

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

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Introduction

The Military Whistleblower Protection Act¹ (MWPA) and the Military Mental Health Evaluation Protection Act² (MMHEPA) attempt to balance command authority with new due process rights for service members. The MWPA encourages service members to report unlawful conduct within the military in exchange for swift redress in the event of reprisal. The MMHEPA requires that commanders and mental health care providers (MHCPs) comply with several procedural requirements before subjecting a service member to a mental health evaluation, treatment or hospitalization. The purpose of the MMHEPA is to protect service members from unwarranted mental health evaluations, treatment, and hospitalization.

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

This article provides a comprehensive analysis of the MWPA and the MMHEPA to aid judge advocates in meeting

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

The Military Whistleblower Protection Act

Origins, Purpose, and Legislative Amendments to the MWPA

The origins of the MWPA trace back to 1951.⁵ While Congress was debating the amendments to the Universal Military Training and Service Act of 1951 (UMTSA),⁶ Representative John W. Byrnes received a letter from a constituent. The parents of a sailor asked Representative Byrnes for help in acquiring a hardship discharge for their son.⁷ When Representative

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1. 10 U.S.C.A. § 1034 (West 1998). *See infra* Appendix I for a complete version of 10 U.S.C.A. § 1034.
 2. National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992) (certain provisions codified at 10 U.S.C.A. § 1074). *See infra* Appendix J for a complete version of Pub. L. No. 102-484, § 546.
 3. *See* 10 U.S.C.A. § 1034(f)(6); *see also* National Defense Authorization Act of 1993 § 546(f).
 4. *See* U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION, para. E.3.d (12 Aug. 1995) [hereinafter DOD DIR. 7050.6]; U.S. DEP'T OF DEFENSE, DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, paras. A.2, E.3 (1 Oct. 1997) [hereinafter DOD DIR. 6490.1].
 5. Pub. L. No. 51-144, § 1(d), 65 Stat. 73, 75-76.
 6. *Id.*
 7. *See* 97 CONG. REC. 3775, 3776 (1951).

Byrnes discovered that a Navy regulation prohibited sailors from communicating with members of Congress without first going through the chain of command,⁸ he proposed an amendment to the UMTSA.⁹ That same year, Congress passed the Byrnes Amendment, which allowed service members to have direct and unrestricted communication with members of Congress.¹⁰ Although communications with members of Congress had to be lawful, the subject matter could include grievances against commanders.¹¹ In 1956, Congress codified the Byrnes

ing 10 U.S.C.A. § 1034 by proposing military whistleblower legislation.¹⁴ After the House bill failed to win Senate approval in 1986,¹⁵ the House re-introduced the military whistleblower legislation the next year (House Bill 1394) and held hearings.¹⁶ After hearing strong and emotional testimony by both propo-

Amendment at 10 U.S.C.A. § 1034.¹² It was almost four decades later,¹³ however, that Congress first considered expand-

nents¹⁷ and opponents¹⁸ of whistleblower protection, in 1988, Congress enacted the Military Whistleblower Protection Act (MWPA of 1988).¹⁹ The purpose of the MWPA of 1988 was to balance the commander's authority to preserve discipline with

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

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

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

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

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

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

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

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

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

the service member's duty to report illegal conduct "without fear of retaliation."²⁰ The MWPA of 1988 mandated unrestricted and reprisal-free communication between service members and Congress or an inspector general (IG).²¹ The

communication, however, had to be lawful²² and involve "a violation of law or regulation," mismanagement, fraud, waste, abuse, or a "substantial and specific danger to public health or safety."²³ In 1989 and 1991, Congress amended the MWPA by expanding the class of persons that could make²⁴ and receive²⁵

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

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

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

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

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

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

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

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

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

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

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

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

protected communications, and making violations of the MWPA punitive.²⁶ In 1994, Congress again amended the MWPA and widened both the class of persons that can receive protected communications²⁷ and the categories of protected communications that a person can make.²⁸ Additionally, in 1994, Congress made several procedural changes to the MWPA.²⁹

The Current Military Whistleblower Protection Act

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

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

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

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

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

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

25.

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

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

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

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

28. *See id.* § 531(b)(2):

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

Id.

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

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

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

30. 10 U.S.C.A. § 1034(a), (b).

31. *Id.* § 1034(c)-(f).

