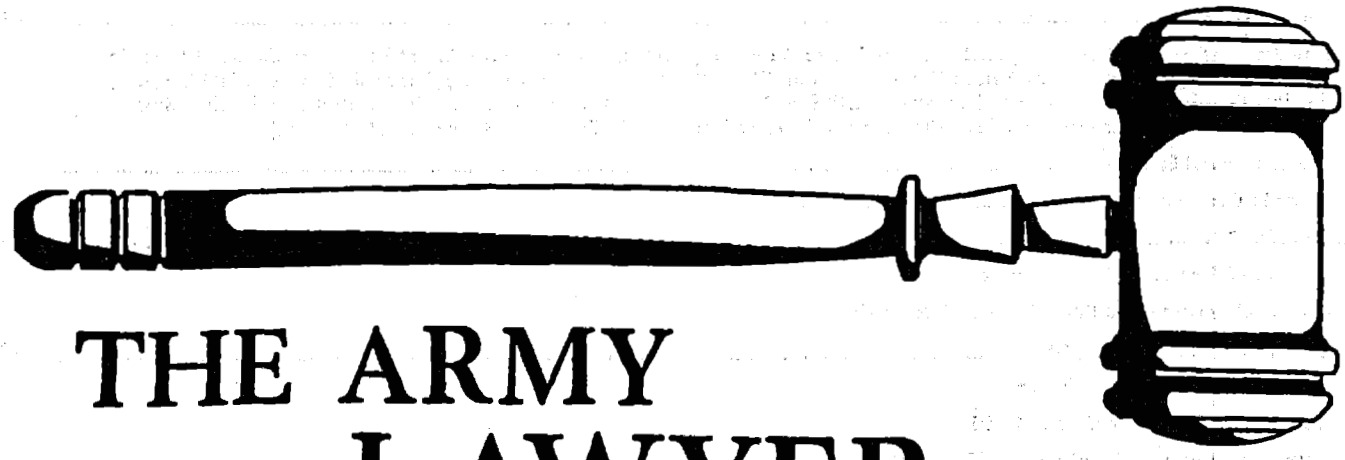

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Editor

Captain Benjamin T. Kash

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Assisting Soldiers in Immigration Matters

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Introduction

Many attorneys consider immigration law to be the most complicated area of American jurisprudence, rivaled in its complexity only by tax law.[1] This article, which focuses on the application of immigration law to members of the United States Armed Forces, should help judge advocates to disentangle some of the intricacies of the immigration system.[2]

Immigration issues typically arise when an alien client[3] seeks legal assistance in obtaining immigration or naturalization benefits. By definition, an alien is anyone who is not a citizen or national of the United States.[4] Alternatively, the client might be an alien or a citizen that wishes to avoid or cure the adverse immigration or naturalization consequences of a conviction, a punitive discharge, or some other mischance.[5] This article outlines the naturalization[6] benefits that Congress has provided to members of the United States Armed Forces and describes naturalization application procedures. It also describes how federal law affects the naturalization applications of deserters, draft evaders, and draft avoiders. Finally, it discusses the bases for deportation and exclusion of alien soldiers.

Occasionally, a legal assistance attorney (LAA) may encounter as a client a naturalized United States citizen who is concerned about losing his or her citizenship through expatriation or revocation of citizenship. This article describes the grounds for revocation of a naturalized citizenship and for expatriation. It concludes by outlining the procedures that apply when a soldier is an "enemy" alien whose departure from the United States has been restricted during a period of hostilities.

Scope of Legal Assistance Services

Army Regulation 27-3 expressly authorizes legal assistance attorneys to assist clients in naturalization and citizenship matters.[7] For example, a legal assistance attorney may help a client to prepare an application for naturalization as a United States citizen.[8] Under some circumstances, an LAA even may appear in court to represent an active duty soldier[9] in litigation against an agency of the United States.[10]

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The author extends particular appreciation to Amy Guastafierro, Ernestine Leslie, Lauren Mack, and Maria Wolfinger for their valuable contributions to this article.

[1] Castro-O'Ryan v. Immigration & Naturalization Serv., 821 F.2d 1415, 1419 (9th Cir.), *modified*, 847 F.2d 1307 (9th Cir. 1987) (describing immigration law as "second only to the Internal Revenue Code in complexity") (quoting E. Hull, Without Justice for All 107 (1985)); *accord* Ramon-Sepulveda v. Immigration & Naturalization Serv., 863 F.2d 1458, 1462-63 (9th Cir. 1988).

[2] Numerous secondary sources explain immigration and naturalization law as it applies to aliens and to United States citizens. For example, the author in his own practice and in researching this article has referred frequently to Gordon & Mailman, Immigration Law and Procedure (1990).

[3] Throughout this article, the term "client" refers to a legal assistance client who is a soldier, unless otherwise specified.

[4] The community of United States citizens is comprised of four groups: (1) Fourteenth Amendment citizens; (2) citizens by acquisition; (3) citizens by derivation; and (4) naturalized citizens. Among "legal" aliens, the main groups are lawful permanent residents, lawful temporary residents, conditional residents, and nonimmigrants. Any alien can become deportable or excludable and, therefore, subject to expulsion or exclusion from the United States. United States citizens, however, may not be deported or excluded from the United States. *See* Gordon & Mailman, *supra* note 2, § 1.03.

[5] Clients of Trial Defense Service attorneys may be concerned about the immigration consequences of court-martial convictions for particular crimes or of other than honorable or punitive discharges. A trial defense counsel must know whether a given conviction or discharge could result in adverse immigration consequences if he or she is to negotiate effectively with the trial counsel.

[6] A naturalized citizen is a person who acquired citizenship by the statutory application process known as naturalization. *See infra* notes 12-91 and accompanying text.

[7] Army Reg. 27-3, Legal Services—Legal Assistance, para. 2-5 (10 Mar. 1989) [hereinafter AR 27-3].

[8] Id., para. 2-5*a*(10).

[9] AR 27-3, para. 2-9*b*(1)(b) ("[c]ourt appearances are generally limited to the representation of qualified active duty clients"); *cf. id.*, para. 2-9*b*(1)(a) ("[r]epresentation in civilian courts is available only to . . . clients [otherwise] eligible for legal assistance services . . . for whom hiring civilian representation would entail a substantial financial hardship . . . ").

[10] *Id.*, paras. 2-9, 2-10. Court appearances by LAAs, however, are subject to limitations set forth at AR 27-3, paragraph 2-9*b*(1), which states, *inter alia*:

> (d) Active Army LAAs generally will not represent individuals who seek to bring court action against the United States or a U.S. agency or official. Should the circumstances of a particular case indicate that representation by an LAA against the United States may be appropriate, the [staff judge advocate] or supervising attorney must obtain prior approval from [The Judge Advocate General] for such representation . . . .
>
> . . . .
>
> (f) Court representation services will be limited to civil matters. LAAs will not represent clients in criminal matters (whether felony or misdemeanor) in court.

Nevertheless, because immigration law is so highly specialized, Army attorneys at times may have to consider referring prospective legal assistance clients to private attorneys.[11]

Naturalization to Citizenship

Alien clients often seek help from legal assistance attorneys in preparing naturalization applications. "Naturalization" is the process by which qualified aliens obtain United States citizenship. As described below, Congress has enacted legislation that provides special naturalization benefits to individuals that have served in the United States Armed Forces.[12]

Aliens With Three Years of Honorable Military Service

Federal law extends naturalization benefits to lawful permanent resident aliens[13] who have served honorably[14] in the United States Armed Forces[15] for three years or longer.[16]

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[11] Army Regulation 27-3 specifically authorizes LAAs to refer clients to other attorneys "whenever referral is in the best interest[s] of the clients." *See* AR 27-3, para. 2-7*a*. Among the factors that an LAA may consider when deciding whether to refer a client to another attorney is the LAA's "expertise in specific areas of the law." *Id.*, para. 2-7*a*(3). If an LAA chooses not to refer the client to a civilian practitioner, he or she still should ask the client's permission to consult with an INS attorney or with some other immigration law expert. *See generally* 8 C.F.R. § 100.4(b), (c) (1990) (listing INS offices in the United States and abroad).

Even if an LAA concludes that he or she has the requisite expertise to assist a prospective client with an immigration or naturalization problem, the LAA may want to consider whether the client's interests are contrary to the interests of the United States before he or she forms an attorney-client relationship. If the two interests are opposed, the LAA arguably could commit a felony by representing the client. The federal criminal code provides, in pertinent part,

> Whoever, being an officer or employee of the United States, . . . otherwise than in the proper discharge of his official duties . . .
> (1) acts as an agent or attorney for prosecuting any claim against the United States . . . or
>
> (2) acts as agent or attorney before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest;
>
> . . . [s]hall be subject to the penalties set forth in section 216 of this title.

18 U.S.C.A. § 205 (West Supp. 1991) (emphasis added).

Title 18, U.S.C. § 216 further provides that "[w]hoever engages in . . . conduct constituting [an] offense [under 18 U.S.C. § 205] shall be imprisoned for not more than one year or fined . . . [not more than $50,000]." *Id.* § 216(a)(1); *cf. id.* § 216(a)(2) (authorizing imprisonment for not more than five years and a fine of not more than $50,000 if the offender willfully violates 18 U.S.C. § 205).

The United States necessarily has a "direct and substantial interest" in virtually every immigration matter. Accordingly, an LAA should determine whether the prospective client has requested services that the LAA can render "in the proper discharge of [his or her] official duties." If the services in question fall within the legitimate scope of legal assistance established by AR 27-3, the federal statute will not bar the LAA from representing the prospective client.

Legal assistance attorneys should not assume that, because the interests of the client appear to conflict with the interests of the INS, the interests of the client and the United States necessarily are opposed. The Department of Defense has entered into an interagency understanding with the Immigration and Naturalization Service (DOD-INS understanding) under which the INS agrees to take no action against aliens as long as they remain on active duty in the United States Armed Forces. *See infra*, notes 144-45 and accompanying text. The DOD-INS understanding arguably demonstrates that the United States has an interest in obtaining terminations or stays of adverse immigration proceedings against aliens in American military service. *See infra*, note 144.

[12] Fong Tak Shan v. United States, 359 U.S. 102 (1959); Jung v. Barber, 184 F.2d 491 (9th Cir. 1950).

[13] Specifically, the alien must establish that he or she "is in the United States pursuant to a lawful admission for permanent residence." 8 C.F.R. § 328.1 (1990). Previous law governing this requirement was contradictory or ambiguous. *See Fong Tak Shan*, 359 U.S. 102, 104 (1959); Chow v. United States, 327 F.2d 340 (9th Cir. 1964); United States v. Rosner, 249 F.2d 49 (1st Cir. 1957); Werblow v. United States, 134 F.2d 791 (2d Cir. 1943) (fraudulent reentry after valid entry); *see also In re* Lim, 71 F. Supp. 84 (N.D. Cal. 1947); INS Interpretations 329.1(c)(2).

Entry by an alien into the United States as a member of the United States Armed Forces under official orders—when federal law exempts the alien from passport and visa requirements—is not a lawful entry for naturalization purposes. Immigration and Nationality Act § 284, 8 U.S.C.A § 1354 (West 1970); INS Interpretations 328.1(b)(3).

[14] *See* 32 C.F.R. pt. 41 (1990) (describing categories of discharges); *see also* United States *ex rel.* Barry v. Shaughnessy, 152 F. Supp. 881 (S.D.N.Y. 1957).

[15] Congress recently amended Immigration and Naturalization Act section 329, 8 U.S.C. § 1440 (honorable service during designated period of hostilities) (described *infra*, notes 32-58 and accompanying text)), to provide that Filipinos who served honorably during World War II in the Philippine Scouts, the Commonwealth Army of the Philippines, or a recognized guerrilla unit can qualify for naturalization benefits. *See* Immigration Act of 1990, Pub. Law No. 101-649, § 405, 104 Stat. 4978, 5039-40. Federal law previously had recognized only service in the Philippine Scouts as service in the United States Armed Forces. See United States v. Sison, 272 F.2d 366 (9th Cir. 1959); *In re* Roble, 207 F. Supp. 384 (N.D. Cal. 1962); *In re* Garces, 192 F. Supp. 439 (N.D. Cal. 1961); INS Interpretations 328.1(b)(4).

To qualify for benefits under the 1990 act, the service member must have been born in the Philippines, must have resided in the Philippines before his or her military service during the designated period of hostilities, and must apply for naturalization between November 29, 1990, and November 30, 1992. If applying from outside the United States, the applicant must mail his or her application to the following address:

> INS Northern Service Center
> Federal Building and U.S. Courthouse
> Room B-26
> 100 Centennial Mall North
> Lincoln, NE 68508-1619.

Arguably, Congress also may have intended to apply the three-years-of-honorable-service provisions to Filipinos that served in the organizations mentioned above. Significantly, however, Congress made no effort to amend the federal statute to reflect this intention.

[16] Immigration and Naturalization Act § 328, 8 U.S.C.A. § 1439 (West 1970 & Supp. 1991). Without the benefits, an alien generally must reside in the United States for five years before he or she may file a naturalization application. *Id.* § 316(a), 8 U.S.C.A. § 1427(a).

Department of Defense regulations require the military services to make every effort to retain lawful permanent resident soldiers for at least this three-year period.[17] An outstanding deportation order or pending deportation proceedings will not preclude an alien from seeking naturalization if the alien is a member of the United States Armed Forces when he or she applies for naturalization.[18]

An alien need not serve during wartime or hostilities to obtain these benefits.[19] Nor are the benefits limited to aliens serving on active duty; aliens serving in the Reserves or National Guard are also eligible.[20] Moreover, an alien's military service does not have to be continuous.[21] If his or her service was not continuous, however, the alien must prove his or her good moral character and his or her attachment and favorable disposition to the United States and must prove that he or she has resided in the United States for at least five years.[22] Federal authorities generally will consider an alien's military service abroad to constitute residence and physical presence in the United States for purposes of satisfying residency requirements.[23]

Aliens who benefit from this legislation are exempt from all other residency and physical presence requirements.[24] Each alien need only demonstrate his or her intent to reside permanently in the United States after naturalization.[25] Similarly, federal law rebuttably presumes an alien's "good moral character" and "attachment and favorable disposition to the United States"[26] during periods covered by a Certificate of Honorable Service.[27] For all other periods, however, an alien must demonstrate good moral character by other means.

An alien wishing to apply for United States citizenship may file a naturalization application in any judicial district, regardless of the applicant's actual residence.[28] The applicant, however, must file this application while he or she is in the armed forces or within six months after his or her discharge.[29] If the applicant misses this deadline, he or she will have to satisfy the five-year *continuous* residence and physical presence requirement[30]—though immigration authorities still will credit the alien with constructive residence and physical presence in the United States for periods that he or she served abroad under orders.

Aliens who benefit under this provision also waive the usual thirty-day delay of final hearing. They may be naturalized immediately if they and their witnesses have been examined by naturalization examiners.[31]

Aliens Who Serve During Designated Periods of Hostilities

Since World War I, Congress has provided benefits to aliens who serve in the United States Armed Forces during

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[17] 32 C.F.R. § 94.4(a)(4) (1990).

[18] Immigration and Naturalization Act §§ 318, 328(b)(2), 8 U.S.C.A. §§ 1429, 1439(b)(2) (West Supp. 1991); *see* INS Interpretations 318.2(c).

[19] Jung v. Barber, 184 F.2d 491 (9th Cir. 1950). If the alien served on active duty during a designated period of hostilities, the provisions granting benefits for military service are more generous. *See* Immigration and Naturalization Act § 329, 8 U.S.C.A § 1440 (West 1970 & Supp. 1991); *see also infra* notes 47-58 and accompanying text.

[20] *In re* Delgado, 57 F. Supp. 460 (N.D. Cal. 1944) (part-time Reserve service); INS Interpretations 328.1(b)(4); *see also* Chow v. United States, 327 F.2d 340 (9th Cir. 1964); Papathanasiou v. United States, 289 F.2d 930 (2d Cir. 1961); United States v. Aronovici, 289 F.2d 559 (7th Cir. 1961); United States v. Rosner, 249 F.2d 49 (1st Cir. 1957); INS Interpretations 328.1(b)(5) (period spent on temporary disability retired list).

[21] Immigration and Naturalization Act § 328(a), (c), 8 U.S.C.A. § 1439(a), (c) (West Supp. 1991).

[22] *Id.* § 328(c), 8 U.S.C.A . § 1439(c); 8 C.F.R. § 328.2 (1990).

[23] INS Interpretations 316.1(b)(2), 316.1(d)(2); *see also In re* Yarina, 73 F. Supp. 688 (N.D. Ohio 1947) (alien taken prisoner on American territory during World War II and thereafter held in a Japanese prisoner of war camp was deemed never to have left the United States); *In re* J.M.D., 7 I&N Dec. (BIA) 105 (1956); *In re* Bauer, 10 I&N Dec. (BIA) 304 (1963); INS Interpretations 316.1(b)(4); *cf.* United States v. Sison, 272 F.2d 366 (9th Cir. 1959).

[24] Without these benefits, an alien normally must reside for three months in a state before he or she may file an application for naturalization there and must be physically present in the United States when he or she applies. *See* Immigration and Naturalization Act § 328(a), 8 U.S.C. § 1439(a) (1988), *amended by* Immigration Act of 1990 § 407, Immigration and Naturalization Act § 328(a)(1), 8 U.S.C.A. § 1439(a)(1)) (West Supp. 1991) (reducing state residency requirement from six months to three months).

[25] *In re* Naturalization of Aliens, 250 F. 316 (E.D. Mo. 1918).

[26] An applicant may rebut this presumption with contrary evidence. *See* Jung v. Barber, 184 F.2d 491 (9th Cir. 1950); United States v. Rubia, 110 F.2d 92 (5th Cir. 1940).

[27] Immigration and Naturalization Act § 328(e) , 8 U.S.C.A. § 1439(e) (West 1970).

[28] *Id.* § 328(b)(1), 8 U.S.C.A. § 1439(b)(1) (West Supp. 1991); 8 C.F.R. § 328.3 (1990).

[29] Immigration and Naturalization Act § 328(a), 8 U.S.C.A. § 1439(a) (West Supp. 1991).

[30] *Id.* § 316(a)(1), 8 U.S.C.A. § 1427(a)(1).

[31] *Id.* § 328(b)(2), 8 U.S.C.A. § 1439(b)(2).

designated periods of hostilities.[32] The current law applies to any alien who served honorably[33] during any of the following periods: World War I;[34] World War II;[35] Korean hostilities;[36] Vietnam hostilities;[37] or any subsequent periods of hostilities that the President may designate by executive order.[38]

To qualify for these benefits, an alien must have served on *active duty* during one or more of these periods.[39] All an alien must show, however, is that he or she actually was on active duty at some time during the conflict. The date of the alien's entry onto active duty,[40] the location of the alien's duty station during the conflict,[41] and the nature of the alien's duties during the conflict are irrelevant to his or her eligibility.[42]

If a naturalized citizen, who previously claimed the naturalization benefits of wartime service, is discharged under other than honorable conditions, federal authorities may revoke his or her naturalization certificate.[43] The effects of an unfavorable discharge, however, do not apply to subsequent, separate periods of military service.[44]

An alien normally may not claim naturalization benefits under this statute, regardless of his or her honorable service

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[32] *See, e.g.*, Act of July 17, 1862, 12 Stat. 594 (codified as Rev. Stat. 2166); Act of May 9, 1918, 40 Stat. 542 (World War I service); Act of March 27, 1942, 56 Stat. 182, 187 (adding §§ 701-705 to the Nationality Act of 1940 (World War II)); Act of June 1, 1948, 62 Stat. 182, 187, (adding Nationality Act of 1940, § 324A) (recodified at Immigration and Naturalization Act § 329, 8 U.S.C. § 1440 (1952)) (World War II); Act of Sept. 21, 1961, 75 Stat. 684 (amending Immigration and Naturalization Act § 329, 8 U.S.C. § 1440 (1952)) (Korean hostilities); Act of Sept. 26, 1961, 75 Stat. 654 (Korean hostilities); Act of Oct. 24, 1968, 82 Stat. 1343, 1344 (amending Immigration and Naturalization Act § 329, 8 U.S.C. § 1440) (1964) (Vietnam hostilities); *see also* United States v. Sison, 272 F.2d 366 (9th Cir. 1959); Fong Tak Shan v. United States, 359 U.S. 102 (1959).

Originally, President Ronald Reagan had ordered benefits to soldiers who participated in the Grenada campaign (25 Oct. to 2 Nov. 1983). *See* Exec. Order No. 12,582, Feb. 2, 1987. The executive order, however, was struck down by at least one federal court because it improperly restricted the physical area of the hostilities. *See* Reyes v. Immigration & Naturalization Serv., 910 F.2d 611 (9th Cir. 1990).

President Bush has not indicated yet whether he will issue an executive order covering the period of the Panamanian campaign without limiting its application to alien soldiers who actually participated. An executive order probably will be issued for the time period connected with Operation Desert Shield and Operation Desert Storm.

Congress recently directed the Attorney General to "provide . . . for the granting of posthumous citizenship" to an alien who dies as a result of injury or disease incurred in, or aggravated by, active-duty service in the armed forces of the United States during designated periods of hostilities. *See* Posthumous Citizenship for Active Duty Service Act of 1990, Pub. L. No. 101-249, 104 Stat. 94; Immigration and Naturalization Act § 329A, 8 U.S.C.A. § 1440-1 (West. Supp. 1991); *see also* 56 Fed. Reg. 49,671-72 (1991) (to be codified as 8 C.F.R. pt. 392) (final rule). Significantly, the new law specifies that the grant of posthumous citizenship to the deceased soldier does not confer any immigration benefits upon surviving family members. Immigration and Naturalization Act § 329A, 8 U.S.C.A. § 1440-1(e).

[33] Immigration and Naturalization Act § 329(a), 8 U.S.C.A. § 1440(a) (West Supp. 1991). Although the statute does not state so explicitly, honorable service is established *conclusively* by certification of discharge under honorable conditions. *See In re* Chung, 149 F.2d 904 (9th Cir. 1945); *In re* Escalona, 311 F. Supp. 648 (D. Guam 1970); INS Interpretations 329.2(c)(5); *cf.* 10 U.S.C.A. § 1552(a) (West 1983 & Supp. 1991) (describing procedures for the correction of military records, including discharge certificates).

[34] 8 C.F.R. § 329.1 (1990) (limiting benefits for World War I service to veterans that served on active duty between 6 Apr. 1917 and 11 Nov. 1918).

[35] Immigration and Naturalization Act § 329, 8 U.S.C.A. § 1440(a) (West Supp. 1991) (extending benefits to aliens and noncitizen nationals that served honorably on active duty between 1 Sept. 1939 and 31 Dec. 1946).

[36] *Id.* (extending benefits to aliens or noncitizen nationals that served honorably on active duty between 25 June 1950 and 1 July 1955).

[37] Id.; Exec. Order No. 12,081, 43 Fed. Reg. 42,237 (1978) (extending benefits to aliens and noncitizen nationals that served honorably on active duty between 28 Feb. 1961 and 15 Oct. 1978).

[38] Immigration and Naturalization Act § 329(a), 8 U.S.C.A. § 1440(a) (West Supp. 1991). Although the situation rarely arises, an alien may not seek naturalization a second time on the basis of the same military service. *Id.*; *see In re* Strati, 131 F. Supp. 786 (E.D. Pa. 1954), *aff'd sub nom.*, United States v. Strati, 223 F.2d 470 (3d Cir. 1955); INS Interpretations 329.1(c)(2).

[39] *In re* Ognistoff, 146 F. Supp. 205 (N.D. Cal. 1956) (applicant's National Guard inactive duty does not satisfy the requirement). Similarly, approved offers to serve do not satisfy the requirement, absent subsequent actual service. United States v. Chen, 170 F.2d 307 (1st Cir. 1948).

The benefits that Congress conferred upon the alien veterans of various conflicts varied from enactment to enactment. Accordingly, a question may arise about whether an applicant may claim the benefits of the current statute rather than the benefits conferred in the originally applicable statutes. The current statute is Immigration and Naturalization Act § 329, 8 U.S.C.A. § 1440 (West 1970 & Supp. 1991). The savings clauses are set forth at Immigration and Naturalization Act § 405, 8 U.S.C.A. § 1101, note (West 1970 & Supp. 1991). Legal assistance attorneys also should see the following cases, which address whether the United States is estopped from denying naturalization benefits to Filipino veterans of World War II under an expired statute: United States v. Mendoza, 464 U.S. 154 (1984); United States v. Hibi, 414 U.S. 5 (1974); Pangilinan v. United States, 796 F.2d 1091 (9th Cir. 1986); Olegario v. United States, 629 F.2d 204 (2d Cir. 1980).

[40] Villarin v. United States, 307 F.2d 774 (9th Cir. 1962).

[41] INS Interpretations 329.1(c)(4).

[42] *In re* Sawyer, 59 F. Supp. 428 (D. Del. 1945) (service as a noncombatant); *In re* Kinloch, 53 F. Supp. 521 (W.D. Wash. 1944) (active duty for training).

[43] Immigration and Naturalization Act § 329(c), 8 U.S.C.A. § 1440(c) (West 1970).

[44] INS Interpretations 329.1(d)(2).

during a designated period of hostilities, if the alien ever avoided his or her service obligation with the United States Armed Forces by claiming an exemption from service on the basis of alienage.[45] A veteran also may be ineligible for these benefits if he or she ever declined to perform military service after claiming conscientious objector status or refused to wear the uniform of an American military service.[46]

An alien soldier that is entitled to the benefits of the statute need not demonstrate that he or she is a lawful permanent resident—that is, a "green card" holder—if the alien was in the United States—that is, the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands—the Canal Zone, American Samoa, or Swains Islands[47] when he or she enlisted, reenlisted,[48] extended enlistment,[49] or was inducted or recalled to active duty.[50] Accordingly, if an "illegal" alien somehow managed to enlist while physically in the United States or its territorial possessions, then served honorably during a designated period of hostilities, he or she arguably could apply for naturalization directly, without ever having to acquire lawful immigration status in the United States.[51] If the alien, however, was not physically present in the greater United States when he or she entered active military service, then he or she must acquire lawful permanent resident status before applying for naturalization to citizenship.[52]

This statute eliminates the usual residency requirements for naturalization.[53] It also waives the standard minimum age requirement for naturalization,[54] the restrictions relating to enemy aliens, and the bars to naturalization that stem from orders of deportation and deportation proceedings.[55] Moreover, the statute permits aliens to file naturalization applications in any judicial district, regardless of the applicant's actual residence.[56] Finally, to qualify for naturalization under this statute, an alien must establish his or her good moral character and attachment and favorable disposition to the United States *only* when filing the application,[57] though his or her past conduct may be relevant to that determination.[58]

Aliens Who Enlisted Abroad

An alien soldier or veteran that enlisted outside the United States may not be entitled to the naturalization benefits that normally attach to honorable military service. To qualify for naturalization benefits incident to three years of honorable military service, an applicant already must be a lawful permanent resident of the United States.[59] An alien who served honorably during a period of hostilities need not be a lawful permanent resident, but he or she must have been

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[45] *See infra* notes 92-99 and accompanying text.

[46] Immigration and Naturalization Act § 329(a), 8 U.S.C.A. § 1440(a) (West Supp. 1991); INS Interpretations 329.1(d) (withholding benefits even though the applicant was discharged under honorable conditions in separation proceedings initiated by the government). A conscientious objector that actually served on active duty, however, may receive the benefits even though he or she served as a noncombatant. *In re* Sawyer, 59 F. Supp. 428 (D. Del. 1945); *In re* Kinloch, 53 F. Supp. 521 (W.D. Wash. 1944).

[47] Immigration and Naturalization Act § 101(1)(38), 8 U.S.C.A. § 1101(a)(38) (West Supp. 1991). The territory described includes incidental territorial waters. *See id.*; Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923); INS Interpretations 329.1(c)(3).

[48] United States v. Convento, 336 F.2d 954 (D.C. Cir. 1964); *In re* Torres, 240 F. Supp. 1021 (D. Ariz. 1965); *In re* Zamora, 232 F. Supp. 1017 (S.D. Cal. 1964). In each case, the applicant enlisted while in the Philippines during hostilities and later reenlisted in the United States.

To qualify, an applicant actually must have commenced his or her extended service while in the United States. To sign an agreement to reenlist while in the United States is not sufficient if the applicant's original term of enlistment has not yet expired. *In re* Ladrido, 307 F. Supp. 799 (D.R.I. 1969); INS Interpretations 329.1(c)(3).

[49] *In re* Alon, 342 F. Supp. 596 (E.D. La. 1972); *In re* Roque, 339 F. Supp. 339 (S.D. Miss. 1971); *In re* Gabriel, 319 F. Supp. 1312 (D.P.R. 1970). In each case, the applicant enlisted while in the Philippines Islands and then extended enlistment while in the United States.

[50] Villarin v. United States , 307 F.2d 774 (9th Cir. 1962) (applicant enlisted in the United States during peacetime and later was recalled to active duty while living in the Philippines); *see* INS Interpretations 329.1(c)(3). Note that aliens no longer may claim immigration benefits for having enlisted abroad in the United States Armed Forces. *See infra* note 60.

[51] Under these circumstances, an alien may apply for naturalization even though he or she has not effected an "entry" into the United States for naturalization purposes. *See In re* Martinez, 202 F. Supp. 153 (N.D. Ill. 1962) (alien was in a parole status); INS Interpretations 329.1(c)(3) (concerning aliens who have made illegal entries).

[52] *See infra* notes 156-58 and accompanying text.

