

**Second Place Winner  
2005 LAMP Essay Contest**

**The Statutory Creation of LAMP Posts:  
The Lanterns of Legal Assistance to Military Personnel**

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The provision of military legal assistance is governed by 10 U.S.C. § 1044. Under the current version of this statute, the provision of such assistance is discretionary. The ABA Standing Committee on Legal Assistance to Military Personnel (LAMP Committee) has proposed revisions to 10 U.S.C. § 1044 to make the provision of military legal assistance mandatory. While the efforts of the LAMP Committee are laudable, they also serve to highlight the shortcomings of the current version of 10 U.S.C. § 1044. This paper serves as a battle cry to amend the statute to create and fund LAMP Posts, with such posts to be based upon the paradigm for low-income taxpayer clinics.

I. Low-Income Taxpayer Clinics

Congress created low-income taxpayer clinics as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3601, 112 Stat. 685, 774-76, available at <http://thomas.loc.gov/bss/d105/d105laws.html>. Low-income individuals who have disputes with the IRS are entitled to legal help from these clinics, which are located in 49 states, plus the District of Columbia and Puerto Rico. Prior to July 22, 1998, the date of enactment of the statute creating these clinics, low-income individuals had little choice with respect to their disputes with the IRS. They did not have the resources to retain an attorney. And many attorneys found such matters to be too uneconomical to handle, except on a *pro bono* basis.

Consequently, low-income individuals were oftentimes forced to represent themselves in cases involving complicated federal tax code provisions.

Congress believed that the provision of tax services by accredited nominal fee clinics to low-income individuals and those for whom English is a second language would improve compliance with the federal tax laws. See S. Rep. No. 105-174, at 99 (1998). It wished to foster the provision of such services and enacted 26 U.S.C. § 7526. See H.R. Conf. Rep. No. 105-599, at 303 (1998), reprinted in 1998 U.S.C.C.A.N. 288. Section 7526 deals with funding for low-income taxpayer clinics. Such funding is done via grants and is within the discretion of the Secretary of Treasury or his designee. 26 U.S.C. §§ 7526(a), 7701(a)(11)(B) (2004).

Since the inception of these clinics, Congress has appropriated funding for them, and low-income individuals have been receiving legal assistance through them. In 2004, the Internal Revenue Service (IRS) funded 135 low-income taxpayer clinics, awarding \$7.5 million in matching grants. Press Release, Internal Revenue Service, IRS Awards \$7.5 Million to Tax Clinics Assisting Low Income Taxpayers, IR-2004-55 (Apr. 15, 2004), available at <http://www.irs.gov/newsroom/article/0,,id=122706,00.html>. In 2005, the IRS also funded these clinics, this time 145 of them. Press Release, Internal Revenue Service, IRS Awards Approximately \$7.5 Million to Tax Clinics Aiding Low Income Taxpayers, IR-2005-26 (Mar. 10, 2005), available at <http://www.irs.gov/newsroom/article/0,,id=136595,00.html>. And the grant program to fund low-income taxpayer clinics is entering its eighth year, the application process being underway for 2006. Press Release, Internal Revenue Service, IRS Accepting Grant Applications for Low Income Taxpayer Clinics, IR-2005-62 (May 26, 2005), available at <http://www.irs.gov/newsroom/article/0,,id=139191,00.html>.

The hallmarks of 26 U.S.C. § 7526 are fourfold. First, the statute provides for an aggregate limitation of \$6,000,000. 26 U.S.C. § 7526(c)(1) (2004). The aggregate limitation provides a level of fiscal certainty as to the maximum amount that the Secretary of Treasury can allocate per year as grants to fund low-income taxpayer clinics.

Second, it features a public-private partnership. The clinic may be a clinical program at an accredited law, business, or accounting school or a tax-exempt organization under 26 U.S.C. § 501(c). 26 U.S.C. § 7526(b)(2) (2004). And the clinic must provide matching funds on a dollar-for-dollar basis, and such funds may include the salary (including fringe benefits) of individuals performing services for the clinic and the cost of equipment used in the clinic. 26 U.S.C. § 7526(c)(5) (2004).

Third, the statute provides for a definition of low-income taxpayers based upon an objective standard. Such taxpayers “have incomes which do not exceed 250 percent of the poverty level, as determined in accordance with criteria established by the Director of the Office of Management and Budget.” 26 U.S.C. § 7526(b)(1)(B)(i) (2004).

