fair Use in Military Scholarship: When, How, and From Whom to Request Permission to Use Copyrighted Works
Captain Evan R. Seamone

The Impact of the Americans with Disability Amendments Act of 2008 on the Rehabilitation Act and Management of Department of the Army Civilian Employees
Major William E. Brown & Major Michele Parchman

Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis
Major Samuel W. Kan

Playing Politics: A Review of Eligibility Rules and Campaign Restrictions for Servicemembers Who Are Nominees or Candidates for Civil Office
Lieutenant Colonel Jeffrey Sexton

OTJAG Practice Note
Office of The Judge Advocate General

Book Reviews
CLE News
Current Materials of Interest

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ADMINISTRATIVE & CIVIL LAW EDITION

New Developments

Administrative & Civil Law 1

Articles

Freedom of Information Act Access to Personal Information Contained in Government Records: Public Property or Protected Information?
Colonel (Ret.) Richard L. Huff & Lieutenant Colonel Craig E. Merutka 2

The Limits of Fair Use in Military Scholarship: When, How, and From Whom to Request Permission to Use Copyrighted Works
Captain Evan R. Seamone 16

The Impact of the American with Disability Amendments Act of 2008 on the Rehabilitation Act and Management of Department of the Army Civilian Employees
Major William E. Brown & Major Michele Parchman 43

Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis
Major Samuel W. Kan 52

Playing Politics: A Review of Eligibility Rules and Campaign Restrictions for Servicemembers Who Are Nominees or Candidates for Civil Office
Lieutenant Colonel Jeffrey Sexton 95

OTJAG Practice Note

Office of The Judge Advocate General

Legal Assistance Policy Division Note

Military Spouses Residency Relief Act (MSRRA): Use Caution and Read Carefully
Lieutenant Colonel Janet H. Fenton 106

Book Reviews

Lessons from the Silver Screen: Must-See Movies for Military Lawyers
Reviewed by *Major Ann B. Ching* 108

CLE News 116

Current Materials of Interest 126

Individual Paid Subscriptions to *The Army Lawyer* ..... Inside Back Cover

Freedom of Information Act Access to Personal Information Contained in Government Records: Public Property or Protected Information?

Colonel (R) Richard L. Huff[*] & *Lieutenant Colonel Craig E Merutka*[**]

When a man assumes a public trust, he should consider himself as public property.
— Thomas Jefferson

When we assumed the Soldier, we did not lay aside the Citizen.
— George Washington

Introduction

On a mid-winter afternoon, the Chief of Administrative Law hands you two recently received Freedom of Information Act[1] (FOIA) requests from the local newspaper. The first requests the identities and punishments imposed on all servicemembers arrested on post for driving under the influence of alcohol on New Year's Eve, and the second requests all records the command has concerning misconduct by First Lieutenant (1LT) Friendly. With regard to the first request, because the command did an excellent job emphasizing the dangers of drunk driving, only three servicemembers were snagged by the MP's New Year's Eve dragnet: Colonel (COL) Oops, the now-former Chief of Staff; Second Lieutenant (2LT) Special, the son of an assistant secretary of the Army; and Private First Class (PFC) Ordinary, a twenty-one–year-old infantryman. As a result of their transgressions, each man received a general officer memorandum of reprimand (GOMOR), and COL Oops was relieved from his position as Chief of Staff. With regard to the second request, the newspaper had recently run an exposé on military fraternization in which it asserted that fraternization between officers and junior enlisted personnel was rampant on post. Included was the allegation that 1LT Friendly had paid all expenses to fly himself and a female PFC in the command to Cancun for a romantic weekend together. As it turns out, the allegation is true, and in addition to a copy of the GOMOR 1LT Friendly received, the command also has an Army Regulation 15-6 investigation that documents the misconduct.

These two FOIA requests highlight the conflict between the public's right to government records and the privacy interests of Department of Defense (DoD) employees, whose personal information may be contained in those government records. This is a real conflict. While DoD employees do assume a public trust when they assume their duties, they certainly do not become "public property"; and while, as holders of such public trust, they are open to more inspection than those employed in the private sector, such inspection is not, and should not be, limitless. The rights that all individuals enjoy, including those involving privacy, survive the oath of office. Where, then, is the line drawn between the public's right to government records and the government employee's right to privacy? How does the DoD meet its obligations under the FOIA while protecting the privacy interests of its personnel? By providing some background and ultimately addressing these two fictional FOIA requests, this article answers these questions and demonstrates that even though DoD employees assume a certain public trust when they work for the DoD, their privacy interests are well protected. In fact, in recent years the protection of personal privacy has taken on a new emphasis throughout DoD as part of a larger force protection posture.

> [The events of 9/11], and the wars the country is currently engaged in [in] Afghanistan and Iraq, have heightened the Defense Department's security awareness, and that in turn has caused us to look at ways to prevent future terrorist attacks and better ensure the safety of our personnel by proactive security precautions. Numerous security measures are now in place for just the purpose of preventing future attacks and protecting DOD personnel. The idea behind such security measures is that a layered response is most effective in dealing with threats that are as yet unknown. The policy to withhold the names of DOD

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[1] 5 U.S.C. § 552 (2006).

> personnel is not the "silver bullet" that will by itself prevent an attack such as the one on the Pentagon; however, it is part of a larger security system designed to enable DOD to prevent attacks directed at any and all DOD personnel. The Department of Defense, through changes in security procedures and regulations including the policy [that most personal information about DOD personnel are redacted from releasable records] at issue here, is trying to make it as difficult as possible for adversaries to collect valuable information that will enable them to carry out attacks on DOD personnel.[2]

Three FOIA exemptions are key to providing this protection. They are Exemption 3,[3] which protects information that other federal statutes require or permit to be withheld from release under the FOIA; Exemption 6,[4] which protects personal information contained in personnel, medical, or similar files; and Exemption 7(C),[5] which protects personal information in law enforcement records. To thoroughly understand these exemptions, however, it is important to consider several issues that affect their application. First, among the dozens of Exemption 3 statutes that exist, the primary Exemption 3 statute used by DoD is 10 U.S.C. § 130b. That provision protects DoD employees serving in specific critical organizations. Second, the applicability of Exemptions 6 and 7(C) depends upon certain thresholds being met since the protection afforded by those exemptions is limited to specific—albeit broad—types of records. More critical, however, is the balancing test that weighs the privacy interest involved and the public interest that may exist in disclosing the records. The outcome of this test will determine whether private information is released or not. And third, recognizing how President Barack Obama's FOIA policy of openness[6] might impact the application of these exemptions is important to ensure current policy is accurately implemented.

Exemption 3 and 10 U.S.C. § 130b

Exemption 3[7] incorporates all federal nondisclosure statutes, including 10 U.S.C. § 130b. Section 130b authorizes the Secretary of Defense to withhold from release any "personally identifying information" concerning DoD personnel—members of the Armed Forces and civilian employees alike—who are assigned to overseas, sensitive, or routinely deployable units.[8] According to DoD, "personally identifying information" includes "the person's name, rank, duty address, and official

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[2] Declaration by Michael B. Donley, Director, Admin. & Mgmt., Office of the Sec'y of Def., *quoted in* Long v. Office of Pers. Mgmt., 2007 U.S. Dist. LEXIS 72887, at *40–41 (N.D.N.Y. Sept. 30, 2007).

[3] 5 U.S.C. § 552(b)(3).

[4] *Id.* § 552(b)(6).

[5] *Id.* § 552(b)(7)(C).

[6] *See* Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, subject: Freedom of Information Act (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/ [hereinafter President Obama's FOIA Memo]; *see also* Memorandum from Attorney General Eric Holder to the Heads of Executive Departments and Agencies, subject: The Freedom of Information Act (FOIA) (Mar. 19, 2009), *available at* http://www.usdoj.gov/ag/foia-memo-march2009.pdf [hereinafter Attorney General Holder's FOIA Guidelines] (implementing President Obama's FOIA Memo); Office of Information Policy, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a "New Era of Open Government" (Apr. 17, 2009), http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm [hereinafter OIP Guidance] (providing guidance to agencies on implementing President Obama's FOIA Memo and Attorney General Holder's FOIA Guidelines).

[7] FOIA Exemption 3 provides, "This section does not apply to matters that are—

> …
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

5 U.S.C. § 552(b)(3).

[8] 10 U.S.C. § 130b (2006) provides

> (a) Exemption From Disclosure.— The Secretary of Defense and, with respect to the Coast Guard when it is not operating as a service in the Navy, the Secretary of Homeland Security may, notwithstanding section 552 of title 5, authorize to be withheld from disclosure to the public personally identifying information regarding—
>
> (1) any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit; and
>
> (2) any employee of the Department of Defense or of the Coast Guard whose duty station is with any such unit.

Id. § 130b(a).

title and information regarding the person's pay."[9] The Army describes personally identifying information as including the "[n]ames and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories."[10] The statute's coverage also applies to similarly situated National Guard units[11] and, presumably, Reserve units. The burden, however, is on the Government to show that a particular unit fits into one of the 10 U.S.C. § 130b categories. Simply concluding that a unit does so, without supporting facts, is not sufficient.[12]

With most deployable units—both active and reserve components—meeting the criteria of 10 U.S.C. § 130b, the coverage is certainly expansive. It is not limitless, however. The DoD has curtailed the statute by declaring that it "does not preclude a DoD component's discretionary release of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons."[13]

The language of 10 U.S.C. § 130b states that the Secretary of Defense may authorize the withholding of personally identifying information. Courts have uniformly interpreted this language to allow for the delegation of this authority if, when invoked in litigation, the protection of personal information is "supported by declaration of a military officer."[14] In other words, the Secretary of Defense need not personally authorize every instance where 10 U.S.C. § 130b is used to redact personal information. If litigated, an appropriate military officer may declare that the redactions comply with Section 130b.

Several other Exemption 3 statutes can also be used to protect personal privacy. For example, 10 U.S.C. § 424 protects names, official titles, occupational series, grades, and salaries of employees of the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency; and 21 U.S.C. § 1175 protects drug abuse program patient records. For additional information, the Office of the Secretary of Defense and Joint Staff Requester Service Center maintain excellent FOIA reference materials, including a list of Exemption 3 statutes used by DoD components.[15]

Exemptions 6 and 7(C): The Privacy Exemptions

Threshold Considerations

Two FOIA exemptions also specifically protect personal privacy. Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personnel privacy."[16] Exemption 7(C) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[17]

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[9] Memorandum from D. O. Cooke, Director, Admin. & Mgmt., Office of the Sec'y of Def., to See Distribution, subject: Withholding of Personal Information of DoD Personnel (Feb. 17, 2001), *available at* http://www.DOD.mil/pubs/foi/dfoipo/docs/130b.pdf [hereinafter Cooke February Memo].

[10] Department of the Army, The Freedom of Information Act Program; Final Rule, 32 C.F.R. § 518, § 518.13(c)(1) (2006), *available at* https://www.rmda.army.mil/foia/docs/foia-32CFRPart518.pdf [hereinafter Army Final Rule]. This rule is intended to replace U.S. Dep't of Army, Reg. 25-55, *The Department of the Army Freedom of Information Act Program* (1 Dec. 1997). While AR 25-55 has not been rescinded, the Final Rule and not AR 25-55 should control if there is a conflict between the two.

[11] *See* Windel v. United States, No. A02-306, 2005 WL 846206 (D. Alaska) (holding that 10 U.S.C. § 130b protects the identities of all members assigned to a outinely deployable unit of the Alaska Air National Guard).

[12] O'Keefe v. Dep't of Def., 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006).

[13] Cooke February Memo, *supra* note 9.

[14] Hiken v. Dep't of Def., 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) (citing *Windel*, 2005 WL 846206, at *2.

[15] Defense Freedom of Information Policy Office, (b)(3) Statutes and Type of Information Covered, http://www.dod.mil/pubs/foi/dfoipo/docs/b3.pdf (last visited 27 January 2010).

[16] 5 U.S.C. § 552(b)(6).

[17] *Id.* § 552(b)(7)(C).

The "similar files" part of the threshold requirement of Exemption 6 caused significant confusion[18] before the Supreme Court clarified the phrase in *U.S. Department of State v. Washington Post Co.*[19] In its ruling, the Supreme Court found that Congress had intended "similar files" to include any information that "applies to a particular individual."[20] In other words, if the record contains personal information about an identified individual, it is considered a "similar file." In light of this broad interpretation, the only potential, but unlikely, limitation to the "similar files" language may be information about a particular individual, but one who cannot be readily identified.[21]

Similarly, the threshold of Exemption7(C) is not as concrete as it may initially appear. "[R]ecords or information compiled for law enforcement purposes" are not limited to those compiled for criminal investigation purposes[22] but also include those compiled for national security investigations,[23] background security investigations[24] and personnel investigations of servicemembers or other employees if they focus on "specific and potentially unlawful activity by particular employees."[25] Sometimes it can be difficult to determine whether an employee record was created for law enforcement purposes or merely as part of an agency's "general monitoring of its own employees to ensure compliance with the agency's statutory mandate and regulations."[26] Records created to conduct "general monitoring," and similar employee files, are not considered law enforcement records and are, therefore, not protected under Exemption 7(C), although they will qualify as "similar files" for Exemption 6 purposes.

Although all records that qualify for protection under Exemption 7(C)'s threshold also qualify under Exemption 6's threshold, the language of Exemption 7(C) affords even greater privacy protection. Exemption 7(C)'s more extensive protection recognizes that there is a stigma attached to being mentioned in a law enforcement record—not to mention being

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[18] *See, e.g.*, Bd. of Trade of Chicago v. Commodity Futures Trading Comm'n, 627 F.2d 392, 400 (D.C. Cir. 1980) (ruling that only "intimate" information is protectable in "similar files").

[19] 456 U.S. 595 (1982).

[20] *Id.* at 602; *see also* Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 361 (5th Cir. 2001) (noting, in the context of protecting social security numbers, that the "Supreme Court has interpreted exemption 6 'files' broadly to include any 'information which applies to any particular individual") (citing *Wash. Post Co.*, 456 U.S. at 602). As a result, any record containing personal information about any individual could be considered a "similar file," and, therefore, would potentially be protected from disclosure by Exemption 6.

[21] *See, e.g.*, Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1467–68 (D.C. Cir. 1983) (finding disclosure of the entire inventory of drugs available to over 1000 individual beneficiaries of the Office of Attending Physician of the U.S. Congress would not apply to any particular individual because there was nothing to connect any specific drug to any identifiable beneficiary); Dayton Newspapers, Inc. v. U.S. Dep't of the Air Force, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999) (refusing to protect details, other than names, social security numbers, home addresses, home and work telephone numbers, and places of employment of individuals receiving medical malpractice settlements even though there was a "possibility that factual information might be pieced together to supply the 'missing link,' and lead to personal identification" of claimants); *cf.* O'Keefe v. Dep't of Def., 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (holding that Exemption 6–protected personal information should be withheld from the requester even though, "due to his 'familiarity and working relationship' with these individuals, he is already able to deduce the identities of the parties").

[22] *See, e.g.*, Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 555 & n.13 (1st Cir. 1992) (noting no dispute that records compiled by the Inspector General in investigation of "alleged misconduct punishable either by internal disciplinary action or by court-martial under the Uniform Code of Military Justice" by two senior National Guard officers satisfied Exemption 7's threshold); Aspin v. Dep't of Def., 491 F.2d 24, 26–28 (D.C. Cir. 1973) (explaining that records of the My Lai investigation "directed toward discovering and toward obtaining evidence of possible offenses under the Uniform Code of Military Justice" were compiled for law enforcement purposes).

[23] *See, e.g.*, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F. 3d 918, 926 (D.C. Cir. 2003) (finding 9/11 investigation into "heinous violation of federal law as well as a breach of this nation's security" to satisfy threshold); L.A. Times Commc'ns v. U.S. Dep't of the Army, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (holding that incident reports from private security contractors in Iraq meet the law enforcement threshold because the purpose of compiling such incident reports "falls within a cognizable law enforcement mandate in Iraq [of tracking] insurgent attacks on and other unlawful activities against Coalition forces [and contract employees] to improve intelligence information that will enhance security").

[24] *See, e.g.*, Mittleman v. Office of Pers. Mgmt., 76 F.3d 1240, 1241–43 (D.C. Cir. 1996) (Office of Personnel Management investigation); Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 809 (9th Cir. 1995) ("FBI government appointment investigations").

[25] Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984) (internal investigation of three FBI employees in connection with a possible cover-up of illegal FBI surveillance activities); *see also* Kimberlin v. Dep't of Justice, 139 F.3d 944, 947–48 (D.C. Cir. 1998) (concluding that an investigation "conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official" satisfies the threshold); Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (ruling agency investigation into employee violation of national security laws by "improperly storing, transporting, and disclosing classified documents" in the context of FOIA Exemption 7 and Privacy Act Exemption (k)(2), qualifies as "compiled for law enforcement purposes"); *O'Keefe*, 463 F. Supp. 2d at 320, 324 (finding that report detailing investigation of Inspector General complaint into alleged misconduct by commanding officers was compiled for law enforcement purposes).

[26] *Stern*, 737 F.2d at 89; *see also* Jefferson v. U.S. Dep't of Justice, 284 F.3d 172, 177 (D.C. Cir. 2002) (holding that agencies must distinguish between "(1) files in connection with government oversight of the performance of duties by its employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions").

the subject of a law enforcement record.[27] As a result, individuals mentioned in law enforcement records are afforded more privacy protection than those mentioned in non–law enforcement records. As the Supreme Court explained,

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.[28]

Although the Government's burden is greater under Exemption 6 than Exemption 7(C), the analysis under each requires that a privacy interest, if any, be identified, and a public interest, if any, be identified, and if both are found to exist, that the two be balanced against each other.[29]

Is There a Privacy Interest?

In the lead case on FOIA's privacy exemptions, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court made three key observations on the concept of privacy: (1) that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person"; (2) that there is a "privacy interest in keeping personal facts away from the public eye"; and (3) that "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons [or] not freely available to the public.'"[30] Also, as the Court itself held in *Reporters Committee*, a privacy interest may exist even though the information may at one time have been known to some members of the public.[31] Similarly, individuals' privacy rights are not lost or diminished merely because the requester is personally aware of the information[32] or because he is able to "piece together" the identities of individuals whose names have been deleted from disclosed records.[33] The result is that if the

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[27] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) ("the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation") (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987)).

[28] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989) (footnotes omitted); *see also* U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 497 (1994) ("Exemption 7(C) is more protective of privacy than Exemption 6: The former provision applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while the latter bars any disclosure that 'would constitute' an invasion of privacy that is 'clearly unwarranted'").

[29] *See, e.g.*, Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (observing under Exemption 6 that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual") (quoting *Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations*, 89th Cong., 1st Sess., at 29–30 (1965)), *cited in* H.R. REP. NO. 1497, at 11) (1966); Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–75 (2004) (discussing the "unwarranted" standard under Exemption 7(C)).

[30] *Reporters Comm.*, 489 U.S. at 763–64, 769 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1804) (1976)).

[31] *Id.* at 767 (protecting FBI criminal history information—a "rap sheet" consisting largely of arrests and convictions—on an alleged organized crime figure, "even where the information may have been at one time public"); *see also Fed. Labor Relations Auth.*, 510 U.S. at 500 (protecting home addresses of government employees and observing that "[i]t is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but 'in an organized society, there are few facts that are not at one time or another divulged to another'") (quoting *Reporters Comm.*, 489 U.S. at 763)); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363–64 (5th Cir. 2001) (protecting social security numbers in award orders listing multiple individuals and observing that "the fact that otherwise private information at one time or in some way may have been placed in the public domain does not mean that a person irretrievably loses his or her privacy interest in the information"); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999) (ruling that publicity surrounding an Airman's suicide and a subsequent investigation into prosecutorial misconduct does not eliminate the subject of the investigation's privacy interests in "avoiding disclosure of the details of the investigation, of his misconduct, and of his punishment ." (citation omitted)); U.S. DEP'T OF DEF., REG. 5400.7-R, FREEDOM OF INFORMATION ACT PROGRAM para. C3.2.1.6.2.1 (4 Sept. 1998), *available at* http://www.dtic.mil/whs/directives/corres/pdf/540007r.pdf [hereinafter DoD REG. 5400.7-R]; Army Final Rule, *supra* note 9, § 518.13 (f)(2)(I) ("A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure.").

[32] *See* Schiffer v. FBI, 78 F.3d 1045, 1411 (9th Cir. 1996).

[33] Weisberg v. U.S. Dep't of Justice, 746 F.2d 1476, 1491 (1984); *see also* L&C Marine Trans. v. United States, 740 F.2d 919, 922 (11th Cir. 1984) (an individual's privacy interest is not lost merely because requester can ascertain it by other means).

information is protected under Exemption 6 or 7(C), an individual's privacy interest should be protected and the information redacted even if the requester can figure out what information has been deleted.

While the concept of a privacy interest is broad, it is limited by case law and certain regulatory requirements. For example, the Department of Justice (DoJ) has long taken the position that a decedent possesses no cognizable privacy interest in any information about him.[34] However, the DoJ and almost all judicial decisions have recognized a privacy interest in the next-of-kin in records reflecting time-of-death information.[35] Removing all doubt on this issue, the Supreme Court in *National Archives and Records Administration v. Favish* ruled that the close relatives of suicide victim Vincent Foster, former White House Deputy Legal Counsel, possessed their own privacy interests in his death-scene photographs.[36] This should be relevant when reviewing hostile death, friendly fire, or other serious accident investigations. The family should receive a copy of the photos, but other requesters should not because of the family's privacy interest.

In addition to case law, administrative determinations on privacy also bind agencies. For instance, by regulation the Office of Personnel Management has determined what personnel information about "most" federal employees should be disclosed or withheld.[37] (Although this regulation provides that a civilian employee's name and duty station will be

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[34] FOIA Update, FOIA Counselor: Questions & Answers, vol. III, no. 4 (1982), *available at* http://www.usdoj.gov/oip/foia_updates/Vol_III_4/page7.htm; *see also Reporters Comm.*, 489 U.S. at 757 (noting that the Department of Justice "provided the requested data concerning three of the [subjects of the request] after their deaths"); DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.3 ("This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest."); *cf.* Army Final Rule, *supra* note 9, § 518.13(f)(2)(ii) ("The right to privacy of deceased persons is not entirely settled, but the majority rule is that death extinguishes their privacy rights. However, particularly sensitive, graphic, personal details about the circumstances surrounding an individual's death may be withheld when necessary to protect the privacy interests of surviving family members. Even information that is not particularly sensitive in and of itself may be withheld to protect the privacy interests of surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment, or cause a disruption of their peace of minds."). *But cf.* Schrecker v. U.S. Dep't of Justice, 254 F.3d 162, 166 (D.C. Cir. 2001) ("The fact of death, therefore, while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information.")

[35] *See, e.g.*, Hale v. U.S. Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (crime scene photograph of decedent), *cert. granted, vacated & remanded on other grounds*, 509 U.S. 918 (1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (autopsy reports); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports); Marzen v. Dep't of Health & Human Servs., 825 F.2d 1148, 1154 (7th Cir. 1987) (deceased infant's medical records); N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631–32 (D.D.C. 1991) (audiotape of voices of Challenger astronauts recorded immediately before their deaths). *But see* Office of Info. Privacy, U.S. Dep't of Justice, Compiled FOIA Decisions (Received January–June 1990) (Nov. 3, 2003), http://www.justice.gov/archive/oip/foiapost/2003foiapost38.htm (summarizing a case titled "Journal-Gazette Co. v. U.S. Dep't of the Army").

[36] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004). *But cf.* Outlaw v. U.S. Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. 1993) (ordering disclosure of five murder-scene photographs to murderer twenty-five years after the crime in the absence of the Army's ability to ascertain whether the victim left any surviving next-of kin or whether any surviving next-of-kin, if extant, would be offended by the disclosure).

[37] 32 C.F.R. § 293.311 (2010) provides:

> (a) The following information from both the OPF and employee performance file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees, is available to the public:
>
> (1) Name;
>
> (2) Present and past position titles and occupational series;
>
> (3) Present and past grades;
>
> (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials);
>
> (5) Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places of employment); and
>
> (6) Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness. Performance elements and standards (or work expectations) may be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.
>
> (b) The Office or agency will generally not disclose information where the data sought is a list of names, present or past position titles, grades, salaries, performance standards, and/or duty stations of Federal employees which, as determined by the official responsible for custody of the information:
>
> (1) Is selected in such a way that would reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

disclosed,[38] it does not override the protections of 10 U.S.C. § 130b for DoD personnel assigned to overseas, sensitive, or routinely deployable units, or other agency-specific protections.) While the DoD regulation did not specifically address the disclosability of information on individuals who did not meet 10 U.S.C. § 130b's criteria, prior to 9 November 2001, the DoD's practice had been to disclose such information, to include lists of names and correlating information.[39] However, on 9 November 2001, as a result of the terrorist attacks of 11 September 2001, the DoD recognized that its "personnel [were] at increased risk regardless of their duty assignment" and, accordingly, modified its policy to require the withholding of lists of names and other personally identifying information of all DoD personnel and contractors associated with a particular component, unit, organization or office.[40] The policy provides for some discretion by stating that components could disclose personal information of this sort if (1) they determined that no privacy concerns were implicated and if such information had routinely been disclosed in the past or (2) the names, other than in list format, were in documents otherwise releasable under the FOIA.[41] Despite the discretion, with this increased security concern and heightened privacy interest, more personal information on DoD employees should still be redacted from released records. Finally, DoD policy also "does not preclude a DOD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons."[42]

Judicial decisions have uniformly approved of the post-9/11 DoD privacy position to withhold the personal information of DoD personnel, in some cases explicitly,[43] and in others implicitly.[44] The protection extended to DoD civilian employees is consistent with other judicially recognized exceptions to the Office of Personnel Management's general rule that the names and duty stations of "most" civilian employees must be disclosed.[45] It should also be noted that even the names and other

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> (2) Would otherwise be protected from mandatory disclosure under an exemption of the FOIA.
>
> (c) In addition to the information described in paragraph (a) of this section, a Government official may provide other information from these records (or automated equivalents) of an employee, to others outside of the agency, under a summons, warrant, subpoena, or other legal process; as provided by the Privacy Act (5 U.S.C. 552a(b)(4) through (b)(11)), under those Privacy Act routine uses promulgated by the Office, and as required by the FOIA.

[38] *Id*. § 293.311(a)(1) and (5).

[39] *See* Memorandum from D. O. Cooke, Director, Admin. & Mgmt., Office of the Sec'y of Def., to DoD FOIA Offices, subject: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA) para. 2 (9 Nov. 2001), *available at* http://www.DOD.mil/pubs/foi/dfoipo/docs/withhold.pdf [hereinafter Cooke November Memo].

[40] *Id.*; *see also* Army Final Rule, *supra* note 9, § 518.13 (f)(2).

> Army components shall ordinarily withhold lists of names (including active duty military, civilian employees, contractors, members of the National Guard and Reserves, and military dependents) and other personally identifying information, including lists of e-mail addresses of personnel currently or recently assigned within a particular component, unit, organization, or office within the Army. Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addressees without the occupant's name.

Id.

[41] Cooke November Memo, *supra* note 9.

[42] *Id.*

[43] *See, e.g.*, Schoenman v. FBI, 575 F. Supp. 2d 136, 160 (D.D.C. 2008) (finding that since the 9/11 attacks, "as a matter of official policy, the DoD carefully considers and limits the release of all names and other personal information concerning military and civilian personnel, based on a conclusion that they 'are at increased risk regardless of their duties or assignment,'" and further finding that this policy reflects "the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency") (second quotation marks omitted); Long v. Office of Pers. Mgmt., No. 5:05-1522, 2007 U.S. Dist. LEXIS 72887, at **21, 47–48 (N.D.N.Y. Sept. 30, 2007) (recognizing that disclosure could subject DoD civilian employees to "'embarrassment and harassment in the conduct of their official duties and personal affairs'") (quoting Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999)); Ctr. for Pub. Integrity v. U.S. Office of Pers. Mgmt., No. 04–1274, 2006 U.S. LEXIS 87367, at **5 & n.2, 18 (D.D.C. Dec. 4, 2006) (finding privacy interest of DoD civilian employees "not insubstantial"); Kimmel v. U.S. Dep't of Def., No. 04-1551, 2006 U.S. LEXIS 14904, at **11–12 (D.D.C. Mar. 31, 2006) (finding that "DoD acted out of concern that employees of DoD could become targets of terrorist assaults, and the court has no reason to question this determination"); Judicial Watch, Inc. v. Dep't of the Army, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (citing with agreement the DoD's position that DoD employees and their families "are particularly vulnerable to harassment and attack and therefore there is a heightened privacy interest in their identities") (citation omitted).

[44] Hiken v. Dep't of Def, 521 F. Supp. 2d 1047, 1065 (N.D. Cal. 2007) (protecting identities of names of military personnel involved in, or interviewed in connection with, an AR 15-6 investigation into the firing upon a car carrying an Italian journalist in Iraq where disclosure "would risk harm or retaliation"); L.A. Times Commc'ns LLC v. U.S. Dep't of Labor, 483 F. Supp. 2d 975, 985 (C.D. Cal. 2007) (protecting identities of DoD civilian contractors since they "have been specifically targeted by enemies of Allied forces, and . . . they continue to be prime targets for enemies of Allied forces") (emphasis omitted).

[45] Other categories of employees qualifying for categorical protection include personnel in "sensitive occupations"—correctional and law enforcement officers, internal revenue agents, nuclear engineering personnel, and intelligence personnel—and all employees in the Drug Enforcement Administration,

identifying information of non-DoD personnel which would otherwise be disclosed may be protected when a privacy interest results from a particular risk of harm or other privacy invasion.[46]

There are also a variety of other circumstances giving rise to privacy interests. The DoD regulation provides the following examples:

> (i) [Records] compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.
>
> (ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.[47]

Case law has also recognized various types of personnel records that implicate privacy issues. For instance, privacy interests have been recognized in the identities of members of military personnel boards,[48] in unsuccessful candidates for federal employment,[49] in employee performance appraisals,[50] in the contents of background investigations,[51] and in various other personal data such as financial information;[52] religious affiliation;[53] marital status and college grades;[54] medical records and related documents concerning a claim under the Federal Employees Compensation Act;[55] social security numbers;[56] home addresses;[57] home telephone numbers;[58] and date of birth, insurance, and retirement information, as well as reasons for leaving prior employment.[59] Finally, a significant privacy interest exists in records reflecting criminal wrongdoing,[60] in

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Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Mint, the Secret Service, and the Customs Service. *See, e.g.*, *Long* 2007 U.S. Dist. LEXIS 72887, at **8 n.5 19; Ctr. for Pub. Integrity v. U.S. Office of Pers. Mgmt., No. 04–1274, 2006 U.S. LEXIS 87367, at **16–18, 67–68 (D.D.C. Dec. 4, 2006).

[46] *See, e.g.*, Judicial Watch, Inc. v. FDA, 449 F.3d 141, 153 (D.C. Cir. 2006) (protecting names of FDA personnel who worked on approval of RU-486, an abortion drug, finding a "priva[cy] interest in avoiding harassment or violence").

[47] DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.1.1.

[48] Brannum v. Dominguez, 377 F. Supp. 2d 75, 84 (D.D.C. 2005); *see also* Dayton Newspapers, Inc. v. U.S. Dep't of the Navy, 109 F. Supp. 2d 768, 775 (S.D. Ohio 1999) (questionnaire responses by court-martial members).

[49] *See, e.g.*, Core v. USPS, 730 F.2d 946, 948-49 (4th Cir. 1984) (protecting identities and qualifications of unsuccessful applicants, but ordering disclosure of same for successful applicants); Putnam v. U.S. Dep't of Justice, 873 F. Supp. 705, 712–13 (D.D.C. 1995) (protecting identities of FBI personnel who were job candidates).

[50] *See, e.g.*, Fed. Labor Relations Auth. v. U.S. Dep't of Commerce, 962 F.2d 1055, 1061 (D.C. Cir. 1992) (performance appraisals); Ripskis v. Dep't of Housing & Urban Dev., 746 F.2d 1, 3–4 (D.C. Cir. 1984) (list of all agency personnel with outstanding evaluations); *see also* Vunder v. Potter, No. 05-142, 2006 WL 162985, at *2–3 (D. Utah Jan. 20, 2006) (protecting list of accomplishments submitted to supervisor as a part of performance evaluation process); Peralta v. U.S. Attorney's Office, 69 F. Supp. 2d 21, 33 (D.D.C. 1999) (protecting letters of commendation); *cf. Fed. Labor Relations Auth.*, 962 F.2d at 1060 (distinguishing personnel "ratings," which traditionally have not been disclosed, from "performance awards," which ordinarily are disclosed).

[51] Ferri v. U.S. Dep't of Justice, 573 F. Supp. 852, 862–63 (W.D. Pa. 1983) (FBI background investigation of a Department of Justice attorney).

[52] Consumers' Checkbook Ctr. for the Study of Servs v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("We have consistently held that an individual has a substantial privacy interest under FOIA in his financial information . . . .").

[53] Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979) ("A reasonable person would be very likely to find that disclosure of religious affiliations and activities would constitute an invasion of his or her privacy.").

[54] Info. Acquisition Corp. v. Dep't of Justice, 444 F. Supp. 458, 463–64 (D.D.C. 1978); *see also* U.S. Department of State v. Washington Post Co., 456 U.S. 595, 600 (1982) (date of marriage).

[55] Plain Dealer Publ'g Co. v. U.S. Dep't of Labor, 471 F. Supp. 1023, 1028-30 (D.D.C. 1979); *see also* Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 54 (D.D.C. 1996) (third-party request for then–Senate candidate Oliver North's medical records).

[56] Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 363–64 (5th Cir. 2001); Norwood v. Fed. Aviation Admin., 993 F.2d 570, 575 (6th Cir. 1993).

[57] U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 500 (1994) (members of bargaining unit); Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) (federal annuitants); Retired Officers Ass'n v. Dep't of the Navy, 744 F. Supp. 1, 2–3 (D.D.C. 1990) (names and home addresses of retired military officers).

[58] Kidd v. Dep't of Justice, 362 F. Supp. 2d 291, 296–97 (D.D.C. 2005); Barvick v. Cisneros, 941 F. Supp. 1015, 1020–21 (D. Kan. 1996).

[59] *Barvick*, 941 F. Supp. at 1020–21; *see also Wash. Post Co.*, 456 U.S. at 600 ("place of birth, date of birth") (dicta).

[60] *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) ("The privacy interest in a rap-sheet is substantial."); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (names and identifying information of third-party suspects); Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999) (material that suggests person may have been subject to criminal investigation); Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 106

records of nonjudicial punishment proceedings,[61] and in documents reflecting allegations of other misconduct by government employees.[62] Identifying the legitimate privacy interest is important because it is this privacy interest that must be balanced against any public interest that might exist in the information.

Is There a Qualifying Public Interest That Outweighs Any Privacy Interest?

If a cognizable privacy interest is identified, the next step to determining whether the information should be withheld or disclosed requires balancing the privacy interest against any public interest in disclosure. If there is no privacy interest to start with, however, the absence of a public interest in disclosure is irrelevant; the record must be disclosed: "Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests."[63]

Just as *Reporters Committee*[64] represents the lead case on the privacy side of the balance, *Reporters Committee* governs the analysis on the public interest side of the balance as well. Prior to *Reporters Committee*, courts made "public interest" determinations based largely on the interest of the requester and the requester's proposed use of the information.[65] In deciding *Reporters Committee*, the Supreme Court ruled that the identity of the requester was irrelevant, holding that, "the identity of the requesting party has no bearing on the merits of his or her FOIA request."[66] Therefore, the requester's interest in the request and anticipated use of the requested information had no bearing on whether the information should be released. (This, of course, does not mean that an agency can assert an individual's own privacy interest to "protect" him from invading his own privacy.[67]) For example, in the context of a request for the home addresses of bargaining unit employees, the Supreme Court ruled in *U.S. Department of Defense v. Federal Labor Relations Authority* that "because all FOIA requesters have an equal, and equally qualified, right to information, the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis."[68] Noble purpose or otherwise, when trying to identify a public

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(D.D.C. 2003) (protecting identities of "law enforcement agents, victims, witnesses, other subjects of investigations, and non-agent third parties" mentioned in a Naval Criminal Investigative Service investigation).

[61] *See, e.g.*, Cochran v. United States, 770 F.2d 949, 956–57 (11th Cir. 1985) ("We assume that appellant had a privacy interest in keeping the information as to his disciplinary proceedings confidential."); Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 43 (D.D.C. 2004) ("An individual does have a privacy interest in keeping employment history, job performance evaluations and information as to disciplinary proceedings confidential."); Schmidt v. U.S. Air Force, No. 06-3069, 2007 U.S. Dist. LEXIS 69584 at *31 (C.D. Ill. Sept. 20, 2007) (finding the subject "had a privacy interest in keeping the information about his discipline confidential); Lurie v. Dep't of the Army, 970 F. Supp. 19, 40 (D.D.C. 1997) ("An individual has a privacy interest in the fact that he or she was the subject or target of a government investigation.").

[62] *See, e.g.*, Dep't of the Air Force v. Rose, 425 U.S. 352, 381 (1976) (names of cadets found to have violated academy honor or ethics code); McCutchen v. U.S. Dept't of Health & Human Servs., 30 F.3d 183, 187–89 (D.C. Cir. 1994) (identities of both federally and privately employed scientists investigated for possible scientific misconduct); Beck v. U.S. Dep't of Justice, 997 F.2d 1489, 1493 (D.C. Cir. 1993) (refusing to confirm or deny existence of disciplinary records pertaining to named DEA agents); Dunkelberger v. Dep't of Justice, 906 F.2d 779, 782 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of FBI agent); Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743–45 (E.D. Va. 1999) (unsubstantiated allegations of prosecutorial misconduct).

[63] Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 291 (quoting Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs, 958 F.2d 503, 509 (2d Cir. 1992)) (internal quotation marks omitted); *see also* Ripskis v. Dep't of Housing & Urban Dev., 746 F.2d 1, 3 (D.C. Cir. 1984) ("if privacy interests in given information are de minimis[,] disclosure would not amount to a clearly unwarranted invasion of personal privacy") (internal quotation marks omitted); *cf.* Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 ("We need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time.").

[64] 489 U.S. 749.

[65] *See, e.g.*, Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C.1977) (ordering disclosure of names and addresses of retired disabled officers to nonprofit organization which might not survive without the data and where disclosure would benefit the officers), *aff'd*, 574 F.2d 636 (D.C. Cir. 1978) (table cite).

[66] 489 U.S. at 771; *see also id*. at 772 (stating that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document]'" (quoting Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U. S. 132, 149 (1975)).

[67] *Id.*

[68] U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 499 (1994); *see also* Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355 (1997) (summarily reversing disclosure order of the Ninth Circuit Court of Appeals based on "perceived public interest in 'providing [persons on the BLM's mailing list] with additional information.'") (brackets in original); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) ("That [the requester] seeks this information to establish indirectly his own innocence does not alter the fact that there would appear to be no FOIA-cognizable public interest in such information."); Hopkins v. U.S. Dep't of Housing & Urban Dev., 929 F.2d 81, 88 (2d Cir. 1991) (explaining "whatever public interest there may be in knowing whether private parties are violating the [Davis-Bacon] law is not the sort of public interest advanced by the FOIA, and has no weight in an Exemption 6 balancing").

interest in disclosure, it simply does not matter who the requester is or how the requester will use the information. Rather, when trying to identify a public interest in disclosure, an application of the FOIA's underlying purpose is key.

The Supreme Court in *Reporters Committee* limited the public interest in records to the FOIA's statutory "core purpose," which "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."[69] In contrast to the burden of proof FOIA normally imposes on an agency,[70] in *National Archives & Records Administration v. Favish*, the Supreme Court held that the privacy exemptions (Exemptions 6 and 7(C)) require "the person requesting the information to establish a sufficient reason for the disclosure."[71] Explaining how this burden was to be satisfied, the Supreme Court instructed, "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted."[72] Finally, the Supreme Court ruled that

> where there is a privacy interest protected by Exemption 7(C) [or Exemption 6] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.[73]

The type of public interest most frequently found to be sufficient to outweigh a substantial privacy interest involves wrongdoing by a high-level government official. Perhaps the best example involved the question of the application of Exemption 6, although not in a judicial case involving a requester seeking records under the FOIA, but one in which the Army disclosed information and the subject of those records sued for a violation of his rights under the Privacy Act's nondisclosure provision.[74] In that case, the Army distributed a press release to members of the media who had inquired about a post's former commander, a major general who had received nonjudicial punishment for wrongful requisition of an aircraft to fly himself and his wife from Fort Stewart to West Point for his son's graduation. He was also disciplined for the diversion of government resources and manpower in connection with a repair of a stove on his private boat.[75] The Eleventh Circuit Court of Appeals ruled that the Army had not violated the Privacy Act because subsection (b)(2) excepts from the act's general prohibition all disclosures "required" by the FOIA.[76] After noting that the subject had a "privacy interest in keeping the information as to his disciplinary proceedings confidential," the court observed that "the balance struck under FOIA exemption six overwhelming[ly] favors the disclosure of information relating to a violation of the public trust by a government official, which certainly includes the situation of a misuse of public funds or facilities by a Major General of the United States Army."[77]

A similar approach is found in judicial decisions ordering the disclosure of the names of civilian employees of government agencies involving (1) deliberate misrepresentations made by a Federal Bureau of Investigation Special Agent in Charge who "knowingly participat[ed] in a cover-up during a 1974 GAO [Government Accountability Office] audit of the FBI's domestic intelligence operations,"[78] (2) an Inspector General's report that contained substantial evidence that the general counsel "allowed former INS [Immigration and Naturalization Service] officials with financial interests in the [visa]

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[69] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989); *see also Fed. Labor Relations Auth.*, 510 U.S. at 495 ("'the only relevant public interest is the extent to which disclosure would contribute significantly to public understanding of the operations or activities of the government'") (quoting *Reporters Comm*., 489 U.S. at 775 (emphasis and internal quotation marks omitted).

[70] *See* 5 U.S.C. § 552(a)(4)(B) (2006) ("the burden is on the agency to sustain its action").

[71] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

[72] *Id.*

[73] *Id*. at 174.

[74] 5 U.S.C. § 552a(b).

[75] Cochran v. United States, 770 F.2d 949 (11th Cir. 1985).

[76] 5 U.S.C. § 552a(b)(2).

[77] 770 F.2d at 956; *see also* Stern v. FBI, 737 F.2d 84, 94 (D.D.C.1984) ("The public has a great interest in being enlightened about that type of malfeasance by this senior FBI official—an action called 'intolerable' by the FBI—an interest that is not outweighed by his own interest in personal privacy.").

[78] 737 F.2d at 87.

program to exercise improper influence over the program's administration,"[79] and (3) an Inspector General's report and reprimand of a senior administrator who misused a government vehicle, failed to report an accident involving a government vehicle, and misappropriated government funds to make repairs to a privately owned automobile.[80]

Judicial decisions have similarly ordered records disclosed (subject to withholding of social security numbers and other personal data) involving the misconduct of (1) a Navy commander who was relieved of his command for dereliction of duty as a result of his vessel's collision with another ship,[81] (2) an Air Force major who was punished for dropping a bomb which resulted in "friendly fire" deaths of several Canadian military personnel, in order to give the public "insight into the way in which the United States government was holding its pilot accountable,"[82] and (3) an Army major whose misrepresentation of medical research and misconduct contributed to Congress appropriating $20,000,000 for a particular form of AIDS research being conducted at the major's research facility.[83]

On the other hand, misconduct by lower-level personnel is almost always considered insufficient to constitute a public interest that will overcome a substantial privacy interest.[84] This is not to say that the personal information of lower-level personnel is automatically redacted and the personal information of higher-level personnel is always released but, rather, the lower the rank of the individual, the more likely the individual's privacy interest will outweigh any public interest in release of the individual's personal information. On this general proposition, the courts have concurred.[85] Examples include protecting the identities of (1) Air Force cadets who violated the Air Force Academy's ethics and honor code,[86] (2) six "low and mid-level" employees who were disciplined in connection with a fire that cost the lives of two of their fellow firefighters,[87] (3) two "mid-level FBI Special Agents censured for negligent job performance,"[88] (4) lower-ranking Navy officers disciplined in connection with their vessel's collision with another ship,[89] and (5) an Air Force major judge advocate accused of prosecutorial misconduct.[90]

Although uncommon, the courts have also weighed in favor of a recognized public interest over the interests of a third party in a few cases not involving wrongdoing by senior officials. Although difficult to categorize, most of these cases involved what the courts described as "lesser," "minimal," or "tepid" privacy interests. In one example, the interest in keeping private the names of site locations that could be used to identify the owners of land on which an endangered species of pygmy owl nested were found to be outweighed by "the public interest in examining the [agency's] use of the owl data in the 1999 critical habitat designation and on a day-to-day basis in a broad array of other contexts."[91] Other "lesser" privacy

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[79] Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 107 (2d Cir. 2002), *vacated & remanded*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 541 U.S. 970, *on remand*, 380 F.3d 110, 111–12 (2d Cir. 2004) (per curiam) (affirming previous holding).

[80] Sullivan v. Veterans Admin., 617 F. Supp. 258 (D.D.C. 1985) (Privacy Act wrongful disclosure suit).

[81] Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 42–45 (D.D.C. 2004) (Privacy Act wrongful disclosure suit involving press release summarizing imposed punishment).

[82] Schmidt v. U.S. Air Force, No. 06-3069, 2007 WL 2812148, at *11 (C.D. Ill. Sept. 20, 2007) (Privacy Act wrongful disclosure suit).

[83] Lurie v. Dep't of the Army, 970 F. Supp. 19, 38–48 (D.D.C. 1997).

[84] *See, e.g.*, Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) ("lower level officials . . . generally have a stronger interest in personal privacy than do senior officials") (quoting Dobronski v. Fed. Commc'ns Comm's, 17 F.3d 275, 280 n.4 (9th Cir. 1994)); Trentadue v. Integrity Comm., 501 F.3d 1215, 1234 (10th Cir. 2007) ("The public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder."). *But cf.* Schmidt v. U.S. Air Force, No. 06-3069, 2007 WL 2812148, at *11 (categorizing a major as a "junior officer," but finding public interest so great as to outweigh his privacy interests).

[85] Kimmel v. U.S. Dep't of Def., No. 04-1551, 2006 WL 1126812 (D.D.C. Mar. 31, 2006) (holding that the protection of "names of civilian personnel below the level of office-director and military personnel below the rank of Colonel" in documents was valid because disclosure of those names would not shed light on the operations and activities of DoD.); Schoenman v. FBI, 575 F. Supp. 2d 136, 160 (D.D.C. 2008) (upholding the withholding of names of Air Force personnel below the office director level amid post-9/11 security concerns and the fact that revealing names would not shed any light on the Air Force's performance of its statutory duties.)

[86] Dep't of the Air Force v. Rose, 425 U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 380 (1976); *see also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) ("[T]he names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code.").

[87] *Forest Serv. Employees for Envtl. Ethics*, 524 F.3d at 1026.

[88] Stern v. FBI, 737 F.2d 84, 94 (D.D.C.1984).

[89] Chang v. Dep't of the Navy, 314 F. Supp. 2d 35, 44–45 (D.D.C. 2004).

[90] Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 743–44 (E.D. Va. 1999).

[91] Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 36 (D.C. Cir. 2002) (ellipsis and internal quotation marks omitted).

interests were found in (1) computerized files reflecting identifiable information describing landowners' farms, tracts, boundaries, acreage, and other characteristics that would permit a reader to accurately estimate the value of the farm in order to monitor whether the Department of Agriculture is "correctly doing its job" in "making subsidy and benefit determinations,"[92] (2) the names and addresses of purchasers of property seized by the U.S. Marshals Service in order to show how the agency is exercising its power to seize property and sell it,[93] and (3) "the names of depositors with unclaimed funds at three banks for which the Federal Deposit Insurance Corporation ("FDIC") is now the receiver" because the depositors, if found, will actually benefit from the disclosure.[94]

The Targeted Request

A special problem arises whenever a request seeks personal information, not officially confirmed by the agency, about a named or otherwise identifiable living person where the response would require the agency to disclose the fact that it maintains responsive records and that the abstract fact that records even exist would result in an invasion of that person's privacy. In order to protect individuals' privacy interest in cases like this, agencies should refuse to confirm or deny the existence of the requested records. For instance, when Reporters Committee for Freedom of the Press sought the criminal history—"rap sheet"—of Charles Medico, the Federal Bureau of Investigation refused to confirm or deny whether it maintained such records, because, based on Exemption 7(C), such a response was necessary to protect the privacy of Mr. Medico. In *Reporters Committee*, the Supreme Court upheld the FBI's response.[95] First recognized in a case involving Exemption 1 (classified records) seeking CIA records that might reveal any covert relationship between the agency and Howard Hughes' submarine retrieval ship, the *Glomar Explorer*,[96] the refusal to confirm or deny the existence of certain records is sometimes referred to as a "Glomar" response, or "Glomarization."

To illustrate the application of the "Glomarization" principle, first imagine a request for all records of nonjudicial punishments imposed on members of the 1st Battalion during the past year. The proper response would be to process all responsive records, withholding only personally identifying information[97] (assuming there were no senior officers who received such punishment during the past year, which might implicate a public interest that would outweigh those officers' privacy interests). "Glomarizing" such a request would be improper because the processed records for a unit as large as a battalion would not invade the privacy of any one individual. On the other hand, imagine a request for any record containing the division commander's social security number. Here the proper response would be to simply deny the request based on Exemption 6. "Glomarizing" such a request would be improper because there is no privacy interest in the abstract fact that the command maintains records containing the commander's social security number or the fact that the commander does, in fact, have a social security number. Finally, imagine a request seeking medical records reflecting whether the installation's current Chief of Administrative Law has ever been diagnosed with a sexually transmitted disease (STD). The proper response is to refuse to confirm or deny whether any such records exist based on Exemption 6. If the Chief of Administrative Law did have an STD and the records are denied based on Exemption 6, the denial would confirm that the individual had an STD. Similarly, it would be "pointless" to disclose the records and merely redact the Chief of Administrative Law's name, because the request itself would have contained the identification.[98] Alternatively, if the individual has not had an STD and a "no records" response is provided, how would the next request seeking records on whether the Chief of Military Justice has had an STD be handled? It is important to give a consistent "Glomarization" response whenever a targeted request for records whose very existence implicates a privacy interest is received. In fact, DoD regulation states that, "A 'refusal to

[92] Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1231 (D.C. Cir. 2008) (2 to 1 decision). Note that the future impact of this holding was legislatively nullified by an Exemption 3 provision of the Food, Conservation and Energy Act of 2008, 7 U.S.C. § 8791(b)(2)(A).

[93] Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 729–30 (D. Md. 2001).

[94] Lepelletier v. Fed. Deposit Ins. Corp., 164 F.3d 37, 46–49 (D.C. Cir. 1999) (recognizing that on remand the district court may find that the privacy interests of depositors of small amounts exceed their interest in recovering their funds, but implicitly admitting that its unprecedented public interest finding is inconsistent with *U.S. Department of Defense. v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (1994)).

[95] 489 U.S. 740, 775 (1989) ("What we have said should make clear that the public interest in the release of any rap-sheet on Medico that may exist is not the type of interest protected by the FOIA. Medico may or may not be one of the 24 million persons for whom the FBI has a rap-sheet.").

[96] 546 F.2d 1009, 1013 (D.C. Cir. 1976) (recognizing the principle, but remanding the case on other grounds).

[97] *See, e.g.*, Associated Press v. U.S. Dep't of Def., 554 F.3d 274, 293 (2d Cir. 2009) (finding that the DoD disclosure of 1400 responsive pages with the names of detainees and their family members redacted satisfied the public interest while properly withholding the identities of certain detainees under Exemptions 6 and 7(C)).

[98] Mueller v. U.S. Dep't of the Air Force, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999).

confirm or deny' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a 'no records' response when a record does not exist and a 'refusal to confirm or deny' when a record does exist will itself disclose personally private information."[99]

Effect of President Obama's FOIA Policy

Upon assuming office, President Barack Obama announced a new openness policy that emphasized that when it comes to FOIA, there must be a "presumption in favor of disclosure."[100] Attorney General Eric Holder has implemented this policy and has instructed that a federal agency "should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."[101] The effect of this policy has been to encourage agencies to make discretionary disclosures of information whenever possible. With regard to the DoJ's litigation responsibility, the Attorney General further advised that "the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[102] With respect to any information that is protected by Exemption 3—for example, information listed under 10 U.S.C. § 130b—the DoJ's Office of Information Policy has advised that no discretionary disclosure is appropriate because such a disclosure would be prohibited by law.[103] Further, "[f]or information falling within Exemption 6 or 7(C), if the information is also protected by the Privacy Act of 1974, it is not possible to make a discretionary release, as the Privacy Act contains a prohibition on disclosure of information not 'required' to be released under the FOIA."[104] Even if the Privacy Act does not apply[105] to the information covered by Exemptions 6 or 7(C), however, the harm implicit in the finding of a privacy interest that outweighs any public interest would make discretionary disclosure inappropriate. Accordingly, the important policy interest in discretionary disclosures does not apply to the exempt information discussed in this article.