[53] Immigration and Naturalization Act § 329(b)(2), 8 U.S.C.A. § 1440(b)(2) (West Supp. 1991). An alien otherwise would have to reside in the United States for five years, and in a specific state for three months. *See id.* § 316(a)(1), 8 U.S.C. § 1427(a)(1) (1988) *amended by* Immigration Act of 1990 § 402, Immigration and Naturalization Act § 316(a)(1), 8 U.S.C.A. § 1427(a)(1)) (West Supp. 1991) (reducing state residency requirement from six months to three months).

[54] *Id.* § 329 (b)(1), 8 U.S.C.A. § 1440(b)(1) (West 1970).

[55] *Id*; *see also* Duenas v. United States, 330 F.2d 726 (9th Cir. 1964); *In re* Santos, 169 F. Supp. 115 (S.D.N.Y. 1958); INS Interpretations 318.2(c).

[56] Immigration and Naturalization Act § 329(b)(3), 8 U.S.C.A. § 1440(b)(3) (West Supp. 1991).

[57] United States v. Docherty, 212 F.2d 40 (5th Cir. 1954) (false statements in naturalization proceeding); Jung v. Barber, 184 F.2d 491 (9th Cir. 1950) (false statement); *In re* Chin, 173 F. Supp. 510 (S.D.N.Y. 1959) (narcotics addiction); *see also* Sing v. United States, 202 F.2d 715 (9th Cir. 1953); INS Interpretations 329.1(c)(6).

[58] *Jung*, 184 F.2d at 491; INS Interpretations 329.1(c)(6).

[59] *See supra* note 13 and accompanying text.

present in the United States or its territorial possessions when he or she enlisted.[60]

Enemy Aliens

Special procedures govern the processing of applications for naturalization of aliens who are citizens or nationals of a nation that is at war with the United States.[61] Federal law currently provides that an alien who is a "native, citizen, subject or denizen" of a country with which the United States is at war may be naturalized if his or her naturalization application was pending at the outbreak of hostilities and the naturalization authority has given the Attorney General of the United States ninety days' notice of the final hearing.[62] To apply for naturalization after the outbreak of hostilities, an enemy alien must obtain permission from the Attorney General.[63]

These procedures apply only during time of war. If interpreted to apply only during a formally declared war, they will not apply during hostilities absent an act of Congress. An applicant's enemy alien status terminates when the President proclaims that hostilities have ended.[64]

Application Procedure

The naturalization application procedure is substantially the same for all applicants, although, as explained below, the INS may expedite a soldier's application if he or she is about to be deployed. Each applicant must submit a preliminary application to the INS on INS Form N-400,[65] together with biographic information (recorded on INS Form G-325), fingerprint cards, photographs, and application fee.[66] The applicant also must submit documents to substantiate his or her purported status and entitlement to benefits.

To apply for naturalization on the basis of past military service,[67] an alien must request certification of military or naval service on INS Form N-426 and must submit biographic information on INS Form G-325B, instead of Form G-325. The INS then will submit Forms N-426 and G-325B to the appropriate military department.[68]

Applicants need not submit evidence of lawful permanent residency with their applications. The INS will verify this status independently, from its own records.

The INS then schedules an interview, at which an INS representative questions the applicant to verify that the applicant is eligible to apply for naturalization and administers a naturalization examination.[69] If the applicant passes the examination and is found to be eligible to apply, he or she will be scheduled to appear for administration of the oath of allegiance. Within the first forty-five days after the INS certifies that the applicant is eligible for naturalization, the federal district court has exclusive jurisdiction to administer the oath. After forty-five days have elapsed, the applicant may have the oath administered either by an INS official or by a federal district court judge.[70] Either way, the ceremony is designed to preserve the dignity and decorum of the occasion.

If the INS fails to adjudicate an alien's application within 120 days after the examination and interview, the applicant

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[60] *See supra* notes 47-51 and accompanying text. *But see supra* text accompanying note 52. An exception once existed to this general rule. Under the Lodge Act, Congress granted immigration benefits to 12,500 male aliens who, having enlisted in the United States Armed Forces abroad, subsequently entered the United States under orders and completed at least five years of honorable military service. *See* Pub. L. No. 81-597, 64 Stat. 316. Congress extended the Lodge Act in the Act of June 19, 1951, Pub. L. No. 82-51, § 21, 65 Stat. 75, 89. Aliens eligible for naturalization under the Lodge Act had to apply for its benefits before the Act expired on 1 July 1959. Act of July 24, 1957, Pub. L. No. 85-116, 71 Stat. 311. No comparable legislation currently exists. *But see infra* notes 165-67 and accompanying text (discussing the recent enactment of the Armed Forces Immigration Adjustment Act of 1991, Pub. L. No. 102-110, 105 Stat. 555 (1991)).

[61] Immigration and Naturalization Act § 331, 8 U.S.C.A. § 1442 (West 1970 & Supp. 1991).

[62] *Id.* § 331(a), (b), 8 U.S.C.A. § 1442(a), (b) (West Supp. 1991).

[63] *Id.* § 331(c), 8 U.S.C.A. § 1442(c). Note that an applicant's "enemy alien" status does not affect naturalization procedures under section 329 of the Immigration and Nationality Act. *See id.* § 329, 8 U.S.C. § 1440 (West 1970 & Supp. 1991) (extending immigration benefits to aliens who served honorably on active duty during a designated period of hostilities).

[64] *Id.* § 331(d), 8 U.S.C. § 1442(d) (West Supp. 1991).

[65] 8 C.F.R. § 328.3 (1990).

[66] *Id.* § 319.11 (1990). The applicant's photographs must be identical, front-faced, measuring two inches by two inches square with the distance from the top of the head to the point of the chin being a distance of one-and-one-quarter inches. The photographs may be in either color or black-and-white. The current application fee is $60.

[67] *See supra* notes 13-58 and accompanying text.

[68] *See* 8 C.F.R. § 328.3 (1990); INS Operations Instructions 328.1.

[69] Before the interview and examination, the applicant should study for the examination. Study materials are available in bookstores and libraries. Adult education programs also provide classes to help applicants to prepare for the examination. The INS recently announced plans to implement an alternate or replacement standardized English and civics testing program. *See* 56 Fed. Reg. 29,714 (1991).

[70] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 102(a), 105 Stat.1733, 1734 (amending Immigration and Naturalization Act § 310(b), 8 U.S.C. § 1421(b), effective 11 Jan. 1992); 56 Fed. Reg. 50,480 (1991) (to be codified at 8 C.F.R. pt. 310) (interim rule).

may seek judicial review.[71] If the INS denies an application, it must state in writing its reasons for doing so.[72] The applicant may seek an administrative review of the denial by filing a hearing request on INS Form N-336 within thirty days after receiving the notice of denial.[73] The INS must complete the requested review no later than 180 days after the request is filed.[74]

The applicant may seek judicial review of a denial only after pursuing administrative review.[75] The applicant must file the petition for review in the appropriate federal district court. The court then will review the INS adjudication de novo.[76]

The INS may expedite naturalization procedures for any service member who has applied for naturalization and has been interviewed by an INS examiner.[77] In practice, these procedures will be expedited only when the service member's commander affirms on Department of Defense Form 1278 that the service member is about to be deployed. The INS then may expedite the procedure by allowing the soldier to take the oath of allegiance at the next possible ceremony.

Expedited procedures are especially important if a soldier is a lawful permanent resident whose spouse or child has not yet acquired lawful permanent resident status in the United States. Were the soldier to die while the process of petitioning for a spouse's or child's lawful permanent resident status still was pending,[78] the petition automatically would be revoked.[79] If the service member was a United States citizen when he or she died, however, the surviving spouse[80] could obtain lawful permanent resident status under a statute specifically designed to permit surviving alien spouses of United States citizens to immigrate into the United States.[81] Moreover, if the spouse already had lawful permanent resident status when the service member died, he or she could apply for naturalization under a provision specifically designed to naturalize surviving spouses[82] of United States citizens that die during periods of active military service.[83]

Alien Spouses of United States Citizen-Soldiers Who Die During Active Duty Service[84]

Few service-related immigration benefits apply to anyone other than the alien who actually serves in the United States Armed Forces. One exceptional benefit, however, applies to lawful permanent resident[85] widows and widowers of United States citizens who die while serving on active duty.[86]

The courts and the INS have interpreted the statute granting this benefit to waive the required period of residency in the United States[87]—although the statute actually contains no explicit waiver. Furthermore, the widow or widower must establish his or her good moral character and favorable disposition to the United States only as of when he or she seeks naturalization[88] He or she does not need to establish these elements for any particular period before filing the

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[71] *Id.* (to be codified at 8 C.F.R. § 310.5) (interim rule).

[72] 56 Fed. Reg. 50,499 (1991) (to be codified at 8 C.F.R. § 336.1) (interim rule).

[73] *Id.* (to be codified at 8 C.F.R. § 336.2) (interim rule).

[74] *Id.*

[75] *Id.* (to be codified at 8 C.F.R. § 336.9) (interim rule).

[76] *Id.*

[77] *See* Immigration and Naturalization Act § 328(b)(2), 8 U.S.C. § 1439(b)(2).

[78] *See id.* § 203(a)(2), 8 U.S.C. § 1153(a)(2) (concerning immigrant visas granting lawful permanent resident status to spouses, and unmarried sons and daughters, of lawful permanent residents).

[79] Under some circumstances, the spouse or child may obtain a waiver of the revocation. *See* 8 C.F.R. § 205.1(a)(3) (1990). An LAA who is not an expert in immigration law, however, probably should refer a case of this sort to a private attorney.

[80] To determine whether the survivors are eligible for legal assistance, see AR 27-3, para. 2-4*b*(7) (surviving family members).

[81] Immigration and Naturalization Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), *amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4980-81.

[82] The requirement that the alien must have been admitted lawfully for permanent residence is not set forth explicitly in the statute. Nevertheless, because this requirement is not waived, the existing requirements for naturalization remain applicable. *See* 40 Op. Att'y Gen. 64 (1941); INS Interpretations 319.2(b)(2).

[83] Immigration and Naturalization Act § 319(d), 8 U.S.C. § 1430(d) (1988); *see infra* notes 84-91 and accompanying text.

[84] To determine whether a survivor is eligible for legal assistance, see AR 27-3, para. 2-4*a*(7) (survivors).

[85] The statute does not provide specifically that an alien widow or widower must have been admitted lawfully for permanent residence to qualify for the benefits set forth in the statute. The existing requirements for naturalization, however, must remain applicable to the extent that Congress does not waive them expressly. *See* 40 Op. Att'y Gen. 64 (1941); INS Interpretations 319.2(b)(2).

[86] Immigration and Naturalization Act § 319(d), 8 U.S.C.A. § 1430(d) (West Supp. 1991). These provisions offer *naturalization* benefits. On analogous *immigration* benefits for widows and widowers of United States citizens in general, see *id.* § 201, 8 U.S.C.A. § 1151.

[87] INS Interpretations 319.2(b).

[88] 8 C.F.R. § 319.3 (1990).

application. Finally, the alien can file a naturalization application in any judicial district, regardless of his or her actual residence.[89]

The statute extends this benefit to the surviving spouse of a citizen-soldier *regardless* of whether the soldier's death is service-related. The statute does require that the widow or widower has been living with the deceased soldier in "marital union"[90] at the time of the soldier's death; however, the surviving spouse's eligibility will not be affected if he or she later remarries.[91]

Bars to Naturalization

Under some circumstances, an alien can become forever ineligible to apply for naturalization to citizenship. A brief description of these circumstances appears below.

Election to Avoid a Military Service Obligation on the Basis of Alienage (Draft Avoidance)

Before 1971, national selective service laws allowed any alien to elect not to serve in the military.[92] Aliens who elected to avoid military service were permanently ineligible to obtain United States citizenship,[93] even if they later served honorably in the armed forces of the United States during a period of hostilities.[94]

In 1971, however, Congress repealed the election provision for immigrant aliens. Thereafter, only nonimmigrant aliens[95] could opt for exemptions from military service obligations on the bases of their alienages.[96] The exemption still is available to certain aliens under exemption treaties.[97]

In 1990, Congress provided relief to aliens who claim exemptions from United States military service pursuant to exemption treaties if, before avoiding military service in this country, they served in the armed forces of their countries of nationality.[98] At present, however, all other aliens who elected for exemption remain forever ineligible for United States citizenship.[99]

Desertion[100]

Legislation enacted in 1940 and 1952 identified desertion from the United States Armed Forces as grounds for expatriation—that is, the forfeiture of United States citizenship—if the deserter subsequently was apprehended, convicted at court-martial, and discharged.[101] The Supreme Court eventually declared these laws to be unconstitutional,[102] and Congress ultimately repealed them.[103]

A conviction for desertion, however, still constitutes a bar to naturalization.[104] Moreover, a naturalized citizen may face

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[89] Immigration and Naturalization Act § 319(d), 8 U.S.C.A. § 1430(d) (West Supp. 1991).

[90] *See* Nationality Act of 1940, Pub. L. No. 76-853, § 311, 54 Stat. 1137, 1145; *In re* Olan, 257 F. Supp. 884 (S.D. Cal. 1966) ("marital union" synonymous with "marital status"); *In re* Kostas, 167 F. Supp. 77 (D. Del. 1958) (long separation vitiates marital union); *In re* Omar, 151 F. Supp. 763 (S.D.N.Y. 1957) (brief, temporary separations do not vitiate marital union); INS Interpretations 319.1(d)(2) (separation for reasons beyond couple's control does not vitiate marital union).

[91] INS Interpretations 319.1(d).

[92] Selective Service Act of 1940, Pub. L. No. 76-783, § 3(a), *amended by* Act of Dec. 20, 1941, Pub. L. No. 77-630, 55 Stat. 844; Selective Service Act of June 24, 1948, Public Law No. 80-759, 62 Stat. 604, *amended by* Universal Training and Service Act of June 19, 1951, 50 U.S.C.A. app. § 454(a)) (West 1968); *see* Riva v. Mitchell, 460 F.2d 1121 (3d Cir. 1972); Jolley v Immigration & Naturalization Serv., 441 F.2d 1245, 1254 n.17 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971); *In re* Dunn, 14 I&N Dec. (BIA) 160 (1972); *In re V*, 6 I&N Dec. (BIA) 186 (1954); ; *In re* V.D., 2 I&N Dec. (A.G.) 417 (1946); *In re* R.A., 2 I&N Dec. (BIA) 282 (1945).

[93] Immigration and Naturalization Act § 315(a), 8 U.S.C.A. § 1426(a) (West Supp. 1991); Barber v. Reitmann, 248 F.2d 118 (9th Cir.), *cert. denied*, 355 U.S. 923 (1957); *see also supra* note 92.

[94] Immigration and Naturalization Act § 329(a), 8 U.S.C.A. § 1440(a) (West Supp. 1991).

[95] A "nonimmigrant" alien is an alien that has been admitted to the United States for a specific, limited purpose, but not as a lawful permanent resident—for example, an alien admitted as a visitor or as a student. *See id.* § 101(a)(15)(B), (F), 8 U.S.C.A. § 1101(a)(15)(B), (F) (West 1970).

[96] 50 U.S.C.A. app. §§ 453, 454(a)) (West 1968).

[97] *See generally* INS Interpretations 315.5(b)(6) (listing relevant treaties).

[98] Immigration Act of 1990, Pub. L. No. 101-649, § 404, 104 Stat. 4978, 5039 (codified at Immigration and Naturalization Act § 315, 8 U.S.C.A. § 1426(c) (West Supp. 1991)).

[99] Immigration and Naturalization Act § 315, 8 U.S.C.A. § 1426 (West Supp. 1991).

[100] *See also infra* notes 137-38 and accompanying text. *See generally* Uniform Code of Military Justice art. 85, 10 U.S.C. § 885 (1988) [hereinafter UCMJ] (describing elements of desertion); 18 U.S.C. § 1381 (1988) (proscribing the incitement of desertion and the harboring of deserters).

[101] Nationality Act of 1940, Pub. L. No. 76-853, § 401(g), 54 Stat. 1137, 1169; Immigration and Naturalization Act § 349(a)(8), 8 U.S.C.A. § 1481(a)(8) (West 1970) (repealed 1978); *see also* Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487, 490.

[102] Trop v. Dulles, 356 U.S. 86 (1958).

[103] Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046.

[104] Immigration and Naturalization Act § 314, 8 U.S.C.A. § 1425 (West 1970).

the revocation of his or her naturalization certificate and, consequently, the loss of his or her United States citizenship if he or she fails to reveal a prior conviction for desertion on his or her naturalization application.[105] A bar to naturalization can be removed only by purging the conviction upon which it is grounded, presumably through a writ of *coram nobis*,[106] a writ of *audita querela*,[107] a pardon,[108] an amnesty,[109] or a comparable legal device.

Draft Evasion[110]

Under legislation enacted in 1944 and codified in 1952,[111] individuals who departed from, or remained outside of, the United States during time of war or declared national emergency to evade service in the United States Armed Forces forfeited their United States citizenships. The Supreme Court declared this statute unconstitutional in 1963[112] and Congress subsequently repealed it.[113] Nevertheless, draft evasion remains a bar to naturalization to this day.[114]

Legal assistance attorneys occasionally may encounter draft evaders who subsequently enlisted in the United States Armed Forces—usually in peacetime—in the hope of rehabilitating themselves. This attempted rehabilitation, however, generally is futile. The bar to naturalization is permanent, and may be reversed only by Congress or the President.[115]

Excludable or Deportable Aliens as Clients

Background

A deportable alien, by definition, is an alien who has entered the United States and is unlawfully present in the United States. One popularly understood example of a deportable alien is the alien who successfully "jumps the line,"[116] eluding inspection by immigration officials by crossing an international boundary into the United States at a point other than an official United States port of entry.[117] Conversely, the classic example of an excludable alien is a stowaway who is discovered aboard an airplane or ship at a port of entry.[118] In each case, one of the underlying grounds for removal (either by deportation or by exclusion) is the

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[105] *See infra* note 171 and accompanying text.

[106] *See* Sawkow v. Immigration & Naturalization Serv., 314 F.2d 34 (3d Cir. 1963); Hirabayashi v. United States, 627 F. Supp. 1445, 1454-55 (W.D. Wash. 1986); *In re C*, 8 I&N Dec. (BIA) 611 (1960).

[107] *See* United States v. Alvarado, 692 F. Supp. 1265, 1268 (E.D. Wash. 1988).

[108] 31 Op. Att'y Gen. 225 (1918).

[109] *See* INS Interpretations 314.2.

[110] *See infra* notes 140-41 and accompanying text.

[111] Nationality Act of 1940, Pub. L. No. 76-853, § 401, 54 Stat. 1137, 1169, *amended by* Act of Sept. 27, 1944, Immigration and Naturalization Act § 349(a)(10), 8 U.S.C.A. § 1481(a)(10) (West 1970) (repealed 1976).

[112] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[113] Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046.

[114] Immigration and Naturalization Act § 314, 8 U.S.C.A. § 1425 (West 1970).

[115] President Calvin Coolidge granted amnesty to World War I deserters who deserted between 11 Nov. 1918 (the date hostilities ended) and 2 July 1921 (the formal end of the war). Proclamation of Mar. 5, 1924, 43 Stat. 1940. President Harry S. Truman granted amnesty to World War II deserters who deserted between 14 Aug. 1945 (the date hostilities ended) and 25 June 1950 (the date of the Korean invasion). Proclamation No. 3001, Dec. 24, 1952. President Jimmy Carter granted amnesty to deserters of the Vietnam hostilities who deserted between 4 Aug. 1964 and 28 Mar. 1973. Proclamation No. 4483, 42 Fed. Reg. 4391 (1977); Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977). Each grant of amnesty removed the bar to naturalization. *See* INS Interpretations 314.2.

Note that an alien need not be convicted of draft evasion to be denied entry to the United States. *See* Immigration and Naturalization Act § 212(a)(8)(B), 8 U.S.C.A. § 1182(a)(8)(B) (West Supp. 1991) (draft evasion as a ground of *exclusion*). An alien, however, must be convicted of draft evasion before the government may deny him or her naturalization. *See id.* § 314, 8 U.S.C.A. § 1425 (West 1970). If the INS decides that an alien is excludable as a draft evader, but the alien neither has been convicted of draft evasion, nor has been pardoned for the offense, the alien's only recourse is to seek administrative and judicial review of the INS decision.

[116] Among immigration lawyers, this act is known as "entry without inspection" or, less formally, as "EWI."

[117] "Port of entry" is a term of art that refers to any place where the INS inspects persons entering the United States. For example, ports of entry exist in New York City (harbor), Phoenix, Arizona (inland airport), and El Paso, Texas (land border crossing). *See generally* 8 C.F.R. § 100.4(c)(2) (1990) (providing a complete list of United States ports of entry).

[118] Were the stowaway to come ashore undetected, he or she would become "deportable," having perfected an entry into the United States without inspection by immigration officials.

alien's lack of documentation authorizing him or her to enter the United States.[119]

As noted above, an alien is deportable if he or she is present unlawfully in the United States. That an alien is deportable, however, does not mean that the alien automatically may be expelled from the United States, even if the INS initiates deportation proceedings against the alien. Before an alien may be deported, an immigration judge must adjudge the alien's deportability and must enter a final deportation order.[120] Moreover, even after the immigration judge has found that the alien is deportable, the alien still may apply for one of several available forms of relief from deportation.[121]

An excludable alien, by definition, may be found inside or outside the United States. If federal officials discover grounds to exclude the alien when he or she is outside the United States—that is, for example, if an American consular official abroad or an INS inspector at a port of entry find a legal basis for exclusion—the alien will be denied entry to the United States. If an excludable alien already is inside the United States, but decides to leave the country temporarily, he or she runs the risk of being refused admission when he or she applies to reenter.

Because the grounds for exclusion and the grounds for deportation are not identical, an alien inside the United States may be excludable, but not deportable. The grounds for exclusion tend to be more rigid than the grounds for deportation. Accordingly, federal authorities generally can exclude an alien more easily than they can deport one.[122]

For example, an alien who successfully has sought relief from a military service obligation on the basis of his or her alienage may be barred forever from obtaining citizenship by naturalization.[123] This alien also is excludable because federal law provides that an alien who is ineligible to apply for citizenship may be denied entry into the United States.[124] An alien's election to avoid military service, however, does *not* constitute a ground for deportation. Accordingly, an alien who exercised the right to avoid military service may not be deported for exercising that right. If he or she ever voluntarily departs the United States, however, he or she thereafter cannot reenter lawfully and, therefore, may be excluded permanently.

Grounds for Deportation and Exclusion

Convictions in Civilian Courts in the United States

In general, LAAs need neither delve into the complex particulars of the grounds for deportation[125] and exclusion,[126] nor study the myriad ways in which aliens can overcome these problems. Whether the alien client is a soldier or a civilian, advice and representation in matters relating to criminal proceedings generally lie outside the scope of the legal assistance program.[127] If a client needs an advocate for a civilian criminal trial or a court-martial, for the expungement of a conviction, or for a waiver of deportability or excludability, the LAA should refer him or her to a private attorney or to the Trial Defense Service, as appropriate.

Convictions Abroad

In general, an alien's conviction abroad constitutes a basis for deportation or exclusion. Some exceptions to the rule,

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[119] Immigration and Naturalization Act section 212(a)(7), 8 U.S.C.A. § 1182(a)(6)(D) (West Supp. 1991), sets forth the government's basis to exclude stowaways. A stowaway that successfully enters without inspection is deportable because he or she was excludable when he or she entered the United States. *See id.* § 241(a)(1)(A), 8 U.S.C. § 1251(a)(1)(A).

Under Immigration and Naturalization Act § 241(a)(1)(B), 8 U.S.C.A. § 1251(a)(1)(B), the act of entering without inspection also is a ground for deportation. Therefore, an alien who has proper documentation, but decides to enter the United States without inspection, renders himself or herself deportable. The classic example is an alien smuggler–himself or herself a lawful permanent resident of the United States—who guides aliens from Mexico into the United States. The act of entry without inspection is also a crime. *Id.* §§ 275(a), 276, 8 U.S.C.A. §§ 1325(a), 1326.

[120] 8 C.F.R. § 243.3 (1990).

[121] *See generally* Immigration and Naturalization Act § 244(e), 8 U.S.C.A. § 1254(e) (West Supp. 1991) (voluntary departure); *id.* § 244(a), 8 U.S.C.A. § 1254(a) (West 1970 & Supp. 1991) (suspension of deportation); id. § 249, 8 U.S.C.A. § 1259 (registry); *infra* notes 144-64 and accompanying text (describing relief that relates specifically to members of the United States Armed Forces). A thorough description of every form of relief exceeds the scope of this article.

[122] *See* Landon v. Plasencia, 459 U.S. 21 (1982).

[123] In the Immigration Act of 1990, Congress provided relief to aliens who claim, or have claimed, exemption from military service pursuant to a treaty and who previously served in the armed forces of their countries of nationality. Immigration Act of 1990, Pub. L. No. 101-649, § 404, 104 Stat. 4978, 5039 (codified at Immigration and Naturalization Act § 315, 8 U.S.C.A § 1426 (West Supp. 1991)); *see supra* notes 92-99 and accompanying text.

[124] Immigration and Naturalization Act § 212(a)(8)(A), 8 U.S.C.A. § 1182(a)(8)(A) (West Supp. 1991).

[125] *See id.* § 241(a)(2), 8 U.S.C.A. § 1251(a)(2).

[126] *See id.* § 212(a)(2), 8 U.S.C.A. § 1182(a)(2).

[127] *See* AR 27-3, para. 2-5*b*(1)(e).

however, may exist. For example, some courts have held that an alien's conviction by a foreign court of a crime of moral turpitude does not justify deportation unless the crime of which the alien was convicted also would be a crime under United States law.[128] Moreover, several courts have held that foreign convictions for crimes involving moral turpitude did not constitute a ground for deportation because the aliens could not seek a "judicial recommendation against deportation" or "JRAD" before the foreign tribunal—a remedy that, until recently, was available to aliens tried and convicted in the United States.[129] Congress, however, eliminated the JRAD when it enacted the Immigration Act of 1990,[130] thereby destroying the rationale that supported those decisions.

Convictions by Courts-Martial

Before Congress enacted the Immigration Act of 1990, several courts held that an alien's court-martial conviction for a crime of moral turpitude could not constitute a ground for deportation or exclusion[131] because the alien could not seek a JRAD before a military tribunal. These decisions—which, from the outset, appear to have been premised on faulty reasoning or outdated law[132]—clearly are without effect now that Congress has eliminated the JRAD requirement from the Immigration and Naturalization Act.[133] At present, LAAs should consider a court-martial conviction to be an adequate legal basis for deportation.

Breach of Military Service Duty

Draft Avoidance—As explained above,[134] draft avoidance is the legal process by which an alien may claim an exemption from a military service obligation on the basis of his or her alienage. Aliens who have elected to avoid military service may be excludable from the United States, but are not deportable.[135]

Desertion[136]—Desertion is not a ground for deportation.[137] An alien, however, may be excluded from the United States if convicted of desertion from the United States Armed Forces while the United States "has been or shall be at war."[138]

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[128] *See, e.g., In re* McNaughton, 16 I&N Dec. (BIA) 589 (1978). *But cf.* Immigration and Naturalization Act §§ 212(a)(2)(A)(i)(II), 241(a)(2)(B), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1051(a)(2)(B) (1988) (providing expressly that convictions relating to controlled substances may constitute grounds for deportation or exclusion); *accord* Brice v. Pickett, 515 F.2d 153 (9th Cir. 1975) (conviction by Japanese court for possession of marijuana); Gardos v. Immigration & Naturalization Serv., 324 F.2d 179 (2d Cir. 1963); *In re* Romandia-Herreros, 11 I&N Dec. (BIA) 772 (1966) (Mexican conviction for narcotics violation in the United States).

[129] Immigration and Naturalization Act § 241(b)(2), 8 U.S.C.A. § 1251(b)(2) (West 1970) (amended 1990).

[130] Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050.

[131] Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958). *But see* United States v. Berumen, 24 M.J. 737, 741 n.2 (A.C.M.R. 1987), *pet. for review denied*, 26 M.J. 67 (C.M.A. 1988); *see also In re F*, 8 I&N Dec. (BIA) 469 (1959) (foreign court-martial); *In re M*, 8 I&N Dec. (BIA) 453 (1959) (conviction by Italian military court); *In re G*, 4 I&N Dec. (BIA) 17 (1950) (American military court in occupied territory); *In re W*, 1 I&N Dec. (BIA) 485 (1943) (court-martial in Canada).

[132] *See Beruman*, 24 M.J. at 741 n.2. In *Beruman* the Army Court of Military Review stated that "a military judge has the authority to recommend . . . against the deportation of an alien convicted by court-martial." Id. (citing Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105(b)(4)) (clemency recommendations)).

[133] Pub. L. No. 101- 649, § 505, 104 Stat. 4978, 5050.

[134] *See supra* notes 92-99 and accompanying text.

[135] Immigration and Naturalization Act § 315, 8 U.S.C.A. § 1426 (West Supp. 1991) (draft avoiders are ineligible to naturalize); *id.* § 212(a)(8)(A), 8 U.S.C.A. § 1182(a)(8)(A) (aliens ineligible to naturalize are excludable); *see also id.* § 101(a)(19), 8 U.S.C. § 1101(a)(19) (West 1970) (definition of "ineligible to citizenship"). Aliens who claimed the exemption pursuant to a treaty and previously served in their own countries no longer are ineligible to naturalize. Immigration Act of 1990, Pub. L. No. 101-649, § 404, 104 Stat. 4978, 5039 (codified at Immigration and Naturalization Act § 315, 8 U.S.C.A. § 1426 (West Supp. 1991)).

