

CLEAN HANDS AND STRICT LIABILITY: CLARIFYING THE MENS REA STANDARD WHEN PROSECUTING SERVICEMEMBERS FOR ERRORS IN MILITARY PAY

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I. INTRODUCTION

Errors in military pay are a frequent and unfortunate fact of life for America's servicemembers.¹ Yet in certain situations, the military justice system prosecutes overpayment of servicemember pay and benefits as if the Uniform Code of Military Justice's (UCMJ) larceny statute were a strict liability offense.² In the author's experience, military lawyers often misapply the UCMJ Article 121³ *mens rea* element in the narrow but common subset of cases where a servicemember is overpaid but did nothing to cause the overpayment. In other words, military commanders too often prosecute

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1. See, e.g., Scott Paltrow, *Special Report: How the Pentagon's Payroll Quagmire Traps America's Soldiers*, REUTERS, July 9, 2013, <http://www.reuters.com/article/us-usa-pentagon-payerrors-special-report-idUSBRE96818I20130709> (describing rampant errors in military pay and the devastating impact those errors may have on servicemembers); David S. Cloud, *Thousands of California Soldiers Forced to Repay Enlistment Bonuses a Decade After Going to War*, L.A. TIMES (Oct. 22, 2016), <http://www.latimes.com/nation/la-na-national-guard-bonus-20161020-snap-story.html> (describing the Department of Defense's efforts to recoup reenlistment bonuses years after they were mistakenly offered to nearly 10,000 Soldiers, many of whom had already finished performing their reenlistment service obligations and served multiple tours in Iraq or Afghanistan).

2. Uniform Code of Military Justice, 10 U.S.C. § 921 art. 121 (2012) (providing for an intent element).

3. The full text of UCMJ Article 121 is "[a]ny person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind--- (1) with intent to permanently deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or (2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation." *Id.*

servicemembers who have clean hands. To address this issue, the Manual for Courts-Martial (MCM) should be revised to provide clearer guidance to commanders and military lawyers regarding *mens rea* in pay and benefits overpayment cases.

First, this article frames the problem by discussing an example of a Soldier who was convicted of larceny for failing to identify an error in his pay. Second, this article discusses how the relevant case law paves the way for military commanders and military lawyers to misapply UCMJ Article 121 as if it were a strict liability offense. Finally, this article recommends revising the Manual for Courts-Martial to clarify the circumstances under which overpayment cases should be treated as criminal larceny versus mere civil debt collection actions.

II. FRAMING THE PROBLEM: HOW SERVICEMEMBERS MISS ERRORS IN THEIR PAY

Sergeant (SGT) D's case illustrates the scenario this article seeks to address.⁴ SGT D arrived in Germany for an unaccompanied tour (i.e. his wife and children remained in the United States). He correctly completed the inprocessing paperwork that the local finance office used to activate the overseas housing and cost-of-living allowances (COLA)⁵ for all incoming Soldiers. However, the local finance office botched their side of the paperwork. The finance office set up SGT D's COLA at the "with dependents" rate when they should have used the lower rate for single Soldiers. Simultaneously, the finance office set his basic allowance for housing (BAH)⁶ rate at the "with dependents" rate when they should have used the lower "BAH diff" rate. Although the overpayment was only a few hundred dollars each month, the total exceeded \$25,000 by the time anyone realized the error.

Even though SGT D had clean hands, he was charged with larceny of the overpayment. Every document he submitted to finance was 100 percent accurate. However, the prosecution argued that SGT D knew he was being overpaid because he regularly checked his online leave and earning statements (LES).⁷ According to the prosecution argument, SGT D formed the intent to

4. All discussion of SGT D's case is based on the author's personal knowledge as lead defense counsel. This scenario is not unique. The author observed variations of this scenario and the varying responses of different commanders and military prosecutors across more than eight years of military justice practice. *See generally* Paltrow, *supra* note 1 (describing rampant errors in military pay and the devastating impact those errors may have on servicemembers).

5. COLA is a monthly allowance designed to offset the higher cost of living for servicemembers stationed overseas. *Overseas Cost of Living Allowances (COLA)*, DEF. TRAVEL MGMT. OFFICE, <http://www.defensetravel.dod.mil/site/cola.cfm> (last visited Mar. 5, 2016) [hereinafter COLA].