Conclusion: What Do We Do With Our Pending FOIA Requests?

For purposes of this article, we will assume that the Soldiers described in the introductory example are not stationed overseas, members of a routinely deployable unit, or otherwise covered by 10 U.S.C. § 130b. As a result, Exemption 3 does not apply to these FOIA requests. Applying, therefore, only the privacy exemptions, the FOIA requires us to disclose in response to the first request, the identities of two of the three Soldiers who received GOMORs, subject to the deletion of personal information such as social security numbers.

In the case of COL Oops, just as in the case of *Cohran v. Department of the Army*,[106] a senior official has engaged in serious misconduct of the sort for which his privacy interests are likely outweighed by the public interest in disclosure. In the case of PFC Ordinary, just as in the case of *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*,[107] a lower-ranking individual has engaged in serious misconduct of the sort for which his privacy interests outweigh the minimal

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[99] DoD REG. 5400.7-R, *supra* note 31, para. C3.2.1.6.5.1.

[100] *See* President Obama's FOIA Memo, *supra* note 6.

[101] Attorney General Holder's FOIA Guidelines, *supra* note 6.

[102] *Id*.

[103] *See* OIP Guidance, *supra* note 6. Note that the guidance contained in the Cooke's February Memorandum permitting the "discretionary release of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons" is not inconsistent with the general prohibition of discretionary disclosures in Exemption 3 cases because 10 U.S.C. § 130b itself permits the Secretary of Defense to define the limits of protection to be claimed under the statute.

[104] *Id.*; *see, e.g.*, U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 502 (1994) ("Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a 'clearly unwarranted invasion of personal privacy.' 5 U. S. C. § 552(b)(6) (2006). The FOIA, thus, does not require the agencies to divulge the addresses, and the Privacy Act, therefore, prohibits their release to the unions.").

[105] The Privacy Act applies to records maintained by an agency about a citizen or someone lawfully admitted for permanent residence that are retrieved from a system of records by the subject's name or personal identifier. *See* 5 U.S.C. § 552a(1), (2), (4), (5).

[106] 770 F.2d 949, 956–57 (11th Cir. 1985).

[107] 524 F.3d 1021, 1025 (9th Cir. 2008).

public interest in disclosure. In this case, all information identifying PFC Ordinary will be redacted. The most difficult case is the one involving 2LT Special. Like the others, 2LT Special has a substantial privacy interest in his disciplinary record, and if we were to look solely at his grade, we would withhold his identity just as in the case of PFC Ordinary. Unfortunately for 2LT Special, his father's senior rank gives rise to a public interest in monitoring the performance of the agency by determining whether the father's rank influenced—directly or indirectly—the fact of, or extent of, his punishment.[108] As a result, 2LT Special's name will be released, although other personal information, such as his social security number, will be withheld.

With respect to the second request, because 1LT Friendly is a junior official, his privacy interests outweigh the public interest in disclosing his misconduct. As a result, 1LT Friendly's personal information should not be released. Since this is a targeted request, however, the appropriate response is to refuse to confirm or deny whether such records exist, rather than just redact the identifying information from the records as in the case of PFC Ordinary. If the requester were told that documents relating to the request regarding 1LT Friendly were found but were being withheld under Exemption 7(C), the response would reveal that 1LT Friendly has, in fact, been involved in an allegation of fraternization. This is the type of information protected by Exemptions 6 and 7(C). Thus, a "Glomar" response is appropriate.

Department of Defense personnel continue to enjoy the rights of all individuals, to include that of privacy, even though they work for the Federal Government, and the fact that their personal information may be contained in an agency record does not make that information public property. In fact, since 9/11, DoD personnel have a heightened privacy interest in the personal information contained in agency records, and due consideration must be given to the protection of that personal privacy. Key to this protection are several FOIA exemptions that must be properly employed. Exemption 3 of the FOIA incorporates other federal withholding statutes and should be used to protect certain information. One of those Exemption 3 statutes is 10 U.S.C. § 130b, which protects personally identifying information of DoD personnel who are assigned to overseas, sensitive, or routinely deployable units. Exemption 6 of the FOIA protects personal information contained in personnel, medical or similar files, and Exemption 7(C) protects personal information in law enforcement records. Application of 6 and 7(C) require a careful balancing of the privacy interest of the individual and the public interest in disclosure. If properly applied, these exemptions should guarantee that DoD personnel are afforded all the protection available to them while ensuring that appropriate agency records or portions thereof are still available to the public.

[108] *See* Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (observing that "the American people have as much interest in knowing that key IRS decisions are free from the taint of conflict of interest as they have in discovering that they are not" in the context of finding a public interest in a fee waiver case).

The Limits of Fair Use in Military Scholarship: When, How, and From Whom to Request Permission to Use Copyrighted Works

Captain Evan R. Seamone[*]

I. Introduction

Scholarly legal writing is a key component of law practice throughout the military.[1] Specialty journals, such as *The Army Lawyer*, and the *Military*, *Naval*, and *Air Force Law Reviews* (combined military publications), jointly embody the philosophy that scholarly legal writing not only serves to develop the skills of judge advocates, but permits the transmission of vital knowledge on legal issues and developments unique to military practice.[2] A substantial amount of scholarly work will emerge in combined military publications solely as a result of mandatory writing requirements in military educational programs.[3] In 2008, for example, student-published work accounted for twenty-eight percent of *The Army Lawyer* and fifty-eight percent of *Military Law Review*.[4] Aside from students, faculty members, military practitioners, and military judges account for the majority of remaining publications, with non-military law professors and practitioners accounting for a much smaller number of contributors.[5]

Among the diverse authors in combined military publications, technology has enabled access to a variety of source material, creating legal considerations.[6] Most articles cite to webpages, and many cite to transcripts of cases, guidelines and standards of professional organizations, interviews, television broadcasts, and even movies.[7] Many articles begin with quotations from popular films or plays for the purpose of grabbing the reader's attention.[8] In addition to copyrighted works, the titles of articles and attention-grabbing excerpts sometimes include material protected as trademarks. Rarely are these uses ever accompanied by indications that the author first received permission to use such material.[9]

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[1] In recognition of this, the Air Force Judge Advocate General's Corps celebrates authorship of scholarly publications by attorneys in its ranks. Its magazine, *The Reporter* contains a recurring section titled "JAG Corps Scholarly Articles and Writings," which begins with a customary notation that "[m]embers of the JAG Corps continue to make significant contributions to academic legal discourse and dialogue, a sample of which is listed below." Note, *The Year in Review 2008*, REPORTER, 2008, at 33, 33–36 (citing individual works, including published articles and book reviews, and "additional papers written in satisfaction of educational requirements").

[2] *E.g.*, Major General Scott C. Black, *Foreword* to 197 MIL. L. REV. (2008) (describing how contributions to the *Military Law Review* serve to continue "legal discourse" on important developments in the military). As one example, *The Army Lawyer*, which is a publication of the Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, routinely publishes a series of articles on new developments in military criminal law. February 2009 marked the Fourteenth Annual Military Justice Symposium, with unique military law perspectives on "the Fourth, Fifth, and Sixth Amendments, as well as substantive criminal law, panel selection, voir dire, challenges, discovery, sentencing, and advocacy." Lieutenant Colonel Daniel G. Brookhart, *Foreword*, ARMY LAW., Feb. 2009, at 1, 1.

[3] In the Army Judge Advocate General's Corps, for example, any member wishing to obtain the Masters in Law in Military Law at the conclusion of the Judge Advocate Officer Graduate Course must complete at least one writing program elective "(primer, research paper, or thesis)" with a sufficient grade. U.S. DEP'T OF ARMY, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, CIRCULAR NO. 351-6, JUDGE ADVOCATE GRADUATE COURSE para. 14(a) (1 Aug. 2008). The Judge Advocate General's Legal Center and School is the only military school authorized to grant the Master of Laws. Note, *TJAGSA Gains Statutory Authority to Award a Master of Laws (LL.M.) in Military Law*, ARMY LAW., Jan. 1988, at 3. *See also* 10 U.S.C. § 4315 (2006). Because of this advantage, members of sister services often attend the Army LL.M. program.

[4] For the purpose of this article, student-published work includes masters' theses, book reviews, and other materials published during the time when students were associated with legal educational programs, as referenced in their biographical data.

[5] In 2008, for example, three non-military authors published articles in the *Military Law Review*. *See* Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196 MIL. L. REV. 91 (2008); Mitchell McNalylor, Book Review, *A.J. Lieblin's World War II Writings*, 196 MIL. L. REV. 170 (2008); Hon. Donna E. Shalala, *The Twenty-Seventh Charles L. Decker Lecture on Administrative and Civil Law*, 197 MIL. L. REV. 145 (2008).

[6] *E.g.*, Ralph S. Brown & Robert C. Denicola, *Preface to* RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP, at v (10th ed. 2009) ("Copyright law is undergoing major transformations as new technologies spawn new challenges.").

[7] *E.g.*, Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 65 n.440 (2001) (citing to a transcript of the television broadcast for the program *Larry King Live*).

[8] William Shakespeare's works are favorites among professors at The Judge Advocate General's School. *E.g.*, Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005, at 1, 1 n.1 (citing several lines of *King Henry*); Major Jon S. Jackson, *Counsel Should Provide More Fury, Less Nothing: 2004 Developments in Professional Responsibility*, ARMY LAW., May 2005, at 35, 35 n.1 (citing several lines of *MacBeth*).

[9] *See infra* note 19 and accompanying discussion.

Military legal practitioners who produce published works are likely to encounter the same legal issues as university professors concerning the use of intellectual property for educational purposes. Chief among these concerns is the notion of "educational fair use," which *potentially* permits unauthorized use of copyrighted works for the purpose of expanding knowledge on an issue through criticism or review.[10] In general, copyright experts warn all authors to err on the side of caution and seek permission to use copyrighted material,[11] particularly because the concept of fair use is one of, if not, *the* most complex areas of copyright law.[12] The concern relates to the fact that there are no automatic standards to determine when one's use is fair.[13] Where infringement does occur, copyright owners can be enjoined from publishing a work or distributing already published work.[14] Judge advocates publishing scholarly work, in fact, have special intellectual property obligations based on the nature of their status in the military.[15] Furthermore, academic standards often add to the existing requirements of Army regulations.[16]

In 1988, long before society merged onto the information superhighway, Captain James Hohensee emphasized the need for military lawyers to learn the nuances of fair use.[17] While he identified numerous reasons for study of these unique rules, misinterpretation and oversimplification were his biggest concerns: "Judge advocates must be alert to the temptation to oversimplify the complex nature of the fair-use doctrine. We look for simple standards such as those holding excessive copying cannot be fair use. If we advise that all educational or military uses are fair use because they are nonprofit we tread dangerous ground."[18] It appears this call to action has fallen upon deaf ears. In fact, a recent search in the LEXIS-NEXIS® "military law reviews combined" database revealed only eighteen citations acknowledging publishers for permission to reprint material.[19] Among this group of articles, authors mainly requested permission only when reproducing entire articles from other legal publications.[20] In a handful of instances, authors requested permission to reprint existing compilations of data, such as charts reflecting statutory trends across the nation.[21] Only one author acknowledged a publisher for permission to reprint images.[22] In hundreds of other articles, frequent citations to blocks of text, figures, charts, photographs, websites, song lyrics, jokes, and other content are accompanied by mere citations.[23]

While, certainly, not all unauthorized citations infringe upon an author's intellectual property rights,[24] some may,[25] and this is a reason for concern. Infringement may be unnoticed simply because readers of military publications remain

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[10] *See infra* Part III (describing the doctrine of fair use and its limitations).

[11] *See infra* Parts III & IV.

[12] *Id*.

[13] *Id.*

[14] *Id.* Even if a defendant succeeds in an infringement case, litigation costs, alone, could exceed $20,000. RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF 227 (3d ed. 2007) (providing an example in which lawyers' fees for mounting a defense to infringement "exceeded $20,000" and eliminated all profits rightfully earned by the user of the work). For this reason, many defendants settle regardless of the merits of a plaintiff's claim. *E.g.*, Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391, 395 (2006) (observing situations in which, "facing the potential of a significant award, a defendant would likely offer to settle with the copyright owner").

[15] *See infra* Part II.

[16] U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, 58TH GRADUATE COURSE PROFESSIONAL WRITING PROGRAM MANUAL 34 (2009) [hereinafter PWP MANUAL] ("Students must comply with applicable copyright laws. . . . Students must obtain any necessary copyright permission and cite it in the appropriate footnotes.").

[17] *See generally* Captain James M. Hohensee, *The Fair Use Doctrine in Copyright: A Growing Concern for Judge Advocates*, 119 MIL. L. REV. 155 (1988).

[18] *Id*. at 200.

[19] The search, last conducted on 10 January 2010, consisted of "republ! or reprint! w/s permission."

[20] *Id*.

[21] *E.g.*, Note, *Legal Assistance Items*, ARMY LAW. May 1992, at 37, 44–45.

[22] Major Douglas A. Dribben, *DNA Statistical Evidence and the "Ceiling Principle": Science or Science Fiction?*, 146 MIL. L. REV. 94, apps. A & B (1994) (reprinting illustrations related to DNA).

[23] *See supra* note 19 and accompanying text.

[24] STIM, *supra* note 14, at 5 (recognizing that even "[i]f a creative work is protected under intellectual property laws, [one's] unauthorized use may still be legal").

[25] *See infra* Part III.A.2 (discussing use of "microworks" and small portions of text that still qualifies as copyright infringement).

predominantly within military circles.[26] However, as civilian courts and commentators increasingly turn to military scholarship in efforts to interpret contemporary national security and international law issues—and combined military publications are available through electronic databases such as LEXIS® and Westlaw® or online[27]—the resulting popularity of military legal works could very well provide original authors with belated knowledge of the ways in which their work has been (mis)used.[28] At the very least, the scarcity of permission references in combined military publications alerts us that many authors have abandoned the required cautious perspective on intellectual property.[29]

This article addresses the practical considerations facing military authors, with a focus on the process of requesting permission to republish copyrighted works. Part II explores the ethical dimension of intellectual property for military members. It highlights the special obligations imposed on military law practitioners that other civilian authors simply do not face. Part III explores notions of fair use in the creation of scholarly works. It dispels four common myths about the fair use doctrine. Part IV identifies the practical requirements for requesting permission to use copyrighted works. Aside from identifying the steps of the permission process, it provides examples of licensing agreements and a description of consolidated permission services, such as the Copyright Clearance Center. For more complex issues of copyright law, Part V includes references to comprehensive resources.

II. The Cautious Perspective and the Ethical Dimension of Military Legal Scholarship

Producing legal scholarship as a judge advocate requires the writer to approach written works with a perspective of caution, acknowledging ethical duties that arise from the status of both government employee as well as law practitioner. Part of this requirement involves an examination of the content of one's writing. For example, the author must consider whether the substance of a given manuscript contains client confidences or assertions that could later be used against the author or her client.[30] It is not uncommon in military publications that an author relates a "war story" from her past to emphasize an argument or scholarly position. Military publications are filled with prompts like "In the author's experience . . . ."[31] In Captain Hohensee's piece on intellectual property, even he relates prior advice he provided to commanders in the course of performing his duties as an administrative law attorney, acknowledging the weaknesses of his approaches. After explaining how simple questions in copyright law "can strike fear into the hearts of administrative law attorneys," he goes on:

> I know from personal experience. While working as an administrative law action officer in 1985 I was assigned a problem from the post youth activities. When the post theater cancelled Saturday afternoon children's matinees, the youth activities wanted to rent videotapes and show them for a small fee. Would this violate the copyrights on the films? To answer this question I turned to the Administrative Law Handbook and was surprised to find no guidance on copyright matters. . . . I concluded that the plan would violate the copyrights. That opinion was right, but it failed in two respects. It failed because I was reduced to hiding behind the language in the regulation to say no. I didn't understand the law that the regulation embodied. The second failure stemmed from the first. Because I didn't understand the law well enough, I was unable to devise an alternative course of action that might have achieved the mission.[32]

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[26] For example, the *Military Law Review's* average circulation in 2008 was 5450, with roughly half of these periodicals provided to subscribers outside the military. Postal Service Form 3526, Statement of Ownership, Management, and Circulation, at 2 (1 Oct. 2008), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/MilitaryLawReview.nsf (for Volume 198) (last visited Jan. 10, 2010).

[27] In the first ten months of Fiscal Year 2008 alone, the Government Printing Office indicated that the *Military Law Review's* website was accessed 1,121,175 times, solely through the Library of Congress' Military Legal Resources Website for the *Military Law Review*. Black, *supra* note 2, at *Foreword*.

[28] STIM, *supra* note 14, at 4 ("[T]he more successful the project becomes, the more likely that a copyright owner will learn of the use."). In this sense, "if you want your project to become successful, unauthorized use becomes an obstacle." *Id*.

[29] *See supra* note 19 and accompanying text. This may, in fact, represent a national trend among civilian legal scholars. *E.g.*, Jessica Litman, *Open Access Publishing and the Future of Legal Scholarship: The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 783 (2006) ("[C]opyright is sufficiently irrelevant that legal scholars, the institutions that employ them, and the journals that publish their research tolerate considerable uncertainty about who owns the copyright to the works in question, without engaging in serious efforts to resolve it."). Even if this is a norm in the world of civilian legal scholarship, different standards apply to military members and practicing attorneys engaging in legal writing.

[30] *See infra* note 35 and accompanying discussion.

[31] *E.g.*, Colonel Thomas G. Becker, *Games Lawyers Play: Pre-Preferral Delay, Due Process, and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1, 21 n.90 & 23 n.103 (1998) (using personal experience to support discussions of charges driven by personal animosity and "unhealthy" competition in the preferral process).

[32] Hohensee, *supra* note 17, at 155–56.

While such commentary surely emphasizes the need for judge advocates to learn more about copyright law,[33] similar comments about the representation of clients in criminal cases or family law matters could easily raise questions of confidentiality.[34] Moreover, as legal scholars warn adjunct professors who practice law and produce legal scholarship, there is potential that "[s]tatements made by a lawyer in publications can be used against the lawyer in a malpractice action"[35] or "against a client [at trial] or in briefs and motions."[36] A conscientious military scholar therefore must first read her manuscript from an ethical perspective and take the necessary precautions to avoid violating confidentiality duties. This may be as simple as removing oneself from the reference and, instead, using a hypothetical attorney faced with a dilemma: "I often write not that a reasonable lawyer must or ought to do something but that a lawyer should consider whether to do that act. Such censorship is not ethically required, but it certainly reduces the potential for controversies arising from a lawyer's scholarly publications."[37]

In the context of source use and attribution, the military scholar will scrutinize her scholarly work for the use of copyrighted material. She will look for textual quotes containing more than a simple phrase or concept.[38] She will question whether her use goes to the "heart" of a copyrighted publication, even if its size is limited.[39] In her description of others' theories or approaches to describing an issue, she will note whether her work follows the same pattern and outline as the original author, even if the cited material contains no verbatim copying.[40] She will pay special attention to use of charts or diagrams, photographs, tables, lists, copies of test questions or guidelines, or excerpts from blogs or websites.[41] She will be conscious of the status of the author of a publication and ready to seek permission not only from the publisher, but also from the author.[42] She will develop lists of potential conflicts and seek permission in all cases where resolution of an issue is not readily apparent, especially because various procedures have simplified the permissions process.[43] The military scholar must take these actions because it is her duty as a military officer and an attorney.

Members of the Army must abide by the provisions of Army Regulation 27-60, *Intellectual Property*, which mandates respect for private intellectual property rights in the performance of military duties.[44] Under the "general rule" on copyrights, "copyrighted works will not be reproduced, distributed, or performed without the permission of the copyright owner unless such use is within an exception under United States Copyright Law . . . or such use is required to meet an immediate mission-essential need for which noninfringing alternatives are either unavailable or unsatisfactory."[45] Where a member of the Army seeks to use copyrighted material without permission, the use of the copyrighted material must first be approved by the

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[33] The excerpt, in fact, reminds readers of common dilemmas facing judge advocates in the interpretation of copyright statutes, especially in modern times.

[34] Rule 1.6, which addresses client confidentiality, prohibits the release of any information relating to the representation of a client without the client's consent, which, in the case of a judge advocate, might include both the Government as a former client as well as individuals with whom the attorney formed an attorney-client relationship. *Compare* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.6 (1 May 1992) [hereinafter AR 27-26] ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation."), *with id.* R. 1.13 (discussing the military attorney's representation of the Government as a client). There is no recognized exception to this rule for academic writing. David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 391 (2001).

[35] Hricik, *supra* note 34, at 400. Hricik further explains, "for example, if a lawyer writes that a prudent lawyer must always investigate the medical history of a personal injury plaintiff, and then fails to do so in representing a defendant in such a case, that statement may likely be admissible against the lawyer." *Id.*

[36] *Id*. at 401.

[37] *Id*. at 401 n.86.

[38] *See infra* Part III.A.2.

[39] *Id.*

[40] *See infra* Part III.

[41] *See infra* Parts III.A.2 & III.A.4.

[42] *See infra* Part IV.

[43] *Id*.

[44] U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY para. 4-1 (1 June 1993) [hereinafter AR 27-60] ("It is DA policy to recognize the rights of copyright owners consistent with the Army's unique mission and worldwide commitments."). *See also* U.S. DEP'T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 2-5 (27 Mar. 2006) [hereinafter AR 25-30] (acknowledging the responsibility to ensure that any work published through the Army "conform[s] to the copyright laws"); *id.* (requiring adherence to U.S. DEP'T OF ARMY PAM. 25-40, ARMY PUBLISHING: ACTION OFFICERS GUIDE, at sec. v (7 Nov. 2006) [hereinafter DA PAM. 25-40 (addressing the "Use of Copyrighted Material")).

[45] AR 25-30, *supra* note 44, para. 2-5*d*(1) ("When copyrighted matter is to be included in a publication, the proponent will obtain prior written permission from the copyright owner or the owner's duly authorized agent."). *See also* Spilman v. Mosby-Yearbook, Inc., 115 F. Supp.2d 148, 156 (D. Mass. 2000) ("The federal government has no privilege to use copyright materials without the owner's consent.").

Intellectual Property Counsel of the Army.[46] In mandating permission requests, AR 27-60 notes instances in which "copyright owners frequently grant the military departments free permission to use copyrighted material."[47]

Aside from violating the Army regulation on intellectual property, another reason to err on the side of caution in requesting permission is the power of copyright infringement—or even suspected copyright infringement—to harm the reputation of the author, The Judge Advocate General's Corps, and the U.S. Army. Although copyright infringement is distinct from plagiarism, both concepts arise from the concern for an author's right to maintain control over her intellectual work product.[48] Some courts refer to copyright infringement as a form of plagiarism.[49] It is certainly cause for concern that a judge advocate engaged in scholarly activity can so easily be viewed as a "plagiarist," "thief,"[50] "victimizer,"[51] "pirate,"[52] no less a "criminal,"[53] simply by the failure to obtain permission for a source attribution.[54] Even when spectators eschew these harsh characterizations, copyright infringement is often considered as the display of "questionable ethics."[55] For these very reasons, The Judge Advocate General's Committee on Professional Responsibility explained, in Legal Opinion 93-1, that copyright law imposes a "special standard of care" on military attorneys to avoid piracy,[56] and the violation of copyright law harms not only the officer, but causes "obvious embarrassment . . . to the Army," the Corps, and the installation.[57] Aside from criminal penalties, the nature of the infringement may constitute misrepresentation under Rules 8.4(b) and (c), which prohibit "criminal act[s] that reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other

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[46] AR 27-60, *supra* note 44, para. 4-1.

[47] *Id.* para. 4-2*a*.

[48] Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 200 (2003) (observing "a significant overlap between plagiarism and copyright infringement").

[49] *Id*.

[50] *Compare* PIRACY: IT'S A CRIME (Motion Picture Ass'n of Am. 2004)

> (You wouldn't steal a car . . . .
>
> You wouldn't steal a handbag . . . .
>
> You wouldn't steal a television . . . .
>
> You wouldn't steal a movie . . . .
>
> Downloading pirated films is stealing . . . .
>
> Stealing is against the law . . . .
>
> Piracy. It's a crime . . . .),

with Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connection Between Land and Copyright*, 83 WASH. U. L.Q. 417, 418 (2005) (observing that "general acceptance of the 'intellectual property' label has spawned analogies to the protections afforded other forms of property–particularly real property," including, and especially, the label "thief"). *See also* DA PAM. 25-40, *supra* note 44, para. 2-37*a* ("Use of the copyright without authority from the owner or as provided by the copyright law is a wrongful taking of the property.").

[51] *E.g.*, Davis v. Gap, Inc., 246 F.3d 152, 164 (2d. Cir. 2001) (referring to "victims of infringement"). Original authors who experienced plagiarism of their works often expressed the sentiments of victims, simply based on the misuse of their works. *E.g.*, Jonathan Pitts, *A Twice Told Tale*, BALT. SUN, Mar. 10, 2002, at 7E ("I agonized over every word in my book. . . . What took me 20 years took him 15 minutes. If that.") (comments of author and historian Joe Balkoski).

[52] Note, *Judicial Plagiarism: It May be Fair Use But is it Ethical?*, 18 CARDOZO L. REV. 1253, 1281 (1997) [hereinafter Plagiarism Note] ("The term 'piracy' . . . better describes copyright infringement.").

[53] *See*, *e.g.*, Joseph W. Cromier et al., *Intellectual Property Crime*, 46 AM. CRIM. L. REV. 761, 782–94 (2009) (reviewing criminal statutes applicable to copyright infringement). Although government employees acting in the scope of their duties are generally immune from criminal sanctions for criminal copyright infringement, military attorneys are subject to professional discipline for such conduct. *Compare* DA PAM. 25-40, *supra* note 44, para. 2-5*c*(4) ("Government employees will not be personally or criminally liable for copyright infringements in the course of their official duties."), *with* The Judge Advocate General's Comm. on. Prof. Res., Opinion 93-1, *reprinted in* Office of The Judge Advocate General, Standards of Conduct Office, *Professional Responsibility Note*, ARMY LAW., June 1993, at 54, 54–57 [hereinafter Opinion 93-1] (finding a legal assistance attorney responsible for violating an ethical rule based, in part, on copyright infringement).

[54] The imagery of infringement is similar to the imagery and labels of plagiarism, with plagiarists often "referred to as 'thieves,' or 'criminals,' and plagiarism as a 'crime,' 'stealing,' 'robbery,' 'piracy,' or 'larceny.'" Green, *supra* note 48, at 169.

[55] STIM, *supra* note 14, at 4.

[56] Opinion 93-1, *supra* note 53, at 56 ("The public rightfully expects attorneys to respect the rights of others; therefore, attorneys have a special standard of care.").

[57] *Id*.

respects" and "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation."[58] While it has been common for judge advocates to broadly interpret the defenses to copyright infringement as support for their lack of knowledge or interest,[59] the stakes are too high to risk an indifferent approach in the name of "educational fair use."[60]

III. Copyright Law Applicable to Military Scholars

Literary copyright infringement occurs when an author uses copyrighted written material without obtaining the copyright owner's permission.[61] The "use" of material is not limited to verbatim copying of text; while verbatim copying is the clearest example of use, infringement can occur through paraphrasing[62] or even by duplicating the structure of a work, so that the original author's "pattern" of analysis is copied.[63] Copyright protection extends to an original author's unique form of creative literary expression, as opposed to the facts or ideas conveyed through that expression.[64] Consequently, historians who use previously-published dates and other facts in their independent scholarship do not infringe on the rights of the author who initially published those dates or facts.[65] Even though the original writer may have spent years uncovering facts, they are considered to be in the public domain.[66] As opposed to facts or ideas, the infringing use of expression relates to:

- "the manner of expression,
- the [original] author's analysis or interpretation,
- the way he structures his material and marshals facts,
- his choice of words, and
- the emphasis he gives to particular developments."[67]

Aside from lack of protection for facts and ideas, the doctrine of fair use permits "others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."[68] A critic, such as a book reviewer, must naturally be allowed to copy enough of the original text to enable fair criticism, just as a scholar must be able to explain a theory in enough detail to accurately convey the basis for incorporation of the work into her own independent one.[69] To this end, the Copyright Act permits use of a work "for purposes such as

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[58] AR 27-26, *supra* note 34, R. 8.4(b) & (c); *see also* Opinion 93-1, *supra* note 53, at 57 (finding a violation of Rule 8.4(c) based on misrepresentation by the legal assistance attorney who infringed on the local reporter's copyrighted article).

[59] Hohensee, *supra* note 17, at 200.

[60] *Id*. *See also infra* Part III.A.3 (dispelling popular myths related to educational fair use).

[61] At the most basic level, "infringement of written works usually involves the unauthorized exercise of a copyright owner's exclusive rights to reproduce the work and prepare derivative works based on it." STEPHEN FISHMAN, THE COPYRIGHT HANDBOOK, at 12/2 (8th ed. 2004).

[62] *E.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (observing that "protected expression [can be] 'used' whether it has been quoted verbatim or only paraphrased").

[63] *E.g.*, Werlin v. Reader's Digest Ass'n, Inc., 528 F. Supp. 451, 463 (S.D.N.Y. 1981) ("In deciding whether there is any significant nonliteral similarity between [two articles], the Court must be attentive to the 'pattern' of [the original] story, to determine whether the [subsequent] article 'tracked' in a material way [the original author's] treatment of the events.") (citations omitted); *Salinger*, 811 F.2d at 98 (observing that a user of copyrighted material can "track[] the original so closely as to constitute infringement").

[64] *E.g.*, Shipkovitz v. United States, 1 Cl. Ct. 400, 403 (1983), *aff'd*, 732 F.2d 168 (Fed. Cir. 1984) ("[I]t is well known that copyright registration only affords protection against the manner in which a writing is written, and does not protect the ideas contained therein."). This rule is longstanding. Baker v. Sedlen, 101 U.S. 99, 102–03 (1879) ("The copyright of a work on mathematical science cannot give the author an exclusive right to the methods of operation which he propounds, of the diagrams which he employs to explain them, so as to prevent an engineer from using them whatever occasion requires.").

[65] Hohensee, *supra* note 17, at 199–200 ("Authors will write about the Vietnam conflict for example. The historical and biographical nature of such works will make them similar to previous works. The similarity is not infringement because of the fact/expression dichotomy.").

[66] Craft v. Kobler, 667 F. Supp. 120, 123 (S.D.N.Y. 1987):

> The law does not . . . enforce efforts to hoard, suppress, sell or license historical fact, or to govern who may and who may not disseminate it. Thus, the copyright law does not protect [historical or bibliographical] research. Notwithstanding that enormous effort and great expense may have been required to discover factual information, it may, nonetheless, be freely taken from the original writer's copyrighted work and republished at will without need of permission or payment.

[67] Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (citation omitted).

[68] Rosemont Enters, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citation omitted).

[69] *E.g.*, Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1525 (D. Colo. 1995) (finding fair use in the posting of Church of Scientology materials because the copying "was made for the non-profit purpose to advance understanding of issues concerning the Church which are the subject of ongoing public controversy" and recognizing that fair use sometimes permits copying of entire documents).

criticism, comment, news reporting, teaching . . . scholarship, or research."[70] In allowing for such use, the Copyright Act balances between the rights of an original author and the competing rights of the public.[71] As a result of this, minimal use of a text is generally permissible to further the public good.[72] However, not all use is permissible. The proper application of this law requires the copier of the work to exercise reasonableness in the use of textual passages.[73] One commentator gives the following advice to reviewers of books,

> If you are commenting on the author's political views in general, you might not need to actually quote any of the text, or you might quote only a few lines to make the point of the vehemence of his views. On the other hand, if you are commenting on a poet's use of repetition, you might need to quote several lines of a poem to make your point.[74]

The labels with which the courts and commentators have referred to "fair use" reveal the difficulty of the concept as applied.[75] While the fair use criteria are codified in the U.S. Code, they cannot be mechanically applied to the facts of a case.[76] The statute identifies four non-exhaustive categories of inquiry, including:

> (1) [t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) [t]he nature of the copyrighted work;
> (3) [t]he amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) [t]he effect of the use upon the potential market for or value of the copyrighted work.[77]

In evaluating these factors, courts must consider each case on its own merits.[78] With respect to fair use, legal opinions have dispelled the myths commonly adopted by some judge advocates.[79]

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[70] 17 U.S.C. § 107 (2006).

[71] *Rosemont Enters*., 366 F.2d at 307 (observing that the fair use doctrine "subordinates the copyright holder's interest in the maximum financial return to the greater public interest in the development of art, science and industry").

[72] *Id.* (observing that "[t]he fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts.'" (citing U.S. CONST. art. I, § 8, cl. 8)).

[73] *E.g*., Hohensee, *supra* note 17, at 200 (stressing that military authors may copy under the fair use doctrine "within reasonable limits necessary for scholarship").

[74] GRETCHEN MCCORD HOFFMANN, COPYRIGHT IN CYBERSPACE: QUESTIONS AND ANSWERS FOR LIBRARIANS 30 (2001).

[75] *E.g*., Marcus v. Rowley, 695 F.2d 1171, 1174 (9th Cir. 1983) (noting that the doctrine "evolved in such a manner as to elude precise definition" and that leading scholars call it "obscure"); Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003), *cert. denied*, 543 U.S. 816 (2004) ("The fair use defense defies codification."). *See also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 13.03[A] (2006) (describing how "determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations").

[76] *E.g*., *Substance, Inc*., 354 F.3d at 629 ("[T]he four factors that Congress established . . . are not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically.").

[77] 17 U.S.C. § 107 (2006). *See also* DA PAM. 25-40, *supra* note 44, para. 2-37*b*(1) (requiring consideration of the same factors to determine whether use of a copyrighted work in military publications is permitted without permission).

[78] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the [fair use] statute, like the doctrine it recognizes, calls for case-by-case analysis.").

[79] Hohensee, *supra* note 17, at 200 (addressing the temptation of judge advocates to "oversimplify the complex nature of the fair use doctrine").

A. Common Myths Among Judge Advocates[80]

1. Myth One: Source Attribution is Sufficient

Perhaps due to the "overlap" between copyright law and plagiarism norms,[81] "[s]ome people mistakenly believe it's permissible to use a work (or portion of it) if an acknowledgement is provided."[82] This assumption is wrong.[83] As attorney Lloyd J. Jassin explains, "[g]iving credit means you can look at yourself in the mirror and say you are not a plagiarist. However, merely giving credit is not a defense to copyright infringement. . . ."[84] While footnotes in legal writing function as a type of insurance against plagiarism because "a footnote ensures that the author receives credit,"[85] an author can infringe on copyrighted material even if she fully acknowledges the owner in a citation.[86] This is just one way in which "the two concepts are obviously distinct [and in which] there [can be] cases of plagiarism that do not constitute copyright infringement and vice versa."[87] Ultimately, while attribution may factor into a fair use analysis,[88] "acknowledgement of a source does not excuse infringement when the other factors listed in Section 107 are present."[89]

2. Myth Two: Small Portions of Text Are Free for the Taking

A popular concept in copyright law is "the less you take, the more likely that your copying will be excused as fair use."[90] The Copyright Office has incorporated such a rule in its regulations that generally deny copyright protection to "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents."[91] The concept also appears in the dicta of court opinions

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[80] Attorney Lloyd J. Jassin lists the following ten common myths related to copyright permission, with short explanations regarding the dangers connected to each one.

1. The work I want to use doesn't have a copyright notice so I don't need permission.
2. If I give credit I don't need permission.
3. Since I'm only using a small portion of the original work, I don't need permission.
4. I don't need permission because I'm going to adapt the original work.
5. Since the work is in the public domain, I don't have to clear permissions.
6. The material I want to reproduce was posted anonymously to an online discussion or newsgroup. That means the work is in the public domain.
7. I can always obtain permission later.
8. The material I want to quote is from an out-of-print book. This means the work is in the public domain.
9. Since I'm planning to use my work for nonprofit educational purposes, I don't need permission.
10. I don't need permission because the work I want to use was published before 1923 and is over 75 years old.

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Lloyd J. Jassin, *Ten Common Copyright Permission Myths*, *available at* http://copylaw.com/new_ articles/copy_myths.html (last visited Jan. 11, 2010). Attorney Richard Stim also developed "Top 10 Tips for Website Creators" exploring additional myths and addressing Internet-related licensing issues. Richard Stim, *Top 10 Tips for Website Creators*, INTERNET LAW., Apr. 2000.

[81] Green, *supra* note 48, at 200 (observing that "there is a significant overlap between plagiarism and copyright infringement").

[82] STIM. *supra*, note 14, at 220.

[83] *Id.*

[84] Jassin, *supra* note 80. This quote is reprinted with permission of Lloyd J. Jassin.

[85] Plagiarism Note, *supra* note 52, at 1265.

[86] Green, *supra* note 48, at 201 ("[A] person who reproduced all or part of a copyrighted work without permission would be committing copyright infringement even if he attributes.").

[87] *Id*. at 200.

[88] STIM, *supra* note 14, at 220.

[89] Marcus v. Rowley, 695 F.2d 1171, 1176 n.8 (9th Cir. 1983).

[90] STIM, *supra* note 14, at 218. *See also* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 577 (2006) ("Under the fair use doctrine, the smaller the amount copied, the fairer the copying.").

[91] 37 C.F.R. § 202.1(a) (2009) (listing "Material Not Subject to Copyright").

addressing *de minimis* or trivial use of copyrighted works, which are supposedly too short to capture enough creativity and originality to warrant protection.[92] However, "even assuming that the shorter the phrase is, the less likely it is to be original, that does not deny the existence of thousands or millions of short phrases that are original enough to cross the modicum of creativity threshold."[93] At the most general level, scholars recommend a few rules of thumb:

> As a general rule, never quote more than a few successive paragraphs from a book or article, quote one or two lines from a poem, or take more than one graphic such as a chart, diagram, or illustration. Also, be aware that although there is no legally established word limit for fair use, many publishers act as if there were one and require their authors to obtain permission to quote more than a specified number of words (ranging from 100 to 1,000 words).[94]

There are several exceptions even to these general guidelines.

Scholars now recognize an increasing trend to protect "microworks," which are very "small pieces of creative expression."[95] This trend accords protection to jokes, for example.[96] Even the shortest of phrases can gain protection if the copied text embodies the very "'heart' of the work," which would meet the third substantiality factor, regardless of the amount of text copied.[97] On this view, use of a microwork, such as a sentence or a phrase of few words could be "'qualitatively great' even if quantitatively small."[98] Hence, while quotations of text over 100 words indicate the need for close scrutiny, so should key paragraphs, sentences, or even phrases. As intellectual property scholars observe, "it is not always okay to take one paragraph or less than 200 words. Copying 12 words from a 14-word haiku poem wouldn't be fair use. Nor would copying 200 words from a work of 300 words likely qualify as fair use."[99] In these unique cases, "[t]he 'ordinary' phrase may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection."[100]

The case of *Cook v. Robbins* provides important insight on the use of phrases.[101] In *Cook*, Wade B. Cook, an author, published *Wall Street Money Machine*,[102] which topped a number of best-seller lists.[103] Drawing on his experience as a taxi driver in New York, Mr. Cook developed short catch phrases to describe investment techniques.[104] The "meter drop" phrase relates to the practical principle that a taxi driver "could make more money taking numerous short trips than by waiting for higher fares,"[105] while the "rolling stock" represents a "stock that tends to consistently roll up to a specific price point in an obvious pattern of repeated waves."[106] Motivational speaker Anthony Robbins read *Wall Street Money Machine*, attended

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[92] Hughes, *supra* note 90, at 577 ("The *de minimis* rule expressly allows the copying of small and insignificant portions of the plaintiff's work."). *See, e.g.*, Bell v. Blaze Magazine, 58 U.S.P.Q.2d (BNA) 1464, 1466 (S.D.N.Y. 2001) ("Words and short phrases, such as titles or slogans, are insufficient to warrant copyright protection, as they do not exhibit the minimal creativity required for such protection.").

[93] Hughes, *supra* note 90, at 607.

[94] FISHMAN, *supra* note 61, at 11/10.

[95] Hughes, *supra* note 90, at 576.

[96] *E.g.*, Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1798 (2008) ("Formally, jokes and comedic routines can enjoy copyright protection. Jokes are literary works, which constitute a protected category under copyright law.").

[97] STIM, *supra* note 14, at 218. *See also* Werlin v. Reader's Digest Ass'n, 58 F. Supp. 451, 464 (S.D.N.Y. 1981) ("[C]ourts have found copyright infringement where . . . only one or two lines in plaintiff's work were literally duplicated."). This concept is quite dated. *E.g.*, Story v. Holcombe, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) ("The infringement of a copyright does not depend so much on the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that which its chief value consists.").

[98] Hughes, *supra* note 90, at 587 (citation omitted).

[99] FISHMAN, *supra* note 61, at 11/9.

[100] Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

[101] Cook v. Robbins, 232 F.3d 736 (2000), *withdrawn and dismissed*, 2001 U.S. App. LEXIS 784 (9th Cir. Jan. 22, 2001), *available at* http://docs.law.gwu.edu/facweb/claw/Cook%27Robb1.pdf [hereinafter *Cook* PDF] (reproducing entire text of opinion).

[102] WADE B. COOK, WALL STREET MONEY MACHINE (1995).

[103] *Cook* PDF, *supra* note 101, at 14700.

[104] *Id*.

[105] *Id*.

[106] *Id*.

one of Cook's seminars, and suggested that they join forces instructing seminars on financial investment.[107] While the alliance was short-lived, Robbins used the phrases "meter drop" and "rolling stock" in his printed seminar materials for a presentation called Financial Power, terms he had never used prior to reading Cook's book.[108] Cook sued Robbins for infringement based on nine uses of the phrase "meter drop" and two uses of the phrase "rolling stock" in the course materials.[109] The trial court found genuine issues of material fact on four of the phrases, permitting a jury to rule on the infringement claim, while granting summary judgment on seven of the claims because they merely "explain the basic rules of stock market movement."[110] The trial judge based his ruling on the fact that "[a] reasonable jury could find that the four passages are qualitatively important."[111] A comparison of the four uses, as reprinted in the Ninth Circuit's opinion, appears below:

Cook's Wall Street Money Machine	**RRI's Financial Power Workbook**[112]
Money is made on the Meter Drop.	The ring toss/meter drop. The most money is made on the _____.
No one I know has come up with a name for the type of investing I call "Rolling Stocks." It works on stocks that roll up and down in repeated waves. . . . Some roll fast and some slow.	A rolling stock is a stock that tends to consistently roll up to a specific price point in an obvious pattern (repeated waves). Some of these companies roll fast (4-6 weeks) and some roll slow (8-10 weeks).
Rule #1: You have to know your exit before ever going in.	Rule #1: You have to know your _____ before going in.
Rule #2: Don't get greedy.	Rule #2: Don't get _____![113]

Based on Robbins's use of the work above, a civil jury awarded Cook $655,900.[114] Robbins appealed to the Ninth Circuit on the basis that his use of the phrases was permitted, first, due to the lack of copyright coverage for such short terms,[115] and second, under the fair use doctrine.[116] Robbins explained not only that the terms merely described an idea "that already existed,"[117] but also that he used such a "miniscule portion" of Cook's work, it could not possibly qualify as substantial copying.[118] The appellate court affirmed the jury's verdict. On the matter creativity, the court ruled that these terms met the very low threshold required for originality and were subject to copyright protection because "Cook's complete expressions in conveying the meaning of 'meter drop' and 'rolling stock' are creative, even if minimally so."[119] On the issue of substantiality, even though Robbins used a few words out of a total of 52,000 words in the entire 300-plus pages of his manual,[120] the use was still substantial: Cook's testimony revealed the context of the phrases as "the very essence" of his

[107] *Id*. at 14701.

[108] *Id.*

[109] *Id.* at 14701–02.

[110] *Id*. at 14702.

[111] *Id*.

[112] The Financial Power workbook contained blank spaces to encourage seminar participants' active participation in the course. *Id*. at 14702 n.3.

[113] *Id*. at 14702–03.

[114] *Id*. at 14703.

[115] *Id.* at 14710.

[116] *Id*. at 14712.

[117] *Id*. at 14711.

[118] *Id*. at 14713.

[119] *Id.* at 14711.

[120] *Id*. at 14701.

teachings and an "important part of [his] book . . . and [his] life."[121] The *Cook* case, though at one time designated for publication, was not reported due to subsequent withdrawal of the action by Cook pursuant to a settlement.[122] However, *Cook* provides a clear indication that fair use does not provide blanket authorization to use even the smallest parts of works.[123]

3. Myth Three: A Non-Profit Education Purpose Permits All Use

Even though the basis for the fair use doctrine is the dissemination of knowledge for the betterment of society, this hardly exempts educators or scholars from unrestricted use of copyrighted material in their written works.[124] The case of *Marcus v. Rowley* dispelled this myth when it found copyright infringement by a home economics teacher who distributed a handbook on cake decorating to her students free of charge.[125] Despite the fact that her use of eleven pages of material from a different handbook was for non-profit and educational purposes, her use constituted infringement because it demonstrated no fair use under the other criteria.[126] The court explained that "a finding of nonprofit educational purpose does not automatically compel a finding of fair use."[127] Because the subsequent user's purpose in disseminating the work was for the same purpose as the owner, the shared objective favored a presumption of no fair use.[128]

Courts have similarly applied the presumption of no fair use in cases involving scholarly research. Here, admittedly, there may be little monetary value obtained directly from the publication of a work in a scholarly journal.[129] Even so, the first statutory factor can still weigh against fair use because "the crux of the profit/nonprofit distinction is . . . whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price."[130] The context of scholarly publication requires attention to "sweat off [the] brow," rather than "dollars and cents."[131] Accordingly, in the "publish or perish" academic environment, which reserves tenure for publishing professors, courts view "promotion and

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[121] *Id.* at 14713.

[122] Hughes, *supra* note 90, at 591 (describing the controversy that ensued over the Ninth Circuit's ruling).

[123] In the reported case of *Andreas v. Volkswagen of America, Inc*., 336 F.3d 789 (8th Cir. 2003), for example, the plaintiff was an artist who produced a print titled "Angels of Mercy" containing the text "Most people don't know that there are angels whose only job is to make sure you don't get too comfortable & fall asleep & miss your life." *Id*. at 791. A company designed a commercial for Volkswagen displaying a car with a voiceover indicating, "I think I just had a wake-up call, and it was disguised as a car, and it was screaming at me not to get too comfortable and fall asleep and miss my life." *Id*. at 792. The jury's finding of copyright infringement was upheld by the Eighth Circuit. *Id*. *See also* Applied Innovations, Inc. v. Regents of the Univ. of Minn., 876 F.2d 626, 634–35 (8th Cir. 1989) (holding that short test questions on a psychological test, such as "No one seems to understand me," "satisfy the minimal standard for works of authorship").

[124] *E.g*., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) ("[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."); HOFFMAN, *supra* note 74, at 29 ("Nonprofit institutions, libraries, and educational institutions get no break per se. . . . It is important to understand that there are no guarantees under the fair use doctrine."). This article does not address the use of copyrighted works, such as clips from or entire movies, in face-to-face classroom instruction, which is permitted under the "Face-to-Face Teaching Exemption" of the Copyright Act. The exemption permits such use without the requirement to obtain permission as long as the copy was not unlawfully made with the displayer's knowledge of unlawfulness. 17 U.S.C. § 110(1) (2006). *E.g*., LORI SILVER, COLLEGE AND UNIVERSITY LAW MANUAL § 3.3.1 (Mass. Continuing Legal Educ. Inc. 2009), *available at* WESTLAW CULM MA-CLE 3 ("This exemption allows faculty to show movies or television shows, display slides, perform plays, listen to music, or read from a book without fear of infringement."); Press Release, Am. Lib. Ass'n., Performance of or Showing Films in the Classroom 2 (Sept. 10, 2009), *available at* http://www.ala.org/ala/issuesadvocacy/copyright/fairuse/digitalclassroomdelivery/webdigitalpsafinal.pdf (observing "a recent hearing before the Copyright Office" in which "representatives of the motion picture industry acknowledged that an instructor's creation of a film clip compilation is a fair use and that section 110(1) permits the instructor to show this compilation in the classroom").

[125] 695 F.2d 1171 (9th Cir. 1983).

[126] *Id*. at 1175–76.

[127] *Id*. at 1175.

[128] *Id.* ("[A] finding that the alleged infringer copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indication of no fair use.").

[129] The court in *Weissmann v. Freeman* observed that "[p]articularly in an academic setting, profit is ill-measured in dollars." 868 F.2d 1313, 1324 (2d. Cir.), *cert. denied*, 493 U.S. 883 (1989).

[130] Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 562 (1985).

[131] *Weissmann*, 868 F.2d at 1324.

advancement"[132] and "recognition . . . among peers in the profession" as the tangible benefits associated with publishing.[133] To find otherwise would eliminate the incentive to continue publishing scholarly works.[134]

In Ethics Opinion 93-1, The Judge Advocate General's Professional Responsibility Committee applied the same statutory factors for fair use, finding a basis for copyright infringement by a lawyer in a legal assistance office.[135] The attorney attempted to invoke the fair use doctrine to defend his unauthorized use of several passages from a local newspaper in an article he published in the installation's newspaper.[136] He further claimed that the Army's Legal Assistance Program encouraged a negligent standard of care by offering material to be reprinted and plagiarized in military publications.[137] While acknowledging the unrestricted use of materials prepared by the Legal Assistance Program, the Committee based its conclusion on the substantial similarity factor, noting that "the extent of copying went beyond that which an attorney could assume would be 'fair use' under 17 U.S.C. § 107's 'amount and substantiality factor.'"[138] This finding of copyright infringement was independent of a separate finding of plagiarism for failure to attribute the source, emphasizing the limitations of fair use on judge advocates. The Committee also found that, even if the attorney expected the publisher to request permission for the copied material, the attorney did not meet his personal duty of care because he failed to "highlight" to the publisher of the installation newspaper that there were "potential" copyright problems.[139]

4. Myth Four: Material on the Internet is Available for Unrestricted Use

The accessibility of information on the Internet can oftentimes lead to an inference that the person posting such information intends for the world to use it.[140] This is a "popular fallacy" because Internet postings are among "original works" that qualify for copyright protection.[141] On the Web, especially, "you cannot tell by looking at a work whether or not it is copyrighted."[142] Because of the possibility of confusion, Web search engines have developed the technology to identify content that is available for use or alteration. An advanced Google® search permits a viewer to "scroll down to 'usage rights' and select an option from a pull-down menu: 'free to use or share'; 'free to use or share, even commercially'; 'free to use, share, or modify'; or 'free to use, share, or modify, even commercially.'"[143] Likewise, the website Flickr® will identify public domain photographs available for use or modification.[144] Even though weblogs (blogs) are generally available for copying based on their nature as the source for multiple contributions,[145] some blogs have adopted limiting standards of use. Creative Commons terms of use, now used by thousands of bloggers, permit a blogger to "specify a license that allows readers to copy and distribute his or her writing, as long as the blogger is given credit for the writing and the use is not for commercial gain."[146] Courts have enforced such licenses, even though "the copyright holder . . . dedicate[d] certain work to

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[132] *Id.* at 1326.

[133] *Id.* at 1324.

[134] *Id*. at 1325–26 (observing that protection of academic works "provides . . . an incentive to continue research," and lack of protection conversely provides a "distinct disincentive" for the same).

[135] Opinion 93-1, *supra* note 53.

[136] *Id*.

[137] *Id*. at 56.

[138] *Id*.

[139] *Id*.

[140] STIM, *supra* note 14, at 166 (observing the perpetuation of incorrect beliefs about Web content "[b]ecause the Web is freely accessible and because of the ease of copying material from one site to another").

[141] *Id.* at 166–67.

[142] HOFFMAN, *supra* note 74, at 18.

[143] Clancy Ratliff, *"Some Rights Reserved": Weblogs with Creative Commons Licenses*, *in* MARTHA WOODSMANSEET & PETER JASZI, THE LAW OF TEXTS: COPYRIGHT IN THE ACADEMY 50, 65 (1995) [hereinafter LAW OF TEXTS].

[144] "A search for 'cupcake' on Flickr with the 'Find content I can modify, adapt, or build upon' box checked yields 6,542 images, any of which a Web designer or graphic artist could use in a collage or site template." *Id*.

[145] Tyanna Herrington, *Blogging Down: Copyright Law and Blogs in the Classroom*, *in* LAW OF TEXTS, *supra* note 143, at 154, 163 ("Under usual circumstances, bloggers intend to publish their work on the Web with the specific purpose of making materials accessible and they assume the risk that users may copy and redistribute their work.").