The General Rule—Protected Communications

The MWPA protects two categories of communications. First, the MWPA protects individual, rather than collective,³² lawful communications between a service member and a member of Congress or an IG.³³ The lawful communication does not have to involve an allegation of illegal conduct.³⁴ In addition, one federal case suggests that a service member must communicate in his unofficial capacity to receive the protection.³⁵ Second, the MWPA protects only those communications that a service member reasonably believes allege illegal conduct.³⁶ These include violations of law or regulation, reports of sexual harassment or discrimination, mismanagement,³⁷ or gross

waste of funds.³⁸ They also include abuse of authority or actions that involve “a substantial and specific danger to public health or safety.”³⁹ The DOD IG guide that covers the investigation of reprisal cases expands the scope of protected communications to include those that are made by third parties on behalf of service members.⁴⁰

Making or Preparing a Communication

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

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

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

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

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

36. *See* 10 U.S.C.A. § 1034(c)(2).

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

Id.

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

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

39. 10 U.S.C.A. § 1034(c)(2).

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

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

To Whom Does the MWPA Apply?

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

41. See 10 U.S.C.A. § 1034(b).

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

....

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

Id.

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

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

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

45. 10 U.S.C.A. § 1034(b).

46. *Id.*

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

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

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

48. 10 U.S.C.A. § 1034(a).

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

50. *Id.*

Whom Does the MWPA Protect?

Although the MWPA protects all “members of the armed forces” who make or prepare a protected communication, it does not define “members of the armed forces.”⁴⁸ The DOD directive, however, defines “members of the armed forces” as all commissioned and warrant officers, and all enlisted members in all services in any Regular, Reserve or National Guard

organization or unit.⁴⁹ It also includes all members of the Coast Guard when they are operating under the Navy.⁵⁰

Statutory Recipients of Protected Communications

The MWPA protects lawful communications that are made by service members to all members of Congress⁵¹ and any IG.⁵² It also protects communications about illegal activities that are made by a service member to all audit, inspection, investigation, or law enforcement personnel within the DOD.⁵³ Service members may also report illegal activities to “any person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communication.”⁵⁴ The MWPA, the DOD, and the Army have not specified exactly who falls within the purview of “any person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established admin-

istrative procedures for such communication.”⁵⁵ This broad language, however, seems to include a variety of individuals. For example, all DOD and service equal opportunity (EO) advisors,⁵⁶ and all investigating officers that are appointed by law⁵⁷ or regulation fall within this language.⁵⁸ The language also includes all DOD, service, major command, or installation level hotlines, including sexual harassment or discrimination hotlines. In addition, the term “statutory recipients” includes all DOD component agencies or employees that are designated to investigate sexual harassment or discrimination. Finally, “statutory recipients” arguably include all supervisory attorneys,⁵⁹ commanders,⁶⁰ and all civilian or military supervisors who receive protected communications from their subordinates.⁶¹

Prohibited Personnel Actions as Reprisals

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

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

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

54. 10 U.S.C.A. § 1034(b)(1)(B)(iv).

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

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

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

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

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

tion of “personnel action.” It includes “any action taken on a military member that affects or has the potential to affect the military member’s current position or career.”⁶⁴

Whistleblower Investigations

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

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

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

62. 10 U.S.C.A. § 1034(b).

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

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

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

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

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

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

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

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

Although the DOD IG oversees all reprisal investigations, it delegates most reprisal investigations to the respective service IGs.⁶⁵ The investigator, however, must be independent and outside the chain of command of both the complaining service member [hereinafter complainant] or the responsible management official (RMO).⁶⁶ Since violations of the MWPA are punitive in nature, judge advocates and commanders should

refer suspects⁶⁷ or RMOs to the United States Army Trial Defense Service (USATDS) for advice and representation.⁶⁸

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

Remedies

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

officials and other legislators.⁸³ Despite complainants' attempts to seek judicial review of their whistleblower cases, recent federal court decisions have held that the MWPA only grants "administrative remedies" rather than "private causes of action."⁸⁴

The Military Mental Health Evaluation Protection Act

Origins of the Military Mental Health Evaluation

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

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

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

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

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

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

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

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

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

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

78. *Id.* § 1034(f)(6).

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

80. *Id.* § 1552(f).

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

82. *Id.*

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

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

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

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

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

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

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

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

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

Id.

