

**LINE OF DUTY INVESTIGATIONS: BATTERED, BROKEN
AND IN NEED OF REFORM**

MAJOR AARON L. LANCASTER*

I. Introduction

Staff Sergeant (SSG) Johnson is a stellar noncommissioned officer (NCO) who excels at work and is an example to junior Soldiers.¹ One Friday night, SSG Johnson and his wife get into an argument over her suspected infidelity. During the argument, SSG Johnson's wife admits to sleeping with a Soldier in SSG Johnson's unit. The fight continues throughout the night and into the next day. Midday Saturday, SSG Johnson goes out to the garage and begins drinking. As the evening progresses, SSG Johnson becomes more intoxicated and furious. Deciding something must be done, SSG Johnson lays out a tarp to prevent a mess, places a chair in the middle of the tarp, and goes into the house and removes a handgun from its lockbox. He then drags his wife out to the garage, sits her in the chair and kills her. Prior to shooting his wife, SSG Johnson sends numerous texts to his friends telling them he is going to kill his wife.

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 25th Sustainment Brigade, 25th Infantry Division, Schofield Barracks, Hawaii. Education includes LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2006, University of Houston; B.A., 2004, University of Texas at Austin. Previous assignments include Deputy Chief of Administrative Law, United States Army Fires Center of Excellence and Fort Sill, Fort Sill, Oklahoma, 2015-2016; Administrative Law Attorney, United States Army Fires Center of Excellence and Fort Sill, Fort Sill, Oklahoma, 2014-2015; Chief of Military Justice, United States Army Japan and I Corps (Forward), Camp Zama, Japan, 2013-2014; Operational Law Attorney, United States Army Japan and I Corps (Forward), Camp Zama, Japan, 2012-2013; Trial Counsel, 21st Theater Sustainment Command, Kelley Barracks, Germany, 2011-2012; Rule of Law Attorney, 10th Mountain Division (Light Infantry), Wardak Province, Afghanistan, 2011; Rule of Law Attorney, 173rd Airborne Brigade Combat Team, Wardak Province, Afghanistan, 2010-2011; Chief of Legal Assistance, 21st Theater Sustainment Command, Kelley Barracks, Germany, 2009-2010; Chief of Claims, 21st Theater Sustainment Command, Kelley Barracks, Germany, 2009. Member of the bar of Texas. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ This example is based on the author's recent professional experience as an Administrative Law Attorney from 2014-2016. Hypothetical information was added for the purpose of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience].

With these facts, what commander would not find SSG Johnson's actions to be intentional, calculated, and premeditated? Staff Sergeant Johnson would likely be found mentally competent and court-martialed for his actions. Why then, when the facts are changed slightly to the Soldier deciding to kill himself instead of his wife, does Army Regulation (AR) 600-8-4 presume—and the command immediately try to find—the Soldier mentally unsound and therefore in the line of duty?² It makes no sense.

Next, consider Private First Class (PFC) Conrad who, while deployed, is knocked unconscious from an enemy fired mortar round and suffers a traumatic brain injury (TBI).³ No line of duty investigation (LODI) is conducted because the medical personnel were too busy handling other Soldiers' visual injuries and the commander was unclear on whether the injury was, in fact, an injury per AR 600-8-4. Private First Class Conrad returns from the deployment and, due in part to the TBI, becomes clinically depressed. Attempting to self-medicate, one Tuesday night PFC Conrad drinks so heavily that he develops acute alcohol poisoning and is taken to the hospital. He quickly regains consciousness but is involuntarily held for treatment for forty-eight hours. Once PFC Conrad is released from the hospital, the command allows him to attend an inpatient treatment facility for the next thirty days to combat his substance and alcohol abuse problems. The chief-of-staff, after reading the serious incident report, asks the staff judge advocate (SJA) whether a LODI is required. The SJA looks through the United States Code (U.S.C.) and AR 600-8-4 and is unsure what to tell the chief-of-staff. The SJA's confusion stems from the fact that AR 600-8-4 is silent regarding both the TBI and inpatient care and conflicts with the U.S.C. regarding the alcohol treatment at the hospital. The confusion and lack of clarity is unacceptable.

When Soldiers are injured or die while on active duty, a determination must be made as to whether the injury or death was in the line of duty (ILD) or not in the line of duty (NILD).⁴ This ILD or NILD decision affects considerable benefits that the Soldier may be entitled to upon their death or separation from the Army.⁵ Because of the substantial economic

² U.S. Dep't of Army, Reg. 600-8-4, Line of Duty Policy, Procedures, and Investigations para. 4-11 (4 Sept. 2008) [hereinafter AR 600-8-4].

³ Professional Experience, *supra* note 1.

⁴ AR 600-8-4, *supra* note 2, at para. 2-1.

⁵ See *infra* Part II for a further discussion on benefits.

interests for both the Soldier and the Army, it is crucial that LODIs are conducted in a way that provides transparency, consistency, and credibility. Unfortunately, as currently drafted, AR 600-8-4 is both confusing to use and does not assist the command in producing LODIs that sufficiently address the reasons for conducting a Lodi in the first place. As such, AR 600-8-4 should be substantially revised. It is poorly drafted, often in conflict with the U.S.C. it is designed to implement, and fails to provide proper protections for either injured Soldiers or the Army.

This article begins by analyzing the importance of LODIs and why doing them properly is essential. Next, the deficiencies in AR 600-8-4 preventing fair and consistent investigations are identified. Finally, this article provides proposed solutions and recommended changes to AR 600-8-4.⁶ The proposed remedies will provide investigating officers (IOs), approving authorities, and judge advocates (JAs) specific and clear guidance when making or recommending decisions for LODIs, resulting in improved consistency and transparency.

II. Background on Line of Duty Investigations

Understanding the deficiencies in AR 600-8-4 requires identifying why the military conducts LODIs and what the potential ramifications an ILD or NILD determination can have on a servicemember.⁷ When a servicemember dies, is injured, or suffers from an illness, under the U.S.C. a LOD determination is required for three basic purposes.⁸ First, a determination must be made for injuries and illnesses suffered by servicemembers in order to ascertain the potential negative effect that lost

⁶ The main part of this paper will address the issues in AR 600-8-4 and the reasons to update the regulation. See *infra* Appendices A-I for the specific proposed updates to AR 600-8-4.

⁷ The background section of this paper only provides a general overview of line of duty investigations (LODIs) and primarily focuses on the areas where AR 600-8-4 is currently deficient. See generally AR 600-8-4, *supra* note 2. For a more thorough background on LODIs, see Major Melvin Williams' 2014 primer. Major Melvin L. Williams, *In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families*, ARMY LAW., Nov. 2014, at 20-32. Throughout the paper the terms servicemember and Soldier will be used. Servicemember will be used to denote sections of statutes and regulations that are applicable to all those in the U.S. Department of Defense (DOD). Soldier will be used for sections of Army regulations that are only applicable to Soldiers. The primary purpose of this differentiation is to highlight which sections are required DOD-wide and which are constructs of the Army.

⁸ 10 U.S.C. § 972 (2004); 10 U.S.C. §§ 1201-1207 (2008); 10 U.S.C. § 1074a (2011).

time will have on servicemembers who are found NILD.⁹ The second purpose of conducting an LODI is to determine whether servicemembers, or their families, may receive compensation upon the servicemembers' death or discharge from the military due to a physical disability.¹⁰ The third purpose is to determine what, if any, benefits reserve servicemembers may be entitled to when they are injured or die.¹¹ In many cases, medical expenses are the primary focus for these reserve servicemembers.¹² Currently, AR 600-8-4 fails to provide enough clarity or sufficient guidance in order to properly address these purposes.

III. Defining Injuries, Investigation Triggers, and Protections for Soldiers

Commanders and their servicing JAs often struggle to answer basic

⁹ 10 U.S.C. § 972 (2004). Enlisted servicemembers, who are unable to perform their duties for more than one day and are found not in the line of duty (NILD), may have the lost time added to the end of their current enlistment period. *Id.* This lost time does not count as credit for the time served towards retirement or pay raises. U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7a, ch. 1 (Apr. 2016). Lost time by officers counts towards length of service for items such as retirement and additional service obligations, but not towards years of service for base pay. *Id.*

¹⁰ 10 U.S.C. §§ 1447-1460B (2007); 38 U.S.C. §§ 1301-1322 (1991); 38 U.S.C. §§ 3500-3566 (1991). The Line of Duty (LOD) determination for a service-ending injury can have a considerably greater financial impact on the servicemember and their family than one involving a servicemember's death. This is because, regardless of the decision made in the LOD, the family of a fallen Soldier will still be entitled to Servicemembers Group Life Insurance (SGLI), the Army Death Gratuity, Social Security, and Special Survivor Indemnification Allowance. National Defense Authorization Act of 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158. Conversely, a servicemember who suffers a service ending injury, found to be NILD, could receive no pension or medical retirement. 10 U.S.C. § 1207 (1956). It should be noted that while eligibility for Department of Veteran Affairs (VA) benefits is done independently of any DOD LOD decision, nothing prohibits the VA from using a DOD LODI when making their findings. 38 U.S.C. § 101 (2008); 38 U.S.C. § 105 (1991).

¹¹ 10 U.S.C. § 1074a (2011). 10 U.S.C. § 1074a differentiates between servicemembers currently serving on active duty for less than thirty days and those serving for more than thirty days. *Id.* For purposes of this paper, the terms activated status or activated reservist are used to identify National Guard of the United States (NG) and United States Army Reserve (USAR) Soldiers who are performing active duty for a period of thirty days or less or are conducting inactive duty training.

¹² Medical bills are paid by the DOD for injuries sustained by active duty servicemembers regardless of whether the injury was incurred ILD or NILD. 10 U.S.C. § 1074 (2009). Reserve servicemembers' medical expenses will only be paid by the DOD if the injury or illness was incurred ILD and in an activated status. *Id.* As a result, for those on active duty, LODIs are primarily completed to document lost duty time or long-term disability, while, for reservists, the focus is also to provide documentation for any injury or illness which may require treatment after the individual is no longer in an activated status.