[146] Ratliff, *supra* note 143, at 50 (defining the "Creative Commons license for content [as one that] enables an author to retain some protections by copyright law but give up others").

free public use."[147] Consequently, much like printed works, unless a military author knows the terms of use for an Internet site, it is prudent to assume that material posted on the Web is not only copyrighted, but creates the same requirement to seek permission.[148] Especially on the Internet, "one can never be 100 percent certain, no matter what the circumstances, that any given situation will be excused as fair use."[149]

B. Other Important Considerations

Aside from myths about copyright law, judge advocates may encounter certain complex copyright rules, especially regarding the use of titles, government works, and the work-for-hire doctrine as it applies to the ownership of a copyrighted work. The sections below briefly address these areas.

1. Titles of Published Works

Commonly, judge advocates follow the popular guidance of writing programs and legal writing experts to use catchy titles for their publications.[150] Because a unique way of recasting information known to the reader garners interest, these authors cite the titles of movies, songs, books, plays, or commercially produced products.[151] Under fundamental principles of copyright, such use does not infringe on the owner of the copyrighted material.[152] Consequently, a military publication with the title, "'It's Raining Men'[153]—'A Few Good Men'[154]: Gender Disparity in the JAG Corps's Applications During the Recession," would not facially raise questions of copyright infringement.[155]

Additional considerations may arise, however, if the title of a work is trademarked.[156] While individual book titles do not obtain copyright protection, titles for a recognizable series of books are eligible for trademark protection.[157] In addition, the use of a trademarked title or character could potentially resurrect interests in copyright protection.[158] Such was the case in

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[147] Jacobsen v. Katzer, 535 F.3d 1373, 1375 (Fed. Cir. 2008). *See also id.* at 1381 ("Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material.").

[148] STIM, *supra* note 14, at 166 (recommending that users should assume Internet works are protected and use a standard approach for requesting permission from the owner); HOFFMANN, *supra* note 74, at 95 ("As always: Proceed with caution.").

[149] HOFFMANN, *supra* note 74, at 39.

[150] *E.g.*, Major Gregory B. Coe, *"Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44. Such conventions are common for legal writers in and outside of the Armed Forces. *E.g.*, Richard B. Cappalli, *The 1990 Rose Awards: The Good, The Bad, The Ugly—Titles for Law Review Articles*, 41 J. LEGAL. EDUC. 485, 485–87 (1991) (providing "long-overdue recognition for the valiant labors of legal writers to coin the perfect title for their masterpieces . . . "); Ronald J. Rychlak, *The Lighter Side of The Green Movement: The Three Stooges as Early Environmentalists*, 48 OLKA. L. REV. 35, 36 n.6 (1995) (observing that, in law reviews, "where humor is found, it is most likely to be in the title") (citing as an example, Erik S. Jaffee, Note, *"She's Got Bette Davis' Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528 (1990)).

[151] *E.g.*, Major Stephen R. Henley, *Postcards from the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92, 92 & 92 n.1 (citing "a witty expose of life in the Hollywood fast lane starring Meryl Streep and Shirley MacLaine"). *Cf.* Eloisa C. Rodriguez-Dod, *"Lucy in the Sky with Diamonds": Airline Liability for Checked-in Jewelry*, 69 J. AIR L. & COM. 743 (2004) (citing a popular song performed by the Beatles).

[152] *E.g.*, Emily Kathryn Taylor, Note, *Infringicus Maximus! An Exploration of Motion Picture Title Protection in an International Film Industry Through the Legal Battles of Harry Potter*, 16 J. INTELL. PROP. L. 323, 327 (2009) ("[A]merican courts consistently hold that a title alone, excluding plot, characterizations, or dialogue will not be afforded protection under copyright law."); Charter Oaks Fire Ins. Co. v. Hedeen & Cos., 280 F.3d 730, 736 (7th Cir. 2002) (recognizing the "non-copyrightable" status of "the title of a book, film, or other literary or artistic work"); Becker v. Loew's, Inc., 133 F.2d 889, 891 (7th Cir. 1943) ("[I]t is well settled that the copyright of a book or play does not give the copyright owner the exclusive right to the use of the title.").

[153] THE WEATHER GIRLS, IT'S RAINING MEN (Columbia Records 1982).

[154] A FEW GOOD MEN (Columbia TriStar/Castle Rock 1992).

[155] *See* sources cited *supra* note 152.

[156] *See generally* James E. Harper, Note, *Single Literary Titles and Federal Trademark Protection: The Anomaly Between the USPTO and Case Law Precedents*, 45 IDEA 77 (2004) (surveying cases in which book titles received trademark protection).

[157] *E.g.*, *In re* Cooper, 254 F.2d 611, 615 (C.C.P.A.), *cert. denied*, 358 U.S. 840 (1958) ("The name for a series [of] books, at least while it is still being published, has a trademark function in indicating that each book of the series comes from the same source as the others."); *In re* Scholastic Inc., 23 U.S.P.Q.2d (BNA) 1774 (T.T.A.B. 1992) ("[N]otwithstanding the fact that it appears as a portion of the titles of specific books in a series, the designation THE MAGIC SCHOOL BUS, as used on books would be recognized as a trademark identifying a series of children's books emanating from applicant.").

[158] Because trademark law protects "any word, name, symbol, device, or combination thereof that is used to identify and distinguish a good or service . . . . an individual or brief phrase can be protected by trademark law" where copyright law might otherwise fail. HOFFMANN, *supra* note 74, at 98.

Universal City Studios, Inc. v. Kamar Indus., Inc.,[159] where unlicensed use of the phrases "I love You E.T." and "E.T. Phone Home" led to a finding of copyright infringement.[160] There, the court relied upon E.T.'s "distinctive and well-developed character," which had been trademarked and whose license was tightly controlled, to conclude that "the average lay observer would readily recognize the name E.T. as having been taken from the copyrighted character."[161] Scholars have noted the *Kamar* case as "the prime example of litigation in which weak copyright claims are coupled with more standard trademark claims" to revitalize copyright protections.[162] The military author who titles her article, "Chicken Soup for the Judge Advocate's Soul," could possibly run the risk that readers would believe the article is endorsed by the authors of the popular trademarked book series.[163]

Any judge advocate contemplating the use of titles of books, movies, and characters in her scholarly work would be well-served running a query of trademarked terms. The website for the Trademark Electronic Search System (TESS) is http://tess2.uspto.gov/. A check of the titles in the hypothetical law review article "'It's Raining Men'—'A Few Good Men': Gender Disparity in the JAG Corps's Applications During the Recession," revealed no identifiable trademark interests for the phrase "It's Raining Men." Contrarily, the term "A Few Good Men" resulted in two live trademarks; owned by a women's cosmetic company in Arizona[164] and a business operating in Western Cape, South Africa.[165] Two additional entries reveal that a music group once owned a trademark for "A Few Good Men," which has now expired.[166]

As a final note, a military scholar would encounter an entirely different issue if she named her article, "The JAG Corps: A Cluster of Summer Trees, A Bit of the Sea, a Pale Every Moon." Here, the text following the colon is an entire haiku verse by Kakuzo Okakura,[167] which legal scholars would certainly accord independent copyright protection as a microwork.[168] Ultimately then, with these few exceptions in mind, military scholars enjoy great latitude in the creation of scholarly titles for their manuscripts.

2. Government Works in the Public Domain

The Copyright Act explicitly exempts U.S. Government works from copyright protection.[169] With the exception of work licensed to the Government by copyright holders,[170] government works can be copied freely.[171] Judicial opinions and the text of statutes fall under this "public domain" category,[172] as do works admitted as evidence or submitted in court as part of the record of trial, including "tapes played in open court and admitted into evidence—no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions."[173]

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[159] 217 U.S.P.Q. (B.N.A.) 1162 (S.D. Tex. 1982).

[160] *Id*. at 1162.

[161] *Id.*

[162] Hughes, *supra* note 90, at 582.

[163] The phrase "Chicken Soup for the Soul" is a protected mark, as are several variations of the phrase. *See* Serial No. 77821658.

[164] Philosophy, Inc., Serial No. 78535264,

[165] Reibeek Kelder Beperk Corp., Serial No. 75850772.

[166] *See* Silent Partner Prods., Inc., Serial No. 74379845 and 4 Life Entertainment, LLC, Serial No. 78632201.

[167] KAKUZO OKAKURA, THE BOOK OF TEA 82 (1989).

[168] Hughes, *supra* note 90, at 633 & 633 n.319.

[169] 17 U.S.C. § 105 (2006) ("Copyright protection under this title is not available for any work of the United States Government. . . ."); *see also* DA PAM. 25-40, *supra* note 44, para. 2-37*e*(1) ("Works of the U.S. Government do not receive copyright protection.").

[170] 17 U.S.C. § 105 ("[T]he United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."); JAMES S. HELLER, THE LIBRARIAN'S COPYRIGHT COMPANION 11 (2004) ("A copyrighted work does not lose its status just because it is included in a work of the U.S. Government.").

[171] *E.g.*, Schnapper v. Foley, 667 F.2d 102, 110 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (observing a circuit court's interpretation that "no copyright could be had in a work (1) commissioned by the Government and (2) published as an official document") (citation omitted). DA PAM. 25-40, *supra* note 44, para. 2-37*e*(1) ("[U]nclassified works of the Government are in the public domain; unless their distribution is restricted, they can be freely reproduced, distributed, or displayed by the public.").

[172] *E.g.*, Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980) (observing settled law that "judicial opinions and statutes are in the public domain and are not subject to copyright" primarily because "[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through democratic process").

[173] Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999).

Drafts of motions, legal memoranda, or other private litigation documents (as opposed to matters in the record of trial) may be protected by copyright.[174] Another limitation on public domain works involves state governments. The Copyright Act's provisions regarding federal publications do not reach scholarly journals in state-operated law reviews or private universities.[175] Without reviewing state open records rules, which may clarify the status of state publications,[176] military scholars should assume that articles appearing in civilian law reviews belong to the author, requiring permission, unless individual arrangements defy the general rules. In a final major limitation on public domain work, as explained below, it is incorrect to assume that the work produced by federal employees automatically becomes property of the Government.

3. Scholarly and Government Publications and the Work-for-Hire Doctrine

Many entities may own a literary work. In the case of a collective publication, like a magazine or a scholarly law review, ownership of a single article in a larger group of articles vests in the author, while the publisher retains merely the right to reproduce, revise, and distribute the work.[177] When a work is jointly authored, each author shares an equal ownership interest, and all must be contacted for permission.[178] Despite these general rules, authors are free to cede their entire ownership interests to a publisher or an employer. Many law reviews, for example, often attempt to obtain the copyright to the work as a primary strategy, and then contract for fewer rights if authors reject their initial approach.[179]

When employees of the Government or professors at universities undertake a written project, the nature of their employment and its relationship to the work often requires additional analysis. In general, the work-for-hire doctrine provides employers with the fruits of their employees' labor, including writings produced during the employment relationship.[180] In interpreting the Copyright Act's provisions for evaluating a work, courts often apply the analysis provided in the *Restatement of Agency*, which considers whether "(1) It is of the kind of work he is employed to perform; (2) [i]t occurs substantially within authorized work hours; [and] (3) [i]t is actuated, at least in part, by a purpose to serve the employer."[181] Because a high school teacher is expected to develop written educational materials, like tests and manuals—even while at home—these works belong to the school district.[182] The same rationale normally applies to government employees.[183]

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[174] Isaacs, *supra* note 14, at 393 & 402 (observing a growing number of attorneys threatening to sue each other for copyright infringement of litigation documents and that such "documents plainly fall within the type of goods covered by the Copyright Act because they [may demonstrate originality and] meet the definition of 'literary works' and they are 'fixed in a tangible medium'").

[175] Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc., 495 F. Supp. 34, 35 (N.D. Ill. 1980), *aff'd*, 692 F.2d 478 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) (observing that "the law with respect to work of the United States government . . . [has] no such provision relating to state governments").

[176] *E.g.*, John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1021 (acknowledging that there may be cases where information possessed, created, or retained by a state may "effectively [be] in the public domain by virtue of state open records laws," despite the absence of an analogous federal works exception); Microdecisions, Inc. v. Skinner, 889 So. 2d 871, 876 (Fla. App. 2004) (observing that "[t]he Florida public records law [in] requir[ing] State and local agencies to make their records available to the public for the cost of reproduction . . . overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exception").

[177] 17 U.S.C. § 201(c) (2006):

> In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

[178] *Id.* § 201(a) ("The authors of a joint work are co-owners of copyright in the work.").

[179] Litman, *supra* note 29, at 790 ("If authors object to the request, the journal instead requests a nonexclusive license to print, reprint, publish, distribute, and authorize the electronic reproduction of the piece in Lexis, Westlaw, and other services.").

[180] *See* 17 U.S.C. § 101 (defining a "work-for-hire" as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned . . ."); *id.* § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

[181] Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177, 184 (2d Cir. 2004) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

[182] *Id.* at 185.

[183] *E.g.*, AR 27-60, *supra* note 44, para. 4-3*e* ("The author of a work of the United States Government has no rights in the work which can be conveyed."); DA PAM. 25-40, *supra* note 44, para. 2-39*b* ("Works prepared by Government employees as part of their official duties cannot be protected by copyright.").

Professorial scholarship recognizes an "academic exception" to the work-for-hire doctrine, which permits professors to retain ownership rights in their scholarly works.[184] In an oft-cited passage, the *Weinstein* Court observed that "a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof."[185] Furthermore, "[t]his has been the academic tradition since copyright law began."[186] While universities commonly allow professors to retain intellectual property rights in employment contracts, there may still be instances where an institution has contracted for the exclusive right to a scholarly work.[187]

Combined military publications provide yet another layer of complexity in the analysis of intellectual property rights. When a military author affixes her official rank and title to a publication, it is hard to deny the fact that she is employed by the U.S. Government. Moreover, the journals themselves are produced by military departments. The *Military Law Review* and *Army Lawyer* are published as Department of the Army Pamphlets through the U.S. Government Printing Office.[188] The *Naval Law Review* and *Air Force Law Review* share the same status.[189] Army authors are guided by the provisions of AR 27-60, which states:

> A work of the United States Government is defined as a work prepared by an officer or employee of the United States Government as part of that person's official duties. Those duties may be express or implied. A Government work results even though the work was prepared using the author-employee's own time, material, or facilities.[190]

As two examples, the regulation cites "a work the preparation of which is necessary for the proper performance and accomplishment of the employee's duties" and one "requested, directed, instructed or otherwise ordered by an appropriate official."[191] Despite these broad considerations, the use of government facilities or subject matter of a work does not transform it into a government work per se.[192] Government employees may even sue the Government for copyright infringement of their works.[193] Where the Government permits an employee to retain the copyright to a work, such arrangements are normally reduced to writing.[194]

Independent of the regulation, scholarly publications completed in satisfaction of a Master of Laws requirement are property of the Government, hence public domain, based on a provision granting first publication rights to the military.[195] Because publication of a work in a governmental journal does not extinguish existing copyright protections of nongovernmental authors[196] and combined military journals or other collective publications vest copyright ownership in the author,[197] military scholars wishing to use the works of nonmilitary or nongovernmental authors in military or other governmental publications should still request permission for such use.

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[184] *Shaul*, 363 F.3d at 186 (observing an "academic tradition' granting [collegiate] authors ownership of their own scholarly work").

[185] Weinstein v. Univ. of Ill., 811 F.2d 1091, 1094 (7th Cir. 1987).

[186] *Id*.

[187] *Id*. (recognizing that a contract may "provide otherwise").

[188] *The Military Law Review* is a serial periodical officially published by the Department of the Army as U.S. DEP'T OF ARMY, PAM. 27-100. The *Army Lawyer* similarly bears the official identifier U.S. DEP'T OF ARMY, PAM. 27-50.

[189] *See* Naval Justice School Publications, *available at* http://www.jag.navy.mil/njs_publications.htm (last visited Jan. 11, 2010) ("The *Naval Law Review* is published from appropriated funds by authority of the Judge Advocate General, in accordance with Navy Publications and Printing Regulations P-35."). The *Air Force Law Review* is officially published by the Department of the Air Force as U.S. DEP'T OF AIR FORCE, PAM. 15-106.

[190] AR 27-60, *supra* note 44, para. 4-3*b*.

[191] *Id*. para. 4-3*b*(1) & (2).

[192] *Id*. para. 4-3*c*. In fact, DA PAM. 25-40, *supra* note 44, para. 2-39*b*, recognizes that the determination of "[w]hether a manuscript is an official work is not always clear," requiring a detailed contextual analysis.

[193] 28 U.S.C. § 1498(b) (2006) (providing "[t]hat a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government").

[194] *E.g.*, 17 U.S.C. § 201(b) (permitting employee ownership, despite work in the scope of employment, only when "the parties have expressly agreed otherwise in a written instrument signed by them"); U.S. DEP'T OF DEF., FEDERAL ACQUISITION REG. SUPP. subpt. 252.227-7013 (May 19, 2006) (specifying contractual provisions for "[i]dentification and delivery of data to be furnished with restrictions on use, release, or disclosure").

[195] PWP MANUAL, *supra* note 16, at 30 ("Primers, research papers, and theses submitted in partial satisfaction of Graduate Course writing program requirements are the property of the Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS). Accordingly, TJAGLCS reserves first publication rights.").

[196] HELLER, *supra* note 170, at 11.

[197] 17 U.S.C. § 201(c).

4. The Special Status of Unpublished Works

Unpublished works may come in the form of interviews or "letters, diaries, and manuscripts."[198] Increasingly, the World Wide Web has been a source for drafts of scholarly works. Sites, such as the Social Science Research Network (SSRN), are indispensable to law professors as they permit authors to track how many times their works have been downloaded by visitors.[199] However, placing scholarship on the Internet prior to its publication risks an unauthorized use or even first publication by a viewer passing it off as his own. Not only may an unpublished work obtain the benefits of copyright protection,[200] it will often receive greater copyright protection than previously published works.[201] As the Supreme Court noted in *Harper & Row v. Nation Enterprises*, "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works."[202] Consequently, where it is unclear whether a work has been published, military scholars should take extra precautions to request permission from the author to use material.

IV. The Mechanics of Requesting Permission

A. General Approach

Because there are so many nuances in copyright law, intellectual property experts recommended reviewing all uses of copyrighted works through the lens of the fair use factors.[203] They further recommend assuming that a work is copyright protected and requesting permission whenever possible.[204] Even accepting that educational use of work furthers societal goals and that legal scholarship, with its abundant footnotes, is more derivative than other scholarly works,[205] military scholars must be alert to copyright infringement. As one legal writer explained,

> [T]hroughout this comment, I have copied from various law review articles and other works subject to copyright. Although I have identified all my sources, I have not sought permission from any of the authors or journals. Almost any author of a research paper, from a fourth grade book report to a dissertation follows the same practice. While this practice is socially accepted, it constitutes prima facie violation of our copyright laws.[206]

Proceeding with the utmost caution is prudent because of the ease with which a work can qualify for protection: "There is no requirement to publish a work in order to copyright it. There is no requirement to display any type of notice, such as © or 'Copyrighted by ABC Press.' An author is not required to list his work, or to deposit a copy of his work with the U.S. Copyright Office or anyone else in order to receive copyright protection."[207] Furthermore, no motive, knowledge, or intent element is required for infringement.[208] Substantial risks can be eliminated with a simple permission request. The cost

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[198] STIM, *supra* note 14, at 26.

[199] Ronnen Perry, *De Jure [sic] Park*, 39 CONN L. REV. CONNTEMPLATIONS 54, 59 (2007) (observing "several companies, most notably SSRN and Bepress, have started providing *free* access to legal manuscripts, published and unpublished" and citing the "promotional value of such access").

[200] *E.g.*, STIM, *supra* note 14, at 27 (explaining that, depending on whether the work was created before or after 1 January 1978, an unpublished work is protected for "the life of the author plus 70 years," "120 years from their creation," or "95 years from first publication").

[201] *E.g.*, Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L. J. 1, 66–67 (1999) (explaining that, even with legislative amendments to eliminate a presumed per se rule against fair use of unpublished works, leading court opinions have "eradicate[d] much of fair use for unpublished manuscripts").

[202] 471 U.S. 539, 551 (1985). *See also* Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 ALB. L. J. SCI. & TECH. 451, 474 (2004) ("[P]reemption of a thesis or dissertation . . . prior to student publication effectively strips the student of the intellectual currency embodied in his or her work that may be crucial to future career advancement.").

[203] *E.g.*, HELLER, *supra* note 170, at 35 ("Every use should be viewed under the Section 107 microscope; when you try to determine whether a use is permitted under other exemptions, also consider whether it is a fair use.").

[204] *E.g.*, STIM, *supra* note 14, at 4 ("In most cases . . . permission *is* required, so it's important to never assume that it's okay to use a work without permission.").

[205] *E.g.*, Lawrence Lessig, *Preface* to LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY, at xv (2004) ("The work of a lawyer is always derivative . . . .").

[206] Jonathan Dowell, Comment, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CAL. L. REV. 843, 848 (1998).

[207] HOFFMAN, *supra* note 74, at 18.

[208] *Id*. at 21.

benefit analysis is compelling: On the one hand, "the legal fees for dealing with an unauthorized use lawsuit can easily cost ten to 50 times the average permission expense—or more!"[209] While the Government has its own attorneys to defend an infringement suit, the law permits actions against the Government in the Court of Federal Claims,[210] and potential recovery of up to $30,000 for copyright infringement.[211] On the other hand, "by simply obtaining permission, you gain lawsuit-free access to the work you need."[212]

B. Practical Guidance

1. Basic Steps

Many websites provide assistance in identifying the owner of a copyright for out-of-print works, authors who have relocated, or publishers who may have obtained the copyright from an author.[213] Contacting the original publisher of the work is often a good starting point.[214] Although permission requests imply the possibility of denial[215] and could require a great amount of energy on the part of the licensee,[216] the process for requesting permission generally requires the completion of a few simple steps. Attorney Richard Stimm summarizes the entire process in four steps, which amount to identifying the desired material and intended use, requesting permission, negotiating the terms of the permission, and summarizing the agreement in writing.[217] A written agreement is preferable and mandatory for works published in Army periodicals.[218] The *Action Officers Guide* for Army publishing identifies a skeletal outline for the contents of a permission request.[219] While recognizing that "there is normally no need for the formalities required for more substantial rights," the pamphlet suggests that permission requests conform to the following guidance on content: "(1) Request only the rights that are actually needed; (2) [f]ully identify the material for which permission is requested; [and] (3) [s]tate the proposed use and conditions of the permission so that the owner or agent need only sign the request to grant permission."[220] The pamphlet discourages requests for multiple signatures from corporate officers, a "corporate seal [or] certificate," or any "warranty as to title."[221] Appendix A contains a template that complies with the *Guide's* basic recommendations.

Out of all actions a requestor takes to request permission, the most challenging is usually articulating desired uses of the material in the most comprehensive manner, as not to exceed the terms of any license that is granted; to this end, the experts

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[209] STIM, *supra* note 14, at 4.

[210] 28 U.S.C. § 1498(b) (2006). *See also* AR 25-30, *supra* note 44, para. 2-5*e*(3) ("The copyright owner may sue the U.S. Government when a Government employee acting in an official capacity commits an infringement. However, the copyright owner's exclusive remedy is by action against the Government for money damages in the U.S. Court of Federal Claims. No injunctive relief is available.").

[211] Wechsberg v. United States, 54 Fed. Cl. 158, 165 & 165 n.15 (Fed. Cl. 2002) (interpreting the statute to permit recovery up to $30,000 in statutory damages, and leaving open the question of whether the $150,000 cap for "willful" infringement would also apply in suits against the Government).

[212] STIM, *supra* note 14, at 1.

[213] For example, the University of Texas's permissions website contains comprehensive advice and links to online resources. *See* Getting Permission, *available at* http://www.utsystem.edu/ogc/ intellectual property/permissn.htm (last visited Jan. 11, 2009). In addition, Attorney Lloyd J. Jassin offers a helpful page devoted to locating copyright holders. *See* Lloyd J. Jassin, Locating Copyright Holders, *available at* http://www.copylaw.com/new_articles/permission.html (last visited Jan. 11, 2009). *See also infra* Part V (citing various resources).

[214] STIM, *supra* note 14, at 16 (describing how, in the advent of statutory revisions, for articles published "in the last 20–25 years, your starting point for permission will be the original publisher of the article").

[215] *E.g.*, Steve Westbrook, *A Refrain of Costly Fires: Visual Rhetoric, Writing Pedagogy, and Copyright Law*, *in* LAW OF TEXTS, *supra* note 143, at 93, 94 ("At the very least, the [permissions] process requires acquiescence with no guarantee of success; copyright holders may simply refuse to grant permission and thus effectively veto the production or circulation of a new work . . . .").

[216] *Id.* ("The process can take months, require exorbitant fees, consist of intense negotiations, and cause many headaches, often leading permission seekers to feel . . . like a cross between a Sisyphean bureaucrat and a charred circus flea.").

[217] STIM, *supra* note 14, at 34.

[218] AR 25-30, *supra* note 44, para. 2-5*d*(1) (mandating that the creator of a work "will obtain prior *written* permission from the copyright owner or the owner's duly authorized agent" when permission is required) (emphasis added).

[219] DA PAM. 25-40, *supra* note 44, para. 2-40.

[220] *Id*. para. 2-40*a*(1)–(3).

[221] *Id*. para. 2-40*a*(6)(*a*)–(*d*).

recommend specificity.[222] Depending on the intended use of the work, an owner's information needs may change. For republication of a literary work, copyright owners commonly want to know information about the work intended to be used, the user, and the intended source for republication. Requirements often exceed the information suggested in the Army's *Guide*.

As an example, when a user desires to republish materials from the *Harvard Law Review*, The Copyright Clearance Center, a consolidated licensing service that represents the *Review*, requires basic "[i]nformation about the new work [one] is creating.[223] This includes the type of medium where the material will be reprinted, such as a PowerPoint® presentation, DVD, brochure, or journal.[224] This also includes the "circulation/ distribution" of the user's work, i.e., the "print run" of a magazine, the "total number of books . . . to be printed," or the number of "downloads" anticipated for an electronic version of a publication.[225] The Center also requires information about the status of the user, i.e., non-profit 501(c)(3) or for-profit.[226] Under the separate category of "[i]nformation about content to be republished," the user must indicate the type of content to be used from a selection of the following choices:

Full article/chapter (text only)
An excerpt
A quotation
Selected pages
A chart
A graph
A figure/diagram/table
A photograph
A cartoon
An illustration.[227]

The Center then asks whether the user was the author of the requested work and for its original publication date.[228] Other copyright owners seek the International Standard Serial Number (ISSN) for the military periodical, the website where the publication will be displayed, the average circulation of the publication or "number of visitors to the site per month," and whether rights desired by the user include alteration in addition to reproduction.[229] For copyright owners seeking the Tax Identification Number of the Government Printing Office, the number is 536002509.

Owners who do not have permissions departments or standard forms may take advantage of permission agreement templates. After indicating the copyright holder's data, identifying the user/author, and including basic information for the work, Sage Publications suggests that its authors use the language in Figure 1, below:

> I hereby request your permission to include the above-referenced material in the scholarly article prepared by me/us tentatively entitled _____ to be published by Sage Publications in the journal _____, Vol. ____, No. _____, Publication Date _____, and the nonexclusive right throughout the world to reproduce, distribute, transmit, and display the material but only as included in the article and all subsequent versions and editions thereof and foreign language translations and other derivative works, in whole or in part, alone or in compilation, in all formats and media now known or later developed, published or prepared by Sage Publications, its assignees and its licensees.

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[222] HOFFMANN, *supra* note 74, at 94 ("Just remember to get permission for exactly what you want to do, not just permission to generally 'use' or copy the work.").

[223] *See* http://www.copyright.com (type *Harvard Law Review* in "Get Permission/Find Title") (last visited Jan. 11, 2010)

[224] *Id.*

[225] *Id*. at "What's this" pull-down menu for "total circulation/distribution."

[226] *Id.* at "Republishing publisher is" prompt.

[227] *Id.*

[228] *Id.*

[229] STIM, *supra* note 14, at 36 ("Text Permission Worksheet").

These rights in no way restrict republication of your material in any form by you or others authorized by you. If you do not control the rights in their entirety, please inform me of others to whom I should write.

At your specific request, Sage Publications will include a credit line to read (please specify):

With appreciation for your cooperation, _____ _____
Author's signature Date

I (we) hereby grant permission for the use of the material requested above.

_____ _____ _____ _____
Signature Date Signature Date

Fig. 1: Sage Publications Permission Request/Agreement[230]

Military scholars can style their letter as an introduction combined with an agreement, like the Sage Publications example,[231] or as a request for information about licensing terms with notice that further information will be provided to meet the owner's specific requirements. A request need not be as formal and may have better chances of success if the military scholar indicates facts about the work, including the value of the material sought for republication. For example, a judge advocate who intended to publish a manuscript in the *Military Law Review* achieved a prompt and positive response to a request similar to the text in Figure 2, below.

My name is _____. I am an active duty Army attorney currently assigned as _____ at _____. I am requesting permission to reprint material in the *Military Law Review*, a quarterly scholarly publication of the Department of the Army distributed free of charge to military attorneys in the United States and abroad, to include attorneys deployed to combat zones. The *Military Law Review* has been published for over 50 years and is one of a few journals specifically tailored to military attorneys.

I have an article that is scheduled for publication in the _____ edition of the *Military Law Review* titled, _____. The purpose of the article is to provide civilian and military attorneys with practical methods to _____, which is currently of concern to attorneys practicing in the specialty of _____.

To this end, I believe that it would be helpful to reprint portions of _____ from pages _____–____. [Separately, I would like to reprint the _____printed at pages ____–____ and adapt the [figure] [text] by _____.] [I have created a .PDF file with my proposed modifications, and I have also included the pages of the original [figure] [text] so you can see where I have proposed certain modifications.] I am more than happy to provide any sort of written notice you believe is necessary to convey the nature of the modifications. The *Military Law Review* will include an attribution indicating the purpose of your book as well as its proper citation format in whatever format you would like.

I am very pleased to note that your organization has before granted permission for [the *Military Law Review*] [and] [the *Army Lawyer*] to republish materials. I [wrote this article as part of my military duties] [was not paid to write this article, and wrote it on my personal time from my own desire to improve legal services in the military]. I will not receive compensation from the *Military Law Review* for publishing this article. Active duty judge advocates and Department of Defense legal civilians receive the *Military Law Review* free of charge. The *Military Law Review* (ISSN 0026-4040)[232] is a scholarly law journal and a Department of the Army Pamphlet produced through the Government Printing Office.

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[230] SAGE PUBLICATIONS, SAGE PUBLICATIONS PERMISSIONS GUIDELINES 18, app. C (rev. ed. 2005), *available at* http://www.sagepub.com/repository/binaries/guidlines/PermissionsGuidelines.pdf ("Request for Permission to Reprint Material for Scholarly Purposes").

[231] The template suggested in DA PAM. 25-40 contains a similar combination letter. *See* Appendix A.

[232] The ISSN for *The Army Lawyer* is 0364-1287.

Thank you for your time and consideration. Please feel free to contact me if you have any questions or concerns.

Fig. 2: Military Publications Permission Request

With these considerations in mind, Attorney Richard Stim designed a comprehensive form to cover most of the issues related to requests for use of text. Nolo Press has kindly granted permission to use the form, which is reprinted at Appendix B.

In response to republication requests, owners can grant varying types of permission. While they are free to grant the license under the proposed terms, they can, and often do, place limitations on what can be done with the text. For example, a response might include the following: "You may not alter the material. You may omit up to 5% of a story by marking the omission with ellipses."[233] In a more detailed example, in permission recently granted by Matthew Bender Company, Inc., for the *Military Law Review* to reprint portions of a legal treatise, limitations included the following:

- Permission is non-exclusive and non-transferable.
- Permission is granted for one-time use only.
- The material must be duplicated in its entirety with no additions, deletions, comments or other changes.
- Except as provided for in the specified uses set forth in the request form, no part of the material(s) may be copied, photocopied, reproduced or translated or reduced to any electronic medium or machine-readable form, in whole or in part, without written consent from Matthew Bender or its affiliated companies. Any other reproduction in any form without permission of Matthew Bender, or its affiliated companies, is prohibited.
- A copy containing the requested material should be forwarded to [address].
- A credit line must accompany each use of the material stating "Material reproduced from [title of treatise] with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis Group of companies."
- Matthew Bender, and its affiliated companies, shall have, in its sole discretion, the right to decline or disapprove of the proposed use of the requested material.
- The grant of permission is void if the required information provided in the permission request is materially false or misleading.
- Matthew Bender and its affiliated companies reserve the right to rescind this agreement at any time. In such event, you agree to immediately remove and/or destroy any copies containing the requested material in your possession.[234]

Copyright owners may also charge fees, which are addressed in the next section.

2. Fees

While the usual fee for permission hovers around $200,[235] an exception to this pricing scheme occurs with "[r]equests for quotations from scholarly books where the use may be more extensive than what is normally considered fair," which are usually free.[236] Likewise, as recognized by the Army regulation on intellectual property, the military use of scholarly work may help eliminate required permission fees.[237] In many cases, negotiation is expected in the quest to obtain a license from a copyright owner.[238] Ultimately, if the owner requires a fee for the permission, and the author cannot obtain funding from the military to cover it, this may be an additional reason to request a fee waiver after explaining one's efforts to obtain permission.

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[233] STIM, *supra* note 14, at 32.

[234] E-mail from Permissions Coordinator, Matthew Bender Company, Inc., to author (Jan. 21, 2010) (on file with author).

[235] STIM, *supra* note 14, at 4.

[236] R. S. TALAB, COMMONSENSE COPYRIGHT: A GUIDE FOR EDUCATORS AND LIBRARIANS 141 (2d ed. 1999) (recognizing this as a type of permission "generally granted without a fee").

[237] AR 27-60, *supra* note 44, para. 4-2*a*.

[238] STIM, *supra* note 14, at 37–40 (describing methods to negotiate optimal fees for the user).

3. Consolidated Permission Services and Permission Departments

Consolidated services, such as iCopyright[239] and the Copyright Clearance Center[240] can be a blessing for authors who need to obtain permission quickly.[241] However, permission fees may diverge widely between the publisher and the consolidated service.[242] In some cases, consolidated services may charge hundreds of dollars for the use of a few pages that organizations will freely grant through their permissions department. To this end, military authors should carefully review webpages for indications of licensing arrangements. Some organizations provide blanket licenses permission through their websites. As one example, the American Psychological Association's (APA) site licenses authors to use,

- "[a] maximum of three figures or tables from a journal article or book chapter[,]
- [s]ingle text extracts of less than 400 words [and][,]
- [s]eries of text extracts that total less than 800 words,"

all without the need for a "formal request."[243] The APA, however, does require permission to reprint "a measure, scale, or instrument," and content that exceeds the license above.[244] Other sites provide simple forms with guaranteed response times. The American Bar Association provides a response to submitted forms within ten days,[245] while the American Psychiatric Association usually responds within two to four weeks, unless the user pays an expedited processing fee for a two-day turn-around.[246]

V. Conclusion

The following references should assist judge advocates in determining the proper course of action regarding copyright permissions.

- Available from Nolo Press, at the list of price $34.99, the third edition of Attorney Richard Stim's Book, *Getting Permission: How to License & Clear Copyrighted Materials Online and Off* provides numerous resources for permission seekers, including templates, worksheets, and even a CD-Rom with electronic documents.[247]

- Available from John Wiley & Sons, Inc., at the list price of $18.95, Attorney Lloyd J. Jassin's *Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers* provides comprehensive advice on the permissions process.[248]

- Lloyd J. Jassin also operates a website, CopyLaw.com, featuring free informative articles on copyright law and the permissions process. These articles include the use of public domain materials,[249] trademark

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[239] *See generally* www.icopyright.com.

[240] *See generally* www.copyright.com.

[241] STIM, *supra* note 14, at 16 (describing the possibility of a short or even instantaneous grant of permission).

[242] *Id.* (describing the possible benefits of "comparison shop[ping]").

[243] American Psychological Association, APA Copyright and Permissions Information, *available at* http://www.apa.org/about/contact/copyright/index.aspx (last visited Jan. 10, 2009).

[244] *Id*.

[245] American Bar Association, Reprint/Reproduction Requests, *available at* http://www.abanet.org/abastore/index.cfm?fm=static&url=htt[://www.abanet.org/abastore/front_end/static/permissions.html (last visited Jan. 10, 2010) ("Our standard response time is approximately **10 business days** if all information is received in advance.").

[246] American Psychiatric Association, Permission Request Form, *available at* http://store.appi.org/RequestForm/Request Form.aspx (last visited Jan. 10, 2010).

[247] Nolo Press, Getting Permission, *available at* http://www.nolo.com/products/getting-permission-RIPER.html (last visited Jan. 11, 2010).

[248] Wiley, The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors, and Publishers, *available at* http://www.wiley.com/WileyCDA/Wiley Title/productCd-0471146544.html (last visited Jan. 11, 2010).

[249] Lloyd J. Jassin, *New Rules for Using Public Domain Materials*, *available at* http://www.copylaw .com/new_articles/PublicDomain.html (last visited Jan. 11, 2010).

considerations in book titles,[250] the work-for-hire doctrine,[251] fair use determinations,[252] electronic publishing rights,[253] and locating copyright holders,[254] to name a few topics.

- Sage Publications offers its own guidelines in a Copyright Quick Reference table with answers to common problems and analysis in support of each interpretation.[255]

- The Copyright Office offers answers to common questions and links to circulars on its permissions website.[256]

- Stanford University's Copyright and Fair Use website provides an introduction to the permissions process with useful links.[257]

- The University of California educational similarly has a series of links to valuable permission resources.[258]

- Columbia University's website offers similar links, in addition to a series of sample permission requests.[259]

- The Indiana University Copyright Management Center provides a "Fair Use Checklist" to assist in evaluating the statutory fair use factors for a given work.[260]

With increased public attention on matters of national security and increased reliance on military scholarship, chances are great that military authors will enjoy recognition for their ideas. The expanded audience for this scholarship may very well include copyright owners who, before the publicity, had no idea of the use of their work by a military scholar.[261] Publishing houses and legal research services have legal departments and resources to pursue contentious litigation. Just as the music industry has relied on copyright law to make an example of individual infringers,[262] publishers can easily turn legal scholarship into a venue for demonstrating the power of deterrence. In fact, many academics in higher education fear that scholarship is the next battleground.[263] Considering that the Federal Government is not immune to lawsuits for copyright infringement, the costs are simply too great to ignore when the remedy is so simple. The first rule of the military scholar should, therefore, be to seek permission from copyright holders, and to do it often.

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[250] Lloyd J. Jassin, *Selecting and Protecting the Title of Your Book*, *available at* http://www.copylaw .com/new_articles/titles.html (last visited Jan. 11, 2010).

[251] Lloyd J. Jassin, *Working With Freelancers: What Every Publisher Should Know About the "Work for Hire" Doctrine*, *available at* http://www.copylaw .com/new_articles/wfh.html (last visited Jan. 11, 2010).

[252] Lloyd J. Jassin, *Fair Use in a Nutshell: A Roadmap to Copyright's Most Important Exception*, *available at* http://www.copylaw .com/new_articles/fairuse.html (last visited Jan. 11, 2010).

[253] Jack McHugh, *Electronic Publishing Rights: An Interview with Lloyd J. Jassin*, *available at* http://www.copylaw .com/new_articles/electronicrights.html (last visited Jan. 11, 2010).

[254] Jassin, *supra* note 213.

[255] SAGE PUBLICATIONS, *supra* note 230, at 14–17.

[256] U.S. Copyright Office, *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, *available at* http://www.copyright.gov/help/faq/faq-fairuse.html (last visited Jan. 11, 2010).

[257] Stanford University Libraries, Copyright and Fair Use, Chapter 1: Introduction to the Permissions Process, *available at* http://fairuse.stanford.edu/Copy right_and_Fair_Use_Overview/chapter1/index.html (last visited Jan. 11, 2010).

[258] University of California, UCCopyright: Copyright Permission Resources, *available at* http://www.universityofcalifornia.edu/copyright/permissions resources.html (last visited Jan. 11, 2010).

[259] Columbia University Libraries/Information Services, Copyright Advisory Office, Permissions, *available at* http://copyright.columbia.edu/copyright/ permissions/ (last visited Jan. 11, 2010).

[260] Indiana Univ., Copyright Mgt. Ctr., Checklist for Fair Use (rev. 3.99), *available at* http://www. ibiblio.org/pub/electronic-publications/stay-free/ml/readings/fairuse_checklist.pdf (last visited Jan. 19, 2010).

[261] *See supra* note 29 and accompanying text.

[262] *E.g.*, Ted Bridis, *Recording Industry Sues 261 Song Sharers*, MIAMI HERALD, Sept. 9, 2003, at 1A.

[263] *E.g.*, Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J. L. & PUB. POL'Y 541, 541 (1999) ("[A]cademic journal articles of scholarship and research . . . are highly likely to precipitate the next fair use controversy."); Sohui Lee, *Fair Use and the Vulnerability of Criticism on the Internet*, *in* LAW OF TEXTS, *supra* note 143, at 31, 36 (observing a "trend" and "shift" in copyright law "toward expanded rights for creators and publishers at the expense of information users—like teachers and students").

Appendix A

Basic Template for Permission Agreement from the *Army Publishing: Action Officers Guide*[264]

(Letterhead)
(Name of Company)
(Address)
(Salutation)

RELEASE
This office is preparing manuscript material for a publication to be issued for defense purposes under the title ***(insert title when known)***.

Permission is requested to include in this publication the following material: ***(insert specific information regarding the pages and lines of the illustration and/or text matter to be released)*** from the work entitled ***(title)***, written by ***(author's name)***, which was published by your company.

Would you please indicate on one copy of this letter, in the space provided below, whether this material may be used in the publication this office is preparing and whether an appropriate credit line is desired? A self-addressed envelope is enclosed for your use.

(Signature of requestor)
(Title)

Publisher's permission:
Release to use requested material is hereby granted, royalty free.

The material covered by this release ***(may) (may not)*** be placed on sale by the U.S. Government Printing Office.

If the government publication is made available to the public for inspection and copying in accordance with the Freedom of Information Act or any other law, the material covered by this release may be similarly made available for inspection and copying in context.

Credit line ***(is) (is not)*** requested.

(Name of copyright owner or authorized agent)
By (Company Officer)
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[264] DA PAM. 25-40, *supra* note 44, fig.2-5 ("Sample format: request for free permission to use copyrighted material").

Appendix B

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[265] STIM, *supra* note 14, at 45–48.

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The Impact of the Americans with Disability Amendments Act of 2008 on the Rehabilitation Act and Management of Department of the Army Civilian Employees

Major William E. Brown[*] *& Major Michele Parchman*[†]

Introduction

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA),[1] which was passed in September 2008, dramatically amended Section 504 of the Rehabilitation Act (Rehab Act), originally enacted in 1973.[2] Both the Rehab Act and Americans with Disability Act (ADA) of 1990 prohibit discrimination in federal employment against "qualified individuals with disabilities" on the basis of their disability.[3] The category of individuals covered by the two acts differs, however. The Rehab Act, the predecessor of the ADA, applies to the Department of the Army (DA) and all other federal agencies, while the ADA is applicable to private employers.[4] The Rehab Act covers all federal employees, applicants for employment, and former employees. For purposes of determining employment discrimination, the standards of the ADA apply in cases alleging violations of the Rehab Act.[5] Meanwhile, as discussed in detail below, the ADAAA reversed a number of Supreme Court decisions that narrowed the definition of a qualified individual with a disability under the ADA. The most obvious impact of the ADAAA is the increase in the population of employees who will meet the definition of disabled.

In enacting the ADA,[6] Congress intended to provide a comprehensive national mandate to eliminate discrimination against individuals with disabilities and to provide broad coverage. Congress recognized that disabilities in no way diminish a person's right to participate fully in all aspects of society, but prejudice, antiquated attitudes, or failure to remove societal and institutional barriers precluded disabled individuals from doing so.[7] Congress's expectation that courts would interpret the ADA definition of disability in a manner consistent with the definition of "handicap" under the Rehab Act was not fulfilled.[8]

Over the years the Supreme Court and lower courts narrowed the broad scope of protections intended under the ADA, eliminating protections for many individuals Congress originally intended to protect.[9] Equally discouraging was the realization that the courts had regularly excluded individuals with a range of substantially limiting impairments from the definition of people with disabilities.[10] The ADAAA clarified and reiterated who is covered by the civil rights protections of the ADA and Rehab Act.

This article first summarizes the ADAAA and provides a basic framework for judge advocates confronted with questions involving the Act. Second, the article addresses the conditions of which DA may provide or deny reasonable accommodation requests from a qualified individual with a disability in light of the newly expanded definition of disability. Third, the article

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[1] Americans with Disability Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101, and 29 U.S.C. § 705 (2006)) [hereinafter ADAAA] (House Resolution 3195 allows for the following short title for this act "ADA Amendments Act of 2008.").

[2] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as 29 U.S.C. § 701 (1973)) [hereinafter Rehab Act].

[3] *See, e.g.*, 42 U.S.C. § 12101(b) (2006).

[4] Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

[5] 29 U.S.C. §§ 790 –794a (2006).

[6] Americans with Disability Act, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (1994 & Supp. V 1999), and 29 U.S.C. § 705 (1999)).

[7] ADAAA, *supra* note 1, § 2(a)(2).

[8] *Id.* § 2(a)(3).

[9] *Id.* § 2(a)(4).

[10] *Id.* § 2(a)(5).

discusses the implications of the ADAAA for the DA. Finally, the article offers practical guidance on how judge advocates should advise commanders and supervisors on employee issues arising from requests for reasonable accommodations.

Overview of the ADA Amendments Act of 2008

On 25 September 2008, President George W. Bush signed the ADAAA into law, and it became effective on 1 January 2009. The provisions of the ADAAA are not retroactive; therefore, the previous ADA standard will continue to apply to Rehab Act cases involving disability discrimination that occurred before 1 January 2009. Although the ADAAA would not apply to a situation in which discrimination or failure to reasonably accommodate occurred in December 2008 and the employee initiated a complaint after 1 January 2009, it would apply to denials of reasonable accommodation requests where a request was made, or an earlier request was renewed, on or after 1 January 2009.

Congress amended the ADA with the specific intent of overturning several Supreme Court decisions that significantly limited the ADA's coverage. Unfortunately, the changes to the ADAAA (which also applies to Section 504 of the Rehab Act) may have unanticipated consequences for DA and its practices. To comply with the legislation, judge advocates and commanders must fully understand the standards under both the ADA and the ADAAA, adhere to the statute, and provide civilian employees reasonable accommodations in the workplace when appropriate.

In enacting the ADAAA, Congress both clarified and reiterated its comprehensive national mandate for the elimination of discrimination and the need for enforceable standards by reinstating broad civil rights protections under the ADA.[11] To that end, Congress legislatively overturned a number of Supreme Court cases it deemed narrowed ADA protections in a manner that improperly excluded individuals who should have been covered by the Act. For example, Congress rejected the requirement to consider the effects of mitigating measures when determining whether an impairment substantially limits a major life activity.[12] In doing so, Congress rejected the Supreme Court's finding in *Sutton v. United Air Lines, Inc.*[13] with regard to coverage under the third prong of the definition of disability. In *Sutton*, the Court had held that corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA.[14] In its place, Congress reinstated the standard followed in *School Board of Nassau County v. Airline*,[15] which set forth a broad view of the third prong of the definition of handicap under the Rehab Act.[16] The amended language states that the ameliorative effects of mitigating measures, such as assistive devices, medical therapies, and medical supplies (other than eyeglasses and contact lenses), have no bearing in determining whether a disability qualifies under the law.[17]

Congress further rejected the standards enunciated in *Toyota Motor Manufacturing v. Williams*,[18] which declared that the terms "substantially" and "major" in the definition of "disability" under the ADA should be interpreted strictly to create a demanding standard for conditions qualifying as impairments and also to narrow the definition of those who are substantially limited in performing a major life activity to individuals with a disability that prevents or severely restricts the performance of activities of central importance to the daily lives of most individuals.[19] The ADAAA revised the definitions of "substantially limits" and "disability" to more broadly encompass impairments that affect a major life activity.[20]

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[11] *Id.* § 2(b)(1).

[12] *Id.* § 2(b)(2).

[13] 527 U.S. 471 (1999).

[14] *Id.* at 482.

[15] 480 U.S. 273 (1987).

[16] § 2(b)(3).

[17] *Id.* § 4(a)(3)(E)(i).

[18] 534 U.S. 184 (2002).

[19] § 2(b)(4).

[20] § 2(b)(2).

Accommodating DA Civilian Employees with Disabilities

The DA must reasonably accommodate the known physical or mental limitations of an otherwise qualified applicant or DA civilian employee with a disability unless the accommodation would impose an undue hardship on its operations.[21] That said, DA civilian employees with a disability are not always entitled to reasonable accommodation. Although DA may elect to advance employee relations by granting requests for various accommodations for claimed disabilities, the Rehab Act only requires that DA reasonably accommodate qualified individuals with disabilities.[22] Additionally, although federal employees are protected by the Rehab Act, the standards applied under the Rehab Act are the same as those applied under the ADA.[23]

When providing advice to commanders, managers, or supervisors of DA civilian employees on whether to provide an individual with a reasonable accommodation, judge advocates should apply a five-step method to the analysis. First, determine if the person is an individual with a disability. Second, determine if the person is a qualified individual with a disability. Third, ensure that management consults with the individual about specific needs and considers accommodation possibilities. Fourth, determine if the preferred accommodation will result in undue hardship to DA. Answering these questions will be an interactive process, which may require consideration of medical documentation, job restructuring, work schedule adjustments, new equipment and furniture, or reassignment as an accommodation of last resort. Lastly, if the accommodation does not present an undue hardship, implement the accommodation.

Additionally, refer to the ADA's definition of "disability" to determine if the individual qualifies as a person with a disability. The ADA's definition of disability remains the same as the ADAAA's. A disability is defined as (1) a physical or mental impairment that substantially limits (i.e., prevents or significantly restricts the manner, condition, or duration of) an individual's performance of one or more of the major life activities[24] (e.g., walking, hearing, or breathing); (2) a record (e.g., a medical record) documenting such an impairment; or (3) being regarded as having such an impairment.[25]

To be entitled to a reasonable accommodation, a DA civilian employee must be a "qualified individual with a disability" as defined in the ADA and, by incorporation, in the Rehab Act.[26] Prior to 1 January 2009, the vast majority of disability discrimination litigation focused on whether a complainant met the definition of "qualified individual with a disability." Although the ADAAA will not completely eliminate litigation of this issue, it should significantly reduce litigation.

Under the ADAAA, a qualified individual with a disability is an individual with an impairment who possesses the necessary skill, experience, education, and other job-related requirements for a position and who is capable of performing the essential functions of the job with or without reasonable accommodation.[27] Meanwhile, the DA can require that the individual not pose a significant risk (i.e., direct threat) of substantial harm to the health and safety of the individual or others in the workplace.[28] If the direct threat cannot be eliminated or reduced by reasonable accommodation, the individual cannot be qualified for the position because his physical limitations would preclude him from performing the essential functions of the job. Commanders must assess each individual's existing ability (with or without a reasonable accommodation) to safely perform the essential functions of the job;[29] if an individual meets the definition of a qualified individual with a disability, judge advocates should ensure management consults the individual about specific needs and considers accommodation possibilities.

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[21] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9 (2009).

[22] Rehabilitation Act, *supra* note 2.

[23] § 1614.203(b).

[24] Major life activities are those basic activities that the average person in general population can perform with little or no difficulty. Major life activities are such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* § 1630.2(i). The EEOC has noted the lists provided in the ADA Amendments Act of 2008 and74 Fed. Reg. 48431, are not exhaustive.

[25] 42 U.S.C. § 12102(2)(B) (2006) (defining "Regarded as"). For example, whenever an employer takes an adverse employment action (e.g. removal, suspension or demotion) against an employee based on an actual or perceived impairment, such as a heart condition, this amounts to regarding the employee as having a disability.

[26] 29 U.S.C. § 791(g) (2006).

[27] § 1630.2(m).

[28] *Id.* § 1630.2(r).

[29] *Id.*

The DA cannot be found liable for failing to provide a reasonable accommodation if an employee does not request one and DA is otherwise unaware of the need for one.[30] However, if a request for accommodation is made to a supervisor or manager, DA must reasonably accommodate the known physical or mental impairments of an otherwise qualified applicant or DA civilian employee.[31] For example, if a worker sustains an eye injury, requests more time to adjust to his monocularity because of loss of depth perception, and details in specific terms the nature of the tasks he cannot perform, the worker's request should trigger DA's obligation to investigate accommodation.