[136] *See also supra* notes 101-09 and accompanying text.

[137] The INS has concluded that desertion is not a crime involving moral turpitude. *In re* S.B., 4 I&N Dec. (BIA) 682 (1952).

[138] Immigration and Naturalization Act § 314, 8 U.S.C.A. § 1425 (West 1970) (deserters are ineligible to naturalize); *id.* § 212(a)(8)(A), 8 U.S.C.A. § 1182(a)(8)(A) (West Supp. 1991) (aliens ineligible to naturalize are excludable); *see also id.* § 101(a)(19), 8 U.S.C. § 1101(a)(19) (West 1970) (definition of "ineligible to citizenship"). Case law has established conclusively that an alien must be convicted of desertion by a court-martial before the government may deny him or her naturalization. *See* Kurtz v. Moffitt, 115 U.S. 487, 501 (1885); Holt v. Holt, 59 Me. 464 (1871) (finding in civil action insufficient); State v. Symonds, 57 Me. 148 (1869) (admission of guilt insufficient, absent subsequent conviction); McCafferty v. Guyer, 59 Pa. 109 (1868) (listing as "deserted" on official military records not sufficient); Huber v. Reilly, 53 Pa. 112 (1866).

The phrase "has been or shall be at war" raises a difficult factual issue when the United States has taken part in a military conflict or other use of force without an express congressional declaration of war. The INS has opined that the United States may be at war for purposes of the Immigration and Nationality Act even if Congress has not declared war. *See In re* B.M., 6 I&N Dec. (BIA) 756 (1955); INS Interpretations 314.1; *see also* Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953); Langlas v. Iowa Life Ins. Co., 63 N.W. 2d 885 (Iowa 1954); Harding v. Pennsylvania Mut. Life Ins. Co., 90 A.2d 589 (Pa. 1952).

Thus, if a convicted alien deserter ever departs the United States, he or she may be barred from returning.

Draft Evasion[139]—A draft evader is a person who willfully departed or remained outside the United States to evade military service.[140] An alien draft evader is excludable,[141] but not deportable, from the United States. If the alien ever departs the United States, he or she may not be readmitted.

Other than Honorable Discharge[142]

An alien's other than honorable discharge from the United States Armed Forces is not a ground of deportation or exclusion. Moreover, because an other than honorable discharge is not conclusive evidence of a lack of good moral character, the discharged soldier is not statutorily ineligible for naturalization. That the alien has received this category of discharge, however, may weigh heavily against a finding that he or she has the "good moral character" needed to qualify for naturalization or to claim numerous immigration benefits.[143]

Relief From Exclusion and Deportation

In general, when the client is a soldier, the immediate threat of deportation is virtually nonexistent. Last year, the Department of Defense (DOD) expressed its interest in protecting service members from adverse immigration actions and in promoting measures to help alien service members to obtain legal resident status and citizenship.[144] To achieve these objectives, the Defense Department entered into an interagency understanding with the Immigration and Naturalization Service (DOD-INS understanding) under which the INS agreed to take no action against aliens as long as they remain on active duty in the United States Armed Forces.[145]

More commonly, the client will want advice on how to terminate or to stay a pending deportation proceeding and on how to legalize his or her status before leaving the service. To obtain a termination or a stay normally is quite simple. The LAA should notify the INS that the client is a member of the United States Armed Forces and should remind the INS of the DOD-INS interagency understanding and of the implementing procedures set forth in the INS Operations Instructions.[146]

If the INS already has commenced deportation proceedings against the soldier, it should terminate, stay, or "administratively close"[147] these proceedings pending the soldier's discharge from the military. The immigration status of a nonimmigrant alien serving in the United States Armed Forces effectively is suspended during his or her military service.[148]

If a client needs assistance beyond these routine services, a legal assistance attorney without extensive experience in immigration law seriously should consider referring the client to a private attorney. If the attorney does choose to continue representation, he or she should verify that this assistance will

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[139] *See also supra* notes 111-15 and accompanying text.

[140] The Immigration and Naturalization Act defines a draft evader as "[a]ny alien who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency . . . ." Immigration and Naturalization Act § 212(a)(8)(B); 8 U.S.C.A. § 1182(a)(8)(B) (West Supp. 1991); *see also id.* § 314, 8 U.S.C.A. § 1425 (West 1970). Section 212, however, expressly excludes from its list of persons ineligible for citizenship any "alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant. *Id.* § 212(a)(8)(B), 8 U.S.C.A. § 1182(a)(8)(B) (West Supp. 1991). Neither section 212(a), nor section 314, appears to render excludable an alien who evades military service by becoming a fugitive within the United States. *See generally id.* §§ 212(a)(8)(B), 314, 8 U.S.C.A. §§ 1182(a)(8)(B), 1425 (West 1970 & Supp. 1991).

[141] *Id.* § 212(a)(8)(B), 8 U.S.C.A. § 1182(a)(8)(B) (West Supp. 1991) (draft evaders are excludable); id. § 314, 8 U.S.C.A. § 1425 (West 1970) (draft evaders are ineligible to naturalize); *id.* § 212(a)(8)(A), 8 U.S.C.A. § 1182(a)(8)(A) (West Supp. 1991) (aliens ineligible to naturalize are excludable); *see also id.* § 101(a)(19), 8 U.S.C.A. § 1101(a)(19) (West 1970) (definition of "ineligible to citizenship").

[142] Army Regulation 27-3, para. 2-4*a*(12) provides that prisoners confined in a United States disciplinary barracks are eligible for legal assistance from the Army Legal Assistance Program even though they have been discharged from the service.

[143] *See, e.g.*, Immigration and Naturalization Act § 244(e), 8 U.S.C.A. § 1254(e) (West Supp. 1991) (voluntary departure); *id.* § 244(a), 8 U.S.C.A. § 1254(a) (West 1970 & Supp. 1991) (suspension of deportation); *id.* § 249, 8 U.S.C.A. § 1259 (registry).

[144] *See* 32 C.F.R. § 94.4 (1991) (requiring military services to make every reasonable effort to retain alien service members in the armed forces for three years so that they may become eligible to apply for naturalization).

[145] *See* INS Operations Instructions 242.1c.

[146] *Id.*

[147] *In re Javier*, 12 I&N Dec. (BIA) 782 (1968) (deportation proceedings were stayed, not terminated).

[148] INS Operations Instructions 242.1(c).

not violate federal law.[149] An LAA normally may assist a client to obtain one of two forms of relief from deportation or exclusion that relate specifically to members of the United States Armed Forces.

Relief From Exclusion: Exemption From Visa and Passport Requirements

As a general rule, no one may enter the United States without a valid passport. If the entrant is an alien, he or she also will need a visa.[150] This rule, however, has many exceptions. For instance, any person "travelling as a member of the Armed Forces of the United States on active duty" may enter the United States without a passport or a visa.[151] A service member need not be traveling pursuant to orders to qualify for this exemption. Therefore, the exemption could apply to an alien serving in the United States Armed Forces overseas who travels to the United States on leave. Furthermore, an alien's registration receipt card—a document more commonly known as the "green card"—will not expire as a travel document during the alien's active duty service abroad.[152]

Relief From Deportation: Suspension of Deportation

As stated above, a soldier who has no legal immigration status is protected under the DOD-INS understanding and the implementing INS Operations Instructions until he or she is discharged.[153] After discharge, however, an alien with no legal immigration status has only three alternatives: to depart the United States, to remain illegally in the United States, or to seek a suspension from deportation.[154]

If granted a "suspension of deportation," an alien with no lawful status in the United States may obtain lawful permanent resident status. In general, any alien may apply for a suspension of deportation if, *inter alia*, he or she has been present in the United States physically and continuously for not less than seven years.[155]

The required period of continuous physical presence, however, is only two years for an alien who was in the United States when he or she enlisted or was inducted into the United States Armed Forces and who thereafter served honorably.[156] Moreover, an alien soldier may claim constructive physical presence in the United States during periods that he or she spent abroad under orders.[157]

This relief applies even to soldiers who have no lawful immigration status in the United States. Only rarely, however, will an LAA encounter a soldier who could benefit from suspension of deportation because only citizens and lawful permanent residents lawfully may enlist in the United States Armed Forces.[158] An alien that obtains an enlistment by misrepresenting his or her immigration status may be charged, convicted, and punished under the Uniform Code of Military Justice.[159] If the alien's punishment upon conviction included a punitive discharge, or if he or she accepted an other than honorable discharge in lieu of court-martial, then he or she will not be eligible for relief.[160]

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[149] *See supra* note 11.

[150] 22 C.F.R. § 53.1 (1990).

[151] *Id.* § 53.2(d).

[152] 8 C.F.R. § 211.1(b)(1)(ii) (1990) (alien traveling pursuant to government orders). Lawful permanent resident aliens must carry an alien registration receipt card or "green card." Immigration and Naturalization Act § 264, 8 U.S.C.A. § 1304(e) (West 1970). Failure to carry the green card is a misdemeanor. *Id.* The card not only evinces the alien's status as a lawful permanent resident, but also functions as a "visa substitute," making an aliens's reentry into the United States a simple process. A green card ceases to function as a "visa substitute" when the alien is not traveling pursuant to government orders and remains outside the United States for more than one year. 8 C.F.R. § 211.1(b)(1)(i)(A).

[153] INS Operations Instructions 242.1c.

[154] Immigration and Naturalization Act § 244(a), 8 U.S.C.A. § 1254(a) (West 1970 & Supp. 1991).

[155] Immigration and Naturalization Act § 244 (a), 8 U.S.C.A. § 1254 (a) (West 1970 & Supp. 1991). The seven-year period is extended to ten years for aliens who have been convicted of certain criminal offenses. *See id.* Significantly, an alien may apply for a suspension of proceedings only in connection with pending *deportation* proceedings. *See In re* Torres, I&N Dec., (BIA) Interim Decision 3010 (1986) relief of suspension of deportation is not available in exclusion proceedings.

[156] Immigration and Naturalization Act § 244(b), 8 U.S.C.A. § 1254(b) (West Supp. 1991); *In re* Gee, 11 I&N Dec. (BIA) 639 (1966); *In re* Leong, 10 I&N Dec. (BIA) 274 (1963). Note that an alien with no immigration status who is in the United States at the time of enlistment or induction and who then serves honorably during a designated period of hostilities is eligible to apply directly for naturalization. *See supra* notes 47-51 and accompanying text.

[157] INS Interpretations 316.1(b)(2), 316(d)(2).

[158] In his capacity as a legal assistance attorney, the author has encountered only one soldier seeking to suspend deportation under these circumstances. The soldier since has naturalized to United States citizenship.

[159] *See* UCMJ art. 83 (fraudulent enlistment, appointment or separation); *id.* art. 84 (effecting unlawful enlistment, appointment, or separation).

[160] Immigration and Naturalization Act § 244(b), 8 U.S.C.A. § 1254(b) (West Supp. 1991).

Assuming, however, that the soldier received an honorable discharge, he or she will be eligible to apply for relief after satisfying the residency requirement. Again, if the soldier enlisted in the United States, he or she will be eligible after only two years of continuous residence in the United States, including constructive residency. If the soldier did *not* enlist in the United States, the seven-year residency requirement will apply.

Applications for suspension of deportation may be made only in connection with pending *deportation* proceedings before an immigration court.[161] Accordingly, a discharged alien who does not want to remain unlawfully in the United States faces an anomalous situation in which he or she must ask the INS to institute deportation proceedings to apply for the remedy. If the INS previously has terminated or closed proceedings against the alien pursuant to the DOD-INS understanding,[162] these proceedings must be reinstituted or reopened before an immigration court may consider the alien's application for suspension of deportation.

If the former soldier decides to remain in the United States illegally until discovered by the INS, he or she can apply for the relief after being placed in deportation proceedings.[163] Until the alien veteran obtains lawful resident status, however, he or she will face all the difficulties inherent to illegal residency, including sharply curtailed employment opportunities.

Because the relief is available in *deportation* proceedings, the soldier must contemplate one possible pitfall *before* being discharged. If the soldier receives his or her honorable discharge outside the United States—or leaves the United States after being discharged here—and then applies for entry to the United States, he or she will be placed in exclusion proceedings in which the relief of suspension of deportation is not available. Yet, were the same veteran successfully to sneak into the United States—entering the country without inspection—or to enter with a nonimmigrant visa, he or she then would become subject to deportation proceedings and therefore could claim the relief. In advising a client that falls within this scenario, an LAA faces many practical, legal, and ethical obstacles to effective representation.[164] He or she should refer the client to a private attorney and should advise the new attorney of the client's situation. Ideally, an LAA should ensure that a client receives his or her honorable discharge *inside* the United States if the client is an unlawful alien.

New Relief: Special Immigrant Status for Twelve Years of Honorable Service

In October 1991, Congress enacted legislation entitled "Armed Forces Immigration Adjustment of 1991."[165] The new law grants special immigrant status to aliens who have served twelve years in the United States Armed Forces or who, as of the new law's enactment, had enlisted to serve for at least twelve years.[166] Only 2000 visas are to be granted each year[167] under this legislation, which is expected eventually to benefit approximately 3000 Filipino sailors presently serving in the United States Navy.

Loss of Citizenship

Introduction

"Denaturalization" is the process by which naturalized citizenship is revoked. Denaturalization is not automatic. The government must initiate a revocation action in federal

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[161] *See* 8 C.F.R. § 244.1 (1991) (suspension of deportation can be provided only by an immigration judge, not by the INS); *see also In re* Torres, 19 I&N Dec. (BIA) 1986) (suspension of deportation is not available in exclusion proceedings).

[162] *See* INS Operations Instructions 242.1c.

[163] Practically speaking, to state categorically that an alien who voluntarily submits to deportation proceedings is more likely to be granted a suspension of deportation by an immigration judge is impossible. Although the judge is allowed to consider voluntary submission as a factor in the alien's favor, one cannot predict how much weight the judge will give it.

The most important hurdle in any application for suspension of deportation is proving hardship. Immigration attorneys often advise their clients to wait until the clients and their families have established strong ties to the United States before asking the INS to initiate proceedings. By establishing these ties, an alien may increase the hardship inherent in his or her deportation and thus may improve his or her chances of obtaining a suspension.

[164] For example, an LAA neither ethically, nor lawfully, could advise a client to enter the United States without undergoing inspection. This entry would be a crime. *See* Immigration and Naturalization Act §§ 275(a), 276, 8 U.S.C.A. §§ 1325(a), 1326 (West Supp. 1991). By advising the client to commit this offense, the LAA himself or herself would be guilty of soliciting the crime. *See* 18 U.S.C.A. § 2 (West 1969) (principals); *see also* Immigration and Naturalization Act § 277, 8 U.S.C.A. § 1327 (West Supp. 1991) (aiding or assisting an illegal entry).

To advise a client to obtain a nonimmigrant visa would be improper if the client actually intends to immigrate to the United States. Were the client to apply for a nonimmigrant visa under false pretenses, he or she could be charged with making a fraudulent statement of entry. *See* 18 U.S.C.A. § 1001 (West 1976). Again, the LAA could be found guilty of soliciting the illegal conduct. *Id.* § 2.

[165] Pub. L. No. 102-110, 105 Stat. 555 (1991).

[166] *Id.*, § 2(a), 105 Stat. at 555 (to be codified as Immigration and Naturalization Act § 101(a)(27)(K), 8 U.S.C. § 1101(a)(27)(K)).

[167] *Id.*, § 2(b), 105 Stat. at 555-56 (to be codified at Immigration and Naturalization Act § 203 (b)(6), 8 U.S.C. § 1153(B)(6)).

district court and the revocation of citizenship must be adjudged finally.[168]

"Expatriation," as used in this article, means the forfeiture of United States citizenship as punishment for a statutorily defined, "expatriating" act.[169] An expatriated citizen becomes, by definition, an alien. Expatriation occurs automatically by operation of the law. It does not have to be adjudged. In general, an accused expatriate bears the burden of establishing that no expatriation took place. He or she must do so by proving that the alleged expatriating acts did not occur or that he or she harbored no intent to renounce his or her citizenship, despite apparently expatriating conduct. The appropriate forum for this litigation will depend upon the manner in which the issue arose.[170]

Denaturalization—Revocation of Naturalization

A naturalized citizen may be subjected to denaturalization if he or she obtained United States citizenship by misrepresenting a material fact in the naturalization application.[171] With respect to aliens who have claimed citizenship on the basis of their honorable military service, a subsequent discharge under other than honorable conditions also may be a ground for denaturalization,[172] subject to the discretion of the judge of the appropriate federal district.[173]

Expatriation

The following information may be particularly important to legal assistance attorneys that represent soldiers stationed abroad.

Foreign Military Service

Congress has identified a United States citizen's voluntary service in a foreign army as an act of expatriation.[174] The Supreme Court has upheld the constitutionality of this legislation.[175] Congress alleviated the impact of this law—at least in part—by exempting from expatriation United States citizens who served in Allied forces in World War I or World War II.[176] No comparable legislation, however, exempts citizens that served with America's allies in other conflicts.[177]

Employment by a Foreign Government

Current law provides that a United States citizen that accepts any employment under a foreign government thereby forfeits his or her citizenship if he or she "has or [has] acquire[d]" the nationality of the foreign nation or has sworn an oath of allegiance to the foreign government to satisfy a

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[168] Immigration and Naturalization Act § 340(a), 8 U.S.C.A. § 1451(a) (West Supp. 1991).

[169] *See id.* § 349, 8 U.S.C.A. § 1481 (West Supp. 1991) (setting forth the general bases for expatriation).

[170] For example, the issue would arise if the government placed the expatriated citizen in deportation or exclusion proceedings. The appropriate forum then would be the immigration court. The issue also would arise if an expatriated citizen applied for, and were denied, a passport. The appropriate forum for challenging the passport denial then would be federal district court. *Compare id.* §§ 106a(a), 242(b), 8 U.S.C.A. §§ 1105a(a), 1252(b) (West 1970) *with id.* § 360(a), 8 U.S.C.A. § 1503(a).

[171] *Id.* § 340(a), 8 U.S.C.A. § 1451(a) (West Supp. 1991); *see* Costello v. United States, 365 U.S. 265 (1961).

[172] Immigration and Naturalization Act § 329(c), 8 U.S.C.A. § 1440(c) (West 1970).

[173] United States v. Sommerfield, 211 F. Supp. 493 (E.D. Pa. 1963); United States v. Meyer, 181 F. Supp. 787 (E.D.N.Y. 1960). Naturalization was not revoked in either case.

[174] Immigration and Naturalization Act § 349(a)(3), 8 U.S.C.A. § 1481(a)(3) (West Supp. 1991).

[175] Marks v. Esperdy, 377 U.S. 214 (1964) (mem.), *aff'g* 315 F.2d 673 (2d Cir. 1963); *see* 42 Op. Att'y Gen. 397 (1969).

[176] Act of Oct. 5, 1917, Pub. L. No. 65-68, 40 Stat. 340; Act of May 9, 1918, Pub. L. No. 64-144, 40 Stat. 542, 545 (amending Act of June 29, 1906, Pub. L. No. 59-338, § 4, 34 Stat. 596, 597-98); Nationality Act of 1940, Pub. L. No. 76-853, § 323, 54 Stat. 1137, 1169, *amended by* Act of Apr. 2, 1942, Pub. L. No. 77-83, 56 Stat. 198. These exemptions presently appear at Immigration and Naturalization Act § 327, 8 U.S.C.A. § 1438 (West 1970 & Supp. 1991).

Under the Nationality Act of 1940, service in the armed forces of a foreign state resulted in loss of citizenship unless the laws of the United States expressly authorized this service and the individual involved was a national of the foreign state. The 1952 Act added that the foreign military service had to be authorized by the Secretary of State and the Secretary of Defense. Immigration and Naturalization Act § 349(a)(3), 8 U.S.C.A. § 1481(a)(3) (West Supp. 1991); *see In re D*, 5 I&N Dec. (BIA) 674 (1954) (authorization by draft board insufficient).

[177] Regarding the effect of foreign military service during other hostilities, one material issue might be whether an individual's service was voluntary. *See* Nishikawa v. Dulles, 356 U.S. 129 (1958); Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953); Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953). Another issue would be whether the individual actually served in the *armed forces* of the foreign nation. *See* Kawakita v. United States, 343 U.S. 717, 727 (1952) (holding individual's employment by private munitions firm controlled by Japanese Government insufficient grounds for expatriation); *In re Z*, 2 I&N Dec. (A.G.) 346 (1945) (holding expatriation inapplicable to a United States citizen who had served in Canadian Officers Training Corps because that organization is not an active component of the Canadian Armed Forces); *In re* L.F., 2 I&N Dec. (BIA) 455 (1946) (same); *In re* S, 8 I&N Dec. (BIA) 340 (1950) (service in Irish Armed Forces did not mandate expatriation). Still another issue would be whether the individual performed military service for a foreign *nation*. *See In re M*, 9 I&N Dec. (BIA) 452 (1961), *aff'd sub. nom.* Marks v. Esperdy, 315 F.2d 673 (2d Cir. 1963), *aff'd*, 377 U.S. 214 (1964) (mem.) (holding service in Cuban rebel army after Castro came to power to be an act of expatriation).

precondition of employment.[178] The federal courts, however, have minimized the effect of the statute.[179]

Voting in Foreign Elections

Congress once enacted legislation providing that voting in a foreign election was an act of expatriation. Any United States citizen—whatever the basis of his or her citizenship[180]—that voted in a foreign election automatically forfeited his or her United States citizenship. In *Afroyim v. Rusk*, however, the Supreme Court repudiated this doctrine, holding expressly that "the Government has no power under this [statute] . . . to rob a citizen of his [or her] citizenship for voting in a political election in a foreign state."[181] Before the *Afroyim* decision, Congress passed special legislation to aid United States citizens who otherwise would have lost their citizenships for voting in Italian[182] or Japanese[183] elections after the end of World War II.

Travel Restrictions on Aliens During Periods of Hostilities[184]

The federal government usually restricts the departures of aliens from the United States only during periods of hostilities. During these periods, the United States may impose additional restrictions on aliens who are nationals of hostile or occupied countries. During the Korean conflict, government agencies promulgated regulations restricting the departure of aliens—particularly Chinese nationals—with scientific knowledge and training.[185] During the Iranian hostage crisis, the government exerted strict controls on travel by Iranian nationals.[186] During Operations Desert Shield and Desert Storm, President Bush also imposed travel and visa controls.[187]

Regulations still exist that authorize federal authorities to prevent an alien's departure from the United States if this departure would be inimical to the interests of the United States.[188] To avert an alien's departure, an immigration judge, after conducting a formal hearing, must advise the INS regional commissioner to restrain the alien.[189] An alien cannot appeal the regional commissioner's decision.[190] The regional commissioner may base his or her decision on confidential information if, in the instant case, secrecy is essential to national security.[191]

Conclusion

Before handling any immigration matter, an LAA should determine whether he or she can handle the matter within the scope of the Army Legal Assistance program. If a matter falls outside the assistance the attorney lawfully may provide, the LAA should decline to represent the prospective client. An LAA who intends to assist a client in an immigration matter should consult with an immigration law expert or—if ethical considerations of confidentiality permit—an INS attorney, to determine the best way to handle the matter.

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[178] Immigration and Naturalization Act § 349(a)(4), 8 U.S.C.A. § 1481(a)(4) (West Supp. 1991).

[179] Afroyim v. Rusk, 387 U.S . 253 (1967) (holding that Congress has no power under the Constitution to divest a person of his or her United States citizenship, absent that person's own voluntary renunciation of citizenship); *see also* Kawakita v. United States, 343 U.S. 717 (1952); Fletes-Mora v. Rogers, 160 F. Supp. 215 (S.D. Cal. 1958); INS Interpretations 349.5(a).

[180] *See supra* note 4.

[181] *Afroyim*, 387 U.S. at 253.

[182] Act of Aug. 16, 1951, Pub L. No. 82-115, 65 Stat. 191; *see also In re* Martini, 184 F. Supp. 395 (S.D.N.Y. 1960).

[183] Act of July 20, 1954, Pub. L. No. 83-515, 68 Stat. 495.

[184] *See also supra* notes 61-64 and accompanying text (discussing restrictions on the naturalization of enemy aliens).

[185] *See* Mao v. Brownell, 207 F.2d 142 (D.C. Cir. 1953) (fair hearing required).

[186] Notice No. 710, 45 Fed. Reg. 24,437 (1980); Notice No. 712, 45 Fed. Reg. 27,600 (1980); *see* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 446 U.S. 957 (1980) (upholding constitutionality of restrictions).

[187] Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (1990) (prohibiting "any transaction by a United States person relating to travel [to Iraq]"); Exec. Order No. 12,725, 55 Fed. Reg. 33,091 (1990) (prohibiting "any transaction by a United States person relating to travel [to Kuwait]"); Dep't of State Cable No. 90-State-294,648, *reprinted in* 67 Interpreter Releases 1038 (1990) (discussing revised visa procedures).

[188] 22 C.F.R. § 46.3 (1990) (authorizing restraint of an alien whose departure is deemed prejudicial to the interests of the United States); *see In re* Nimmons, 11 I&N Dec. (BIA) 599 (1966).

[189] 22 C.F.R. pt. 46 ; *see* Mao v. Brownell, 207 F.2d 142 (D.C. Cir. 1953) (fair hearing required).

[190] 22 C.F.R. § 46.5.

[191] *Id.*

Who's Afraid of Command Influence; Or Can the Court of Military Appeals Be This Wrong?

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"Nothing can be done at once hastily and prudently."
—Publilius Syrus, c. 42 B.C.

The Court of Military Appeals yielded to pressure to act hastily when it considered the extraordinary writ styled *Waller v. Swift*.[1] The accused, Sergeant Waller, had been convicted by a general court-martial and sentenced to a bad conduct discharge (BCD), forfeiture of $400 pay per month for one month, and reduction to the grade of private (E-1).[2] The convening authority, relying on clear authority in the Manual for Courts-Martial (MCM),[3] prior precedent from the Army Court of Military Review,[4] and the advice of his staff judge advocate[5] (SJA), commuted Waller's BCD to confinement for twelve months.

The Court of Military Appeals accepted an extraordinary writ[6] in which defense counsel advanced several arguments contending that the commutation of the sentence was improper. The court dismissed all but one of the accused's arguments, but agreed with the defense's contention that the convening authority had violated Rule for Courts-Martial 1107(d)1 by *increasing* the sentence of the court.[7] The Court of Military Appeals should have heeded the advice of Publilius Syrus.

In beginning the majority's analysis of the issue, Chief Judge Everett, writing for himself and Judge Sullivan, restated the well-known rule that a convening authority's power to commute a sentence is not absolute and that a sentence may not be increased by commutation.[8] Then, apparently having found what two writers later characterized as a "hint of unlawful command influence,"[9] the court misstated: "A basic theme of the Uniform Code of Military Justice is to prevent command influence."[10] We must assume this error was unintentional, for everyone is aware that commanders properly exert command influence on our system every day.[11]

Although the court may have forgotten momentarily, we must remember exactly what command influence is and what

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[1] 30 M.J. 139 (C.M.A. 1990).

[2] *Id.* at 140.

[3] Rule for Courts-Martial 1107(d)(1) provides that "[t]he convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107(d)(1)[hereinafter R.C.M.].

[4] United States v. Darusin, 43 C.M.R. 194, 196 (C.M.A. 1971) ("replacement of an adjudged punitive discharge with confinement at hard labor for one year would not increase the severity of the sentence").

[5] *See Waller*, 30 M.J. at 140-41. I should note that I was the SJA in Waller's case.

[6] Although the court could have denied the writ because the accused could have raised the issue on direct review, instead it chose to hear the writ, commenting, "it seems appropriate to consider . . . at this time, rather than await direct appellate review when any relief granted would be of much less value." *Id.* at 143. Is this not true, however, in every case in which a convening authority has ordered a convicted accused placed in confinement?

[7] *Id.*

[8] *Id.* A convening authority who felt the sentence of a court-martial inadequate once could return the case to the court "for correction." Some convening authorities sent cases back several times. *See* William W. Winthrop, *Military Law and Precedents* 455 (2d ed. 1920). Although in today's climate a commander is unlikely to increase an accused's sentence intentionally, this action is not without historical precedent. In Florida in 1818, Major General Andrew Jackson court-martialed Robert C. Ambrister for inciting and aiding the Creek Indians in their war against the United States. Colonel Winthrop relates that the court-martial reconsidered its initial sentence that Ambrister be shot, and recommended instead that he be given fifty lashes and confined with ball and chain, at hard labor, for twelve months. *Id.* at 464. General Jackson felt the court got it right the first time and disapproved the reconsideration. Id. Ambrister was shot.

[9] TJAGSA Practice Notes, *Commuting Sentences–When Is Less Really More?*, The Army Lawyer, Apr. 1991, at 44.

[10] *Waller*, 30 M.J. at 143.

[11] I do not intend to deny the existence of the many civilian gadflies of military justice who would like to see the commander totally removed from every aspect of our system. *See, e.g.*, Arthur J. Keefe and Morton Moskin, *Codified Military Injustice*, 35 Cornell L.Q. 151, (1949); J. Sherrill, *Military Justice is to Justice as Military Music is to Music*, (1970). For a more balanced view of this issue, see David A. Schlueter, *Military Justice For the 1990's—A Legal System Looking for Respect*, 133 Mil. L. Rev. 1 (1991).

it is not. Many forms of command influence are legal. Indeed, most command influence is mandated by Congress and the President.[12]

Was there command influence in *Waller*? Of course. Was it illegal? Let us take a look.