6. BAH is the monthly housing allowance servicemembers receive when they or their family members reside in off-post housing. BAH rates vary by location, rank of the servicemember, and whether the servicemember is single or has a family. *Basic Allowance for Housing (BAH)*, U.S. DEP'T OF DEF., <http://www.defensetravel.dod.mil/site/bah.cfm> (last visited Mar. 5, 2016).

7. A servicemember's LES summarizes her pay, allowances, and leave data each month.

commit larceny every time he checked his LES. Importantly, there was no other evidence of intent.

Unfortunately, a servicemember's LES is at best a murky and labyrinthine document. The LES is a one-page document containing 85 tiny blocks of data and codes, with unhelpful titles such as "M/S," "Ex," "TPC," and "Stat."⁸ The COLA rate is displayed on the LES using two numerical codes that are not explained anywhere on the form.⁹ The BAH rate is displayed on the LES using shorthand phrases such "w/dep."¹⁰ While "w/dep" may appear to mean "with dependents,"¹¹ a servicemember with dependents may not actually be entitled to pay at the BAH "with dependents" rate.¹² To further confuse matters, the COLA and BAH codes are displayed in boxes that are not labeled "COLA" or BAH.¹³

Not only is the LES unreadable, SGT D had good reason to think he was receiving the correct compensation amount. First, even if he cracked the code and realized he was being paid the "with dependents" rate, SGT D paid monthly child support for his two children who lived in the United States. A reasonable person could assume that having dependents entitled SGT D to the COLA "with dependents" rate. Second, SGT D had been (correctly) receiving the BAH "with dependents" rate at his previous duty station in the United States. A reasonable person could assume that he would be entitled to the same rate at his overseas duty station. Third, SGT D's company commander reviewed his pay data each month for two years.¹⁴ Every month, the company commander submitted a form to finance indicating any pay errors in his company.¹⁵ SGT D's name was never on the list.

Further, the regulations that govern BAH and COLA rates are massive, technical, and far from user-friendly.¹⁶ It took SGT D's defense counsel more

See DEF. FIN. & ACCT. SERV., HOW TO READ AN ACTIVE DUTY ARMY LEAVE AND EARNING STATEMENT, http://www.dfas.mil/dam/jcr:a41809fa-81a4-4cc7-890e-0207e58fef1d/Army_reading_your_LES.pdf (last visited Sept. 21, 2016) [hereinafter HOW TO READ A LES].

8. See *id.*

9. See *id.*

10. See *id.*

11. "Dependents" is a military term for family members who rely on a servicemember for financial support. See, e.g., U.S. DEP'T OF ARMY, REG. 37-104-4, MILITARY PAY AND ALLOWANCES POLICY, ¶ 13-1 (June 8, 2005) [hereinafter AR 37-104-4].

12. See, e.g., U.S. DEP'T OF DEF., JOINT TRAVEL REG., ¶ 10402 (Oct. 2014) [hereinafter JTR].

13. The COLA codes are displayed in boxes titled "JFTR" and "Depns." The BAH codes are displayed in boxes titled "BAQ Type" and "BAQ Depn." See HOW TO READ A LES, *supra* note 7.

14. Each month, the battalion S1 (personnel officer) creates a Unit Commander Financial Report that lists the pay and entitlements of each Soldier in the unit. Army company commanders review and certify the report each month to ensure their Soldiers are being paid correctly. See AR 37-104-4, *supra* note 11, ¶ 1-4g(2); *Army Unit Commander Financial Report*, ARMY NCO GUIDE, <http://armyncoguide.com/commander/soldier-finance.html> (last visited Mar. 5, 2016).

15. See generally *supra* note 14.

16. Well over 1000 pages of regulations across multiple sources govern servicemember pay. See generally U.S. DEP'T OF DEF., FIN. MGMT. REG. vol. 7A (Apr. 2016); JTR, *supra* note 12; AR 37-104-4, *supra* note 11.

than an hour of research to determine the proper BAH rate in this complicated scenario. It is unrealistic to assume that a young, high school-educated Soldier invested the time required to decipher the complex rules on his own, realized that finance was overpaying him, and then formed a criminal intent to steal the overpayments. Even the local finance office did not know the rules for BAH in SGT D's situation. When SGT D's defense counsel queried multiple finance personnel about SGT D's scenario, they provided conflicting answers. Given the confusing finance rules and non-intuitive facts of SGT D's scenario, concluding that SGT D had intent to steal merely because he checked his LES is akin to applying a strict liability theory to larceny.