Identifying an individual's precise physical limitations and determining what accommodation would be reasonable and appropriate to overcome those limitations is an interactive process.[32] Management representatives who fail to engage in the process may subject DA to liability for disability discrimination based on a failure to accommodate.[33] Likewise, a complainant's failure to respond to DA inquiries made in furtherance of the process may result in a dismissal of a potential disability discrimination claim.[34] Management options for reasonable accommodation include job restructuring by reallocating or redistributing nonessential functions, modification of shifts (e.g., the use of straight shifts rather than split shifts), new equipment and furniture, telework in which an employee performs officially assigned duties at an alternative worksite on a regular, recurring or ad hoc basis, and reassignment. Judge advocates should ensure individuals are consulted about their specific needs and that the appropriate accommodation is considered.

On the other hand, an undue burden may excuse DA from providing a reasonable accommodation. Once an employee shows that an accommodation is reasonable, the burden shifts to DA to provide specific evidence establishing that the accommodation would cause an undue hardship.[35] Undue hardship includes situations which would result in extreme financial expense, substantial or disruptive change, or a fundamental alteration to the nature of the work.[36] If undue hardship cannot be established, the reasonable accommodation should be implemented.

ADAAA Retains the Intent and Protections of the Original ADA

The ADAAA retains the basic three-part ADA definition of disability: a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. It is the meaning of the terms "substantially limits" and "major life activities" that have changed. These changes to the terms emphasize that the definition of disability is to be construed to the maximum extent permitted by the terms of the ADA in favor of a broad coverage of individuals. Moreover, the expanded definition of disabled is intended to alleviate, as much as possible, the requirement for the once extensive analysis that was often burdensome for both the employee and the employer.

In determining whether an employee has a disability, employers are reminded that an impairment need not prevent, or significantly or severely restrict performance of a "major life activity" to be "substantially limiting," and an impairment need not substantially limit more than one major life activity.[37] An individual with a disability will usually be limited in more than one major life activity, so considering whether the individual is substantially limited in working is generally unnecessary. Employers are advised to take a common sense approach to the analysis of whether an employee has an impairment that "substantially limits" one or more "major life activities" and not an extensive analysis requiring scientific or medical evidence. An individual's ability to perform a major life activity is compared to "most people in the general population." Therefore, to have a disability an individual must be substantially limited in performing a major life activity as compared to most people in the general population.

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[30] Sutton v. U.S. Postal Serv., EEOC No. 0120055392, 107 FEOR 157 (Dec. 28, 2006).

[31] § 1630.9.

[32] *Id.* § 1630.2(o)(3).

[33] Black v. U.S. Postal Serv., EEOC No. 01A42589, 106 FEOR 447 (June 9, 2006).

[34] Billman v. Dep't of Veterans Affairs, EEOC No. 01A21619, 104 FEOR 12 (Aug. 15, 2003).

[35] U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[36] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9 (2009).

[37] ADAAA of 2008, *supra* note 1, § 3(4)(C).

"Major life activities" are basic activities that most people in the general population can perform with little or no difficulty. The ADAAA includes a non-exhaustive list of examples of "major life activities."[38] This list is drawn from the ADA, published Equal Employment Opportunity Commission (EEOC) guidance and ADA and Rehabilitation Act court cases. The ADAAA list specifically includes the operation of major bodily functions as major life activities.[39] The inclusion of major bodily functions on the list reflects the ADAAA's intent to make it easier for individuals seeking protection under the ADA to establish the existence of their disability within the meaning of the ADA.

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The EEOC has included a non-exhaustive list of examples of mitigating measures in the proposed rules. Consideration of mitigating measures is limited. For instance, the positive effects of an individual's use of mitigating measures will not be considered when determining if an impairment substantially limits a major life activity. The determination of whether an individual's condition meets the definition of a disability focuses on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. However, the ADAAA does allow for consideration of the negative effects from use of a mitigating measure in determining if a disability exists.[40]

Additionally, the definition of "regarded as" no longer requires a showing that the employer perceives the individual to be substantially limited in the performance of a major life activity. Now the individual, either applicant or employee, is "regarded as" disabled if subjected to an action prohibited by the ADA based on an impairment, or on an impairment the employer believes the individual has, unless the impairment is transitory and minor. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."[41]

Implications of the ADA Amendments Act of 2008 for the Department of the Army

The provisions of the ADAAA and the EEOC's proposed rules will result in a lower threshold for finding a substantial limitation of a major life activity. Considering that the definition of disability is to be construed in favor of broad coverage of individuals and that determining whether an employee is disabled should not require an extensive analysis, the changes to the meaning of the terms "substantially limiting" and "major life activities" will necessarily include a larger percentage of the workplace population.[42]

Although the population of covered employees may increase significantly, it remains to be seen whether it will make a practical difference in day-to-day employment decisions on issues of disability and reasonable accommodation.[43] Most employers are unlikely to question an individual's impairment as a disability when presented with a request for a reasonable accommodation based on a diagnosed medical condition. In fact, most often the focus in the analysis is on the reasonableness of the requested accommodation and not on whether the impairment "substantially limits a major life activity." In analyzing the reasonableness of the requested accommodation the question remains whether the requested accommodation allows the employee to perform the essential functions of his job.

Practice Tips for Judge Advocates

The impact of the significant shift in the definition of disability and the changes brought about by the ADAAA will not reach the courts for some time. However, judge advocates who serve as labor and employment law practitioners would be wise to become familiar with the ADA Amendments Act of 2008 and the EEOC's proposed rules now. The most immediate consideration is the timing of complaints alleging discrimination based on a disability or allegations that the employer has failed to reasonably accommodate a request for accommodation. The timing of the complaint and when the alleged

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[38] *Id.* § 4a (amending Section 3(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12102)).

[39] *Id.* (amending Section 3(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)).

[40] *Id.*

[41] ADA Amendments Act of 2008, *supra* note 1, § 3(3)(B).

[42] *See* Notice of Proposed Rulemaking, 74 Fed. Reg. 485431, 48,436 tbl.3 (2009) (providing information on the Population With Disabilities Using Current Population Survey Data, 1999–2007). A copy of the table is at Appendix A.

[43] *Id.* at 48,436 tbl.4 (providing statistics on the Estimated Reasonable Accomodation Cost With 16 Percent Request Rate). A copy of the table is at Appendix B.

discrimination or failure to accommodate occurred will determine the definition of disability used in analyzing the employer's position and possible defenses to the alleged discrimination.[44]

Reviewing current organization or installation Equal Employment Opportunity (EEO) policies on disability discrimination and reasonable accommodation policies and procedures is a first step. Equally important is working with human resources personnel and the servicing EEO Officer to ensure that the organization or installation policies and procedures address language in the ADAAA. The U.S. Army Procedures for Providing Reasonable Accommodation for Individuals with Disabilities, issued on 17 March 2009, provides guidance on the procedures for processing reasonable accommodation requests throughout the Army.[45] These procedures are designed to assist the Army in meeting its obligations in addressing requests for reasonable accommodation submitted by individuals with disabilities.

Some impairments will consistently meet the definition of disability when analyzed in light of the ADAAA changes. Broadly construing the term "disability"—by considering that an impairment's substantial limitation on a major bodily function is sufficient to constitute a disability, by disregarding the ameliorative effects of mitigating measures, and by recognizing that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active—results in a more broad coverage of impairments. The proposed regulations provide a non-exhaustive list of such impairments. For such impairments an individualized assessment can be conducted quickly and easily.[46]

Impairments that may be substantially limiting for some individuals, but not for others, may require somewhat more analysis, although the level of analysis should not require extensive medical or scientific information. The proposed regulations also include examples of such impairments.[47]

The ADAAA, and the proposed regulation, also contained several significant items, which are noted below:

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Such impairments should not be confused with temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity and will not be considered disabilities.[48]

- Asking an employee who appears to be having difficulty performing his job because of an impairment whether he needs a reasonable accommodation will not violate the ADA or the ADAAA. The same is true for situations in which an employer asks an employee for medical information as part of the reasonable accommodation interactive process when the employee's disability or the accommodation are not obvious.

- The ADAAA does not change the definitions of "qualified," "direct threat," "reasonable accommodation," or "undue hardship," and the burdens applicable to each one have not changed. It does, however, provide that individuals covered only under the "regarded as" prong as not entitled to reasonable accommodation.[49]

- The ADAAA and the proposed regulations do not change the standards for determining eligibility for benefits under worker's compensation laws or disability benefit programs.[50]

- The ADAAA specifically declares that nothing in the Act provides a basis for a claim of discrimination based on the lack of a disability by an employee who claims to have a disability but who does not actually have the claimed disability.[51] Additionally, the ADAAA language precludes a claim of reverse discrimination.

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[44] Landgraf v. USI Film Prods., Inc., 511 U.S. 244 (1994) (finding remedial amendments of 1991 Civil Rights Act not retroactive).

[45] Memorandum from Dep't of the Army, Office of the Assistant Sec'y, Manpower & Reserve Affairs, for See Distribution, subject: U.S. Army Procedures for Providing Reasonable Accomodation for Individuals with Disabilities (17 Mar. 2009).

[46] Notice of Proposed Rulemaking, 74 Fed. Reg. at 48447.

[47] *Id.*

[48] ADA Amendments Act of 2008, *supra* note 1, § 4(4)(D).

[49] *Id.* § 6(h).

[50] *Id.* § 6.

[51] *Id.* § 6(g) (amending Title V of the Americans with Disabilities Act of 1990, 42 U.S.C. 12201 by adding language at section 501(f)).

- The proposed regulation clarifies that coverage of the "record of" prong of the definition of "disability" is not dependent on whether the employer relied on a record in making an employment decision. The employer's knowledge of an individual's past substantially limiting impairment is relative to whether the employer engaged in discrimination. It does not relate to whether the individual is covered.[52]

- The ADAAA does not require that the employer accept the individual's requested accommodation; a reasonable accommodation does not mean the individual's accommodation of choice. Additionally, the ADAAA does not change the employer's right to deny a request for accommodation in situations where a disabled employee presents a direct threat to the workplace. Such a determination to deny a request for reasonable accommodation based on an individual's impairment that presents a direct threat to the workplace should not be made by managers and supervisors without consulting with human resources, EEO, and legal advisors.

Upon reviewing requests for reasonable accommodation, judge advocates should consider carefully whether to focus efforts on demonstrating that an individual's impairment is not a disability. Instead, focus should be directed at whether the individual was actually qualified for the job, whether the employer's decision was made on the basis of the disability or for some other legitimate unrelated reason, whether the individual was engaged in the interactive process, and whether specific accommodations were reasonable or available.

Conclusion

This article provides judge advocates with a comprehensive analysis of the ADAA by examining its origin, purpose, and current applicability. The ADAAA narrows DA's determination that a particular employee does not have a disability. The amended language puts a greater emphasis on the question of what is necessary in order to provide an employee with a nondiscriminatory workplace. While it may be true that DA may not need to significantly modify its regulations, it is not clear what impact the ADAAA will have on the Army. The effect of the ADAAA will depend in major part on how the courts will interpret current and new regulations based on the ADAAA's expanded definition of disability and the related practices required of DA managers and supervisors.

As evident by this article, the ADAA is a complicated statute. Judge advocates and DA labor attorneys must thoroughly review the statute and follow pending court decisions on the ADAA to provide competent advice to commanders and other supervisory officials to ensure their compliance with the ADAA.

[52] *Id.*

Appendix A

Population With Disabilities Using Current Population Survey Data, 1999–2007[53]

Year	Workers with disabilities	Labor force participants with disabilities
1999	3,207,218	3,588,806
2000	3,545,209	3,889,789
2001	3,187,276	3,533,647
2002	3,081,585	3,574,294
2003	2,835,976	3,414,687
2004	3,146,749	3,727,859
2005	3,067,059	3,579,808
2006	3,200,808	3,698,593
2007	3,042,300	3,497,321

Table 3

[53] Notice of Proposed Rulemaking, 74 Fed. Reg. 48436 (2009).

Appendix B

Estimated Reasonable Accommodation Costs With 16 Percent Request Rate[54]

Average accommodation cost	Total cost (million)	Accommodations over five years (million)
$462	**$74**	**$15**
$865	**$138**	**$28**
$1,434	**$229**	**$46**

Table 4

[54] *Id.* at 48437.

Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis

Major Samuel W. Kan[*]

[People] make a lot of pocketbook decisions every day that have an impact on the health of the economy, such as whether to take on a particular mortgage, how much to save and invest, whether to lease or buy a car, and how to manage credit cards. . . . The choices we make as individuals . . . are linked to the broader economy in ways that we don't always appreciate. However, one thing is certain—we make better decisions if we are better informed, and the whole economy benefits.[1]

Failures don't plan to fail, they fail to plan—Plan and succeed.[2]

I. Introduction

In times of increasing financial uncertainty, servicemembers must consider the extent of their financial planning. Current economic conditions have transformed the way people plan for themselves and their families. While, prior to the financial crisis that began in 2007 the average American considered financial planning in terms of building wealth, modern times have forced Americans to focus on providing for their own subsistence and maintaining enough resources to outlast the next financial crisis.[3] This article is the second installment of a 2006 military financial planning resource.[4] While the first article addressed planning considerations for the average military member considering the purchase of a home, this article considers the unique issues facing servicemembers who have substantial assets, who want to provide for non-citizen dependents, and who desire to make unusual conveyances in their wills. These issues are addressed in a manner that is sensitive to the unique challenges of the contemporary financial operating environment.

To avoid financial ruin in times of increased financial risk, all servicemembers should have a process in place for evaluating their current and future needs, including the period after their death. At the simplest level, prudent financial planning is encapsulated in a four-step process. First, servicemembers should understand that estate planning is appropriate for almost everyone. Therefore, they should pursue legal measures, such as preparing a will and power of attorney. Second, servicemembers should become familiar with the tax system so that they can make informed tax decisions and minimize the negative consequences of uninformed legal and financial choices. Third, servicemembers should build and hold assets in a calculated manner to build wealth while accounting for risk. Fourth, servicemembers should make appropriate arrangements during life and at death to ensure that their designated beneficiaries reap the maximum rewards of their lifetime efforts. While most servicemembers will not have to complete the full four-step analysis,[5] servicemembers should become familiar with broader tax concepts so that they can accomplish their lifelong objectives and minimize negative tax and estate planning consequences.

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[1] Frederic S. Mishkin, Governor, Fed. Reserve Sys., The Importance of Economic Education and Financial Literacy, Speech at the Third National Summit on Economic and Financial Literacy (Feb. 27, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/mishkin20080227a.htm (last visited Jan. 28, 2010).

[2] John Alquist, Failures *Don't Plan to Fail, They Fail to Plan—Plan and Succeed*, EZINE ARTICLES, Sept. 13, 2007, http://ezinearticles.com/?Failures-Dont-Plan-to-Fail,-They-Fail-To-Plan---Plan-And-Succeed&id=730076.

[3] *See, e.g.*, Daniel K. Tarullo, Governor, Fed. Reserve Sys., In the Wake of the Crisis, Speech at the Phoenix Metropolitan Area Community Leader's Luncheon (Oct. 8, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/tarullo20091008a.htm (last visited Feb. 1, 2010) (pointing out that the economy has been losing about a quarter of a million jobs every month and that uncertainty has made financial planning much more difficult).

[4] Major Samuel W. Kan, *Setting Servicemembers Up for Success: Buying a Home, a Legal and Financial Analysis*, ARMY LAW., Nov. 2006, at 1.

[5] *See generally* JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 1, 29 (2007), *available at* www.jct.gov/x-108-07.pdf (last visited Apr. 21, 2009) [hereinafter JOINT COMMITTEE] (explaining that in 2004, only 19,294 estate tax returns in the United States reported some tax liability; forecasting that only 3.42% of deaths will result in a taxable estate in 2016).

II. Step One: The Need for Servicemembers to use the Estate Planning Process

At present, it is not uncommon to encounter military members who have deployed five times since 11 September 2001.[6] Many servicemembers have been exposed to combat and the dangers of combat environments during recent conflicts.[7] This increased exposure to danger necessitates both financial and estate planning in the military more than civilian occupations. Getting one's affairs in order may involve no more than executing a will and creating a power of attorney. To this end, even if sevicemembers have few assets and no dependents, preparing these basic documents can minimize costs on their survivors and make it easier to attain personal objectives. Effective planning, may, however, require far more in other circumstances, which the following sections explore in detail.

A. Powers of Attorney and Advanced Medical Directives (i.e., Living Wills)

Research has shown that the Iraq and Afghanistan campaigns are different from prior conflicts. Medical and technological advances have improved the quality of healthcare, increasing the chances that American servicemembers will survive even the most horrendous types of injuries.[8] With improvised explosive devices—the "signature" weapon of modern campaigns—accounting for a majority of injuries sustained, servicemembers face complicated medical situations, such as vegetative states and severe neurological impairments. Dependents often must assume the roles of daytime care providers in the most basic activities, struggling with the financial consequences of these injuries.[9] These situations, where round-the-clock care is often required, emphasize the need for serious planning considerations, not only for supplemental income but also for end-of-life decision-making.[10]

Servicemembers may create different types of powers of attorney for different purposes, such as handling financial affairs and making health care decisions. General powers of attorney enable individuals to empower agents to handle all of their legal and financial affairs. Although servicemembers should try to ensure that their powers of attorney comply with state law, federal law protects military powers of attorney even if they might otherwise fail under state law.[11] Unfortunately, many third parties may be unfamiliar with federal law and may initially refuse to honor military powers of attorney that do not comply with state law. Additionally, agents, particularly those acting under the broad authority of general powers of attorney, may abuse their powers or mismanage servicemembers' affairs. Because of these uncertainties, third parties, such as banks, may be reluctant to honor general powers of attorney and may insist on the use of their own forms, which often limit agents' authority to specific types of transactions. Since third parties are not forced to honor powers of attorney, refusals by third parties may create complications for servicemembers.

Special powers of attorney, which give agents specified, limited powers, such as the power to pay taxes, sell property, make gifts, sign leases, or access health records, can protect servicemembers from the risk of refusal. Like general powers of attorney, special powers of attorney offer servicemembers the convenience of allowing someone else to carry on their personal and legal affairs if they are unavailable due to temporary duty or deployments. Additionally, special powers of attorney are more likely to be honored by third parties because of their specificity. Nevertheless, some third parties, such as hospital records rooms, may still prefer the use of their own forms to ensure their own compliance with applicable laws.[12] To ensure third parties honor servicemembers' instructions, servicemembers should coordinate with potential third parties in advance to determine whether their powers of attorney will be honored. In some cases, the use of specific, third-party forms, such as bank or hospital forms, up front will facilitate certain transactions and forgo the need to go to a legal office to have a special power of attorney drafted.

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[6] Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 327 (2009).

[7] Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW. ENG. J. MED. 13, 18 tbl. 2 (2004).

[8] J.C. Van Lierop III, Note, *Post-9/11 Army Disability Decisions: Reinforcing Administrative Law Principles in Fitness and Disability Rating Determinations*, 61 FLA. L. REV. 639, 640 (2009) (observing that "a much higher percentage of troops survive battlefield injuries today compared to only a few decades ago").

[9] *E.g.*, Clayton Taylor, *Wounded Vets Need Help*, COURIER-J. (Louisville, Ky.), Nov. 11, 2009, at 11A.

[10] *E.g.*, *id.* (describing how "[t]ypically, with such catastrophic injuries, a parent or spouse is forced to leave the workforce to care for their loved one").

[11] *See generally* 10 U.S.C. § 1044b (2006) (giving legal effect to notarized military powers of attorney without regard to compliance with state law requirements as to form, substance, formality, or recording).

[12] *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d (2006) (regulating the disclosure of health information and records); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462 (Westlaw 2010) (codified at 45 C.F.R. § 160–164 (same).

Despite these complications, powers of attorney can be extremely useful, especially if tailored appropriately. For example, depending on state law and the servicemember's intent, powers of attorney can be durable or springing.[13] Durable powers of attorney remain in effect even if a servicemember becomes disabled and loses the capacity to make decisions. To draft a durable power of attorney, attorneys should include language such as, that the powers granted continue to be effective even if the servicemember becomes disabled or incompetent.[14] In this example, disabilities should be stated broadly enough to encompass both physical limitations as well as neurological or psychological conditions. By contrast, springing powers of attorney become effective upon the occurrence of a specified event, such as a servicemember becoming incapacitated. To draft a springing power of attorney, attorneys should include language such as, that the powers may only be used after certification that the servicemember has become disabled, incapacitated, or incompetent.[15] Springing powers of attorney may be more complicated and time consuming for agents to operate under because the specified event (e.g., the occurrence of the servicemember's incapacity) may require proof in the form of a physician's written certification or other tangible evidence.

In addition to general and special powers of attorney for legal and financial affairs, a health care power of attorney allows a servicemember to designate an agent to make health care decisions in the event of the servicemember's incapacitation. For example, if a servicemember becomes disabled and cannot explain his current desires, a previously designated agent, acting under a health care power of attorney, can ensure the servicemember's wishes with regard to health care (e.g., to be admitted to a hospital, to employ a health care provider, or to consent to certain types of surgery) are carried out. Attorneys in the U.S. Army currently use a software program, DL Wills, to draft state specific health care powers of attorney, wills, and advanced medical directives.[16]

To ensure proper planning for "end-of-life medical treatment,"[17] servicemembers should consider completing an advanced medical directive or "living will."[18] In the absence of contrary guidance, the default medical option is to prolong the lives of those who are incapacitated. Servicemembers who do not wish to be kept on life support when they have no reasonable expectation of recovery can specify their wish to be disconnected from life support in an advanced medical directive. Military directives have special value because Federal law protects military advanced medical directives that might otherwise fail under state law.[19]

In any of the above examples, the few hours required to research and develop special healthcare plans can have lifelong benefits. The costs of ignorance in this area are simply far too great.

B. Wills

Similar to an advanced medical directive, a last will and testament can be used to make a servicemember's intent clear on a range of issues, from the disposition of property and the payment of taxes to the identification of the servicemember's state of domicile[20] and the appointment of guardians.[21] By expressing their desires in a will, servicemembers can avoid the default intestacy laws of states, which may direct the disposal of property contrary to a servicemember's wishes. To facilitate the recognition of servicemembers' wills, federal law requires that courts give military testamentary instruments legal effect,

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[13] *See generally* ADMINISTRATIVE & CIVIL DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., 54TH GRADUATE COURSE DESKBOOK, ESTATE PLANNING ELECTIVE P-50 to P55 (2006) (listing each state code with commentary indicating whether a given state recognizes durable and springing/contingent powers of attorney) [hereinafter DESKBOOK 2006].

[14] *See, e.g.*, Drafting Libraries [Will Software], *available at* http://www.draftinglib.com (last visited Jan. 28, 2010) (providing appropriate language).

[15] *See e.g., id.*

[16] *See id.* (providing information on how to acquire DL Wills software and the latest supplement updates to the software).

[17] Captain Thaddeus A. Hoffmeister, *The Growing Importance of Advanced Medical Directives*, 177 MIL. L. REV. 110, 111 (2003) (providing a detailed discussion of advanced medical directives and their interaction with powers of attorney for health care, which together may form a single legal instrument).

[18] *See generally id.* at 110–132 (explaining the need of AMDs in light of Terri Schiavo).

[19] *See generally* 10 U.S.C. § 1044c (2006) (giving legal effect to military advanced medical directives without regard to compliance with state law requirements as to form, substance, formality, or recording).

[20] Because the state law where servicemembers are domiciled can control the disposition of a will, servicemembers can "select" the applicable state law by establishing domicile in a state and declaring their domicile in a will. *See infra* notes 45–49 and accompanying text (discussing the concept of domicile and how to establish domicile).

[21] *See generally* TAX MANAGEMENT INC., TAX MANAGEMENT; ESTATES, GIFTS, AND TRUSTS PORTFOLIOS; ESTATE PLANNING, at A-28 TO A35 (2006) [hereinafter T.M. ESTATE PLANNING] (discussing the purpose, basic structure, and components of a will).

regardless of state law requirements, as long as they are executed by a competent testator eligible for military legal assistance in the presence of a military legal assistance counsel and at least two disinterested witnesses.[22]

III. Step Two: Understanding the Tax System and The Wisdom of Tax Planning

Executing powers of attorney, advanced medical directives, and wills represent an important first step in the estate planning process. However, in order to meet current and future financial needs, servicemembers should also engage in basic tax planning. Understanding the multilayered and multidimensional tax system is crucial to building wealth. Forgoing basic tax planning can result in unintended and significant depletions of a taxpayer's income and, ultimately, a decedent's estate.

The law treats servicemembers like every other individual taxpayer, except that servicemembers receive extra tax benefits and considerations. For example, unlike other taxpayers, servicemembers can receive a tax-free housing allowance that they can use to generate mortgage interest tax deductions on their homes.[23] Despite these benefits, servicemembers, like all other taxpayers, face income, gift, estate, and generation skipping transfer taxes at both state and federal levels. Similarly, servicemembers must pay property, sales, use, and other types of taxes at the state and local government levels.[24]

A. Income Tax Considerations

1. Federal Income Tax

To reduce their federal income taxes, servicemembers must first understand the six steps required to calculate the Federal Income Tax.[25] First, the taxpayer must calculate gross income, which includes numerous items such as compensation for services (e.g., military and non-military pay), interest, rents, and pensions.[26] Second, the taxpayer must calculate adjusted gross income by deducting adjustments (i.e., "above the line deductions"), such as expenses of producing rents and certain individual retirement account (IRA) contributions. Third, the taxpayer must calculate taxable income by deducting personal exemptions and the greater of the standard deduction or itemized deductions. Fourth, the taxpayer must look up the tax due based on taxable income.[27] Fifth, from this amount, the taxpayer must calculate the net tax due (i.e., "total tax") by deducting applicable credits, such as the credit for child and dependent care, educational credits, the child tax credit, and, if applicable, by adding in other taxes such as the self-employment tax.[28] Sixth, the taxpayer must calculate "total payments," which include federal income taxes withheld and credits, such as the earned income credit[29] and the additional child tax credit. If the taxpayer's "total payments" exceed the "total tax," the taxpayer can file for a tax refund. In contrast, if the "total tax" exceeds the "total payments," the taxpayer will owe taxes.

Taxpayers should be familiar with how important characteristics of the federal income tax system may affect their own tax liability. First, a taxpayer's filing status can provide significant benefits. For example, in general, married taxpayers filing joint returns pay less taxes and can qualify for the earned income credit, while married taxpayers filing separate returns

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[22] *See* 10 U.S.C. § 1044d (giving legal effect to military testamentary instruments without regard to state law requirements on form, formality, or recording).

[23] *See, e.g.*, Treas. Reg. 1.61-2(b) (establishing that military housing allowances received by servicemembers are excludable from gross income). *See also*, I.R.C. § 265(a)(6) (allowing a servicemember to deduct mortgage interest on a home even though the servicemember receives a military housing allowance that is excludable from gross income). *See infra* note 32 and accompanying text.

[24] *See generally* Retirement Living Information Ctr., Inc., Taxes by State, *available at* http://www.retirementliving.com/RLtaxes.html (last visited Feb. 16, 2009) [hereinafter Retirement Living] (explaining the numerous types of taxes and the rates applied by each state including property, sales, fuel, cigarette, and other types of taxes, and providing links to official state tax websites); CCH, 2010 U.S. STATE TAX HANDBOOK (2009) (providing a quick-reference guide for state tax issues); OFFICE OF THE JUDGE ADVOCATE GENERAL, CODE 16, STATE TAX GUIDE (Jan. 31, 2010), *available at* http://www.jag.navy.mil/organization/documents/tax/2009StateTaxGuide.pdf (last visited Feb. 18, 2010) (providing a very useful quick reference guide for state income tax issues).

[25] *See, e.g.*, INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 1040 INSTRUCTIONS (2009) [hereinafter FORM 1040 INSTRUCTIONS]; G. VICTOR HALLMAN & JERRY S. ROSENBLOOM, PERSONAL FINANCIAL PLANNING 257-259 (7th ed. 2003) (describing, in general, how to calculate the federal income tax).

[26] *See* I.R.C. § 61(a) (2009) (defining the numerous components of gross income).

[27] *See* Internal Revenue Serv., U.S. Dep't of the Treasury, Form 1040: U.S. Individual Income Tax Return (2009) [hereinafter FORM 1040].

[28] *See id.* (describing how to calculate the "total tax" or net tax due). *See infra* note 37.

[29] *See* I.R.C. § 32(a) (defining the earned income credit and establishing its limitations).

pay more taxes and cannot qualify for the earned income credit.[30] Second, as individuals earn more taxable income, the Government taxes that income at gradually increasing rates.[31] Third, the Government taxes different types of income at different rates, while excluding certain types of income from taxation, such as military housing allowances[32] and combat pay.[33] Fourth, while the Government allows deductions, exemptions, and adjustments to reduce taxable income, these benefits have limits.[34] For example, if a taxpayer had an adjusted gross income (AGI) of $100,000 in 2009, the taxpayer's first $7,500 of unreimbursed medical and dental expenses incurred would not be deductible due to a 7.5% AGI threshold limitation.[35] Fifth, while the Government allows credits to offset taxes due, all credits are not created equal.[36] For example, if the credit is "nonrefundable" like the child and dependent care credit[37] and the credit is larger than the tax owed, tax refunds will be limited to the amount of the tax owed.[38] In contrast, if the credit is "refundable," like the earned income credit, taxpayers will receive a full refund for the credit even though the credit exceeds the tax due.[39]

Ultimately, servicemembers should understand that, despite the existence of programs designed to reduce taxes, the Federal Government created the Alternative Minimum Tax (AMT) to ensure taxpayers pay a minimum amount of tax, regardless of deductions, exemptions, and credits.[40] To this end, the more income a taxpayer makes, the greater the possibility that the taxpayer will be covered by the AMT.[41]

2. State Income Tax

As states increasingly face "devastating" deficits,[42] the state taxing authorities have increasingly become concerned with residents who have neither filed nor paid state income tax.[43] On one hand, military members who are ordered to move to a

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[30] *See* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. 4012, VOLUNTEER RESOURCE GUIDE, at H-2 (2009) [hereinafter PUB. 4012] (providing a very useful quick resource guide to identify the Earned Income Credit's qualification requirements).

[31] *See e.g.*, FORM 1040 INSTRUCTIONS, *supra* note 25 (Establishing six individual tax brackets for 2009: 10%, 15%, 25%, 28%, 33%, and 35%). For example, in 2009, married taxpayers filing jointly would have a 15% marginal tax rate if they had taxable income between $16,700 and $67,900, but would have a 28% marginal tax rate if they had taxable income between $137,050 and $208,850. *Id.*

[32] *See, e.g.*, Treas. Reg. 1.61-2(b) (establishing that military housing allowances received by servicemembers are excludable from gross income). *See also*, I.R.C. § 265(a)(6) (allowing a servicemember to deduct mortgage interest on a home even though the servicemember receives a military housing allowance that is excludable from gross income). *See also*, Rev. Rul. 61-5 (establishing that military housing and cost-of-living allowances received by servicemembers while stationed outside the United States are excludable from gross income). *See generally* Kan, *supra* note 4, at 2 (discussing military housing allowances, their non-taxability, and the broader consequences of receiving such allowances).

[33] *See, e.g.*, I.R.C. § 112 (excluding certain combat zone compensation from gross income). *See also*, Treas. Reg. § 1.112-1(f) (2010) (providing examples excluding certain combat zone compensation from gross income). *See also* U.S. DEP'T OF DEFENSE FINANCIAL MANAGEMENT REG. 7000.14-R, DOD, vol. 7A, ch. 44, at 15–16 (July 2009) [hereinafter DOD FMR] (discussing combat zone tax relief areas for personnel in direct support of a combat zone). *But see* I.R.C. §§ 32(c)(2)(B)(vi) & 219(f)(7) (allowing combat pay to be included in earned income for purposes of the earned income tax credit and for purposes of making deductible IRA contributions).

[34] *See generally* INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 26–38, 121–140, 141–208 (2009) [hereinafter PUB. 17] (explaining personal and dependent exemptions, available adjustments to income; and available deductions).

[35] *See* I.R.C. § 213(a).

[36] *See generally* PUB. 17, *supra* note 34, at 209–263 (explaining available credits).

[37] *See* I.R.C. § 21 (establishing a credit for taxpayers who incur dependent care service expenses to allow them to have gainful employment).

[38] *See* INTERNAL REVENUE SERV., PUB. 4491, VITA/TCE-2008 STUDENT TRAINING GUIDE 8-3 (2008) [hereinafter PUB. 4491 (2008)].

[39] *See id. See supra* note 29.

[40] *See* The President's Advisory Panel on Federal Tax Reform, *America Needs a Better Tax System: Statement by the Members of the President's Advisory Panel on Federal Tax Reform* (Apr. 13, 2005), *available at* http://www.taxreformpanel.gov/04132005.pdf (last visited Jan. 28, 2010). By 2015, the AMT is estimated to apply to approximately fifty-two million taxpayers. *Id. But see* THE PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, REPORT OF THE PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 5 (2005), *available at* http://www.taxreformpanel.gov/final-report/TaxReform_Intro.pdf (recommending the elimination of the AMT).

[41] *See generally* PUB. 17, *supra* note 34, at 210 (explaining the 2009 income tax limits which may result in the need to pay the AMT). *See generally* GEORGE G. JONES, TOP FEDERAL TAX ISSUES FOR 2009 CPE COURSE 1.20–1.24 (2008) (discussing the history of the AMT, and the current AMT patch created by the Emergency Economic Stabilization Act of 2008). To determine whether the AMT applies, taxpayers should fill out the AMT Worksheet. *See generally* FORM 1040 INSTRUCTIONS, *supra* note 25, at 41. If applicable, taxpayers should fill out IRS form 6251 according to its instructions. *See generally* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 6251 INSTRUCTIONS: ALTERNATIVE MINIMUM TAX—INDIVIDUALS (2009).

[42] *See, e.g.*, Ryan Kost, Oregon State Deficit Could Grow by $1 Billion, *available at* http://www.katu.com/news/local/37747104.html (last visited Jan. 28, 2010).

[43] *See e.g.*, Carr v. Dep't of Revenue, 2005 WL 3047252 (Or. Tax Nov. 4, 2005) (holding a servicemember liable for state income taxes in Oregon, even though the servicemember claimed to be from Nevada, a state without a state income tax).

new state may establish sufficient connections to the new state to justify the imposition of that state's income tax. On the other hand, military members who had a prior connection with a state before entering active duty service may appear to have neglected the payment of state tax, when, in fact, these servicemembers legally changed their state of domicile. In short, military members must be vigilant in understanding the meaning of domicile[44] and documenting the factors that prove their domicile. This section explores the fundamental distinctions.

a. Military Pay

In addition to paying federal income tax, many servicemembers must consider state income taxes, depending on their state of domicile.[45] A servicemember can establish a state as their domicile based on their physical presence in the state and their intent to make the state their permanent home.[46] Servicemembers may reap significant tax benefits based on the tax laws of their state of domicile because some states, like Texas, Nevada, and Florida, have no state income tax. In addition, other states exclude some or all military pay from income tax (see Appendix E).[47]

To establish and maintain domicile, servicemembers must take specific steps to demonstrate their intent to make a state their permanent home rather than engaging in subterfuge to avoid paying state income tax.[48] First, after establishing physical presence in the state, servicemembers should visit their local finance office and fill out appropriate paperwork, such as the DD Form 2058, *State of Legal Residence Certificate*.[49] Second, servicemembers should establish as many ties as possible to the state, such as registering to vote, purchasing real property, and obtaining professional and driver's licenses within the state. Third, servicemembers should express their desire to make the state their permanent home by telling others, such as friends and family, about their intent.

Servicemembers must exercise caution due to the variations in state law[50] and level of aggressive enforcement by state revenue collection authorities. For example, in *Carr v. Dep't of Revenue*, the court held that a servicemember had no connection to Nevada, his claimed state of domicile, but had sufficient nexus[51] to the State of Oregon even though he was not registered to vote in Oregon, had no Oregon driver's license, and had no intent to remain in Oregon once his military obligation was completed.[52] As a result of his connections to Oregon, including the purchase of a home and registering vehicles in Oregon, and, more importantly, his lack of current connections to Nevada, the court held that the servicemember was liable for paying Oregon's state income tax on his military income.[53]

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[44] Domicile is defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." BLACKS LAW DICTIONARY 501 (7th ed. 1999).

[45] *See generally* Retirement Living, *supra* note 24 (providing various resources relating to individual state requirements).

[46] *See generally* Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49, 52 (2003) (explaining the requirements of establishing domicile).

[47] *See id.* at 102–09 (describing the extent to which each state includes or excludes military pay and military retirement pay). *See also* Major Richard W. Rousseau, *Update: Tax Benefits for Military Personnel in a Combat Zone or Qualified Hazardous Duty Area*, ARMY LAW., Dec. 1999, at 1, 15–29 (describing the extent to which each state taxes combat pay).

[48] *See, e.g.*, Texas v. Florida, 306 U.S. 398 (1939) (discussing subterfuge situations).

[49] U.S. Dept. of Defense, DD Form 2058, State of Legal Residence Certificate (Feb. 1977), *available at* http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2058.pdf (last visited on Jan. 28, 2010).

[50] *See e.g.*, *In re* Gatchell (N.Y. Tax Comm. 1984), *available at* http://www.nysdta.org/STC/Personal/1984/a_l0170.pdf (last visited Jan. 27, 2010) (establishing that a servicemember who lives in a military barracks does not have a permanent place of abode and thus is not exempt from New York state income tax).

[51] Nexus is defined as "[a] connection or link . . . ." BLACKS LAW DICTIONARY, *supra* note 44, at 1066.

[52] *See, e.g.*, Carr v. Dep't of Revenue, 2005 WL 3047252 (Or. Tax Nov. 4, 2005) (holding a servicemember liable for state income taxes in Oregon, even though the servicemember claimed to be from Nevada, a state without a state income tax).

[53] *See e.g.*, *id.* The court noted that if the taxpayers had "owned property in Nevada, had Nevada driver's licenses, voted in Nevada, registered their vehicles in Nevada, or spoke convincingly of an intention to return to Nevada, their case would be stronger." *Id.*

b. Non-Military (i.e., Civilian) Income

Although military income may not be subject to state income tax in certain states, non-military income of servicemembers and their spouses may be subject to state income tax based on the location where the income is earned. For example, if a servicemember owns rental property in a state that imposes state income tax, the servicemember may be obligated to file a non-resident income tax return for the state in which the rental income was earned. Similarly, if the servicemember receives compensation from a non-military job, the servicemember may need to file a state income tax return.

In a very important statutory development, civilian spouses who meet the domicile test of physical presence and the intent to make a state their permanent home can now receive protections similar to servicemembers due to the Military Spouses Residency Relief Act (MSRRA).[54] As a result of this Act, as of 2009, if military members and their spouses each separately establish and maintain domicile in the same state, they can keep this domicile even though they later move together upon the receipt of military orders to a new state.

For example, a servicemember and a civilian spouse may establish Texas as their domicile if both are physically present in Texas, express the intent to make Texas their domicile, and establish their own contacts to Texas, such as purchasing real property, voting, and becoming licensed in Texas. If the servicemember receives orders to move to Virginia and the spouse moves with the servicemember solely to be together, both can maintain Texas as their domicile. If the servicemember's spouse gets a civilian job in Virginia, the spouse can assert the MSRRA claiming Texas as the state where the spouse established and maintains domicile. By asserting and providing appropriate substantiation to this claim, the spouse's civilian pay would not be subject to taxation by Virginia. This result may seem unfair because the civilian pay of a servicemember who obtains civilian employment in Virginia would be subject to Virginia's income tax.

Servicemembers and their spouses should exercise caution because the Act may be interpreted differently by each state as the states react to the new federal legislation. Servicemembers and their spouses should be prepared to provide to their employers, as well as to the state taxing authorities, substantial evidence that they properly established and currently maintain a specific state as their domicile. If the claimed state of domicile has a state income tax, servicemembers and their spouses should ensure that their employers properly withhold the appropriate state's income tax.

B. The "Unified" Federal Transfer Tax System and "The Unified Credit"

In addition to taxing income, the Government designed a "unified" federal transfer tax system which incorporates the gift tax, the estate tax, and the generation skipping transfer tax to tax the transfer of wealth from one generation to the next.[55] The unified system targets individuals who fall into higher tax brackets and who possess more substantial assets. The gift tax covers lifetime transfers by gift; the estate tax applies to transfers at death; and the generation skipping transfer tax addresses "transfers designed to skip generations."[56] Career military members who have invested over time, built successful businesses during their service, or who have, themselves, inherited sizeable estates may be found throughout the active military.[57] They face unique concerns that are not normally capable of being addressed during the course of a brief meeting with an attorney, such as what occurs at a Soldier Readiness Processing (SRP) station preparing servicemembers to deploy to combat zones.

Although the Government designed a "unified credit" to allow for the tax-free transfer of a limited amount of wealth, the amount of the unified credit has diverged over time due to changes in tax law (see Appendix A). For example, in 2002, the

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[54] 50 App. U.S.C. § 571. The Act, which amended the Servicemembers Civil Relief Act, states:

> A spouse of a servicemembers shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse. . . . Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouses is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.

Id.

[55] *See* HALLMAN & ROSENBLOOM, *supra* note 25, at 462.

[56] *Id.*

[57] *E.g.*, Editorial, *Augusta Soldier Wins $1 Million in* Lottery, FLA. TIMES-UNION (Jacksonville), June 1, 2005, at B-4 (describing the lottery winnings of a Fort Gordon sergeant first class who chose to remain in the Army).

unified credit allowed a transferor to transfer up to $1 million tax free through lifetime taxable gifts, bequests at death, or a combination thereof. Specifically, if a transferor previously gave $400,000 of taxable lifetime gifts, he would only be able to transfer an additional $600,000 tax free through bequests at his death in 2002. While the transfers would be "taxable," the unified credit would prevent any tax from being payable. While the gift tax exclusion amount has remained and will continue to remain at $1 million, the applicable exclusion amount for the federal estate and generation skipping transfer tax has increased gradually up to $3.5 million in 2009. As a result, a transferor could have given $1 million of lifetime taxable gifts tax free and still transferred an additional $2.5 million tax free through bequests at his death in 2009.

However, in 2010, the federal estate and generation skipping transfer taxes have been temporarily repealed, with a reinstatement date of 2011.[58] In 2011, the top marginal tax rate for transfers will be 55% and the "unified credit" will shelter $1 million in transfers. Although numerous bills[59] are pending in Congress to change the status quo, no bill has been successful as of the date of this article.[60]

C. The Gift Tax

1. The Federal Gift Tax

In the terminology of tax law, a "gift" is merely a voluntary lifetime transfer of property by one person to another, where the value of the property transferred exceeds any consideration received.[61] Unlike the estate and generation skipping transfer taxes that may disappear for one year in 2010, the gift tax will remain in place for certain lifetime transfers to others.[62] Fortunately, the Government excludes some transfers from taxation under the gift tax, such as medical payments made directly to medical service providers and tuition payments paid directly to an educational organization.[63] Other transfers meeting the criteria of "non-taxable gifts" are excluded from taxation,[64] as are small monetary gifts meeting the threshold for annual de minimis gift amounts.[65] Some gifts exceeding the de minimis threshold may still be transferred as tax-free lifetime gifts as a result of the unified credit.[66] Finally, the Government allows for an unlimited marital deduction for lifetime gifts between U.S. citizen spouses.[67] Servicemembers should study the factors that distinguish between taxable and non-taxable gifts under the Federal gift tax as a hallmark of effective financial planning.

To calculate the gift tax due during a particular year, a servicemember must account for the total amount of lifetime gifts made in previous years. First, the servicemember must add the taxable gifts made in the current year with the gifts made in all previous years; then, the servicemember must calculate the tax on the sum of the lifetime gifts. Next, the servicemember must subtract the gift tax paid in prior years from the previously calculated tax on the total of the lifetime gifts; the remainder

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[58] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38 (codified as amended in 26 U.S.C.). The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001 sunsets on 31 Dec. 2010, restoring the tax status quo as of 2001.

[59] For the text of specific acts, visit The Library of Congress: Thomas, *available at* http://www.thomas.gov (last visited Jan. 29, 2010) (search for S. 722, H.R. 2023, H.R. 436, H.R. 498, and H.R. 4154 in the textbox marked "Search Bill Summary & Status").

[60] *See* CCH, CCH Tax Briefing: Federal Estate Tax (H.R. 4154), Estate Tax Extension Passes House, Fails in Senate; Carryover Basis Effective January 1, 2010, *available at* http://tax.cchgroup.com/legislation/HouseEstateTax.pdf (last visited Jan. 29, 2010) (providing an information paper on the current status of the bill). "On December 3 [2009], the House approved the Permanent Estate Tax Relief for Families, Farmers and Small Businesses Bill of 2009 (H.R. 4154), which would permanently extend the top federal estate tax rate of 45 percent with a $3.5 million exclusion. . . . [However,] the bill failed to win support in the Senate, as did a temporary stop-gap measure to extend the 2009 estate tax regime through March 2010." *Id. See generally* CCH, *available at* http://tax.cchgroup.com/news/legislation/default.asp (last visited Jan. 29, 2010) (providing the latest legislative tax updates).

[61] *See generally* CCH, 2010 U.S. MASTER ESTATE AND GIFT TAX GUIDE 353 (2009). An inter vivos gift is defined as, "A gift made during the donor's lifetime and delivered with the intention of irrevocably surrendering control over the property." BLACKS LAW DICTIONARY, *supra* note 44, at 697.

[62] *See generally* I.R.C. §§ 2501 to 2524 (covering all applicable code sections of the federal gift tax). *See generally* RICHARD B. STEPHENS ET AL., FEDERAL ESTATE & GIFT TAXATION 9–5 (8th ed. 2002) (discussing the imposition of the gift tax).

[63] *See* I.R.C. § 2503(e) (excluding qualified transfers for tuition and medical expenses paid on behalf of an individual directly to an educational organization or medical service provider).

[64] *See, e.g., id.* § 2501(a)(4) (excluding transfers to political organizations for gift tax purposes). *See generally* STEPHENS, *supra* note 62, at 9-7, 9-43 to 9-44 (discussing transfers to political organizations; explaining transfers for medical and tuition expenses).

[65] *See* I.R.C. § 2503(b). *See generally* STEPHENS, *supra* note 62, at 9-14 (discussing inflation adjustments). In 2010, the annual exclusion equals $13,000. *See* Rev. Proc. 2009-50 § 2523 (see cost of living adjustments for 2010, Section 3.30(2)).

[66] *See* I.R.C. § 2505(a). In 2010, due to the federal gift tax ("unified") credit, $1 million of lifetime taxable gifts could be made before incurring gift tax.

[67] *See id.* § 2523. However, the unlimited marital deduction does not apply to gifts to foreign spouses. In 2010, taxpayers could transfer up to $134,000 tax free to a noncitizen spouse. *See* Rev. Proc. 2009-50 § 2523 (see cost of living adjustments for 2010, Section 3.30(2)).

will be the amount of gift tax due in the current year. Finally, the servicemember must subtract the unified gift tax credit from the gift tax due to calculate any gift tax owed. For example, independently wealthy Colonel Brad Smith gave his niece a $688,000 home in 2009 (see Appendix B) and later gives his nephew a $500,000 vacation condominium in 2010. Since the annual exclusion covering *deminimis* gifts was $13,000 in 2009 and 2010, the taxable value of the gifts in 2009 and 2010 were $675,000 and $487,000, respectively. When applying the gift tax law to this scenario, Colonel Smith should add $487,000 to $675,000 for a total of $1,162,000. Assuming he gave no other taxable gifts previously, he would then calculate the gift tax due on the $1,162,000. The unified credit would exclude $1 million of the transfer and expose the remaining $162,000 to gift tax. At a gift tax rate of 35%, Colonel Smith would be liable for $56,700 (i.e., .35 x $162,000) in gift tax.

Although taxpayers making taxable gifts must pay the gift taxes owed, they may still enjoy certain tangible benefits. By making taxable gifts, donors can remove the gifted property from their gross estates at a relatively low cost compared to incurring estate taxes, because the gift tax is tax exclusive while the estate tax is tax inclusive (i.e., unlike the gift tax, the estate tax taxes the amount of money used to pay the tax). For example, assume a taxpayer in the 45% gift tax bracket who had already used the unified credit and annual exclusion, made a gift of $1,000,000 of Microsoft stock to his son in 2009. He would incur a $450,000 gift tax for a total transfer cost of $1,450,000.[68] In addition, because the taxpayer made a completed transfer for gift tax purposes, neither the taxpayer nor his estate would be subsequently liable for any future taxes on the property and the property's post-transfer appreciation. If, after the transfer, the stock's value increased by $100,000 and the son sold the stock, the son (i.e., not the father) would be liable for paying tax on that gain.

As a result, for those planning to transfer property and deplete their estates, taxpayers should consider giving others items they expect will appreciate over time. Meanwhile, recipients of these gifts should understand that they will take the donor's basis in the assets and potentially pay greater taxes upon sale of the assets.[69] In addition, special provisions account for taxpayers who die within three years of paying gift taxes. For such taxpayers, the Government includes gift taxes paid in the taxpayer's gross estate.[70] As the next section explains, these taxes may only be the beginning. Specifically, once a servicemember has considered the federal gift tax, the financial analysis may continue forward to the state gift tax.

2. The State Gift Tax

Depending on a servicemember's domicile, state governments may also apply a state gift tax. For example, while most states do not impose a gift tax, states like Connecticut and Tennessee tax gift transfers.[71] The extent to which state gift statutes resemble the federal gift tax vary greatly and hinge on issues such as lifetime exemption amounts and annual exclusions (see Appendix F).[72] For instance, Connecticut imposes a gift tax on the aggregated amount of gifts over $3.5 million made after 1 January 2010, at graduated tax rates as high as 12%.[73] In comparison, Tennessee applies gift rates and exemption amounts depending on the status of donees.[74] Due to the variance in state gift tax statutes, servicemembers must pay close attention to their state's specific gift tax laws in addition to Federal ones. Furthermore, lifetime gift taxes at either level should not be confused with estate taxes, which concern themselves with taxing the transfer of wealth at death.

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[68] *See* I.R.C. § 2001(c) (establishing the maximum gift and estate tax brackets in 2009 as 45%). In contrast, a bequest of only $797,500 would be possible with estate assets worth $1,450,000 under the same circumstances as this gift example. *See infra* note 76 and its accompanying text.

[69] *See* I.R.C. § 1015(a) (establishing that the gift's basis in the hands of the recipient is equal to the donor's basis). Taxpayers should contrast the treatment of gifts with the treatment of bequests regarding basis. Taxpayers acquiring property from a decedent dying before 31 December 2009 received a basis equal to the fair market value at the time of death (i.e., a "stepped up basis"). *See id.* § 1014(a)(1). *But see id.* §§ 1014(f) and 1022 (limiting the step up in basis for property acquired from a decedent dying after 31 December 2009, to an aggregate amount of $1.3 million, with an additional $3 million dollars if the qualified spousal property is acquired by a surviving spouse).

[70] *See id.* § 2035. Gross estate is defined as "The total value of a decedent's property without any deductions." BLACKS LAW DICTIONARY, *supra* note 44, at 568. *See supra* notes 77, 84–92, and accompanying text.

[71] *See generally* 4 RESEARCH INSTITUTE OF AMERICA, INC., ESTATE PLANNING & TAXATION COORDINATOR: FEDERAL ESTATE & GIFT TAXATION 53,001–53,004 (2008) [hereinafter TAXATION COORDINATOR] (discussing the implications of state gift taxation; pointing out that only one-third of the states have enacted gift tax statutes; elaborating that many of these states such as North and South Carolina no longer tax current gift transfers).

[72] *See id.* at 53,003.

[73] *See id.* at 56,014–56,015.

[74] *See id.* at 56,112.

D. The Estate Tax

1. The Federal Estate Tax

Even though most servicemembers do not have the luxury of being able to make large gifts of property during their lifetime, most servicemembers should engage in some degree of estate-planning to maximize the property they can pass at their death. Even with no prior planning, estate taxes may be at issue if property is ultimately inherited by one other than the Government. In short, in addition to facing the income and gift taxes, servicemembers may also be subject to the federal estate tax upon their death, unless they die in 2010.[75] While the gift tax applies to property transfers during one's life, estate tax applies to transfers of property at one's death. When compared to the federal gift tax, the federal estate tax can be costlier. Specifically, the estate tax is tax inclusive like the income tax, because the amounts used to pay the tax are themselves subject to tax. Assuming the unified credit and annual exclusion did not apply, if a servicemember in the 45% estate tax bracket died in 2009 attempting to leave $1,450,0000 to his son, he would incur an estate tax of $652,500 (i.e., 0.45 x $1,450,000), leaving only $797,500 (i.e., $1,450,000 – $625,500) of the original amount to his son.[76] Had the servicemember transferred these funds to his son as a gift during his lifetime, the gift tax would have been $450,000, ultimately providing his son with $1,000,000. Simply by making a lifetime gift, the servicemember would have been able to make his son $202,500 richer, demonstrating the value of proper advance planning.