Fourth, the statute limits the type of taxpayer cases that a clinic may handle to disputes with the IRS involving amounts of \$50,000 or less. 26 U.S.C. §§ 7463, 7526(b)(1)(A)(ii), (B)(ii) (2004).

## II. The Current State of Military Legal Assistance

Like 26 U.S.C. § 7526, the current version of 10 U.S.C. § 1044 provides for discretionary funding of legal assistance. Specifically, it provides that “the Secretary concerned *may* provide legal assistance in connection with their personal civil legal affairs” for the following five categories of persons who may avail themselves of such assistance:

1. Members of the armed forces who are on active duty;

2. Members and former members entitled to retired or retainer pay or equivalent pay;
3. Officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay;
4. Members of reserve components not covered by paragraph (1) or (2) following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary of Defense), for a period of time, prescribed by the Secretary of Defense, that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.
5. Dependents of members and former members described in paragraphs (1), (2), (3), and (4).

10 U.S.C. § 1044(a)(1)-(5) (2004) (emphasis added).

For these five categories of persons, the provision of legal assistance is limited not only by the discretion of the Secretary concerned, but also by three statutory limitations. First, it is “[s]ubject to the availability of legal staff resources.” *Id.* Second, legal assistance is unavailable if such persons seeking legal assistance “can afford legal fees for such representation without undue hardship.” 10 U.S.C. § 1044(c) (2004). Third, the type of legal assistance that may be provided is that “in connection with personal civil legal affairs.” For the second and third statutory limitations, it is not clear what constitutes “undue hardship” and “personal civil legal affairs,” respectively.

A movement has been afoot in recent years to change this paradigm. The LAMP Standing Committee has proposed amendments to 10 U.S.C. § 1044 making legal assistance an entitlement for the first of the five aforementioned categories of person, namely, members of the armed forces who are on active duty. ABA StC on Legal Assistance for Military Personnel, Legal Assistance as an Entitlement, at <http://www.abanet.org/legalservices/lamp/home.html> (last visited June 29, 2005). The first amendment would have made legal assistance an entitlement

for the first of the five aforementioned categories of persons, namely, members of the armed forces who are on active duty. Under the LAMP Committee's proposal, the provision of legal assistance for the remaining four categories of persons would remain within the discretion of the Secretary concerned. Another change advocated by the Committee would allow any attorneys providing military legal assistance to practice in military jurisdictions where they are not licensed.

### III. Reasons for Change

The former LAMP Standing Committee chair argued:

Service members cannot perform adequately if they are distracted by legal concerns at home. Legal readiness should be a priority equivalent to medical care, dental care, physical fitness, and combat and occupational training. All too often legal preparedness is equated with a hastily executed will in a massive deployment situation. Service members who proactively address the myriad of legal concerns that can arise during extended absences can then focus their full attention on their military duties without being confronted by problems arising from unresolved legal problems. . . .

Rear Admiral John Jenkins (retired), From the Chair, 7 Dialogue 9, 10 (Fall 2003).

In short, military preparedness is the reason given for making military legal assistance an entitlement. Certainly *in times of conflict* it is desirable to have members of the armed forces who are on active duty focus solely on their military duties and not be distracted by personal legal affairs. Making legal services an entitlement for them would help effectuate this desire and would positively affect their morale and esprit de corps.

However, other policy reasons should be proffered. Military preparedness does not serve as compelling a policy rationale *during times of peace*. By its terms, 10 U.S.C. § 1044 involves legal affairs that are "personal" and "civil" in nature. Fiscal conservatives might be quick to point out that the very nature of these legal affairs have little nexus to military preparedness when service members are not involved in an extended conflict or a massive deployment

situation. So any debates regarding whether and how to amend 10 U.S.C. § 1044 should be mindful of budgetary considerations.