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

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

91. *Id.* § 546(b).

92. *Id.* § 546(d).

Protected Persons

The MMHEPA applies to all active duty and reserve⁹⁴ service members in the Army, Navy, Air Force, and Marine Corps.⁹⁵ It also applies to all active and reserve service members in the Coast Guard when they are operating under the Navy.⁹⁶

Mental Health Referrals within the MMHEPA

The legislative history⁹⁷ and the MMHEPA suggest that the procedural protections that are afforded to service members should apply to all involuntary mental health referrals.⁹⁸ The scope of the procedural protections depends on whether the

referral is for an outpatient or an inpatient evaluation, an emergency evaluation, or an involuntary hospitalization.⁹⁹ Although the MMHEPA defines a “mental health evaluation,”¹⁰⁰ it makes no distinction between routine, non-routine, discretionary, or non-discretionary referrals.¹⁰¹ The MMHEPA also fails to provide any guidance on whether there are certain types of mental health evaluations that fall outside of its coverage.¹⁰²

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

93. *Id.* § 546(f).

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

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

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

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

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

The MMHEPA provides:

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

Id.

99. *Id.* § 546(b)(1), (d)(1).

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

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

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

101. National Defense Authorization Act of 1993 § 546.

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

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

ries of mental health referrals as non-discretionary and inapplicable to the MMHEPA.¹⁰⁵ They are: voluntary self-referrals, mental capacity and mental responsibility inquiries,¹⁰⁶ referrals to family advocacy programs,¹⁰⁷ referrals to drug and alcohol abuse rehabilitation programs,¹⁰⁸ voluntary diagnostic referrals that are made by non-MHCPs, and non-discretionary

Non-Emergency Outpatient and Inpatient Evaluations

Before referring a service member to a MHCP for a non-emergency outpatient mental health evaluation or treatment,

evaluations that are required by a “service regulation for special duties or occupational classifications.”¹⁰⁹ The Army has also exempted the above listed evaluations.¹¹⁰

commanders must consult¹¹¹ with a MHCP,¹¹² or equivalent.¹¹³ Although the MMHEPA is unclear on the extent of the consultation requirement, the DOD requires that commanders discuss the service member’s “actions and behaviors” and the reasons for the referral with the MHCP.¹¹⁴ Finally, commanders must

Commander’s Responsibilities

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

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

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

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

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

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

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

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

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

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

After consulting with a MHCP, commanders must provide written notice of the referral to the service member at least two business days before making a non-emergency referral.¹¹⁶ The written notice must include the date, time, place, and name of the MHCP who will perform the evaluation.¹¹⁷ It must list the

commander's reasons for the referral and the name of the MHCP when the commander consulted.¹¹⁸ It must include an explanation if the commander was unable to consult with a MHCP prior to the referral.¹¹⁹ The notice must also inform the service member of the names and phone numbers of local individuals who can assist the service member rebut the referral.¹²⁰

Commanders must also notify the service member of several non-waivable rights.¹²¹ First, a commander must notify the service member of his right to speak to an attorney at least two business days before the scheduled evaluation.¹²² Second, a commander must notify the service member of the right to speak to the IG and to file a complaint with the IG if the service

member believes that the referral is improper.¹²³ Third, a commander must notify the service member of his right to have an independent MHCP evaluate him at his own expense.¹²⁴ Finally, a commander must notify the service member of his right to communicate with Congress or an IG about the referral.¹²⁵ After the commander and the service member sign the

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

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

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

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

Id.

115. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration of the MHCP’s Recommendations

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

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

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

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

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

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

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

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

130. *Id.* § 546(b)(2).

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

132. *Id.*

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

Emergency Evaluations

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

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

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

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

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

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

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

137. *Id.*

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

139. *Id.*

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

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

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* See *infra* Appendix C.

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

as soon as possible, provide the service member with the same referral and rights notice that is required for non-emergency evaluations¹⁴⁷ If a MHCP decides to involuntarily hospitalize a service member, commanders must further inform the service member of the “reasons for and the likely consequences of the admission.”¹⁴⁸ Finally, a commander must advise the service member of his right to contact “a family member, friend, chaplain, attorney, or IG.”¹⁴⁹

Whenever a commander believes that a service member is “likely” to harm himself or others, and he is suffering from a “severe mental disorder,”¹⁵⁰ the commander must refer him for an emergency evaluation.¹⁵¹ Despite this affirmative duty, com-

manders must still comply with the consultation and notice requirements that are required for emergency referrals.¹⁵²

Mental Health Care Provider Responsibilities

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

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

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

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

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

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

Id. para. 2-1.