To further minimize federal estate taxes, servicemembers should understand how to calculate the estate tax due in a comprehensive manner consisting of five steps (see Appendix C). By using fair market value principles, the taxpayer first identifies and determines the value of all the property in the decedent's gross estate, including the value of all the property owned or controlled by the decedent at death.[77] Second, the taxpayer determines the decedent's taxable estate by subtracting applicable deductions—such as reasonable funeral expenses,[78] state death taxes paid,[79] charitable deductions,[80] and the marital deduction—from the decedent's gross estate.[81] Third, the taxpayer determines the tentative estate tax base by adding adjusted taxable gifts made during the decedent's lifetime to the decedent's taxable estate. Fourth, the taxpayer calculates the tentative estate tax by multiplying the tentative estate tax base by the applicable estate tax rate.[82] Fifth, the taxpayer calculates the federal estate tax by subtracting from the tentative tax applicable credits, such as the unified credit, and gift taxes paid on taxable gifts.[83]

Even with these five steps in mind, determining the estate tax is not as simple as it may appear; the property included in a decedent's gross estate is far from intuitive. As just one example, the gross estate includes any illegal property in which the decedent had an interest.[84] As another example, the gross estate also includes property that is not physically owned by the decedent but still under his "dominion and control"[85] such as an irrevocable transfer to a trust in which the decedent retained the power to alter the time when the trust's beneficiary will receive the interest. This property would, no doubt, remain in the decedent's gross estate for tax purposes.[86] Even an irrevocable transfer to a trust with the power to add or change the beneficiaries would fall under the decedent's gross estate based on the same principle.[87]

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[75] *See* I.R.C. §§ 2001–2210 (2009) (covering all applications code sections of the federal estate tax). *See generally* STEPHENS, *supra* note 62, at 2-2 (discussing the federal estate tax and the method of computation). There is currently no federal estate tax in 2010. However, legislation in Congress is currently pending, and if the legislation passes, a federal estate tax may apply to 2010 retroactively. *See supra* notes 59 and 60 and accompanying text.

[76] *See* I.R.C. §§ 2001-2210. Taxpayers should compare the consequences of the gift tax. *See supra* note 68 and its accompanying text.

[77] *See id.* §§ 2001, 2031, and 2033.

[78] *See id.* § 2053.

[79] *See id.* § 2038.

[80] *See id.* § 2055.

[81] *See id.* § 2056.

[82] *See id.* § 2001.

[83] *See id.* § 2010.

[84] *See id.* §§ 2033. For example, illegal drugs would be includable in the gross estate even though no deduction would be allowed for its confiscation.

[85] *See id.* §§ 2035–2038.

[86] *See id.* § 2038.

[87] *See id.*

The gross estate also includes specific types of property the decedent may have irrevocably transfered with no remaining powers exercised if the property was transferred within three years of the decedent's death,[88] such as a servicemember's transfer of a life insurance policy to another less than three years prior to his death.[89] Similarly, if the servicemember makes a taxable gift, pays the gift tax, and then dies within three years, the gift tax paid (but not the value of the gift itself) reverts back into the gross estate for estate tax purposes.[90] Yet another consideration revealing the complexity of these issues involves accounts created by the servicemember under the provisions of the Uniform Gifts to Minors Act (UGMA) or Uniform Transfers to Minors Act (UTMA).[91] The death of a servicemember serving as a trustee for such accounts before the minor beneficiary reaches the age of majority also results in reversion of the funds into the decedent's gross estate.[92]

Even when estate taxes rise due to the inclusion of property in the gross estate, beneficiaries can still realize positive consequences relating to tax basis, such as a stepped up basis in the property received.[93] This higher basis can reduce income taxes due when the beneficiary later sells the property.

2. State Death Taxation

In addition to the federal estate tax, the District of Columbia and many states, such as New York, impose a state estate tax. Like state gift taxes, state law varies greatly with regard to state estate taxes. For example, New York imposes a state estate tax equal to the maximum 1998 federal estate tax credit[94] while the District of Columbia has a credit of $385,800 for individuals who died on or after 1 January 2003, allowing for the tax-free transfer of estate assets worth $1 million.[95] Complicating the analysis, the Internal Revenue Code temporarily replaced the previous federal estate tax credit for state death taxes with a deduction[96] "for death taxes actually paid to any state . . . with respect to property included in the decedent's gross estate."[97]

Some states also impose inheritance taxes, which are not necessarily the same as estate taxes.[98] In general, while an estate tax covers the "transfer of property by a decedent," an inheritance tax usually applies to "the taking of property by a beneficiary."[99] As an example of the great variances in state tax law, states such as Texas and Maryland impose different types of inheritance taxes (see Appendix G). Texas imposes an inheritance tax based entirely upon the federal estate tax and thus is closer to an estate tax than an inheritance tax.[100] In addition, Texas treats residents, non-residents, and aliens

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[88] *See id.* § 203.

[89] *See id.* §§ 2035 & 2042.

[90] *See id.* § 2035. The gift tax paid includes all gift taxes paid even if the gift was a split gift where the decedent paid the gift taxes.

[91] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-94 (explaining that UTMA and UGMA accounts are custodial accounts that can be used for the support, maintenance, education, and benefit of the minor; explains that the minor takes legal ownership of the property once the minor reaches the age of legal capacity). *See also* ADMINISTRATIVE & CIVIL DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., 57TH GRADUATE COURSE DESKBOOK, ESTATE PLANNING ELECTIVE L-51 (2009) (discussing UTMA and UGMA accounts) [hereinafter DESKBOOK 2009].

[92] *See* I.R.C. § 2035.

[93] *See id.* § 1014(a)(1) (establishing that taxpayers acquiring property from a decedent dying before 31 December 2009, received a basis equal to the fair market value at the time of death (i.e., a "stepped up basis"). *But see id.* §§ 1014(f) & 1022 (limiting the step up in basis for property acquired from a decendent dying after 31 December 2009, to an aggregate amount of $1.3 million, with an additional $3 million dollars if the qualified spousal property is acquired by a surviving spouse).

[94] *See* N.Y. TAX LAW § 952(a) (McKinney 2009). *See generally* TAXATION COORDINATOR, *supra* note 74, at 56,088 (explaining the New York estate tax). Basically, New York's state estate tax is a "fixed" "soak up" tax meant to reap the maximum revenue benefits from the federal law, as of 1998. While some states peg their statutes to a fixed time (i.e., "fixed" systems), other states have "floating" systems which automatically adopt federal law as federal law changes over time. While having a floating system may be easier for states to administer, states take the risk of making federal law state law without the advance opportunity to make adjustments. *See id. See also* MARTIN NISSENBAUM ET AL., ERNST & YOUNG'S PERSONAL FINANCIAL PLANNING GUIDE 339 (5th ed. 2004) (distinguishing states that have "soak-up" type taxes from states that have "decoupled" from the federal estate tax system).

[95] *See* D.C. CODE ANN. §§ 47-3701(4)(C)(ii) & 47-3702 (LexisNexis 2009). *See generally* TAXATION COORDINATOR, *supra* note 71, at 56,019.

[96] *See* I.R.C. § 2058 (providing a deduction for estates of decedents dying before 31 December 2010). *See* JOINT COMMITTEE, *supra* note 5, at 17 (explaining that the state death tax credit will be reinstated for decedents dying after 31 December 2010).

[97] STEPHENS, *supra* note 62, at 5-261.

[98] *See* TAXATION COORDINATOR, *supra* note 71, at 52,001 (discussing typical patterns of state death taxation). *See generally* Retirement Living, *supra* note 24 (providing numerous links and resources).

[99] TAXATION COORDINATOR, *supra* note 71, at 52,001.

[100] *See, e.g., id.* at 56,123; TEX. TAX CODE ANN. §§ 211.051–211.053 (Vernon 2009) (discussing the tax treatment of residents, nonresidents, and aliens).

differently for tax purposes.[101] In contrast, Maryland "imposes an inheritance tax on the privilege of receiving property that passes from a decedent that has a taxable situs in Maryland" and the person who distributes the property is liable for the tax.[102]

All of these differences, especially the different federal and state exclusion amounts, may force some taxpayers to either forgo their full federal exclusion amount or to pay state estate taxes. Due to the complexities of local law, servicemembers should seek out legal counsel familiar with the peculiarities of their state's specific laws.[103] For servicemembers, this necessary task may be extremely difficult, if not impossible, due to the obstacles of assignments, deployments, or temporary duty to remote areas where meetings with legal assistance attorneys are an uncommon luxury.

E. The Daunting Nature of the Generation Skipping Transfer Tax

1. The Federal Generation Skipping Transfer Tax

The Internal Revenue Code anticipates that tax savvy earners will inevitably search for loopholes that allow them to convey property in a tax evading manner. To address the efforts of the wealthy to avoid the imposition of successive estate taxes or reward grandchildren with expensive new cars as college graduation gifts, the Code instituted the generation skipping transfer (GST) tax, with the objective of assessing transfer taxes at each generation of donee.[104] Four common scenarios may trigger the GST tax: (1) the giving of direct gifts to grandchildren or great grandchildren (i.e., inter vivos direct skips);[105] (2) the existence of bequests to grandchildren made in a will (i.e., testamentary direct skips); (3) the creation of testamentary trusts for children and grandchildren in which the trustee retains the power to make distributions to grandchildren (i.e., taxable distributions); [106] and (4) the existence of testamentary trusts for children and grandchildren when the children subsequently die leaving only "skip person"[107] grandchildren as beneficiaries (i.e., taxable terminations).[108] In each of these situations, donors may inadvertently trigger the heavy-handed GST tax, which is limited only by the federal GST exemption,[109] annual exclusions, and gift-splitting measures. Unaffected by the GST tax, however, are transfers directly to educational and medical service providers for tuition and health care, which donors may use freely much like they do with the gift tax.[110] Donors have great incentive to give gifts crossing numerous generations in 2010, as the Internal Revenue Code exempts this year from GST tax coverage.

Where taxes must be paid and the GST exemption and annual exclusions do not apply, the federal transfer tax implications can be quite severe. The first common scenario that may trigger the GST tax is called the "the inter vivos direct skip" scenario, in which a servicemember in the 50% gift, estate, and GST tax brackets plans to transfer $100,000 to his grandchild.[111] As a result of the GST tax, the donor would actually have to expend $225,000 to effectuate the $100,000 transfer, at the loss of a whopping $125,000. Three steps will determine the funds needed to transfer $100,000 under the

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[101] *See, e.g.*, TAXATION COORDINATOR, *supra* note 71, at 56,123; TEX. TAX CODE ANN. §§ 211.051–211.053 (Vernon 2009) (discussing the tax treatment of residents, nonresidents, and aliens).

[102] *E.g.*, TAXATION COORDINATOR, *supra* note 71, at 56,051. *See also* M.D. CODE ANN., TAX-GEN. § 7-202 (LexisNexis 2009).

[103] For example, a servicemember stationed in Iraq and interested in drafting a Louisiana will may be able to visit his local legal assistance office, which may be able to work with licensed Louisiana attorneys at Fort Polk, to draft the will, giving appropriate consideration to the appropriate state law issues rooted in French civil law.

[104] *See* I.R.C. §§ 2601-2664. *See also* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended beginning at 26 U.S.C. § 1) (enacting the current form of the generation skipping transfer tax). *See generally* ELLEN K. HARISON, GENERATION-SKIPPING TRANSFER TAX PLANNING 9-1 to 9-71 (2009) (discussing an overview of the generation-skipping transfer tax).

[105] *See* I.R.C. § 2612(c).

[106] *See id.* § 2612(b).

[107] *See id.* § 2613(a) (defining "skip persons" as persons assigned to a generation which is two or more generations below the transferor's generation, or a trust where either all interests are held by skip persons or no person holds an interest in the trust and no distribution may be made to a non-skip person).

[108] *See id.* § 2612(a).

[109] *See id.* § 2631(c) (2009).

[110] *See id.* § 2611(b).

[111] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-146 (showing similar examples). The author chose the year 2002 in the example as the year of transfer, because the 50% gift, estate, and GST tax brackets existing at that time simplify calculations and make the analysis easier to follow.

current GST regime. In the first step, the transferor[112] should use the amount "received" as the basis for the tax assessment, which is $100,000 (see Appendix D).[113] Second, the transferor should consider the gift tax amount on $100,000, which is $50,000 (i.e., 0.5 x $100,000). Third, because the transferor must pay the GST tax, the $50,000 GST tax paid constitutes a taxable gift to the grandchild, which is subject to an additional $25,000 gift tax (i.e., 0.5 x $50,000).[114] Although, by definition, direct skip gift transfers are tax exclusive because the GST tax base for a direct skip transfer "does not include the amount of any federal estate or gift tax payable with respect to the generation-skipping transfer,"[115] direct skip transfers are "not entirely tax exclusive"[116] because federal gift tax is imposed on the federal GST tax paid. Even with multiple layers of taxation, the direct skip transfer is still more advantageous tax-wise than a direct skip bequest (the second common scenario), which would require $300,000 (i.e., including $150,000 in estate taxes and $50,000 in GST taxes) in order to complete the transfer of $100,000 to a grandchild. Notably, in a direct skip gift transfer scenario, if the transferor dies within three years of paying the gift taxes, the gift taxes paid are included in the transferor's gross estate for estate tax purposes.[117]

While the direct skip transfer and bequest scenarios may seem heavy-handed and prohibitive to the transferor/testator, scenarios involving the creation of testamentary trusts are more severe because they are more tax inclusive. In situations involving taxable distributions and taxable terminations, a servicemember would have to leave $400,000 in a testamentary trust in 2002 in order to transfer $100,000 to a grandchild later that year. Under the operation of the GST regime, the $400,000 bequest to the trust would first be subject to a $200,000 Federal estate tax. Next, in the taxable distribution scenario, the $200,000 would be distributed to the grandchild who would have to use $100,000 of it to pay[118] the GST tax.[119] Similarly, in the taxable termination scenario, the trustee[120] would have to use $100,000 to pay the GST tax on the $100,000 transfer to the grandchild.[121] In either case, the grandchild would only receive $100,000, while $300,000 would go directly to Federal transfer taxes.

These examples show how proper planning and structuring of generation skipping transfers ensure the minimization of taxes and the accomplishment of servicemembers' goals.[122] If servicemembers cannot avoid transfers subject to GST tax, they should strive to make the best use of their GST exemptions and annual exclusions. Exemptions should be aimed at transfers to grandchildren and other skip person beneficiaries. Here, servicemembers should allocate their GST exemption in order to produce a "dynasty trust"[123] with an "inclusion ratio"[124] of zero and thus an effective tax rate of zero, for the exclusive benefit of skip persons (e.g., grandchildren and subsequent generations). Simultaneously, servicemembers should ensure that no GST exemption is allocated to trusts (i.e., producing an inclusion ratio of one and exposing the entire transfer

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[112] I.R.C. § 2603(a)(3). In contrast to direct skip transfers, taxable distributions impose the tax on the transferee while taxable terminations impose the tax on the trustee. *See id.* § 2603(a).

[113] *Id.* § 2623.

[114] *See id.* § 2515 (2009).

[115] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-146.

[116] E-mail from Ellen Harrison, Adjunct Professor, Georgetown University Law Center, to author (Mar. 29, 2009, 10:22) (on file with author). "I would argue that it is correct to say that the GST tax is computed on a tax exclusive basis because the GST tax is not in the tax base. However, it is true that because there is gift tax on GST tax, the tax on direct skips is not entirely tax exclusive." *Id.*

[117] *See* I.R.C. § 2035(b) (including gift taxes on gifts made during three years before the decedent's death in the decedent's gross estate). One benefit of gross estate inclusion is that the transferee will receive a stepped-up basis in the property (except if the transferor dies in 2010).

[118] *See id.* § 2603(a)(1) (imposing the liability to pay the GST tax on the transferee).

[119] *See id.* § 2621(a) (subjecting the amount received by the transferee minus expenses incurred to the GST tax). For example, because $200,000 was received by the grandchild, 50% of $200,000 = $100,000 GST tax owed.

[120] *See id.* § 2603(a)(2) (2009) (imposing the liability to pay the GST tax on the trustee).

[121] *See id.* § 2622 (subjecting the value of *all property* with respect to which the taxable termination has occurred minus certain deductions to the GST tax). For example, since $200,000 was the value of the property to which the termination occurred, 50% of $200,000 = $100,000 GST tax owed.

[122] *See generally* HARISON, *supra* note 104, at 9-2 to 9-14 (discussing the differences between tax exclusive I.R.C. § 2623 direct skips, and tax inclusive I.R.C. § 2621 taxable distributions and I.R.C. § 2622 taxable terminations; explaining the importance of structuring transactions to ensure either an inclusion ratio of 1 or 0, and thus avoiding a mixed inclusion ratio).

[123] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-38 (discussing the "dynasty trust" concept, a trust that can exist for an extended period of time that is potentially able to pass property free of GST tax liability).

[124] *See* I.R.C. § 2642(a) (defining the inclusion ratio as one minus the applicable fraction; defining the applicable fraction as a fraction with the numerator equal to the GST exemption allocated to the trust or property transferred, and the denominator equal to the value of the property transferred reduced by the sum of certain taxes and charitable deductions allowed with respect to such property). *See also* T.M. ESTATE PLANNING, *supra* note 21, at A-148 (discussing the GST planning concept of layering trusts)

to GST tax) for the exclusive benefit of non-skip persons[125] (e.g., children). Additional considerations arise in the form of automatic allocations that may occur "under certain statutorily prescribed circumstances,"[126] such as lifetime direct skip transfers (e.g., giving a grandchild a car as a college graduation gift). By purposefully allocating their GST exemption and avoiding mixed inclusion ratios (i.e., ratios between zero and one), servicemembers can ensure that their GST exemption will not be squandered on transfers to children, but rather preserved for transfers to grandchildren that might otherwise be subject to GST tax.

2. The State Generation Skipping Transfer Tax

In addition to the federal GST tax, about half the states, including New York and Texas, have a state GST tax.[127] As with the state gift, estate, and inheritance taxes, the state GST tax statutes vary greatly. On the one hand, New York imposes a GST tax equal to the 1998 federal GST maximum tax credit (i.e., a "fixed" system), multiplied by the amount of New York property transferred, divided by the all the property transferred.[128] On the other hand, Texas imposes a GST tax equal to the federal GST exemption (i.e., a "floating" system), multiplied by the value of Texas property transferred, divided by all the property transferred.[129] As a result of such variance, servicemembers should seek guidance from local counsel familiar with the laws of their particular state.

IV. Step Three: Building an Estate and Holding Assets

Despite the existence of a more challenging economy, there are several avenues for servicemembers to invest and establish assets. Some may even argue that the economic downturn has created additional opportunities to profit.[130] With the constraints of the tax system in mind, servicemembers should develop estate plans that minimize taxes, facilitate liquidity in the allocation of resources, and prevent the unnecessary depletion of the estate for the benefit of future beneficiaries. These objectives are attainable when servicemembers account for the property they own, properly assess risk, and accumulate assets that will best preserve their wealth.

A. Holding Assets

Servicemembers hold property in different ways depending on the nature and location of the property, as well as the nature of their marital status. For example, a married servicemember who purchases a home in a community property state may be determined to have made a gift to his spouse worth the value of one-half of the home. This may become an issue if there is a divorce or death later in the marriage. Because several standards may apply to different types of property simultaneously, servicemembers should adopt a standard evaluative approach.

Servicemembers should begin by determining the type of legal system that governs the property: Is it a community property law system, a common law system, or a combination of both? In many common law states, the nature of the title to property often dictates ownership of the property. In contrast, in many community property states, courts often presume that

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[125] *See* I.R.C. § 2613(b) (defining non-skip persons as persons who are not skip persons).

[126] T.M. ESTATE PLANNING, *supra* note 21, at A-147. Servicemembers may elect out of automatic allocations by filing IRS Form 709 and paying applicable GSTs on direct skip transfers. *See* I.R.C. § 2632 (discussing deemed allocation and how to elect out).

[127] *See* TAXATION COORDINATOR, *supra* note 71, at 52501 (discussing the implications of state generation skipping taxation by approximately one-half of all the states).

[128] *See* N.Y. TAX LAW § 1022 (McKinney 2009). *See generally* TAXATION COORDINATOR, *supra* note 71, at 56,090 (explaining the NY GST).

[129] TEX. TAX CODE ANN. § 211.054 (Vernon 2009). *See generally* TAXATION COORDINATOR, *supra* note 71, at 56,131 (explaining the Texas GST).

[130] *See, e.g.*, Warren E. Buffet, *Buy American. I Am*, N.Y. TIMES, Oct. 16, 2008, *available at* http://www.nytimes.com/2008/10/17/opinion/17buffett.html (last visited Feb. 1, 2010).

> A simple rule dictates my buying: Be fearful when others are greedy, and be greedy when others are fearful. And most certainly, fear is now widespread, gripping even seasoned investors. . . . But fears regarding the long-term prosperity of the nation's many sound companies make no sense. These businesses will indeed suffer earnings hiccups, as they always have. But most major companies will be setting new profit records 5, 10 and 20 years from now.

Id.

property is community property,[131] unless the owner can rebut the presumption by demonstrating that the property is separate property.[132]

After determining what system applies, servicemembers should next determine the property that will pass under the servicemember's will, versus property that will bypass the probate process. Servicemembers can best clarify their intentions for the transfer of property by executing a will that clearly disposes of their probate assets and explicitly designates their domicile (i.e., which may determine which state's law applies). Aside from the will, servicemembers should simultaneously designate beneficiaries on appropriate beneficiary designation forms for their non-probate assets, such as life insurance and pay-on-death bank accounts. The sections below provide more detailed guidance for the conscientious financial planner.

1. Who Owns the Property? Community Property Versus Common Law Property

For single servicemembers, the difference between community property and common law systems may be irrelevant because joint ownership of accumulated property is not normally at issue. However, for servicemembers who marry and amass property while stationed in different states during their careers, the nature of the property ownership system can ultimately determine who owns certain property in the event of the servicemember's divorce or death. While most states have adopted a common law system for the disposition of property, "Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin" operate under community property regimes.[133] Because major military bases are located in both common law and community property states, servicemembers may pass through both legal systems during the course of their military service. Conscientious servicemembers must therefore keep tabs on the legal regime that applies to property transfers made at all times during their life and also those which are likely to occur at the time of their death.

Transfers of property during one's life differ significantly between community property and common law regimes because these systems operate under completely different rationales. In general, community property law treats marriage as an equal partnership and thus presumes equal ownership over property acquired during the course of the marriage.[134] Consequently, even where property is titled in one spouse's name, the law nevertheless presumes it to be jointly owned community property.[135] Under such a presumption, servicemembers who give third parties gifts like cars, which were acquired during the marriage, may find such gifts classified as split gifts (i.e., a gift of equal amounts given by each spouse).[136] Similarly, if a portion of the servicemember's salary (presumed community property if earned during marriage) is used to acquire and pay premiums on one's own life insurance policy, at the time of the servicemember's death, half of any insurance proceeds paid to the children may be included in the servicemember's gross estate with the other half determined to be a deemed gift from the surviving spouse.[137]

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[131] Community property is defined as, "Property owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or gift to one spouse, each spouse holding a one-half interest in the property. . . . [States with community property systems include] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin." BLACKS LAW DICTIONARY, *supra* note 44, at 412.

[132] Separate Property is defined as,

> [Property in a community-property state] that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party, or property acquired during marriage but after the spouses have entered into a separation agreement and have begun living apart . . . [and property in some common-law states that is] titled to one spouse or acquired by one spouse individually during marriage.

Id. at 1369.

[133] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-155 (explaining that, while some states like California and Texas have established community property law systems, other states, like Alaska, have an elective community property system, while states like Wisconsin implement community property law principles).

[134] *See id.*

[135] *See id.* at A-155 to A-156 (explaining that property acquired through gift, devise, or descent is treated as separate property; explaining that property acquired through the use of separate property should be considered separate property, applying the inception of title doctrine). Servicemembers can use prenuptial agreements to clarify whether property will be considered separate or community property.

[136] *See id.* at A-158. If the gift is over the annual exclusion (e.g., $13,000 for 2010), the taxpayers must file split gift tax returns.

[137] *See id.* at A-156 to A-157 (explaining the differences between state laws and the importance of the facts and circumstances of the case, such as whether the spouse had previously agreed to the beneficiary designation).

As a significant benefit, community property law states allow decedents to include only half the value of community property in their gross estates, even though the estates benefit from a step-up in basis to the full market value of the property.[138] For example, if a servicemember purchased a home for $100,000 during marriage and the home appreciates to a value of $300,000 at the servicemember's death, only $150,000 would be included in the servicemember's gross estate (i.e., 0.5 x $300,000), while the recipient of the home would benefit from a $200,000 stepped-up basis in the property (i.e., $300,000 – $100,000). Due to the stepped-up basis, if the beneficiary of the home later sold the property for $550,000, the beneficiary would only recognize $250,000 of gain (i.e., $550,000 – $300,000), which itself may be nontaxable.[139] Spouses in common law states that do not recognize community property principles face far fewer complications in the determination of property ownership. However, to minimize potential issues, servicemembers considering marriage may want to consider prenuptial agreements that clarify property ownership.

2. Probate Property Versus Non-Probate Property

After determining whether common law or community property law governs transferred or transferable property, servicemembers should decide whether to hold the property in a probate or non-probate status. While probate property, such as a home or car held in the testator's name "is subject to the will provisions and to the probate jurisdiction of the local court," non-probate property will bypass local probate administration unaffected "by the existence (or nonexistence) of a valid last will" and testament.[140] Examples of non-probate property include life insurance policies, pay-on-death bank accounts, transfer-on-death securities, property held in trust, and jointly-held property passing under the right of survivorship.[141] Despite the distinction between probate and non-probate property, both categories will ultimately be included in their gross estate at death, even though only their probate property (i.e., their probate estate) will be subject to probate.

The holding of probate versus non-probate property should not be guided by the desire to save taxes on property transfers. It should, instead, depend on the desire to avoid publicity and the supervision of a probate court and other more nuanced benefits. Holding non-probate assets in a trust is particularly useful in maximizing privacy, minimizing the potential for challenges to the servicemember's capacity, and facilitating the administration of property when a servicemember owns real estate in different states. To gain these advantages, the servicmember must be willing to invest the time and money to transfer assets into a trust. Furthermore, trustees must ensure that they administer the trust properly. With non-probate property, such as life insurance and pay-on-death accounts, servicemembers must regularly monitor their assets and ensure beneficiary designation forms are kept current to avoid unintended transfers, such as the transfer of wealth to a former spouse at death.

3. Intestacy

Servicemembers who die without a will or an invalid will become subject to the mercies of state intestacy statutes.[142] Servicemembers may intentionally elect this route in an effort to avoid probate or as the result of a common belief that dying without a last will and testament somehow facilitates a fair distribution of their estate upon their death. Commonly, a servicemember decides not to execute a will after consultation with legal counsel because he is insolvent and his only family members are his happily-married parents who do not require additional income. Contrary to these beliefs, reliance on state intestate succession statutes or holding only non-probate property can markedly frustrate the administration of an estate.[143] Furthermore, servicemembers face situations that change rapidly, such as winning the lottery, having a child out of wedlock, or becoming incapacitated. To meet the ever-changing demands of life with a degree of certainty and the minimization of

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[138] *See* I.R.C. § 1014(b)(6). However, the stepped-up basis advantage may be limited and the estate tax itself may not be applicable for deaths in 2010.

[139] *See e.g., id.* § 121 (establishing that if the recipient lived in the property for two out the previous five years, the $250,000 of gain would not be taxable).

[140] T.M. ESTATE PLANNING, *supra* note 21, at A-27.

[141] *See generally id.* at A-28 and A-151 (explaining that if property is held as a joint tenancy with right of survivorship (JTWROS), the joint owners hold concurrent ownership, but the survivor of the joint tenants succeed to the entire property interest pursuant to the contractual arrangement; contrasting JTWROS with property held as a tenancy in common where owners possess a proportionate interest in the property that may be alienated, devised, or inherited under local law).

[142] *See generally* National Conference of Commissioners on Uniform State Laws, Uniform Probate Code § 2-101 (rev. 2006 rev.), *available at* http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm (last visited Jan. 26, 2010) (discussing a model intestate succession statute, which many states have adopted in full or in part).

[143] *See id.* § 2-101 to 2-114 (discussing a model intestate succession statute, which many states have adopted in full or in part).

costs, servicemembers should specify in advance who they wish to appoint as executors and guardians and to whom property should be left at their death.

B. Building an Estate

The development of a well-balanced portfolio will assist servicemembers in withstanding the booms and busts of the modern economy. It may ultimately provide for their needs and the needs of their beneficiaries. This process begins with an investment in one's education, the acquisition of marketable skills, and the disciplined practice of cutting unnecessary expenses. It also includes the creation of a realistic budget and the establishment of a liquid financial reserve fund for genuine emergencies. Beyond these fundamentals, servicemembers should focus on building a well-balanced portfolio, which include life insurance, real estate, retirement and survivor benefits, and other prudent financial investments, all of which are described below.

1. Life Insurance

Servicemembers have many reasons to acquire life insurance.[144] For example, ownership of life insurance within one's taxable estate can provide for surviving family members or other beneficiaries in the event of the servicemember's death. It also provides liquidity to pay taxes and other expenses at the time of their death.[145] In addition, ownership of life insurance outside one's taxable estate provides a means to transfer substantial assets to younger generations with minimal tax consequences. These benefits make life insurance an indispensable option in addition to other types of insurance such as liability insurance, property insurance, and disability insurance. Considering the possibility of natural disasters and tort litigation, flood and umbrella policy insurance may also be of great benefit. Because life insurance has many different forms, some of which may produce income during the course of the owner's life, the following section describes the most common issues.

a. Forms of Life Insurance

Life insurance policies available through dependable insurers commonly include term or permanent/cash value policies.[146] While term insurance generally protects an insured individual for a specific period of time, has no cash value, and charges increasingly higher premiums as the policyholder ages, permanent/cash value life insurance generally accumulates up cash value over time,[147] offers investment-type options, and costs more.[148] Types of permanent policies include traditional fixed premium policies, such as whole life insurance, flexible-premium policies, such as universal life insurance, and variable policies, such as variable life insurance.[149] In contrast to whole and universal life insurance, variable life insurance imposes more risk on the insured because the policyholder generally has the ability to allocate premiums among investment sub-accounts that are "distinct from the insurer's general investment portfolio."[150] These term and cash value life insurance policies may be individual or joint policies, where a death benefit is paid on the death of the survivor.[151] Joint/survivorship policies may be especially useful where one of the insured might not otherwise be insurable or where individual policies may be too expensive.

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[144] *See* I.R.C. § 7702 (defining life insurance contracts). *See also* Helvering v. LeGierse, 312 U.S. 531 (1941) (defining life insurance's historic and essential characteristic of risk shifting and risk distribution).

[145] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-162.

[146] *See* HALLMAN & ROSENBLOOM, *supra* note 25, at 30–33, & 43 (describing the financial ratings and other considerations involved in selecting an insurer; distinguishing the general types of insurance available for consumers).

[147] *See id.* at 43-45.

[148] *See id.* For example, available options may include a guaranteed minimum return, the ability to change premium payments, and/or the ability to borrow or even withdraw from the policy.

[149] *See id.* at 43. *See also* T.M. ESTATE PLANNING, *supra* note 21, at A-163 (describing the different types of insurance policies available).

[150] HALLMAN & ROSENBLOOM, *supra* note 25, at 50.

[151] *Id.* at 53.

For most servicemembers, Servicemember's Group Life Insurance (SGLI)[152] and Family Servicemember's Group Life Insurance (FSGLI)[153] automatically cover servicemembers and their insurable dependents, unless a servicemember elects in writing not to be covered. As a type of group term life insurance policy, SGLI provides life insurance protection at a relatively low cost because it is a group policy partially subsidized by Congress.[154] One undesirable aspect of SGLI coverage is its termination after the completion of the policyholder's military service. At such time, former servicemembers may convert their SGLI policies into Veterans Group Life Insurance policies, while spouses may convert their FSGLI policies into commercial policies provided by participating life insurance companies.[155] Fortunately, these follow-on policies do not require proof of good health, provided the insured meets certain procedural requirements.[156]

b. Proceeds of Insurance and Ensuring a Smooth Process

To ensure an efficient transfer of wealth at the time of their passing, servicemembers should properly designate beneficiaries and account for tax consequences ahead of time. Specifically, servicemembers should coordinate their will and trust instruments with their life insurance beneficiary designation forms to minimize any potential inconsistencies or conflicts between the legal documents, especially when servicemembers want to designate ex-spouses, stepchildren, illegitimate children, non-Family members, or minor biological children as their beneficiaries.[157] Failure to coordinate and plan accordingly can result in unintended consequences. For example, if a servicemember fails to designate SGLI beneficiaries or the designation of SGLI beneficiaries otherwise fails, the SGLI proceeds will be distributed according to federal law, which may exclude intended beneficiaries or result in the distribution of funds to beneficiaries who are not mature enough to handle the responsibility of a sudden financial windfall.

Servicemembers can provide for minors using SGLI proceeds while ensuring beneficiaries do not receive funds too early by establishing a testamentary trust in their will for the benefit of their minor children and by making appropriate designations on their SGLI beneficiary form.[158] Those who believe the oversight provided by a trust is not necessary or is not worth the administration costs may instead designate a custodian of an UGMA or UTMA account for the benefit of their minor children.[159] Another important planning precaution is to account for the tax consequences of life insurance policies. To this end, owners of life insurance policies should understand that life insurance proceeds are generally not subject to income tax[160] but are included in the gross estate.[161] To ensure that life insurance proceeds are not included in the gross estate, an individual must neither own the policy nor retain incidents of ownership in the policy. This can be accomplished by establishing an irrevocable life insurance trust (ILIT) that could purchase and own the policy for the benefit of the insured's beneficiaries. Servicemembers who already own a commercial life insurance policy can transfer their policy to an ILIT, but, if they die within three years of the transfer, the value of the proceeds would be included in their gross estate.[162]

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[152] 38 U.S.C. § 1967. Servicemember's Group Life Insurance also automatically covers servicemembers who suffer traumatic injuries (i.e., Traumatic SGLI). *See id.* § 1980A (2006). *See generally* Captain Wojciech Z. Kornacki, *What Every Soldier and Legal Assistance Attorney Should Know about Servicemembers Group Life Insurance*, ARMY LAW., Nov. 2006, at 42, 42–52 (explaining the history of SGLI, the designation of beneficiaries, and the distribution of SGLI proceeds).

[153] *See generally* U.S. Dep't of Veterans Affairs, Servicemembers' & Veterans' Group Life Insurance, *available at* http://www.insurance.va.gov/sgliSITE/FSGLI/sglifam.htm (last visited Jan. 21, 2010) [hereinafter Veterans SGLI] (discussing the policies and procedures of how insurable dependants are insured by FSGLI; including web links to premium rates).

[154] *See* S. REP. NO. 91-398, at 2 (1969). "The low cost to individuals is made possible by insuring all members of the uniformed services under a single group insurance master contract, and by the government bearing the cost of the extra hazard attributable to military service." *Id.*

[155] *See, e.g.*, 38 U.S.C. § 1968(b)(1)(B); *id.* § 1977(e).

[156] *See* 38 U.S.C.A. § 1977(e) (LexisNexis 2010).

[157] *See* Ridgway v. Ridgway, 454 U.S. 46, 52 (1981) (holding that a servicemember has the right to freely designate his SGLI beneficiaries and to alter that choice at any time; holding that the designated beneficiary will take the life insurance proceeds despite contrary state law due to the supremacy clause).

[158] *See* DESKBOOK 2009, *supra* note 91, at L-51 (on file with author) (suggesting appropriate language and procedures to follow in filling out SGLI beneficiary designation forms). For example, on the SGLV Form 8236, servicemembers can designate their beneficiaries as follows: To my "trustee to fund a trust established for the benefit of my children under my will." *Id.*

[159] *See id.* at L-51 (on file with author). For example, on the SGLV Form 8236, servicemembers can designate their beneficiaries as follows: To "(Name of custodian), as custodian for each of my children, pursuant to the UGMA/UTMA of the state of (name of state), with distribution to each minor when that minor reaches age (desired age)." *Id*. *See also supra* note 91 and accompanying text (discussing UTMA and UGMA).

[160] *See* I.R.C. § 101(a)(1).

[161] *See id.* § 2042 (establishing the inclusion of life insurance proceeds in the gross estate). *See also id.* § 2035(a) (establishing the inclusion of life insurance proceeds in the gross estate if the decedent transferred the policy within three years of his death).

[162] *See id.* § 2035.

2. Real Estate

For many servicemembers, the greatest asset they own, other than life insurance, is real estate purchased as a principal residence and, potentially, used later as a rental property. By holding properties for longer periods of time, servicemembers can build wealth by paying down mortgages, experiencing tax savings, and benefitting from appreciation. Because they move frequently, servicemembers often find it difficult to keep their homes, unless they rent out the properties after moving to new duty stations. As a result, prior to buying a home, servicemembers should anticipate the rental cash flows that a property may generate to ensure that the income will sufficiently cover the mortgage, taxes, and other property expenses, such as management fees and repairs.[163]

Servicemembers who choose to be landlords must understand that their ability to deduct possible losses on their income tax returns may be limited by certain legal rules.[164] This is especially important during challenging economic times when properties may remain vacant for months or even years, resulting in significant rental losses. Fortunately, rental real estate qualifies for an exception to the rules that would otherwise limit a taxpayer's ability to deduct rental losses.[165] As long as individuals "actively participate" in the real estate activity, they can reduce their non-passive income (e.g., a salary) by up to $25,000 of rental real estate losses.[166] Assume that a taxpayer has salary income of $70,000, passive activity income of $10,000, active participation rental property income of $22,000, and active participation rental property losses of $60,000.[167] The taxpayer can offset $32,000 of the $60,000 losses against the $10,000 passive activity and $22,000 active participation rental property income. On these facts, the $25,000 "ceiling" limitation will limit the taxpayer's offset to only $25,000 of the remaining $28,000 (i.e., $60,000 – $32,000) worth of losses against his non-passive salary income. The remaining $3,000 of losses must be carried over to later years.[168] Although these provisions can be advantageous, servicemembers need to understand the difficulty of establishing that they qualify for active participation under a given set of circumstances.

As a related consideration, servicemembers who experience significant rental losses over time may struggle to make mortgage payments and ultimately may be unable to sell the property. As a result, they may encounter mortgage workouts, foreclosure, or even bankruptcy. Under prior law, if lenders forgave mortgage debt, the taxpayer could experience taxable income. However, due to recent tax code changes, individuals will face less threat of such cancellation of indebtedness income. The law provides that the discharge of indebtedness from a qualified principal residence will be excluded from the definition of gross income.[169] Furthermore, servicemembers who eventually rent their principal residence and later sell the property for a gain may be able to exclude some of that gain,[170] while those who rent property and sell at a loss may be able to offset that loss against other income.[171]

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[163] *See generally* Kan, *supra* note 4, at 8 (explaining the legal and financial analysis servicemembers should conduct prior to buying a home).

[164] *See* I.R.C. § 465 (limiting deductions of losses to the amount an individual has at risk in an activity). *See generally* BORIS BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS, at 19-20 to 19-30 (3d ed. 2002) (discussing how to identify and compute the at-risk amount). *See* I.R.C. § 469 (limiting passive activity losses and credits; defining "passive activity" as any activity which involves the conduct of a trade or business and in which the taxpayer does not materially participate). *See generally* BITTKER, *supra*, at 19-30 to 19-58 (discussing degrees of participation, types of activities, and the interaction between active and passive income and losses).

[165] *See* I.R.C. § 469(h) (defining "material participation" as an activity where the taxpayer is involved in the operations of the activity on a basis which is regular, continuous, and substantial). *See generally* BITTKER, *supra* note 164, at 19-50 to 19-53 (discussing I.R.C. §469(i)'s relaxation of the passive activity rules to rental real estate).

[166] *See* BITTKER, *supra* note 164, at 19-50 to 19-52 (describing "active participation" as a less stringent standard than "material participation" that can be met if the taxpayer has a significant and bona fide role in management; explaining that the participation of a spouse is taken into consideration by attribution so that the nonparticipating spouse is deemed to "actively participate" if her spouse "actively participates"). *See* I.R.C. § 469(i). But there are phase-out limitations that apply for those taxpayers with adjusted gross income over $100,000. *See id.* § 469(i)(3).

[167] *See* BITTKER, *supra* note 164, at 19-51 (showing the same example).

[168] *See* I.R.C. § 469(b).

[169] *See id.* § 108(a)(1)(E). Gross income also does not include the discharge of indebtedness due to the taxpayer's insolvency. *See id.* § 108(a)(1)(B). *See also* Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803. *See generally* Note, *Update for 2007 Federal Income Tax Returns*, ARMY LAW., Dec. 2007, at 60, 71 (explaining the implications of amending I.R.C. § 108(a)). *See generally* JONES, *supra* note 41, at 2.5 (discussing the principal residence exclusion provision's extension until December 31, 2012 due to the Emergency Economic Stabilization Act of 2008).

[170] *See* I.R.C. § 121 (2010) (establishing the exclusion of gain from the sale of a principal residence and the significance of nonqualified use of the residence). *See generally* Major Patricia K. Hinshaw, *Tax Primer for Servicemembers with Residential Rental Property*, ARMY LAW., Nov. 2009, at 1, 10–11 (explaining the exclusion of gain under I.R.C. § 121 and the limitations concerning qualified and non-qualified use of the property after 1 January 2009). *See generally* Kan, *supra* note 4, at 23–25 (contrasting the ability to sell rental properties and take losses, with the ability to sell personal residences and exclude income even though the servicemember rented the property out and did not live in the property due to periods of qualified extended duty).

[171] *See* I.R.C. § 165(c) (discussing losses). However, if their homes are not rented out and treated as rental properties, taxpayers cannot deduct the loss upon sale of their homes. *See* INTERNAL REVENUE SERV., PUB. 523, SELLING YOUR HOME 4 (2008); *see also* 26 C.F.R. §§ 1.165-9 (2010) (discussing losses). In

Fortunately, the Homeowner Assistance Program (HAP), administered by the U.S. Corps of Engineers, may cushion the financial blow for servicemembers, certain civilian employees, and surviving spouses who sold their homes at a loss or were unable to sell their homes due to the recent mortgage crisis or a base closure.[172] Those who qualify for the program[173] may get reimbursed for allowable closing costs of the sale of their home plus the difference between the sales price and an applicable percentage of their original purchase price.[174] If qualifying members cannot sell their homes, the Government can acquire the home for an applicable percentage of the prior fair market value.[175] In addition, the benefits accorded by HAP are excludable from federal income tax.[176]

3. Retirement and Survivorship Planning

a. Individual Retirement Accounts

In addition to real estate investments, servicemembers should strongly consider contributing to traditional[177] and Roth[178] individual retirement accounts (IRA) as part of a diversified portfolio.[179] While traditional IRAs allow servicemembers to make deductible contributions, which grow on a tax deferred basis, lower income phase-out amounts,[180] age, and other limitations may significantly restrict potential benefits from traditional IRAs.[181] In contrast, Roth IRAs do not allow servicemembers to make deductible contributions,[182] but allow qualified distributions to be made tax free.[183] Roth IRAs are not limited by the numerous restrictions imposed by traditional IRAs. For example, unlike traditional IRAs, the phase-out

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addition, if their homes are not rented for profit, taxpayers can deduct rental expenses only up to the amount of the rental income. *See* INTERNAL REVENUE SERV., PUB. 527, RESIDENTIAL RENTAL PROPERTY 5 (2008).

[172] *See* Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, §§ 101–114, 80 Stat. 1255 (codified as amended at 42 U.S.C. § 3301–3313 (1968) (establishing HAP). *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001 (expanding HAP). *See* 32 C.F.R. § 239 (authorizing HAP).

[173] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001 [hereinafter ARRA]. In general, to qualify for the program, individuals must fall into one of three categories: (1) A servicemember or DOD or non-appropriated funds (NAF) civilian employee who purchased a primary residence before 1 July 2006, at or near a military installation that has been ordered to be closed, who sold the property between 1 July 2006 and 30 September 2012, and who did not previously benefit from HAP; (2) A servicemember or DoD/U.S. Guard civilian employee who was wounded or became ill in the line of duty during a deployment (for civilian employees the deployment must have been on or after 11 September 2001), or their surviving spouse if the member died in the line of duty or as a result of a wound, injury, or illness incurred in the line of duty during a deployment on or after 11 September 2001, and the spouse relocates within two years of the member's death; (3) A servicemember who purchased a primary residence before 1 July 2006, who was reassigned between 1 February 2006 and 30 September2012, to an installation more than fifty miles from his previous installation, and who did not previously benefit from HAP. *See id. See* 32 C.F.R. § 239.6.

[174] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1001. *See* 32 C.F.R. § 239.5(a)(2). Under current implementing policy, the applicable percentage is 95% if the applicant is a Wounded Warrior or civilian, or a Surviving Spouse, and 90% for other applicants. *See* 32 C.F.R. § 239.5(a)(4). *See generally* U.S. Dep't of Defense—Homeowners Assistance Program, Benefits, *available at* http://hap.usace.army.mil/Benefits.html (last visited Jan. 21, 2010) [hereinafter Assistance Program].

[175] *See* ARRA of 2009, *supra* note 173, § 1001. The Government may purchase the primary residence for the greater of the applicable percentage of the prior fair market value (i.e., usually the purchase price) of the residence or the total amount of the eligible mortgage that remains outstanding. *See* 32 C.F.R. § 239.5(a). Under current implementing policy, the applicable percent is 95% if the applicant is a Wounded Warrior or civilian, or a Surviving Spouse, and 75% for other applicants (in addition, other applicants do not receive closing costs). *See id.* § 239.5(a)(4).

[176] *See* I.R.C. § 132(n) (2010). *See also* INTERNAL REVENUE SERV., PUB.4491-X, SUPP., NEW TAX LEGISLATION & OTHER UPDATES TO VITA/TCE TRAINING PRODUCTS 5 (2009) [hereinafter PUB. 4491-X].

[177] I.R.C. § 408 (2009).

[178] *Id.* § 408A.

[179] *See generally* Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1, 8 (explaining the difference between traditional and Roth IRAs).

[180] *See* I.R.C. § 219(g). For example, for the 2009 tax year, the IRA deduction for single and head of household taxpayers who are active participants in employer's retirement plans begin to be phased-out when their modified adjusted gross income (MAGI) reaches $55,000, and are completely phased-out when their MAGI reaches $65,000. *See* CCH, 2010 U.S. MASTER TAX GUIDE 687 (2009) [hereinafter 2010 U.S. MASTER TAX GUIDE]. For married filing joint return taxpayers, the phase-out amounts are $89,000 and $109,000 respectively. *See id*. at 688. In contrast, for the 2009 tax year, "the maximum yearly contribution that can be made to a Roth IRA is phased out for a single individual with modified AGI between $105,000 and $120,000, [and] for joint filers with modified AGI between $166,000 and 176,000. . . ." *Id*. at 693.

[181] *See* I.R.C. § 219. *See also* DESKBOOK 2006, *supra* note 13, at S-6 to S-12 (on file with author) (explaining the numerous restrictions of traditional IRAs).

[182] *See* I.R.C. § 408A(c)(1) (2009).

[183] *See id.* § 408A(d)(1). Roth IRA qualified distributions should be contrasted with traditional IRA distributions which are generally includable in gross income. *See id.* § 408(d).

amounts for Roth IRA contributions are higher,[184] individuals may make contributions after reaching age seventy-and-a-half,[185] and Roth IRAs are not subject to the required minimum distribution rules.[186]

The benefits of Roth IRAs may appeal to servicmembers, especially if servicemembers earn income that is above the phase-out levels for traditional IRAs and can only make nondeductible contributions.[187] If servicemembers believe they will occupy a higher income tax bracket when they receive IRA distributions, they may want to consider converting their traditional IRAs to Roth IRAs now that the Internal Revenue Code has eliminated the $100,000 adjusted gross income limit for conversions in tax years after 2009.[188] Not only can taxpayers earning taxable income contribute to their own IRAs, but they can also contribute to spousal IRAs, even if their spouses do not earn income.[189] Furthermore, in situations where contributors have deployed, servicemembers can still participate in IRAs even though they do not earn taxable income, as they may have received only tax-free combat pay due to continual deployment throughout the tax year.[190]

b. The Thrift Savings Plan

Participation in the Thrift Savings Plan (TSP),[191] a defined contribution plan similar to a 401(k)[192] plan, may be advantageous for servicemembers.[193] The primary benefits of contributing to the TSP are the tax deferral of income, ease of making contributions, and extremely low fund maintenance costs.[194] In 2011, the TSP will begin to offer the significant new benefit of a Roth 401(k) feature.[195] For 2009 and 2010, servicemembers can make contributions up to $16,500, and up to $49,000 if they are in a combat zone.[196] The TSP offers several investment funds with varied rates of return,[197] including lifecycle funds, a government securities fund, a fixed income index fund, a common stock index fund, a small capitalization stock index fund, and an international stock index fund.[198] Unfortunately, while civilian employers often match employee

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[184] *See generally* HALLMAN & ROSENBLOOM, *supra* note 25, at 364 (contrasting traditional IRAs with Roth IRAs that are not affected by coverage under employer retirement plans). For example, in 2009, "the maximum yearly contribution that can be made to a Roth IRA is phased out for a single individual with modified AGI between $105,000 and $120,000, [and] for joint filers with modified AGI between $166,000 and 176,000 . . . ." 2010 U.S. MASTER TAX GUIDE, *supra* note 180, at 693. The phase-out amounts for a single and a joint filer who are active participants in employer's retirement plans are $55,000–$65,000, and $89,000-$109,000 respectively. *See id*. at 688.

[185] *See* I.R.C. § 408A(c)(4).

[186] *See id*. § 408A(c)(5).

[187] *See generally* HALLMAN & ROSENBLOOM, *supra* note 25, at 367 (describing that the only real tax advantage of making non deductible IRA contributions is that the investment income and capital gains will accumulate in the IRA without current income taxation).

[188] *See* I.R.C. § 408A(c)(3)(B).

[189] *See generally* HALLMAN & ROSENBLOOM, *supra* note 25, at 370 (describing spousal IRAs).

[190] *See* I.R.C. § 219(f)(7). *See generally* TJAGLCS Practice Note*: Update for 2006 Federal Income Tax Returns*, ARMY LAW., Dec. 2006, at 51, 51 (explaining the implications of the Heroes Earned Retirement Opportunities (HERO) Act which allowed tax-free combat zone pay to be considered for purposes of determining qualification for IRA contributions).

[191] 5 U.S.C. §§ 8431–8840 (2006). *See* Thrift Savings Plan, *available at* http://www.tsp.gov (last visited Apr. 12, 2009) (providing a wealth of information regarding the Thrift Savings Plan including applicable forms and publications as well as historical rates of returns for each type of TSP fund). *See generally* Captain Anita J. Fitch, *Thrift Savings Plan Update*, ARMY LAW., Dec. 2005, at 70, 70–71 (explaining changes to the TSP enrollment procedures and changes through the selection of asset allocations).

[192] I.R.C. § 401(k).

[193] *See generally* MAJOR DAVID TRYBULA & LIEUTENANT COLONEL RICHARD HEWITT, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 278–80 (5th ed. 2002) (evaluating the advantages and disadvantages of the TSP, including the Government's failure to provide matching contributions for servicemembers).

[194] *See generally* Thrift Savings Plan, *supra* note 191. For example, servicemembers can have contributions taken directly from their pay without the high minimum initial investments typical of many mutual funds.

[195] *See* 5 U.S.C. § 8432(d). *See* Thrift Savings Plan, Is the TSP Offering a Roth 401(k) Feature?, *available at* http://www.tsp.gov/forms/oc06-5.pdf (last visited Jan. 25, 2010).

[196] *See* I.R.C. § 402(g) (2010) (limiting income exclusions for elective deferrals). *See id.* § 415(c) (allowing contributions of more than the I.R.C. § 402(g) elective deferral limit to servicemembers in combat zones). *See* Thrift Savings Plan, Summary of the Thrift Savings Plan 5, *available at* http://www.tsp.gov/forms/tspbk08.pdf (last visited Jan. 25, 2010).

[197] *See* Thrift Savings Plan, TSP Individual Funds Historical Rates, *available at* http://www.tsp.gov/rates/history-summary.html (last visited Apr. 12, 2009) (showing that ten year compounded rates of return from 1999 to 2008 ranged from a negative 1.4% for the common stock index fund to a positive 5.7% for the fixed income index fund).