Nonetheless, the military judge agreed with the prosecution theory of *mens rea* and sentenced him to six months confinement and a Bad-Conduct Discharge. Unfortunately, the basic fact pattern illustrated in SGT D's case is not unique (although this article refers to it generically as the "SGT D scenario"). This author has encountered it a variety of times from both the prosecution and defense perspectives.

III. THE CASE LAW: A BROAD STANDARD THAT LENDS ITSELF TO OVER-PROSECUTION

The drafters of UCMJ Article 121 made the statute broad by design and stretched its *mens rea* element to accommodate a very wide range of misconduct.¹⁷ However, the appellate courts have not yet provided clear guidance as to the outer limits of the statute's *mens rea* element.¹⁸ This lack of clarity lends itself to over-prosecution in the SGT D scenario.

The drafters of UCMJ Article 121 purposefully made the statute broad enough to combine the previous offenses of larceny, obtaining by false pretense, and embezzlement.¹⁹ Accordingly, the elements of UCMJ Article 121 are (1) wrongfully taking, obtaining, or withholding, (2) property belonging to a certain person, (3) of a certain value, (4) with the intent to permanently deprive or defraud.²⁰ Because the statute is broad by design, a trial counsel may charge any of the three theories of larceny using a generic specification alleging that the accused "did steal" the property in question.²¹

17. See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46c(1)(a) (2012) [hereinafter MCM].

18. See Uniform Code of Military Justice, 10 U.S.C. § 921 art. 121 (2012); United States v. Helms, 47 M.J. 1, 6–7 (C.A.A.F. 1997); United States v. Dean, 33 M.J. 505, 511–12 (A.F.C.M.R. 1991); United States v. Perkins, 56 M.J. 825, 828–29 (A. Ct. Crim. App. 2001).

19. MCM, *supra* note 17, at pt. IV, ¶ 46c(1)(a). *But see Embezzlement*, BLACK'S LAW DICTIONARY FREE ONLINE LAW DICTIONARY 2ND ED., <http://thelawdictionary.org/embezzlement/> (last visited Sept. 21, 2016) ("The fraudulent appropriation to his own use or benefit of property or money in trusted to him by another, by a clerk, agent, trustee, public officer, or other person acting in a fiduciary character."). Embezzlement requires a fiduciary or special trust relationship that is absent when an employer sends a paycheck to the average employee. *Id.*

20. 10 U.S.C. § 921 art. 121.

21. MCM, *supra* note 17, at pt. IV, ¶ 46c(1)(a). However, creating such a generic model specification also creates the possibility of confusion. For example, the prosecution in SGT D's case advanced false pretense as the legal theory of their case until the judge and defense counsel

Sergeant D's case properly falls under the wrongful withholding theory of larceny (formerly the crime of embezzlement) because he failed to return property (BAH and COLA overpayments), which he did not have a right to possess.²²

When practitioners attempt to apply the wrongful withholding theory to Soldiers who are overpaid despite having clean hands, the intent element of Article 121 stretches to the point of breaking. This is the scenario in which aggressive military attorneys attempt to prosecute Soldiers like SGT D for errors committed solely by their local finance offices. The problem begins with the MCM explanation that “[a]lthough a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or withholding and the property is wrongfully withheld with that intent.”²³ This explanation of intent would be entirely appropriate in the case of a valet who drives away with a Ferrari left in his care.²⁴ It would also be appropriate for a Soldier who knows he is being overpaid but takes action to hide it from his command in order to obtain more money.²⁵

However, this explanation of intent implies that an accused must first become aware of the wrongful taking or obtaining before the accused can form the intent to steal.²⁶ Because the MCM implies that a servicemember cannot form the intent to wrongfully withhold something if he or she does not yet realize he or she wrongfully obtained it,²⁷ aggressive practitioners are tempted to stretch to find improperly creative ways to infer the requisite knowledge.

Unfortunately, the case law paints an incomplete picture. Two cases speak to the SGT D scenario. First, *U.S. v. Dean* illustrates the correct application of *mens rea* in the SGT D scenario.²⁸ A general court-martial convicted Sergeant Dean under a wrongful withholding theory for continuing to receive BAH after he moved into the barracks.²⁹ Sergeant Dean did nothing improper to cause the BAH payments to start.³⁰ Unfortunately, he also did nothing to stop the BAH payments even though he knew he was not authorized

corrected them during a pretrial motion to dismiss. *See id.*

22. *See* MCM, *supra* note 17, pt. IV, ¶ 46c(1) (“[a] ‘withholding’ may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due. . . .”).