151. The DOD directive that implements the MMHEPA provides:

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

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

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

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

Before a non-emergency mental health evaluation occurs, the mental healthcare provider shall determine if procedures for referral for mental health evaluation have been followed in accordance with *DOD Directive 6490.1* and [*DOD Instruction 6490.4*] . . . Specifically, the mental healthcare provider shall review the signed memorandum including the Statement of service member’s Rights forwarded by the Service member’s commanding officer in accordance with subparagraph F.1.a(4)(a).

Id. See *infra* Appendices A and B.

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

155. The instruction provides:

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

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

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

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

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

Whenever a service member both intends to and has an ability to seriously injure himself or others, the MHCP must take

precautions.¹⁶⁵ These precautions may include, but are not limited to, notifying the service member's commander, military or civilian police, or "potential victims."¹⁶⁶ Upon taking these precautions, the MHCP must also notify the service member of the precautions that were taken and document them in his medical records.¹⁶⁷ Finally, prior to discharging the service member, the MHCP must inform the service member's commander and "potential victims" of the discharge.¹⁶⁸

Independent Review of Admission and Continued Hospitalization

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

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

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

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

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

160. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

Army Investigations of Improper Referrals and Evaluations

The DOD IG generally delegates the investigation of unlawful or improper mental health referrals to the service IGs.¹⁷⁹ If

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

172. *Id.*

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

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

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

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

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

178. *Id.*

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

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

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

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

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

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

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

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

Army Implementation of the MWPA and the MMHEPA

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

The United States Army Trial Defense Service (USATDS) regarding training initiatives, is at the forefront in training defense counsel on the provisions of the MWPA and the MMHEPA. The USATDS has also trained counsel on how to

represent complainants and RMOs.¹⁹⁰ The USATDS policy is to advise and represent soldiers whenever a reprisal or an improper referral is part of a pending or recently completed criminal proceeding.¹⁹¹ Legal assistance attorneys handle all other reprisal or improper referral cases.¹⁹² In addition, the United States Army Medical Command (MEDCOM) has issued written guidance to MHCPs on how to comply with the procedural requirements of the MMHEPA.¹⁹³ All Army medical centers are aware of the MMHEPA's procedural requirements and some have implemented their own local procedures.¹⁹⁴

Practical Guidance on Implementing the MMHEPA

Advising Commanders and Mental Health Care Providers

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

Advising the Service Member

The MMHEPA and the implementing DOD instruction require commanders to provide counsel to service members who seek to rebut their mental health evaluation, treatment or hospitalization.¹⁹⁹ The MMHEPA mandates that judge advocates competently advise and represent service members on all

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

A Critique of the MWPA and the MMHEPA

The MWPA's Shortcomings

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

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

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

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

197. The DOD instruction provides:

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

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

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

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

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

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

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

First, as one opponent to the MWPA observed, the MWPA fails to define what “preparing to make” means.²⁰³ The DOD IG further complicates the term “preparing to make” by unnecessarily broadening its meaning.²⁰⁴ For example, as long as service members allege that they made or prepared a protected communication, even if it was never actually made or prepared, the DOD IG will investigate their reprisal complaints.²⁰⁵ This fluid interpretation of “preparing to make” is too broad and invites abuse. It allows service members who justifiably receive unfavorable actions to invoke the MWPA’s protections by simply claiming that they were preparing a protected communication. Although the amount of reprisal complaints that have been filed with the DOD²⁰⁶ and the Army IGs²⁰⁷ has been manageable, unless Congress reasonably defines and limits the scope of “preparing to make” protected communications, service members will continue to misuse the MWPA.²⁰⁸

Second, the definition of “reprisal” is dangerously broad because it covers all aspects of the military’s management of its force, and could be disruptive to unit readiness.²⁰⁹ For example,

assume that a commander selects a service member for an undesirable duty. By simply alleging that his selection (a personnel action) was made in reprisal, the service member could delay or avoid the undesirable duty. Congress should limit the term reprisal to cover solely unfavorable personnel actions such as negative evaluation reports, negative counselings, and letters of reprimand.