The commander in *Waller* followed the laws Congress gave us in the Uniform Code of Military Justice,[13] the rules the President gave us in the Rules for Courts-Martial,[14] and the clear, specific precedent[15] of the self-proclaimed "supreme court of the military judicial system."[16] What more could we ask of our commanders and our staff judge advocates? If, under these circumstances, a majority of the Court of Military Appeals[17] can find a hint of unlawful command influence, where are we to find prescient commanders and SJA's to follow the rules the court might craft in the future?

With what rule did the Court of Military Appeals leave us? Chief Judge Everett flatly stated, "We need not decide what would be the maximum amount of confinement, *if any*, to which the convening authority could lawfully have commuted the bad conduct discharge in this case over defense objection."[18] Apparently, we now have no rule, no predictability. What can an SJA today advise a commander? "Well, General, we don't know if you can commute the BCD to anything.[19] All the old rules are out the window[20] and now we must look at many factors.[21] One of the most important, it seems, is what does the accused want?[22] No, General, I'm not kidding. No, General, you don't have to ask him; I will. Yes, General, the system sure has changed."

Similarly, how can a military judge instruct the panel at a rehearing on the maximum sentence if the prior sentence was a BCD? "Well, ladies and gentlemen, the maximum penalty in this case is a BCD, but if you decide that confinement is more appropriate, you may substitute confinement for the BCD. The maximum amount of confinement, however, is uncertain and perhaps any confinement is too much."

The Court of Military Appeals certainly has created another meaningless area of appellate advocacy.[23] *Every* commutation now will be an issue on appeal.

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[12] *E.g.*, Uniform Code of Military Justice arts. 22, 23, 24 (restricting authority to convene courts-martial to designated commanders) [hereinafter UCMJ]; *id.* art. 25 (requiring convening authorities to select the court members personally based upon statutory criteria); *id.* art. 60 empowering convening authorities to take action on the findings and sentence of the court with "sole discretion" to commute). The requirements the Manual for Courts-Martial places on the commanders in our military justice system are too numerous to list here.

[13] *See id.* art. 60(c)(a) ("[t]he authority under this section to modify the findings and sentence of a court-martial is a matter of *command prerogative involving the sole discretion* of the convening authority") (emphasis added); id. art. 60(c)(2) ("[t]he convening authority or other person taking such action, in his [or her] *sole discretion*, may approve, disapprove, commute, or suspend the sentence in whole or in part") (emphasis added).

[14] R.C.M. 1107(d)(1); *see also supra* note 3.

[15] *Darusin*, 43 C.M.R. at 196; *see also supra* note 4.

[16] McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976).

[17] Judge Cox dissented in a clear, two sentence opinion:

> A sentence to confinement for 1 year is either less than, equal to, or greater than, being awarded a bad-conduct discharge. Because I am of the opinion that a punitive discharge is a serious and strong punishment, I believe the 1-year sentence to be a commutation. See United States v. Ohrt, 28 M.J. 301, 306 (C.M.A. 1989).

Walker, 30 M.J. at 145 (Cox, J., dissenting).

[18] *Waller*, 30 M.J. at 144 (emphasis added).

[19] *Id.*

[20] *Cf.* United States v. Hodges, 22 M.J. 260, 262 (C.M.A. 1986) ("[w]e have, however, generally acknowledged that a punitive discharge may lawfully be commuted to *some period of confinement*") (emphasis added).

[21] Factors the *Waller* court expressly considered included the effect of the punishment on the accused's veterans' benefits, the accused's consent to the proposed commutation, the accused's "well-founded objection," the view of the accused's lawyer, opinion of the court members, and the impact of the punishment on the accused's family. *See Waller*, 30 M.J. at 144.

[22] Indeed, the accused, SGT Waller , did ask the court to discharge him, *see id.* at 140, from which the majority of the Court of Military Appeals divined the resulting discharge to be "the court-martial's lenient intent." *Id.* at 143. Because the court members were not polled, this is but an interesting speculation. Might not the panel actually have felt that a bad conduct discharge was significantly more severe than the lengthy confinement requested by the prosecutor? Though each unsupported theory is as likely as the other, the court relies on but one to support its opinion. *See also*, TJAGSA Practice Note, *supra* note 9 at 43 n.242.

[23] Consider the fatuous appellate sophistry dealing with credit for days spent in pretrial confinement (or its equivalent) or the "Sargasso Sea" of multiplicity that the Court of Military Appeals has created. *See, e.g.*, United States v. Zlotkowski, 15 M.J. 320 (C.M.A. 1983) (order granting petition for review) (Cook, J., dissenting). As Judge Cook remarked,

> How can there be prejudice to the accused . . . where: (1) the accused pleaded guilty, (2) in a special court-martial, (3) military judge alone, (4) pursuant to a pretrial agreement limiting punishment, and, (5) the military judge consider[ed] many of the specifications multiplicitous for sentencing, (6) adjudge[d] a sentence less than the statutory maximum for a special court-martial, and (7) any one of the specifications carried a maximum sentence in excess of the jurisdictional limits of the special court-martial? Surely this court has better uses of its time than pondering the specified issues which is little better than debating how many angels can dance on the head of a pin.

Id.

Before *Waller*, commuting sentences involved no serious ambiguity. Many previous decisions approved various possible commutations of sentences.[24] Prior Manuals for Courts-Martial even included limited "Table[s] of Equivalent Punishments" to help guide commanders.[25]

If the new rule must give great weight to the desires of the accused, where does that leave the commander who wants to commute a sentence of confinement in order to take a soldier to war? Judge advocates involved in the Gulf War mobilization understand that some soldiers would see the commutation of confinement into a verbal reprimand and immediate deployment as "increasing" their sentences.

The defense in *Waller* also asked the Court of Military Appeals to examine the convening authority's intent in commuting the sentence. Apparently, the court declined only because of a government concession on this issue.[26] Where does the Court of Military Appeals find authority to consider this issue in light of the clearly contrary language in the statute and the Rules for Court-Martial? What could Congress have meant when it wrote that commutation is within a convening authority's "sole discretion"?[27] What might the President have meant when he ordered that the convening authority may commute a sentence "for any or no reason"?[28]

When the court offers legal reasoning of this sort, what are practitioners in the field to do? Is it wrong to question or debate through critical articles in the military community's legal publications?[29] I think not. If anything, *more* detailed critical analysis is needed to ensure a healthy system and to encourage acuity in the appellate judiciary.[30]

Judge advocates well could write law review articles to discuss some of the weak decisions that the Court of Military Appeals has rendered over the years. Some obvious cases that come to mind include *Cooke v. Orser*,[31] *United States v.*

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[24] *E.g.*, United States v. Brown, 32 C.M.R. 333 (C.M.A. 1962) ("[c]onsidering the consequences of a bad-conduct discharge, *we entertain no doubt* that confinement at hard labor for six months and forfeiture of pay for a like period is a less severe penalty") (emphasis added); United States v. Prow, 32 C.M.R. 63 (C.M.A. 1962) (holding BCD to be more severe than three months' confinement with partial forfeitures).

In *United States v. Johnson* the Court of Military Appeals expressly disapproved the commutation of one year's confinement and total forfeitures into a BCD. United States v. Johnson, 31 C.M.R. 226 (C.M.A 1962) The court held that

> [c]onfinement at hard labor involves placing a military accused under physical restraint in a designated facility and there requiring him to perform such tasks as may be lawfully assigned .... When the accused's term of imprisonment is over, he is entitled to be returned to duty with his armed service, unless, of course, it has in the meantime ended his military status administratively. Indeed, it is the purpose of the Army's fine disciplinary barracks system to use confinement in such a way that, where possible, the prisoner is restored to society as one willing and able to abide by its mores .... [Certainly] the damage visited upon an accused by a sentence to confinement may not involve the serious consequences of a punitive discharge .... Indeed we have implicitly recognized that its burden may exceed that of confinement to the extent that we have approved an instruction which permitted a court-martial on rehearing to adjudge this physical restraint in lieu of a former sentence to a bad-conduct discharge.

Id.; *see also* United States v. Kelley, 17 C.M.R. 259 (C.M.A. 1954) ("viewed realistically and practically, I doubt that scarcely any punishment is more severe than a punitive discharge"); *cf.* United States v. Smith, 31 C.M.R. 181 (C.M.A. 1961) (holding that confinement may be substituted for a BCD at a rehearing); United States v. Christensen, 31 C.M.R. 393 (C.M.A. 1961) (suspension from rank for 12 months may be commuted to forfeiture of $25 per month for 12 months).

"There being no common denominator in the many forms of permissible penalties, we conclude the best workable rule requires an affirmance of [the convening authority's] judgment on appeal unless it can be said that, *as a matter of law*, he has increased the severity of the sentence." *Christensen*, 31 C.M.R. at 393 (emphasis added).

[25] *E.g.*, Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 127(c).

[26] *Waller*, 30 M.J. at 144 n.5. Without presenting any supporting evidence, the defense claimed the commutation was motivated by a wish to have Waller available as a witness in another trial. Noting that the Government had replied that Waller's presence otherwise could be assured, the court stated that it "[t]herefore, ... [did not] need [to] ... consider the relevance of such putative intent." *Id.*

[27] UCMJ art. 60(c).

[28] R.C.M. 1107(d)(1).

[29] In recent years, the court, to its credit, has sought a wide variety of input to its decisions by means of *amicus* filings from the civilian and academic communities. It has not always been so tolerant. Judge William J. Cook disclosed that, in 1955, the Court of Military Appeals reviewed an early article that was critical of the court to determine if its author was guilty of conduct unbecoming a member of the military bar, but ultimately initiated no disciplinary proceedings. William J. Cooke, *Courts-Martial: The Third System in American Criminal Law*, 1978 S. Ill. U. L.J. 1, 29 n.126.

[30] See the Lincoln Day, 1898, address of Mr. Justice Brewer, *in Government by Injunction*, 15 Nat'l Corp. Rep. 848, 849. Justice Brewer declared,

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death. *Id.*

[31] 12 M.J. 335 (C.M.A. 1982). Departing from years of precedent, the Court of Military Appeals allowed the assurances of an Air Force judge advocate who had lacked actual authority to act for the convening authority to bind the Government and ordered dismissal of charges against Second Lieutenant Christopher M. Cooke. *Id.* at 346. Cooke, a nuclear missile launch officer who transferred extremely sensitive documents to Soviet agents, was described by his commanding general as "[a] traitor of the first magnitude." *See id.* at 363 ((Cook, J., dissenting).

Judge Cook's excellent dissent in *Cooke* is one of many that rank him among the finest jurists to sit on the Court of Military Appeals, or perhaps any court.

Fimmano,[32] *United States v. Allen*,[33] *United States v. Kinman*,[34] and the long awaited, but disappointing, *United States v. Cortes-Crespo*.[35] Although every attorney may have his or her favorite,[36] sufficient appropriate cases undoubtedly exist to fill an issue of a law review.

A more important question is why these articles have not been written already. One possible answer is that military attorneys are trained to respect institutions like the court, and further, that some attorneys fear the effect that pointed criticism of the Court of Military Appeals might have on their military careers.[37] Any chill on the literary efforts of judge advocates effectively chills discussion as a whole because few attorneys outside the military know enough about our system to analyze it critically.[38]

Some critics might argue that the court, without serious oversight, has been too loose or "freewheeling"[39] in its statutory role.[40] Commentators once expressed some optimism that Supreme Court review, available for the first time in 1985, would influence the court significantly. Due to the extremely few military decisions for which the Court has granted review,[41] this arguably has not come to pass. Nevertheless, the potential of Supreme Court review must provide some measure of restraint on the Court of Military Appeals.

So, where do we go from here? Must we allow the Court of Military Appeals to meander jurisprudentially without critical guidance from the military bar? Or, as I suggest, shall we answer the call by writing and speaking on the issues we feel the court could handle better? These judges are smart and they work hard on their opinions; they desperately want to be right.[42] Let us do what we can to help them by providing fair and well-reasoned criticism.

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[32] 8 M.J. 197 (C.M.A. 1980). "Today, the majority wipes out two centuries of military practice and nearly three decades of decision in this Court to hold that an authorization to search must be based on information provided under an oath or affirmation." *Id.* at 206 (Cook, J. dissenting). So begins another of Judge Cook's efforts to distance himself from a majority position he found wrong. The court, too, backed away from *Fimmano*, reversing the oath requirement just one year later in *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

[33] 17 M.J. 126 (C.M.A. 1984). In requiring day-for-day credit for time spent in pretrial confinement the Court of Military Appeals obviously misinterpreted the relationship of a Department of Defense Instruction to the 1966 Bail Reform Act, 18 U.S.C. § 3568 (1982) and the 1969 Manual for Courts-Martial. Again, see Judge Cook's excellent dissent, *id.* at 130-31.

[34] 25 M.J. 99 (C.M.A. 1987). *Kinman* is but one of many cases in which the Court of Military Appeals refused to accept the presumption that the trial judge knows and applies the law. At sentencing, the Government offered, and the trial judge received, a statement by the victim that referred in passing to the accused's acts of uncharged misconduct. The military judge stated unequivocally that he would *not* consider the uncharged misconduct in determining an appropriate sentence. The accused previously had pleaded guilty to sexual misconduct with his daughter under an agreement limiting the sentence to 18 months confinement, dishonorable discharge, reduction to private (E-1), and partial forfeiture of pay and allowances. The military judge sentenced the accused only to reduction to specialist (E-4), a bad conduct discharge, and confinement for 18 months. No forfeitures were adjudged. The Court of Military Appeals, however, somehow found prejudice and set aside the sentence. *Id.* at 101-02. Judge Cox dissented vigorously. *See id.* at 102-04.

[35] 13 M.J. 420 (C.M.A. 1982). During a time of great uncertainty in the area of mental responsibility, the Court of Military Appeals, after specifying seven supplemental issues, and after inviting widespread *amicus* briefs, took two years to deliver a two page opinion that concluded, "[W]e can no better define the terms 'mental disease or defect' than by use of the terms themselves." *Id.* at 422.

[36] My personal favorites deal with the court's expansion of its jurisdiction in ways that Congress neither envisioned, nor authorized. *E.g.*, McPhail v. United States, 1 M.J. (C.M.A. 1976) (review of a writ requesting relief from a court-martial sentence that was insufficient to reach the court under its UCMJ art. 67 statutory appellate authority). Over the years, the court has pressed into other unreviewable areas, such as summary courts-martial, *e.g.*, Alvarez v. United States, 9 M.J. 14 (C.M.A. 1980); nonjudicial punishment under UCMJ article 15, *e.g.*, Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978); honor code violations at the United States Military Academy, *e.g.*, Harms v. United States Military Academy, 5 M.J. 1111 (C.M.A. 1976); and advisory opinions on the lawfulness of orders, *e.g.*, United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988).

[37] The claim that criticizing the Court of Military Appeals may hurt one's military career is an argument without merit. Leaders in The Judge Advocate General's Corps recognize both the court's role in the military justice system and the value of critical review.

[38] "[T]here is little reason other than public spirit or nostalgia for virtually any lawyer to develop or maintain an interest, much less expertise, in this field." Eugene Fidell, *Military Justice: The Bar's Concern*, 67 A.B.A. J. 1280 (Oct. 1981).

[39] When it was established in 1950, the court had no encumbering precedent. According to one interview, "That freedom, says Chief Judge Everett, has allowed the court the latitude to 'do justice' in individual cases, while at times, he concedes, sacrificing a little in legal consistency." Lauter, *The Military's Supreme Court*, The Nat'l L.J., Oct. 31, 1983, at 23. One court watcher, Eugene Fidell, went further, saying the court "seems to lack that sense of restraint which is an article of faith among" judges in the civilian federal courts. *Id.* at 23.

[40] The Court of Military Appeals is a court established by Congress under Article I of the Constitution. Its jurisdiction thus is limited to its enabling legislation—UCMJ article 67. Remaining within their statutory charter proved difficult for some judges, who apparently chose instead to push the limits outward in attempts to acquire Article III jurisdiction by appropriation. *See, e.g.*, Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989). In this decision, the court found jurisdiction to hear an extraordinary writ request on a case that it lacked the authority to review under UCMJ article 66(b). The court based its decision upon the possibility that the Navy Judge Advocate General *could* refer the case to the Navy-Marine Corps Court of Military Review, from which it *might* be certified to the Court of Military Appeals under article 67(b)(2). The majority justified this expansive view of their jurisdiction by proclaiming, "[O]n no occasion has Congress indicated any dissatisfaction with the scope of our All-Writs Act supervisory jurisdiction, as we explained it in *McPhail*." *Unger*, 27 M.J. at 353.

[41] As of this writing, only one case has received plenary review. *See* Solorio v. United States, 483 U.S. 435 (1987).

[42] No citation is necessary to support claims of intelligence and industry. I infer their desire to be correct from my six years on the trial bench.

Annual Review of Developments in Instructions

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This article reviews some of the more important appellate cases of the last year involving instructional issues.

Preliminary Instructions

A military judge may give preliminary instructions[1] to the members of a court-martial.[2] When a judge delivers these instructions, they must be complete and they must not refer to instructions given in other cases.[3] Although the Court of Military Appeals recognizes that preliminary instructions are not essential, it has emphasized that to give them is "the much preferred practice."[4]

Last year, the Army Court of Military Review came close to requiring trial judges to give preliminary instructions—at least in contested cases. In *United States v. Brewster*[5] the Army court conceded that the instructions are not required by law. It opined, however, that the delivery of preliminary instructions "is conducive to ensuring that the accused receives a fair trial,"[6] adding, "[W]e again commend this practice to the military judges and particularly commend the practice in contested cases."[7]

To argue with the recommended practice is difficult when members are sitting as a court-martial for the first time or when they have not sat as a court in a long while. To accept that preliminary instructions will benefit the members or the accused significantly is equally difficult, however, when the members regularly have been sitting as a court for an extended period. That the record of trial will look better if the trial judge delivers these instructions is undeniable. That the members, however, will listen attentively to instructions they already have heard repeated again and again is doubtful at best.

A trial judge knows the members because he or she has seen them regularly. The judge can tell by their expressions and by their body languages whether preliminary instructions are necessary—or would be of any value at all. Perhaps appellate courts should leave this matter to the discretion of trial judges, rather than recommending the use of preliminary instructions in language that almost amounts to a command.[8]

Offenses

In *United States v. Vidal*,[9] the accused and an accomplice kidnapped the victim and drove her to a secluded area. There, both men raped her—first the accomplice, then the accused. The accused later was charged and convicted of one specification of rape[10] and of one specification of kidnapping.[11] The Government used the standard rape specification.[12] It did not specify whether the accused was

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[1] *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-24 (1 May 1982) (C1, 15 Feb. 1985) [hereinafter Benchbook].

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 913(a) [hereinafter R.C.M. 913(a)].

[3] United States v. Waggoner, 6 M.J. 77, 79 (C.M.A. 1978).

[4] *Id.* at 79.

[5] 32 M.J. 591 (A.C.M.R. 1991).

[6] *Id.* at 594; *see also Waggoner*, 6 M.J. at 79 n.2. In United States v. Ryan, 21 M.J. 627, 632 (A.C.M.R. 1985), the court approved preliminary instructions that included instructions on reasonable doubt and credibility. Preliminary instructions also may discuss anticipated defenses. *See* United States v. Bradford, 29 M.J. 829, 831-32 (A.C.M.R. 1989) (discussing use of excessive force to deter); Benchbook, paras. 5-2, V.

[7] *Brewster*, 32 M.J. at 594.

[8] When a military judge declines to deliver preliminary instructions, he or she may want to place the reasons for that decision on the record.

[9] 23 M.J. 319 (C.M.A. 1987).

[10] *Id.* at 320; *see* Uniform Code of Military Justice art. 120, 10 U.S.C. § 920 (1988) [hereinafter UCMJ].

[11] *Vidal*, 23 M.J. at 320; *see* UCMJ art. 134; *see also* Manual for Courts-Martial, United States, 1984, Part IV, para. 92 [hereinafter MCM, 1984].

[12] *See generally* MCM, 1984, Part IV, para. 45*f*.

charged as a perpetrator or as an abettor.[13] On appeal, the defense claimed that, to convict the accused, two-thirds of the members had to agree on the same theory of criminal liability, arguing that the trial judge had erred by failing to declare this in his instructions to the members.[14] The Court of Military Appeals expressly rejected this argument. It stated that the members did not have to agree on any particular theory of criminal liability to convict the accused.[15]

The court also recognized that Vidal actually participated in two rapes in a very short time.[16] It noted that when multiple criminal acts occur, but only one is charged, the military judge should compel the Government to elect which act it wants to prosecute.[17] The court, however, concluded that this remedy was unavailable to Vidal, remarking that "an election has not been required where offenses are so closely connected in time as to constitute a single transaction."[18]

Last year, in *United States v. Holt*,[19] the court refined the teachings of *Vidal*. Holt was convicted of one specification of sodomy, and of one specification of indecent acts, upon his minor stepdaughter. The sodomy specification alleged that Holt had committed sodomy with the stepdaughter "on divers occasions" at Fort Polk, Louisiana, and Heidelberg, Germany.[20] The evidence ultimately established that he had committed one act of sodomy at each location.[21]

On appeal, the defense claimed that the trial judge should have instructed the members that, to convict the accused, two-thirds of the members had to agree that the accused had committed a particular act of sodomy at a specific time and place. The court agreed that two-thirds of the members had to concur that a particular act had occurred. It observed, however, that, in his instructions, the trial judge actually stated that two-thirds of the members had to agree that *all* the acts had occurred before finding the accused guilty. The court concluded that the accused actually benefited from the faulty instruction, remarking that, although either act would have been legally sufficient to establish the accused's guilt, the instructions essentially required the Government to prove both acts to obtain a conviction.[22]

The issue these decisions raise for trial judges is how to apply the teachings of both cases. *Vidal* clearly holds that when one criminal transaction occurs and the accused may be found guilty of an offense under multiple theories of criminal liability, two-thirds of the members need not agree on any particular theory to convict. Accordingly, the trial judge need not give an instruction mandating agreement on a particular theory. When the specification or the evidence indicates multiple criminal acts, rather than multiple theories of liability, *Vidal* apparently requires the Government to elect which offense is being prosecuted, unless the acts are so close in time that they essentially are parts of the same transaction.

Holt suggests another course. If a specification alleges that an accused committed multiple criminal acts on divers occasions, or if the evidence establishes that the accused committed several discrete offenses—although he or she actually was charged with only one offense—the military judge may instruct that, to convict, two-thirds of the members must agree that a particular act occurred. The former situation reflects the facts found in *Holt*. The latter could arise when a specification alleges that an accused raped the victim on or about a certain date and the evidence establishes that, on that date, the accused actually committed multiple

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[13] *Vidal*, 23 M.J. at 322. *See generally* MCM, 1984, Part IV, para. 45*f*.

[14] *Vidal*, 23 M.J. at 322; *see also* UCMJ art. 77; MCM, 1984, Part IV, para. 1.

[15] *Vidal*, 23 M.J. at 324-25. The court noted, *inter alia*, that because "the interval between the two acts of sexual intercourse was very brief" and "[t]he location was the same" that "the [forced] penetration[s] of the victim . . . [were] one continuous [criminal] transaction." *Id.* at 325. It then remarked that the accused could be found guilty as a principle either as an abettor or as a perpetrator. *Id.* (citing UCMJ art. 77). The court concluded that, as long as sufficient evidence existed for the members to find the accused guilty of rape for his participation in the one criminal transaction, "[i]t [made] no difference how many members chose . . . one theory of liability or the other." *Id.*

Under the facts, the accused also may have been guilty of rape as a coconspirator. *See* United States v. Gaeta, 14 M.J. 383, 391-92 (C.M.A. 1983); MCM, 1984, Part IV, para. 5*c*(4)(5). If the accused had been tried by a five-member court and one member had found the accused guilty only on a theory of abetment, one member had found the accused guilty only as a coconspirator and two had found him guilty only as the perpetrator, the four members would have to vote for a finding of guilty. Accordingly, the accused legally could be found guilty even if a simple majority of the court-martial failed to agree on the theory of guilt.

[16] *Vidal*, 23 M.J. at 320-21, 324-25.

[17] *Id.* at 325.

[18] *Id.*

[19] 33 M.J. 400 (C.M.A. 1991).

[20] *Id.* at 402. The Court of Military Appeals set out the complete specification in its opinion. *See id.*

[21] *Id.*

[22] *Id.* at 403.

rapes several hours apart. If election were the only remedy, the Government might be encouraged to plead multiple specifications that not only would lengthen the charge sheet, but also could expose the accused to absurdly long periods of confinement upon conviction. The suggested instruction regarding concurrence on a particular act, however, comports well with the court's expressed concern for double jeopardy protection.

Last term, the Supreme Court considered issues similar to those litigated in *Vidal* and reached a similar conclusion. In *Schad v. Arizona*[23] the accused was charged with one count of first-degree murder. The relevant Arizona statute defined first-degree murder, *inter alia*, as premeditated or felony murder.[24] At trial, the defense asked the judge to instruct the jury that, to convict, it had to agree unanimously on a single theory of murder. The judge refused. The jury later convicted the accused. On appeal, the Supreme Court affirmed Schad's conviction. The Court held that Arizona's statutory definition comported with due process,[25] concluding that the alternate criminal theories set out in the statute were not elements of the offense, but only "means of satisfying the element of *mens rea*."[26] Accordingly, the instruction the defense requested was not required.

In *United States v. Lyons*[27] the Court of Military Appeals discussed the instructions applicable to carrying a concealed weapon.[28] After his conviction for that offense, Lyons had argued on appeal that unlawful carrying is an element of the offense. He claimed that, because the Government had presented no evidence that he had carried the weapon unlawfully, his conviction should be set aside.

The Air Force Court of Military Review agreed that unlawful or unsanctioned carrying is an element of the offense, but disagreed with the accused's claim that the Government had to introduce actual evidence of that unlawfulness to obtain a conviction. It held that the fact finder may infer unlawfulness from the circumstances surrounding the carrying of the weapon. The court also opined that the military judge should instruct the members "regarding the existence and application of the inference."[29] It stated specifically that the judge should instruct

> (1) that carrying a concealed weapon is unlawful unless it is specifically author-ized by military regulation or competent authority or is necessitated by the exigencies of military service;
>
> (2) that carrying a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary; and
>
> (3) that the drawing of this inference is not required.[30]

Finally, the court held that the trial judge's failure to deliver a permissive inference instruction did not prejudice the accused.[31]

Lyons fared no better when he repeated his argument before the Court of Military Appeals. The higher court concurred that "the unlawfulness of the carrying of a concealed weapon is an element of the charged offense,"[32] but also found that direct evidence of unlawfulness was not required[33] and held that the members could infer unlawfulness.[34]

The Court of Military Appeals did not refer specifically to the Air Force court's three-part recommended instruction. A fair reading of the opinion, however, suggests that when the Government seeks to prove unlawfulness by circumstantial evidence and the evidence supports an inference of

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[23] 111 S. Ct. 2491 (1991).

[24] *See id.* at 2495 n.1 (quoting Ariz. Rev. Stat. Ann. § 13.1105.A (1989)).

[25] *Id.* at 2504.

[26] *Id.* at 2500, 2504.

[27] 33 M.J. 88 (C.M.A. 1991), *aff'g* 30 M.J. 724 (A.F.C.M.R. 1990).

[28] UCMJ art. 134; *see also* MCM, 1984, Part IV, para. 112; Benchbook, para. 3-186.

[29] United States v. Lyons, 30 M.J. 724, 726 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 88 (C.M.A. 1991).

[30] *Id.*

[31] *Id.* at 727.

[32] *Lyons*, 33 M.J. at 89.

[33] *Id.* at 90.

[34] *Id.*

unlawfulness, the military judge should instruct the members that they may infer unlawfulness in the absence of contrary evidence and that the drawing of that inference is not mandatory.[35]

Whether the judge should deliver a permissive inference instruction depends on the facts of the case. In *Lyons*, the Court of Military Appeals noted that a judge may give the instruction "if there is a rational connection between the fact proved and the ultimate fact presumed . . . . [T]he inference [, however, must not be] so strained as not to have a reasonable relation to the circumstances of life as we know them."[36] Because Lyons' military duties involved "stereotypical maintenance functions,"[37] the members reasonably could conclude that his carrying of a concealed weapon was unlawful.[38] Accordingly, a permissive inference instruction would have been proper, had the judge chosen to deliver it.

As noted above, the Air Force Court of Military Review proposed a three-part model instruction. The Court of Military Appeals surely was aware of this proposal. Its opinion, however, is silent on the efficacy of the first part of the model instruction. Accordingly, trial judges may wish to avoid using the first part of the suggested instruction when they instruct courts-martial.[39]

The crime of rape[40] requires as essential elements that the accused engage in sexual intercourse by force and without the victim's consent. Evidence that the accused used physical force to overcome the victim's actual resistance, or to place the victim in such a position that she could not resist, clearly establishes the requisite force.[41] When "intimidation or threats of death or physical injury make resistance futile, it is said that [the accused applied] 'constructive force'. . . , satisfying this element."[42] In intrafamily, parent-child rapes, the perpetrators rarely rely on physical force or on overt constructive force, such as threats of bodily harm. Nevertheless, the Government can prove the requisite use of force by presenting evidence that "the sexual intercourse [was] accomplished under the compulsion of long continued parental duress."[43]

In *United States v. Palmer*,[44] the accused was charged with raping and sodomizing his minor stepdaughter. The military judge gave the standard instructions on force and lack of consent.[45] He then attempted to tailor these instructions to the unique parent-child relationship, stating,

> Resistance of a victim is a relative term and must be considered in accordance with the special circumstances of each case. Consent to sexual intercourse if induced by fear, fright or coercion, is equivalent to physical force. Accord-ingly, in the rape of a stepdaughter by her father, it is not necessary to show that she physically resisted. It is sufficient that she submitted under compulsion of a parental command.[46]

On appeal, the accused cited this instruction as error, claiming that it improperly relieved the Government of part

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[35] *See id.* The *Military Judges' Benchbook* provides a permissive inference instruction at paragraph 7-3. This model instruction, however, is unnecessarily long. Better sources for the wording of a permissive inference instruction are the second and third parts of the instruction suggested by the Air Force Court of Military Review. *See Lyons*, 30 M.J. at 726 (citing United States v. Thompson, 14 C.M.R. 38, 42 (C.M.A. 1954)). *See generally* United States v. Mance, 26 M.J. 244, 253-56 (C.M.A. 1988).