Moreover, any amendments to 10 U.S.C. § 1044 should address the problem of multi-jurisdictional practice under the current system. Each state or jurisdiction has its own rules regarding who may practice law. Military lawyers normally are not stationed permanently in the same state or jurisdiction. If they are reassigned to a military base in another jurisdiction, they will need to comply with that particular jurisdiction's rules regarding who may practice law. Utah has recently adopted an Expanded Legal Assistance Program rule that permits military lawyers who are stationed in Utah, but who do not hold a license to practice law there, to provide free legal services to service members and their dependents. ELAP Success in Utah, 8 Dialogue 18 (Summer 2004). The Commonwealth of Virginia also provides a special rule of admission for military lawyers who are authorized to provide legal assistance pursuant to 10 U.S.C. §1044 and who are employed, stationed, or assigned within Virginia. Va. Sup. Ct. R. 1A:6 (2004). But not every state is as advanced as Utah or Virginia.

Moreover, Virginia's rule of admission regarding military lawyers limits the types of cases that such lawyers may handle. They may appear before a court or tribunal of the Commonwealth of Virginia as counsel for a client eligible for legal assistance on (1) adoptions; (2) guardianships; (3) name changes; (4) divorces; (5) paternity; (6) child custody and visitation, and child and spousal support; (7) landlord-tenant disputes on behalf of tenants; (8) consumer advocacy cases involving alleged breaches of contracts or warranties, repossession, or fraud; (9) garnishment defense; (10) probate; (11) enforcement of rights under the Soldiers' and Sailors' Civil Relief Act of 1940; (12) enforcement of rights under the Uniformed Services Employment

and Reemployment Rights Act of 1944; and (13) such other cases within the discretion of the court or tribunal before which the matter is pending. Va. Sup. Ct. R. 1A:6(e) (2004).

#### IV. LAMP Posts: Lanterns of Legal Assistance

The aforementioned policy rationales are best effectuated, and the problems under the current system are best resolved, by amending 10 U.S.C. § 1044 to create and fund LAMP Posts. These posts would ideally be located near large military communities around the country. In this sense, the concept of LAMP Posts would be similar to that of military consumer law centers. But similar to low-income taxpayer clinics, the LAMP Posts would be public-private partnerships with funding via matching grants. The public portion of these grants would be subject to an annual aggregate limitation imposed by Congress, while the private portion may include the salary (including fringe benefits) of attorneys providing military legal assistance and the cost of equipment used. The funding limitation and the matching requirement would promote fiscal certainty.

Each LAMP Post would feature civilian attorneys, each of whom would have to be admitted to practice law in their respective jurisdiction. Having civilian attorneys permanently staff these posts would help avoid the problems arising from multi-jurisdictional practice. The civilian attorneys could be statutorily authorized to handle certain types of personal civil legal affairs, such as those enumerated under Rule 1A:6(e) of the Rules of the Supreme Court of Virginia.

Besides the civilian attorneys, the Secretary concerned or his or her designees would also have a significant role in this public-private partnership. Military lawyers would provide intake and referral services to the appropriate LAMP Post. But prior to such referral, they would be responsible for verifying that the service members who seek military legal assistance are

qualified to receive such assistance. The qualifications should be based upon a standard that is more objective than simply “undue hardship,” which is currently the standard under 10 U.S.C. § 1044(c). For example, to qualify for assistance by low-income taxpayer clinics, the taxpayer would have to have an income that does not exceed 250 percent of the poverty level, as determined in accordance with criteria established by the Director of the Office of Management and Budget. 26 U.S.C. § 7526(b)(1)(B)(i) (2004).

## V. Conclusion

Legitimate and compelling reasons exist for amending 10 U.S.C. § 1044. While low-income taxpayers, by definition, contribute little, if any, to the public fisc, Congress has conferred upon them the benefit of legal assistance by funding low-income taxpayer clinics. Surely service members, who put their lives on the line in the call of duty and for their country, should be entitled the same benefit, if not more. Military preparedness and the shortcomings of the current system regarding military legal assistance should serve as catalysts to revise and improve 10 U.S.C. § 1044.

If that statute is to be amended, lessons can be learned from the battle for low-income taxpayer clinics. The enactment of 26 U.S.C. § 7526 resulted in a public-private partnership paradigm with matching grants and aggregate funding limitations. That paradigm can be adopted in the context of providing military legal assistance throughout the country near large military communities. The private component would feature civilian attorneys who would provide such assistance with regard to certain personal civil legal affairs of qualified service members, while the public component would feature primarily oversight and matching funds. Together those two components would be known as LAMP Posts, serving as legal lanterns to those service members who are most in need of assistance, but cannot afford it.

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\* Note: The opinions of this essay are those of the author and not those of his past or present employer.