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

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

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

205. *Id.*

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

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

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

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

210. 10 U.S.C.A. § 1034(b)(1)(B)(iv).

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

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

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

Fifth, once the service member establishes a “low-threshold” prima facie case of reprisal,²¹⁹ the investigations unnecessarily place the burden on the RMOs to prove that they took no reprisal. Since violations of the MWPA and the DOD directive

are punitive, the MWPA should not force RMOs who are accused of a criminal offense to prove their innocence.²²⁰ Placing this burden on the RMOs is contrary to the constitutional notions of fairness and due process, and strikes against the presumption of innocence. Since the burdens of persuasion and proof in reprisal investigations favor complainants, this factor alone may be disruptive to unit readiness. Commanders may unnecessarily hesitate before making important personnel and managerial decisions that affect subordinates to avoid an IG investigation and its punitive consequences.

The MMHEPA's Shortcomings

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

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

212.

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

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

213. *Id.*

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

215. UCMJ art. 138.

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

217. 10 U.S.C.A. § 1553.

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

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

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

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

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

Second, despite the MMHEPA’s potential punitive nature, it fails to distinguish between major and minor, or intentional and non-intentional violations.²²³ Because the MMHEPA fails to make these distinctions, commanders might second guess themselves before they make proper referrals simply to avoid possible IG investigations and resulting penalties. The MMHEPA’s punitive aspect could cause unnecessary delays in emergency situations, which may result in harm to potential victims or service members who require immediate treatment.

Congress and the DOD should limit investigations to major and intentional violations of the MMHEPA. Minor procedural and non-intentional violations of the MMHEPA will likely occur, especially since the services are only in the training and implementing stages of this complex area of law.

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

Proposed Legislative Changes to the MWPA

Although the DOD does not expect any legislative changes to the MMHEPA in the near future,²²⁸ some procedural and substantive changes may occur to the MWPA by fiscal year 1999.²²⁹ The DOD will propose to Congress one substantive

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

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

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

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

225. GUIDELINES, *supra* note 201.

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

227. *Id.* para. E1.

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

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

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

Despite the DOD proposals, which appear to limit or restrict the MWPA authority, Congress is considering increasing military whistleblower protections. In April 1997, Representative Carolyn Maloney (New York) introduced a bill, the Maloney Amendment, that would mandate the appointment of a judge advocate to any service member who files a reprisal complaint.²³⁶ The service member would receive representation by a judge advocate during all proceedings or investigations.²³⁷ It would expand the service member's time for filing a reprisal

complaint from sixty days to one hundred and twenty days.²³⁸ The Maloney Amendment would also expand statutory recipients that could receive protected communications by adding "equal employment opportunity officers."²³⁹ Finally, the Maloney Amendment would require commanders to display the MWPA's rights and protections "in prominent locations" in every military installation containing more than one hundred service members.²⁴⁰ The Maloney Amendment is currently pending a review before the House Subcommittee on Military Personnel.²⁴¹

Conclusion

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

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

230. *Id.*

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

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

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

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

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

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

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

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

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

The MMHEPA creates several statutory responsibilities for DOD personnel. First, commanders must comply with the consultation, notice and formal request requirements before subjecting a service member to a discretionary mental health evaluation, treatment or hospitalization. Second, MHCPs must also comply with certain notice requirements. They must ensure that commanders comply with their procedural requirements before performing a discretionary mental health evaluation administering, treatment or hospitalizing a service member. Third, commanders must ensure that service mem-

bers are trained to identify and report “imminently or potentially dangerous” military personnel. The purpose of this “identify and report” requirement is to protect potential victims and to provide prompt treatment to individuals who are mentally unstable. Finally, judge advocates must be ready to provide competent advice and representation to service members who have been subjected to improper mental health evaluations, treatment, or hospitalization.

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

APPENDIX A¹

SAMPLE COMMANDER'S NOTICE
TO SOLDIER OF REFERRAL AND RIGHTS

(Office Symbol)

(Date)

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

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

1. References:

- (a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.
- (b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.
- (c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.
- (d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

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

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

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

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

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

- a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.
- b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.
- c. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DOD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.
- d. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).
- e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a _____

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

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights DOD mental health care provider.