[36] *Lyons*, 33 M.J. at 90.

[37] *Id.*

[38] *Id.*

[39] The Court of Military Appeals recommended that the circumstantial evidence instruction that appears in the *Military Judges' Benchbook* be modified. *See id.* at 90 n.* (citing Benchbook, para. 7-3). Compared to the permissive inference instruction, however, the importance of the circumstantial evidence instruction in *Lyons* is negligible.

[40] UCMJ art. 120.

[41] *See generally* United States v. Bonano-Torres, 31 M.J. 175 (C.M.A. 1990); United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Short, 16 C.M.R. 11 (C.M.A. 1954), United States v. Henderson, 15 C.M.R. 268 (C.M.A. 1954). Neither the *Military Judges' Benchbook*, nor the Manual for Courts-Martial, defines force. *See* MCM, 1984, Part IV, para. 45; Benchbook, para. 3-89.

[42] United States v. Palmer, 33 M.J. 7, 9 (C.M.A. 1991). *See generally* United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

[43] United States v. Dejonge, 16 M.J. 974, 976 (A.F.C.M.R. 1983).

[44] 33 M.J. 7 (C.M.A. 1991).

[45] *Id.* at 10. *See generally* Benchbook, para. 3-89.

[46] *Palmer*, 33 M.J. at 9. The rules may be different, however, when a juvenile victim is an older teenager. *See* United States v. Rhea, 33 M.J. 413, 424-25 (C.M.A. 1991).

of its burden of proof by establishing a per se rule of force and lack of consent in intrafamily sex offense cases.[47] The Court of Military Appeals disagreed. The court first acknowledged that, in intrafamily sex offense cases, the element of force can include the constructive force that emanates from the unique power of parental control. It then found that the trial judge's instructions, taken as a whole, properly defined the concepts of force and lack of consent. Finally, it rejected the accused's claim that the instructions had created a per se rule of force and lack of consent. Holding that the instructions properly defined the issues, the court concluded that, although the tailored instruction might have been better crafted, it was legally adequate and did not prejudice the accused.[48]

Substantive rules of law determined the adequacy of instructions in several decisions during 1991. In one case,[49] the court held that espionage[50] is a specific intent crime. The perpetrator must act either with the intent to injure the United States or with reason to believe that his or her actions will harm the nation. Accordingly, an instruction that permits a court-martial to convict an accused of espionage on evidence that shows only that the accused acted "without authority" is insufficient to communicate the specific intent required.[51]

In another case,[52] the accused was charged with felony murder. The Government alleged that the accused killed the victim while committing a robbery.[53] The defense counsel asked the military judge to instruct the members that, to convict the accused of felony murder, they had to find that he had harbored the intent required for robbery when he struck and fatally injured the victim.[54] The judge refused. The Army Court of Military Review affirmed the conviction on appeal. It found that the requested instruction would have been erroneous because "the intent to steal required in robbery may have been formed after the commission of an assault rendering the victim helpless."[55]

Instructions in Air Force fraternization cases once again were the subjects of appellate litigation.[56] In *United States v. Wales*[57] the Court of Military Appeals held that, in the absence of a punitive regulation, fraternization between an officer and an enlisted service member is punishable in the Air Force only if a command or supervisory relationship exists between the individuals.[58] It further held that, under the circumstances of that case, an instruction calling on the members to consider whether the chain of command had been compromised would have been too confusing.[59]

In *United States v. Fox*[60] a squadron commander was accused of fraternization with his first sergeant. The military judge gave instructions identical to the instructions in *Wales*. The Air Force Court of Military Review, however, upheld the instructions and the conviction. The court distinguished *Wales* factually, noting that, in *Fox*, the command and supervisory relationship was clear. It then held that "the presence of a direct supervisory relationship has never been elevated to the status of a separate element."[61] Finally, it opined that, although an instruction addressing the issue of supervisory relationships might have been appropriate, in the

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[47] *Palmer*, 33 M.J. at 9.

[48] *Id.* at 10.

[49] United States v. Richardson, 33 M.J. 127 (C.M.A. 1991).

[50] UCMJ art. 106a.

[51] *Richardson*, 33 M.J. at 131. The instruction appears in the opinion. *See id.* at 129. The standard *Benchbook* instruction later was amended to conform to *Richardson*. *See* Trial Judiciary Memorandum 91-10, Office of the Chief Trial Judge, U.S. Army, 30 Oct. 1991.

[52] United States v. Fell, 33 M.J. 628 (A.C.M.R. 1991).

[53] UCMJ art. 118(4).

[54] *Fell*, 33 M.J. at 632. The requested instruction appears in the opinion. *See id.*

[55] *Id. See generally* United States v. Washington, 12 M.J. 1036 (A.C.M.R. 1982).

[56] Fraternization in the Air Force has been the subject of an inordinate amount of appellate scrutiny. *See generally* United States v. Appel, 31 M.J. 314 (C.M.A. 1990); United States v. Wales, 31 M.J. 301 (C.M.A. 1990); United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd in part and rev'd in part*, 20 M.J. 155 (C.M.A. 1985).

[57] 31 M.J. 301 (C.M.A. 1985).

[58] *Id.* at 307.

[59] *Id.* at 308. As originally drafted, the specifications in *Wales* alleged that the enlisted person involved was under the accused's military supervision. *Id.* at 302. The Government, however, deleted this language prior to assembly. *Id.* at 303. Nevertheless, at trial, the trial counsel prevailed upon the judge to deliver an instruction referring to the compromise of the chain of command. Under these circumstances, Chief Judge Everett and Judge Sullivan found this instruction to be prejudicially confusing. *Id.* at 308. The offending instruction appears in the opinion. *See id.* at 305. Notwithstanding the confusion unique to *Wales*, the instruction delivered by the trial judge essentially reflected the time-honored definition of fraternization. *Compare id. with* United States v. Free, 14 C.M.R. 466 (N.B.R. 1953).

[60] 32 M.J. 747 (A.F.C.M.R. 1991).

[61] *Id.* at 750.

instant case it was not required and its absence did not mandate reversal.

Defenses

In *United States v. Langley*[62] the Court of Military Appeals reversed one decision of the Army Court of Military Review and sounded the death knell for another.[63] Charged with assault with intent to commit rape,[64] Langley had defended on a theory of mistake of fact as to the victim's consent.[65] The trial judge instructed the members that this mistake would be a defense if the mistake was both honest and reasonable.[66] The defense counsel objected, arguing that because Langley was charged with a specific intent crime, his mistake was a defense if it was honest, however unreasonable it might be. The judge overruled the objection and Langley was convicted. Langley appealed, claiming as error the judge's instruction on honest and reasonable mistake.

The Army Court of Military Review affirmed,[67] citing *United States v. McFarlin*.[68] In *McFarlin*, the Army court had held that an accused's mistaken belief that the victim had consented to sexual intercourse is a defense to indecent assault only if it is both honest and reasonable. "This is because the mistake in question [does] not relate to [the accused's] intent, but rather to another element, the presence or absence of the victim's consent."[69] The Army court accepted *McFarlin* as persuasive authority in *Langley*, stating that "[al]though *[McFarlin]* involved an indecent assault, it is nevertheless pertinent here since indecent assault is a lesser included offense of assault with intent to commit rape and in both *McFarlin*, and this case, the consent of the respective victims was at issue."[70]

The Court of Military Appeals completely rejected the lower court's reasoning. Initially, it reaffirmed that an honest, albeit unreasonable, mistake of fact is a defense if it relates directly to the *mens rea* of a specific intent offense.[71] Conversely, when a mistake affects an element requiring only general intent or knowledge, the mistake is a defense only if it was honest and reasonable.[72] *McFarlin* did not deny these rules. In that decision, the Army court correctly noted that the specific intent involved in sexual assault goes only to the intent to gratify sexual desires, not to the offense as a whole.[73] McFarlin's mistake related to the absence of consent—an element of sexual assault for which a specific intent is not required.[74] Therefore, his unreasonable belief that the victim had consented did not constitute a defense.

Next, the court analyzed the specific intent inherent in assault with intent to commit rape. It found that the pertinent specific intent of that offense "includes the entire crime of rape—including taking [the] victim without her consent."[75] Accordingly, the Army court erred when it applied *McFarlin*—a case analyzing the effect of mistake on a general intent element—to *Langley*. The Court of Military Appeals concluded that, if Langley honestly believed that the victim had consented to sexual intercourse, this honest mistake—however unreasonable—was a defense. That the mistake was not a defense to a lesser-included offense of the charged specific intent offense was of no consequence.[76]

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[62] 33 M.J. 278 (C.M.A. 1991).

[63] *See* United States v. Apilado, CM 9001937, 1991 WL 182991 (A.C.M.R. 12 Sept. 1991), *vacated*, 1991 WL 250619 (A.C.M.R. 26 Nov. 1991).

[64] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 64.

[65] *Langley*, 33 M.J. at 279; *see also* R.C.M. 916(j).

[66] *Langley*, 33 M.J. at 280. The instruction appears in the opinion. *See id.*

[67] United States v. Langley, 29 M.J. 1015 (A.C.M.R. 1990), *rev'd*, 33 M.J. 278 (C.M.A. 1991).

[68] 19 M.J. 790 (A.C.M.R. 1985).

[69] *Id.* at 793.

[70] *Langley*, 29 M.J. at 1017.

[71] *See Langley*, 33 M.J. at 282.

[72] *Id.*

[73] *Id.*

[74] The Manual for Courts-Martial does not assert that acting without the consent of the victim actually is an element of indecent assault. It does state, however, that one element of the offense is that the accused assaulted the victim. MCM, 1984, Part IV, para. 63. The Manual defines an assault, in part, as an act taken without the lawful consent of the victim. *See* MCM, 1984, Part IV, para. 54c(1)(a). Similarly, the *Benchbook* includes the following as an element of indecent assault: "That the accused's acts were done without the consent of . . . [the victim] . . . and against her/his will." Benchbook, para. 3-128.

[75] *Langley*, 33 M.J. at 282 & n.4 (citing United States v. Hobbs, 23 C.M.R. 157, 162 (C.M.A. 1957)).

[76] Notwithstanding the instructional error, the court affirmed, holding that the trial judge's error was harmless. *See Langley*, 33 M.J. at 283.

In *United States v. Apilado*[77] the Army court repeated the errors it made in *Langley*. Apilado was convicted of attempted rape.[78] On appeal, he challenged as erroneous the trial judge's instruction that an accused's honest and reasonable mistake that the victim had consented to sexual intercourse was a defense.[79] The Army court affirmed Apilado's conviction. In its opinion, the court acknowledged that honest mistake is a defense to a specific intent crime. It opined, however, that the *mens rea* element of the crime an accused has attempted to commit determines whether a specific intent is at issue. Accordingly, the court concluded that attempted rape, like rape itself, is a general intent offense and ruled that the accused's mistake as to consent had to be both honest and reasonable to amount to a defense. The court also relied on *McFarlin* and on its opinion in *Langley* to support its conclusion.[80]

Clearly, the Army court decided *Apilado* incorrectly. Attempted rape requires as an essential element that the accused specifically intended to have sexual intercourse with the victim without her consent. An accused's mistaken belief that the victim consented relates directly to the specific intent inherent in the crime. Accordingly, the mistake is a defense if it is honest, even if it is not reasonable. Moreover, the Army court's reliance on prior precedent was ill-founded. The Court of Military Appeals expressly rejected the Army court's reasoning in *Langley* and found *McFarlin* inapposite to attempted rape cases; therefore, *Apilado* plainly cannot be sustained by these authorities.[81]

In the wake of *Langley*, the Army Court of Military Review reconsidered *Apilado*.[82] Finding *Apilado* inconsistent with *Langley*, the Army court held that the trial judge's instructions on mistake were erroneous, set aside Apilado's conviction, and authorized a rehearing.[83]

The instruction for mistake of fact as to consent also was at issue in *United States v. Sellers*.[84] Sellers was convicted of raping a female airman in her room. On appeal, he claimed as error the failure of the military judge to instruct on mistake of fact regarding the victim's consent. The court responded by repeating the general rules that apply to instructions on defenses. If the evidence reasonably raises a defense, the trial judge must instruct on that defense sua sponte.[85] The right to an instruction is not waived by the accused's failure to request it; nor must the accused testify to raise the issue.[86] The court then noted that the accused and the victim had engaged in consensual sexual intercourse on two prior occasions and that, when Sellers allegedly raped her, the victim neither cried out loudly, nor tried to remove herself from the scene. Nevertheless, the court affirmed Sellers' conviction. Although it described the case as "borderline,"[87] the court held that no instruction on the mistake of fact defense had been necessary, asserting, "It would have been virtual speculation for the court members to find that the victim did not consent, but that the accused believed she did."[88]

Military appellate courts considered similar issues in several other cases. In *United States v. Watford*,[89] the accused claimed as error the trial judge's failure to deliver sua sponte a voluntary intoxication instruction. The evidence, however, established only that the accused had consumed two rum drinks and two beers in slightly more than four hours.

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[77] United States v. Apilado, CM 9001937, 1991 WL 182991 (A.C.M.R. 12 Sept. 1991), *vacated*, 1991 WL 250619 (A.C.M.R. 26 Nov. 1991).

[78] Attempted rape and assault with intent to commit rape are essentially the same offense. *See* United States v. Gibson, 11 M.J. 435 (C.M.A. 1981); United States v. Hobbs, 23 C.M.R. 157 (C.M.A. 1957).

[79] *Apilado*, 1991 WL 182991 at *2. The instruction appears in the opinion. *Id.*

[80] *Apilado* also cited United States v. Short, 16 C.M.R. 11 (C.M.A. 1954), as persuasive authority. *See Apilado*, 1991 WL 182991, at *3. In *Langley*, however, Senior Judge Everett pointed out that only one member of the *Short* court asserted that honest and reasonable mistake as to consent was a defense to assault with attempt to commit rape. *Langley*, 33 M.J. at 282-83. The Court of Military Appeals unanimously rejected this interpretation of mistake in *Langley*. *Id.* at 282.

[81] What is intriguing about the Army Court of Military Review's opinions in *Langley* and *Apilado* is the failure of both appellate panels to follow the general rule governing the mistake of fact defense set forth in the Manual for Courts-Martial. *See* R.C.M. 916(j). Instead of following this clear guidance, the *Langley* court cited as precedent *McFarlin*, a clearly inapposite case. *See Langley*, 29 M.J. at 1017. *Apilado* also cited *McFarlin* and summarily rejected the opinion in United States v. Daniels, 28 M.J. 743 (A.F.C.M.R. 1989) (holding that an honest, but unreasonable, mistake as to consent is a defense to attempted rape). *See Apilado*, 1991 WL 182991, at *2. The Air Force court decided *Daniels* ten months before the Army Court of Military Review delivered its opinion in *Langley*. The Army court's opinion, however, gives no indication that the court was aware of *Daniels*. The Army court's reasons for its apparent failure to follow the general rule appear in United States v. Apilado, 1991 WL 250619, at *3 to *6 (A.C.M.R. 26 Nov. 1991) (Johnston, J., dissenting).

[82] *Apilado*, 1991 WL 250169, at *1.

[83] The Army Court of Military Review properly reconsidered *Apilado* and properly enforced the law as prescribed by the Court of Military Appeals. *See Apilado*, 1991 WL 250169, at *1. The dissenting judge, however, again argued that, because the specific intent of attempted rape is the intent to commit rape—a general intent crime—the defense of mistake as to consent was available to the accused only if it was both honest and reasonable. *Id.* at *4 to *5. (Johnston, J., dissenting). The majority opinion suggested that the Court of Military Appeals reconsider the law of mistake as set forth in *Langley* and adopt the views of the dissenting judge. *Id.* at *1.

[84] 33 M.J. 364 (C.M.A. 1991).

[85] A defense reasonably is raised by the evidence when "some evidence" exists to which the members might attach credence. *See* United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Simmelkjaer, 40 C.M.R. 118 (C.M.A. 1969).

[86] *See generally* United States v. Rose, 28 M.J. 132 (C.M.A. 1989).

[87] *Sellers*, 33 M.J. at 368.

[88] *Id.* at 369.

[89] 32 M.J. 176 (C.M.A. 1991). The accused was charged with premeditated murder. Voluntary intoxication is relevant on the issue of whether the accused had a premeditated design to kill and therefore is a defense. Voluntary intoxication will not reduce unpremeditated murder to a lesser-included offense. *See* MCM, 1984, Part IV, para. 43c(3)(c). *But see* United States v. Tilley, 25 M.J. 20 (C.M.A. 1987).

None of the witnesses who were with the accused on the night of the offense testified that the accused had been under the influence of alcohol. Moreover, in a pretrial statement, the accused himself expressly denied that he had been intoxicated. The Court of Military Appeals held that the evidence reasonably did not raise the defense of voluntary intoxication and that no instruction on voluntary intoxication was required. In a similar decision, the court held that self-defense was not raised by the evidence when the record revealed that an incident in which the victim struck the accused repeatedly, bit his nose, pushed him into a swimming pool, and threatened to blow his head off occurred eight months before the accused assaulted her.[90] Accordingly, the trial judge did not err by forbearing to deliver a self-defense instruction.[91]

In *United States v. Rankins*,[92] the accused refused to go to the field with her unit. She claimed she was afraid her husband would suffer a heart attack while she was gone. Her husband previously had been hospitalized for a heart-related medical condition, but subsequently had been cleared for regular physical training and for deployment to Saudi Arabia. The military judge refused to give a requested duress instruction,[93] finding that the accused had no cause to believe that her husband would suffer any immediate harm.[94] The appellate court affirmed the conviction for missing movement. It held that the accused's fear that her husband would suffer a heart attack was mere speculation.[95] Because the defense of duress requires fear of immediate harm, the trial judge's refusal to give the instruction was proper.[96]

The Court of Military Appeals considered unconventional defense instructions in two cases. In one case, the accused was charged with numerous specifications of dereliction of duty for failing to report drug abuse. The Court of Military Appeals has held that an individual properly may refuse on grounds of self-incrimination to report drug abuse of others when he or she is engaged in the same abuse and that an accused cannot be convicted of dereliction of duty for failing to report his or her own drug abuse.[97] In *United States v. Medley*[98]—the instant case—some of the specifications of dereliction of duty derived from the accused's failures to report her own drug abuse and some derived from her failures to report abuse by others. The military judge instructed the members that the accused "could not be convicted of failing to report her fellow service members for any occasion on which she herself participated in the usage."[99] The Court of Military Appeals held that the military judge had handled the instructions adroitly and that he properly had presented the applicable law to the members.[100]

In *United States v. Berri*,[101] the accused was convicted of attempted murder, maiming, and assault by intentionally inflicting grievous bodily harm—all specific intent crimes.[102] The defense counsel presented extensive psychiatric evidence on the accused's behalf[103] and the military judge instructed the members on the defense of lack of mental responsibility.[104] The judge, however, refused to address the impact of the psychological evidence on the specific intent of each

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[90] United States v. Reid, 32 M.J. 146 (C.M.A. 1991). The court found no indication that the victim was about to engage in similarly violent or threatening acts on the night that the accused assaulted her. *Id.* at 148.

[91] *Id.*

[92] 32 M.J. 971 (A.C.M.R. 1991).

[93] *Id.* at 973. *See generally* Benchbook, para. 5-5.

[94] *See generally* R.C.M. 916(h).

[95] *Rankins*, 32 M.J. at 974.

[96] *Id.* The court also accorded a great deal of credibility to the Government's claim that the accused's purported concern for her husband's welfare was merely a pretext offered to hide her general disinclination to serve in the field. *See id.* at 973.

The most recent reported case in which duress is raised by the evidence appears to be United States v. Dehart, 33 M.J. 58 (C.M.A. 1991). The opinion sets out a tailored duress instruction. *See id.* at 63-65.

[97] United States v. Heyward, 22 M.J. 35 (C.M.A. 1986); *see also* United States v. Dupree, 24 M.J. 319 (C.M.A. 1987); United States v. Thompson, 22 M.J. 40 (C.M.A. 1986).

[98] 33 M.J. 75 (C.M.A. 1991).

[99] *Id.* at 76.

[100] *Id.* at 77-78. The accused also argued that if she reported the use of drugs by others, they might then report her use. *Id.* at 77. She asserted that by reporting others, she indirectly would be reporting herself, in violation of her right against self-incrimination. *Id.* The court rejected this argument, holding that the accused's right against self-incrimination extended only to instances of her own drug abuse. *Id.* at 77-78.

[101] 33 M.J. 337 (C.M.A. 1991), *aff'g* 30 M.J. 1169 (C.G.C.M.R. 1990).

[102] *See* MCM, 1984, Part IV, paras. 4, 50, 54.

[103] *Berri*, 33 M.J. at 339-41.

[104] *Id.*; *see also* UCMJ art. 50(a).

offense.[105] On appeal, the accused claimed that the judge erred by refusing to give these instructions.

An accused has a right to present evidence that he or she suffers from a mental condition that is not sufficiently severe to give rise to the defense of lack of mental responsibility if this evidence tends to negate an element of the offense with which the accused is charged.[106] If the evidence is relevant to the specific intent involved and may negate that intent, it is admissible. When this evidence is admitted, the military judge must instruct on the effect of the evidence.[107] In *Berri*, the Coast Guard Court of Military Review found that the trial judge's refusal to instruct the members on the effect of the psychiatric evidence as it related to the element of specific intent was error.[108] The Court of Military Appeals affirmed. Holding that the lower court "was within its prerogative in ruling that the testimony was relevant to specific intent,"[109] it concluded, "As a matter of law, we cannot say that the court erred in so doing. Therefore, the instructions denied the accused the opportunity to advance a legitimate defense theory to the fact finder."[110]

Evidence

Ordinarily, a trial judge must give the accomplice testimony instruction[111] only if the accused expressly asks that it be delivered.[112] Nevertheless, if the testimony of an accomplice—that is, one who culpably is involved in an offense with the accused[113]—virtually comprises the entire case,[114] or is of vital[115] or pivotal importance to the prosecution,[116] the judge must give the instruction sua sponte.

In *United States v. McKinnie*,[117] an instructor was charged with fraternizing with students in violation of a school regulation.[118] A fellow instructor and several students testified for the prosecution. The defense counsel asked the judge to deliver the accomplice testimony instruction regarding these witnesses. The judge gave this instruction for the fellow instructor, but he refused to apply the instruction to the students, stating that they were victims—not accomplices. On appeal, the Court of Military Appeals reiterated the general rule that a witness is an accomplice if "the witness himself [or herself] could have been convicted of the same crime for which the defendant is being prosecuted."[119] The school regulation applied to *all* personnel, including students. Therefore, students at the school could violate the regulation by fraternizing with the instructors. Accordingly, the court found that the student witnesses were accomplices, to whom the instruction applied. The court then reaffirmed existing law, declaring, "'Instruction on accomplice testimony should be given whenever the evidence tends to indicate that a witness adverse to the accused was culpably involved in a crime with which the accused is charged.'"[120] Finally, the court tested the omission for prejudice. Because the military judge had given the accomplice instruction in his comments on the testimony of the accused's fellow instructor and had given a credibility instruction concerning all the witnesses, the court found the error harmless.

Should the accomplice testimony instruction be given when a defense witness testifies? The Court of Military Appeals expressly declined to address this issue last year in *United States v. Davis*.[121] At Davis' court-martial for rape, he called as a defense witness his accomplice, who then had

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[105] *Berri*, 30 M.J. at 1172.

[106] Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

[107] United States v. Tarver, 29 M.J. 605, 609 (A.C.M.R. 1989); *see Berri*, 33 M.J. at 341-42.

[108] United States v. Berri, 30 M.J. 1169, 1173 (C.G.C.M.R. 1990), *aff'd*, 33 M.J. 337 (C.M.A. 1991).

[109] *Berri*, 33 M.J. at 344.

[110] *Id.*

[111] Benchbook, para. 7-10.

[112] United States v. Lell, 36 C.M.R. 317 (C.M.A. 1966); United States v. Stephen, 35 C.M.R. 286 (C.M.A. 1965); United States v. Schreiber, 18 C.M.R. 226 (1955).

[113] United States v. Garcia, 46 C.M.R. 8 (C.M.A. 1972).

[114] *Stephen*, 35 C.M.R. at 288.

[115] *Lell*, 36 C.M.R. at 322.

[116] United States v. Gilliam, 48 C.M.R. 260, 262 (C.M.A. 1974); United States v. Adams, 19 M.J. 996, 998 (A.C.M.R. 1985); United States v. Young, 11 M.J. 634, 636 (A.F.C.M.R. 1981).

[117] 32 M.J. 141 (C.M.A. 1991).

[118] *Id.* at 141-42. The accused was an instructor at the Academy of Health Sciences, Fort Sam Houston, Texas. *Id.* at 142. The students were undergoing training at that institution. *Id.*

[119] *Id.* at 143.

[120] *Id.* at 144 n.1.

[121] 32 M.J. 166 (C.M.A. 1991).

yet to stand trial for the same offense. Testifying under a grant of immunity, the accomplice claimed that the victim had consented to repeated acts of sexual intercourse. The military judge gave a credibility instruction and then—without defense objection—gave an accomplice testimony instruction that benefited the prosecution.[122] The Court of Military Appeals held that, in the absence of plain error, the defense counsel's failure to object waived any defect. The court briefly acknowledged that "many courts discourage accomplice instructions for defense witnesses,"[123] but it also recognized a minority view, holding that the instruction should be given whenever an accomplice testifies.[124] On the facts of this case, however, the court found no need to decide the issue. Noting that the members "well knew that [the accomplice] was pending charges for the same offenses, and . . . [that] he was testifying for the defense under a grant of immunity," the court stated that they "could hardly have been more acutely aware of [the accomplice's] stake in the matter, and they could not fail to take that into consideration, instruction or not."[125] The court concluded that the military judge's instruction "did nothing to heighten member awareness" and thus was harmless error, if it was error at all.[126]

In the past, however, the Court of Military Appeals has not hesitated to address this issue more directly. As long ago as 1954, the court, finding compelling precedent in civilian appellate decisions and in paragraph 153*a* of the 1951 Manual for Courts-Martial,[127] declared that "'a conviction cannot be based upon the . . . uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory uncertain or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.'"[128]

In *United States v. Scoles*,[129] another case decided while the 1951 Manual for Courts-Martial was in effect, the court found expressly that the rules governing accomplice testimony were developed solely to protect the accused.[130] Pursuant to *Scoles*, paragraph 153*a* was revised in the 1969 Manual for Courts-Martial.[131] As amended, it provided that

> a conviction cannot be based upon uncorroborated testimony given by . . . an accomplice in a trial for any offense if . . . the testimony is self-contradictory, uncertain, or improbable. Even if apparently corroborated and apparently credible, the testimony of an accomplice *which is adverse to the accused* is of questionable integrity and is to be considered with great caution . . . . When appropriate, the above rules should, *upon request by the defense*, be included in the general instructions of the military judge.[132]

These changes were adopted because "the history of and reason for the rule [reveal that] the rule as such applies *only to accomplice testimony adverse to the accused.*"[133]

As the foregoing precedent clearly demonstrates, the present military rule permits a trial judge to give this instruction only when prosecution witnesses testify. Unless the Court of Military Appeals changes the law, military judges should not apply the accomplice testimony to defense witnesses.[134]

The use of instructions to limit admissible evidence to its proper scope is accepted widely.[135] Several recent decisions commented on various limiting instructions. In one case,[136] the accused was charged with impersonating a petty officer, possessing a false identification card, and falsifying an application for an armed forces identification card by stating untruthfully that he was a petty officer third class. The

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[122] *Id.* at 167. The instructions are set out in the opinion. *See id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 168.

[126] *Id.*

[127] Manual for Courts-Martial, United States, 1951, para. 153*a*. [hereinafter MCM, 1951].

[128] United States v. Bey, 16 C.M.R. 239, 242 (C.M.A. 1954) (quoting MCM, 1951, para. 153*a*). This rule antedated the 1951 Manual. *See* Dep't of Army, Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, para. 153*a*.

[129] 33 C.M.R. 226 (C.M.A. 1963).

[130] *Id.* at 230-32.

[131] Manual for Courts-Martial, United States, 1969 (Rev. ed) [hereinafter MCM, 1969].

[132] MCM, 1969, para. 153*a* (emphasis added).

[133] Dep't of Army, Pam. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 Revised Edition, para. 153*a* (emphasis added).

[134] That the Court of Military Appeals mentioned the minority view regarding accomplice testimony instruction without referring to the clear military precedent limiting the instruction to witnesses adverse to the accused is somewhat disturbing. *See Davis*, 32 M.J. at 167.

[135] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 105 [hereinafter Mil. R. Evid.].

[136] United States v. Bender, 32 M.J. 1002 (N.M.C.M.R. 1991).