LOD questions such as: does a Soldier's injury require a LODI and, if so, what type of LODI is required? The problem arises, not because the situations that commanders and JAs are dealing with are particularly complex, but because AR 600-8-4 is poorly written with inconsistent language regarding how to define an injury and the type of investigation that must be completed.¹³ Further complicating the process, AR 600-8-4 fails to provide adequate guidance regarding what statements by the Soldier can be used in the investigation.¹⁴

A. Formal vs. Informal Line of Duty Investigations

Under AR 600-8-4, LODIs can be conducted either as a formal or an informal investigation.¹⁵ The key distinction between the two is the suspicion of whether negligence or misconduct was the proximate cause of the injury or illness.¹⁶ Informal LODIs can only be conducted where *no* misconduct or negligence is indicated.¹⁷ If *any* negligence or misconduct is suspected, a formal LODI is required.¹⁸ This distinction unnecessarily elevates cases involving suspected simple negligence to a formal LODI.¹⁹

For example, a Soldier drives at night with a broken headlight. He has an accident and is injured. There is no reason to believe that the evidence from the investigation will show the proximate cause of the Soldier's injuries to be anything other than the broken headlight—which the Special Court-Martial Convening Authority (SPCMCA) believes is simple negligence and will result in an ILD determination. Currently, the SPCMCA, suspecting *any* negligence, must start a formal LODI, thereby requiring action by the GCMCA.²⁰

¹³ AR 600-8-4, *supra* note 2, para. 2-3.

¹⁴ *Id.*

¹⁵ *Id.* Formal LODIs can be appointed by a Special Court-Martial Convening Authority (SPCMCA) or a General Court-Martial Convening Authority (GCMCA) and approved by the GCMCA. *Id.* para. 1-11 (appointing authority); *Id.* para. 2-5 (approving authority). Informal LODIs are typically appointed and approved by the SPCMCA. *Id.* para. 1-11.

¹⁶ AR 600-8-4, *supra* note 2, para. 2-3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ In order to find a Soldier NILD, the command must show by a preponderance of the evidence that the proximate cause of the Soldier's injury was intentional misconduct or willful negligence. *Id.* app. B-10, R. 1. Simple negligence is not misconduct and will result in an in line of duty (ILD) determination. *Id.* app. B-10, R. 2.

²⁰ AR 600-8-4, *supra* note 2, para. 2-3.

The solution is simple and has already been implemented by the Navy and the Air Force.²¹ Both services only require a formal²² investigation when “the injury was incurred under circumstances which suggest a finding of ‘misconduct’ might result.”²³ If misconduct is suspected, a formal LODI is required. If misconduct is not suspected, an informal LODI is completed. Updating AR 600-8-4 to reflect this change will allow SPCMCAs to more expeditiously handle the majority of LODIs and only require GCMCA action on cases that could potentially result in a NILD determination. Further, this change will allow the GCMCA more time to properly identify and investigate questionable or problematic cases.

B. Identifying Injuries

1. *Defining What Constitutes an Injury*

While identifying whether a formal or informal LODI is required is important, an often more fundamental question commanders struggle with is, what injuries require a LODI? For example, does a Soldier who pulls a muscle during physical training (PT) and will miss three weeks of PT need a LODI? What about a Soldier who is drunk and falls out of a parked car resulting in a concussion but no lacerations? Finally, what about a Soldier who suffers from substance abuse which requires extended treatment at an inpatient facility? None of these situations are currently answered in AR 600-8-4.²⁴

The primary problem is that is that injury is not specifically defined under the U.S.C. or by the DOD. Army Regulation 600-8-4 also fails to

²¹ U.S. DEP’T OF NAVY, JAGINST 5800.7F, MANUEL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0222d (26 June 2012) [hereinafter JAGMAN]; U.S. DEP’T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION para. 2.3.4 (8 Oct. 2015) [hereinafter AFMAN].

²² The Navy uses the term “Command Investigations” instead of “formal.” JAGMAN, *supra* note 21, para. 209.

²³ JAGMAN, *supra* note 21, para. 222d1; AFMAN, *supra* note 21, para. 2.3.4.1. Misconduct, as defined by both the Air Force and Navy, is intentional conduct that is wrongful or improper or willful or gross negligence. JAGMAN, *supra* note 21, para. 0216a; AFMAN *supra* note 21, “Terms.” By combining willful/gross negligence and intentionally incurred injuries under the term misconduct, the Navy and Air Force have simplified when a formal LODI is required.

²⁴ See generally AR 600-8-4, *supra* note 2.

give a definition of what constitutes an injury.²⁵ The only guidance that the regulation provides is that a LODI is required for an injury in excess of one “clearly of no lasting significance (for example, superficial laceration or abrasions or mild heat injuries).”²⁶ No guidance is given to medical personnel or commanders to better understand what is meant by “no lasting significance.”²⁷ As discussed above, the DOD is required to complete LODIs for three reasons. These are to determine potential lost service in excess of one day, identify potential disability upon exiting military service, and make sure that reserve servicemembers who are no longer activated can continue to receive care for injuries received while on active duty.²⁸ Unfortunately, AR 600-8-4’s guidance regarding injuries is insufficient to properly answer any of these.²⁹

The solution is to create a two-part, black and white test of what constitutes an injury under AR 600-8-4. First, does the injury result in the Soldier being unable to perform military duties for more than twenty-four hours?³⁰ Second, is it probable or possible that the injury may result in a permanent disability?³¹

To identify whether a Soldier is unable to perform military duties for more than twenty-four hours, the command should determine whether the physical injury substantially prevents the specific Soldier from completing his or her assigned duties.³² For example, SPC Jones, a file clerk, pulls his hamstring while running and is placed on a running profile for three weeks. Although SPC Jones will be unable to participate in organized PT, the command determines that he is otherwise able to perform his military duties as a file clerk. In this case, no LODI would be required.³³ On the

²⁵ *Id.* para. 2-3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 10 U.S.C. § 972 (2004) (lost service); 10 U.S.C. §§ 1201-1207 (2008) (potential disability); 10 U.S.C. § 1074a (2011) (continued reserve care).

²⁹ AR 600-8-4, *supra* note 2, para. 2-3.

³⁰ 10 U.S.C. § 972 (2004).

³¹ 10 U.S.C. §§ 1201-1207 (2008).

³² 10 U.S.C. § 972 does not specifically address what is meant by the term “duties.” 10 U.S.C. § 972 (2004). It does couch duties in terms of “his duties” indicating that the intent was to make an individual determination of whether the specific servicemember was able to perform their assigned duties. *Id.*

³³ There is always the possibility that this type of injury could become aggravated in the future, resulting in either missed work or permanent disability. In that case, a LODI would be required for the aggravating incident and the investigation could incorporate the medical documentation from the previous injury.

other hand, if SPC Jones was on a training mission providing security for a dismounted patrol, the command would likely determine that his injury prevents him from completing these tasks and therefore a LODI would be required.

In addition to making a determination regarding assigned duties, AR 600-8-4 should provide clear guidance as to whether specific medical care would, or would not, trigger the twenty-four hour rule.³⁴ Under AR 600-8-4, there is no guidance as to how the command should treat the time spent in a medical facility.³⁵

10 U.S.C. § 972 defines “missed time” using the term “unable.”³⁶ AR 600-8-4 should implement similar language while providing an explanation as to what unable means. The simplest solution is to identify whether the time spent in the hospital or outpatient facility was deemed medically necessary or whether the treatment or rehabilitation was authorized by the command. If the command authorizes the treatment or rehabilitation, and therefore it is not medically required, then no LODI should be required. This is because, if the command *allows* the treatment, there is a presumption that the Soldier was medically *able* to perform his duties, but the command decided it would be in the Soldier’s best interest to receive treatment. On the other hand, if the treatment was deemed

³⁴ 10 U.S.C. § 972 (2004).

³⁵ See generally AR 600-8-4, *supra* note 2. Ironically, the only place AR 600-8-4 discusses time spent in a treatment facility involves alcohol and substance abuse and is inconsistent with the statutory requirements of 10 U.S.C. § 972. *Id.* para. 4-10. Paragraph 4-10 of AR 600-8-4 states:

That portion of time in the hospital that a doctor determines a soldier to be totally physically incapacitated for more than 24 consecutive hours solely because of alcohol or drug abuse will be “not line of duty—due to own misconduct.” Total physical incapacitation means the soldier is so disabled by the drugs or alcohol that he or she is comatose. The remainder of the period of hospitalization, treatment, or rehabilitation will be administrative absence from duty and does not require an LD determination.

Id. The term total physical incapacitation is incongruent with the specific language of 10 U.S.C. § 972. 10 U.S.C. § 972 (2004). Under 10 U.S.C. § 972, a LODI is required when a servicemember “is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor” *Id.* Therefore AR 600-8-4 should be amended by removing the word “totally” from paragraph 4-11 and its subsequent definition and adding “unable to perform military duties.” AR 600-8-4, *supra* note 2, para. 4-10.

³⁶ 10 U.S.C. § 972 (2004).

medically necessary, then the Soldier was unable to perform his duties and a LODI would be required.

Taking the case of PFC Conrad, which is discussed previously, the command should conduct a LODI for the forty-eight hours that PFC Conrad was held for medically necessary treatment at the hospital since he was unable to perform his duties during this time. Contrast that with the thirty days that the command allowed PFC Conrad to attend inpatient care. This treatment was at the command's discretion, not medically necessary, and therefore no LODI is required. But what about the TBI that PFC Conrad suffered downrange?

2. *Non-Visual Injuries*

Army Regulation 600-8-4 provides no guidance on how to treat non-visual injuries such as concussions or TBIs.³⁷ Doing so is crucial as studies have found increasing evidence to show that a single TBI “can produce long-term gray and white matter atrophy, precipitate or accelerate age-related neurodegeneration, and increase the risk of developing Alzheimer’s disease, Parkinson’s disease, and motor neuron disease. In addition, repetitive mild TBIs can provoke the development of a tauopathy, chronic traumatic encephalopathy.”³⁸

The absence of guidance regarding head injuries is remarkable considering that Army provided direction on the issuance of Purple Heart medals for TBI-related injuries on May 2, 2011.³⁹ The Army then codified this guidance in AR 600-8-22, paragraph 2-8 identifying the following as a nonexclusive list of conditions warranting a Purple Heart:

- (a) Diagnosis of concussion or mild traumatic brain injury.

³⁷ See generally AR 600-8-4, *supra* note 2. Estimates from 2014 indicate that between 15.2% and 22.8% of deployed servicemembers—as many as 320,000 troops—have suffered at least a mild TBI. Ann C. McKee & Meghan E. Robinson, *Military-Related Traumatic Brain Injury and Neurodegeneration*, 10 *Alzheimer’s & Dementia* I3, S242, S243 (2014).

³⁸ Ann C. McKee & Meghan E. Robinson, *Military-Related Traumatic Brain Injury and Neurodegeneration*, 10 *Alzheimer’s & Dementia* I3, S242, S243 (2014).