[198] *See* Thrift Savings Plan, Thrift Saving Plan Fund Information, March 2008, *available at* http://www.tsp.gov/forms/fundsheets-all.pdf (last visited Apr. 12, 2009).

contributions to 401(k) plans as a significant incentive to encourage contributions, the Government currently does not match the contributions of military TSP participants.[199] This and other TSP limitations, may motivate servicemembers to maximize their own Roth IRA and their spouse's 401(k) to the extent of employer matching contributions before contributing to the TSP.[200]

c. Retirement and Survivor Benefits[201]

Servicemembers who are eligible for retirement may take advantage of one of the few remaining defined benefit retirement plans without the need to financially invest in defined contribution plans like their civilian counterparts. Although most retired servicemembers must wait before eventually receiving social security benefits,[202] they enjoy the luxury of immediately drawing a reliable monthly government paycheck without the necessity of a single financial contribution.[203] Retired servicemembers also qualify for numerous additional benefits, including post-exchange and commissary privileges, reduced medical costs, and free space-available travel.[204]

Retirees may also benefit from the Survivor Benefit Plan (SBP), a program that provides a potential lifetime annuity to beneficiaries at the retiree's death.[205] The SBP automatically covers all active duty servicemembers once they become retirement eligible.[206] However, in general, those who do not want to participate, or want less than spousal SBP coverage based on full retired pay once they retire, must get their spouse's written consent and must submit their election not to fully participate before they retire.[207] Retirees participating in SBP experience a reduction in their retirement pay to cover the costs of premiums, but their survivors will benefit from an annuity paid upon their death.[208] Like regular annuities that allow the decedent to designate beneficiaries, the SBP annuity distributed to survivors is taxable as ordinary income to the beneficiaries, and includable in the retiree's gross estate.[209]

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[199] *See* MARGARET H. BELKNAP & F. MICHAEL MARTY, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 210 (6th ed. 2007). Although the statute authorizes matching contributions, the service secretaries are not currently authorizing matching servicemember contributions. *See* Thrift Savings Plan, Summary of the Thrift Savings Plan 4, *available at* http://www.tsp.gov/forms/tspbk08.pdf (last visited Jan. 25, 2010).

[200] *See* BELKNAP & MARTY, *supra* note 199, at 199 (recommending a specific retirement savings priority list with a servicemember's Roth IRA as the highest priority).

[201] *See generally* Cole, *supra* note 179, at 1–8 (explaining the numerous government survivor benefits available to servicemembers).

[202] *See generally* BELKNAP & MARTY, *supra* note 199, at 275–84 (discussing eligibility and the benefits of social security). *See* U.S. Social Security Administration, http://www.ssa.gov (last visited Apr. 12, 2009) (providing a wealth of information on social security).

[203] *See generally* BELKNAP & MARTY, *supra* note 199, at 285 (discussing the three military retirement systems).

[204] *See generally* SPACE-A TRAVEL.COM, WORLDWIDE SPACE-A TRAVEL HANDBOOK & RV CAMPING GUIDE (13th ed. 2002) (offering an indispensable and, by far, the most useful guidebook for servicemembers regarding free space-A travel; providing domestic and international travel policies, major flight routes and schedules, phone and fax numbers to installations worldwide, and useful maps and descriptions of each base to facilitate travel and lodging).

[205] *See* 10 U.S.C. § 1447 (2006) (defining SBP terms). *See generally* TRYBULA & HEWITT, *supra* note 193, at 355–66 (describing SBP and evaluating it financially compared to life insurance; concluding that SBP is an excellent program that guarantees a secure income for a surviving spouse and dependent children that cannot be eroded by inflation due to cost of living allowances). *See generally* BELKNAP & MARTY, *supra* note 199, at 290 (listing the advantages and disadvantages of participating in SBP). *See generally* My Army Benefits, *available at* http://myarmybenefits.us.army.mil/EN/default.aspx (last visited Aug. 24, 2009) [hereinafter My Army Benefits] (calculating available benefits).

[206] *See* 10 U.S.C. § 1448(d).

[207] *See* DOD FMR, *supra* note 33, at vol. 7B, ch. 43, para. 430101 & 430303 (June 2008), *available at* http://comptroller.defense.gov/fmr/07b/07b_43.pdf (last visited Feb 2, 2010). Elections that do not comply with all the requirements, such as having the spouse's consent witnessed by at least one person, will be disregarded and the retiree will be enrolled for the full amount of SBP coverage. *See id.* *See* 10 U.S.C. § 1448(a)(2). *See also* Dept. of Health and Human Services, Form PHS-5150: Survivor Benefit Plan (SBP) Election Certificate, *available at* http://dcp.psc.gov/PDF_docs/phs5150.pdf (last visited Feb 2, 2010) (providing a form to make an SBP election).

[208] *See* MyArmyBenefits, MyArmyBenefits Survivorship Calculator, *available at* https://myarmybenefits.us.army.mil/PreBuilt/customapps/Survivorship/Instructions.aspx (last visited Jan. 25, 2010) [hereinafter Survivorship Calculator] (last visited Jan. 25, 2010). *See* Dept. of Defense Office of the Actuary, SBP Program Premium, *available at* http://actuary.defense.gov/ (last visited Feb. 2, 2010) (providing a calculator to determine the cost of active duty retiree SBP premiums and a probability estimator to compute the probability that a retiree's spouse will outlive the servicemember and benefit from SBP). U.S. Army Human Resources Command, Calculate Survivor Benefit Plan Application, *available at* https://www.hrc.army.mil/site/reserve/soldierservices/retirement/survivorbenefitpaycalc.asp (last visited Feb. 2, 2010) (providing those with AKO access a calculator to calculate the premiums and benefits of SBP for reserve servicemembers).

[209] *See* DOD FMR, *supra* note 33, at vol. 7B, ch. 46, para. 461401 & 461405 (Dec. 2009), *available at* http://comptroller.defense.gov/fmr/07b/07b_46.pdf (explaining that SBP monthly annuity amounts received by beneficiaries are subject to federal income tax; recommending that executors handling the estates of servicemembers should contact the General Actuarial Branch of the IRS to compute the value of the SBP annuity for federal estate tax purposes). *See also* DESKBOOK 2009, *supra* note 91, at L-18 and G-51, app. C (on file with author) (showing a calculation of the estate tax value of the SBP upon the death of a retired military member).

For those servicemembers who die on active duty in the line of duty,[210] their eligible survivor beneficiaries qualify for numerous benefits, including SBP,[211] dependency and indemnity compensation (DIC),[212] dependents educational assistance (DEA),[213] social security, death gratuities,[214] the Marine Gunnery Sergeant John David Fry Scholarship,[215] and other benefits.[216] Many benefits, including DIC and the death gratuity, are neither includable in the decedent's gross estate nor taxable to the recipient.[217] Despite these tax savings, servicemembers must be concerned that their conduct (e.g., a finding that their conduct was not in the line of duty) may cause their families to lose many of these benefits.

In addition, servicmembers and their families should be prepared for their government benefits to decrease in the future, such as when dependent children reach the age of 18 and social security drops to zero (until the surviving spouse reaches age 62).[218] Furthermore, servicemembers and their family members must stay alert as the available federal and state benefits frequently and continually change each year. As a result, servicemembers must plan their financial affairs appropriately so that their beneficiaries are financially supported in the event of their untimely death. A balanced financial portfolio will help accomplish this objective.

4. Financial Investments

A well-balanced financial portfolio includes not only life insurance, real estate, and a retirement plan, but also a calculated asset mixture including investments such as stocks, bonds, precious metals, treasuries, and cash. Servicemembers can build a balanced portfolio by using asset allocation models, which attempt to reduce risk through diversification among several asset classes.[219] Diversifying between equity, fixed income, growth, value, short-, and long-term investments can

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[210] *See* DOD FMR, *supra* note 33, vol. 7B, ch. 46, para. 460204 (Dec. 2009), *available at* http://comptroller.defense.gov/fmr/07b/07b_46.pdf (explaining that a servicemember's death will generally be considered to be in the line of duty unless the death occurred under one of the following conditions: (1) the death occurred while the servicemember was not serving on active duty; (2) the death resulted from the servicemember's own intentional misconduct or willful negligence; or (3) the death occurred during a period of unauthorized absence).

[211] *See* 10 U.S.C. § 1448(d)(1)(B) (establishing automatic SBP benefits for servicemembers who die in the line of duty while on active duty). *See* DOD FMR, *supra* note 33, at vol. 7B, ch. 46, para. 460201 (Dec. 2009), *available at* http://comptroller.defense.gov/fmr/07b/07b_46.pdf (establishing the active duty death requirements to qualify for SBP).

[212] *See* 38 U.S.C. §§ 1301–1322. Surviving spouses who receive both DIC and SBP, have their SBP annuity amount "offset by DIC, unless the eligible surviving spouse remarries after age 57, and thereby, retains entitlement to DIC. A surviving spouse who receives DIC due to remarriage after age 57 becomes entitled to the full SBP annuity unreduced by DIC, as well as the full DIC amount." DOD FMR, *supra* note 33, at vol. 7B, para. 460401. *See also* Sharp v. United States, 580 F.3d 1234 (Fed. Cir. 2009) (holding that surviving spouses who remarried after the age of 57 were entitled to SBP payments unreduced by any offset for DIC payments). Surviving spouses who have their SBP annuity amount offset by DIC may qualify for Special Survivor Indemnity Allowance (SSIA), a monthly amount which increases from $60 in 2010 to $310 in 2017. *See* 10 U.S.C. § 1450(m). Because government benefits change constantly, servicemembers, family members, and financial advisors must stay attuned to current developments. One way to see the most current benefits is to visit the MyArmyBenefits website. *See* My Army Benefits, *supra* note 208. Those who do not stay current and abide by appropriate timelines may experience financial loss. For example, surviving family members who do not file DIC applications within one year of the servicemember's death will only receive DIC payments as of the date the Veterans Administration receives the claim. *See* 38 C.F.R. § 3.400 (Westlaw 2010).

[213] *See* 38 U.S.C. §§ 3500–3566 (2006).

[214] *See* 10 U.S.C. § 1475.

[215] *See* 38 U.S.C. § 3311 (entitling children of servicemembers who die in the line of duty on or after 11 September 2001, to Post 9/11 Educational Assistance). *See generally* Veterans Administration, Post 9/11 GI Bill: Marine Gunnery Sergeant John David Fry Scholarship, *available at* http://www.gibill.va.gov/ documents/Fry_Scholarship.pdf (last visited Jan. 27, 2010) (providing an information paper on who is eligible for the scholarship and how the benefits will be paid).

[216] *See, e.g.*, 10 U.S.C. § 1482 (establishing burial benefits). *See e.g.*, DESKBOOK 2009, *supra* note 91, at L-43 to L-45 (on file with author) (listing benefits such as the shipment of household goods, the temporary allowance to live in military housing or receive basic allowance for housing, commissary and post-exchange privileges, and the right to medical care and legal assistance). Surviving family members who would like free professional assistance attaining all the benefits to which they are entitled, as well as, managing their financial assets should see advisors at FinancialPoint and the Armed Forces Services Corporation. *See generally* U.S. Dept of Veterans Affairs, Free Financial Counseling Service, *available at* http://www.insurance.va.gov/SGLISITE/BFCS.htm (last visited Feb. 2, 2010) (providing information about free financial counseling services provided by FinancialPoint). *See generally* Armed Forces Services Corporation, Member Services, *available at* http://www.afsc-usa.com/services_to_members.html (last visited Feb. 2, 2010) (providing commission free referrals concerning financial decisions).

[217] *See* I.R.C. § 134(b)(3)(C). *See generally* 10 U.S.C §§ 1448(d). *See generally* Major Dana J. Chase, *Survivors Benefit Update*, ARMY LAW., Dec. 2008, at 20, 23 (describing changes to the taxability of survivor benefits due to the Heroes Earnings Assistance and Relief Tax Act of 2008 and The National Defense Authorization Acts for Fiscal Years 2007–2009).

[218] *See e.g.*, Survivorship Calculator, *supra* note 208 (showing that many benefits such as social security, SSIA, and even SBP may decrease to zero depending on the circumstances) (last visited Jan. 25, 2010).

[219] *See* HALLMAN & ROSENBLOOM, *supra* note 25, at 233 (describing asset allocation strategies and models).

achieve liquidity and reduce overall financial risk.[220] Investors can maintain liquidity by "laddering" assets, whereby investors invest amounts that mature in different years over time.[221] By "laddering" fixed income investments, such as certificates of deposits (CDs) insured by the Federal Deposit Insurance Corporation (FDIC), servicemembers can guard against interest rate fluctuations and the loss of capital, provide liquidity as assets become available over time, and benefit from higher interest rates compared to investing only in shorter-term investments.[222] As the CDs mature, servicemembers can use the funds to meet expenses or reinvest. Other beneficial fixed income investments include U.S. savings bonds, which provide tax advantages such as the exclusion of savings bond interest from income taxes when taxpayers use Series EE bonds to pay college tuition and fees.[223]

While fixed income investments provide liquidity and protect assets against interest rate fluctuations—as well as outright loss of one's investment principal—equity investments protect against inflation and often generate significant financial gains during economic booms. Investors can achieve broad diversification in equities through mutual funds and exchange traded funds (ETFs). When investing in equities, servicemembers can invest a fixed dollar amount in mutual funds every month in a strategy commonly known as "dollar cost averaging." This practice can be used in all different types of mutual funds such as those that focus on growth, value, precious metals, or international exposure.[224] Dollar cost averaging forces the investor to invest in both good and bad economic times, which can result in the purchase of a greater number of shares at lower prices and benefit from rising prices, assuming the market improves over time.[225] Those who believe they can identify market bottoms when they can purchase a large number of shares at discount prices, might rather invest in a few ETFs to save on fund maintenance costs.[226] ETFs also tend to generate fewer capital gains in addition to saving costs because most ETFs are index funds that experience a lower turnover of securities.[227]

Digesting all of these investment opportunities within the current challenging economic environment can be overwhelming to a servicemember. As a result, servicemembers should develop a methodical strategy to deal with these issues by properly positioning themselves through regular investing, rebalancing portfolios, diversifying their assets, and applying the investment principles of the time value of money and compound interest. Essentially, to maximize their future financial growth potential, servicemember must pay themselves by saving and investing first, and then by paying bills second. Paying oneself first, by automatically investing funds directly out of one's pay or bank accounts, allows investors to invest early in their careers and thus compound their earnings over time. More important, paying oneself first forces investors to live on less while retaining the flexibility to splurge (e.g., cut back on one's savings) if emergencies arise.

V. Step Four: Transferring Assets Out of the Gross Estate and Related Tax Consequences

As servicemembers acquire wealth, they may become subject to the estate tax or GST tax, especially in light of possible reductions in the unified credit. As a result, these individuals should plan ahead to avoid the unnecessary taxes that would otherwise deplete their assets at a significant cost to their beneficiaries. Those who remain unaffected by the estate tax may also plan accordingly to ensure that any lifetime transfers they might make will be subject to only minimal income and gift tax consequences. Legal and financial guidance from qualified experts is necessary before investors decide how to proceed on these complex issues. The following sections explore the tax consequences of one's active measures to minimize taxation.

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[220] *See id.* at 234–35.

[221] *See id.* at 135.

[222] *See id.* at 202.

[223] *See* I.R.C. § 135 (excluding U.S. savings bonds income from the definition of gross income if the redeemed funds are used for higher education expenses, certain modified adjusted gross income amounts are not exceeded, the bonds were issued after 1989, and the bonds were issued to someone over the age of twenty-four before the date of issuance). *See* HALLMAN & ROSENBLOOM, *supra* note 25, at 198.

[224] *See* HALLMAN & ROSENBLOOM, *supra* note 25, at 215–16 (explaining that growth funds target capital appreciation in companies while precious metal funds are surrogates for holding gold or other precious metals directly).

[225] *See id.* at 158–59 (providing an example of dollar cost averaging in table 9.1). Dollar cost averaging "normally results in a lower average cost per share than the average market price per share during the period in question, because the investor buys more shares with the fixed amount of money when the stock is low in price than when it is high." *Id.*

[226] *See* BELKNAP & MARTY, *supra* note 199, at 168 (discussing that mutual funds are best for more frequent purchases of shares, while ETFs are best for large dollar-amount purchases, because mutual funds avoid brokerage fees for multiple-share purchases while ETFs charge brokerage fees for each transaction). *See generally* HALLMAN & ROSENBLOOM, *supra* note 25, at 230 (discussing the differences between mutual funds and ETFs such as that ETFs are traded on an organized exchange and bought and sold through brokerage firms, and that ETFs can be traded through limit orders, sold short, and purchased on margin).

[227] *See* BELKNAP & MARTY, *supra* note 199, at 167.

A. Minimizing Taxation Before Death: Lifetime Gifts

Although the future of the federal estate and GST taxes remain uncertain, the gift tax will remain in full force. The federal gift tax provides a limited unified credit[228] for lifetime gifts before taxpayers must pay gift tax. To maximize the value of this credit, servicemembers should fully disclose the value of gifts in timely-filed gift tax returns. This precaution fixes the value of the transfers and starts the statute of limitations for gifts whose value may later be challenged by the Internal Revenue Service during an audit.[229] Such disclosure is especially important for transfers of property that have the potential to realize substantial appreciation over time. By transferring such property, taxpayers can remove substantially appreciating assets from their estates while paying gift tax on the transfers to reduce the value of their gross estates.

Considering the Government allows only a limited gift tax credit, servicemembers should take full advantage of strategies that avoid using the credit, such as the annual exclusion, the marital deduction, the charitable deduction, and financial principals that maximize the use of these transfers (e.g., leverage, discounts, and the time value of money). Servicemembers should also use nontaxable gifts, such as direct transfers to educational institutions for tuition and to medical service providers for health services and long term care.[230] The effective use of all these tools during one's lifetime can enable many servicemembers to deplete their estates and totally avoid estate and generation skipping transfer taxes.

1. Annual Exclusions

Using annual exclusions is one of the easiest ways to deplete an estate free of tax consequences. Specifically, the Government allows a donor to make a certain dollar amount of tax-free gifts (other than gifts of future interests) to any person in a given year.[231] Servicemembers may double the amount that they can transfer tax free by making split gifts with their spouses and filing applicable gift tax returns. By making split gifts, each spouse is treated as the donor of half the gift, which uses the annual exclusion of both spouses.[232] Taxpayers can further increase the amount that they can transfer in a single calendar year using annual exclusions by contributing to certain plans (e.g., 529 plans) for the purpose of paying a beneficiary's future qualified higher education expenses.[233] This transfer not only qualifies as a completed gift in the year of transfer (i.e., not as a gift of a future interest), it also allows for the consideration of any amount contributed over the annual exclusion ratably over five years, beginning with the year of the transfer.[234] The operation of this provision permits individuals to frontload up to ten annual exclusions in a single year, if their spouses make split gifts to such plans.

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[228] *See* I.R.C. § 2505(a) (2010). The federal gift tax credit is currently $1 million. As a result, taxpayers can make $1 million of taxable gifts before they must begin paying gift tax.

[229] *See id.* § 6501(a) (providing a three year statute of limitations for the IRS to assess and challenge gift valuations). This is especially important, because the value of these lifetime taxable gifts will be considered when calculating estate taxes, which incorporates the value of adjusted taxable gifts. *See id.* § 2001(f). In general, if the Government unsuccessfully attempts to collect a tax, interest, or penalty, and it cannot establish that its position was substantially justified, taxpayers may be able to be awarded a judgment for reasonable administrative and litigation costs incurred. *See id.* § 7430.

[230] *See id.* § 2503(e) (excluding certain transfers for educational and medical expenses from treatment as transfers of property by gift for purposes of Chapter 12 of the gift tax).

[231] *See id.* § 2503(b) (establishing an annual exclusion of $10,000 and adjusting the amount each year for inflation). In 2009 and 2010, the annual exclusion was $13,000. *See id.*

[232] *See id.* § 2513(a) (considering spousal gifts to third parties as made one-half by each spouse). Individuals making split gifts must file IRS Form 709. Once spouses make the gift splitting election, gift splitting will apply to "all such gifts made during the calendar year by either [spouse] while married to the other." *See id.*

[233] *Id.* § 529. *See generally* Lieutenant Colonel Craig D. Bell & Maureen C. Ackerly, *A Primer: Section 529 Plans, Coverdell Education Savings Accounts (Education IRAs), and Other Tax-Smart Ways to Save for College*, ARMY LAW., Apr. 2004, at 28, 28–44 (discussing the use of 529 plans and other ways to save for college and, as a result, deplete a taxpayer's gross estate). In addition, servicemembers can save for college and reduce the money needed to pay educational expenses by taking advantage of opportunities to pay in-state tuition at public institutions of higher education. For example,

> In the case of a member of the armed forces who is on active duty for a period of more than 30 days and whose domicile or permanent duty station is in a State that receives assistance under this chapter, such State shall not charge such member (or the spouse or dependent child of such member) tuition for attendance at a public institution of higher education in the State at a rate that is greater than the rate charged for residents of the State.

20 U.S.C.A. § 1015d(a) (Westlaw 2010).

[234] I.R.C. § 529(c)(2).

The use of other, more sophisticated, leveraging tools, including Crummey[235] powers, life insurance trusts, and split gifts, can further maximize annual exclusions when used in conjunction. For example, if a transferor contributes the annual exclusion amount every year to an irrevocable trust for the benefit of a beneficiary, the beneficiary can be given the power to withdraw the amount for a period of thirty days after the contribution (i.e., Crummey powers) to ensure the amount qualifies for the annual exclusion as a gift of a present interest. If the beneficiary is provided adequate notice of his right to withdraw and voluntarily chooses not to withdraw the funds, the trust can use the funds to purchase life insurance on the transferor's life[236] and pay the required premiums.[237] Since the trust would own the life insurance policy, the life insurance proceeds would not be included in the servicemember's gross estate at his death. Those interested in even more sophisticated techniques should seek the advice of an experienced estate planner to discuss the numerous possibilities available.[238]

2. Spousal Gifts and Limitations to Foreign Spouses

Servicemembers can also deplete their estates by making lifetime gifts to spouses. In general, lifetime gifts to U.S. citizen spouses qualify for the unlimited marital deduction.[239] However, gifts to non-U.S. citizen spouses do not qualify in the same manner.[240] Instead, gifts that "would have qualified for the marital deduction had the donee spouse been a U.S. citizen" can be given tax-free, as long as the gift's value falls within a maximum amount established by law, indexed for inflation.[241] For example, in 2010, a spousal donor could gift a non-U.S. citizen spouse up to $134,000 tax-free.[242]

3. Charitable Gifts

Contributions to charity allow servicemembers to take advantage of both income tax and gift tax charitable deductions[243] while simultaneously achieving their charitable objectives at a significantly reduced "net real cost."[244] For example, a taxpayer in the 45% gift tax bracket could effectively transfer $14,500 to a public charity at the same cost as transferring $10,000 to a non-charitable beneficiary (assuming annual exclusions did not apply) and paying the resulting $4,500 in gift taxes (i.e., 0.45 x $10,000 = $4,500). In addition to taking gift tax charitable deductions and efficiently removing property

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[235] Crummey v. Comm'r, 397 F.2d 82 (9th Cir. 1968). *See generally* STEPHENS, *supra* note 62, at 9-29 to 9-34 (discussing how Crummey powers can be used to qualify for the annual exclusion and avoid the problems created by a transfer of future interests). As an alternative to using Crummey powers, transferors could establish defective grantor trusts for income tax purposes, to buy insurance on the transferor's life.

[236] To buy life insurance, there must be an insurable interest. The general principal behind requiring an insurable interest is to allow only those who will be hurt by the insured's death to purchase a policy on the insured's life.

[237] The trust may take advantage of the "5 & 5 rule" and include "hanging powers," a controversial technique that the IRS does not believe works, to prevent a gift from being made from the beneficiary to the trust. Using these powers, the right to withdraw would lapse every year to the extent of the greater of $5,000 or 5% of the trust's corpus, while the remaining amount would "hang" in the balance and lapse in subsequent years as the corpus of the trust grows.

[238] *See generally* T.M., ESTATE PLANNING, *supra* note 21, at A106 to A107 (providing a useful discussion of the use of defective grantor trusts). *See generally* Rev. Rul. 2004-64 (establishing the ability of owners of defective grantor trusts to pay the income taxes of the trust without being treated as making gifts to the trust beneficiaries). *See generally* Samuel A. Donaldson, Fundamentals of Grantor Trusts 242–44 (June 18–23, 2006), *available at* http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CL092_chapter_03_thumb.pdf (last visited Apr. 22, 2009) (discussing the use of Crummey powers in defective grantor trusts; explaining that many practitioners do not give Crummey powers to beneficiaries of defective grantor trusts due to the uncertainties involved). *See generally* HOWARD M. ZARITSKY, *GRANTOR TRUSTS: SECTIONS 671–679* (2d Portfolio 858) (Tax Mgmt. Inc. 2001) (discussing the numerous aspects of grantor trusts).

[239] *See* I.R.C. § 2523(a) (2010). *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-88 (explaining the gift tax marital deduction). *But see* I.R.C. § 2523(b) (denying an unlimited deduction for gifts of terminable interests).

[240] I.R.C. § 2523(i). *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-88 (explaining the tax implications of gifts to non-U.S. citizen spouses).

[241] T.M. ESTATE PLANNING, *supra* note 21, at A-88.

[242] *See* Rev. Proc. 2009-50, sec. 3, para. 30 (2009) (establishing the cost-of-living adjustments for 2010).

[243] *See* I.R.C. § 170 (outlining the income tax charitable deduction). *See id.* § 2522 (outlining the gift tax charitable deduction). *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-175 to A-186 (explaining the tax implications of charitable transfers). STEPHENS, *supra* note 62, at 11-3. In contrast, I.R.C. § 2055(c) reduces the estate tax charitable deduction for estate taxes paid from the charitable bequest, while I.R.C. § 642(g) preclude double deductions under the estate tax for charitable bequests. *See id.* at 5-62 to 5-63. Specifically, under § 642(g), the estate tax charitable deduction is reduced by administrative expense deductions taken under § 2053 and losses taken under § 2054. *See id.* at 5-62 to 5-63. *See* I.R.C. §§ 642(g) and 2055(c). As a result, servicemember may want to make only charitable gifts rather than charitable bequests to maximize the beneficial tax savings effect. For those who want to make charitable bequests, servicemembers may want to consider specifying in their will that taxes will be paid out of other funds rather than out of the charitable bequest pro rata, to ensure that the charitable estate tax deduction is not reduced under I.R.C. § 2055(c).

[244] T.M. ESTATE PLANNING, *supra* note 21, at A-176.

from their gross estates, taxpayers could take income tax deductions for charitable contributions, although the deductions may be limited by factors such as the donor's adjusted gross income and the specific status of the charitable recipients.[245]

To increase the benefits of charitable deductions, instead of contributing cash, servicemembers can donate appreciated tangible personal property, such as a valuable painting to an art museum. Where there is clearly "related use" between the contributed property and the public charity (e.g., the museum will display the donated painting for the public's pleasure rather than selling it to generate income to feed the homeless), the taxpayer will be entitled to a charitable deduction equal to the painting's full fair market value, even though the gain resulting from the painting's appreciation is not included in the taxpayer's gross income.[246]

4. Premiums, Discounts, and other Valuation Issues

To maximize gift transfers while minimizing tax implications, servicemembers can also take advantage of valuation issues. Servicemembers who own a family business can use minority interest, lack of marketability, and fractional interest discounts to transfer property to others at a tax value that is a fraction of its inherent value.[247] Furthermore, due to historically low interest levels, taxpayers may take advantage of more advanced instruments, such as short-term rolling grantor retained annuity trusts (GRATs).[248] "Zeroing out" the GRATs, taxpayers can make tax-free transfers of assets that are expected to appreciate substantially while retaining an income interest for the term of the GRAT equal to the value of the original transfer.[249] Reliance on historically low interest rates (i.e., "the hurdle rate") often prompts GRAT assets to outperform the interest rate, producing a significant remainder for tax-free transfer.[250] At the expiration of the short-term GRAT, servicemembers can create another GRAT (hence the term "short-term rolling GRATs"), creating further opportunities to outperform the "hurdle rate" and make tax-free transfers of remainder interests. Where the servicemember dies during the term of the GRAT, the Internal Revenue Code includes the entire amount, including any appreciation, in the servicemember's gross estate.[251]

B. Minimizing Taxation at Death: Using Available Credits and Deductions

To minimize the overall tax effect on a family and maximize the funds available for transfer to beneficiaries, taxpayers should structure their estate planning documents and transactions to take advantage of both spouses' federal estate and GST tax exemptions and available deductions, such as the marital and charitable deductions. Specifically, servicemembers who want to provide for their spouses by deferring tax should ensure that their estate planning documents include appropriate formula clauses that allow them to fall back on the unlimited marital deduction after using their exemptions.[252] The most

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[245] *See* I.R.C. § 170(b). For example, the income tax deduction for a cash contribution to a public charity is limited to 50% of the taxpayer's adjusted gross income. *See id.* § 170(b)(1)(A). In contrast, the income tax deduction for a cash contribution to certain non operating private foundations (e.g., a foundation that just makes grants) is limited to 30% of the taxpayer's adjusted gross income. *See id.* § 170(b)(1)(D)(i)(II). Fortunately, excess contributions can be carried over for five years. *See id.* § 170(b).

[246] *See id.* § 170(e)(1)(B)(i)(I). *See* T.M. ESTATE PLANNING, *supra* note 21, at A-177.

[247] *See generally* STEPHENS, *supra* note 62, at 10-56 to 10-66 (explaining available premiums and discounts with regard to transfers of interests in property). It important to understand that discounts are layered and not cumulative. For example, if a taxpayer has a 20% lack of marketability discount and a 40% other type of discount, the taxpayer only has a 52% discount (i.e., 20% + (80% x 40%) rather than a 60% discount. *See* Estate of Bailey v. Comm'r, 83 T.C.M. (C.C.H.) 1862 (2002). In addition, servicemembers, especially those interested in shifting effective control in a family business to younger generations, need to ensure they do not inadvertently run afoul of the special valuation rules of Chapter 14 of the Internal Revenue Code. *See* I.R.C. §§ 2701-2704. *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-191 to A-209 (explaining the complicated provisions and almost punitive effects of Chapter 14).

[248] *See* I.R.C. § 2702 (2010). In general, to qualify for a GRAT, there must be a fixed annuity amount paid at least annually without the possibility of commutation or payment via a note. *See generally* Treas. Reg. § 25.2702-3(b) & (d) (2009) (establishing the requirements and limitations of GRATs).

[249] *See* Walton v. Comm'r, 115 T.C. 589 (2000).

[250] *See* I.R.C. § 7520 (establishing the applicable interest rates which change monthly (e.g., March 2009 had a rate of 2.4%)).

[251] *See id.* § 2036(a).

[252] *See id.* § 2056. In general, to qualify for the marital deduction for bequests, etc., to the surviving spouse, the decedent must have been survived by his spouse, the value of the interest deductible must be includible in the decedent's gross estate, the interest must pass from the decedent to the surviving spouse, and the interest must not be a nondeductible terminable interest. *See id.* Some examples of exceptions to these general requirements to qualify for the unlimited marital deduction include marital deduction and QTIP trusts, as well as, transfers to non US citizen spouses. *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-48 to A-77 (explaining the estate tax marital deduction).

effective clauses leave spouses with assets in a marital deduction trust[253] in an amount determined by a formula.[254] Such a clause will ensure that servicemembers use their full exemption, leaving the maximum amount to their beneficiaries in a credit shelter or bypass trust, free of federal estate and GST taxes. Additionally, any estate assets over the full exemption amount would pass to the surviving spouse and be protected by the unlimited marital deduction, ultimately deferring taxes due until the surviving spouse's death.

Servicemembers who want to provide for a surviving spouse and defer taxes while maintaining control of the ultimate disposition of funds should consider establishing a qualified termination of interest property (QTIP) trust.[255] The unlimited marital deduction clause in a QTIP trust must provide all income (except stub income) to the spouse, at least annually, and disallow any other permissible beneficiary during the spouse's lifetime.[256] In addition, the executor must make an irrevocable QTIP election on the decedent's estate tax return. Depending on the circumstances, an executor may make either a full or partial QTIP election [257] to minimize taxes. The flexibility of the election itself and the ability to make the election as late as fifteen months after the decedent's death[258] gives the executor the ability to do significant postmortem estate planning.[259]

For servicemembers with non-U.S. citizen spouses, a qualified domestic trust[260] (QDOT) can accomplish some of the same objectives as a QTIP trust, including the deferment of estate taxes. To ensure the property transferred does not escape U.S. estate taxation, the law requires that at least one trustee be either a U.S. citizen or a U.S. corporation (unless the Department of the Treasury waives the requirement), and that no distributions, other than of income, be made unless the trustee has the power to withhold applicable taxes.[261] In contrast to a QTIP trust, a QDOT can still qualify for the marital

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[253] I.R.C. § 2056(b)(5). In general, to qualify for the unlimited marital deduction under § 2056(b)(5), the trust must pay all income (except stub income) to the surviving spouse at least annually and give the spouse a general power of appointment that is "exercisable by such spouse alone and in all events." *Id. See also* Regs. 20.2056(b)-7(d)(4) (specifying that stub income, income between the last distribution date and the date of the surviving spouse's death, need not be paid to the surviving spouse or to the surviving spouse's estate).

[254] *See, e.g.*, STANLEY JOHANSON, WILLS & ESTATES FALL SEMESTER 1999 SUPPLEMENTAL MATERIALS, pt. VI, at 65 (1999). As an example, a formula clause could include the following language:

> If my wife survives me, I give to [my wife] [the trustee of a marital deduction trust] a cash legacy in an amount which, when added to the value for federal estate tax purposes of all items in my gross estate which qualify for the marital deduction and which pass or have passed to my wife in a form qualifying for the marital deduction otherwise than under this . . . [bequest], produces *the smallest marital deduction* (and thus *the largest taxable estate*) that will result in no federal estate tax being payable by my estate, after allowing for the . . . [estate tax] credit against the federal estate tax and all other factors that affect my estate's federal estate tax liability. In making this computation, values as finally determined for federal estate tax purposes should be used. If no federal estate tax would be payable by my estate even if no gift were made by this paragraph, this gift shall not me made.

Id.

[255] I.R.C. § 2056(b)(7). *See also* Regs. 20.2056(b)-7(d)(4) (specifying that stub income, income between the last distribution date and the date of the surviving spouse's death, need not be paid to the surviving spouse or to the surviving spouse's estate). *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-58 to A-62 (explaining QTIPs and their requirements; warning of the dangers associated with the estate making a QTIP election that was not necessary to reduce estate tax liability and the corresponding possible relief available for a surviving spouse under Rev. Proc. 2001-38).

[256] *See* I.R.C. § 2056(b)(7).

[257] *See, e.g.*, JOHANSON, *supra* note 254, pt. VI, at 103 (on file with author). As an example, a partial QTIP election might include the following formula language:

> I elect qualified terminable interest property treatment for the following fractional share of the residuary trust created by . . . the decedent's will: The numerator of the fraction shall be an amount which, when added to the value for federal estate tax purposes of all items in the decedent's gross estate which qualify for the marital deduction and which pass or have passed to the decedent's spouse in a form qualifying for the marital deduction otherwise than under this trust, produces the smallest marital deduction (and thus the largest taxable estate) that will result in no federal estate tax being payable by the decedent's estate, after allowing for the . . . [estate tax] credit against the federal estate tax and all other factors that affect my estate's federal estate tax liability. The denominator of the fraction shall be the value of the corpus of the residuary trust. In making this computation, values as finally determined for federal estate tax purposes shall be used.

Id. The elected portion would be includable in the spouse's gross estate under §2044 while the unelected portion would bypass the spouse's estate. *Id.* Pt. VI, at 104.

[258] Nine months to file the federal estate tax return plus six months if the estate gets an extension.

[259] *See* I.R.C. § 2056(b)(7) (2010).

[260] *Id.* § 2056A. *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A50 and A-74 to A-75 (explaining the history and requirements of the QDOT; discussing how to conduct marital deduction transfers to non-U.S. citizens surviving spouses).

[261] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-74. The U.S. trustee is personally liable for the taxes if they are not paid.

deduction even though there is no requirement to pay the surviving spouse all the income at least annually.[262] In addition, unlike a QTIP trust, lifetime distributions from a QDOT other than distributions of income will be subject to estate tax when made, and any property remaining will be subject to the estate tax at the surviving spouse's death.[263]

C. Minimizing Taxation After Death: Postmortem Planning

After a servicemember's death, executors and beneficiaries can still conduct postmortem estate planning using various mechanisms, such as using an alternate valuation date[264] if the decedent's gross estate depreciates after the decedent's death,[265] and selecting an estate's accounting year[266] if the estate's income can be spread out more evenly. In addition, servicemembers can use three powerful postmortem planning techniques including QTIP elections, qualified disclaimers, and the choice of where and when to take deductions. For example, by making a QTIP election after the decedent's death, the executor can modify the use of the marital deduction and ensure the full use of the decedent's unified credit.[267]

A beneficiary can accomplish similar results by making a qualified disclaimer.[268] By making an "irrevocable and unqualified refusal"[269] to accept the property transferred, the property will bypass the beneficiary, as if the beneficiary died before the decedent. This technique can be extremely useful in cases where the use of the marital deduction "overfunds" the marital transfer.[270] For instance, if a taxpayer with a $4.5 million gross estate died in 2009 leaving his entire estate to his independently wealthy spouse, the taxpayer would overfund the marital transfer wasting the unified credit. To resolve this error, the surviving spouse could disclaim $3.5 million of assets.[271] As a result, the disclaimed $3.5 million of assets could pass tax-free to their children. Furthermore, if the taxpayer had not previously used his GST exemption and the children to whom the assets would pass were themselves wealthy, the children could make a qualified disclaimer,[272] passing the property to their children (i.e., the taxpayer's grandchildren) free of federal estate and GST taxes. In short, while $1 million would pass to the surviving spouse tax-free under the unlimited marital deduction, $3.5 million could escape both the federal estate and GST taxes.

Executors can engage in further postmortem planning by selecting whether and when to take funeral, administrative, and medical expenses[273] on either the decedent's last income tax return, the estate's income tax return, or the estate's estate tax return.[274] If estate taxes are not due as a result of the unified credit and marital deduction, executors may choose to deduct an

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[262] *See* I.R.C. § 2056A(a)(2); T.M. ESTATE PLANNING, *supra* note 21, at A-75 (explaining that the Revenue Reconciliation Act of 1989 deleted the requirement of former § 2056A(a)(2) requiring current income distributions).

[263] *See* I.R.C. § 2056A(b)(1).

[264] *See id.* § 2032.

[265] *See* T.M. ESTATE PLANNING, *supra* note 21, at A-253 (explaining that the alternate valuation date is six months after death, unless the property was distributed, sold, exchanged, or otherwise disposed at an earlier date, in which case that earlier date would be applicable date).

[266] *See id.* at A-241 (describing the advantages of having the estate select either a fiscal or calendar year such as the deferral of taxes through staggered fiscal years).

[267] *See generally* STEPHENS, *supra* note 62, at 5-174 (discussing the advantages of allowing the executor to make a QTIP election as a method of post mortem planning; describing how to make a QTIP election).

[268] *See* I.R.C. § 2046 (referencing the uniform disclaimer rules of § 2518 which also apply for purposes of the estate tax). *See id.* § 2518 (defining qualified disclaimers and explaining the implications of making qualified disclaimers). *See generally* STEPHENS, *supra* note 62, at 10–108 (discussing disclaimers).

[269] *See* I.R.C. § 2518(b). To qualify as a qualified disclaimer, (1) the refusal must be in writing and received by the transferor not later than nine months after the interest's creation (i.e., the testator's death) or the beneficiary's 21st birthday, (2) the beneficiary must not accept the property nor any of its benefits, and (3) as a result of the refusal, the property must pass without any direction on the part of the beneficiary to the spouse of the decedent or to a person other than the person making the disclaimer. *Id.* As a result, "[t]o minimize complications, wills or trusts should have an express provisions as to what will happen if a property interest is disclaimed." HALLMAN & ROSENBLOOM, *supra* note 25, at 523. *See generally* STEPHENS, *supra* note 62, at 10-118 (discussing that a resident's use of residential property held in joint tenancy or as community property, is not acceptance of the property).

[270] T.M. ESTATE PLANNING, *supra* note 21, at A-75.

[271] *See generally* HALLMAN & ROSENBLOOM, *supra* note 25, at 523–24 (showing a similar example from a decedent dying in 2002). The unified credit in 2009 would protect the transfer of $3.5 million.

[272] *See generally* STEPHENS, *supra* note 62, at 10-108 (discussing timely disclaimers). It is important to note that a "person who receives an interest in property as a result of a qualified disclaimer of the interest must also disclaim the previously disclaimed interest no later than nine months after the date of the taxable transfer creating the interest." *Id.* In short, if the property is left by will, all parties over the age of twenty-one must disclaim within nine months of the decedent's death. *See id.* at 10–116.

[273] *See* I.R.C. § 2053.

[274] *See generally* T.M. ESTATE PLANNING, *supra* note 21, at A-239 (discussing post-mortem planning techniques).

administrative expense on the estate's income tax return. In contrast, if both income and estate tax is due, executors may choose to deduct the expenses on the estate tax return as it will generally be "more valuable"[275] as a estate tax deduction. However, if both income and estate taxes are due and the executor takes deductions on the estate's income tax return, rather than the estate's estate tax return, the estate tax will increase to the detriment of the remainder beneficiaries while the income tax will decrease to the benefit of the income beneficiaries.[276] If the remainder and income beneficiaries are not the same people, these issues may create conflicts.

VI. Conclusion

The current unpredictable economic climate has created substantial challenges for servicemembers seeking to build wealth and provide for beneficiaries after death. While proper financial planning requires substantial energy and intense thought, it is essential. Servicemembers should be especially cautious of estate planning ramifications and tax consequences of investments and property transfers. Any effort at tax and estate planning should begin with the guidance of a knowledgeable and trained professional. After servicemembers have executed a will and power of attorney, they should strive to become better informed about the tax system so that they can use the system to their advantage.

Building wealth and providing for future generations requires diversification of assets and commitment of funds in a manner that does not expose assets to excessive risk. The acquisition of life and property insurance serve as a productive starting point, but servicemembers can reap significant benefits from regular investments in financial assets such as a Roth IRA diversified mutual fund that facilitates tax savings, dollar cost averaging, the compounding of funds, and the exploitation of the time value of money. Exposure to both fixed income and equity investments can also benefit servicemembers. While fixed income investments, such as "laddered" CDs and savings bonds, protect against the loss of capital in economic busts, equity investments allow servicemembers to benefit from economic booms. In addition, those wishing to reap potentially huge benefits from owning real property should consider purchasing well-located properties that will sustain themselves with positive rental cash flows when the property no longer serves as a principal residence.

In order to generate funds for investment, maintain liquid financial reserves, and sustain a diversified, balanced portfolio, servicemembers must be prepared to live beneath their means. They may begin by cutting expenses and taking advantage of numerous military benefits, such as free education and space available travel, as well as, reduced on-post housing costs and utility fees. Automatically investing one's annual pay raises and tax refunds can also increase the availability of funds by preventing servicemembers from continually increasing their living standards every time their wealth increases. Servicemembers who elect to work after achieving retirement from the military can invest their military retirement pay check while paying monthly bills with their civilian employment's earnings. However, the best way to reduce expenses is for servicemembers and retirees simply to distinguish their needs from their wants. By focusing on actual needs, such as basic food, clothing, and shelter, servicemembers can steer clear of the dangers of keeping up with their neighbors and can expedite their journey to financial freedom and success.

A final step to attaining financial security and building wealth for oneself and for one's family is the establishment of a comprehensive plan to transfer wealth to beneficiaries in a tax-efficient manner. By taking advantage of annual exclusions, direct tuition payments to schools, direct payments to medical providers, the unified credit, charitable deductions, and the marital deduction, servicemembers can set themselves and their beneficiaries up for success. In short, conscientious legal and financial planning combined with a diversified investment strategy will help servicemembers build and keep the wealth they have earned through a lifetime of work. These measures will also allow servicemembers to pass more of that wealth to future generations with minimal losses to taxes.

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[275] *Id.* at A-239.

[276] *See id*. at A-242.

Appendix A

Exclusions, Exemptions, and Gift / Estate / GST Tax Rates[277]

Year	Annual Gift Exclusion	Estate / GST Exclusion	Gift Tax Exclusion	Highest Estate & Gift Tax Rate
2002	$11,000	$1 Million	$1 Million	50%
2003	$11,000	$1 Million	$1 Million	49%
2004	$11,000	$1.5 Million	$1 Million	48%
2005	$11,000	$1.5 Million	$1 Million	47%
2006	$12,000	$2 Million	$1 Million	46%
2007	$12,000	$2 Million	$1 Million	45%
2008	$12,000	$2 Million	$1 Million	45%
2009	$13,000	$3.5 Million	$1 Million	45%
2010	$13,000	(Taxes Repealed)	$1 Million	35%
2011	To be Determined	$1 Million	$1 Million	55% (EGTRRA Sunsets)

[277] *See* JOINT COMMITTEE, *supra* note 5, at 11 and 14 (showing similar tables). *See* DESKBOOK 2006, *supra* note 13, at G-5 (on file with author) (showing a similar table). *See* JOINT COMMITTEE, *supra* note 5, at 11 and 14 (showing similar tables). *See supra* note 58 and accompanying text (explaining that EGTRRA sunsets on 31 December 2010).

Appendix B

Federal Gift Tax Computation Examples[278]

Hypo A: Colonel Smith, who has previously never made any taxable gifts to anyone, gave his niece a home worth $688,000 in 2009 and gave his nephew a condominium worth $338,000 in 2010.

Hypo B: The same as Hypo A, except Colonel Smith's gift of the condominium to his nephew in 2010 is worth $500,000.

	2009	(Hypo A) 2010	(Hypo B) 2010
Gift	$688,000	$338,000	$500,000
- Annual Exclusion	- 13,000	-$13,000	-$13,000
= Taxable Gift	= $675,000	$325,000	$487,000

Taxable Gift	$675,000	$325,000	$487,000
+ Prior Taxable Gifts	- 0	+675,000	+675,000
= Total Taxable Gifts	= $675,000	=$1,000,000	=1,162,000

Tax of Total Gifts under I.R.C. § 2502(a)	$220,550[279]	$330,800[280]	$387,500[281]
- Tax from Gifts made in Prior Years	- 0	- 0	- 0
= Gift Tax in Current Year	= $220,550	= $330,800	= $387,500

Gift Tax in Current Year	$220,550	$330,800	$387,500
- Federal Gift Tax Credit (Unified Credit)[282]	- 220,550	-330,800[283]	-330,800
= Gift Tax Owed	= $0	= $0	= $56,700

[278] *See* DESKBOOK 2006, *supra* note 13, at G-12 (on file with author) (showing a similar example).

[279] *See* I.R.C. § 2502(a) (2009) (applying gift rates under I.R.C. § 2001(c) for gifts made *prior to* 31 December 2009). For example, tax on taxable gifts of $675,000 = 155,800 + .37 x (675,000 – 500,000) = $220,550.

[280] *See id.* § 2502(a)(2) (applying gift rates for gifts made *after* 31 December 2009). For example, tax on taxable gifts of $1,000,000 = 155,800 + .35 x (1,000,000 – 500,000) = $330,800.

[281] *See id.* § 2502(a)(2) (applying gift rates for gifts made *after* 31 December 2009). For example, tax on taxable gifts of $1,162,000 = 155,800 + .35 x (1,162,000 – 500,000) = $387,500.

[282] *See id.* § 2505(a) (setting the federal gift credit imposed for gift taxes imposed by I.R.C., § 2501).

[283] *See id.* § 2505(a) (setting the federal gift credit imposed for gift taxes imposed by I.R.C., § 2501). For example, the maximum credit for lifetime gifts = $155,880 + .35 x (1,000,000 – 500,000) = $330,800.

Appendix C

Outline for Calculating Federal Estate Tax[284]

IRC Section	Property Covered
§2033	Property Owned at Death
+ §2035	Certain Transfers Within Three Years of Death
+ §2036	Transfers with Retained Life Estate or Retained Control
+ §2037	Transfers Taking Effect at Death
+ §2038	Revocable Transfers
+ §2039	Annuities and Employee Death Benefits
+ §2040	Property Passing by Rights of Survivorship
+ §2041	General Powers of Appointment
+ §2042	Life Insurance Proceeds (Where Decedent Held Incidents of Ownership)
+ §2043	Transfers for Partial Consideration
+ §2044	QTIP Transfers for which Marital Deduction was Previously Allowed

= **Gross Estate (GE)**

	Type of Deduction
- §2053	Deduction for Administrative and Funeral Expenses, as well as Debts
- §2054	Deduction for Casualty Losses
- §2055	Charitable Deduction
- §2056	Marital Deduction
- §2058	Deduction for State Death Taxes Paid (dying between 1 JAN 05 - 31 DEC 09)

= **Taxable Estate**

+ Adjusted Taxable Gifts Taxable Gifts Made After 1976 not Otherwise Includable in GE

= **Tentative Estate Tax Base**

x §2001 Estate Tax Rate Schedule

= **Tentative Estate Tax**

	Type of Credit
- Gift Taxes Paid on Taxable Gifts Made After 1976	
- §2010	Estate Tax Unified Credit
- §2011	Credit for State Death Taxes (decedents dying after 31 DEC 10)
- §2012	Credit for pre-1977 Gift Taxes on Property Included in Gross Estate
- §2013	Credit for Taxes on Prior Transfers *to* Decedent (i.e., prior inclusion in *a* GE)
- §2014	Credit for Foreign Death Taxes

= **Federal Estate Tax**

[284] *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 869–70 (7th ed. 2005) (showing a similar outline). *See also* HALLMAN & ROSENBLOOM, *supra* note 25, at 472 (showing a more general outline).

Appendix D

Federal GST Tax Calculation Examples[285]

Task: Ensure that skip person grandchild receives $100,000 in 2002.

Conditions: Servicemember Transferor is in the 50% gift, estate, and GST tax brackets. Neither the unified credit nor annual exclusions are available.

Standard: Incur the least federal transfer taxes by comparing the alternatives.

Alternative 1: Inter Vivos Direct Skip to Grandchild (This is the Best Alternative)

Amount Received by Grandchild	**$100,000**
+ GST Tax on Gift	+ 50,000
+ Federal Gift Tax on Gift	+ 50,000
+ Federal Gift Tax on GST Tax Paid	+ 25,000
= Total Funds Needed for Transfer	**= $225,000**

Alternative 2: Testamentary Direct Skip Transfer to Grandchild (i.e., A Bequest)

Funds Necessary for Bequest	**$300,000**
- Federal Estate Tax on Funds	- 150,000
- GST Tax on Bequest	- 50,000
= Amount Received by Grandchild	**= $100,000**

Alternatives 3 and 4: Transfer to Grandchild from Testamentary Trust (e.g., Taxable Distribution and Taxable Termination)

Funds for Bequest to Testamentary Trust	**$400,000**
- Federal Estate Tax on Funds	- 200,000
- GST Tax Paid by Grandchild or Trustee	- 100,000
= Amount Received by Grandchild	**= $100,000**

[285] *See* T.M., ESTATE PLANNING, *supra* note 21, at A-146 (showing a similar example). The year 2002 was chosen in the example as the year of transfer, because the 50% gift, estate, and GST tax brackets existing at that time simplify calculations.

Appendix E

State Income Tax (A Quick Reference Guide)

STATE	MILITARY PAY EXCLUDED?	MIL. RETIREMENT PAY EXCLUDED?	CITATION
Alabama	No	Yes	ALA. CODE § 40-18-3 (LexisNexis 2009), ALA. CODE § 40-18-20 (LexisNexis 2009)
Alaska	No State Income Tax	No State Income Tax	ALASKA STAT. § 43.20.010 (2009)
Arizona	Yes[286]	Partial[287]	ARIZ. REV. STAT. § 43-1022 (LexisNexis 2008)
Arkansas	Partial[288]	Partial[289]	ARK. CODE ANN. § 26-51-306 (2008), ARK. CODE ANN. 26-51-307 (2008)
California	Yes[290]	No	CAL. REV. & TAX. CODE § 17140.5 (Deering 2009)
Colorado	No[291]	Partial[292]	COLO. REV. STAT. § 39-22-103 (2008), COLO. REV. STAT. § 39-22-112 (2008), COLO. REV. STAT. § 39-22-104 (2008)
Connecticut	Yes[293]	No	CONN. GEN. STAT. § 12-701 (2008)
Delaware	No	Partial[294]	DEL. CODE ANN. tit. 30, § 1121 (2009), DEL. CODE ANN. tit. 30, § 1106 (2009)
Florida	No State Income Tax	No State Income Tax	FLA. STAT. ANN. *§ 220.02 (LexisNexis 2009)*
Georgia	No	Partial[295]	GA. CODE ANN. § 48-7-27 (2009)
Hawaii	No	Yes	HAW. REV. STAT. § 235-2.3 (2009); HAW. REV. STAT. § 235-7 (2009)

[286] ARIZ. REV. STAT. § 43-1022 (Westlaw 2010). Excluded from Arizona state tax is "compensation received for active service as a member of the reserves, the national guard or the armed forces of the United States."