Government presented evidence that the accused previously had acknowledged in writing that his recommendation for advancement to petty officer third class had been withdrawn. The military judge then advised the members that they could "consider that document or . . . its relevance if any to the charge and specifications before the court."[137] The Navy Court of Military Review opined that a more ample instruction might have been given. It suggested an instruction that clearly outlined the purposes for which the members could consider the uncharged misconduct—for example, to rebut evidence that the accused erroneously had believed that he was a petty officer third class.[138]

Another case involved an instruction limiting use of out-of-court statements admitted to establish a declarant's state of mind.[139] The Court of Military Appeals opined that a more appropriate instruction would declare specifically that the members could not consider these statements for the truth of the matters the statements asserted.[140]

In a third case,[141] the instruction limited to impeachment the use of a witness's prior inconsistent statement.[142] The declarant, however, had made the statement under oath at an article 32 investigation,[143] subject to the penalty of perjury. Accordingly, the statement was nonhearsay and was admissible to prove the truth of the matter it asserted.[144]

The Court of Military Appeals presented an example of a well-crafted instruction for uncharged misconduct in *United States v. Rhea*.[145] In *Rhea*, the trial judge admitted pornographic books into evidence to permit the Government to establish the accused's motive for committing sexual offenses with his stepdaughter. The judge properly supplemented the standard uncharged misconduct instruction[146] by carefully explaining motive to the members.[147]

The Court of Military Appeals again emphasized its preference for an instruction to disregard—rather than the declaration of a mistrial—when improper evidence is admitted erroneously.[148] It found that when a witness inadvertently mentioned the accused's unsuccessful request for a discharge in lieu of court-martial, the trial judge's

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[137] *Id.* at 1003. The complete instruction appears in the opinion. *Id.*

[138] The Navy-Marine Court of Military Review set forth its suggested instruction in the opinion as follows:

> Prosecution Exhibit 3 has been admitted for the limited purpose of such tendency, if any, as it may have to establish the accused's actual knowledge that he was not a petty officer and to rebut evidence of mistake on his part as to whether or not he was a third-class petty officer. You may consider it for no other purpose; specifically, you may not infer from it that the accused is a bad person who is predisposed to commit offenses and that he must, therefore, be guilty of the offenses charged against him.

Id.

[139] United States v. Elmore, 33 M.J. 387 (C.M.A. 1991). The instruction appears in the opinion. *Id.* at 395.

[140] *Id.* at 395 n.8. In United States v. Munoz, 32 M.J. 359, 365 n.* (C.M.A. 1991), the court set out what it called a limiting instruction, carefully delineating the proper use of uncharged misconduct.

> Now with respect to the testimony of [*I*], evidence that the accused may have committed certain acts with her, which would be uncharged misconduct; that is, other criminal offenses which are not before you; that evidence may be considered by you for the independent purpose of its tendency, if any, to prove a plan or design of the accused to sexually molest his own children. Now, you may not consider that evidence, that is the evidence presented by [*I*], for any other purpose. And you may not conclude from the evidence that the accused is a bad person or has criminal tendencies and he, therefore, committed the offenses as charged. That evidence was not offered for that purpose and you may not use it for that purpose. You may, as I say, use it only for the limited purpose of its tendency, if any, to prove a plan or a design by the accused to sexually molest his own children.

[141] United States v. Armstrong, 33 M.J. 1011 (A.C.M.R. 1991).

[142] *Id.* at 1015.

[143] *See generally* UCMJ art. 32.

[144] *See* Mil. R. Evid. 801(d)(1)(A).

[145] 33 M.J. 413, 421 (C.M.A. 1991).

[146] Benchbook, para. 7-13.

[147] The judge stated:

> Members of the court, before permitting counsel to argue their cases, I'm going to give you one legal instruction at this time.
>
> I have admitted three books into evidence. The books admitted as Prosecution Exhibits 3, 4, and 5 may be considered by you only for the limited purpose of their tendency, if any, to prove that they establish a motive for the accused to commit the offenses of rape of Youie Rhea, forcible sodomy of Youie Rhea, and indecent acts with Youie Rhea. Now, "motive" is defined in law as, that which incites or stimulates a person to do an act. You may not consider this evidence for *any* other purpose, and you may not conclude from the evidence that the accused is a bad person, or has criminal tendencies, and that he therefore must have committed the referenced offenses.

Rhea, 33 M.J. at 421.

[148] United States v. Balagna, 33 M.J. 54, 56 (C.M.A. 1991); *see* United States v. Rushatz, 31 M.J. 450, 456-57 (C.M.A. 1990).

proper remedy was to instruct the members to disregard the evidence completely.[149]

Procedure

Military law permits the Government to try several unrelated offenses at once.[150] Historically, courts have preferred a single, swift resolution of all charges to successive, time-consuming, multiple trials.[151] Nevertheless, when the Government tries unrelated charges at the same time, some danger always exists that the members may use evidence of one offense to convict the accused of another.[152] The specter of improper use may arise even when the unrelated charges are dissimilar because these charges may lead members to conclude that the accused is a bad person or that he or she has a propensity for criminal behavior. Likewise, when the offenses are similar, the members improperly may decide that the accused has a propensity to commit a particular type of offense.

The Court of Military Appeals formally recognized this spillover effect in *United States v. Hogan*.[153] The accused was convicted of two rapes, which he allegedly committed nineteen months apart. The Air Force Court of Military Review set aside his conviction for one rape, but affirmed his conviction for the other.[154] The Court of Military Appeals, however, reversed the remaining conviction, stating that "the risk is just too great that the evidence of the second rape spilled over to the first one."[155] The court suggested that had the military judge instructed the members to consider the evidence of each alleged offense separately, "the chances of their cumulating [sic] the evidence would have substantially diminished, and we might have reached a different result."[156]

In a subsequent case,[157] the Court of Military Appeals explained that a cautionary instruction—such as the instruction suggested in *Hogan*—is not always sufficient to eliminate the danger of spillover. The court held that, despite the military judge's credible efforts to comply with the teachings of *Hogan*, an instruction directing the members to consider evidence of similar offenses separately was inadequate to protect the accused's right to a fair trial.[158]

Military appellate courts considered spillover issues in two cases last year. In one case,[159] the court set aside a conviction for rape and authorized a new trial on a related indecent assault charge. The military judge's failure to instruct the members to "compartmentalize the evidence"[160] left the appellate court uncertain that the members had not used the evidence of one offense to convict the accused on the other.[161]

In the second case, *United States v. Garces*,[162] the convening authority referred thirteen specifications to trial. As the pretrial sessions progressed, the military judge dismissed several specifications and the Government amended another to reflect attempt. During the trial on the

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[149] The trial judge gave the following cautionary instruction:

> Well, the court is advised that—as Mr. Zelbst indicated, the answer that the Command Sergeant Major gave regarding the report in question has no relevance to this trial, and you should not draw any adverse inference against Sergeant Balagna in any way because of the fact that particular report came up. Can all the court members abide by that instruction?

Balagna, 33 M.J. at 55. Finding this instruction adequate to neutralize the adverse impact of the improper testimony, the Court of Military Appeals held that the trial judge properly refused to grant a mistrial. *See id.* at 57.

[150] *See* R.C.M. 307(c)(4), 601(e)(2).

[151] *See, e.g.*, MCM, 1969, para. 30(g) ("charges against an accused . . . ordinarily should be tried at a single trial").

[152] See United States v. Rivera, 23 M.J. 89 (C.M.A. 1986).

[153] 20 M.J. 71 (C.M.A. 1985).

[154] United States v. Hogan, 16 M.J. 549, 550 (A.F.C.M.R. 1983), *rev'd*, 20 M.J. 71 (C.M.A. 1985).

[155] *Id.* at 73.

[156] *Id.*

[157] United States v. Haye, 29 M.J. 213 (C.M.A. 1989).

[158] The military judge gave the following instruction:

> Each offense charged must stand on its own. Proof of one offense carries with it no inference that an accused is guilty of another offense. The Government has the burden of proving each and every element of each offense, beyond a reasonable doubt.

Id. at 214 n.*.

[159] United States v. Taylor, 32 M.J. 684 (A.F.C.M.R. 1991).

[160] *Id.* at 687.

[161] *Id.*

[162] 32 M.J. 345 (C.M.A. 1991).

merits, the judge granted a defense motion for a finding of not guilty on one specification and dismissed yet another. Denying repeated defense motions for a mistrial, the military judge then instructed the members on the meaning of a motion for a finding of not guilty and told them to disregard the dismissed charge. The judge repeated this advice during the general findings instructions. The Court of Military Appeals later held that the judge's actions effectively prevented any improper spillover.[163]

Article 51 of the Uniform Code of Military Justice (UCMJ) provides that, in a court-martial, the junior member must count the votes and the president must check the count and announce the result.[164] The standard instruction in the *Judges' Benchbook* likewise states that "the junior member collects and counts the votes [and] the count is checked by the president who immediately announces the result of the ballot to the members."[165] The Army Court of Military Review has held that an instruction that advises the junior members merely to collect the ballots does not comport with the statutory requirement.[166] This erroneous instruction, however, is not plain error and the Army court usually regards it as harmless. In the past year, two appellate panels of the Army court again reviewed instructions implementing article 51. One panel held that the junior member's responsibilities are merely ministerial and that a trial judge's failure to instruct on them was harmless error.[167] The other panel found the junior member's duties to be a vote verification procedure and refused to characterize them as ministerial. Nevertheless, it also held that a similar instructional omission was harmless.[168]

When an accused pleads guilty to some charges and not guilty to others, the members ordinarily are not informed of the guilty pleas until after the findings are announced on the contested offenses.[169] In a mixed-plea case in which the accused is acquitted of every contested offense, the members can be taken aback when, after they announce what they believe to be a complete acquittal, the judge tells them that they still have considerable work to do. *United States v. Childress*[170] was a mixed-plea case in which the court-martial acquitted the accused of all the contested offenses. As the trial entered the sentencing phase, the military judge—presumably intending to soften the effect on the members—prefaced his announcement of the guilty pleas with a statement conceding that his concealment of this information might be considered deception or even the perpetration of a fraud.[171] The appellate court upheld the military judge's decision to explain the reasons for withholding the information, but it disagreed sharply with the judge's characterization of the withholding procedure.[172]

The members of a court-martial may call and recall witnesses, subject to the approval of the military judge.[173] They may exercise this authority even after they begin their deliberations.[174] In deciding whether to grant the members' requests for witnesses or additional evidence, the judge must consider—*inter alia*—the relevance of the requested evidence, the difficulty and delay involved, and the views of the parties.[175]

In *United States v. Lents*[176] the members asked for additional evidence during the findings instructions. The military judge, without weighing the appropriate factors, responded that after the evidence was closed, no additional evidence could be obtained.[177] This instruction was erroneous and an abuse of discretion.[178]

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[163] *Id.* at 349.

[164] UCMJ art. 51.

[165] Benchbook, para. 2-30.

[166] United States v. Hutto, 29 M.J. 917 (A.C.M.R. 1989); United States v. Kendrick, 29 M.J. 792 (A.C.M.R. 1989).

[167] United States v. Llewellyn, 32 M.J. 803 (A.C.M.R. 1991). The court emphasized that the opinion should not be construed "as approval for not following the time-tested provisions of the Benchbook." *Id.* at 805 n.3.

[168] United States v. Truitt, 32 M.J. 1010 (A.C.M.R. 1991).

[169] R.C.M. 913(a); *see also* United States v. Rivera, 23 M.J. 89 (C.M.A. 1986); Benchbook, para. 2-25 n.5.

[170] 33 M.J. 602 (A.C.M.R. 1991).

[171] *Id.* at 603. The complete instruction appears in the opinion. *See id.* at 603-04.

[172] *Id.* at 604.

[173] R.C.M. 801(c); Mil. R. Evid. 614.

[174] United States v. Jones, 26 M. J. 197, (C.M.A. 1988); United States v. Lampani, 14 M.J. 22 (C.M.A. 1982); United States v. Parker, 21 C.M.R. 308 (C.M.A. 1956).

[175] *Lampani*, 14 M.J. at 26.

[176] 32 M.J. 636 (A.C.M.R. 1991).

[177] *Id.* at 637. The instruction appears in the opinion. *See id.*

[178] *Id.* at 638.

Sentencing

Over the past year, appellate courts have rendered several decisions defining the instructional responsibilities of trial judges to control the impact of an accused's uncharged misconduct on sentencing. In one case,[179] the military judge permitted the trial counsel to ask a defense witness on cross-examination if the witness knew of any other misconduct by the accused. The witness's answer was not specific, but it revealed that the accused had committed an act of uncharged misconduct.[180] The appellate court found the question and the answer improper. It opined, however, that had the judge instructed the members to disregard the question and the answer, no prejudice would have resulted.[181]

Even when the Government properly mentions an accused's uncharged misconduct during sentencing, the judge may have an instructional responsibility. In *United States v. White*[182] the trial counsel asked a defense witness on cross-examination if his opinion of the accused would be different if he knew the accused had tested positive for cocaine in a urinalysis. The witness answered that he did not know.[183] The trial counsel later argued that the accused had tested positive for cocaine use.[184] This argument clearly was improper because the Government never offered any evidence to prove that the accused tested positive for the illegal drug. The court found the military judge erred by not interrupting the argument sua sponte and giving a proper instruction.[185]

Almost one quarter of a century ago,[186] the Court of Military Appeals declared that law officers—now known as military judges—must "delineate the matters which the court-martial should consider in its deliberations" on sentencing.[187] Moreover, a law officer had "to tailor his [or her] instructions on the sentence to the law and the evidence."[188] Two cases in the past year considered the success with which military judges have adhered to this early guidance. In *United States v. Kirkpatrick*,[189] the accused, a sergeant first class, was convicted of several offenses, including the wrongful use of marijuana.[190] In his sentencing instructions, the military judge urged the members to consider the extensive time and effort the Army expends in combatting illegal drug use and emphasized that the use of marijuana by a senior noncommissioned officer violated an express Army policy.[191] On appeal, the court held that the judge's reference to the Army drug policy was prejudicial error.[192] In *United States v. Romey*,[193] however, the court found proper an instruction that the members should consider the nature and the extent of any psychological or mental injuries suffered by the victim—the

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[179] United States v. Bright, 32 M.J. 679 (A.F.C.M.R. 1991).

[180] The witness answered, "I know of something else she's done but it has nothing to do with the post office directly." *Id.* at 680.

[181] *Id.* at 681 n.3 (citing United States v. Brooks, 26 M.J. 28 (C.M.A. 1988)). In United States v. Bartoletti, 32 M.J. 419 (C.M.A. 1991) the court held that the standard instruction that "you must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty," which appears in the *Military Judges' Benchbook*, was sufficient to overcome any prejudice resulting from the erroneous admission of statistics relating to similar crimes on the military installation. *Id.* at 422; *see also* Benchbook, para. 2-37.

[182] 33 M.J. 555 (A.C.M.R. 1991).

[183] *Id.* at 557. The pertinent part of the cross-examination appears in the opinion. *See id.*

[184] The pertinent part of the argument appears in the opinion. *Id.* at 558.

[185] *Id.*; *accord* United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980) ("[a]lso of concern to us is the failure of the military judge to interrupt the trial counsel in the midst of his improper argument and to instruct the court on the spot to disregard it"); United States v. Knickerbocker 2 M.J. 128, 129 (C.M.A. 1977) ("At the very least the judge should have interrupted the trial counsel before he ran the full course of his impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks."); *see also* United States v. Williams, 23 M.J. 525 (A.C.M.R. 1985); United States v. Young, 8 M.J. 676 (A.C.M.R. 1980); United States v. Mills, 7 M.J. 664 (A.C.M.R. 1979).

[186] United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967).

[187] *Id.* at 75.

[188] *Id.*

[189] 33 M.J. 132 (C.M.A. 1991).

[190] *Id.* *See generally* UCMJ art. 112a (wrongful use of a controlled substance).

[191] *See Kirkpatrick*, 33 M.J. at 133 (setting forth the instruction verbatim).

[192] *Id.* at 133-34. Courts consistently have condemned improper courtroom references to service policies. *See, e.g.*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Walk, 26 M.J 665 (A.F.C.M.R. 1987). The instruction in *Kirkpatrick* was improper not only because of its content, but also because of its apparent abandonment of judicial fairness and impartiality. Compare United States v. Grandy, 11 M.J. 270, 277 (C.M.A. 1981), in which the court, addressing a different issue, stated,

> In like manner, our reading of the comments of the military judge suggests that, while he was attempting to comply with the principle that instructions be tailored to the evidence he failed to do so in an even-handed manner. Indeed, in some respects the marshaling of evidence in favor of the Government would do credit to a prosecutor's argument.

[193] 32 M.J. 180 (C.M.A. 1991).

accused's minor stepdaughter, whom the accused had abused sexually.[194]

In *United States v. Davidson*[195] the Court of Military Appeals held that a military judge erred by failing to instruct the members that pretrial confinement was a matter in mitigation that they should consider in determining a sentence.[196] In *United States v. Allen*[197] the court held that the accused was entitled to day-for-day credit applied against the sentence to confinement for any pretrial confinement. Former Chief Judge Everett, concurring in that decision, proposed that the members be instructed specifically how pretrial confinement is treated for sentencing purposes.[198] The Army[199] and Air Force[200] Courts of Military Review subsequently accepted the Chief Judge's proposal and made this instruction mandatory for their services.[201]

The latest case to address this issue is *United States v. Balboa*.[202] The military judge advised the members that Balboa would receive day-for-day credit for sixty-eight days he had spent in pretrial confinement. The members adjudged a sentence that included confinement for sixty-eight days plus twelve months. On appeal, the accused cited the confinement credit instruction as error, claiming that it had encouraged the members to adjudge a greater sentence than they would have rendered had the instruction not been given. The court disagreed. Holding that the instruction did not invite the members to adjudge excessive confinement, it stated that the instruction was consistent with the interests of reliability and truthful sentencing. Finally, it opined that the members are not required to be ignorant of the administrative credit.

In contrast to *Balboa*—in which the court considered the propriety of an instruction given by the trial judge—*United States v. Goodwin*[203] addressed the effect of an instruction that a trial judge failed to give. The standard instruction on the effects of punitive discharges states that a punitive discharge deprives the recipient of substantially all service and veterans' benefits.[204] The Court of Military Appeals, however, has declared that the loss of benefits incident to the punitive discharge applies only to the term of enlistment to which that discharge relates.[205] Because Goodwin had served prior enlistments and previously had been discharged honorably, a punitive discharge would not deprive him of all benefits. Accordingly, the court concluded that an instruction indicating total deprivation of benefits would have been incorrect and held that the trial judge's omission of the instruction was not erroneous.

Although *Goodwin* demonstrates that, under some circumstances, a military judge may forego delivering the punitive discharge instruction, judges should not apply *Goodwin* too broadly. When a military judge omits the punitive discharge instruction entirely, the members do not learn the particular adverse effects that a punitive discharge would have on the accused's present enlistment. A military judge's best course may be to deliver the standard instruction, augmented with a statement that the loss of benefits generally is limited to the term of enlistment to which the discharge applies. By combining this information in a single instruction, a judge not only will alert the members to the severe consequences of a punitive discharge, but also will apprise them of the limits of those consequences.[206]

Several instructional issues have arisen from murder cases. In one case involving first-degree murder,[207] the Tenth Circuit Court of Appeals held that a military judge should have instructed a court-martial that at least three-quarters of

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[194] *Id.* at 184. The instruction appears in the opinion. *Id.*

[195] 14 M.J. 81 (C.M.A. 1982).

[196] *Id.* at 85; *see also id.* at 85 n.9 (setting forth the challenged instruction).

[197] 17 M.J. 126 (C.M.A. 1984).

[198] United States v. Allen, 17 M.J. 126, 130 (C.M.A. 1984) (Everett, C.J., concurring).

[199] United States v . Stark, 19 M.J. 519 (A.C.M.R. 1984), *aff'd*, 24 M.J. 381 (C.M.A. 1987).

[200] United States v. Noonan, 21 M.J. 763 (A.F.C.M.R. 1986).

[201] In *Stark*, the Army court provided an acceptable instruction to implement its guidance. *See* 19 M.J. at 527 n.3.

[202] 33 M.J. 304 (C.M.A. 1991).

[203] 33 M.J. 18 (C.M.A. 1991).

[204] *See* Benchbook, para. 2-37.

[205] Waller v. Swift, 30 M.J. 139 (C.M.A. 1989).

[206] *See* United States v. Goodwin, 30 M.J. 989 , 991 (A.C.M.R. 1990). The standard instruction on the effects of a punitive discharge provides, in pertinent part, "A (dishonorable or) bad-conduct discharge deprives one of substantially all benefits administered by the . . . [Department of Veterans' Affairs] . . . and the Arm establishment." Benchbook para. 2-37. By further instructing that "this deprivation generally applies only to the term of enlistment to which the discharg applies," the military judge may ensure that the members are advised properly of the effects of a punitive discharge and its limitations. The Air Force, however, ha proposed a different instruction. *See* Trial Judiciary Memorandum 90-4, Office of the Chief Trial Judge, U.S. Army, 11 Sept. 1990.

[207] Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990).

the members must concur in a sentence that includes life imprisonment or confinement for more than ten years.[208] The Tenth Circuit reached this decision even though the members in the instant case had no alternative but to adjudge a sentence of life imprisonment or death once they convicted the accused of premeditated murder.[209] In another decision,[210] the Court of Military Appeals remanded a capital murder case to the Court of Military Review to determine, *inter alia*, whether

> (1) . . . instructions [that] state that the death sentence may not be adjudged unless the members find that any and all extenuating and mitigating circumstances are substantially outweighed by aggravating factors sufficiently inform the members that this finding must be unanimous; and
>
> (2) . . . the members [must] be instructed that even though they unanimously find one or more aggravating factors and that the aggravating factors meet the test of substantially outweighing the extenuating factors, they still have the absolute discretion to decline to impose the death penalty.[211]

[208] *Id.* at 1262; *see also* UCMJ, art. 52(b)(2). *See generally* Trial Judge Memorandum 91-2, Office of the Chief Trial Judge, U.S. Army, 5 Mar. 1991, subject: Voting Procedures for Mandatory Sentences.

[209] *See* UCMJ, art. 118(1). Article 118 provides, in pertinent part, "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he [or she] has a premeditated design to kill . . . shall suffer death or imprisonment for life as a court-martial may direct. *Id.*

In the instant case, the court-martial convicted the accused of premeditated murder and felony murder. *Dodson*, 917 F.2d at 1251. The accused was sentenced to life imprisonment when the members did not vote unanimously to sentence him to death. *Id.* The Court of Military Appeals later dismissed the felony murder specification as multiplicitous and set aside the finding of guilty on that offense. *See* United States v. Dodson, 21 M.J. 237 (C.M.A.), *cert. denied*, 479 U.S. 1006 (1986).

[210] United States v. Curtis, 33 M.J. 101 (C.M.A. 1991).

[211] *Id.* at 107 n.8.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Satisfying All Elements of Adultery: Was the Act Service-Discrediting?

Even if an accused has engaged in extramarital sexual intercourse, the offense of adultery under the Uniform Code of Military Justice (UCMJ)[1] is not complete unless the accused's conduct is service-discrediting.[2] Some offenses, by their very natures, are service-discrediting; however, a panel of the Army Court of Military Review recently ruled that adultery is not among them. In *United States v. Perez*, the court held that by neglecting to establish that the accused's private, consensual acts of extramarital sex were service-discrediting, the Government failed to prove that these acts violated UCMJ article 134.[3]

The accused was infected with the Human Immunodeficiency Virus (HIV). Before contracting HIV, however, he had undergone a vasectomy, which arguably

[1] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1988) [hereinafter UCMJ].

[2] For example, negligent homicide and indecent acts with a child are inherently service-discrediting and do not require independent proof of that element. United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Scott, 21 M.J. 345 (C.M.A. 1986).

[3] 33 M.J. 1050 (A.C.M.R. 1991)

rendered him incapable of transmitting the disease.[4] On three occasions between November 1989 and January 1990 he engaged in private, consensual sexual intercourse with Ms. *E.* Perez first met *E* in 1989, when she was hired as a civilian clerk typist in the office where he worked. She worked with the accused that year from February until August, when she started a new job in another office on post.

In late November 1989, the accused approached *E* and asked her for a date. He told her that he was legally separated from his wife and that his divorce was pending. The accused, however, failed to tell *E* that he had tested positive for the HIV virus. From November to January, the accused and *E* had three dates, all of which culminated in consensual, unprotected sexual intercourse in *E*'s off-post apartment. Consequently, the accused later was charged with aggravated assault and adultery.[5]

In setting aside the accused's adultery conviction, the court noted that the Government must prove by direct evidence, or by inference, that the accused's conduct was prejudicial to good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces. The court was convinced that the consensual, private, off-post sexual liaison between the accused and *E* was not directly and palpably prejudicial to good order and discipline. It observed that *E* had known that the accused was married, that the two lovers did not have a work relationship, and that the Government had failed to show that the accused could transmit HIV through sexual intercourse.[6] The court also emphasized that one provision in the separation agreement between the accused and his wife expressly allowed each party to "conduct . . . personal affairs without interfering with each other in any way, just as if [they] were not married."[7] This provision, it concluded, essentially permitted both spouses to engage in sexual intercourse outside the marriage "without violating the sanctity of the marriage contract."[8]

Because most commands either prosecute adultery rarely, or include it on a charge sheet only as a catch-all offense underlying a more serious sex crime, trial defense counsel may overlook the importance of the element of service-discrediting conduct. As the Manual for Courts-Martial points out:

> Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some direct or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is direct and palpable.[9]

Because the essence of the criminality of adultery is its repugnance to the morals of society and to the institution of marriage, the requisite prejudice must relate to these two concepts.[10] Accordingly, when an accused is separated from his or her spouse, the Government is hard pressed to argue that the commission of adultery is inherently prejudicial, absent aggravating circumstances.[11] The execution of a simple separation agreement also may erode the illegality of an extramarital affair.

When confronted with circumstances similar to those in *Perez*, a defense counsel properly may move to dismiss the charge or may move for a finding of not guilty. *Perez* shows that simply proving that the accused engaged in extramarital sexual intercourse is not sufficient to establish prejudice. Should a defense counsel be forced to proceed to a trial on the merits, however, he or she should ensure that the military judge tailors the instructions to emphasize to the panel members factors that contradict the Government's allegations that the accused's acts were service discrediting.[12] Captain Mayer.

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[4] At trial, the Government's expert witness testified that HIV is carried in cellular material, stating under cross-examination that "the likelihood of the [HIV] infection being spread by genital secretions is related to the number of cellular elements [suspended in the] fluid." *Id.* at 1052. A vasectomy largely prevents cellular material from being carried in the ejaculate and, therefore, essentially eradicates the cellular component of the semen. *See id.* The defense counsel called another expert witness to develop this theory further. Commenting on the accused's vasectomy and noting that the accused had not infected his wife or his other sexual partners with HIV, this expert concluded that "Perez [could] not transmit the virus because he [had] an acellular semen specimen." *Id.* at 1053. The Government offered no evidence to rebut this conclusion. *See id.*

[5] The military judge, sitting as a special court-martial, ultimately found the accused guilty of the adultery and of assault consummated by a battery. *See id.* at 1051.

[6] *Id.* at 1054.

[7] *Id.*

[8] *Id.*

[9] Manual for Courts-Martial, United States, 1984, Part IV, para. 60c(2)(a) [hereinafter MCM, 1984].

[10] *See* United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Ambalada, 1 M.J. 1132 (N.M.C.M.R. 1977).

[11] An example of aggravating circumstances would be a noncommissioned officer's illicit affair with a subordinate's spouse while the subordinate is on duty or in the field.

[12] *Perez* indicates that significant factors may include consent, privacy, the existence of a separation agreement, the lack of a work relationship, and the paramour's knowledge of the accused's martial status and marital discord. *See* 33 M.J. at 1054. Even when these factors are present, however, counsel should take care to consider where the intercourse occurred. That an accused's misconduct may be found service-discrediting if it is open and notorious is well established. *See, e.g.*, United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); *cf.* United States v. Blake, 33 M.J. 923, 926 (A.C.M.R. 1991) (a consensual sexual act is not private and may be found to be indecent if a substantial risk exists that it can be viewed by others).

Sloppy Staff Judge Advocate's Recommendation May Result in Plain Error

In *United States v. Jones*,[13] the Army Court of Military Review found that plain error occurred when a staff judge advocate's (SJA's) recommendation related inaccurate information to the convening authority. In this recommendation, the SJA inadvertently mislabeled one charge and failed to state that the trial judge had ruled that the two charges of which the accused actually was convicted were multiplicious for sentencing.

Jones pleaded guilty to larceny and housebreaking. Both charges arose out of a single incident, in which he had entered the barracks room of another soldier and had stolen some jewelry. Upon defense motion, the military judge found the two charges multiplicious for sentencing.

The posttrial recommendation erroneously stated that, pursuant to his pleas, the accused had been found guilty of larceny and attempted larceny. The recommendation also noted that the accused was single, although he actually had three dependents. Nowhere in the recommendation did the SJA mention that the military judge had found the two correct charges multiplicious.

After being served with a copy of the recommendation, the trial defense counsel prepared a posttrial submission[14] in which he pointed out that the military judge had found the two correct charges multiplicious for sentencing and that the accused was married and had two young sons. The defense counsel, however, did not argue in this submission that the SJA's recommendation was erroneous. After reviewing the defense posttrial submission, the convening authority wrote "Noted" on the second page of the document, then dated and signed it.