³⁹ Todd Lopez & J.D. Leipold, *Army Clarifies Award of Purple Heart for Concussion*, ARMY NEWS SERV. (May 2, 2011), <https://www.army.mil/article/55850>.

- (b) Any period of loss or a decreased level of consciousness.
- (c) Any loss of memory for events immediately before or after the injury.
- (d) Neurological deficits (weakness, loss of balance, change in vision, praxis (that is, difficulty with coordinating movements), headaches, nausea, difficulty with understanding or expressing words, sensitivity to light, and so forth) that may or may not be transient. Intracranial lesion (positive computerized axial tomography or magnetic resonance imaging scan).⁴⁰

Providing specific guidance in AR 600-8-4, similar to AR 600-8-22, will allow medical professionals and commanders the ability to more precisely identify what type of head traumas may result in long term disability and therefore require a LOD determination. Proper identification of non-visual injuries, while important for all Soldiers, is especially important for those in the reserve component since their medical expenses are only covered for injuries sustained in an activated status.⁴¹

3. Line of Duty Investigations for National Guard and Army Reserve Soldiers

Currently, injuries for all Soldiers, including those on active duty, in the National Guard of the United States (NG), and United States Army Reserve (USAR), are handled using the same standards and timelines.⁴² The result is that the current processing goals for reserve Soldiers is forty days for an informal LODI and seventy-five days for a formal LODI.⁴³ This can result in an NG or USAR Soldier being forced to pay for their

⁴⁰ U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 2-8I (22 June 2015). The nonexclusive list requires certain other conditions being met, such as receiving the injury while under enemy fire. *Id.* at para. 2-8b.

⁴¹ 10 U.S.C. § 1074a (2011).

⁴² AR 600-8-4, *supra* note 2, tbls. 3-1, 3-2. Interestingly, while the processing times are the same for active duty, USAR, and NG Soldiers, formal LODIs for NG Soldiers require an additional review by a "Reviewing Authority." *Id.* tbl. 3-1. The reviewing authority is the adjunct general for the state that the Soldier serves in. *Id.* para. 1-14.

⁴³ AR 600-8-4, *supra* note 2, tbls. 3-1, 3-2.

medical bills at personal expense prior to receiving a determination on their LODI.⁴⁴

The answer to this potential injustice is simple and already required by DODI 1241.2.⁴⁵ For reserve servicemembers, “an appropriate approving authority shall issue an interim LOD determination in sufficient time to ensure that pay and allowances will commence within [thirty] days of the date that the injury, illness, or disease was reported.”⁴⁶ The Air Force and Navy have already implemented some form of an interim decision for reservists.⁴⁷ The Navy is required to issue an interim LOD determination within seven days of a reservist being injured or suffering an illness.⁴⁸ The Air Force, while *allowing* the immediate commander to make an interim decision, specifies that the decision is only valid for fifty-five days.⁴⁹ The Army must update AR 600-8-4 to comply with the DODI and prevent NG or USAR Soldiers from being personally liable for medical expenses pending a LODI determination. Requiring these Soldiers to pay for their own medical expenses, because the Army has not implemented the DODI is unacceptable. Unfortunately this is not the only place that the Army fails to protect the rights of Soldiers.

C. Origin of Injury Warning

Line of duty investigations are unique in that they are one of the only administrative processes in which a subject must be advised of his rights absent any suspicion of criminal misconduct.⁵⁰ The protection for LODIs stems from 10 U.S.C. § 1219 which says that “[a] member of an armed

⁴⁴ Meghann Meyers, *After Uproar, Army Agrees to Cover Soldier's Heart Attack Bills*, ARMY TIMES (Nov. 3, 2016), <https://www.armytimes.com/articles/after-uproar-army-agrees-to-cover-soldiers-heart-attack-bills>. Captain Shane Morgan, who suffered a heart attack during an Army Physical Fitness Test (APFT), waited twelve months and was personally liable for \$30,000 dollars in medical bills before the Army agreed to cover his medical costs. *Id.*

⁴⁵ U.S. DEP'T OF DEF., INSTR. 1241.2, RESERVE COMPONENT INCAPACITATION SYSTEM MANAGEMENT (30 May 2001) [hereinafter DODI 1241.2].

⁴⁶ DODI 1241.2, *supra* note 45, para. 6.4.2.

⁴⁷ JAGMAN, *supra* note 21, para. 224a; AFMAN, *supra* note 21, para. 2.3.3.

⁴⁸ JAGMAN, *supra* note 21, para. 0224a.

⁴⁹ AFMAN, *supra* note 21, para. 2.3.3.

⁵⁰ 10 U.S.C. § 1219 (1962). Unless suspected of a criminal offense, Soldiers are not entitled to be warned prior to making an incriminating statement during: a Financial Liability Investigation of Property Loss under AR 735-5, an administrative investigation under AR 15-6, or an investigation into the abeyance of clinical privileges under AR 40-68, chapter 10. *Id.*

force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid.”⁵¹ 10 U.S.C. § 1219 only applies to written statements.⁵² The Army, along with the Navy and Air Force, has expanded the statutory language to require that a warning be given to a servicemember prior to taking any written or oral statement made by the subject which is then reduced to writing.⁵³ While all three services have clarified that the protection applies to oral and written statements, none of the three provides guidance as to exactly when the warning must be given or what specific evidence may or may not be used if taken without a warning.⁵⁴

For example, imagine a drunk Soldier who jumps from a second floor window and tears a ligament in his knee when he lands. There are no witnesses. The Soldier does not go to the hospital because he knows he will get in trouble.⁵⁵ The next morning at formation, his first line leader notices him limping and asks him how he hurt himself. The Soldier refuses to answer and is sent by the unit to the on-post hospital. While there, the doctor, as he is required to do under AR 600-8-4, asks the Soldier how he hurt himself.⁵⁶ Wanting proper medical care, the Soldier is honest with the doctor. The Soldier’s answers are captured in his medical records. The health care provider alerts the unit and fills out a Department of the Army (DA) Form 2173.⁵⁷ On the form, the doctor indicates that the Soldier was under the influence of alcohol and recommends that the injury

⁵¹ *Id.* The statute does not define or clarify what “required” means or give assistance on when statements from servicemembers can be used in a LODI. *Id.*

⁵² *Id.*

⁵³ AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c. The concept of warning a servicemember prior to taking their statement about the origin, incurrence, or aggravation of a disease or injury is not statutorily required in 10 U.S.C. § 1219, but it appears that each service has implemented the concept of warning the servicemember out of an abundance of caution to ensure statutory compliance with any interpretation. 10 U.S.C. § 1219 (1962); AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c.

⁵⁴ AR 600-8-4, *supra* note 2, para. 3-3b; AFMAN, *supra* note 21, para. A3.2.3.2; JAGMAN, *supra* note 21, para. 0212c.

⁵⁵ Interestingly, Airmen are required to self-report all injuries to their chain of command. AFMAN, *supra* note 21, para. 2.2.1. The Army has no similar requirement. *See generally* AR 600-8-4, *supra* note 2.

⁵⁶ AR 600-8-4, *supra* note 2, para. 1-13.

⁵⁷ U.S. Dep’t of Army, DA Form 2173, Statement of Medical Examination and Duty Status (Oct. 1972) [hereinafter DA Form 2173]. *See infra* Appendix I for recommended changes to DA Form 2173.

be found NILD.⁵⁸ During the LODI, the IO advises the Soldier of his right not to make a statement, which the Soldier invokes. Without any additional evidence of misconduct, the approving authority relies on the medical records alone to find the Soldier NILD.⁵⁹

Was this a proper determination by the approving authority?⁶⁰ The decision hinges on whether oral statements made to medical personnel, given without a warning, can be used in making the LOD determination. Army Regulation 600-8-4 does not give any guidance on this, although the prevailing understanding and practice in the field is that this information can be used when making LOD determinations.⁶¹ Although widespread, this practice should not be allowed. Currently, medical personnel, in order to properly fill out DA Form 2173, are required to ask questions to the Soldier to ascertain whether they were committing misconduct at the time of the injury.⁶² There is no dispute that these questions would be absolutely improper for the command or the IO to do without warning the Soldier.⁶³ Why then has the Army deputized its medical personnel and created a culture that circumvents its own restrictions?⁶⁴

There are three solutions to this issue.⁶⁵ First, the Army can eliminate the expansion of 10 U.S.C. § 1219 in AR 600-8-4 covering oral statements.⁶⁶ This would be problematic for numerous reasons, such as allowing IOs to intentionally take oral statements and then reduce them to writing if they thought that subjects would not be willing to waive their rights. While the Army would be strictly complying with 10 U.S.C. § 1219, it would not be within the spirit of the statute. The second solution

⁵⁸ DA Form 2173, *supra* note 57, block 11.

⁵⁹ In an informal survey conducted by the author, thirteen out of thirteen judge advocates from the Army, Navy, Air Force, and Marines interpreted their service regulation as allowing the command to use medical information from this fact pattern when making the line of duty determination [hereinafter Origin of Injury Survey].

⁶⁰ For purposes of this paper, the question of compliance with 10 U.S.C. § 1219 will be restricted to statements made to medical personnel. The same concerns could exist with any questioning of Soldiers by any DOD agency including the U.S. Army Criminal Investigation Command (CID) or Military Police Investigations (MPI). 10 U.S.C. § 1219, in describing the servicemembers' rights does not limit it to the LODI process or define who is taking the statement. 10 U.S.C. § 1219 (1962). Therefore, the protection would seem to apply to any member of the DOD asking a servicemember about their injuries. *Id.*

⁶¹ AR 600-8-4, *supra* note 2, para. 3-3; Origin of Injury Survey, *supra* note 59.

⁶² AR 600-8-4, *supra* note 2, para. 3-2.

⁶³ AR 600-8-4, *supra* note 2, para. 3-3.

⁶⁴ Origin of Injury Survey, *supra* note 59.

⁶⁵ The best solution would be for Congress to update 10 U.S.C. § 1219 to provide the services a better understanding of when the protection applies.

⁶⁶ AR 600-8-4, *supra* note 2, para. 3-3.

is to require medical personnel to warn Soldiers about their right not to make a statement. The concern here is that Soldiers may be deprived of proper medical care if they give less or inaccurate information to medical personnel. The third option, which is the simplest and most soldier friendly, is to restrict the information that the command receives from the Soldier's medical record to just the diagnosis of the injury.⁶⁷ This would allow medical personnel to best treat Soldiers by letting Soldiers be honest regarding their injuries, eliminating medical personnel from being an active part of the LODI process, and reducing the concerns with violating Soldiers' rights under 10 U.S.C. § 1219 and AR 600-8-4.