23. MCM, *supra* note 17, pt. IV, ¶ 46c(1)(f)(i).

24. *See, e.g.,* FERRIS BUELLER’S DAY OFF (Paramount Pictures 1986).

25. *See* United States v. Helms, 47 M.J. 1, 1–2 (C.A.A.F. 1997) (upholding larceny conviction where the accused failed to go to the finance office after an NCO told him to correct his incorrect pay).

26. *See* MCM, *supra* note 17, at pt. IV, ¶ 46c(1)(f); *Helms*, 47 M.J. at 3.

27. *See* MCM, *supra* note 17, at pt. IV, ¶ 46c(1)(f).

28. *See* United States v. Dean, 33 M.J. 505 (A.F.C.M.R. 1991); *see also* United States v. Perkins, 56 M.J. 825, 828 (A. Ct. Crim. App. 2001) (adopting the same position for the Army Court of Criminal Appeals).

29. *See* *Dean*, 33 M.J. at 507–08. Servicemembers without dependents who reside in the barracks generally may not receive BAH. *See id.* at 507–08.

30. *Id.*

to continue receiving them.³¹ The trial court convicted Sergeant Dean of larceny under a wrongful withholding theory.³² However, the appellate court overturned Sergeant Dean's larceny conviction and held that a servicemember's duty to report an overpayment is not criminal, absent either a special fiduciary duty or false pretenses.³³ In other words, merely knowing about an overpayment is not enough to sustain a larceny conviction.³⁴ A normal servicemember would not be guilty of larceny for BAH overpayments unless he either intentionally submitted false paperwork to the finance office or intentionally failed to update the finance office after his entitlements changed (for example, he divorced or moved into the barracks).³⁵ SGT D's scenario would not cause problems if the case law stopped here.

However, *U.S. v. Helms* upheld a conviction under a wrongful withholding theory with facts that are closer to (but still distinguishable from) the SGT D scenario.³⁶ Similarly to the SGT D scenario, Airman First Class Helms did nothing to cause himself to be overpaid BAH.³⁷ Yet unlike SGT D, Airman First Class Helms knew he was being overpaid and a noncommissioned officer directed him to go to the finance office to correct his pay.³⁸ The Court of Appeals for the Armed Forces (CAAF) held that a wrongful withholding theory could support conviction in an overpayment case so long as the evidence establishes that the servicemember (1) realized he was mistakenly receiving housing allowances and (2) formed the intent to steal it.³⁹ In *Helms*, CAAF inferred intent to steal because Airman First Class Helms had been notified of the overpayment and directed to correct it, but he evaded his responsibility to do so.⁴⁰ In other words, *Helms* broadened the application of the wrongful withholding theory by applying it to overpayment scenarios but only addressed scenarios where servicemembers have *unclean* hands.⁴¹ The *Helms* decision becomes problematic only when practitioners do logical gymnastics in an attempt to apply it to servicemembers with *clean* hands (the SGT D scenario).

Significantly, CAAF's guidance in *Helms* and the MCM explanation are essentially the same.⁴² Both require evidence that the accused formed the intent to steal after he lawfully obtained the property.⁴³ But because there is no *Helms*-like evidence of intent in the SGT D clean hands scenario, practitioners are tempted to use flawed logic to create the extra logical inference required to

31. *Id.*

32. *Id.* at 508–11.

33. *See id.* at 505–11. However, a servicemember's failure to correct overpayments could violate UCMJ Article 92 (dereliction of duty) given egregious circumstances. *See id.* at 511 n.5.

34. *See id.* at 508–11.

35. *See id.*

36. *See United States v. Helms*, 47 M.J. 1 (C.A.A.F. 1997).

37. *See id.* at 2.

38. *See id.*

39. *See id.* at 3.

40. *See id.*

41. *See id.*

42. Compare MCM, *supra* note 18, at pt. IV, ¶ 46c(1)(f) with *Helms*, 47 M.J. at 3.

43. *See MCM*, *supra* note 17, at pt. IV, ¶ 46c(1)(f); *Helms*, 47 M.J. at 3.

criminalize the overpayment.