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

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

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

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

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

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

(Name)

(Rank/Branch)

Commanding

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

Soldier's signature _____ . Date _____ .

IF SOLDIER DECLINES TO SIGN

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

Witness's signature _____ . Date _____ .

Print witness's rank and name _____ .

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

APPENDIX B¹

SAMPLE REQUEST FOR NON EMERGENCY
MENTAL HEALTH EVALUATION

(Office Symbol)

(Date)

MEMORANDUM FOR Commander, (MTF or Clinic) _____

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

1. References:

- (a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.
- (b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.
- (c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.
- (d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

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

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

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

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

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

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

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

Encl

(Name)

(Rank/Branch)

Commanding

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

APPENDIX C¹

SAMPLE REQUEST FOR EMERGENCY
MENTAL HEALTH EVALUATION

(Office Symbol)

(Date)

MEMORANDUM FOR _____ (mental health care provider).

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

1. References:

- (a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.
- (b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.
- (c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.
- (d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

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

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

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

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

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

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

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

XXX-XXXX

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

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

Encl

(Name)

(Rank/Branch)

Commanding

APPENDIX D¹

EMERGENCY EVALUATIONS

SAMPLE COMMANDER'S NOTICE
TO SOLDIER OF REFERRAL AND RIGHTS

(Office Symbol

)(Date)

MEMORANDUM FOR _____

(Soldier's name, rank, and SS#)

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

1. References:

- (a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.
- (b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.
- (c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.
- (d) DOD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

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

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

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

- a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.
- b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.
- c. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DOD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.
- d. The right to submit to the DOD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

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

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

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

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

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

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

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

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

(Name)

(Rank/Branch)

Commanding

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

Soldier's signature _____ . Date _____ .

IF SOLDIER DECLINES TO SIGN

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

Witness signature _____ . Date _____ .

Witness (print) rank and name _____ .

APPENDIX E

**SAMPLE MHCP MENTAL HEALTH EVALUATION
MEMORANDUM TO COMMANDER**

(Office Symbol)

(Date)

MEMORANDUM THRU Commander, (MTF or Clinic) _____

FOR Commander, (Referred soldiers commander) _____

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

1. References:

- (a) DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.
- (b) DOD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

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

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

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

_____.

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

OR

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

_____.

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

_____.

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

OR

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

XXXX-XX

SUBJECT: Command Referral of _____ (Name, Rank, SS#) for a Mental Health Evaluation¹

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

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

AND/OR

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

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

AND/OR

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

AND/OR

d. Other.

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

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

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

(MHP's name)

(Rank/Branch)