IV. Handling Suicides and Self Injuries Under Army Regulation 600-8-4

A. The Treatment of Suicides Under Army Regulation 600-8-4

Servicemember suicide is both tragic and “continues to be a significant public health issue in the military.”⁶⁸ In calendar year 2015 alone, 478 active duty and reserve servicemembers took their own lives.⁶⁹ For each of these suicides, the DOD required that a LODI determine whether the death occurred ILD or NILD.⁷⁰ Between October 1, 2009, and November 29, 2016, the Army conducted 1,080 suicide LODIs.⁷¹ Of these, ninety-five percent found that the Soldier was mentally unsound.⁷² The staggeringly high percentage of suicides that are found mentally unsound raises the question whether AR 600-8-4 gives sufficient clarity to IOs and medical health officers (MHO) during the LODI process.

⁶⁷ This would also be in compliance with the DOD's disclosure of medical information. U.S. DEP'T OF DEF., 6025.18-R, DOD HEALTH INFO PRIVACY REGULATION para. C7.11.1.3. (24 Jan. 2003).

⁶⁸ Keita Franklin, *Department of Defense Quarterly Suicide Report - Calendar Year 2016 1st Quarter*, DEFENSE SUICIDE PREVENTION OFFICE (DSPO), <http://www.dspo.mil/Portals/113/Documents/DoD%20Quarterly%20Suicide%20Report%20CY2016%20Q1.pdf> (last visited Jan. 28, 2017).

⁶⁹ *Id.*

⁷⁰ AR 600-8-4, *supra* note 2, at para. 2-3c(3); AFMAN, *supra* note 21, at para. 1.6.1; JAGMAN, *supra* note 21, at para. 0212b.

⁷¹ E-mail from Major Joseph V. Messina, Chief, Casualty Investigations at U.S. Army Human Resources Command, to Major Aaron L. Lancaster, Student, 65th Judge Advocate Officer Course, The Judge Advocate Gen.'s Sch. (30 Nov. 2016, 11:18 EST) [hereinafter MAJ Messina email to MAJ Lancaster] (on file with author).

⁷² *Id.*

As a rule, the Army presumes that all injuries, diseases, or deaths are incurred ILD.⁷³ This presumption is only overcome when supported by “substantial evidence and by a greater weight of evidence than supports any different conclusion.”⁷⁴ This standard is almost identical for suicides.⁷⁵ The only substantive difference is that for suicides, the Army created “Rule 10” of AR 600-8-4 which states that the “law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide).”⁷⁶

In addition to this presumption, the Army employs a two-part test to determine the mental soundness of Soldiers who commit suicide. First, the IO must determine if the Soldier committed suicide because of a mental defect, disease, or derangement.⁷⁷ Second, the IO, in consultation with an MHO, must then determine if the mental defect, disease, or derangement made the Soldier unable to comprehend the nature of or control his actions.⁷⁸

This process is flawed for three reasons. First, mental soundness is being determined by an IO with no medical training and an MHO who often never spoke with the Soldier.⁷⁹ This frequently results in a less than definitive analysis.⁸⁰ Second, IOs, MHOs, and commanders only have two options when deciding mental soundness—mentally unsound or mentally sound.⁸¹ This binary determination is required regardless of whether sufficient evidence exists to make any definitive conclusion

⁷³ AR 600-8-4, *supra* note 2, at para. 2-6b.

⁷⁴ *Id.* at para. 2-6c.

⁷⁵ *Id.* at app. B-10, R. 10.

⁷⁶ *Id.*

⁷⁷ *Id.* at para. 4-11.

⁷⁸ AR 600-8-4, *supra* note 2, at para. 4-11. In order to help make this determination, AR 600-8-4 explains that IOs should inquire into “the [S]oldier’s social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons.” *Id.* para. 4-11b. In addition, the IO must provide the investigation to a mental health officer for review. *Id.* The mental health officer will render an opinion as to the probable causes of the self-destructive behavior and whether the Soldier was mentally sound. *Id.*

⁷⁹ For more information on the problems of having a mental health officer conduct a mental soundness determination when they never met the Soldier, see Major Marcus Misinec’s 2014 article on LODIs. Major Marcus L. Misinec, *Get Back in Line: How Minor Revisions to AR 600-8-4 Would Rejuvenate Suicide Line of Duty Investigations*, 221 MIL. L. REV. 183, 196-200 (Nov. 2014).

⁸⁰ *Id.*

⁸¹ AR 600-8-4, *supra* note 2, at para. 4-11, app. B-10 at R. 10.

regarding the Soldier's mental soundness. Third, IOs, MHOs, and commanders have to unnecessarily find Soldiers "mentally unsound" in order to provide the maximum benefits to the Soldier's family.⁸² The result is that many mental health reports look something like this:

Mental soundness refers to a Soldier's ability to rationally process consequences, comprehend interactions or practically participate in rendering reasonable judgments. It is probable that this soldier understood the potential consequences of his actions. The Soldier's decision to end his life came at a time of some pending life changes, but not overtly overwhelming distress. There is a possibility that this distress compromised his judgment and temporarily altered his mental soundness. Regardless of his awareness, "Suicide is the deliberate and intentional destruction of one's own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide)." It is therefore my opinion that the Soldier was NOT mentally sound at the time of his suicide.⁸³

B. Proposed Solution

The issues with the treatment of suicides under AR 600-8-4 are not new. Major Marcus Misinec addressed the concern recently in his article and as a solution advocated for the removal of the mental unsoundness presumption in cases where Soldiers are suspected of committing misconduct.⁸⁴ However, this recommendation, while addressing some of

⁸² AR 600-8-4, *supra* note 2, at para. 4-11.

⁸³ Professional Experience, *supra* note 1. Numerous reports from Fort Sill, Oklahoma, and Camp Zama, Japan had nearly identical language to describe the mental soundness of Soldiers who had committed suicide. In no case did the behavioral health report identify the most probable cause of the suicide. *Id.*

⁸⁴ See Misinec, *supra* note 79. The key premise of MAJ Misinec's article is that Soldiers, who show no prior mental health issues and who are suspected of committing misconduct, should not be found ILD when they commit suicide to avoid responsibility for their misconduct. *Id.* at 210. Misinec's recommendations is to update AR 600-8-4 to create a split in determining mental soundness for suicides. *Id.* Soldiers who were not suspected of misconduct would continue to be assessed using the current language in AR 600-8-4. *Id.* Soldiers who were suspected of misconduct would lose the mental unsoundness presumption. *Id.* In these cases, a JA, instead of a behavioral health officer, would provide a recommendation on the LODI. *Id.* The opinion would consider whether sufficient

the deficiencies in AR 600-8-4, would leave too many questions unanswered. First, what type of misconduct—adultery, rape, or fraternization—would cause a Soldier to lose the mental soundness presumption? Second, without a presumption of mental soundness, what standard would the command use when a Soldier had both mental health issues and committed misconduct? The solution is far simpler and would allow commanders to provide maximum support to the Soldier's family while simultaneously producing consistent and credible LODIs which have findings based on the facts therein.

First, the presumption of mental unsoundness should be removed for all self-inflicted injuries and suicides, not just those involving criminal misconduct. Army Regulation 600-8-4 already presumes that any injury or death was incurred ILD unless refuted by a preponderance of the evidence.⁸⁵ Therefore, Soldiers are considered ILD unless the LODI can *prove* otherwise. For suicides, this means all Soldiers will be found ILD unless a preponderance of the evidence indicates that they were, in fact, mentally sound.⁸⁶ Requiring an affirmative finding of mental unsoundness is unnecessary. Second, IOs, MHOs, and commanders should be given the option to make a finding that insufficient information exists to determine mental soundness. The current mentally sound, mentally unsound determination is akin to asking a panel in a court-martial to find the accused either guilty or innocent. The failure to prove the accused's guilt does not mean that they are innocent any more than the inability to prove mental soundness conversely shows mental unsoundness.

Third, for any suspected self-injury or suicide, the IO and MHO should identify any potential causes which may have contributed to the Soldier's injury or death.⁸⁷ Finally, the IO and mental health officer should identify whether substantial evidence indicates that any of the potential causes were the proximate cause of the Soldier's decision to commit suicide. If the proximate cause can be identified and is something other than mental defect, disease, or derangement, the Soldier should be found

evidence existed that the Soldier committed the misconduct and whether the exposure of the evidence was the proximate cause of the suicide. *Id.*

⁸⁵ AR 600-8-4, *supra* note 2, at paras. 2-6b and 2-6c.

⁸⁶ *Id.* at para. 4-11, app. B-10 at R. 10.

⁸⁷ This requirement already exists in paragraph 4-11 of AR 600-8-4. AR 600-8-4, *supra* note 2, at para. 4-11.

NILD due to misconduct.⁸⁸ If the proximate cause can be identified and is a mental defect, disease, or derangement, the Soldier should be found ILD due to being mentally unsound. If the proximate cause cannot be identified, the commander should find the Soldier ILD due to an inability to overcome the presumption for all LODIs of ILD.

While these changes may be unpopular, the Army must recognize that in many cases there is insufficient information to determine what motivated a Soldier to take his or her life or the Soldier's mental state at the time that they killed themselves. In these cases, requiring IOs, MHOs, and commanders to unnecessarily find Soldiers mentally unsound, just to provide full benefits to the family, does disservice to the process, the Army, and the Soldier.

On July 31, 2016, Major General (MG) John G. Rossi took his own life just hours before being promoted to lieutenant general.⁸⁹ Reports indicate that there were no allegations of adultery, misconduct, or alcohol or drug abuse.⁹⁰ The best guess appears to be that he was sleep-deprived and overwhelmed by his upcoming responsibilities.⁹¹

The report of the investigation is at best perplexing. The IO found that:

Although MG (P) Rossi appeared to be focused on future events during the weeks leading up to his death, his decision to commit suicide was not spontaneous or impulsive. The evidence suggests that this decision developed and was planned during the tumultuous week leading up to his death. Specifically, the location, method, and timing of his suicidal act all suggest that he had considered and planned the act. Additionally, certain of

⁸⁸ The most likely examples would involve Soldiers who commit suicide in order to avoid criminal misconduct.

⁸⁹ Tom Vanden Brook, *General is Most Senior Army Officer to Kill Self*, USA TODAY, Oct. 28, 2016, <http://www.usatoday.com/story/news/politics/2016/10/28/army-generals-death-ruled-suicide/92880986/>.