[287] ARIZ. REV. STAT. § 43-1022 (Westlaw 2010). Up to $2500 in military retirement benefits may be excluded for Arizona state tax purposes.

[288] ARK. CODE ANN. § 26-51-306 (Westlaw 2010). Only the first $9000 of active duty pay is exempt.

[289] ARK. CODE ANN. § 26-51-307 (Westlaw 2010). Up to $6000 of pension is excluded.

[290] CAL. REV. & TAX. CODE § 17140.5 (Deering 2009). An individual domiciled in California when entering the military is considered to be a nonresident while stationed outside of California on PCS orders. *See* STATE OF CALIFORNIA FRANCHISE TAX BOARD, FTB PUB. 1032 TAX INFORMATION FOR MILITARY PERSONNEL (2009), *available at* http://www.ftb.ca.gov/forms/2009/09_1032.pdf (last visited Feb. 12, 2010).

[291] COLO. REV. STAT. § 39-22-103 (Westlaw 2010). An individual domiciled in Colorado who Is absent from the state for a period of at least three hundred five days of the tax year and is stationed outside of the United States of America for active military duty may file as a non-resident.

[292] COLO. REV. STAT. § 39-22-104 (Westlaw 2010). Servicemembers age fifty-five to sixty-four may exclude up to $20,000 of their military retirement benefits. Servicemembers age sixty-five and up may exclude up to $24,000.

[293] CONN. GEN. STAT. § 12-701 (Westlaw 2010). A servicemember domiciled in Connecticut may qualify as a non-resident for tax purposes if he meets either of the following requirements: (A) 1. Maintains no permanent place of abode in CT. 2. Maintains a permanent place of abode elsewhere. 3. Spends no more than thirty days of the taxable year in CT. or (B) 1. Within any period of 548 consecutive days, he is not present in the state for more than 90 days and does not maintain a permanent place of abode in CT [with some exceptions].

[294] DEL. CODE ANN. tit. 30, § 1106 (Westlaw 2010). Servicemembers under age sixty may exclude up to $2000 of their pension. Those age sixty and over may exclude up to $12,500.

[295] GA. CODE ANN. § 48-7-27 (Westlaw 2010). For taxable years beginning on or after 1 January 2008, Georgia allows a retirement exclusion of up to $35,000 for individuals age sixty-two or over.

Idaho	Yes[296]	Partial[297]	IDAHO CODE ANN. § 63-3013 (2008), IDAHO CODE ANN. §63-3022A (2008)
Illinois	Yes	Yes	35 ILL. COMP. STAT. ANN. 5/203 (LexisNexis 2009)
Indiana	No	Partial	IND. CODE ANN. § 6-3-2-1 (LexisNexis 2009), IND. CODE ANN. § 6-3-2-3.7 (LexisNexis 2009)
Iowa	No	Partial	IOWA CODE § 422.9 (2008)
Kansas	No	Yes	KAN. STAT. ANN. § 79-32,117 (2008)
Kentucky	Yes[298]	Partial	Joe Biesk, *Income Tax Exemption to Benefit Military Personnel*, DAILY INDEP., July 3, 2009, KY. REV. STAT. ANN. § 141.021 (LexisNexis 2009)
Louisiana	Partial[299]	Yes	LA. REV. STAT. ANN. § 47:293 (2009), LA. REV. STAT. ANN. § 47:44.2 (2009)
Maine	No	Partial[300]	ME. REV. STAT. ANN. tit. 36, § 5122 (2009)
Maryland	No	Partial[301]	MD. CODE ANN., TAX-GEN. § 10-207 (2009)
Massachusetts	No	Yes	MASS. ANN. LAWS ch. 62, § 2 (LexisNexis 2009)
Michigan	Yes	Yes	MICH. COMP. LAWS SERV. § 206.30 (LexisNexis 2009)
Minnesota	Yes[302]	No	MINN. STAT. § 290.01 (2008)
Mississippi	No	Yes	MISS. CODE ANN. § 27-7-15 (2008)
Missouri	Yes[303]	Partial[304]	MO. REV. STAT. § 143.041 (2009), MO. REV. STAT. § 143.123 (2009)
Montana	No	Partial[305]	MONT. ADMIN. R. 42.15.219 (2009)
Nebraska	No	No	NEB. REV. STAT. ANN. § 77-2716 (LexisNexis 2009), NEBRASKA DEPT. OF REVENUE, NEBRASKA INCOME TAX FOR MILITARY SERVICE MEMBERS AND CIVILIANS WORKING WITH U.S. FORCES IN COMBAT ZONES 1 (2009), *available at* http://www.revenue. ne.gov/info/8-364.pdf. (last visited Jul. 20, 2009)
Nevada	No State Income Tax	No State Income Tax	Nevada Dept. of Taxation, *available at* http://tax.state. nv.us (last visited Jul. 20, 2009).

[296] IDAHO CODE ANN. § 63-3013 (Westlaw 2010). Servicemembers who are absent from the state for at least 445 days in a fifteen-month period are not considered residents and do not have to file an Idaho income tax return. This classification does not apply to servicemembers who (1) have a permanent home where their spouses or minor children live for more than sixty days in any calendar year or (2) claim Idaho as their tax home for Federal Income Tax purposes. Servicemembers regain their resident status when they spend more than sixty days in Idaho in any calendar year.

[297] IDAHO CODE ANN. §63-3022A (Westlaw 2010). Retirement pay is excluded once servicemember reaches age of sixty-five, or sixty-two if disabled.

[298] Joe Biesk, *Income Tax Exemption to Benefit Military Personnel*, DAILY INDEP., July 3, 2009, http://www.dailyindependent.com/statenews/local_story_184083714.html/resources_printstory. Active duty military pay is exempt for Kentucky state tax purposes starting January 2010.

[299] LA. REV. STAT. ANN. § 293(9)(e) (Westlaw 2010) ("[I]n the case of an individual who is on active duty as a member of the armed forces of the United States, which full-time duty is or will be continuous and uninterrupted for one hundred twenty consecutive days or more, total compensation paid for services performed outside this state by the armed forces of the United States of up to thirty thousand dollars shall be excluded from "tax table income" and is hereby declared exempt from state income taxation.").

[300] ME. REV. STAT. ANN. tit. 36, § 5122 (Westlaw 2010). Servicemembers may deduct up to $6000 of their military pensions.

[301] MD. CODE ANN., TAX-GEN. § 10-207 (Westlaw 2010). The first $5000 of military retired pay may be excluded.

[302] MINN. STAT. § 290.01 (Westlaw 2010). Members of U.S. Armed Forces stationed outside the state are not considered residents for tax purposes.

[303] MO. REV. STAT. § 143.041 (Westlaw 2010). Military pay is not subject to Missouri tax if servicemember is considered a non-resident for tax purposes. He or she must spend less than 30 days in Missouri and not maintain permanent living quarters.

[304] MO. REV. STAT. § 143.123 (Westlaw 2010). Up to $6000 of retirement pay may be excluded.

[305] MONT. ADMIN. R. 42.15.219 (Westlaw 2010). There is a $3600 exclusion, if adjusted gross income is less than $30,000.

New Hampshire	No State Income Tax	No State Income Tax	New Hampshire Dept. of Revenue Administration Taxpayer Assistance, *available at* http://www.nh.gov/ revenue/faq/gti-rev.htm (last visited Jul. 20, 2009).
New Jersey	Yes	Yes	N.J. REV. STAT. § 54A:6-26 (2009)
New Mexico	No	No	N.M. ADMIN. CODE § 3.3.4.1-12 (2009), N.M. ADMIN. CODE § 3.3.11.13 (2009)
New York	Yes[306]	Yes	N.Y. TAX LAW § 605 (Consol. 2009), N.Y. TAX LAW § 612 (Consol. 2009)
North Carolina	No	Partial[307]	N.C. GEN. STAT. §105-134.6 (2009)
North Dakota	Partial[308]	Partial[309]	CORY FONG, TAX COMMISSIONER, INCOME TAX TREATMENT OF MILITARY PERSONNEL 5 (n.d.), *available at* http://www.nd.gov/tax/indincome/ pubs/guide/gl-28243.pdf (last visited Feb. 4, 2010)
Ohio	Yes[310]	Yes[311]	OHIO REV. CODE ANN. § 5747.01(24) (LexisNexis 2009); OHIO REV. CODE ANN. § 5747.01(26) (LexisNexis 2009)
Oklahoma	Yes[312]	Partial	S.B. 881, 52nd Legis. Sess., 1st Sess. (Okla. 2009); OKLA. STAT. tit. 68, § 2358 (2009)
Oregon	Partial	Partial	OR. REV. STAT. § 316.791 (2007), Oregon Department of Revenue, Military Personnel Filing Information 150-101-657 (Rev. Jan. 2010), *available at* http://egov.oregon.gov/DOR/PERTAX/docs/101-657.pdf (last visited Feb. 22, 2010)
Pennsylvania	Partial	Yes	72 PA. CONS. STAT. § 3402-303 (2009), Pennsylvania Department of Revenue, PA-40 Pennsylvania Personal Income Tax Return 2009, *available at* http://www.portal.state.pa.us/portal/server.pt/community/personal_income_tax/14692 (last visited Feb. 22, 2010)
Rhode Island	No	No	R.I. GEN. LAWS § 44-30-2.6 (2009)

[306] N.Y. TAX LAW § 605 (Consol. 2009). Servicemembers are considered non-residents for tax purposes if they fall into either of two groups. Group A: (1) they do not maintain a permanent home in New York, (2) They maintain a permanent home outside New York, and (3) They did not spend more than 30 days in New York during the tax year. Group B: (1) They were in a foreign country for at least 450 out of 548 consecutive days, and (2) spent less than 90 days in a permanent home in New York during that time.

[307] N.C. GEN. STAT. §105-134.6 (Westlaw 2010). Retirees may deduct up to $4,000 depending on their circumstance.

[308] CORY FONG, TAX COMMISSIONER, INCOME TAX TREATMENT OF MILITARY PERSONNEL 5 (n.d.), *available at* http://www.nd.gov/tax/indincome/pubs/guide/gl-28243.pdf. If resident servicemembers use form ND-2, they may exclude up to $1,000 of military pay. Additionally, they may exclude $300 per month for each month they served overseas.

[309] *Id*. Retirees who are at least fifty years old may exclude up to $5000 of retirement pay.

[310] OHIO REV. CODE ANN. § 5747.01(24) (Westlaw 2010).

> Deduct, to the extent included in federal adjusted gross income and not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, military pay and allowances received by the taxpayer during the taxable year for active duty service in the United States army, air force, navy, marine corps, or coast guard or reserve components thereof or the national guard. The deduction may not be claimed for military pay and allowances received by the taxpayer while the taxpayer is stationed in this state.

[311] *Id.*

> Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, amounts received by the taxpayer as retired military personnel pay for service in the United States Army, Navy, Air Force, Coast Guard, or Marine Corps or reserve components thereof, or the national guard, or received by the surviving spouse or former spouse of such a taxpayer under the survivor benefit plan on account of such a taxpayer's death.

[312] S.B. 881, 52nd Legis. Sess., 1st Sess. (Okla. 2009). Oklahoma State Senate Bill 881 passed in May 2009. Active duty military pay is exempt for state tax purposes beginning 1 July 2010.

South Carolina	No	Partial[313]	S.C. CODE ANN. § 12-6-1170 (2008)
South Dakota	No State Income Tax	No State Income Tax	South Dakota Department of Revenue & Regulation, http://www.state.sd.us/drr2 (last visited Jul. 20, 2009)
Tennessee	No State Income Tax	No State Income Tax	Tennessee Dept. of Revenue Frequently Asked Questions, *available at* http://www.tennessee.gov/ revenue/faqs/indincome.htm#3 (last visited Jul. 20, 2009)
Texas	No State Income Tax	No State Income Tax	Comptroller of Public Accounts Windows on State Government, *available at* http://www.window.state. tx.us/taxes/ (last visited Jul. 20, 2009)
Utah	No	No[314]	UTAH CODE ANN. § 59-10-1019 (2009)
Vermont	Partial	No[315]	VT. STAT. ANN. tit. 32, § 5823 (2009), VT. STAT. ANN. tit. 32, § 5824 (2009)
Virginia	Partial[316]	Partial[317]	VA. CODE ANN. § 58.1-322 (2009)
Washington	No State Income Tax	No State Income Tax	Dept. of Revenue Income Tax, *available at* http://dor.wa.gov/content/FindTaxesAndRates/IncomeTax/ (last visited Jul. 20, 2009)
West Virginia	Yes[318]	Partial[319]	W. VA. CODE § 11-21-7 (2009), W. VA. CODE § 11-21-12 (2009)
Wisconsin	No	Yes	WIS. STAT. § 71.05 (2008)
Wyoming	No State Income Tax	No State Income Tax	Wyoming Dept. of Revenue, *available at* http://revenue.state.wy.us/ (last visited Jul. 20, 2009)

[313] S.C. CODE ANN. § 12-6-1170 (Westlaw 2010). An individual taxpayer who is the original owner of a qualified retirement account is allowed an annual deduction from South Carolina taxable income of not more than three thousand dollars of retirement income received. Beginning in the year in which the taxpayer reaches age sixty-five, the taxpayer may deduct not more than ten thousand dollars of retirement income that is included in South Carolina taxable income.

[314] UTAH CODE ANN. § 59-10-1019 (Westlaw 2010). Starting in 2008, Utah retirees can no longer exclude retirement income. Retirees sixty-five and over may claim tax credit of $450. Retirees under sixty-five may claim a credit the greater of 6% of retirement income or $288.

[315] VT. STAT. ANN. tit. 32, § 5824 (Westlaw 2010). Vermont follows federal tax rules for retirement pay.

[316] VA. CODE ANN. § 58.1-322 (Westlaw 2010) ("$15,000 of military basic pay for military service personnel on extended active duty for periods in excess of 90 days; however, the subtraction amount shall be reduced dollar-for-dollar by the amount which the taxpayer's military basic pay exceeds $ 15,000 and shall be reduced to zero if such military basic pay amount is equal to or exceeds $30,000.").

[317] *Id*. Retirees may deduct up to $12,000, depending upon age and amount of income.

[318] W. VA. CODE § 11-21-7 (Westlaw 2010). A servicemember is considered a non-resident for tax purposes if "he maintains no permanent place of abode in [the] state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in [the] state, or (2) . . . is not domiciled in [the] state but maintains a permanent place of abode in [the] state and spends in the aggregate more than one hundred eighty-three days of the taxable year in [the] state." *Id*.

[319] W. VA. CODE § 11-21-12 (Westlaw 2010). The first $20,000 of military retirement pay may be excluded.

Appendix F

State Gift Tax (A Quick Reference Guide)

STATE	STATE GIFT TAX?	CITATION
Alabama	No.	*See* Alabama Dept. of Revenue, *Alabama Estate and Inheritance Tax*, *available at* http://www.ador.state.al.us/incometax/Estate&Inh.htm (last visited Jul. 20, 2009). *See generally* ALA. CODE tit. 40 (LexisNexis 2009)
Alaska	No.	*See* Alaska Dept. of Revenue, *Tax Division* Programs, *available at* http://www.tax.alaska.gov/programs/index.aspx (last visited Jul. 20, 2009). *See generally* ALASKA STAT. tit. 43 (2009)
Arizona	No.	*See* Arizona Dept. of Revenue, *Estate Tax*, *available at* http://www.azdor.gov/brochure/900.pdf (last visited Jul. 20, 2009). *See generally* ARIZ. REV. STAT. tit. 42 (LexisNexis 2009).
Arkansas	No.	*See* Arkansas Dept. of Finance & Administration, *Taxes Overview*, *available at* http://www.state.ar.us/dfa/dfa_taxes.html (last visited Jul. 20, 2009). *See generally* ARK. CODE ANN. tit. 26 (2009).
California	No.	*See generally* CAL. CODE REGS. tit. 18, § 13301 (2009)
Colorado	No.	*See generally* COLO. REV. STAT. tit. 39 (2008)
Connecticut	Yes.[320]	CONN. GEN. STAT. § 12-640 (2008)
Delaware	No.	*See generally* DEL. CODE ANN. tit. 30 (2009)
Florida	No.	*See generally* FLA. STAT. ANN. tit. 14 (2009)
Georgia	No.	*See* Georgia Dept. of Revenue, *Estate Tax*, *available at* https://etax.dor.ga.gov/inctax/estatetax/index.aspx (last visited Jul. 20, 2009). *See generally* GA. CODE ANN. tit. 48 (2009)
Hawaii	No.	*See generally* HAW. REV. STAT. tit. 14 (LexisNexis 2009)
Idaho	No.	*See generally* IDAHO CODE ANN. tit. 63 (LexisNexis 2009)
Illinois	No.	*See generally* 36 ILL. COMP. STAT. ANN. (LexisNexis 2009)
Indiana	No.	*See generally* IND. CODE ANN. tit. 6 (LexisNexis 2009)
Iowa	No.	*See generally* IOWA CODE tit. 10 (2008)
Kansas	No.	*See generally* KAN. STAT. ANN. ch. 79 (2008)
Kentucky	No.	*See generally* KY. REV. STAT. ANN. tit. 11 (LexisNexis 2009)
Louisiana	No.	*See generally* LA. REV. STAT. ANN. tit. 47 (2009)
Maine	No.	*See generally* ME. REV. STAT. ANN. tit. 36 (2009)
Maryland	No.	*See generally* MD. CODE ANN., TAX-GEN. (LexisNexis 2009)
Massachusetts	No.	*See generally* MASS. ANN. LAWS tit. 9 (LexisNexis 2009)
Michigan	No.	*See generally* MICH. COMP. LAWS SERV. ch. 205 (LexisNexis 2009)
Minnesota	No.	*See* MINN. STAT. ch. 292 (2008)
Mississippi	No.	*See generally* MISS. CODE ANN. tit. 27 (2008)
Missouri	No.	*See generally* MO. REV. STAT. tit. 10 (2009)
Montana	No.	*See generally* MONT. CODE ANN. tit. 15 (2008)
Nebraska	No.	*See generally* NEB. REV. STAT. ANN. ch. 77 (LexisNexis 2009)
Nevada	No.	*See generally* NEV. REV. STAT. ANN. tit. 32 (LexisNexis 2009)
New Hampshire	No.	*See generally* N.H. REV. STAT. ANN. tit. 5 (LexisNexis 2009)
New Jersey	No.	*See generally* N.J. STAT. ANN. tit. 54 (2009)
New Mexico	No.	*See generally* N.M. STAT. ANN. ch. 7 (LexisNexis 2008)
New York	No.	*See generally* N.Y. TAX LAW (Consol. 2009)
North Carolina	No.	N.C. GEN. STAT. § 105-188 (2009)

[320] CONN. GEN. STAT. §12-640 (Westlaw 2010). Connecticut imposes a gift tax on property transfers at a rate according to a chart in § 12-642.

North Dakota	No.	*See generally* N.D. CENT. CODE tit. 57 (2009)
Ohio	No.	*See generally* OHIO REV. CODE ANN. tit. 57 (2009)
Oklahoma	No.	*See generally* OKLA. STAT. tit. 68 (2009)
Oregon	No.	*See generally* OR. REV. STAT. tit. 29 (2009)
Pennsylvania	No.	*See generally* PA. STAT. ANN. tit 72 (2009)
Rhode Island	No.	*See generally* R.I. GEN. LAWS tit. 44 (2009)
South Carolina	No.	*See generally* S.C. CODE ANN. tit. 12 (2008)
South Dakota	No.	*See generally* S.D. CODIFIED LAWS tit. 10 (2009)
Tennessee	Yes.[321]	TENN. CODE ANN. § 67-8-101
Texas	No.	*See generally* TEX. TAX CODE ANN. tit. 2 (2009)
Utah	No.	*See generally* UTAH CODE ANN. tit. 59 (2009)
Vermont	No.	*See generally* VT. STAT. ANN. tit. 32 (2009)

[321] TENN. CODE. ANN. § 67-8-102 & 106(b) (Westlaw 2010).

The following named donees shall be included in:

(1) Class A: Husband, wife, son, daughter, lineal ancestor, lineal descendant, brother, sister, stepchild, son-in-law or daughter-in-law. If a person has no child or grandchild, a niece or nephew of such person and the issue of such niece or nephew shall be a donee within this class. For the purposes of this part, a person who is related to the donor as a result of legal adoption shall be considered to have the same relationship as a natural lineal ancestor, lineal descendant, brother, sister or stepchild; and

(2) Class B: Any other relative, person, association or corporation not specifically designated in Class A

Tax Rates on Gifts made before 1984

CLASS A

1.4 % on amounts from $10,000 to $25,000;

2 % on the next $25,000 or part thereof;

4 % on the next $50,000 or part thereof;

5.5 % on the next $200,000 or part thereof;

6.5 % on the next $200,000 or part thereof;

9.5 % on the excess over $500,000.

CLASS B

6.5 % on amounts from $5000 to $50,000;

9.5 % on the next $50,000 or part thereof;

12 % on the next $50,000 or part thereof;

13.5 % on the next $50,000 or part thereof;

16 % on the next $50,000 or part thereof;

20 % on the excess over $250,000.

Tax Rates on Gifts made after 1983

CLASS A

5.5 % on the amount of net taxable gifts up to $40,000;

6.5 % on the next $200,000 or part thereof;

7.5 % on the next $200,000 or part thereof;

9.5 % on the excess over $440,000.

CLASS B

6.5 % on the amount of net taxable gifts up to $50,000;

9.5 % on the next $50,000 or part thereof;

12 % on the next $50,000 or part thereof;

13.5 % on the next $50,000 or part thereof;

16 % on the excess over $200,000.

Virginia	No.	*See generally* VA. CODE ANN. tit. 58.1 (2009)
Washington	No.	*See generally* WASH. REV. CODE tit. 83 (2009)
West Virginia	No.	*See generally* W. VA. CODE ANN. ch. 11 (LexisNexis 2009)
Wisconsin	No.	*See generally* WIS. STAT. ch. 72 (2009)
Wyoming	No.	*See generally* WYO. STAT. ANN. tit 39 (2009)

Appendix G

State Estate Tax (A Quick Reference Guide)

STATE	ESTATE TAX?	CITATION
Alabama	No.	*See* ALA. CODE § 40-15-2 (LexisNexis 2009); Alabama Dept. of Revenue, *Alabama Estate and Inheritance Tax*, *available at* http://www.ador.state.al.us/incometax/Estate&Inh.htm (last visited Jul. 20, 2009)
Alaska	No.	*See* ALASKA STAT. § 43.31.011 (2009).
Arizona	No.	*See* ARIZ. REV. STAT. §§ 42-4001, 4051 (LexisNexis 2009)
Arkansas	No.	*See* ARK. CODE ANN. §§ 26-59-103, 106, 109 (2009)
California	No.	*See* CAL. REV. & TAX. CODE §§ 13302, 13411 (Deering 2009)
Colorado	No.	*See* COLO. REV. STAT. §§ 39-23.5-102, 103 (2008)
Connecticut	Yes.[322]	CONN. GEN. STAT. § 12-391 (2008)
Delaware	Pick-up only.	*See* DEL. CODE ANN. tit. 30, § 1502 (2009)
Florida	No.	*See* FLA. STAT. ANN. § 198.02 (2009)
Georgia	No.	*See* GA. CODE ANN § 48-12-2 (2009)
Hawaii	No.	*See* HAW. REV. STAT. ANN. § 236D-2, 3 (LexisNexis 2009)
Idaho	No.	*See* IDAHO CODE ANN. §§ 14-403, 63-3004 (LexisNexis 2009)
Illinois	Pick-up only.	*See* 35 ILL. COMP. STAT. ANN. § 405/2-3 (LexisNexis 2009)
Indiana	Inheritance tax.	*See* IND. CODE ANN. §§ 6-4.1-1-4, 6-4.1-11-2 (LexisNexis 2009)
Iowa	Inheritance tax.	*See* IOWA CODE §§ 451.13, 451.2 (2008)
Kansas	Yes.[323]	*See* KAN. STAT. ANN. § 79-15 (2008)
Kentucky	Inheritance tax.	*See* KY. REV. STAT. ANN. § 140.130 (LexisNexis 2009)
Louisiana	No.	*See* LA. REV. STAT. ANN. §§ 47:2431, 2432, 2434 (2009)
Maine	Pick-up only.	*See* ME. REV. STAT. ANN. tit. 36, § 4062 (2009)
Maryland	Yes	*See* MD. CODE ANN., TAX-GEN §§ 7-304, 309 (LexisNexis 2009)
Massachusetts	Pick-up only.	*See* MASS. ANN. LAWS ch. 65C, § 2A (LexisNexis 2009)
Michigan	No.	*See* MICH. COMP. LAWS SERV. §§ 205.232, 205.256 (LexisNexis 2009)
Minnesota	Pick-up only.	*See* MINN. STAT. § 291.005, 291.03 (2008)
Mississippi	No.	*See* MISS. CODE ANN. § 27-9-5 (2008).
Missouri	No.	*See* MO. REV. STAT. §§ 145.011, 145.091 (2009)
Montana	No.	*See* MONT. CODE ANN. §§ 72-16-904, 905 (2008)

[322] CONN. GEN. STAT. § 12-391 (Westlaw 2010). Connecticut has a separate estate tax with a $2 million exemption.

[323] *See* KAN. STAT. ANN. § 79-15 (Westlaw 2010). In addition to a pick-up tax, Kansas has an estate tax effective 1 January 2007 through 31 December 2009.

Nebraska	Inheritance tax.[324]	*See* NEB. REV. STAT. ANN. § 77-2102.01 (LexisNexis 2009)
Nevada	No.	*See* NEV. REV. STAT. ANN. §§375A.025, 375A.100 (LexisNexis 2009)
New Hampshire	No.	*See* N.H. REV. STAT. ANN. § 87:1, 87:7 (LexisNexis 2009)
New Jersey	Pick-up and inheritance tax.	*See* N.J. STAT. ANN. §54:38 (2009)
New Mexico	No.	*See* N.M. STAT. ANN. §§ 7-7-2, 7-7-3 (LexisNexis 2008)
New York	Pick-up only.	*See* N.Y. TAX LAW §§ 951, 952 (Consol. 2009)
North Carolina	Pick-up only.	*See* N.C. GEN. STAT. §§ 105-32.1, 105-32.2, 105-228.90 (2009)
North Dakota	No.	*See* N.D. CENT. CODE § 57-37.1-04 (2009)
Ohio	Separate estate tax.	*See* OHIO REV. CODE ANN. § 5731.02 (2009)
Oklahoma	Separate estate tax.	*See* OKLA. STAT. tit. 68, §§ 804, 809 (2009)
Oregon	Pick-up only.	*See* OR. REV. STAT. § 118.010 (2009)
Pennsylvania	Inheritance.	*See* 72 PA. STAT. ANN. § 9117 (2009)
Rhode Island	Pick-up only.	*See* R.I. GEN. LAWS §44-22-1.1 (2009)
South Carolina	No.	*See* S.C. CODE ANN. §§ 12-6-40, 12-16-20, 12-16-510 (2008)
South Dakota	No.	*See* S.D. CODIFIED LAWS §§ 10-40A-1, 10-40A-3 (2009)
Tennessee	Inheritance.	*See* TENN. CODE ANN. § 67-8-202, 67-8-203 (2009).
Texas	Inheritance.	*See* TEX. TAX CODE ANN. §§ 211.001, 211.003, 211.051 (2009)
Utah	No.	*See* UTAH CODE ANN. § 59-11-102, 59-11-103 (2009)
Vermont	Pick-up only.	*See* VT. STAT. ANN. tit. 32, §§ 7402(8), 7442a, 7475 (2009)
Virginia	Pick-up only.	*See* VA. CODE ANN. §§ 58.1-901, 58.1-902 (2009)
Washington	Separate estate tax.	*See* WASH. REV. CODE §§ 83.100.020, 83.100.040. (2009)
West Virginia	No.	*See* W. VA. CODE ANN. § 11-11-3 (LexisNexis 2009)
Wisconsin	No.	*See* WIS. STAT. §§ 72.01, 72.02 (2009)
Wyoming	No.	*See* WYO. STAT. ANN. §§ 39-19-103, 39-19-104 (2009)

[324] *See* NEB. REV. STAT. ANN. § 77-2102.01 (Westlaw 2010). Nebraska counties have separate inheritance taxes.

Playing Politics: A Review of Eligibility Rules and Campaign Restrictions for Servicemembers Who Are Nominees or Candidates for Civil Office

Lieutenant Colonel Jeffrey Sexton[1]

A 2009 survey by the National Network of Legislators in the Military and the National Conference of State Legislators identified sixty-five state legislators serving in the Armed Forces as Reserve or National Guard members.[2] Almost half of them deployed while serving as members of their respective legislatures.[3] Countless other Reserve and Guard members, perhaps in the hundreds, hold civil offices at other levels of federal, state, and local government.[4] While the topic of civil office candidacy may seem of little relevance to career active component servicemembers, individuals who serve in the Reserves or National Guard know that running for civil office can be a challenging issue within their ranks. Eligibility rules for servicemembers seeking civil office are often misunderstood, and the relatively new restrictions on how they may conduct their campaigns are equally misconstrued.

With the 2010 election season just around the corner, a review of the guidelines for servicemembers seeking civil office is important, not only for servicemembers who are potential candidates, but also for judge advocates who advise individual servicemembers and commanders on these issues. This article examines Department of Defense (DoD) rules for servicemembers who are nominees or candidates for civil office using the most recent guidance found in DoD Directive 1344.10, *Political Activities by Members of the Armed Forces*.[5] The article begins by exploring the directive's definition of "civil office," and then proceeds to examine the eligibility rules and campaign restrictions for servicemembers seeking civil office.

"Civil Office" Defined

In February 2008, the DoD updated DoD Directive 1344.10,[6] which covers limitations on political activities of members of the U.S. Armed Forces. The directive reiterates long-standing DoD policy that servicemembers on active duty should not "engage in partisan political activity," and that servicemembers not on active duty should "avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement . . . ."[7] These baseline tenets are the foundation for rules regarding whether servicemembers may be nominees or candidates for civil office, the most visible of which is the rule prohibiting servicemembers from being nominees or candidates for civil office if they are on active duty or under a call to active duty for more than 270 days.[8] This limitation clearly reflects a deep concern that partisan political activity by servicemembers on extended active duty may unduly entangle the military in the civil branch of government.

But what does the directive mean by the term "civil office"? Does it mean any "public" office, or is it more specific? Paragraph E2.3 of the directive defines "civil office" as follows:

> A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.[9]

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[2] *See* Press Release, Nat'l Conference of State Legislatures, State Legislators in U.S. Military Serve Country and State: Sixty-five State Lawmakers in Armed Forces, Nov. 11, 2009, http://www.ncsl.org/Press Room/PressReleaseLegislatorsServingintheMilitary/tabid/19082/Default.aspx.

[3] *Id.*

[4] Current examples include Senator Lindsey Graham of South Carolina, a colonel and judge advocate in the Air Force Reserve and the only current military member in the U.S. Senate; Congressman Steve Buyer of Indiana, a colonel and judge advocate in the Army Reserve; Governor Mark Sanford of South Carolina, a captain in the Air Force Reserve; and Mayor Setti Warren of Newton, Massachusetts, an intelligence officer in the Navy Reserve.

[5] U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (19 Feb. 2008) [hereinafter DODD 1344.10]. Among other issues, the Directive implements 10 U.S.C. § 973(b) through (d), which addresses holding and exercising the functions of civil office by Regular officers, as well as retired Regular officers and Reserve officers serving on active duty for a period in excess of 270 days.

[6] *Id.* para. 1.1.

[7] *Id.* para. 4.

[8] *Id.* para. 4.2.2.

[9] *Id.* enclosure 2, para. E2.3.

A lot is packed into the definition. First, the definition includes offices at the federal, state, and local level, regardless of the size or supposed importance of the office. For example, the limitations in DoD Directive 1344.10 are just as applicable to a servicemember seeking election to a county supervisor position as they are to a servicemember seeking election to state attorney general or even the U.S. House of Representatives. Second, the definition makes no distinction between *appointed* offices and *elective* offices. Thus, a servicemember seeking an appointed state judge position must comply with DoD Directive 1344.10 to the same extent as a servicemember seeking an elective state judge position. On the other hand, the definition is not so broad as to include *every* possible appointed or elective office that a servicemember may seek. For instance, the election of a servicemember to the office of deacon at his local church is not within the scope of the directive, nor is the appointment of a servicemember to president of her neighborhood swim club. Those offices do not exercise the "authority of civil government" and, consequently, are outside the scope of DoD Directive 1344.10. Finally, note the definition's approach to positions in civilian law enforcement, fire departments, and rescue squads. Although these positions are no doubt viewed by the average citizen as "civil office" positions (especially law enforcement positions), they are not considered civil office positions for purposes of the directive unless they are elective positions. Thus, an Army Reserve Soldier who is hired to a non-elective position as a civilian police officer is not subject to the prohibitions regarding holding and seeking a civil office. In contrast, if the Soldier later enters the race for an elective county sheriff position, he is clearly seeking a "civil office" that is subject to the restrictions laid out in DoD Directive 1344.10.

Eligibility for Civil Office

Specific Guidelines

Having clarified the definition of "civil office" in DoD Directive 1344.10, we now turn to the specific rules regarding eligibility for civil office.[10] Assuming that the office in question meets the definition of civil office under DoD Directive 1344.10, the next step in deciding whether the individual is eligible for the office is to determine if the servicemember is a Regular member of the Armed Forces on active duty (i.e., a Regular component member).[11] The bottom line is that Regular component members on active duty are prohibited from being nominees or candidates for civil office.[12] This limitation clearly has its genesis in the general policy prohibiting members on active duty from engaging in partisan political activity. However, as with most prohibitions involving civil office issues, an exception is possible if the servicemember receives permission from the relevant service Secretary.[13] An example is the case of a career, Regular component servicemember who plans to seek and hold civil office immediately upon retirement from the military. If the servicemember intends to retire in October but wants to be on the ballot for an elective civil office in the November election, he must file for candidacy in June. In this situation, the servicemember must seek permission from the service Secretary in order remain on active duty as a candidate between the June filing and the October retirement. If the request is granted, then the servicemember may remain a candidate between the June filing and retirement from active duty.

Contrast that example with the servicemember who is *not* a Regular member of the Armed Forces (i.e., is either a Reserve or Guard member or a retired Regular member). In this situation, eligibility to be a nominee or candidate depends on the member's active duty status. The central question is as follows: Is the servicemember on active duty, and, if so, for how long? If the Reserve member, Guard member, or retired Regular member is *not* on active duty, then he may be a nominee or candidate for civil office without any requirement to seek permission from the military. If the Reserve member, Guard member,[14] or retired Regular member *is* on active duty,[15] then he or she *may* be eligible to be a nominee or candidate depending on the length of the active duty tour. If the call or order to active duty is for *more than* 270 days, then the member

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[10] See Appendix, *infra*, for a step-by-step guide to civil office eligibility.

[11] Regular Component members are those Soldiers, Sailors, Airmen, and Marines who serve in continuous service on active duty in both peace and war. *See* 10 U.S.C. § 3075, 8075 (2006),

[12] DoDD 1344.10, *supra* note 5, para. 4.2.2.

[13] *Id.* para. 4.2.2. This paragraph states that a Regular member, or a retired Regular or Reserve component member on orders for active duty for more than 270 days may not be a nominee or candidate for civil office "except when the Secretary concerned grants permission." *See infra* pp. 97–98 (providing more specific coverage of the requirement to gain Secretarial approval).

[14] *See infra* pp. 99–102, *Campaign Limitations on Nominees/Candidates on Active Duty* (discussing whether National Guard duty pursuant to title 32, United States Code (e.g., example, annual training duty, or active duty for training) constitutes "active duty" for purposes of DoD Directive 1344.10).

[15] On occasion, retired Regular members may be called back to active duty. Pursuant to 10 U.S.C. § 688(a), a retired Regular member may be ordered to active duty "by the Secretary of the military department concerned at any time." 10 U.S.C. § 688(a) (2006).

is prohibited from being a nominee or candidate, except when the Secretary concerned grants permission.[16] If the call or order to active duty is for *270 days or fewer*, the member may become a nominee or candidate "provided there is no interference with the performance of military duty."[17] In this situation the servicemember is not required to obtain permission to remain or become a nominee or candidate but must be careful to comply with other limitations, such as the rules prohibiting the conduct of campaign activities while on active duty, which will be addressed later in this article.

It is important to emphasize what the 270-day rule means in practical terms. The rule does not mean that the restrictions in the directive *begin* on day 271 of active duty. For example, some servicemembers have interpreted the rule to mean that during a call or order to active duty they may remain a candidate for civil office through day 270 of the active duty order and are only required to withdraw from the candidacy upon reaching day 271 of active duty. This is a faulty interpretation of the directive. Instead, the directive requires that from the *first day* of an active duty order exceeding 270 days, the Reserve or Guard member cannot be a candidate or nominee. In this regard, paragraph E2.2 of the directive is very clear: "Any prohibitions or limitations this directive triggers by a call or order to active duty for more than 270 days begins on the first day of the active duty."[18] Consequently, a Reserve or Guard member who receives orders for a 365-day active duty tour is prohibited on *day one* of active duty from being a nominee or candidate for civil office. Day 270 of the active duty tour is not the time to begin paying attention to the restrictions of DoD Directive 1344.10.

Not surprisingly, servicemembers have been creative in seeking ways around the 270-day rule. Some servicemembers and units have proposed "cobbling" or piecing together multiple active duty orders of shorter duration as a way around the 270-day rule. For instance, instead of issuing an order calling a Reserve or Guard member to active duty for 365 days, a unit might issue an initial order for 185 days, followed by a short break from active duty (from one day to perhaps a week or two), followed by a second order calling the servicemember back to active duty for an additional 180 days. By doing this, the unit has technically avoided the 270-day trigger and reaped the benefit of having the servicemember on active duty for most of the year anyway. Similarly, the servicemember has benefited by remaining a nominee or candidate during the active duty periods without having to seek permission from the service Secretary. Although the directive does not speak directly to this scenario, commanders should avoid issuing orders in this manner. Paragraph 4.1.5 of the directive states, in part, "Activities not expressly prohibited may be contrary to the spirit and intent of this Directive," and, "Any activity that . . . is otherwise contrary to the spirit and intention of this Directive shall be avoided."[19] The intentional "cobbling" together of orders to avoid the 270-day rule is contrary the intent of the DoD with regard to eligibility to seek civil office. After all, the longer the tour of active duty, the more likely it is that a servicemember's candidacy will interfere with the performance of duty and bring into question whether the candidacy implies official sponsorship, approval, or endorsement by the military.[20]

Requesting Permission to Become a Nominee or Candidate

As mentioned previously, despite the general limitations on servicemembers being nominees or candidates for civil office while on active duty tours of longer duration, they may request an exception by seeking permission from their service Secretary.[21] This requirement for secretarial approval is a major change. Under the previous directive, the Secretary *or the Secretary's designee* could grant or deny the request.[22] The updated DoD Directive 1344.10 now explicitly states, "[T]he Secretary concerned may NOT delegate the authority to grant or deny such permission."[23] This is a clear message from the

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[16] DoDD 1344.10, *supra* note 5, para. 4.2.2. Similar to the case of the Regular member who is granted permission to become a nominee or candidate while on active duty, if the Secretary concerned grants permission for a Reserve component member or retired Regular member to remain or become a candidate while on active duty for more than 270 days, the member must not participate in any campaign activities while on active duty pursuant to paragraph 4.3.3 of the Directive. A discussion of what constitutes "campaign activities" is provided later in this article in the section entitled *Limitations on Campaigning for Civil Office*.

[17] *Id.* para. 4.2.3.

[18] *Id.* enclosure 2, para. E2.2.

[19] *Id.* para. 4.1.5.

[20] In fact, even servicemembers serving shorter tours of 270 days or less may be prohibited from remaining as nominees or candidates if their candidacy interferes with the performance of duty. *See id.* para. 4.2.3.

[21] *Id.* para. 4.2.2.

[22] U.S. DEP'T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY para. 4.2.2 (2 Aug. 2004). This version of the directive was superceded by the current directive on 19 February 2008.

[23] DoDD 1344.10, *supra* note 5, para. 4.2.2.1. The term "Secretary concerned" is defined in 10 U.S.C. § 101(a)(9) as follows:

(A) the Secretary of the Army, with respect to matters concerning the Army;

DoD that running for civil office while on longer tours of active duty will be the exception and not the rule and will receive the highest scrutiny.

Acknowledgment of Limitations

The directive states at paragraph 4.3.5 that servicemembers on active duty who are nominees or candidates for civil office must complete an acknowledgement of limitations memorandum.[24] This requirement applies to *any* nominee or candidate who is on active duty, whether a Regular component or Reserve or Guard member, whether on a long or short tour of active duty, and whether they were required to gain permission from the service Secretary to be a nominee or candidate. The acknowledgment memorandum ensures that the servicemember is aware of the requirements to request permission to be a nominee or candidate and emphasizes that he may remain a nominee or candidate only as long as the candidacy does not interfere with the performance of military duty. The memorandum also ensures that the servicemember is aware of the directive's very specific limitations on how the servicemember may conduct his campaign, a subject that is discussed later in this article.

Also, the directive requires that servicemembers who are required to gain permission to be a nominee or candidate sign the acknowledgement before permission may be granted. In contrast, servicemembers who are not required to gain permission must sign the acknowledgement within fifteen days of becoming a nominee or candidate, or within fifteen days of entry on active duty if already a nominee candidate.[25] The memorandum must be forwarded through the servicemember's immediate supervisor to the first general officer in the chain of command. [26] A sample acknowledgement of limitations memorandum is located at enclosure 4 of DoD Directive 1344.10.

Special Exceptions Regarding Eligibility for Civil Office

A final point regarding eligibility to seek civil office pertains to several special exceptions noted specifically in the directive. Notwithstanding the restrictions addressed above, any *enlisted* servicemember may seek and serve in certain nonpartisan civil offices *even while on active duty*. These offices are notary public, or a member of a school board, neighborhood planning commission, or similar local agency.[27] This exception comes with the usual caveat that the offices will be held in a non-military capacity and that there will be no interference with the performance of military duties.[28] In addition, warrant and commissioned officers may seek and serve as members on independent school boards located exclusively on a military installation.[29] The position must be non-partisan, must be held in a non-military capacity, and must not interfere with the performance of military duties.[30]

Limitations on Campaigning for Civil Office

Recent examples of questionable campaign activity by servicemembers running for civil office include engaging in behind-the-scenes campaign activities while on active duty,[31] using military rank and service affiliation without providing a

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(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;
(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and
(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

[24] *Id.* para. 4.3.5.

[25] *Id.*

[26] *Id.*

[27] *Id.* para. 4.2.4.1.

[28] *Id.*

[29] *Id.* para. 4.2.4.2.

[30] *Id.*

[31] Mark Kirk, a Navy reservist and candidate for the U.S. Senate seat in Illinois, was accused in July 2009 of using the Internet to send "tweets" from his campaign's Twitter™ account while on duty at the Pentagon's National Military Command Center, see Zach Christman, *Mark Kirk's Twitter Trouble*, nbcchicago.com, July 30, 2009, *available at*: http://www.nbcchicago.com/news/politics/Mark-Kirks-in-Twitter-Trouble-52088462.html.

proper disclaimer,[32] and displaying large photographs of the candidate in military uniform on campaign websites.[33] These activities foster legitimate concerns from the general public, as well as from rank-and-file servicemembers, as to whether the candidacy interferes with the performance of duty or represents official sponsorship, approval, or endorsement by the military. To address these very concerns, the new DoD Directive 1344.10 added explicit limitations on campaign activities, as detailed below.[34] A careful reading of the limitations reveals some important points. First, although the rules are much more restrictive for nominees or candidates on active duty, they also include very specific limitations for nominees or candidates not on active duty. Second, the rules are broad in scope with regard to duty status, extending even to campaign activities of National Guard members *serving in a non-federal status*.[35] Consequently, all servicemembers who are nominees or candidates for civil office, whether on active duty or not, and whether Regular, Reserve, Guard, or retired members, should review DoD Directive 1344.10 carefully to ensure compliance with the new limitations.

Campaign Limitation on Nominees or Candidates NOT on Active Duty

For purposes of reviewing campaign limitations for servicemembers in non-active duty situations, presume that the nominee or candidate is a traditional Reserve or Guard member (or Regular retiree) who is not currently serving a standard active duty tour (such as an active duty mobilization or deployment in support of a war or contingency operation, or any type of annual training, active duty for training, or active duty for special work). In this regard, the directive's main focus is with campaign literature, which includes websites, videos, television, and conventional print advertisements.[36] The directive gives a very specific list of the do's and don'ts of campaign literature,[37] emphasizing the proper use of military information and photographs. Simply put, a nominee or candidate not on active duty may do the following:

- Use military information such as rank, grade, and service affiliation under certain conditions. Candidates may use this information in campaign literature but "must clearly indicate their retired or reserve status."[38]

- Use other military information, such as military duty title or position, under certain conditions. The candidate may use current or former information in campaign literature when displayed with other, non-military biographical information and when accompanied by a "prominent and clearly displayed disclaimer . . . ."[39] The disclaimer must disavow endorsement by the DoD or the particular military department.

- Use photographs in military uniform under certain conditions. The same rules regarding the use of other military information, described above, apply: The photograph must be displayed with non-military biographical information, and must have a disclaimer.[40]

As previously mentioned, approval to use the information described above is conditioned on the nominee or candidate complying with specific requirements of the directive, such as disclosing retired or reserve status, limiting use of the information to biographical situations, and providing disclaimers. The DoD's obvious concern is that a candidacy not give the impression of official sponsorship, approval, or endorsement by the military.

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[32] In May 2008, the Montana Republican Party accused Jim Hunt, a retired Army National Guard member and candidate for the U.S. House of Representatives, of repeatedly using his military photographs and military rank and affiliation on his campaign website without providing disclaimers as required by DoDD 1344.10, paragraph 4.3.1.2. DoDD 1344.10, *supra* note 5, para. 4.3.1.2. Targeted News Service, Montana GOP: Jim Hunt Says He's Above the Law, May 22, 2008, *available at* http://www.highbeam.com/doc/1P3-1483310171.html.

[33] In March 2008, Adam Cote, a first lieutenant in the Maine Army National Guard and candidate for the U.S. House of Representatives in Maine, was reported to have displayed a large photograph of himself in military uniform on the introductory page of his campaign website. *See* Kevin Wack, *Playbook Limited for Military Candidates*, PORTLAND PRESS HERALD, Mar. 23, 2008, *available at* http://pressherald.maintoday.com/story.php?id=177265&ac=PHnws.

[34] DODD 1344.10, *supra* note 5, para. 4.3.

[35] *Id.* para. 2.

[36] *Id.* para. 4.3.1.

[37] *Id.* paras. 4.3.1 and 4.3.2.

[38] *Id.* para. 4.3.1.1.

[39] *Id.* para. 4.3.1.2.

[40] *Id.*

Next, in addition to listing what nominees or candidates on active duty *may* do, the directive lists what they may *not* do. The directive explicitly prohibits nominees or candidates from doing the following:

- Using photographs, drawings and other similar media formats of themselves in uniform as the primary graphic representation in media such as billboards, brochures, websites, flyers, or television commercials.[41]

- Depicting or allowing the depiction of themselves in uniform in a manner that does not accurately reflect their actual performance of duty.[42]

The key point here is the restriction on the use of military photographs as a "primary graphic representation" in campaign media. But what does the "primary graphic representation" restriction mean in practice? The restriction is easier to understand if viewed in concert with the earlier rule that allows photographs in military uniform when displayed with other non-military biographical details. For instance, placing a military photograph in a campaign brochure is allowed if the photograph is located in the biographical section, such as a section entitled "About Bob," that also mentions the candidate's work experience, community involvement, hobbies, church affiliation and the like. The placement of the military photograph in that section, along with other biographical photos of the candidate's life, would keep the photograph from being the "primary graphic representation" of the candidate and make it an appropriate use of the candidate's military affiliation. On the other hand, if the military photograph is the only photograph in the brochure or is prominently displayed elsewhere, such as on the front page of the brochure, then its use is improper. The photograph is now the "primary graphic representation" in the brochure, magnifying the candidate's military affiliation beyond the comfort level of the DoD. A similar analysis would apply to the use of a military photograph on the front page of a campaign website as the primary representation of the candidate and the use of a military photograph on a campaign billboard. The bottom line is that if the military photograph is used in a way not associated with non-military biographical information, its use has violated the directive.

Campaign Limitations on Nominees or Candidates on Active Duty

As stated earlier, the fact that a nominee or candidate is on active duty ups the ante considerably with regard to the nominee or candidate's freedom to conduct campaign activities. The directive's baseline rule for nominees or candidates on active duty is that "[a]ny member on active duty who is . . . a nominee or candidate for office . . . may NOT participate in any campaign activities. This includes open and active campaigning and all behind-the-scene activities."[43]

The guidance is simple enough: No campaign activities, whether out in the open or behind-the-scenes, are permitted while on active duty. This logically raises the question: What is meant by "campaign activities"? The directive settles this by listing a litany of campaign activities an active duty nominee or candidate may *not* conduct, which include the following:

- "Direct, control, manage, or otherwise participate in their campaign, including behind-the-scene activities."[44]

- "Make statements to, or answer questions from the news media regarding political issues or regarding government policies or activities unless specifically authorized to do so . . . ."[45]
- "Publish or allow to be published partisan political articles, literature, or documents that they have signed, written, or approved that solicit votes for or against a partisan political party, candidate, issue or cause."[46]

If a candidate on active duty is not swayed by the explicit statement that he "may not participate in any campaign activities," the above list should relieve all doubts. Not only are candidates prohibited from any open or behind-the-scenes participation in a campaign, they are further prohibited from communicating to the media concerning their campaign and prohibited from publishing anything that solicits votes. Then, as if the point were not already clear, the directive imparts additional clarity by stating what the nominee or candidate *must* do:

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[41] *Id.*

[42] *Id.* para. 4.3.2.2.

[43] *Id.* para. 4.3.3.

[44] *Id.* para. 4.3.3.1.

[45] *Id.* para. 4.3.3.2.

[46] *Id.* para. 4.3.3.3.

- "Take affirmative, documented efforts to inform those who work for them and those whom they control that they (the nominees or candidates) may not direct, control, manage or otherwise participate in campaign activities . . . ."[47]

- "Take all reasonable efforts to prevent current or anticipated advertisements that they (the nominees or candidates) control from being publicly displayed or running in any media. This includes Web sites devoted to the nomination or candidacy."[48]

In sum, not only must active duty nominees or candidates refrain from participating in any campaign activities, they must also inform their campaign staff and workers of this fact and prevent advertisements from running during the time they are on active duty. In addition, campaign websites may not be updated or revised and may be ordered shut down "as the Secretary concerned may direct."[49] In effect, an active duty candidate is completely barred from doing *anything* with regard to the candidacy while on active duty.

This point is certain to fuel questions in the Reserve and Guard ranks concerning the definition of "active duty." After all, active duty in the Reserve component world comes in many shapes and sizes, not just longer active duty tours. For instance, in a typical year not involving a long mobilization or deployment, a Reserve component servicemember will perform the traditional "two weeks per year" annual training (AT) requirement, plus a week or more in an active duty for training (ADT) status to satisfy military schooling requirements. In addition, the servicemember may perform other days of active duty in a special work status (ADSW) to meet additional demands of the unit. Does the directive's ban on campaign activities apply to these routine Reserve component active duty situations? A typical example is a Reserve or Guard member running for civil office who is on ADT orders to attend a five-day military training event. The training schedule may require the servicemember to be in training from 0730 to 1730 each day, but after that, the servicemember is off-duty. Is the servicemember prohibited from engaging in all campaign activities during this five-day period, even behind-the-scenes activities such as phone calls or e-mails to campaign staffers while off-duty in the evening in his hotel room? Expanding the example even further, what about the unique duty situations of the National Guard, such as AT or ADT in a title 32 status (federal funding, but state command and control), or a pure state active duty mission, such as a state activation at the call of the Governor in response to a natural disaster?

Fortunately, these questions can be resolved by reviewing key definitions contained in enclosure 2 of the directive. The enclosure defines "active duty" as follows:

> Full-time duty in the active military service of the United States regardless of duration or purpose. Active duty includes full-time training duty; annual training duty; and attendance, while in the active military service, at a school designated as a Service school by law or by the Secretary concerned. For purposes of this Directive only, active duty also includes full-time National Guard duty.[50]

Applying the definition to situations applicable to each of the military components (i.e., the Regular component, the Reserves, and the National Guard) yields the results outlined below.

Regular Components

Regular component members, such as those who serve in the Regular Army, are always on active duty in the full-time active military service of the United States. As a result, a Regular component member who is a nominee or candidate for civil office (assuming permission from the Secretary concerned has been granted) may not conduct any campaign activities while on active duty.