On appeal, the Army Court of Military Review stated that it could not "determine whether the convening authority [had] acted on . . . the erroneous facts presented by the staff judge advocate or [on] the correct facts presented by the trial defense counsel."[15] In the absence of evidence to the contrary, the court concluded that plain error had occurred. Normally, a trial defense counsel's failure to comment on misinformation in the recommendation would waive this issue on review.[16] In the instant case, however, the court's finding of plain error precluded waiver.[17]

Nevertheless, the Army court did not stop with a finding of plain error. It went one step further, holding that, even in the absence of plain error, the defense counsel's posttrial submission would have been sufficient to avoid waiver. The court characterized the defense submission as a petition for clemency under Rule for Courts-Martial (R.C.M.) 1105, rather than a response to the SJA's recommendation under R.C.M. 1106. It also remarked that, although the defense counsel did not state specifically that he was correcting the recommendation, his submission was adequate to alert the SJA that the recommendation was erroneous.[18] The Army court set aside the action and returned the record for a new recommendation and action by the same convening authority.

One might ask how a client would benefit from having an action set aside. An accused actually could benefit in two ways. First, the accused could benefit financially. Forfeitures of pay and allowances ordered as part of an accused's sentence do not become effective until the convening authority acts.[19] If the convening authority's action is set aside, the accused will receive back pay—including all pay held in accrual from the date the sentence is announced if the accused was placed in confinement.[20] Second, a possibility always exists that the convening authority will act more favorably on the accused's sentence when presented with correct information by the SJA.

The Court of Military Appeals has stressed the importance of the SJA's recommendation, stating that "it is at the convening authority's level that an accused has [the] best opportunity to receive clemency."[21] An approved sentence cannot be affirmed if an SJA's recommendation has misled a convening authority on substantial issues of fact or law.[22]

In *United States v. Ford*[23] the Navy-Marine Court of Military Review also found plain error in an erroneous SJA's recommendation. In *Ford*, the posttrial recommendation stated that the accused had only four months of prior service, when he actually had served four years before receiving an honorable discharge. The recommendation also failed to mention three awards that the accused had received.

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[13] CM 9101951 (A.C.M.R. 16 Jan. 1991) (unpub.).

[14] *See generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105 [hereinafter R.C.M.].

[15] *Jones*, slip op. at 2.

[16] *See* United States v. Lohrman, 26 M.J. 610, 612 (A.C.M.R. 1988).

[17] *See* R.C.M. 1106(f)(6).

[18] *Jones*, slip op. at 2. The Court noted that, under R.C.M. 1106(f)(4), the defense counsel "may comment on any other matter" and that no "magic words" are required. *Id.*

[19] Rule for Courts-Martial 1113(b) authorizes a convening authority to execute all portions of a sentence—including forfeitures, but not including certain punitive discharges and dismissals listed in subsection (c) of the same rule—when he or she signs the action.

[20] If the accused's term of enlistment expired during this period, however, his or her pay would stop accordingly.

[21] *See* United States v. Goode, 1 M.J. 3, 5 (C.M.A. 1975).

[22] *Lohrman*, 26 M. J. at 611 (citing United States v. Dowell, 15 M.J. 351, 353 (C.M.A. 1983)).

[23] 33 M.J. 1046 (N.M.C.M.R. 1991).

A trial defense counsel should read the SJA's recommendation carefully and should object to any errors it may contain. The defense counsel also may consider including these objections in the accused's petition for clemency. Plain error remains a difficult hurdle to overcome and defense counsel must not assume that an error automatically will be corrected on appeal. Captain Smith.

The Providence Inquiry: Instructions Must Be Correct

The providence inquiry in the military justice system is unique in American jurisprudence. It was designed to keep guilty pleas above reproach by ensuring that each accused's decision to plead guilty is open, knowing, and factually supported.[24] At a providence inquiry, the accused, testifying under oath, not only must admit that he or she actually is guilty while establishing a factual predicate for the plea, but also must demonstrate that he or she understands the law as it relates to the facts of his or her case and is cognizant of all available defenses.[25] The providence inquiry, which can be an arduous gauntlet both for the accused and for counsel, is an unmistakable hallmark of the paternalistic military justice system.[26] The ever-critical question of "who must prove what" is not relaxed by the accused's decision to plead guilty.[27]

In *United States v. Lilly*, a case that has wound through the appellate process for eight years, the Army Court of Military Review accentuated the importance of correct instructions during a providence inquiry.[28] In July 1983, Lilly was convicted of rape, attempted rape, burglary, and indecent assault. Along with other punishments, he was sentenced to thirty years' confinement. Although the defense counsel had Lilly examined by psychiatric professionals before the court-martial began, the defense counsel presented no evidence at trial on the issues of Lilly's mental capacity or mental responsibility. After his conviction, however, Lilly's mental status became more problematic.[29] Over the next several years, various mental health experts compiled a huge body of psychiatric evidence on him. The Court of Military Appeals finally remanded the case to the Army Court of Military Review in February 1988.[30] The Army court ordered a rehearing on the issues of mental responsibility and mental capacity in February 1990.[31] Three months later, a military judge conducted the rehearing. The defense counsel vigorously litigated the issue of the accused's mental capacity to stand trial. Nevertheless, the military judge found "beyond a reasonable doubt" that the accused had the present mental capacity to stand trial.[32] The accused then pleaded guilty thereby obtaining the benefit of a pretrial agreement that limited his confinement to time served.

The military judge conducted a exhaustive providence inquiry. Regarding the defense of lack of mental responsibility, the military judge advised the accused that, in considering that defense, "the court would have to determine beyond a reasonable doubt, . . . whether . . . [Lilly] lacked substantial capacity to appreciate the criminality of [his conduct." The judge added, "I want you to understand that if this court were to find beyond a reasonable doubt that . . . you lacked the mental responsibility, then you cannot . . . be convicted of . . . these offenses."[33] When instructing the

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[24] *See Hearings Before House Armed Services Comm. on H.R. 2498*, 81st Cong., 1st Sess. 1052-57 (1950).

[25] *See* UCMJ art. 45(a). Article 45(a) provides:

> If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he pleaded not guilty.

[26] *See* GAD Note, *The Providence Inquiry: Trial Counsel's Role*, The Army Lawyer, June 1988, at 43 (citing United States v. Parker, 10 M.J. 849, 8 (N.M.C.M.R. 1981)).

[27] *See* United States v. DeVore, 46 C.M.R. 612, 613 (A.C.M.R. 1972) (holding a guilty plea improvident when, at the providence inquiry, the military jud inaccurately advised the accused about burdens of proof).

[28] 34 M.J. 670 (A.C.M.R. 1992) (setting aside the findings of guilty and the sentence); *see also* United States v. Lilly, CM 44919 (A.C.M.R. 21 Aug. 19 (unpub.), *rev'd*, 25 M.J. 403 (C.M.A. 1988).

[29] After sentencing, Lilly was returned to the Mannheim confinement facility. Enroute, he escaped and allegedly committed an indecent assault on a 13-year- German girl. He was reapprehended later that day, but never was tried for these offenses because the convening authority determined that Lilly was not menta responsible.

[30] United States v. Lilly, 25 M.J. 403 (C.M.A. 1988).

[31] United States v. Lilly, CM 44919 (A.C.M.R. 9 Feb. 1990) (unpub.).

[32] *Lilly* apparently is the last case on appeal to fall within the ambit of the 1969 Manual for Courts-Martial. *See generally* Manual for Courts-Martial, United Stat 1969 (Rev. ed.) [hereinafter MCM, 1969]. Paragraph 122 of the 1969 Manual provides that, once the issue of sanity is raised, the Government must prove "beyo a reasonable doubt" that the accused has the present capacity to stand trial. This was the standard the military judge employed in *Lilly*. The 1984 Manual Courts-Martial, as originally promulgated, reduced the Government's burden to proof by a "preponderance of the evidence." *See* R.C.M. 909(c)(2) (amen 1986). Executive Order 12,550 amended the 1984 Manual, shifting to the defense the burden of proving the accused's lack of mental capacity by a "preponderan of the evidence." *See* 51 Fed. Reg. 4967 (1986); R.C.M. 909(c)(2) (C2, 15 May 1986).

[33] Both the 1969 Manual and the original 1984 Manual required the Government to prove "beyond a reasonable doubt" that an accused was mentally responsi *See* MCM, 1969, para. 120(b); R.C.M. 909(b), 916(k)(3)(c) (amended 1986). The test contained both a volitional and a cognitive prong, and an accused co escape responsibility if the Government failed to establish either prong. *See* MCM, 1969, para. 120(b); R.C.M. 909(b), 916(k)(3)(c) (amended 1986). Execut Order 12,550 amended R.C.M. 909 and R.C.M. 916, changing the burden of proof to "clear and convincing," deleting the "volitional prong," and shifting burden to the defense. *See* 51 Fed. Reg. 4967 (1986); R.C.M. 909(b), 916(k)(3)(c) (C2, 15 May 1986).

accused on partial mental responsibility, the military judge remarked that the accused might claim this defense "even were a court not to believe beyond a reasonable doubt that you lacked mental responsibility at the time of the offense . . . ."

The military judge evidently intended to outline the standard set forth in the 1969 Manual for Courts-Martial. The 1969 Manual placed on the Government the burden of proving an accused's mental responsibility "beyond a reasonable doubt." The court, however, found that the judge actually advised Lilly that an *accused* must meet this standard at trial to prove his or her lack of mental responsibility.

Thus interpreted, the judge's advice was clearly erroneous. As the court pointed out, the rules of the 1969 Manual governed the proceedings in *Lilly* whether the legal changes embodied in the 1984 Manual for Courts-Martial were substantive or procedural. A change that shifts the burden of proof arguably is substantive. It cannot be applied retroactively without violating the prohibition on ex post facto punishment.[34] In the instant case, a procedural change is similarly ineffective, albeit for different reasons. Rule for Courts-Martial 810 requires a military judge to apply the same procedural law at a rehearing that was applied at the original trial. In *Lilly*, this would mandate use of the 1969 Manual. In any event, neither Manual ever required an accused to establish his or her lack of mental responsibility beyond a reasonable doubt.

On appeal, the Government advanced the same argument it had presented years earlier in *United States v. DeVore*.[35] It contended that the guilty plea was provident because the accused had admitted his guilt and because the evidence against him was overwhelming. As in *DeVore*, this argument failed to sway the court. Indeed, relying expressly on *DeVore*, the Army court held that an erroneous instruction on the allocation of a burden of proof destroys the providence of a guilty plea. Although *DeVore* is a rather old and obscure case, the court's willingness to rely upon it in *Lilly* is not surprising. The Army court has emphasized again and again that a guilty plea must be an "intentional relinquishment or abandonment of a known right or privilege."[36] Even if an accused admits every element of an offense, his or her plea "cannot be said to be voluntary unless the defendant possesses an understanding of the law in relation to [the] facts."[37] That an accused's understanding of available defenses is an essential precondition to providence is a well-established rule of military law.[38] When a military judge grossly misinforms an accused of the law applicable to a defense supported by eight years' accumulation of psychiatric evidence, the accused's guilty plea hardly can be described as fully informed, knowing, or voluntary.

Lilly demonstrates the need for trial counsel and defense counsel to pay close attention during providence inquiries. The same instructional errors that plague contested courts-martial can appear in a simple guilty plea. Counsel must not let the familiar drone of the providence inquiry lull them into a false sense that all is well. Captain Lawlor.

United States v. Hall: The Army Court of Military Review's Stand Against Consensual Heterosexual Sodomy

In *United States v. Hall*,[39] the Army Court of Military Review upheld the constitutionality of UCMJ article 125 as it applies to heterosexual, noncommercial, private acts of sodomy[40] between consenting adults. *Hall* contradicts the recent Air Force Court of Military Review decision in *United States v. Fagg*.[41] In *Fagg*, the Air Force court reversed the accused's conviction for sodomy, holding that the constitutional right of privacy extends to heterosexual, noncommercial, private acts of oral sex between consenting adults.[42] The Judge Advocate General of the Air Force certified the privacy issue in *Fagg* for review by the Court of Military Appeals, which heard argument on 5 December 1991. The decision by the Court of Military Appeals should resolve the conflict among the services. Moreover, a reversal of the Air Force court's decision on the privacy issue could present an issue worthy of Supreme Court review.

The accused in *Fagg* admitted to engaging in oral sex with his girlfriend on many occasions.[43] The accused in *Hall*

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[34] *See* United States v. Alexander, 805 F.2d 1458, 1460 n.2 (11th Cir. 1986); United States v. Mest, 789 F.2d 1069, 1073 n.3 (4th Cir. 1986) (Government conceded that ex post facto prohibitions precluded retroactive application of shift in the burden of proof in the sanity defense).

[35] 46 C.M.R. 612, 613 (A.C.M.R. 1972).

[36] United States v. Martin, 4 M.J. 852, 858 (A.C.M.R. 1978); *see also* United States v. Woods, 25 M.J. 916 (A.C.M.R. 1988), *petition for review denied*, 28 M.J. 345 (C.M.A. 1989).

[37] *Martin*, 4 M.J. at 858.

[38] *See* United States v. Barrois, 47 C.M.R. 169, 171 (A.C.M.R. 1973).

[39] United States v. Hall, CM 9001937 (A.C.M.R. 15 Nov. 1991).

[40] UCMJ art. 125.

[41] 33 M.J. 618 (A.F.C.M.R. 1991).

[42] For an analysis of the Air Force court opinion in *Fagg*, see DAD Note, *Consensual Heterosexual Sodomy: A Constitutionally Protected Zone of Privacy?*, The Army Lawyer, Oct. 1991, at 35.

[43] *Fagg*, 33 M.J. at 618.

denied that the charged heterosexual sodomy occurred, but was convicted nonetheless. Captain Hall had videotaped himself at home having extramarital sex on two occasions, each time with a different woman. Captain Hall's wife discovered a tape that showed the appellant having sex with the first woman, first in the "missionary position," then "by means of entry from the rear."[44] Captain Hall pleaded guilty to the two charged specifications of adultery and of videotaping those acts in violation of article 133.[45] He pleaded not guilty to the charged specification of sodomy.[46] Captain Hall was convicted as charged, and sentenced to dismissal and forfeiture of $1000 pay per month for three months.

On appeal, the Army court considered: (1) whether the adultery and sodomy specifications were multiplicious for sentencing; (2) whether the record supported a finding sodomy; and (3) if the Army court did find sufficient evidence of sodomy, whether—in light of *Fagg*—article 125 is unconstitutional.[47] The court ruled succinctly that the defense counsel had waived the multiplicity issue by failing to raise it at trial; that the evidence of sodomy was legally and factually sufficient; and that, contrary to the Air Force court's ruling in *Fagg*, article 125 is constitutional.[48]

The lengthiest part of the *Hall* opinion addresses the constitutionality of article 125, "which prohibits—without exception of any nature whatsoever—sodomy."[49] The Army court, however, first tried to distinguish *Hall* from *Fagg*, emphasizing distinctions that appear irrelevant in the context of an article 125 offense. For example, the court noted that *Fagg* involved unmarried adults participating in voluntary acts, and stated that, because Captain Hall and his partner both were married to other soldiers, the accused's reliance upon *Fagg* and its rationale was misplaced.[50] Although that distinction certainly is relevant in a prosecution for adultery[51] or for conduct unbecoming an officer,[52] an accused's marital status is irrelevant in terms of sodomy.[53] The distinction seems even less relevant when one evaluates the application of the constitutional right of privacy to an alleged act of consensual heterosexual sodomy.

The Army court also noted that *Fagg* had involved purely private conduct, while Captain Hall had recorded his sexual activity on a videotape. The court averred that this recording of the charged acts rendered their "private" nature disputable.[54] As the court correctly stated in its factual summary, Captain Hall's wife found the videotape in their quarters.[55] No evidence, however, suggested that Captain Hall ever replayed the videotape or that it ever was viewed by any third party. Even if Captain Hall had replayed the videotape while alone in the privacy of his own home, this distinction from *Fagg* seems irrelevant.

The Army court declared that it could have dismissed the privacy issue on waiver grounds, as it dismissed the multiplicity issue, because the defense counsel did not raise this issue at trial.[56] Nevertheless, the court addressed the privacy issue at length, apparently intending to send a loud, clear signal that the court disagrees with *Fagg*. Indeed, the Army court clearly expressed its disagreement with *Fagg* in its opening remarks about the right to privacy and article 125, stating:

> The Air Force Court of Military Review held in Fagg that the constitutional right of privacy extends to heterosexual, noncommercial, private acts of oral sex between consenting adults . . . . In the view of that court at least, to the extent that Article 125 purports to include such acts within its prohibitive ambit, it is unconstitutional. The appellant asks us to so hold, too. We disagree; the balance of this opinion tells why. [57]

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[44] *Hall*, slip op. at 2.

[45] *Id. See generally* UCMJ art. 133 (conduct unbecoming an officer).

[46] The only Government evidence of sodomy was the videotape—which arguably was inconclusive on this issue because the camera angle did not allow viewers to see the actual method of penetration—and the testimony of Captain Hall's partner, who admitted that she had vaginal intercourse with Captain Hall, but denied that he had entered her anally. *See Hall*, slip op. at 2. A doctor testified at an article 32(b) hearing that he could not determine from the videotape whether the intercourse had been anal or vaginal.

[47] *Hall*, slip op. at 1.

[48] *Id.*, slip op. at 2-3.

[49] *Id.*, slip op. at 2.

[50] *Id.*, slip op. at 4.

[51] UCMJ art. 134.

[52] UCMJ art. 133.

[53] UCMJ art. 125.

[54] *Hall*, slip op. at 4-5.

[55] *Id.*, slip op. at 2.

[56] *Id.*, slip op. at 5.

[57] *Id.*, slip op. at 3 (citation omitted).

In addressing the constitutionality of article 125, *Hall* discusses the law of privacy, providing a historical account of sodomy going back to biblical times. It also examines article 125 and the legislative and judicial treatment of sodomy in both the civilian and military environments. The Army court rationalized its decision to uphold the constitutionality of article 125 on the basis of existing case law. Even so, the court's statement that "[w]hat is certain to us is that our court and, more importantly, the United States Court of Military Appeals, have spoken recently, clearly, and dispositively,"[58] certainly appears debatable after one reviews the cases upon which the court relied.

In its opinion, the court relied heavily on *United States v. Scoby*,[59] a case involving homosexual sodomy in a barracks full of soldiers who supposedly were asleep, and *United States v. Jones*,[60] a case that involved heterosexual sodomy that the accused committed on the victim during a violent aggravated assault. The *Hall* court seemed to question whether consent even was an issue in *Jones*.[61] The court apparently drew a broad inference from cases involving homosexual sodomy, fraternization, conduct unbecoming an officer, rape, forcible sodomy, and assault by engaging in heterosexual conduct when carrying HIV. It relied on no decisions that were factually similar to *Hall* and *Fagg*, or that addressed the same issues.

In *Hall* the court essentially concluded that, until Congress decriminalizes the conduct proscribed by article 125, the court is bound by prior precedent.[62] The *Hall* opinion suggests that the Air Force Court of Military Review went too far in *Fagg* because no precedent for its rationale exists. Ironically, the *Hall* court itself may have gone too far by embarking on a broad review of the constitutionality of article 125, rather than focusing narrowly on the issue presented, as did the *Fagg* court. The issues raised in both cases are fact-specific and a narrow interpretation of article 125 based on those facts arguably would be more likely to survive judicial scrutiny.

The decision of the Court of Military Appeals in *Fagg* could affect article 125 significantly. If the court affirms *Fagg*, the Army court will have to reconsider its position. If the Court of Military Appeals reverses *Fagg*, the Air Force defense appellant branch intends to petition the Supreme Court for certiorari. Arguably, as article 125 currently stands—prohibiting sodomy even between heterosexual married adults—public pressure, congressional action, or a Supreme Court decision soon may lead to its amendment. Captain Heaton.

Clerk of Court Note

Court-Martial Processing Times

The table below shows the Army-wide average processing times for general courts-martial and bad-conduct discharge special courts-martial for the first quarter of fiscal year (FY) 1992. Averages for the last two quarters of FY 1991 are shown for comparison.

General Courts-Martial

	FY 91/3d Q	FY 91/4th Q	FY 92/1st Q
Records received by Clerk of Court	309	255	265
Days from charging or restraint to sentence	44	48	52
Days from sentence to action	63	66	75
Days from action to dispatch	6	8	7
Days from dispatch to receipt by the Clerk	11	10	10

BCD Special Courts-Martial

	FY 91/3d Q	FY 91/4th Q	FY 92/1st Q
Records received by Clerk of Court	99	94	78
Days from charging or restraint to sentence	31	36	46
Days from sentence to action	53	58	63
Days from action to dispatch	7	7	6
Days from dispatch to receipt by the Clerk	10	11	9

[58] *Id.*, slip op. at 4.

[59] 5 M.J. 160 (C.M.A. 1978).

[60] 14 M.J. 1008 (A.C.M.R. 1982).

[61] *Hall*, slip op. at 8.

[62] *Id.*, slip op. at 15.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Multiplicity— Charting the Chaos

The mere mention of the word "multiplicity" vexes many military counsel and military judges. No one in the military judicial system seems able to determine definitely when offenses are multiplicious for charging, findings, or sentencing. Even the appellate courts have acknowledged that the law on multiplicity is in a state of confusion.[1] An assertion advanced by one appellate court nearly five years ago remains an appropriate summation of multiplicity:

> Although military "legal purists" may wince at the thought, it appears that our current military rules of multiplicity are a curious blend of military due process, equity, and policy considerations. Somehow, through this maze, our appellate courts, with the help of an overall enlightened "field" legal practice, are basically reaching fundamentally fair dispositions of multiplicity issues.[2]

In an attempt to enlighten legal practitioners in the field and to make multiplicity practice more manageable for counsel and judges, the author has prepared the following "Multiplicity Chart." This chart should help counsel and judges to review the current state of multiplicity law as it relates to the specific offenses that they may encounter. The chart also should help trial counsel to determine whether offenses are multiplicious before the offenses appear on a charge sheet. If multiplicious charges do find their ways onto the charge sheet, the defense counsel and the military judge can use the chart to decide whether the offenses should be treated as multiplicious for findings, or for sentencing.

Any decision on whether offenses are multiplicious depends primarily upon the particular facts that surround the offenses. Accordingly, criminal law practitioners should not rely solely on the "yes-or-no" answers that appear on the Multiplicity Chart,[3] but should study the cited decisions carefully to determine why the offenses were, or were not, held to be multiplicious. Lieutenant Colonel Holland.

MULTIPLICITY CHART[4]

NOTE: A citation to a decision that states whether two offenses are multiplicious may be listed under only one of the offenses involved. Accordingly, to determine the prevailing law, look under *each* offense for an appropriate citation. The chart is divided alphabetically into major topic headings as follows:

- ABSENCES
- ADULTERY
- ARSON
- ASSAULTS, AGGRAVATED
- ASSAULTS, OTHER
- ATTEMPTS
- BAD CHECKS
- BREAKING RESTRICTION
- COMMUNICATION OF A THREAT
- CONDUCT UNBECOMING AN OFFICER
- CONSPIRACY
- DAMAGE TO PROPERTY
- DISORDERLY CONDUCT
- DISRESPECT
- DRUG OFFENSES
- DRUNK DRIVING
- FAILURE TO REPAIR
- FALSE CLAIMS
- FALSE STATEMENTS
- FORGERY
- FRATERNIZATION
- HOUSEBREAKING
- IMPERSONATION OF AN OFFICER OR AN NCO
- INDECENT ASSAULT, ACTS, OR LANGUAGE
- WRONGFUL APPROPRIATION
- INDECENT EXPOSURE
- LARCENY
- MAIL THEFT
- MISSING MOVEMENT
- MURDER AND HOMICIDE
- OBSTRUCTION OF JUSTICE
- RAPE
- RECEIVING, BUYING, OR CONCEALING STOLEN PROPERTY
- RESISTING APPREHENSION
- ROBBERY
- SODOMY
- VIOLATION OF A REGULATION OR AN ORDER

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[1] For an excellent analysis of the law on multiplicity, see Thomas Herrington, *Multiplicity in the Military*, 134 Mil. L. Rev. 45 (1991).

[2] United States v. Barnum, 24 M.J. 729, 731 n.3 (A.C.M.R. 1987).

[3] In most instances, the Multiplicity Chart states definitely when two offenses are, or are not, multiplicious. The multiplicity decisions of one military appellate court, however, occasionally may conflict with, or appear to conflict with, the decisions of another. *Compare* United States v. Shears, 27 M.J. 509 (A.C.M.R. 1988) (finding accused's conviction for absence without leave multiplicious with his conviction for escaping from custody) *with* United States v. Johnson, 17 M.J. 83 (C.M.A. 1983) (finding accused's conviction for absence without leave was not multiplicious with his conviction for escaping from custody). When authorities appear to be divided in this manner, the chart gives a "yes *and* no" answer, citing to the appropriate supporting decisions.

[4] Prepared on 19 February 1992, this chart includes citations through 34 M.J. 44.