⁹⁰ Lieutenant General Patrick J. Donahue II, Army Regulation 15-6/Line of Duty Investigation Findings and Recommendations - Death of Major General (Promotable) John G. Rossi (Sept. 29, 2016), <https://www.foia.army.mil/ReadingRoom/FileDownload.dl?docId=44fd6f76-925c-46ab-af60-7bc813b09c79> (redacted copy) [hereinafter MG Rossi Investigation].

⁹¹ *Id.*

his actions throughout the week leading up to his death suggest that he was contemplating his impending death.⁹²

On the other hand, the MHO stated that “[i]n summary, even if MG(P) Rossi had presented for care he would have been assessed as being at low risk for suicide. He had displayed no overt warning signs that might have alerted friends, family, or colleagues.”⁹³ Regardless, the IO found that:

IAW the provisions of AR 600-8-4, paragraph B-10, I find MG (P) Rossi's death was in line of duty. There is insufficient evidence to overcome the legal presumption that a mentally sound person will not commit suicide. Accordingly, MG (P) Rossi was not mentally sound when he decided to take his own life.⁹⁴

The Army was required to find MG Rossi mentally unsound in order to find him ILD.⁹⁵ Not astonishingly, the Army used “Rule 10” to find him mentally unsound.⁹⁶ Doing so belittles the memory of MG Rossi and his years of service. Eliminating the presumption of mental unsoundness will not change the outcome, but will bring credibility to the process. His family can be told that a full and complete investigation was done and that insufficient evidence could be found to determine exactly why MG Rossi took his own life. Therefore, he was ILD at the time of his death, not because he was mentally unsound, but because all Soldiers are presumed to be ILD unless sufficient evidence proves otherwise.

V. Procedural Deficiencies in Army Regulation 600-8-4

A. Lack of Understanding About the Final Approval Authority

A Soldier dies and the Commanding General (CG) appoints an IO for a LODI. The IO recommends the Soldier be found NILD. The SJA advises the CG that there is sufficient evidence to find the Soldier ILD or NILD. The CG disagrees with the IO and approves the LODI by signing

⁹² *Id.* Although the IO listed these events, he did not address what effect they may have had on his mental soundness at the time of his death. *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ AR 600-8-4, *supra* note 2, at para. 4-11, app. B-10 at R. 10.

⁹⁶ MG Rossi Investigation, *supra* note 90.

the DD Form 261 as the “Final Approval.”⁹⁷ Case closed—except it is not. Four months later, Human Resources Command (HRC) sends an e-mail to the CG telling him that they reversed his decision and are finding the Soldier NILD.

While uncommon, this scenario occurs roughly fifteen times a year in the Army.⁹⁸ The situation is confusing because chapter 3 of AR 600-8-4 gives a detailed description of the LODI process but makes no mention of any role by HRC.⁹⁹ The only mention of HRC’s ability to overturn a case is found in AR 600-8-4, paragraph 4-18, which says that [t]he commanding general, USA HRC, acting for the SA [Secretary of the Army], may at any time change a determination made under this regulation. The correct conclusion based on the facts must be shown.”¹⁰⁰ This means that HRC can conduct a de novo review of any case and change the determination. Roughly two-thirds of reversed cases are suicides.¹⁰¹

The solution is simple. First, “final approving authority” should be removed from AR 600-8-4 and replaced with “approving authority.”¹⁰² Using the term final is both confusing and misleading to GCMCAs making the determinations and the families of deceased Soldiers. Second, chapter 3 of AR 600-8-4 should be updated to include a paragraph describing HRC’s role in reviewing LODIs. The description should indicate that while approving authorities are delegated the authority from the SA to make determinations on LODIs, HRC reserves the right to review and overturn any LODI determination.

B. Sexual Assault Line of Duty Processing

⁹⁷ AR 600-8-4, *supra* note 2, at para. 3-11 (final approval authority); U.S. Dep’t of Def., DD Form 261, Report of Investigation Line of Duty and Misconduct Status (Oct. 1995) [hereinafter DD Form 261].

⁹⁸ E-mail from Major Joseph V. Messina, Chief, Casualty Investigations at U.S. Army Human Resources Command, to Major Jess R. Rankin, Chief, Administrative and Civil Law, Fort Sill, Oklahoma (9 Mar. 2016, 16:20 EST) (on file with author) [hereinafter MAJ Messina email to MAJ Rankin].

⁹⁹ AR 600-8-4, *supra* note 2, at chap. 3.

¹⁰⁰ *Id.* at para. 4-18.

¹⁰¹ MAJ Messina email to MAJ Rankin, *supra* note 98.

¹⁰² AR 600-8-4, *supra* note 2, at para. 3-11. Further confusing the situation is that informal LODIs appear to require review by the “final approving authority” although nowhere in AR 600-8-4 is it discussed who is the final approving authority for an informal LODI. *Id.* tbl. 3-1. The GCMCA is the final approving authority for formal LODIs. *Id.* at para. 3-11.

An activated reservist is sexually assaulted during a drill weekend. The Soldier contacts his victim advocate (VA), and after discussing the options, files a restricted report.¹⁰³ Because a restricted report is filed, no LODI is completed.¹⁰⁴ Monday, the Soldier goes back to his civilian job. The Soldier, as a result of the sexual assault, begins to become depressed and agitated at work. Realizing that he needs mental health services, the Soldier contacts a mental health professional. Without a LODI, the Soldier has to pay for the mental health services at personal expense.¹⁰⁵ The VA calls the JA asking for help. The JA rereads AR 600-8-4 and advises that there is nothing the unit can do unless the victim makes an unrestricted report. The Soldier is forced to choose between the restricted report and receiving medical care.

This situation is both unfortunate and completely preventable. Since March 28, 2013, the DOD has required that the reserve component commanders implement a program to conduct LODIs for restricted reports of sexual assault.¹⁰⁶ The Army has failed to incorporate these changes into AR 600-8-4 preventing those assisting victims from understanding their obligations and the victim's options.¹⁰⁷ Army Regulation 600-8-4 must be updated to incorporate these changes in order to protect the rights of alleged victims of sexual assault.¹⁰⁸

¹⁰³ Restricted reporting allows a Soldier, who is a sexual assault victim, to confidentially disclose the details of their assault to specifically identified individuals and receive medical treatment and counseling, without triggering an official investigative process. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-4c (6 Nov. 2014).

¹⁰⁴ See generally AR 600-8-4, *supra* note 2. Although AR 600-8-4 does not specifically prohibit a LODI for a restricted report, in practice it does as the commander does not know the identity of the Soldier involved. *Id.*

¹⁰⁵ 10 U.S.C. § 1074a (2011).

¹⁰⁶ U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enc. 4, para. 4 (28 Mar. 2013) [hereinafter SAPR DODI]. The SAPR DODI was updated on July 7, 2015 and the provision is now found in enclosure 5, paragraph 5. U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enc. 5, para. 5 (28 Mar. 2013) (C2, 7 Jul. 2015) [hereinafter Updated SAPR DODI].

¹⁰⁷ See generally AR 600-8-4, *supra* note 2.

¹⁰⁸ The needed updates to AR 600-8-4 can essentially be lifted from the requirements of DODI 6495.02. Under the DODI, reserve commanders will designate an individual or individuals to process LODIs for victims of sexual assault which occurred while the Soldier was activated. Updated SAPR DODI, *supra* note 106, at encl. 5, para. 5d(2). The individual shall possess the maturity and experience to assist in sensitive and protected restricted sexual assault cases and have Sexual Assault, Prevention, and Response (SAPR) training. *Id.* at encl. 5, para. 5d(2)b. The individual's primary job is to help document the medical condition of the victim and substantiate the victim's duty status at the time of the

C. Department of the Army Form 2173

For a financial liability investigation of property loss, the commander has a DD Form 200.¹⁰⁹ For an AR 15-6 investigation, the commander has a DA Form 1574-1.¹¹⁰ For a formal LODI, the commander has a DD Form 261.¹¹¹ Each of these forms acts as a one to four page consolidated report listing the subject, the incident, the pertinent details, and gives the commander or approving official blocks to check or sign to “Approve” or “Disapprove” the findings of the investigation.¹¹² Informal LODIs have no such form.¹¹³ The only Army form used for informal LODIs is a DA Form 2173.¹¹⁴ On the DA Form 2173, the unit commander has two discretionary decisions. First, is a formal LODI required?¹¹⁵ Second, is the injury considered to have been incurred ILD?¹¹⁶ The first is binding and will be discussed below.¹¹⁷ The second is simply a recommendation to the approving authority.

Once the form is forwarded to the approving authority, AR 600-8-4

incident. *Id.* at encl. 5, para. 5d(3). The key aspect of these LODIs is that the designated individual will make the LOD determination without identifying the victim to the chain of command or identifying the source of the injuries. *Id.* at encl. 5, para. 5d(1). These provisions will allow the victim to continue to access medical care and psychological counseling while maintaining their restricted report.

¹⁰⁹ U.S. Dep’t of Def., DD Form 200, Financial Investigation of Property Loss (Jul. 2009) [hereinafter DD Form 200].

¹¹⁰ U.S. Dep’t of Army, DA Form 1574-1, Report of Proceedings by Investigating Officer (Apr. 2016) [hereinafter DA Form 1574-1].

¹¹¹ DD Form 261, *supra* note 97.

¹¹² DD Form 200, *supra* note 109; DA Form 1574-1, *supra* note 110; DD Form 261, *supra* note 97. DD Form 261 uses “Approved” and “Disapproved.” DD Form 261, *supra* note 97.

¹¹³ A DD Form 261 can theoretically be used for informal LODIs. The concern is that the form assumes that an IO has been appointed and that a major Army commander will be approving. DD Form 261, *supra* note 97. In addition, using the form for informal LODIs would likely confuse the approving authority as there are three potential places that the commander could sign to approve the LODI. *Id.*

¹¹⁴ DA form 2173, *supra* note 57. The form consists of two sections. *Id.* Section 1 includes information from the attending physician or hospital patient administrator regarding the injury or death. *Id.* Section 2 is filled out by the unit commander, usually the company level commander, and includes additional information primarily related to the Soldier’s duty status at the time of the injury. *Id.*

¹¹⁵ DA form 2173, *supra* note 57, at block 31.

¹¹⁶ DA form 2173, *supra* note 57, at block 32.