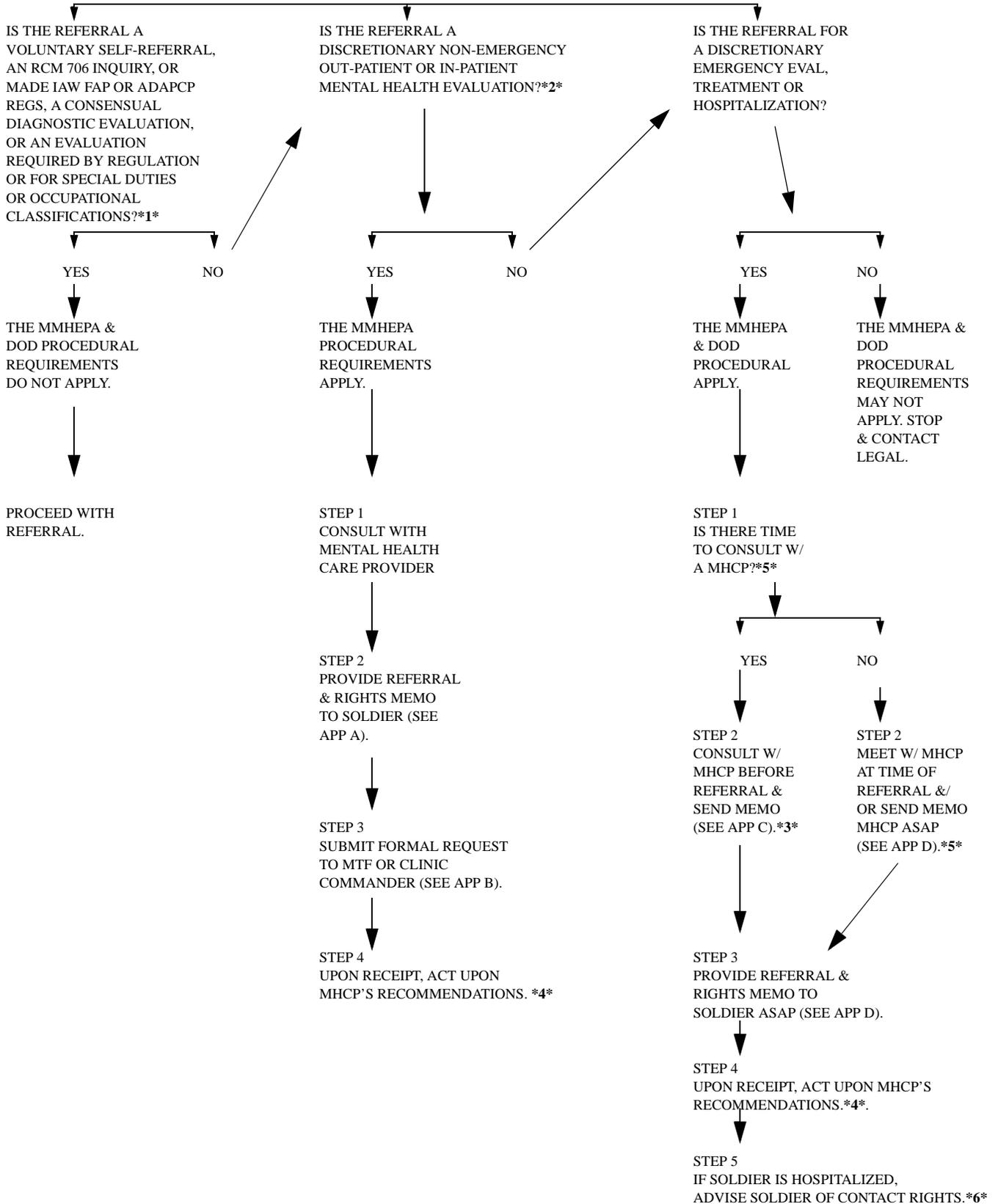
(Title)

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

APPENDIX F

CHECKLIST FOR COMMANDERS

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



CHECKLIST TABLE FOR APPENDIX F

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

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

Voluntary self-referrals.

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

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

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

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

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

Security Clearance Evaluations IAW Army Regulation 380-67;

Personnel Reliability Program Evaluations IAW Army Regulation 380-67;

Evaluations made IAW Army Regulation 135-178;

Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;

Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;

Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;

Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

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

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.

Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;

Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;

Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;

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

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

Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;

Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;

Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;

Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;

Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and

Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

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

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

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

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

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

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

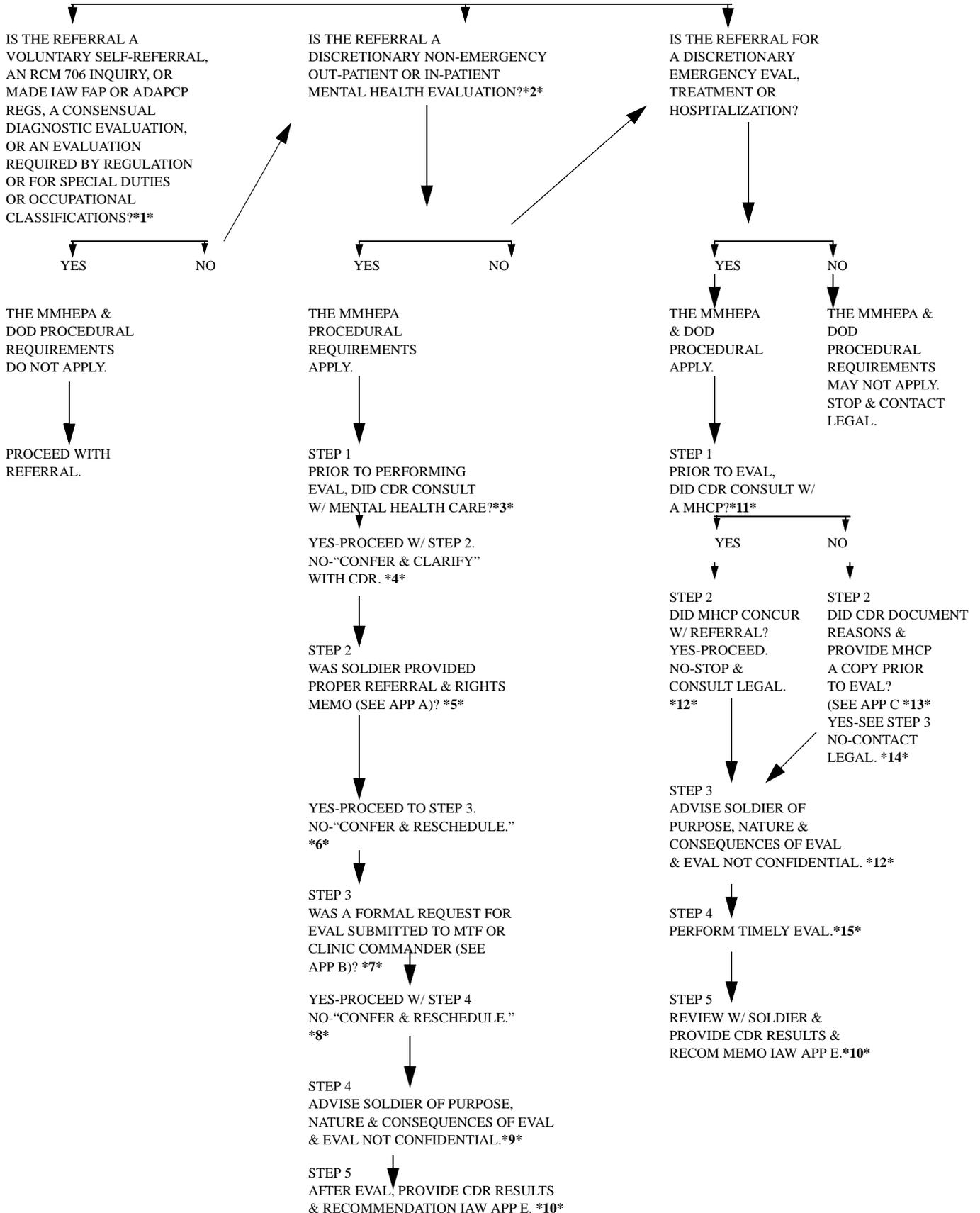
5 = Paragraph D.2.c. of the DODD requires you to refer soldiers for emergency mental health evaluations when one of your soldiers, by acts or words, is likely to cause injury to himself or herself, or others. You must also make an emergency referral whenever you believe your soldier is suffering from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

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

APPENDIX G

CHECKLIST FOR MENTAL HEALTH CARE PROVIDERS

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



CHECKLIST TABLE FOR APPENDIX G

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

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

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

Voluntary self-referrals.

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

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

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

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

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

Security Clearance Evaluations IAW Army Regulation 380-67;

Personnel Reliability Program Evaluations IAW Army Regulation 380-67;

Evaluations made IAW Army Regulation 135-178;

Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;

Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;

Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;

Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

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

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.

Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;

Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;

Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX H

SOLDIER'S COUNSEL CHECKLIST

I. The DOD Directive implementing the Military Mental Health Evaluation Protection Act (MMHEPA) references the Guidelines For Involuntary Civil Commitment¹ (Guidelines) as one source attorneys should use when representing soldiers pending mental health evaluations, treatment or hospitalization. Paragraph E.2 of the Guidelines provides, "for attorneys to assume the proper advocacy role, the attorney must advise the respondent of all available options, as well as the practical consequences of those options . . . the attorney should advocate the position that best safeguards and advances the client's interest." In order to best represent the interests of your client, counsel should use the following suggested approach in accordance with paragraph E1-E7 of the Guidelines.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Review Client's History and Explore Alternatives.

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

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

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

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

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

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

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

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

IV. Emergency Evaluations, Treatment and Hospitalization.

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

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

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

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

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

V. Review of Referral, Evaluation and Continued Hospitalization.

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

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

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

Counsel should consider:

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

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

APPENDIX I

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Current through P.L. 105-153, approved 12-17-97

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

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

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

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

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

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

(i) a Member of Congress;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) Definitions.--In this section:

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

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

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

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

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

APPENDIX J

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<< 10 USCA § 1074 NOTE >>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) DEFINITIONS.--In this section:

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

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

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

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

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

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

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

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

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

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

(3) the reasons for such differences.

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