In the author's experience, the flawed argument usually employed in the clean hands scenario follows this general form: (1) all servicemembers have knowledge of all published orders and regulations,⁴⁴ (2) a servicemember who has knowledge of all published orders and regulations would know he was being overpaid if he checked his LES, (3) the accused checked his LES, (4) therefore, the accused knew he was being overpaid, (5) therefore, the accused formed the intent to commit larceny every time he checked his LES because he knew he was being overpaid. There are two logical flaws in this argument. First, an LES does not provide enough information to determine whether a servicemember's pay is correct. As noted above, COLA rates may change each pay period,⁴⁵ an LES displays unexplained codes,⁴⁶ and even the data fields that appear obvious (such as "BAQ type") sometimes trigger complicated rules⁴⁷. Thus, the mere act of checking one's LES should not be sufficient to establish knowledge of an overpayment. Second, it is pure fiction to assume servicemembers understand all published regulations. As SGT D's case illustrates, local finance personnel may not understand all of their own regulations and even experienced attorneys have to devote serious research time to untangle the complex finance rules.⁴⁸ The argument breaks down because practitioners cannot realistically assume a common servicemember has a level of technical knowledge that rivals or exceeds that of the subject matter experts.

When the only path to *mens rea* requires practitioners to make unrealistic assumptions about a servicemember's knowledge of obscure finance rules, they are really applying a *de facto* strict liability standard.⁴⁹ That is, they have moved beyond a fact-based examination of the accused's state of mind and entered the realm where the conduct itself is per se prohibited.⁵⁰ However, criminal strict liability exists only where statute clearly provides for a strict liability *mens rea*.⁵¹ Further, strict liability is usually employed only for offenses with minor penalties such as traffic violations.⁵² Because larceny is a

44. See, e.g., *United States v. Tolkach*, 14 M.J. 239, 240 (C.M.A. 1982) (holding that actual knowledge of the general order or regulation a servicemember violated is not an element of UCMJ Article 92). However, UCMJ Article 92 only speaks to violations of punitive general orders and regulations. See Uniform Code of Military Justice, 10 U.S.C. § 892 art. 92. Relaxing the knowledge requirement for violating a regulation and inferring intent in a larceny case are two wholly different scenarios. Compare *Tolkach*, 14 M.J. at 240 (discussing violations of general orders) with *Helms*, 47 M.J. at 3 (discussing larceny).

45. See *COLA*, *supra* note 6.

46. See U.S. DEF. FIN. & ACCOUNTING SERV., Form 702, Military Leave and Earnings Statement (Jan. 2002).

47. For example, having dependents does not always entitle a servicemember to BAH at the "with dependents" rate. See *supra* Part II.

48. See *supra* Part II.

49. See AM. JUR. 2D *Criminal Law* § 127 (2016).

50. See *id.*

51. See *id.*

52. See *id.* Even the UCMJ's statutory rape article goes beyond pure strict liability by providing a reasonable mistake of fact defense in some instances. See Uniform Code of Military Justice, 10 U.S.C. § 920b art. 120b(d)(2).

serious felony-type offense and the statute requires intent, it is incorrect for practitioners to approach larceny as if it were a strict liability offense.⁵³

IV. REVISE THE MCM TO PROVIDE CLEARER GUIDANCE FOR PRACTITIONERS AS THEY DECIDE BETWEEN PURSUING LARCENY VERSUS CIVIL DEBT COLLECTION ACTIONS

Because practitioners mistakenly apply UCMJ Article 121 to the SGT D scenario as if it were a strict liability offense, the UCMJ explanation should be revised to include a paragraph that clarifies the appropriate approach to servicemember overpayment cases. The proposed revision follows:

Overpayment of pay and entitlements: The wrongful obtaining theory generally applies in cases where a servicemember knowingly provides false or misleading information that results in overpayment. A servicemember who does not take affirmative steps to cause an overpayment to begin may nonetheless be prosecuted under a wrongful withholding theory if, once the servicemember has knowledge of an overpayment, the servicemember takes action to conceal the overpayment or the servicemember takes action to cause additional overpayments to continue. Servicemembers will be not be presumed to have knowledge of an overpayment simply because they checked their leave and earnings statement. Generally, knowledge under the wrongful withholding theory requires that a third party provide notice to the accused. For example, evidence that a noncommissioned officer told a servicemember that he thinks the servicemember's pay and entitlements are incorrect may be sufficient to establish that the servicemember knew he was being overpaid. While a servicemember who did not take affirmative steps to cause an overpayment to begin or continue is not guilty of larceny, nothing in this explanation limits the government's ability to recover the overpayment through civil or administrative procedures.