¹¹⁷ AR 600-8-4, *supra* note 2, at para. 3-6a(1).

gives the approving authority two choices—approve the informal LODI or appoint an IO for a formal LODI.¹¹⁸ The issue is that AR 600-8-4 does not provide guidance on how the approving authority physically annotates either choice and DA Form 2173 does not provide the approving authority a section to mark his choice.¹¹⁹ The solution is to update DA Form 2173 to include an additional space below “Section II” providing the approving authority blocks to check indicating that the LODI is approved or that the case requires a formal LODI and is being forwarded to the GCMCA.¹²⁰

Adding a space for the approving authority will only solve one of the issues with the DA Form 2173. The second problem is that the form allows junior commanders to force a superior commander to take a specific action.¹²¹ Per AR 600-8-4 the SPCMCA or GCMCA “must” appoint an IO and conduct a formal investigation if the unit commander checks the box on the DA Form 2173 indicating that a formal LODI is required.¹²² The superior commander has no discretion. Allowing subordinate commanders to require a specific action by a superior commander is contrary to Army policy. The solution is to update both AR 600-8-4 and DA Form 2173 to make them consistent with Army policy regarding the chain of command.¹²³ Unit commanders should be restricted to only making a recommendation as to the disposition of the LOD. This will allow superior commanders to exercise their independent judgment to take appropriate action on each case.

VI. Conclusion

Line of duty investigations must be transparent, consistent, and credible. In the hypothetical case of PFC Conrad, the command should have clear guidance on whether he suffered an injury and if a LODI is required. They should know what level of command the investigation can be adjudicated at and provided a proper form upon which to document

¹¹⁸ *Id.* at tbl. 3-1.

¹¹⁹ *Id.*; DA form 2173, *supra* note 57.

¹²⁰ *See infra* Appendix I for proposed update to DA Form 2173.

¹²¹ DA form 2173, *supra* note 57.

¹²² AR 600-8-4, *supra* note 2, at para. 3-6a(1). While AR 600-8-4 does not specifically require formal LODI, it does require a “detailed investigation.” *Id.* “Detailed investigation” only appears one other place in AR 600-8-4 and that is in paragraph 2-5 which states that “[a] formal LD investigation is a detailed investigation. . .” *Id.* para. 2-5. Therefore, AR 600-8-4 appears to require a formal LODI in these cases.

¹²³ *See generally* DA form 2173, *supra* note 57, at para. 2-1.

their decision. In the case of SSG Johnson, the Army needs to stop forcing mental health professionals, IOs, and commanders into finding Soldiers mentally unsound in order to provide support to the Soldier's family. The ability to provide an accurate investigation to the family and the correct adjudication of a LODI are not mutually exclusive.

Even with these changes, the process will still be flawed. The LODI process is driven by Congress. While Congress provided broad guidelines on what is required for LODIs, they gave little guidance on the actual process. The DOD failed to fill this gap and therefore each service implemented its own regulation. The result is contradictory regulations and unfair adjudications.¹²⁴ The only solution is for the DOD to consolidate the service regulations and publish a DOD LOD regulation allowing servicemembers to have their injuries or deaths adjudicated in a fair and consistent manner. Unfortunately, this appears unlikely to happen anytime soon. Therefore, in the absence of a consolidated DOD issuance, the Army must amend AR 600-8-4 to place the process more in line with Congressional intent regarding injuries and the LOD process.

¹²⁴ As just one example, under AR 600-8-4, "[d]evelopment of a disease that may be a result of the abuse of alcohol or other drugs is not intentional misconduct within the meaning of 10 U.S.C. [§] 1207." AR 600-8-4, *supra* note 2, at para. 4-10c. So in the Army if you damage your liver from excess drinking it is considered ILD. This is in direct contradiction to Air Force Instruction which says that "[a]dditionally, organic diseases or disabilities that are secondary to alcoholism, such as Laennec's cirrhosis, fatty metamorphosis of the liver and chronic brain syndrome, should be found to be due to misconduct." AFMAN *supra* note 21, at para. A2.1.1.2. In the Air Force you will be found NILD. There is zero logic as to why some servicemembers should receive disability for the same injury that others are not.

Appendix A. Proposed Revision to Army Regulation 600-8-4, Paragraph 2-3

2-3. Requirements for line of duty investigations

Line of duty investigations are conducted to identify the circumstances surrounding the disease, injury, or death of a soldier and to determine whether the soldier was in line of duty or not in line of duty at the time of the disease, injury, or death. Depending on the circumstances of the case, an LD investigation may or may not be required to make this determination.

a. The LD determination is presumed to be "LD YES" without an investigation—

(1) In the case of disease, except as described in paragraphs *b*(1) through (8) below.

(2) In the case of injuries clearly incurred as a result of enemy action or attack by terrorists.

(3) In the case of death due to natural causes or while a passenger in a common commercial carrier or military aircraft.

(Current sub-paragraphs 2-3b and c.)

b. In all other cases of death or injury, except injuries so slight as to be clearly of no lasting significance (for example, superficial lacerations or abrasions or mild heat injuries), an LD investigation must be conducted.

c. Investigations can be conducted informally by the chain of command where no misconduct or negligence is indicated, or formally where an investigating officer is appointed to conduct an investigation into suspected misconduct or negligence. A formal LD investigation must be conducted in the following circumstances:

(Proposed revision and consolidation of the two sub-paragraphs)

b. In all other cases of death or injury an LD investigation must be conducted. Investigations can be conducted informally (Chapter 3, Section I) where no misconduct is suspected, or formally (Chapter 4, Section II) when misconduct is suspected. A formal LD investigation must be conducted in the following circumstances:

- (1) Injury, disease, death, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct.
- (2) Injury or death involving the abuse of alcohol or other drugs.
- (3) Self-inflicted injuries or possible suicide.
- (4) Injury or death incurred while AWOL.
- (5) Injury or death that occurs while an individual was en route to final acceptance in the Army.
- (6) Death of a USAR or ARNG soldier while participating in authorized training or duty.
- (7) Injury or death of a USAR or ARNG soldier while traveling to or from authorized training or duty.
- (8) When a USAR or ARNG soldier serving on an AD tour of 30 days or less is disabled due to disease.
- (9) In connection with an appeal of an unfavorable determination of abuse of alcohol or other drugs (para 4-10a).
- (10) When requested or directed for other cases.

Appendix B. Proposed Revision to Army Regulation 600-8-4, Paragraph 4-11

4-11. Mental responsibility, emotional disorders, suicide, and suicide attempts

a. A Soldier may be held responsible for his or her acts and their foreseeable consequences only if the Soldier was able to comprehend the nature of such acts or to control his or her actions. When evidence in the investigation raises the possibility that the Soldier may not have been mentally responsible for their actions, the MTF must identify, evaluate, and document any potential mental and emotional disorders.

b. All line of duty investigations of self-destructive behavior, including suicide or attempted suicide, must determine the Soldier's mental responsibility at the time of the incident. The question of mental responsibility can only be resolved by inquiring into and obtaining evidence of the Soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased Soldier are valuable evidence.

c. In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the Soldier's desire to end his or her life. The mental health officer will note any causes of the self-destructive behavior, whether any of these causes appear to be the proximate cause of the Soldier's self-destructive behavior and the Soldier's mental responsibility at the time of the incident. The mental health officer will make a determination whether the Soldier was mentally sound, mentally unsound, or whether insufficient information exists to determine the Soldier's mental soundness. Death or injuries sustained as the result of a suicide or suicide attempt only constitute misconduct if a greater weight of evidence indicates that the Soldier was mentally sound at the time of the incident.

d. If the Soldier is found mentally unsound, the mental health officer should determine whether the soldier's mental condition was an EPTS condition aggravated by Service or was due to the soldier's own misconduct. Those conditions occurring during the first six months of AD may be considered as EPTS, depending on history. Personality disorders by their nature are considered as EPTS.

e. In cases of suicide or attempted suicide during AWOL, mental soundness at the inception of the absence must also be determined.

f. Death, injury, or disease intentionally self-inflicted or an ill effect that results from the attempt (including attempts by taking poison or drugs) when mental soundness existed at the time should be considered misconduct.

(Current version of Army Regulation 600-8-4, Paragraph 4-11)

4-11. Mental responsibility, emotional disorders, suicide, and suicide attempts

a. The MTF must identify, evaluate, and document mental and emotional disorders. A soldier may not be held responsible for his or her acts and their foreseeable consequences if, as the result of mental defect, disease, or derangement, the soldier was unable to comprehend the nature of such acts or to control his or her actions. Therefore, these disorders are considered "in LD" unless they existed before entering the Service and were not aggravated by military service. Personality disorders by their nature are considered as EPTS.

b. Line of duty investigations of suicide or attempted suicide must determine whether the soldier was mentally sound at the time of the incident. The question of sanity can only be resolved by inquiring into and obtaining evidence of the soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased soldier are valuable evidence. In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the soldier's desire to end his or her life. The mental health officer will render an opinion as to the probable causes of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident.

c. If the soldier is found mentally unsound, the mental health officer should determine whether the soldier's mental condition was an EPTS condition aggravated by Service or was due to the soldier's own misconduct. Those conditions occurring during the first six months of AD may be considered as EPTS, depending on history.

d. In cases of suicide or attempted suicide during AWOL, mental soundness at the inception of the absence must also be determined.

e. An injury or disease intentionally self-inflicted or an ill effect that results from the attempt (including attempts by taking poison or drugs) when mental soundness existed at the time should be considered misconduct.

**Appendix C. Proposed Revision to Army Regulation 600-8-4,
Paragraph 4-10**

4-10. Intoxication and drug abuse

a. That portion of time in the hospital ~~that a doctor determines a Soldier to be totally physically incapacitated~~ is unable to perform military duties for more than 24 consecutive hours solely because of alcohol or drug abuse will be "not line of duty—due to own misconduct." ~~Total physical incapacitation means the soldier is so disabled by the drugs or alcohol that he or she is comatose. The remainder of the period of hospitalization, treatment, or rehabilitation will be administrative absence from duty and does not require an LD determination. (Hospitalization of less than 24 hours for abuse of alcohol or other drugs does not require an LD determination.) When the person is released from the MTF, the MTF commander or commander designee will inform the soldier and the soldier's unit commander in writing of the LD determination. To preclude unauthorized access to this information, the memorandum will be transmitted in a sealed envelope marked: EXCLUSIVELY FOR the unit commander of the individual concerned and will comply with AR 340-21. The LD determination may be appealed under paragraph 4-17 to the unit commander. In appealed cases, the MTF will prepare DA Form 2173 upon request of the unit commander.~~

b. An injury incurred as the "proximate result" of prior and specific voluntary intoxication is incurred as the result of misconduct. For intoxication alone to be the basis for a determination of misconduct with respect to a related injury, there must be a clear showing that the soldier's physical or mental faculties were impaired due to intoxication at the time of the injury, the extent of the impairment, and that the impairment was a proximate cause of the injury.

c. Development of a disease that may be a result of the abuse of alcohol or other drugs is not intentional misconduct within the meaning of 10 USC 1207. It would be considered as "in line of duty."