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[47] *Id.* para. 4.3.4.1.

[48] *Id.* para. 4.3.4.2.

[49] *Id*

[50] *Id.* enclosure 4, para. E2.1.

Reserves

Although Reserve members (such as Army Reserve, Navy Reserve, Marine Corp Reserve, Air Force Reserve, and Coast Guard Reserve) are federal servicemembers at all times,[51] they are *not* always on active duty. In fact, the well-known "drill" weekend is specifically designated "inactive duty training" (IDT)[52] and is not active duty for purposes of the DoD Directive 1344.10 definition of "active duty." Consequently, a Reserve member on IDT status is not subject to the broad rule prohibiting all campaign activities while on active duty. Rather, the member on IDT status is subject to the other, less prohibitive, campaign restrictions on non-active duty campaigning found in paragraphs 4.3.1 and 4.3.2 of the directive.

Regarding active duty service by a Reserve member, any time a Reserve member is on active duty,[53] whether it is AT, ADT, ADSW, or a mobilization or deployment, the member is performing duty in the active military service of the United States and is barred from engaging in any campaign activities pursuant to paragraph 4.3.3 of the directive.[54] Also, because the directive makes no distinction between the *length* of active duty orders, the ban applies to any active duty tour, to include even a one day active duty order. Thus, to use the previous example, the Reserve nominee or candidate on active duty orders for five days to attend military schooling is barred from performing *any* campaign activities while on orders, to include when off-duty in the evening in the hotel room.[55] The bottom line for Reserve members is that active duty means active duty, regardless of duration; all campaign activities by Reserve members while on any type of active duty are barred.

National Guard

When analyzing the legality of campaign activities by National Guard members, it is critical to understand that the directive's limitations on campaigning apply to members of the National Guard "even when in a non-Federal status."[56] Thus, regardless of the numerous types of National Guard duty that may be performed, National Guard members are, at a minimum, *always* subject to the campaign restrictions found in paragraphs 4.3.1 and 4.3.2 regarding non-active duty campaign activities. Then, if it is determined that the National Guard member is performing active duty as defined by the directive, the member must comply with the more restrictive rules that ban campaign activities while on active duty.

So what type of duty by National Guard members meets the definition of active duty found in the directive? The first, and easiest, place to start is with a federal call or order to active duty pursuant to title 10, U.S. Code, such as a deployment overseas.[57] Title 10 orders place the Guard member in federal status—that is, in full-time active military service of the United States under federal command and control.[58] This situation is no different than a Regular component or Reserve servicemember on federal active duty. The result is that the National Guard nominee or candidate who is on title 10 orders is on "active duty" under the directive and is barred from performing any campaign activities pursuant to paragraph 4.3.3 of the directive.

The next situation involves duty pursuant to title 32, U.S. Code.[59] National Guard members perform various types of title 32 duty, to include the traditional IDT (otherwise known as "drill" duty),[60] the familiar two-week AT duty,[61] required

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[51] For example, Army Reserve and Air Force Reserve members are defined by statute as "all Reserves of the Army [or Air Force] who are not members of the Army [or Air] National Guard of the United States." 10 U.S.C. §§ 10104, 10110 (2006). These Reserve members have no National Guard affiliation and, therefore, always serve as federal servicemembers, although not necessarily always on active duty.

[52] 37 U.S.C.S. § 206 (LexisNexis 2009).

[53] 10 U.S.C.S. § 101(d)(1) (LexisNexis 2009).

[54] DoDD 1344.10, *supra* note 5, para. 4.3.3.

[55] *Id.* para. 4.3.3.

[56] *Id.* para. 2.

[57] 10 U.S.C. § 12301 (2006).

[58] *Id.* § 101(d)(1). Note that this title 10 statutory definition of active duty defines "active duty" to mean "full-time duty in the active military service of the United States," and specifically excludes "full-time National Guard duty." However, the definition of active duty in DoDD 1344.10 specifically *includes* "full-time National Guard duty."

[59] Title 32, U.S. Code, is entitled "National Guard."

[60] 32 U.S.C.S. § 502(a)(1) (LexisNexis 2009).

[61] *Id.* § 502(a)(2) (requiring at least fifteen days each year of training in addition to drill duty).

schooling,[62] active duty to conduct title 32 "other" missions,[63] and full-time National Guard duty as a state AGR (active Guard or Reserve) Soldier or Airman.[64] Drill duty does not meet the definition of active duty under the directive because it is not included in the definition of "full-time National Guard duty" found at 10 U.S.C. § 101(d)(5), as further defined below. On the other hand, the other types of title 32 duty situations (e.g., AT, required schooling, "other" missions, and state AGR duty) are clearly included in the definition of "full-time National Guard duty" under 10 U.S.C. § 101(d)(5), as follows:

> The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.[65]

This definition covers virtually every type of National Guard title 32 duty conceivable, with the exception of IDT "drill" status as previously mentioned. Accordingly, the typical National Guard member performing non-drill duty under title 32 is performing "full-time National Guard duty" under 10 U.S.C. § 101(d)(5). Because the term "full-time National Guard duty" is included in the definition of active duty in DoD Directive 1344.10, National Guard nominees or candidates who perform non-drill duty under title 32 are barred from engaging in any campaign activities.[66]

Despite the above, there is one remaining duty situation involving the National Guard that is not considered "active duty" for purposes of the directive's prohibition against active duty campaign activities. That situation is the traditional state active duty under state law, which involves an activation by the state governor to perform state missions, such as relief efforts during natural disasters or responses to civil disturbances. In this capacity, the National Guard member is under the command of the governor and is funded by the state. Because this duty does not fall within the definition of "full-time National Guard duty" under 10 U.S.C. § 101(d)(5) and is, therefore, not under the directive's definition of "active duty," a National Guard member who is a nominee or candidate for civil office and performs state active duty is not subject to the directive's all-out ban from campaign activities. Instead, the member must comply with the directive's other campaign limitations in paragraphs 4.3.1 and 4.3.2 pertaining to members not on active duty. This is required because, as previously mentioned, the directive states in paragraph 2 that the limitations in paragraphs 4.3.1 and 4.3.2 apply to members of the National Guard, "even when in a non-Federal status."[67] Be aware, however, that state law may prescribe additional limitations on members' campaign activities while performing state active duty.

Punitive Nature of the DoD Directive 1344.10

A final point pertains to the punitive nature of DoD Directive 1344.10. Paragraph 4.6.4 states that the directive is a lawful general regulation and that violations of paragraphs 4.1 through 4.5 by persons "subject to the Uniform Code of Military Justice" (UCMJ) are punishable under Article 92, UCMJ. This article has focused exclusively on paragraphs 4.2 and 4.3 of the directive, which fall within the range of punishable sections in the directive. That said, readers should be cautious when analyzing whether suspected violations of paragraphs 4.2 or 4.3 by a Reserve or Guard member actually fall under the jurisdiction of the UCMJ. Although Regular component servicemembers are always under UCMJ jurisdiction,[68] Reserve and Guard members are frequently not subject to the UCMJ. For example, Reserve members are subject to the UCMJ only when in an active duty status or an IDT "drill" status.[69] Hence, a Reserve nominee or candidate not on active duty or IDT status who violates the rules in paragraph 4.3 regarding the proper use of military photographs during a campaign is not subject to UCMJ jurisdiction. Although the chain of command may discipline the Reserve member through administrative measures, they may not pursue action under the UCMJ. Meanwhile, National Guard members are subject to

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[62] *Id.* §§ 504 and 505.

[63] *Id.* § 502(f).

[64] *Id.*

[65] 10 U.S.C. § 101(d)(5) (2006). This definition of "full-time National Guard duty" is identical to the definition found at 32 U.S.C.S. § 101(19).

[66] DoDD 1344.10, *supra* note 5, para. 4.3.3.

[67] *Id.* para. 2.

[68] UCMJ art. 2(a)(1) (2008).

[69] *Id.* art. 2(a)(1) and (3).

the UCMJ only when in a title 10 federal active duty status.[70] They are not subject to the UCMJ when serving in a purely state active duty status or when serving pursuant to title 32 orders. Because service under title 32 orders is still under state command and control, a National Guard nominee or candidate performing any type of title 32 duty who violates the campaign rules found in paragraphs 4.2 and 4.3 of DoD Directive 1344.10 is not subject to UCMJ jurisdiction. As always, however, authority may exist under state law to discipline the National Guard member.

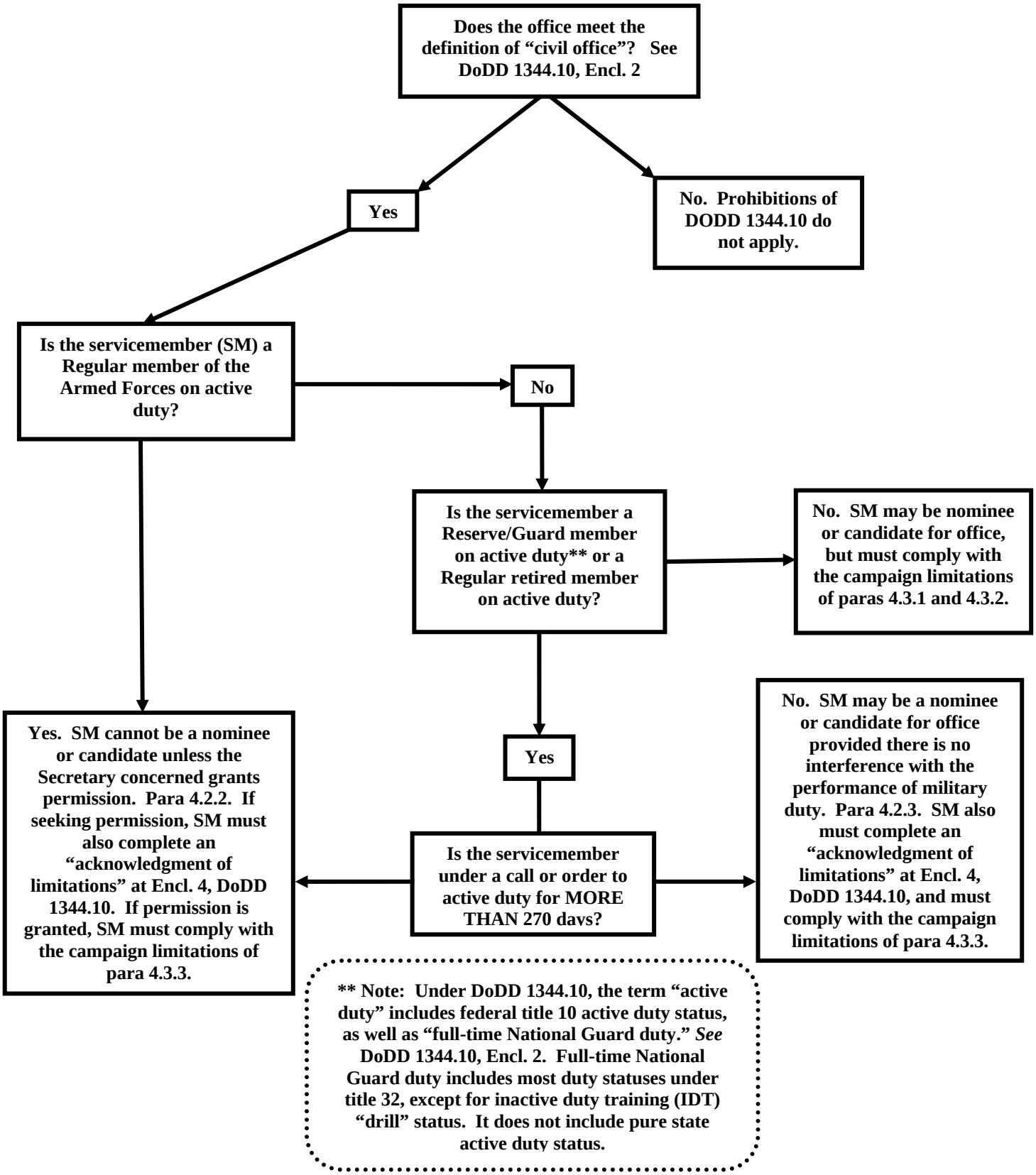
Conclusion

This article examined current DoD policy and restrictions for servicemembers who are nominees or candidates for civil office. Although DoD Directive 1344.10 addresses a myriad of other issues regarding the political activity of servicemembers, questions pertaining to candidacy for civil office are particularly compelling due to the impact that a candidate's conduct may have on the public's perception of the military. Of initial concern in this article was whether the "civil office" in question meets the directive's definition of civil office. The article then turned to the rules regarding servicemember eligibility for civil office, emphasizing the significance that the servicemember's military component and length of active duty tour play in the analysis. Finally, the article focused on the directive's relatively new and very specific limitations on campaigning for civil office, highlighting important differences in application depending on whether the nominee or candidate is or is not on active duty. To ensure that "no stone is unturned" concerning the highly visible and public issues standing at the intersection of military service and political activity, servicemembers and judge advocates alike should research the directive carefully when faced with issues involving candidacy and campaigning for civil office.

[70] *Id.* art. 2(a)(3).

Appendix

Eligibility for Civil Office Under DoD Directive 1344.10



Office of The Judge Advocate General
Legal Assistance Policy Division

OTJAG Practice Note

Military Spouses Residency Relief Act (MSRRA): Use Caution and Read Carefully

Lieutenant Colonel Janet H. Fenton∗

On 11 November 2009, President Obama signed the Military Spouses Residency Relief Act (MSRRA) into law.[1] The MSRRA amends the Servicemembers Civil Relief Act (SCRA)[2] to provide some military spouses the ability to regain a "lost" domicile for tax purposes. As in everything, the devil is in the details.

Much of the news coverage about the MSRRA is misleading. This law does not simply permit a Soldier's spouse to "pick" or "choose" a legal domicile in any state—say, for example, one that does not have income tax. The MSRRA states:

> A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.

Essentially, the MSRRA allows military spouses to maintain their domicile if they move to accompany their Soldier-spouse due to military orders and the spouse has the same domicile as the Soldier. As used in the SCRA, the terms "residence" and "domicile" are interchangeable. These terms denote the place where a Soldier—and now, the Soldier's spouse—maintains his permanent home and to which the Soldier has the intention to return whenever he is absent. The SCRA, as amended by the MSRRA, now protects Soldiers from owing income taxes on military pay, except in their state of legal residence or domicile, and protects spouses from owing income taxes earned in the state in which they reside solely to be with the Soldier due to military orders, unless the state is also their state of legal residence or domicile. Spouses may not simply pick their domicile to be the same as the Soldier, however. Spouses must meet the requirement of physical presence in the state and show indicia of intent to make the state their permanent home, in order to benefit from the MSRRA's protections.

Domicile is established, not chosen, even though it is no secret that many Soldiers have a propensity to establish domicile in income tax free states, such as Texas, Florida, Washington, Nevada, Alaska, South Dakota, and Wyoming, as well as other tax-favored states, such as New Hampshire and Tennessee. A Soldier must complete DD Form 2058, "State of Legal Residence Certificate," and file the completed form with the personnel office to declare his state of residence or domicile.[3] The Defense Finance and Accounting Service (DFAS) uses the DD Form 2058 to determine whether state income tax should be withheld from the Soldier's military pay. However, the DD Form 2058 does not, by itself, legally change the Soldier's domicile.

The DD Form 2058 describes the difference between "home of record" and legal residence or domicile. The instructions explain that residence and domicile are a matter of "physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile. In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly indicated."[4]

The following scenarios highlight some of the implications of the MSRRA.

Example 1. Soldier is a resident/domiciliary of Texas. His spouse takes the required steps to establish and maintain residency/domicile in Texas as well. Soldier is then assigned to Virginia, and his spouse moves to Virginia to live with the Soldier. The spouse eventually gets a job in Virginia. The spouse can assert the SCRA, and Virginia cannot tax the spouse's income earned in Virginia.

Example 2. Soldier is a resident/domiciliary of Texas. He is assigned to Virginia, and while in Virginia he meets and marries his spouse, who is working in Virginia. The MSRRA does not permit the spouse to now claim Texas residency/domiciliary. Virginia can tax the spouse's income.

Example 3. Soldier is a resident/domiciliary of Pennsylvania. Her spouse takes the required steps to establish and maintain residency/domicile in Pennsylvania.

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[1] Pub. L. No. 111-97, 123 Stat. 3007 (2009).

[2] Pub. L. No. 108-189, 117 Stat. 2835 (2003).

[3] U.S. Dep't of Def., DD Form 2058, State of Legal Residence Certificate (Feb. 1977).

[4] *Id.*

Soldier is then assigned to North Carolina, and her spouse moves to North Carolina to live with the Soldier. The spouse eventually gets a job in North Carolina. The spouse can assert SCRA, and North Carolina cannot tax the spouse's income earned in North Carolina; however, Pennsylvania can tax the income. It is incumbent on the spouse to file Pennsylvania estimated taxes on the income and file a Pennsylvania tax return.

States are still sorting out the implications of this law on their income and personal property tax systems. The law is effective for tax year 2009, and state-by-state guidance concerning refunds on 2009 taxes can be found online at individual state tax websites.[5] In general, if a military spouse seeks a refund for the income tax withheld by a state, both the Soldier and the spouse should expect some inquiry into their claims of domicile.

Especially in states with large military populations (e.g., Virginia, Maryland, North Carolina, and California,) the initial burden of establishing the bona fides of residence and domicile will fall on the Soldier and spouse. The required indicia of domicile differ from state to state, so Soldiers and their spouses should be careful to check their state's tax form instructions for guidance. Even after a Soldier has demonstrated sufficient evidence to establish residence or domicile in a state, the state may require additional evidence of the spouse's shared domicile with the Soldier. State refunds will often be held pending confirmation of qualification under the MSRRA. Tax refunds may even be delayed in states that allow MSRRA claims to be filed electronically.

In short, legal assistance practitioners should keep the following key points in mind when educating their clients on the MSRRA. First, the MSRRA does *not* create the right to pick and choose any state as a state of residence. Second, the claims of residency of both spouses and Soldiers are likely to be scrutinized carefully by state taxing authorities because the basis for the new SCRA protection is the shared residence or domicile of a Soldier and spouse. Third, unsupportable claims of changed residency may be viewed as fraudulent by state taxing authorities and may subject the family to significant additional tax penalties and interest. Finally, contrary to media reports, neither the SCRA nor the MSRRA exempt Soldiers or spouses who physically reside in a particular state from complying with that state's driver's license requirements.

For more information concerning individual state guidance on these issues, visit the Tax Discussion Board on JAGCNet.

[5] *See generally* Federation of Tax Administrators, FTA Links Page, http://www.taxadmin.org/fta/link/ (last visited Jan. 26, 2010) (providing links to individual state tax websites).

Book Reviews

Lessons from the Silver Screen: Must-See Movies for Military Lawyers

Major Ann B. Ching[*]

Introduction

A longstanding tradition of *The Army Lawyer*, the *Military Law Review*, and other legal journals is to provide regular reviews of books of interest to the legal community. Book reviews steer readers toward literature that enhances professional development, provides information on a novel area of law, or provokes thought concerning legal, political, or ethical issues. Whether the reader chooses to download a book onto an electronic device or simply thumb through a paperback, the value of reading has not diminished in this electronic era, nor has the value of book reviews.

This article takes a different tack, however, by reviewing another form of popular media: film. Evidence abounds that military lawyers love to watch movies. Walk into a typical Army legal office and shout, "You can't handle the truth!"[1] Chances are, people will know what you are talking about. The multiple overseas deployments of the past several years have also had the collateral effect of developing a new generation of film buffs. Watching DVDs on a portable player or laptop computer is a great way to endure the inevitable lulls of a protracted deployment.

Movies can provide more than entertainment, however. Movies can educate and inspire. Movies also enjoy certain advantages over books. It takes two, maybe three hours to watch a movie, whereas most people will require many more hours to read a book. Furthermore, movies allow a group experience, conducive to subsequent debate and discussion. No wonder many law schools find ways to weave popular film into their curriculum.[2]

What follows is a review of five films that every military lawyer should watch. These movies were carefully selected with several criteria in mind: they must entertain as well as educate; they must exemplify the best of the medium in terms of acting, directing, and cinematography; and they must relate directly to the practice of law in the military.[3] The goal is to entice the reader to see these movies by highlighting their salient points and discussing their relevance to the contemporary practice of military law. These films also provide an excellent foundation for a professional development class that combines a screening with a follow-on discussion (and, of course, hot buttered popcorn).

Judgment at Nuremberg[4]

What difference does it make if a few political extremists lose their rights? What difference does it make if a few racial minorities lose their rights? It is only a passing phase.

First on the list is a military courtroom drama with a twist—this time, the judges are the accused. As the title suggests, this classic is set during the post–World War II tribunals in Nuremberg. Rather than recount the trials of Nazi party leaders and military officers, however, *Judgment at Nuremberg* is based on the true story of three German judges tried for war crimes.

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[1] A FEW GOOD MEN (United Artists 1992).

[2] *See* Francis M. Nevins, *Using Fiction and Film as Law School Tools*, *in* LEGAL EDUCATION FOR THE 21ST CENTURY 177–85 (Donald B. King ed., 1999), *available at* http://tarlton.law.utexas.edu/lpop/etext/nevinsusing.htm.

[3] Furthermore, all of these movies are readily available on DVD for under twenty dollars. *See, e.g.*, http://www.amazon.com (last visited July 14, 2009). In selecting these five films, the author consulted several sources: fellow judge advocates; the American Film Institute's list of top courtroom dramas; and several prominent film guides. *See* AFI's 10 Top 10, Top 10 Courtroom Drama, http://www.afi.com/10top10/crdrama.html (last visited Aug. 6, 2009); HALLIWELL'S FILM GUIDE (John Walker ed., 8th ed. 1991); ALUN EVANS, BRASSEY'S GUIDE TO WAR FILMS (2000). Additionally, in the author's opinion, these films also are notable for their entertainment value and straightforward teaching points for military lawyers.

[4] JUDGMENT AT NUREMBERG (United Artists 1961). Although nominated for eleven Academy Awards, the film ultimately earned two: one for best adapted screenplay (Abby Mann) and a Best Actor trophy for Maximilian Schell as defense attorney Hans Rolfe. *See* EVANS, *supra* note 3, at 109.

The Nuremberg trials have been widely praised as an unprecedented application of the rule of law in the aftermath of warfare; the Nuremberg tribunal's first chief prosecutor, Robert H. Jackson, described them as "one of the most significant tributes that Power has ever paid to Reason."[5] *Judgment at Nuremberg*, however, takes place when the tribunal and its prosecutions are becoming politically inconvenient. As the movie opens, the Nuremberg trials have been going on for two years. The U.S. Government is realizing the strategic value of maintaining a good relationship with Germany at the dawn of the Cold War. Against this backdrop, Judge Haywood (Spencer Tracy) finds himself presiding over a difficult and unpopular trial. The prosecution is arguing that the three defendants actively participated in the crimes of the Nazi party by carrying out the "Nuremberg laws." Indeed, the judges are charged with murder. The most sympathetic of the three defendants is Ernst Janning (compellingly portrayed by Burt Lancaster), a respected legal scholar who nonetheless sentenced seemingly innocent defendants to harsh punishment, even death, in enforcement of Hitler's Nuremberg laws.

This film benefits from the credibility lent by its author, Abby Mann, who served three years in the Army; the movie uses actual Army Signal Corps footage when the prosecution details the atrocities of the Nazis in concentration camps.[6] Furthermore, *Judgment at Nuremberg* showcases a true all-star cast, in the best tradition of the Golden Age of Hollywood; Spencer Tracy, Marlene Dietrich, Maximillian Schell, Burt Lancaster, Judy Garland, and Montgomery Clift turn in memorable performances.[7] Although the dialogue and pace of this film echo a stage drama more than a modern film, the compelling performances, superb screenplay, and tight cinematography will draw in a contemporary audience.

Though produced nearly fifty years ago, *Judgment at Nuremberg* deals with issues that modern military lawyers will readily recognize. Hardcore international law practitioners can have a field day discussing the legitimacy of the tribunal and the propriety of charging the judges with murder and other war crimes. The beauty of this film, however, is that any judge advocate can relate to themes wholly independent of the mechanics of the International Military Tribunal itself.

One such theme is that of the duty of a government lawyer. Like judge advocates, the defendants had simultaneous duties toward their government and toward the rule of law.[8] A primary defense of the judges at trial in this film is that as public servants, they fulfilled their duty to execute the laws as dictated by their leader, Adolph Hitler—"My country, right or wrong." The tribunal (and the viewer) must ask the next question: Should judges adhere to a higher duty to abide by the rule of law, versus the law of a dictator with no regard for human rights? In retrospect, especially given the brutal laws executed by the Nazi judges, the answer seems simple: The judges should have recognized the perversion of justice created by the Nuremberg laws, and either resigned or refused to enforce them.

Nevertheless, any judge advocate who has disagreed with a commander over a course of action can understand the difficulty of such a position. The Army's Rules of Professional Conduct tell us to give competent advice, but to accept the decisions of Army officers because these decisions "are not as such in the lawyer's province."[9] The only exception is if the lawyer "has reason to know that *the Army* may be substantially injured by the action of an officer . . . that is in violation of law or directive."[10] In that instance, if the officer "insists upon action" and the lawyer has exhausted his options, he "may terminate representation . . . . In no event shall the lawyer participate or assist in the illegal activity."[11] In some instances, then, a lawyer's higher duty to the law is congruent with his duty as a judge advocate to represent and protect the Army. A *Nuremberg* viewer should consider whether the Nazi judges' loyalty to their country was congruent with, or at odds with, their duty to uphold the Nuremberg laws.

Intertwined with that theme is the notion of national emergency justifying behavior that might otherwise be condemned. The defense argues that a convergence of internal and international pressures threatened the very survival of Germany. Resigning from the bench or other demonstrated disloyalty would disrupt a key pillar of government, thereby jeopardizing national security even more. Thus, the judges believed themselves justified in carrying out their nation's laws, confident that the resolution of this national crisis would allow them to return to a more just execution of their duties.

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[5] INTERNATIONAL MILITARY TRIBUNAL, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (photo. reprint 1995) (1947) (opening statement of Justice Robert H. Jackson, Chief of Counsel for the United States, Nov. 21, 1945).

[6] *See* Obituary, *Abby Mann*, TELEGRAPH, Mar. 29, 2008, *available at* http://www.telegraph.co.uk/news/obituaries/1583183/Abby-Mann.html.

[7] Not to mention a pre-*Star Trek* appearance by William Shatner as an Army JAG captain. HALLIWELL'S FILM GUIDE, *supra* note 3, at 597.

[8] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6 (pmbl.) [hereinafter AR 27-26] ("A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.").

[9] *Id.* R. 1.13 cmt. (Army as Client).

[10] *Id.* (emphasis added).

[11] *Id.* R. 1.13(d).

In light of recent national debate over government conduct in the War on Terrorism,[12] a contemporary viewer will readily recognize an enduring theme. At what point does national emergency justify government action that, in another context, may be criticized as inhumane, even illegal? In *Judgment at Nuremberg*, the defense argued that the "enemy was gripping our throats" in a manner that justified the most extreme measures to ensure the nation's survival. History, and this film, ultimately disagreed with that notion.

The Caine Mutiny[13]

[T]here are four ways of doing things aboard my ship: The right way, the wrong way, the Navy way, and my way.

As the title indicates, this film is about a crime—mutiny—and its aftermath. Codified at Article 94 of the Uniform Code of Military Justice, mutiny and sedition have traditionally been "characterized as the gravest and most criminal of the offenses known to the military code."[14] Mutiny also stands apart from simple insubordination in that it requires the principal to act "in concert with any other person."[15] In other words, mutiny is the perfect subject for a maritime and courtroom drama like *The Caine Mutiny*.

Up front, the film carefully points out that no mutiny has ever taken place on a U.S. Navy vessel. Indeed, the film is based on a work of fiction: a novel of the same title by Herman Wouk.[16] Rather than a violent uprising, the mutiny in this story is based on a series of small events that call into question the captain's judgment and fitness for duty. The film opens with the protagonist, Ensign Willie Keith, eagerly graduating from Officer Candidate School and certain he will work on a battleship or destroyer. To his dismay, he is assigned to the U.S.S. *Caine*—a minesweeper that has seen better days. The hull sports rust, and military standards and courtesies seem to have deteriorated as much as the *Caine* herself. After a rough start with the *Caine*'s captain, Ensign Keith welcomes the arrival of the new captain, Lieutenant Commander (LCDR) Queeg (Humphrey Bogart). Soon, however, Queeg's "eccentricities" and questionable decisions alarm Keith and his fellow officers. Lieutenant Thomas Keefer suggests to the Executive Officer (XO), Lieutenant Stephen Maryk, that Queeg may be suffering from a mental disorder, namely, "acute paranoia." The XO starts to document LCDR Queeg's actions and his behavior seems increasingly bizarre, culminating with an overblown investigation into a quart of stolen strawberries. Shortly after, Queeg appears to freeze as the ship navigates through a dangerous storm; the XO (having been previously briefed on "Article 184" by Keefer)[17] relieves the captain and steers the *Caine* to safety.

At this point, the setting changes from the *Caine* to dry land as Maryk and Keith face a court-martial. After eight other lawyers turn down the case, Lieutenant Greenwald (adeptly portrayed by a young Jose Ferrar) takes up Lieutenant Maryk's defense, even though he thinks that what he has done "stinks." Lieutenant Keefer, who has avoided charges because he was absent from the bridge when Maryk took over, is reluctant to testify that he suggested to Maryk that Queeg was mentally unstable (thereby possibly incriminating himself in the process). Despite his open disdain for his clients, Greenwald zealously defends them to the point of pushing Queeg to the brink of a breakdown on the stand. Unlike two of the other films discussed in this article, *The Caine Mutiny* does not end with a firing squad; Greenwald wins his case and his clients are fully acquitted. This doesn't keep him from tossing a glass of champagne in Keefer's face—the man he considers "the real author of the Caine mutiny."[18]

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[12] *See, e.g.*, The Torture Question: Is Torture Ever Justified?, Frontline, PBS, http://www.pbs.org/wgbh/pages/frontline/torture/justify/ (Oct. 18, 2005) (debating the use of torture in the "ticking time bomb" scenario).

[13] THE CAINE MUTINY (Columbia Pictures 1954).

[14] Kevin M. Kelly, Comment, *"You Murdered Queeg": Lawyers' Ethics, Military Justice, and The Caine Mutiny*, 1991 WIS. L. REV. 543, 543 (May/June 1991) (quoting WILLIAM WINTHROP, 2 MILITARY LAW AND PRECEDENTS 892 (2d ed. 1896)).

[15] UCMJ art. 94(a)(1) (2008).

[16] HERMAN WOUK, THE CAINE MUTINY (1951).

[17] According to Lieutenant Keefer, Article 184 of Navy Regulations states, "It is conceivable that most unusual and extraordinary circumstances may arise in which the relief from duty of a commanding officer by a subordinate becomes necessary, either by placing him under arrest or on the sick list . . . ."

[18] As a side note, the "villain," Lieutenant Keefer, is played by Fred McMurray. Viewers will likely recognize him for a more popular role as the father on *My Three Sons*. *See* Turner Classic Movies, Biography for Fred MacMurray, http://www.tcm.com/tcmdb/participant.jsp?spid=119195 (last visited Aug. 12, 2009).

Like many military courtroom films, *The Caine Mutiny* brings up several issues of professional responsibility.[19] Lieutenant Greenwald finds his personal feelings in conflict with his duty to represent the clients he believes to be guilty. Any current or former trial defense counsel can readily identify and empathize with Greenwald's situation. The Army's Rules of Professional Conduct for Lawyers directly acknowledge this situation, stating that "[m]ostly all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the law and the legal system and to the lawyer's own interest in remaining an upright person."[20] As a seasoned lawyer, he is able to set those feelings aside and concentrate on zealously defending Lieutenant Maryk.

Greenwald's zealous representation raises other issues, however. To defend Maryk, he must not only impeach the testimony of a military psychiatrist, but he must do all he can to make Queeg appear to be mentally unstable. His rigorous cross-examination does the trick, but after the trial Greenwald is disgusted by what he has done. Although the novel deals with this conflict in more detail,[21] the film provides enough to engender debate among judge advocates. Arguably, his conduct skirts the boundaries of Rule 3.5, Impartiality and Decorum of the Tribunal.[22] As the commentary states, "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."[23] The counterargument would be that his conduct falls within the permissible boundaries of zealous representation; after all, impeaching a witness's credibility is a common and accepted trial tactic. Any judge advocate who has prosecuted or defended a Soldier will have an opinion on the propriety of Greenwald's actions.

On a different note, the film is also noteworthy for its treatment of mental illness. The film leaves no doubt as to the captain's obvious missteps and shortcomings. A modern audience will identify, as did the captain's staff, his behavior as possible symptoms of post-traumatic stress disorder (PTSD), paranoid personality disorder, or any of a number of other diagnoses out of the DSM-IV.[24] In light of rising suicide rates in the past few years, the Army has stepped up training on identifying and addressing signs of mental illness.[25] A judge advocate viewer must ask, did the accused take appropriate steps, given the circumstances? Perhaps one answer lies in a crucial scene, where the staff has an opportunity to warn a senior admiral about Queeg's behavior, but back off when Lieutenant Keefer loses his nerve. The film makes it clear that mutiny must be a last resort. The viewer is left to consider whether Lieutenant Maryk had exhausted his options before making that choice.

Breaker Morant[26]

It's a new war for a new century. I suppose this is the first time the enemy hasn't been in uniform. They're farmers. They're people from small towns. And they shoot at us from houses and from paddocks. Some of them are women, some of them are children, and some of them are missionaries . . . .

Shortly after a well-respected army captain is brutally killed by enemy insurgents, three soldiers stand trial for murdering detainees. At their court-martial, the defense proffers several arguments: "take no prisoners" orders from higher headquarters; confusing rules of engagement; and self-defense. On the other hand, the prosecution contends that a conviction is necessary to show the local population that the army punishes its own for war crimes.

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[19] For the sake of storytelling and dramatic pacing, ethical guidelines are usually glossed over or ignored altogether in film and television, sometimes to the point of incredulity. *See, e.g.*, SUSPECT (Tri-Star Pictures 1987) (depicting a public defender (Cher) who has an affair with a jury member (Liam Neeson) with seeming impunity).

[20] AR 27-26, *supra* note 8, para. 6 (pmbl.).

[21] *See* Kelly, *supra* note 14, at 560–64 (thoroughly analyzing the ethical issues raised by Greenwald's tactics as depicted in the novel).

[22] AR 27-26, *supra* note 8, R. 3.5.

[23] *Id.* (commentary).

[24] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR]. Paranoid personality disorder is defined as "a pattern of pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent." *Id.* at 690. Post-traumatic Stress Disorder is defined as "the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or physical injury," among other possible traumas. *Id.* at 463. Examples of PTSD symptoms that Queeg displays are irritability, hypervigilance, and "outbursts of anger." *Id.* at 468.

[25] *See, e.g.*, C. Todd Lopez, *Vice Says Mental Health More Than Stopping Suicides*, ARMY NEWS SERV., July 31, 2009, *available at* http://www.army.mil/-news/2009/08/03/25400-vice-says-mental-health-more-than-stopping-suicides/.

[26] BREAKER MORANT (Roadshow Entertainment 1980).

This scenario could describe a number of cases stemming from the Iraq war. Soldiers from the Fourth Infantry Division were court-martialed for drowning an Iraqi man, allegedly motivated in part by the death of a captain in their battalion a few days before.[27] Two years later, in the trial of Soldiers for murdering detainees, the commanding general of the 101st Airborne Division was accused of issuing a "kill all military age males" order.[28] Nevertheless, this scenario is actually a synopsis of the plot of *Breaker Morant*—a true story, set during a war that occurred 100 years ago, on another continent, fought by soldiers from another country. The modern viewer will marvel at the enduring nature of the moral and legal issues faced by military leaders adapting to guerilla warfare at the dawn of the twentieth century.

Set during the Boer War in what is now South Africa, *Breaker Morant* uses flashbacks, interspersed with scenes of the present day, to narrate the court-martial of Harry "Breaker" Morant, Peter Handcock, and George Witton.[29] Morant is a lieutenant with the Bushveldt Carbineers, an Australian unit operating under the control of the British army. His best friend, Captain Hunt, is ambushed and wounded during a patrol. When the patrol returns and reports that Hunt is missing, Morant immediately says, "Avenge Captain Hunt." As the trial unfolds, the viewer learns more about the events that led to the charges. Morant is first motivated by discovering a prisoner wearing a khaki uniform, ostensibly that of Captain Hunt. This leads to the first execution—explained later by an order that "all prisoners wearing khakis will be shot."[30] Next, Morant assembles a firing squad to dispose of a group of six Boer prisoners, even though they surrendered under a white flag. The final act in question involves a German missionary whom Morant saw speaking to the Boer prisoners, despite his orders not to. A flashback depicts Handcock riding after the missionary, who is later found shot. Adding to the drama and suspense, the details of these events are revealed very gradually during the tense courtroom scenes.

Any former trial defense counsel will identify with the defense counsel, Major J.F. Thomas. Prior to being appointed to defend all three Carbineers, his only legal experience was in land conveyances and wills. Nonetheless, he launches a volley of forceful legal arguments: the trial is unconstitutional, because the accused are Australian, not British; the defense just received the evidence, so the trial must be delayed; the defendants were following orders from Lord Kitchener that all prisoners be shot; and the defendants did what they had to do against an undisciplined insurgency who themselves disregarded the laws of war. Despite his lack of courtroom experience, Major Thomas proves to be an effective litigator, skillfully exposing biases in prosecution witnesses and forcefully arguing that the defendants are mere scapegoats, used by the British government to hasten a peace treaty and end to the war.[31] Major Thomas's selection as defense counsel seems to validate some critics of today's U.S. Army, who contend that the least experienced attorneys are called upon to handle the most serious cases.[32] Thomas's skillful handling of the case demonstrates the counterpoint, however—that according to our rules of professional conduct, Army lawyers are deemed competent absent contrary evidence.[33]

The average viewer/lawyer looking for more lessons learned will find many in *Breaker Morant*. This film has garnered renown not only for its superb acting and direction, but for the abundance of moral and ethical issues it confronts in a frank, straightforward manner. Indeed, *Breaker Morant* has been the subject of many scholarly articles that dissect its plot and discuss in detail concepts such as professionalism[34] and heroism.[35]

For the military lawyer, however, the film *Breaker Morant* remains especially relevant because of its parallels with the issues faced by today's Soldiers. The passing of a century has seemingly done little to clarify the legal dilemmas that arise in

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[27] *See, e.g.*, NATHAN SASSAMAN, WARRIOR KING (2009) (describing this event, among others, from the battalion commander's point of view).

[28] *See, e.g.*, Raffi Khatchadourian, *The Kill Company*, NEW YORKER, July 6 & 13, 2009, at 41, 50.

[29] Any fan of 1980s television will recognize Edward Woodward (who plays Morant), as "The Equalizer." If Handcock looks familiar, it may be from actor Bryan Brown's role as Tom Cruise's mentor in *Cocktail*.

[30] The prosecution contends that this order meant to shoot only those who wore khakis with "intent to deceive."

[31] Indeed, Lieutenant Witton's memoir uses the same term in its title. GEORGE WITTON, SCAPEGOATS OF THE EMPIRE: THE TRUE STORY OF BREAKER MORANT'S BUSHVELDT CARBINEERS (Angus & Robertson 1982) (1907).

[32] *See* Katie Couric, *Sexual Assault Permeates U.S. Armed Forces*, CBS NEWS, Mar. 17, 2009, *available at* http://www.cbsnews.com/stories/2009 /03/17/eveningnews/main4872713.shtml (quoting one former judge advocate's opinion: "what we see in the JAG court is [sic] very inexperienced, brand spanking new lawyers").

[33] One could argue that special rules should apply for defense counsel in capital cases. Although the American Bar Association states that its guidelines for capital cases apply to military proceedings, neither the *Manual for Courts-Martial* nor AR 27-26 expressly adopt these guidelines. *See* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 2 (rev. ed. 2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf.

[34] Drew L. Kershen, *Breaker Morant*, 22 OKLA. L. REV. 107 (1997) (reviewing in detail the themes of integrity and professionalism throughout the film).

[35] Michael Asimov, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131 (1995–1996).

asymmetric warfare. Shifting from status-based to conduct-based rules of engagement requires Soldiers to engage in highly discretionary judgments of hostile intent and proportionality.[36] Both the Boer War and Operation Iraqi Freedom have highlighted the heightened responsibility this places on senior commanders to ensure that rules of engagement are clear, understandable, and properly disseminated through the ranks. Clarifying "take no prisoners" or "kill all military-age males" orders not only spares lives, but also keeps otherwise good soldiers—like Breaker Morant—out of the courtroom and on the battlefield.

Paths of Glory[37]

There are few things more fundamentally encouraging and stimulating than seeing someone else die.

Fans of film classics like *The Shining*,[38] *2001: A Space Odyssey*,[39] and *Full Metal Jacket*[40] may be surprised to learn that visionary director Stanley Kubrick laid the foundation for these films early in his career with the critical success *Paths of Glory*. Although it stars legendary American actor Kirk Douglas, *Paths of Glory* is set amidst the French army's trenches during World War I. More poignantly than *Breaker Morant*, *Paths of Glory* explores the concept of punishing soldiers to maintain good order and discipline—in this case, to deter other soldiers from acts of cowardice.

The film begins by depicting a common plot device in war films: the senior officer who chases ambition at the cost of his subordinates' lives. General Mireau, ordered on a virtual suicide mission to attack a German position called "The Anthill," initially balks until he realizes the career benefit to be gained through a successful mission. Seemingly oblivious to the real cost to his soldiers—and his good fortune to stay far back from the frontlines—he cheerfully walks through the trenches early in the film, asking soldiers if they are "ready to kill more Germans."

In contrast, Colonel Dax is immediately ill-at-ease with the mission, briefing General Mireau that at least sixty percent of his men will probably be killed. Nonetheless, Dax agrees to carry out the mission. As the battle wages, however, the ferocity of the German counterattack pins an entire company in its trenches. Furious at their "cowardice," Mireau orders the regiment to fall back and convenes a general court-martial, stating, "If those little sweethearts won't face German bullets, they'll face French ones!"

Colonel Dax, who before the war was one of the best criminal lawyers in France, is appointed defense counsel for three soldiers—one from each company.[41] Similar to *Breaker Morant*, the so-called trial is hastily thrown together with a predetermined result. Dax rails against the system, emphatically pointing out the defects in the proceeding—"no written indictment," "no witnesses," "no record of trial," and "no access to evidence," concluding that "this court-martial is a disgrace—not the battle." Despite his valiant efforts, however, the trial marches inexorably toward its only possible verdict.

Paths of Glory echoes many themes of the films already reviewed here, such as the pitfalls of battlefield justice, the fog of war, and weak leadership. A post-screening discussion could certainly focus on these issues, but could also benefit from examining one issue in detail—the value of general deterrence in maintaining military discipline. A corollary issue is whether it is just to ask a few people to face punishment for the acts engaged in by many, and whether there is any "fair" way to select the accused from all culpable parties.

Today's *Manual for Courts-Martial* reflects the traditional reasons for inflicting punishment on a guilty servicemember: "rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution."[42]

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[36] *See* Khatchadourian, *supra* note 28, at 47–48.

[37] PATHS OF GLORY (United Artists 1957).

[38] THE SHINING (Warner Bros. 1980).

[39] 2001: A SPACE ODYSSEY (MGM 1968).

[40] FULL METAL JACKET (Warner Bros. 1987).

[41] Mireau initially wants to execute 100 soldiers, ten from each company; his superior officer convinces him instead to try one man from each company in the first wave. The practice of punishing a military unit by executing randomly selected individuals dates to at least Roman times. In the Roman Army, a unit was "decimated" when one out of every ten soldiers was executed as a form of punishment. After Antony's defeat at Media, for example, Plutarch writes, "Antony, finding that his men had in a panic deserted the defence of the mound, upon a sally of the Medes, resolved to proceed against them by decimation, as it is called, which is done by dividing the soldiers into tens, and, out of every ten, putting one to death, as it happens by lot." PLUTARCH, ANTONY (John Dryden trans. 1909) (75 C.E.), *available at* http://classics.mit.edu/Plutarch/antony.html (last visited Jan. 18, 2010).

[42] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(g) (2008).

Given that Colonel Dax's clients face the firing squad, the only applicable sentencing philosophies are general deterrence and social retribution. Although, arguably, social retribution provides one reason for a death sentence (or, at the very least, General Mireau's desire for personal retribution), the overt reason for convening the court-martial was general deterrence. As one character states, "Troops crave discipline . . . . One way to maintain discipline is to shoot a man now and then."

In the context of the film, this general officer's statement is cold, even cruel. The average audience will doubtless find barbaric the seemingly arbitrary practice of selecting three men to "make an example" for hundreds of others. No wonder that *Paths of Glory* is often touted as an openly anti-war film.[43] Setting aside, however, the myriad injustices surrounding the "trial" (many of which are not even touched on here), the desire to maintain good order and discipline through general deterrence is an accepted, even encouraged, practice in the military to this day.

Compared to the average audience, judge advocate viewers will likely be able to compare this theme to their own experiences in the courtroom. Logic and practicality dictate that not every positive urinalysis or AWOL will be dealt with by general court-martial; nonetheless, commanders do need to bring certain cases to trial in order to maintain discipline. The discretion vested in commanders by the military justice system can make these decisions appear arbitrary to an outside observer. In *Paths of Glory*, the three defendants are chosen by their respective companies in three different ways. One man is chosen by lot; one man is identified as a "social undesirable"; and the third is selected by his commander because he witnessed the commander committing fratricide. Each method reflects a different shade of meaning of the word "unfair." Nonetheless, judge advocates, whether they agree with these methods or not, can find much to contemplate when comparing this regiment's desire for general deterrence with their own experiences with commanders and clients.

The Best Years of Our Lives[44]

You know, I had a dream. I dreamt I was home. I've had that dream hundreds of times before. This time, I wanted to find out if it's really true. Am I really home?

This classic recounts the story of three veterans returning to a small Midwestern town from their tour of duty in World War II. Meeting up in a military terminal and hitching rides back to the United States, the three couldn't be more different—a decorated officer, a world-weary infantry first sergeant, and a seriously wounded, but upbeat, sailor (played by real-life veteran and double-amputee Harold Russell). Once they return home, however, it turns out that all three must deal with wounds, both physical and mental, inflicted by their war experience.

The first sergeant is actually a well-off bank vice president with a loving wife (played with tenderness and class by Myrna Loy) and adoring children. His military tour, however, has left him impatient with the money-first practices of his bank, especially when it comes to granting GI Loans to returning servicemen. He also is quick to temper his moodiness with alcohol, which is played more comically (with the exasperated reactions of his wife) than tragically. The captain, who had hastily married a young singer/dancer before shipping off, returns to his bride's disappointment when he sheds his dashing uniform to return to civilian life as a soda jerk. Furthermore, he suffers vivid nightmares and flashbacks to his time in the ball turret of a fighter plane; nowadays, this would be labeled PTSD, although that term was unknown when this film was made.[45] Perhaps the film's most poignant portrait is that of young Homer Parrish. Externally upbeat, he demonstrates his agility with the hooks that now substitute for hands, lighting cigarettes and playing the piano. Behind closed doors, however, the effects of his disability are stark. One memorable scene unflinchingly depicts his father buttoning his pajamas after he has shrugged off his artificial arms. In addition, his cheerful demeanor belies his deep anxiety over the reaction of his family, and especially that of his young fiancée. Harold Russell won a well-deserved Best Supporting Actor Academy Award for his portrayal of Homer; he skillfully demonstrated both the capabilities of and the obstacles faced by wounded servicemen.[46]

Although the film has a typical Hollywood ending, it is still eminently watchable for modern audiences. Acclaimed director William Wyler deftly blends humor and drama, providing both a story of struggle with one of hope and redemption through the love of the family and friends of each veteran. Military lawyers will additionally benefit from its sincere

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[43] For example, the booklet accompanying the Metro-Goldwyn Mayer Home Entertainment DVD describes the film as "a searing indictment against the . . . ultimate folly of war."

[44] THE BEST YEARS OF OUR LIVES (The Samuel Goldwyn Company 1946).

[45] *See* DSM-IV-TR, *supra* note 24. The American Psychiatric Association classified "Posttraumatic Stress Disorder" as a mental disorder in 1980. *See* Nat'l Inst. of Health, Fact Sheet: Post-Traumatic Stress Disorder 1 (July 2007), *available at* http://www.nih.gov/about/researchresultsforthepublic/PTSD.pdf.

[46] EVANS, *supra* note 3, at 27.

portrayal of veterans' post-deployment issues. No movie before or since has so expertly portrayed every dimension of a veteran's re-integration into "normal" life after a combat deployment. Even more so than the obvious challenges faced by the double-amputee, the film accurately portrays the very real effects of PTSD. The captain returns a decorated "hero," only to face the very real, crippling effects of his nightmares and flashbacks. Although he has no external wounds, the film grants his mental trauma the same serious treatment and sympathy as the external wounds suffered by Homer Parrish. Such a depiction is ahead of its times, given the stigma and skepticism that still accompany diagnoses of mental illness in today's servicemembers.[47]

Judge advocates viewing this film today will immediately remark on the lack of support for these veterans. As depicted in this film, the support of friends and family and the resilience of the individual are the only sources available to help these vets overcome their issues. Any judge advocate screening this film today should be able to identify the many services that each of these veterans could use in this Operation Iraqi Freedom/Operation Enduring Freedom era.[48] Furthermore, the humane portrayal of each veteran serves as a reminder of the humanity of the Soldiers we counsel.

Conclusion

Notwithstanding the vast body of literature discussing film as a serious art form, people go to the movies because they are fun. Whether your "home theater" is a sixty-inch flatscreen TV with surround sound or a sixteen-inch laptop screen in a trailer in Afghanistan, movies can transport you to another place and time. Next time you're deciding what to watch, reach for one of these five films. Not only is it a chance to blend recreation with professional development—it's an excellent excuse to break out some gummi bears.

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[47] *See* Jennifer Clampet, *Counselors Help Combat Mental Health Stigma*, U.S. Army Homepage, July 15, 2009, http://www.army.mil~news/2009/07/15/24394-counselor-help-combat-mental-health-stigma/.

[48] For example, the Army created the Wounded Warrior Program to assist Soldiers dealing with physical disabilities and behavioral health issues. *See* https://www.aw2.army.mil/index.html (last visited Aug. 13, 2009).

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 service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

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 ATTRS 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 Globe Icon (not the AARTS Transcript Services).

Go to ATTRS 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 ATTRS 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. TJAGLCS CLE Course Schedule (2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10

5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
512-27D30	4th Advanced Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	6th Advanced Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	2d Senior Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
WARRANT OFFICER COURSES		
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th BCT NCOIC Course	10 – 14 May 10
5F-F57	2010 BJA Symposium	10 – 14 May 10
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	13th Redictation Course	29 Mar – 2 Apr 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F24	34th Administrative Law for Military Installations and Operations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10

CONTRACT AND FISCAL LAW		
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10

CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009–2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020) Lawyer Course (030)	25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	8 – 12 Mar 10 (Newport) 12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)

03RF	Legalman Accession Course (020) Legalman Accession Course (030)	15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10
056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (010) Trial Refresher Enhancement Training (020)	1 – 5 Feb 10 2 – 6 Aug 10
4040	Paralegal Research & Writing (020)	19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (010) Mid Level Legalman Course (020)	22 Feb – 5 Mar 10 (San Diego) 14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (020) Continuing Legal Education (030)	25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)

961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (020)	12 – 16 Apr 10 (San Diego)
NA	Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Apr 10 6 – 9 Jul 10
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	22 Feb – 12 Mar 10 29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	1 – 12 Mar 10 5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 1 7 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	22 Feb – 12 Mar 10 3 – 21 May 10 7 – 25 Jun 10 19 Jul –6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) Senior Officer Course (090)	29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

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
APRI:	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
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 National Law Center 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
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095

NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
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

6. 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 (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, 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 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

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).

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.

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.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate 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.

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

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POCs
19 – 21 Mar 2010	Northeast On-Site	Boston, MA	3rd LSO 4th LSO 7th LSO	003	MAJ Don Corsaro Don.corsaro@us.army.mil Mr. Aaron Stein 617.753.4565 Mr. Aaron.Stein1@usar.army.mil
23 – 30 Apr 2010	Western On-Site & FX	San Francisco, CA (followed by FX at Fort Hunter Liggett 25 – 30 Apr)	87th LSO 6th LSO 75th LSO 78th LSO	004	LTC Tomson T. Ong Tomson.Ong@us.army.mil Tong@LASuperiorCourt.org 562.491.6294 Mr. Khahn Do Khahn.K.Do@usar.army.mil 650.603.8652
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

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

The TJAGSA, U.S. Army, 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 XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO 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.

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.

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

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.

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.