Regardless of whether this proposed revision or another revision is ultimately adopted, the revision to the Manual for Courts-Martial's explanation of UCMJ Article 121 should note that the armed services may take appropriate civil debt collection action to recover all overpayments, but commanders should pursue criminal causes of action only in cases where the evidence shows actual intent to commit larceny. The explanation should distinguish between clean hands and unclean hands scenarios of overpayments. Additionally, it should make clear that merely checking one's LES does not by itself establish that a servicemember knew he was being overpaid or formed the intent to commit larceny.

53. See 10 U.S.C § 921 art. 121; MCM, *supra* note 17, at pt. IV, ¶ 46e (listing ten year maximum punishment). Note that this argument is not an attack against UCMJ Article 92 (violation of general orders or regulations). UCMJ Article 92 specifically provides for strict liability. 10 U.S.C § 892 art. 92. Further, punitive orders and regulations are generally highly publicized and far less complex than the finance regulations. See 82D AIRBORNE DIV., REG. 190-2, PROHIBITED ACTIVITIES AND ITEMS (30 Nov. 2010) (prohibiting actions such as providing alcohol to minors or possessing certain types of weapons).

There are four benefits to these proposed revisions. First, they do not reduce the government's ability to recover overpayments. A court-martial lacks the authority to order a servicemember to repay a debt or to seize property from a servicemember.⁵⁴ In contrast, the Department of Defense has an arsenal of civil and administrative tools to recover overpayments from servicemembers.⁵⁵ Recovery already occurs through the civil debt collection process regardless of whether a servicemember faces criminal charges.⁵⁶ For example, the Defense Finance and Accounting Service (DFAS) recoups overpayments using its administrative authority to withhold a portion of a servicemember's monthly paycheck.⁵⁷ DFAS's withholding authority is a powerful tool to recover an overpayment because withholding is initiated by the very organization that issues the servicemember's paycheck and occurs before the paycheck reaches the servicemember's back account.⁵⁸ Compared to withholding, prosecution at court-martial is an inefficient method to recover an overpayment given the inability of a court-martial to order restitution⁵⁹ and the general reluctance of military judges to order fines as part of a court-martial sentence⁶⁰. In the author's experience, withholding is also a far

54. See MCM, *supra* note 17, at R.C.M. 201(a)(1). A court-martial "has no power to adjudge civil remedies" and "may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property." MCM, *supra* note 17, at R.C.M. 201(a)(1) discussion.

55. See U.S. DEP'T OF DEF., FIN. MGMT. REG. vol. 16, ¶ 0303, 030505 (Jan. 2016) (providing for involuntary withholding of servicemember pay for indebtedness to the United States and discussing civil debt collection procedures) [hereinafter FMR vol. 16].

56. See *id.* at ¶ 0303, 030505. The MCM's explanation that a debtor's failure to pay a debt does not sustain a larceny charge highlights the inappropriateness of charging servicemembers in SGT D's scenario. See MCM, *supra* note 17, at pt. IV, ¶ 46c(1)(b). An overpaid servicemember in SGT D's scenario is essentially in a debtor-creditor relationship with the Defense Finance and Accounting Service (DFAS). See *id.*; see *supra* Part II.

57. See FMR vol. 16, *supra* note 55, at ¶ 0303, tbl. 3-1. DFAS's authority to withhold a servicemember's pay is an administrative remedy that exists independently from the criminal justice system. 37 U.S.C. § 1007(c) (2010).

58. See FMR vol. 16, *supra* note 55, at ¶ 0303.

59. See MCM, *supra* note 17, at R.C.M. 201(a)(1). A court-martial "has no power to adjudge civil remedies" and "may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property." MCM, *supra* note 17, at R.C.M. 201(a)(1) discussion. An agreement to provide restitution is a permissible term of a pretrial agreement (i.e. a plea deal) between an accused and a military court-martial convening authority. MCM, *supra* note 17, at R.C.M. 705(c)(2)(C). However, the author has never encountered a pretrial agreement that includes a restitution clause; instead, the author has observed a general reluctance among court-martial convening authorities and their staff judge advocates to enter into pretrial agreements that require ongoing monitoring or risk additional litigation.