**Appendix D. Proposed Paragraph for Army Regulation 600-8-4
Regarding Reserve Component Sexual Assault Line of Duty
Procedures**

4-XX. Allegations of Sexual Assault by Reserve Component Soldiers

a. Members of the ARNG or USAR, whether they file a restricted or unrestricted report, shall have access to medical treatment and counseling for injuries and illness incurred from a sexual assault inflicted upon a Service member when performing active service, as defined in Title 10, section 101(d)(3), and inactive duty training.

b. Medical entitlements remain dependent on a LD determination as to whether or not the sexual assault incident occurred in an active service or inactive duty training status. However, regardless of their duty status at the time that the sexual assault incident occurred, or at the time that they are seeking Sexual Harassment/Assault Response & Prevention (SHARP) services, Reserve Component members can elect either the Restricted or Unrestricted Reporting option.

c. Any alleged collateral misconduct by a victim associated with the sexual assault incident will be excluded from consideration as intentional misconduct or gross negligence under the analysis required by Title 10, section 1074a(c) in LD findings for healthcare to ensure sexual assault victims are able to access medical treatment and mental health services.

d. The following LOD procedures shall be followed by Reserve Component commanders.

(1) To safeguard the confidentiality of Restricted Reports, LOD determinations may be made without the victim being identified to DoD law enforcement or command, solely for the purpose of enabling the victim to access medical care and psychological counseling, and without identifying injuries from sexual assault as the cause.

(2) For LOD determinations for sexual assault victims, the USAR and the directors of the Army NG shall designate individuals within their respective organizations to process LODs for victims of sexual assault when performing active service, as defined in Title 10, Section 101(d)(3) and inactive duty training.

(a) Designated individuals shall possess the maturity and experience to

assist in a sensitive situation, will have SHARP training, so they can appropriately interact with sexual assault victims, and if dealing with a Restricted Report, to safeguard confidential communications and preserve a Restricted Report (e.g., SARC and healthcare personnel). These individuals are specifically authorized to receive confidential communications for the purpose of determining LOD status.

(b) The appropriate SARC will brief the designated individuals on Restricted Reporting policies, exceptions to Restricted Reporting, and the limitations of disclosure of confidential communications. The SARC and these individuals, or the healthcare provider may consult with their servicing legal office, in the same manner as other recipients of privileged information for assistance, exercising due care to protect confidential communications in Restricted Reports by disclosing only non-identifying information. Unauthorized disclosure may result in disciplinary action.

(3) For LOD purposes, the victim's SARC may provide documentation that substantiates the victim's duty status as well as the filing of the Restricted Report to the designated official.

(4) If medical or mental healthcare is required beyond initial treatment and follow-up, a licensed medical or mental health provider must recommend a continued treatment plan.

(5) Reserve Component members who are victims of sexual assault may be retained or returned to active duty in accordance with Title 10, Section 12323.

(a) Reserve Component member must be answered with a decision within 30 days from the date of the request.

(b) If the request is denied, the Reserve Component member may appeal to the first general officer in his or her chain of command. A decision must be made on that appeal within 15 days from the date of the appeal.

**Appendix E. Proposed Paragraph for Army Regulation 600-8-4
Regarding Interim Line of Duty Decisions for Reserve Component
Members**

4-XX. Interim Line of Duty Determinations

Interim Line of Duty determination. In order to meet the requirements of DODI 1241.2, the SPCMCA or GCMCA must issue an “interim” line of duty determination within seven days of being notified that a reservist, not on the active duty list, has an incapacitating injury or illness incurred or aggravated while on active duty, including leave, active duty for training, inactive duty training, or travel to or from such duty. This interim determination is intended to ensure that the reservist's incapacitation pay can be started without delay. If the final line of duty determination is adverse to the member, immediate action must be taken to stop incapacitation benefits. The only exception to the requirement to conduct an interim Line of Duty determination is if there is clear and convincing evidence that the injury, illness, or disease was not incurred or aggravated in a duty status described in DOD Directive 1215.6 and not covered under Title 10, Sections 1074 or 1074a, or was due to the misconduct of the member.

Appendix F. Proposed Revision to Army Regulation 600-8-4

3-3. Evidence collection

b. Warning required before requesting statements regarding disease or injury.

(1) A soldier may not be required to make a statement relating to the origin, incurrence, or aggravation of his or her disease or injury. This applies to statements given to any member of the DOD. Any involuntary statement against a soldier's interests, made by the soldier, is invalid and may not be considered in determining LD status (10 USC 1219). Any soldier, prior to being asked to make any statement relating to the origin, incurrence, or aggravation of any disease or injury that the soldier has suffered shall be advised of his or her right that he or she need not make such a statement. A statement voluntarily provided by the soldier after such advice may be considered. The soldier's right not to make a statement is violated if a person, ~~in the course of the investigation~~, obtains the soldier's oral statements and reduces them to writing, unless the above advice was given first.

(2) If information concerning the incident is sought from the soldier, the soldier will be advised that he or she does not have to make any statement that is against his or her interest that relates to the origin, incurrence, or aggravation of any injury or disease he or she suffered. If any information is obtained from the soldier, a statement attesting the above warning was given must be attached to the DA Form 2173. Any written correspondence requesting information from the soldier will also contain the above warning and be attached to the DA Form 2173. If the soldier is also suspected or accused of any offense under the Uniform Code of Military Justice (UCMJ), the soldier should also be advised of his or her rights under UCMJ Art. 31 and right to counsel. A DA Form 3881 (Rights Warning Procedure/Waiver Certificate) should generally be used for such advice.

(3) Nothing in subparagraphs 3-3b(1) and (2) shall be construed to prohibit or restrict medical or emergency services personnel from providing treatment to a Soldier suffering from a disease or injury. Any statement made by the Soldier during their diagnosis or treatment and taken without a warning shall be disclosed to the Soldier's command only if permitted by DOD Regulation 6025.18-R and shall not be used in making any LOD determination.

Appendix G. Proposed Revision to Army Regulation 600-8-4**Section II
Terms****Existed prior to service**

Any injury, disease, or illness, to include the underlying causative condition, which was sustained or contracted prior to the present period of AD or authorized training, or had its inception between prior and present periods of AD or training is considered to have existed prior to service. A medical condition may in fact be present or developing for some time prior to the point when it is either diagnosed or manifests symptoms. Consequently, the time at which a medical condition "exists" or is "incurred" is not dependent on the date of diagnosis or when the condition becomes symptomatic. (Examples of some conditions which may be pre-existing are slow-growing cancers, heart disease, diabetes or mental conditions, which can all be present well before they manifest themselves by becoming symptomatic.)

Gross Negligence

Same as willful negligence.

Injury

Damage or harm caused to the structure or function of the body caused by an outside agent or force. For purposes of this regulation, an injury includes damage or harm that results in a Soldier being unable to perform military duties for more than 24 hours or may result in permanent disability. Injuries may be visual; such as broken bones or lacerations, or may be non-visual such as a concussion or traumatic brain injury. The following is a non-exhaustive list of non-visual injuries that generally require an LD investigation: diagnosis of concussion or mild traumatic brain injury; any period of loss or a decreased level of consciousness; any loss of memory for events immediately before or after an injury; any neurological deficits that may or may not be transient, or evidence of an intracranial lesion.

Intentional misconduct

Any wrongful or improper conduct which is intended or deliberate is intentional misconduct. Intent may be expressed by direct evidence of a member's statements or may be implied by direct or indirect evidence of the member's conduct. Misconduct does not necessarily involve committing an offense under the UCMJ or local law.

Intentional conduct

An act, by commission or omission, done on purpose.

Mental responsibility

The capacity to understand when one's conduct is wrong and to conform one's conduct to the requirement of the law. Soldiers are generally presumed to be mentally responsible for their actions. This presumption usually means it is unnecessary to pursue the issue of mental responsibility unless there is credible evidence to raise the issue of a lack of mental responsibility. Such evidence may consist of the circumstances surrounding the death, illness, injury or disease, previous abnormal or irrational behavior, expert opinion or other evidence directly or indirectly pointing toward lack of mental responsibility. All suicide and bona fide suicide attempts raise the issue of mental responsibility.

Misconduct

Intentional conduct that is wrongful or improper. Also, willful negligence or gross negligence.

Preponderance of evidence

Evidence that tends to prove one side of a disputed fact by outweighing the evidence to the contrary (that is, more than 50 percent). Preponderance does not necessarily mean a greater number of witnesses or a greater mass of evidence; rather preponderance means a superiority of evidence on one side or the other of a disputed fact. It is a term that refers to the quality, rather than the quantity, of the evidence.

Presumption

An inference of the truth of a proposition or fact, reached through a process of reasoning and based on the existence of other facts. Matters that are presumed need no proof to support them, but may be rebutted by evidence to the contrary.

Proximate cause

A proximate cause is a cause which, in a natural and continuous sequence, unbroken by a new cause, produces an injury, illness, disease, or death and without which the injury, illness, disease, or death would not have occurred. A proximate cause is a primary moving or predominating cause and is the connecting relationship between the intentional misconduct or willful negligence of the member and the injury, illness, disease, or death that results as a natural, direct and immediate consequence that supports a

“not line of duty—due to own misconduct” determination.

Service aggravation

Refers to a medical condition that existed prior to service and which worsened or was aggravated as a result of military service more than it would have been worsened or aggravated in the absence of military service.

Simple negligence

The failure to exercise that degree of care which a similarly situated person of ordinary prudence usually takes in the same or similar circumstances, taking into consideration the age, maturity of judgment, experience, education, and training of the soldier. An injury, disease, illness, or death caused solely by simple negligence is in line of duty unless it existed prior to entry into the Service or occurred during a period of AWOL (except when the soldier was mentally unsound at the inception of the unauthorized absence).

Unable to perform military duties

The Soldier is unable to perform their specified tasks. This decision is made by the unit commander and is based on whether the physical injury substantially prevents the specific Soldier from completing their assigned duties. Injuries that solely prevent a Soldier from participating in organized physical training will generally not qualify as making them unable to perform military duties. A Soldier is normally unable to perform their military duties while being treated at a medical treatment facility (hospital, clinic, or inpatient facility) for medically required testing, treatment, or observation. A Soldier is considered able to perform their military duties during any such time that the unit commander authorizes treatment which is not medically necessary.