60. In more than eight years of military justice practice, the author has only encountered one court-martial case that included a fine. A court-martial may order a fine as part of an adjudged sentence. MCM, *supra* note 17, at R.C.M. 1003(b)(3). However, a fine is a poor mechanism to collect a large debt over time because the entire amount of the fine becomes due immediately. See MCM, *supra* note 17, at R.C.M. 1003(b)(3). Additionally, a court-martial's authority to enforce fines is subject to significant limitations. See MCM, *supra* note 17, at R.C.M. 1113(e)(3) (limiting the government's ability to demand payment of a fine by an indigent servicemember and requiring a hearing before executing confinement in lieu of an unpaid fine). In the author's experience, military judges avoid including fines in a court-martial sentence in

speedier option to recover an overpayment given that DFAS usually begins withholding pay months before prosecutors prefer charges. While withholding is a powerful tool to recover overpayments from servicemembers who are still currently serving, DFAS has additional options to recover from servicemembers who have already retired or separated from the military. For example, DFAS's Debt and Claims Management Office (DCMO) pursues collection actions using a variety of civil debt collection procedures such as issuing written demands for payment, referring delinquent debts to private collection agencies, reporting debts to credit bureaus, and referring debts to the Department of Justice for litigation.⁶¹

The second benefit of the proposed revisions is that servicemembers would continue to have a duty to correct pay errors.⁶² Servicemembers who fail to correct pay errors would continue to face adverse administrative action or poor evaluations if the circumstances raise questions regarding the servicemember's values or judgment.⁶³ The change would primarily be a recognition that pay errors are common enough and the rules are complex enough that overpayments should be addressed by a regulatory (rather than criminal) duty. The third benefit of the proposed revisions is that they would promote uniformity in how overpayments are addressed across the force. In the author's experience, commanders⁶⁴ tend to hold junior servicemembers and poor duty performers to a strict liability standard in clean hands overpayment cases, while being more lenient on officers, senior noncommissioned officers, and excellent duty performers. This is backwards, given that the most experienced and accomplished servicemembers are in the best position to identify and correct pay errors. A final benefit of the proposed revisions is that they would bring practice in line with the law.⁶⁵

Adding this explanatory paragraph is also in line with the MCM's general structure. Unusually, the MCM includes five pages of explanation to guide practitioners as they apply the expansively-crafted larceny statute.⁶⁶ The MCM devotes more pages to explaining larceny than it devotes to any other

part because of concerns over ongoing monitoring or procedural difficulties involved with enforcement.

61. See FMR vol. 16, *supra* note 55, at ¶ 030505. See also Cloud, *supra* note 1 (describing the Department of Defense's efforts to recoup reenlistment bonuses years after they were mistakenly offered to nearly 10,000 Soldiers).

62. See *The Army Values*, U.S. ARMY, <http://www.army.mil/values/> (last visited June 20, 2015) (explaining that integrity is one of the seven core values of a U.S. Soldier).

63. See U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, ¶ 3-2c (Dec. 19, 1986) (instructing Army leaders that they should file reprimands indicating substandard morals or integrity in a Soldier's official personnel file). See generally U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (Nov. 4, 2015) (providing a personnel evaluation system that rates military leaders based in part on their character and personal integrity).

64. In the military justice system, military commanders (rather than prosecutors) decide whether to prosecute particular cases. MCM, *supra* note 17, at R.C.M. 407.

65. See Uniform Code of Military Justice, 10 U.S.C. § 921 art. 121 (requiring proof of intent).

66. See MCM, *supra* note 17, at pt. IV, ¶ 46.

offense (including all UCMJ Article 120 sexual assault offenses combined).⁶⁷ Five paragraphs of the MCM's explanation cover intent, which is unsurprising given the complexity of defining an intent element that covers three separate common law offenses.⁶⁸ A total of eight paragraphs describe special situations or miscellaneous considerations for larceny charges.⁶⁹ The proposed explanatory paragraph would fit incongruously into the preexisting structure of either the "intent" or the "special situations" sections of the MCM's explanation of Article 121.

V. CONCLUSION

The government should continue to recover all overpayments of servicemember pay and benefits through the civil debt collection process, but should not prosecute all overpayments as if larceny were a strict liability offense. Revising the MCM to explain that clean hands overpayments are not larceny is important because UCMJ Article 121 is often misapplied or applied unevenly across the military. The revision would promote justice while protecting the junior servicemembers who are the most likely to be prosecuted for clean hands larceny but are the least prepared to identify pay errors.

67. *See id.*

68. *See id.* at ¶ 46c(1)(f).

69. *See id.* at ¶ 46c(1).