Willful Negligence

A conscious and intentional omission of the proper degree of care that a reasonably careful person would exercise under the same or similar circumstances is willful negligence. Willful negligence is a degree of carelessness greater than simple negligence. Willfulness may be expressed by direct evidence of a member’s conduct and will be presumed when the member’s conduct demonstrates a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of an act or failure to act. Willful negligence does not necessarily involve committing an offense under the UCMJ or local law. Willful negligence is the same as gross negligence.

Appendix H. Proposed Changes to Appendix B of Army Regulation 600-8-4

Appendix B

Rules Governing Line of Duty and Misconduct Determinations

In every formal investigation, the purpose is to find out whether there is evidence of ~~intentional misconduct or willful negligence~~ that is substantial and of a greater weight than the presumption of "in line of duty." To arrive at such decisions, several basic rules apply to various situations. The specific rules of misconduct are listed below.

B-1. Rule 1

Injury, disease, or death directly caused by the individual's ~~misconduct or willful negligence~~ is not in line of duty. ~~It is due to misconduct.~~ This is a general rule and must be considered in every case where there might have been ~~misconduct or willful negligence~~. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies—(1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct. When the nature of the injury, illness, or death raises the question of mental soundness, the investigation must also show by substantial and a greater weight of evidence that the Soldier was mentally sound in order to overcome the presumption of "in line of duty." All suicides and self-inflicted injuries raise the question of mental soundness.

B-2. Rule 2

Mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is generally no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is generally not enough to determine that the injury, disease, or death resulted from misconduct unless the conduct which caused the violation was the proximate cause of the Soldier's injury, disease, or death. ~~However, the violation is one circumstance to be examined and weighed with the other circumstances.~~

B-3. Rule 3

Injury, disease, or death that results in the Soldier suffering a permanent disability or being unable to perform military duties ~~incapacitation~~ because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct. This rule applies to the effect of the drug on the soldier's conduct, as well as to the physical effect on the soldier's body.

Any wrongfully drug-induced actions that cause injury, disease, or death are misconduct. That the soldier may have had a pre-existing physical condition that caused increased susceptibility to the effects of the drug does not excuse the misconduct.

B-4. Rule 4

Injury, disease, or death that results in the soldier suffering a permanent disability or being unable to perform military duties ~~incapacitation~~ because of the abuse of intoxicating liquor is not in line of duty. It is due to misconduct. The principles in Rule 3 apply here. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standards of conduct as one who is sober. Intoxication does not excuse misconduct. While normally there are behavior patterns common to persons who are intoxicated, some, if not all, of these characteristics may be caused by other conditions. For example, an apparent drunken stupor might have been caused by a blow to the head. Consequently, when the fact of intoxication is not clearly fixed, care should be taken to determine the actual cause of any irrational behavior.

B-5. Rule 5

Injury or death incurred while knowingly resisting a lawful arrest, or while attempting to escape from a guard or other lawful custody, is incurred not in line of duty. It is due to misconduct. One who resists arrest, or who attempts to escape from custody, can reasonably expect that necessary force, even that which may be excessive under the circumstances, will be used to restrain him or her and, is committing misconduct ~~acting with willful negligence~~.

B-6. Rule 6

Injury or death incurred while tampering with, attempting to ignite, or otherwise handling an explosive, firearm, or highly flammable liquid in disregard of its dangerous qualities is incurred not in line of duty. It is due to misconduct. Unexploded ammunition, highly flammable liquids, and firearms are inherently dangerous. Their handling and use require a high degree of care. A soldier who knows the nature of such an object or substance and who voluntarily or willfully handles or tampers with these materials without authority or in disregard of their dangerous qualities, is misconduct ~~willfully negligent~~. This rule does not apply when a soldier is required by assigned duties or authorized by appropriate authority to handle the explosive, firearm, or liquid, and reasonable precautions have been taken. The fact that the soldier has been trained or worked with the

use or employment of such objects or substances will have an important bearing on whether reasonable precautions were observed.

B-7. Rule 7

Injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict in which one is equally at fault in starting or continuing the conflict, when one could have reasonably withdrawn or fled, is not in line of duty. It is due to misconduct. An injury received or death suffered by a soldier in an affray in which he or she is the aggressor is caused by his or her own misconduct. This rule does not apply when a soldier is the victim of an unprovoked assault and sustains injuries or dies while acting in self-defense. The soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonably foreseen in the incident, the resulting injury or death is not considered to have been caused by misconduct. Except for self-defense, a soldier who persists in a fight or similar conflict after an adversary produces a dangerous weapon, and a reasonable person would have withdrawn or fled, is acting in willful disregard for safety and is therefore willfully negligent.

B-8. Rule 8

Injury or death caused by a soldier driving a vehicle when in an unfit condition of which the soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A soldier involved in an automobile accident caused by falling asleep while driving is not guilty of misconduct ~~willful negligence~~ solely because of falling asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.

B-9. Rule 9

Injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others. "Thrill" or "dare-devil" type activities are also examples of when this rule may be applied.

B-10. Rule 10

Suicides and self-inflicted injuries are presumed in the line of duty unless

substantial and a greater weight of evidence shows that the soldier was mentally sound at the time of their injury or death. A soldier who commits suicide or self-injures themselves should only be found mentally sound if substantial and a greater weight of evidence shows that the soldier was able to comprehend the nature of their acts and control their actions. A mental defect, disease, or derangement, raises a strong indication that the soldier was not able to comprehend the nature of their acts or to control their actions. Suicide is the deliberate and intentional destruction of one's own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion. Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

B-11. Rule 11

Misconduct or willful negligence of another person is attributed to the soldier if the soldier has control over and is responsible for the other person's conduct, or if the misconduct or neglect shows enough planned action to establish a joint venture. The mere presence of the soldier is not a basis for charging the soldier with the misconduct or willful negligence of another, even though the soldier may have had some influence over the circumstances or encouraged it. If the soldier, however, has substantially participated with others in the venture, then that is misconduct.

B-12. Rule 12

The line of duty and misconduct status of a soldier injured or incurring disease or death while taking part in outside activities, such as business ventures, hobbies, contests, or professional or amateur athletic activities, is determined under the same rules as other situations. To determine whether an injury or death is due to willful negligence, the nature of the outside activity should be considered, along with the training and experience of the soldier.

B-13. Rule 13

When determining whether a soldier is substantially able to perform military duties, the unit commander must determine whether the physical

injury substantially prevents the specific Soldier from completing his or her assigned duties. For example, a soldier while serving as a file clerk pulls his hamstring. The Soldier will be unable to participate in organized physical training (PT) for three weeks, but will be otherwise able to perform his duties as a file clerk. In this case, no LODI would be required since the Soldier can still substantially perform his assigned tasks. On the other hand, if the Soldier was on a training mission providing security for a dismounted patrol, his injury would likely prevent him from completing these tasks and a LODI would be required.

B-14. Rule 14

Medical treatment of more than twenty-four hours may or may not require a LODI. The determination of whether the treatment requires a LODI is whether it is medically necessary or was treatment authorized by the command and therefore not medically necessary. Medically necessary treatment in excess of twenty-four hours requires a LODI. Treatment authorized by the command does not require a LODI regardless of the length. For example, a soldier who overdoses on alcohol and is medically held at the hospital for forty-eight hours requires a LODI. A soldier who makes a suicidal gesture, resulting in no permanent disability and is allowed, on the recommendation of behavioral health, to attend a three week inpatient treatment facility would not require a LODI. The treatment at the inpatient facility was authorized by the command and therefore was not medically necessary.

Appendix I. Proposed Revision to Department of the Army Form 2173

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS For use of this form, see AR 600-8-4, the proponent agency is DCS, G-1.			
THRU: (Include ZIP Code)		TO: (Include ZIP Code)	FROM: (Include ZIP Code)
1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial)		2. SSN	3. GRADE
4. ORGANIZATION AND STATION		5. ACCIDENT INFORMATION	
		a. DATE	b. PLACE (City and State)
6. INVESTIGATION OF <input type="checkbox"/> DEATH <input type="checkbox"/> INJURY <input type="checkbox"/> ILLNESS <input type="checkbox"/> DISEASE			
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
7. INDIVIDUAL WAS <input type="checkbox"/> OUT PATIENT <input type="checkbox"/> ADMITTED <input type="checkbox"/> DEAD ON ARRIVAL		8. NAME OF HOSPITAL OR TREATMENT FACILITY <input type="checkbox"/> CIVILIAN <input type="checkbox"/> MILITARY	
9. HOUR AND DATE ADMITTED		10. HOUR AND DATE EXAMINED	
11. DESCRIPTION OF SYMPTOMS AND DIAGNOSIS (for death cases, explain cause of death)			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input type="checkbox"/> PERMANENT TOTAL		13. TEST FOR <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS	14. RESULT OF TEST(S)
15. DATE	16. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR		17. SIGNATURE
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
18. DUTY STATION <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE <input type="checkbox"/> ABSENT WITH AUTHORITY: <input type="checkbox"/> ABSENT WITHOUT AUTHORITY		19. HOUR AND DATE OF ABSENCE a. FROM	
		b. TO	
20. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance) YES NO			
21. INDIVIDUAL WAS ON <input type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		22. HOUR AND DATE TRAINING a. BEGAN	
		b. ENDED	
23. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING		DIRECTLY TO TRAINING	DIRECTLY FROM TRAINING
24. MODE OF TRANSPORTATION	25. HOUR BEGINNING TRAVEL	26. DISTANCE INVOLVED	27. NORMAL TIME FOR TRAVEL
28. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
29. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach enclosures as necessary)			
30. FORMAL LINE OF DUTY INVESTIGATION RECOMMENDED <input type="checkbox"/> YES <input type="checkbox"/> NO		31. RECOMMEND INJURY BE CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths) <input type="checkbox"/> YES <input type="checkbox"/> NO	
32. DATE	33. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER		34. SIGNATURE
SECTION III - TO BE COMPLETED BY THE APPOINTING AUTHORITY			
35. AFTER REVIEWING THE FILE AS THE APPOINTING AUTHORITY, I FIND THE LINE OF DUTY DETERMINATION TO BE <input type="checkbox"/> APPROVED - SOLDIER'S INJURY OR ILLNESS WAS INCURRED IN LINE OF DUTY <input type="checkbox"/> I HAVE APPOINTED AN INVESTIGATING OFFICER TO CONDUCT A FORMAL LINE OF DUTY INVESTIGATION <input type="checkbox"/> I HAVE FORWARDED THE FILE TO THE APPROVING AUTHORITY FOR ACTION			
36. DATE	37. TYPED NAME AND GRADE OF APPOINTING AUTHORITY		38. SIGNATURE