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
ABSENCES			
AWOL/BREAKING ARREST	-	YES	31 C.M.R. 63 (C.M.A. 1961)
BRIEF AWOL/ BREAKING RESTRICTION	YES	-	21 M.J. 179-80 (C.M.A. 1985) 20 M.J. 414 (C.M.A. 1985) 20 M.J. 246 (C.M.A. 1985) 25 C.M.R. 414 (C.M.A. 1958) 26 C.M.R. 35 (C.M.A. 1958) 18 M.J. 450 (C.M.A. 1984) 15 M.J. 409 (C.M.A. 1983) 16 M.J. 901 (C.M.A. 1983)
LONGER AWOL/ BREAKING RESTRICTION	NO	-	18 M.J. 602 (N.M.C.M.R. 1984) 17 M.J. 77 (C.M.A. 1983)
AWOL/BREACH OF RESTRAINT FROM CORRECTIONAL CUSTODY FACILITY	NO	-	17 M.J. 95 (C.M.A. 1983) 16 M.J. 524 (A.C.M.R. 1983)
AWOL/DISOBEDIENCE OF ORDER TO RETURN TO DUTY STATION	NO	NO	17 M.J. 69 (C.M.A. 1983)
AWOL/DISOBEDIENCE OF ORDER NOT TO LEAVE AREA	NO	-	16 M.J. 654 (A.F.C.M.R. 1983)
AWOL/ESCAPE FROM CONFINEMENT	NO	-	14 M.J. 771 (A.C.M.R. 1982) *But see* 26 C.M.R. 35 (C.M.A. 1958)
AWOL/ESCAPE FROM CUSTODY	YES NO	- -	27 M.J. 509 (A.C.M.R. 1988) 17 M.J. 83 (C.M.A. 1983) 17 M.J. 415 (C.M.A. 1984) 17 M.J. 1089 (A.F.C.M.R. 1984) *But see* 15 M.J. 183 (C.M.A. 1983)
AWOL/MISSING MOVEMENT	NO	-	20 M.J. 90 (C.M.A. 1985) 19 M.J. 239 (C.M.A. 1985) 17 M.J. 415 (C.M.A. 1984), *But see* 18 M.J. 427 (C.M.A. 1984) 39 C.M.R. 866 (N.B.R. 1969)
	YES	-	21 M.J. 76 (C.M.A. 1985)
MISSING MOVEMENT/ DISOBEDIENCE OF ORDER	YES	YES	27 M.J. 692 (N.M.C.M.R. 1988)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
ADULTERY			
ADULTERY/CARNAL KNOWLEDGE	NO YES	YES -	28 C.M.R. 900 (A.F.B.R 1960) 24 M.J. 593 (A.F.C.M.R. 1987)
ADULTERY/ FRATERNIZATION	YES NO -	- - YES	21 M.J. 203 (C.M.A. 1986) 23 M.J. 748 (A.F.C.M.R. 1987) 32 M.J. 747 (A.F.C.M.R. 1990)
ADULTERY/RAPE	YES	-	16 M.J. 485 (C.M.A. 1983) 33 M.J. 543 (A.F.C.M.R. 1991)
ADULTERY/CONDUCT UNBECOMING AN OFFICER	YES	-	21 M.J. 74 (C.M.R. 1985)
ADULTERY/DISOBEY SAFE-SEX ORDER	NO	-	28 M.J. 775 (A.C.M.R. 1989)
ADULTERY/INDECENT ACTS/ SODOMY w/ SAME PERSON OVER EXTENDED LENGTH OF TIME	NO	-	26 M.J. 638 (A.C.M.R. 1988)
ARSON			
ARSON THAT DAMAGED SEVERAL ITEMS OWNED BY DIFFERENT VICTIMS	YES	-	19 M.J. 574 (N.M.C.M.R. 1984)
ARSON/WILLFUL DAMAGE TO GOV'T PROPERTY	(*see* "Damage to Property")		
AGG. ARSON OF DWELLING/ SIMPLE ARSON OF CONTENTS	NO	-	20 M.J. 220 (C.M.A. 1985)
ASSAULTS, AGGRAVATED			
AGG. ASSAULT/ ATTEMPTED MURDER	YES	-	26 M.J. 122 (C.M.A. 1983)
AGG. ASSAULT/ ATTEMPTED RAPE	YES	-	16 M.J. 305 (C.M.A. 1980) *But see* 17 M.J. 893 (N.M.C.M.R. 1984) 15 M.J. 699 (A.C.M.R. 1983)
AGG. ASSAULT/ COMMUNICATION OF THREAT	YES	-	17 M.J. 408 (C.M.A. 1984) *But see* 14 M.J. 361 (C.M.A. 1983)
AGG. ASSAULT/FORCIBLE SODOMY/RAPE	NO	YES	16 M.J. 397 (C.M.A. 1983)
AGG. ASSAULT/INVOLUNTARY MANSLAUGHTER	-	NO	38 C.M.R. 346 (C.M.A. 1968)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
ASSAULTS, AGGRAVATED (Con't)			
ASSAULT/INVOLUNTARY MANSLAUGHTER	YES	-	22 M.J. 559 (C.M.A. 1986)
AGG. ASSAULT/RAPE	YES	-	14 M.J. 211 (C.M.A. 1982)
AGG. ASSAULT/ROBBERY	YES	-	15 M.J. 284 (C.M.A. 1983)
AGG. ASSAULT/WRONGFUL DISCHARGE OF FIREARM	NO	-	20 C.M.R. 497 (N.B.R. 1955)
AGG. ASSAULT/DISOBEYING SAFE-SEX ORDER	NO	NO	28 M.J. 836 (A.F.C.M.R. 1989)
AGG. ASSAULT/DAMAGE TO PROPERTY	NO	-	29 M.J. 904 (A.C.M.R. 1989)
AGG. ASSAULT/INDECENT ASSAULT/COMMUNICATING THREAT/INDECENT LANGUAGE	-	YES	28 M.J. 871 (A.C.M.R. 1989)
AGG. ASSAULT/ATTEMPTED SODOMY	-	YES	27 M.J. 798 (A.F.C.M.R. 1988)
ASSAULTS, OTHER THAN AGGRAVATED			
ASSAULT/AGG. ASSAULT	YES	-	15 M.J. 316 (C.M.A. 1983) 11 M.J. 95 (C.M.A. 1981) 37 C.M.R. 98 (C.M.A. 1962)
ASSAULT/BREACH OF PEACE	YES NO	- -	16 M.J. 205 (C.M.A. 1983) 20 M.J. 218 (C.M.A. 1985)
ASSAULT/COMMUNICATION OF THREAT	NO	YES	14 M.J. 361 (C.M.A. 1983) *But see* 16 M.J. 164 (C.M.A. 1983) 15 M.J. 316 (C.M.A. 1983) 15 M.J. 176 (C.M.A. 1983)
ASSAULT/FORCIBLE SODOMY	YES	-	15 M.J. 169 (C.M.A. 1983)
ASSAULT/LIFT WEAPON AGAINST OFFICER/DISRESPECT	YES	-	29 C.M.R. 250 (C.G.B.R. 1960)
ASSAULT/RAPE	YES NO	- -	15 M.J. 285 (C.M.A. 1983) 14 M.J. 811 (A.C.M.R. 1982) 21 M.J. 224 (C.M.A. 1986)
ASSAULT/ROBBERY	YES	-	17 M.J. 437 (C.M.A. 1984)
ASSAULT (separate blows on same victim)	YES	-	18 M.J. 450 (C.M.A. 1984)
ASSAULT (on same victim within 25 minutes)	-	NO	24 M.J. 518 (A.F.C.M.R. 1987)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
ASSAULTS, OTHER THAN AGGRAVATED (Con't)			
ASSAULT/MALTREATMENT	NO	-	25 M.J. 703 (A.C.M.R. 1987)
ASSAULT w/ INTENT TO RAPE/ASSAULT w/ INTENT TO COMMIT SODOMY	NO	-	28 M.J. 218 (C.M.A. 1989)
ASSAULT w/ INTENT TO COMMIT SODOMY/ COMMUNICATING THREAT	NO	YES	31 M.J. 526 (A.C.M.R. 1990)
ASSAULT/CARRYING CONCEALED WEAPON	-	NO	30 M.J. 724 (A.F.C.M.R. 1990)
ATTEMPTS			
ATTEMPTED LARCENY/ FORGERY	NO -	YES YES	33 M.J. 571 (N.M.C.M.R. 1991) 15 M.J. 791 (A.C.M.R. 1983) *see also* 25 C.M.R. 784 (A.B.R. 1958)
ATTEMPTED LARCENY/ WILLFUL DAMAGE TO PROPERTY	YES	-	6 M.J. 669 (A.C.M.R. 1978)
ATTEMPTED LARCENY/ FAILURE TO PAY DEBT	NO	NO	23 M.J. 801 (N.M.C.M.R. 1986)
ATTEMPTED LARCENY/ WRONGFUL APPROPRIATION	YES	-	31 M.J. 906 (A.F.C.M.R. 1990)
ATTEMPTED ROBBERY/ASSAULT	YES	-	33 M.J. 257 (C.M.A. 1991)
ATTEMPTED SODOMY/AGG. ASSAULT (though transmission of HIV virus)	YES	-	27 M.J. 798 (A.C.M.R. 1988)
ATTEMPTED INDECENT ACTS w/ TWO VICTIMS AT SAME TIME	NO	-	26 M.J. 652 (A.C.M.R. 1988)
ATTEMPTED USE OF DRUG/ POSSESSION OF DRUG	YES	YES	24 M.J. 818 (A.C.M.R. 1987)
ATTEMPTED RAPE/ASSAULT w/ INTENT TO COMMIT RAPE	YES	-	11 M.J. 435 (C.M.A. 1981)
ATTEMPTED SODOMY/ RAPE	NO	NO	17 M.J. 997 (A.C.M.R. 1984)
ATTEMPTED POSS./ ATTEMPTED DISTR.	YES	-	19 M.J. 321 (C.M.A. 1985)
BAD CHECKS			
MAKING/UTTERING BAD CHECKS	YES	-	31 M.J. 691 (N.M.C.M.R. 1990) 24 M.J. 686 (A.C.M.R. 1987)
	NO	NO	17 M.J. 781 (A.F.C.M.R. 1983) *But see* 19 M.J. 582 (N.M.C.M.R. 1984)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
BREAKING RESTRICTION			
BREAKING RESTRICTION/ DISOBEDIENCE OF ORDER	NO	-	8 C.M.R. 660 (A.B.R. 1953)
BREAKING RESTRICTION/ AWOL	(*see* "Absences")		
COMMUNICATION OF A THREAT			
COMMUNICATION OF THREAT/ DISRESPECT/DISOBEDIENCE	-	YES	32 C.M.R. 544 (A.C.M.R. 1962)
COMMUNICATION OF THREAT/ ENDEAVORING TO INFLUENCE TESTIMONY OF OTHERS	YES	-	15 M.J. 99 (C.M.A. 1983) 15 M.J. 378 (C.M.A. 1983)
COMMUNICATION OF THREAT/RAPE	YES	-	16 M.J. 164 (C.M.A. 1983)
COMMUNICATION OF THREAT/OBSTRUCTION OF JUSTICE	YES	-	20 M.J. 377-78 (C.M.A. 1985)
COMMUNICATION OF THREAT/SODOMY	YES	-	21 M.J. 96 (C.M.A. 1985)
COMMUNICATION OF THREAT/ASSAULT ON NCO	YES	-	20 M.J. 298 (C.M.A. 1985)
CONDUCT UNBECOMING AN OFFICER			
CONDUCT UNBECOMING/ SAME OFFENSE CHARGED UNDER DIFFERENT ARTICLE	YES	-	32 M.J. 274 (C.M.A. 1991) 24 M.J. 11 (C.M.A. 1987) 23 M.J. 314 (C.M.A. 1987) 22 M.J. 70 (C.M.A. 1986) 21 M.J. 345 (C.M.A. 1986) 20 M.J. 564 (N.M.C.M.R. 1985) 19 M.J. 617 (A.C.M.R. 1984) 18 M.J. 371 (C.M.A. 1984) 18 M.J. 363 (C.M.A. 1984) *But see* 26 M.J. 477 (C.M.A. 1988)
CONDUCT UNBECOMING (adultery)/CONDUCT UNBECOMING (fraternization)	YES	-	21 M.J. 203 (C.M.A. 1986)
CONSPIRACY			
CONSPIRACY/OFFENSE THAT IS THE OBJECT OF THE CONSPIRACY	NO	NO	29 M.J. 505 (A.C.M.R.1989) 27 M.J. 818 (A.C.M.R. 1988) 21 M.J. 1002 (A.C.M.R. 1986)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
CONSPIRACY (Con't)			
CONSPIRACY TO TRANSFER DRUGS/TRANSFER OF DRUGS	NO	NO	14 M.J. 511 (A.F.C.M.R. 1982)
CONSPIRACY TO STEAL FROM TWO VICTIMS/ LARCENY FROM THE TWO VICTIMS	RULE: Should be only one conspiracy and one larceny charge		17 M.J. 981 (A.C.M.R. 1984)
CONSPIRACY TO COMMIT MURDER/SOLICITATION TO COMMIT MURDER	NO	-	30 M.J. 179 (C.M.A. 1990) 29 M.J. 702 (A.C.M.R. 1989)
CONSPIRACY TO RECEIVE STOLEN PROPERTY/ LARCENY OF SAME PROPERTY	NO	-	27 M.J. 818 (A.C.M.R. 1988)
CONSPIRACY TO COMMIT LARCENY/LARCENY	NO	-	28 M.J. 477 (A.C.M.R. 1989)
CONSPIRACY TO TRANSFER DUTY-FREE GOODS/ SOLICITATION TO VIOLATE REGULATION	YES	-	28 M.J. 908 (A.C.M.R. 1989)
CONSPIRACY TO DAMAGE PROPERTY/DAMAGE TO THE PROPERTY	NO	-	30 M.J. 1229 (A.C.M.R. 1990)
CONSPIRACY TO COMMIT LARCENY/SIGNING FALSE OFFICIAL STATEMENTS	YES	-	30 M.J. 930 (A.C.M.R. 1990)
DAMAGE TO PROPERTY			
WILLFUL DAMAGE/ARSON	NO	NO	16 M.J. 43 (C.M.A. 1983) *But see* 20 M.J. 172 (C.M.A. 1985)
WILLFUL DAMAGE TO GOV'T PROP/PRIVATE PROP/ LARCENY	-	NO	18 M.J. 27 (C.M.A. 1984)
WILLFUL DAMAGE (widespread damages during one spree)	-	NO	15 M.J. 970 (A.C.M.R. 1983)
WILLFUL DAMAGE/ HOUSEBREAKING	YES	YES	19 M.J. 991 (A.C.M.R. 1984)
DAMAGE TO PROPERTY/ ATTEMPTED UNLAWFUL ENTRY	YES	YES	24 M.J. 731 (A.C.M.R. 1987)
DAMAGE TO PROPERTY/ LARCENY	-	YES	30 M.J. 1229 (A.C.M.R. 1990)
DISORDERLY CONDUCT			
DISORDERLY CONDUCT/ BREACH OF PEACE	YES	-	19 M.J. 844 (A.F.C.M.R. 1985)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
DISRESPECT			
DISRESPECT/COMMUNICATION OF THREAT	YES -	- YES	18 M.J. 142 (C.M.A. 1984) 32 C.M.R. 544 (A.C.M.R. 1962)
DISRESPECT/DISOBEDIENCE	YES	-	21 M.J. 162 (C.M.A. 1985) 15 M.J. 183 (C.M.A. 1983) 14 M.J. 819 (A.C.M.R. 1982) 12 M.J. 654 (A.C.M.R. 1981) 47 C.M.R. 331 (C.M.A. 1973) 1 M.J. 635 (A.C.M.R. 1975) *But see* 15 M.J. 723 (A.C.M.R. 1983)
DISRESPECT/ASSAULT DISOBEDIENCE	NO	-	22 M.J. 548 (N.M.C.M.R. 1986)
DRUG OFFENSES			
POSSESSION w/ INTENT/ DISTRIBUTION	YES	-	30 M.J. 1122 (N.M.C.M.R. 1989) 23 M.J. 105 (C.M.A. 1986) 21 M.J. 693 (A.C.M.R. 1985) 21 M.J. 205 (C.M.A. 1986)
	NO	-	22 M.J. 631 (N.M.C.M.R. 1986) 20 M.J. 223 (C.M.A. 1985) 20 M.J. 134 (C.M.A. 1985) 19 M.J. 320 (C.M.A. 1985) 19 M.J. 63 (C.M.A. 1984)
POSSESSION/ DISTRIBUTION	YES	-	22 M.J. 651 (A.C.M.R. 1986) 22 M.J. 640 (A.C.M.R. 1986) 22 M.J. 953 (A.C.M.R. 1986) 20 M.J. 873 (A.C.M.R. 1985) 20 M.J. 141 (C.M.A. 1985) 20 M.J. 142 (C.M.A. 1985) 20 M.J. 138 (C.M.A. 1985) 20 M.J. 134 (C.M.A. 1985) 19 M.J. 320 (C.M.A. 1985) 19 M.J. 788 (A.C.M.R. 1985) 18 M.J. 378 (C.M.A. 1984) 16 M.J. 5894 (A.C.M.R. 1983)
POSSESSION/INTRODUCTION	YES	-	20 M.J. 216 (C.M.A. 1985) 19 M.J. 351 (C.M.A. 1985) 19 M.J. 896 (A.C.M.R. 1985) 18 M.J. 459 (C.M.A. 1984) 19 M.J. 132 (C.M.A. 1984) 16 M.J. 229 (C.M.A. 1983) 16 M.J. 157 (C.M.A. 1983) 16 M.J. 62 (C.M.A. 1983) 15 M.J. 341 (C.M.A. 1983) *But see* 19 M.J. 581 (N.M.C.M.R. 1984)
	NOTE: If the amount possessed was larger than the amount introduced, the trial counsel may allege possession of the excess amount.		* 18 M.J. 108 (C.M.A. 1984).

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
DRUG OFFENSES (Con't)			
DISTRIBUTION OF SAME DRUG IN DIFFERENT FORMS	YES	-	30 M.J. 736 (A.F.C.M.R. 1990)
POSSESSION OF SAME DRUG IN DIFFERENT FORMS	YES	-	30 M.J. 995 (N.M.C.M.R. 1990)
POSSESSION/DISTR. OF SMALL AMOUNT OF THE DRUG POSSESSED	YES	-	20 M.J. 138-9 (C.M.A. 1985) 20 M.J. 129 (C.M.A. 1985)
POSSESSION w/ INTENT/ VIOLATION OF REG. (by importation)	NO	-	29 M.J. 1075 (A.C.M.R. 1990)
POSSESSION w/ INTENT/ INTRODUCTION	YES NO	- NO	29 M.J. 217 (C.M.A. 1989) 18 M.J. 378 (C.M.A. 1984)
DISTRIBUTION/MANUFACTURE	-	NO	29 M.J. 565 (A.F.C.M.R. 1989)
POSSESSION/USE	YES	-	24 M.J. 818 (A.C.M.R. 1986) 22 M.J. 947 (A.C.M.R. 1986) 20 M.J. 221 (C.M.A. 1985) 20 M.J. 180 (C.M.A. 1985) 20 M.J. 179 (C.M.A. 1985) 20 M.J. 138 (C.M.A. 1985) 20 M.J. 145 (C.M.A. 1985) 19 M.J. 957 (A.F.C.M.R. 1985) 19 M.J. 321 (C.M.A. 1985) 18 M.J. 164 (C.M.A. 1984) *But see* 17 M.J. 887 (A.F.C.M.R. 1984)
	NO	-	19 M.J. 951 (A.F.C.M.R. 1985) (charges not multiplicious if accused possessed more than he or she used)
DISTRIBUTION (to different people at same time)	YES NO	YES NO	26 M.J. 686 (A.C.M.R. 1988) 19 M.J. 741 (A.F.C.M.R. 1984)
DISTRIBUTION OF DIFFERENT DRUGS (to same person within four minutes)	NO	-	28 M.J. 526 (A.C.M.R. 1986)
INTRODUCTION w/ INTENT/ DISTRIBUTION	YES NO	- -	23 M.J. 687 (A.F.C.M.R. 1986) 16 M.J. 988 (A.C.M.R. 1983)
POSSESSION/POSSESSION OF DRUG PARAPHERNALIA	YES	-	24 M.J. 818 (A.C.M.R. 1986) 21 M.J. 642 (A.C.M.R. 1985) 16 M.J. 204 (C.M.A. 1983) 17 M.J. 347 (C.M.A. 1984)
	NO	YES	21 M.J. 642 (A.C.M.R. 1985)
POSSESSION OF DRUG PARAPHERNALIA/USE OF PARAPHERNALIA	YES	-	20 M.J. 138 (C.M.A. 1985)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
DRUG OFFENSES (Con't)			
POSSESSION (of different drugs at same time)	YES	-	32 M.J. 664 (A.F.C.M.R. 1991) 17 M.J. 405 (C.M.A. 1984) 17 M.J. 1036 (A.C.M.R. 1984) 16 M.J. 722 (A.F.C.M.R. 1983) 12 M.J. 640 (A.F.C.M.R. 1981) 12 M.J. 673 (A.C.M.R. 1981)
	-	YES	23 M.J. 687 (A.F.C.M.R. 1986)
POSSESSION/POSSESSION w/ INTENT	YES	-	17 M.J. 347 (C.M.A. 1983)
POSSESSION (of small part of large cache)/ POSSESSION (of cache)	YES	-	16 M.J. 674 (A.C.M.R. 1983) *see also* 16 M.J. 584 (A.C.M.R. 1983) 15 M.J. 1010 (A.C.M.R. 1983)
POSSESSION/OBSTRUCTION OF JUSTICE ("planting" drugs on victim)	YES	-	19 M.J. 871 (A.C.M.R. 1985)
INTRODUCTION/DISTRIBUTION	NO	-	19 M.J. 351 (C.M.A. 1985)
USE OF TWO DRUGS ON SAME DATE	NO	-	20 M.J. 562 (A.F.C.M.R. 1985)
USE OF TWO DRUGS AT SAME TIME	YES	-	30 M.J. 1118 (N.M.C.M.R. 1989) 28 M.J. 530 (A.F.C.M.R. 1989)
USE/DERELICTION BY USING	YES	-	2 M.J. 733 (C.G.C.M.R. 1986) *But see* 30 M.J. 879 (A.F.C.M.R. 1990)
USE/ATTEMPTED USE	YES	-	24 M.J. 818 (A.C.M.R. 1987)
USE/DISTRIBUTION	NO	-	30 M.J. 736 (A.F.C.M.R. 1990) 33 M.J. 965 (N.M.C.M.R. 1991)
POSSESSION OF SAME DRUG ON DIFFERENT DATES (charged separately and charged also in a consolidated specification)	YES	-	25 M.J. 816 (A.F.C.M.R. 1988)
DRUNK DRIVING			
DRUNK DRIVING/ INVOLUNTARY MANSLAUGHTER	YES	-	21 M.J. 856 (A.C.M.R. 1986) 15 M.J. 525 (A.C.M.R. 1983) *But see* 17 M.J. 528 (A.C.M.R. 1983)
	-	NO	24 M.J. 132 (C.M.A. 1987)
DRUNK DRIVING/ RECKLESS DRIVING	YES	-	5 C.M.R. 339 (N.B.R. 1952)
	-	YES	24 M.J. 823 (A.C.M.R. 1987)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
DRUNK DRIVING (Con't)			
DRUNK DRIVING/VIOLATION OF ORDER NOT TO DRIVE ON POST	NO	-	17 M.J. 938 (A.F.C.M.R. 1984)
DRUNK DRIVING/NEGL. DESTRUCTION OF MIL. PROPERTY	NO	YES	19 M.J. 959 (A.C.M.R. 1985)
DRUNK DRIVING/ NEGLIGENT HOMICIDE	NO	NO	23 M.J. 856 (A.F.C.M.R. 1987) 25 M.J. 720 (A.C.M.R. 1987)
FALSE CLAIMS			
FALSE CLAIM/FALSE OFFICIAL STATEMENT	YES	-	17 M.J. 436 (C.M.A. 1984) 25 C.M.R. 516 (A.B.R. 1957) *But see* 15 M.J. 669 (A.F.C.M.R. 1983)
FALSE CLAIM (PRESENTING/ MAKING/USING)/FORGERY	-	YES	25 C.M.R. 437 (C.M.A. 1958)
FALSE CLAIM/LARCENY	YES	-	32 M.J. 863 (N.M.C.M.R. 1991) 28 M.J. 769 (A.C.M.R. 1989) 27 M.J. 576 (A.F.C.M.R. 1988) 23 M.J. 540 (A.C.M.R. 1986) 21 M.J. 167 (C.M.A. 1985) 21 M.J. 633 (A.C.M.R. 1985) 19 M.J. 804 (A.C.M.R. 1984) 17 M.J. 320 (C.M.A. 1984) 17 M.J. 412 (C.M.A. 1984) 16 M.J. 395 (C.M.A. 1983) 15 M.J. 377 (C.M.A., 1983)
	NO	-	28 M.J. 556 (C.G.C.M.R. 1989) 17 M.J. 318 (C.M.A. 1984)
FALSE CLAIM/ATTEMPTED LARCENY	YES	-	32 M.J. 705 (A.C.M.R. 1991)
FALSE STATEMENTS			
SIGNING FALSE DOCUMENT/ TAKING PUBLIC RECORD	-	YES	29 M.J. 734 (A.F.C.M.R. 1989)
SIGNING TWO FORMS FALSELY AT SAME TIME	YES	-	21 M.J. 82 (C.M.A. 1985)
FALSE STATEMENT/ PERJURY (same lie at different times)	NO	YES	32 M.J. 906 (A.F.C.M.R. 1991)
FORGERY			
FORGERY/USING MAIL TO DEFRAUD	NO	YES	20 C.M.R. 12 (C.M.A. 1955)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
FORGERY (Con't)			
FORGERY/UTTERING FORGED INSTRUMENT	NO	NO	29 C.M.R. 62 (C.M.A. 1960) 29 C.M.R. 67 (C.M.A. 1960)
	-	YES	31 C.M.R. 576 (A.F.B.R. 1961)
FORGERY BY MAKING/ FORGERY BY UTTERING	YES	-	19 M.J. 582 (N.M.C.M.R. 1984) (*see also* "Bad Checks")
	NO	-	22 M.J. 719 (A.C.M.R. 1986)
FORGERY/ATTEMPTED LARCENY	YES	-	21 M.J. 162 (C.M.A. 1985)[5]
FORGERY (of several items for single purpose)	NO	-	29 M.J. 441 (A.F.C.M.R. 1989)
FRATERNIZATION			
FRATERNIZATION (art. 134)/ CONDUCT UNBECOMING (art. 133)	NO	-	21 M.J. 770 (A.C.M.R. 1986)
FRATERNIZATION (art. 134)/ FRATERNIZATION (art. 133)	YES	-	21 M.J. 822 (N.M.C.M.R. 1985)
FRATERNIZATION/ VIOLATION OF ORDER NOT TO FRATERNIZE	YES	-	22 M.J. 819 (N.M.C.M.R. 1986)
FRATERNIZATION/ DERELICTION OF DUTY	YES	-	23 M.J. 683 (N.M.C.M.R. 1986)
FRATERNIZATION (with same "victim" at different locations)	YES	-	30 M.J. 314 (C.M.A. 1990)
FRATERNIZATION/USE OF DRUGS	NO	-	31 M.J. 942 (A.C.M.R. 1990)
FTR (FAILURE TO REPAIR)			
FTR/DESERTION	-	YES	30 C.M.R. 408 (C.M.A. 1960)
FTR/DISOBEY ORDER TO GO TO PLACE OF DUTY	YES	-	15 M.J. 316 (C.M.A. 1983) 22 C.M.R. 748 (C.G.B.R. 1956)
	-	YES	26 M.J. 276 (N.M.C.M.R. 1988)
HOUSEBREAKING			
HOUSEBREAKING/ KIDNAPPING	-	YES	32 M.J. 520 (A.F.C.M.R. 1990)
HOUSEBREAKING/LARCENY	-	NO	26 M.J. 564 (C.G.C.M.R. 1988)

[5] *Cf.* United States v. Moody, 17 M.J. 437 (C.M.A. 1984) (charges of forgery of endorsement on checks and of attempted larceny not multiplicious when check offenses are not alleged to be the means by which the larceny was attempted); United States v. Jackson, 20 M.J. 414 (C.M.A. 1985) (finding forgery of a check multiplicious for findings with attempted larceny by check, but holding accused "was not prejudiced as to the sentence by this multiplicity").

MULTIPLICIOUS FOR

OFFENSE	FINDINGS?	SENTENCING?	CITATION
IMPERSONATING OFFICER/NCO			
IMPERSONATION (by use of ID card)/WRONGFUL POSSESSION OF ID CARD	YES	-	32 M.J. 1002 (N.M.C.M.R. 1991)
			17 M.J. 571 (A.F.C.M.R. 1983)
INDECENT ASSAULT/ ACTS/LANGUAGE			
INDECENT ASSAULT/ VIOLATING REG.	YES	-	14 M.J. 489 (C.M.A. 1983)
			18 M.J. 14 (C.M.A. 1984)
INDECENT ACTS/ASSAULT w/ INTENT TO COMMIT SODOMY	-	YES	25 C.M.R. 317 (C.M.A. 1958)
INDECENT ACTS (two acts with same victim at same time)	YES	-	18 M.J. 716 (A.F.C.M.R. 1984)
INDECENT LANGUAGE TO CHILD/RAPE	YES	-	17 M.J. 997 (A.C.M.R. 1984)
INDECENT ASSAULT/KIDNAPPING	NO	-	15 M.J. 513 (A.C.M.R. 1982)
INDECENT ASSAULT/ COMMUNICATION OF THREAT	NO	-	14 M.J. 811 (A.C.M.R. 1982)
INDECENT ACTS/SODOMY/ CARNAL KNOWLEDGE	NO	YES	30 M.J. 1144 (A.F.C.M.R. 1990)
INDECENT EXPOSURE			
INDECENT EXPOSURE/ MASTURBATING IN PUBLIC	YES	-	21 M.J. 353 (C.M.A. 1986)
INDECENT EXPOSURE/ INDECENT ACTS	YES	-	32 M.J. 771 (A.C.M.R. 1991)
LARCENY			
LARCENY/ALTERING PUBLIC RECORDS	NO	NO	19 M.J. 681 (A.F.C.M.R. 1984)
LARCENY/BAD CHECKS	YES	-	16 M.J. 395 (C.M.A. 1983)
			15 M.J. 377 (C.M.A. 1983)
	-	YES	23 C.M.R. 611 (A.C.M.R. 1957)
	NO	-	17 M.J. 346 (C.M.A. 1984)
LARCENY OF BLANK CHECKS/MAKING AND UTTERING THE CHECKS	NO	NO	17 M.J. 781 (A.F.C.M.R. 1983)
LARCENY/DERELICTION OF DUTY	NO	-	30 C.M.R. 710 (N.B.R. 1960)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
LARCENY (Con't)			
LARCENY (of different property from different victims at the same time)	YES	-	30 M.J. 867 (N.M.C.M.R. 1990) 20 M.J. 139 (C.M.A. 1985) 17 M.J. 345 (C.M.A. 1984) 17 M.J. 981 (A.C.M.R. 1984)
LARCENY (of similar property, but at different times)	-	NO	23 M.J. 570 (A.C.M.R. 1986)
LARCENY (of several checks at same time)	YES	-	20 M.J. 741 (N.M.C.M.R. 1985)
LARCENY (of different property from different rooms, one room after the other)	NO	-	1 M.J. 1193 (N.C.M.R. 1976)
LARCENY/FALSE OFFICIAL STATEMENT	NO	-	29 M.J. 734 (A.F.C.M.R. 1989) 17 M.J. 319 (C.M.A. 1984) 17 M.J. 321 (C.M.A. 1984)
LARCENY/BURGLARY	-	NO	26 M.J. 991 (A.F.C.M.R. 1988)
LARCENY/FORGERY	YES	-	24 M.J. 827 (A.C.M.R. 1987) 24 M.J. 796 (A.C.M.R. 1987) 22 M.J. 872 (A.C.M.R. 1986)
	-	YES	24 M.J. 608 (A.C.M.R. 1987)
	NO	NO	29 M.J. 621 (C.G.C.M.R. 1989) 25 M.J. 604 (A.C.M.R. 1987) 24 M.J. 621 (C.G.C.M.R. 1989) 25 M.J. 604 (A.C.M.R. 1987) 24 M.J. 729 (A.C.M.R. 1987) 20 M.J. 602 (N.M.C.M.R. 1985) 19 M.J. 130 (C.M.A. 1985) 19 M.J. 542 (A.C.M.R. 1984) 17 M.J. 773 (A.F.C.M.R. 1983) 29 C.M.R. 790 (A.F.B.R. 1960) 25 C.M.R. 784 (A.F.B.R. 1957)
	YES	-	20 M.J. 307 (C.M.A. 1985)
LARCENY BY CHECK/ FAILURE TO MAINTAIN SUFFICIENT FUNDS	NO	-	7 C.M.R. 251 (A.B.R. 1952)
LARCENY/MAIL THEFT	-	YES	24 C.M.R. 163 (C.M.A. 1957) 24 C.M.R. 283 (C.M.A. 1957) 29 C.M.R. 790 (A.F.B.R. 1960) *But see* 25 C.M.R. 148 (C.M.A. 1958)
LARCENY/HOUSEBREAKING TO COMMIT LARCENY	NO	NO	14 C.M.R. 164 (C.M.A. 1954)
LARCENY/UNLAWFUL ENTRY	NO	-	33 M.J. 522 (A.F.C.M.R. 1991)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
LARCENY (Con't)			
LARCENY (of bank card)/ LARCENY (through use of the card to obtain money from bank)	NO	NO	28 M.J. 634 (A.F.C.M.R. 1989) 27 M.J. 582 (A.F.C.M.R. 1988) 20 M.J. 506 (A.F.C.M.R. 1985) 19 M.J. 619 (A.C.M.R. 1984)
LARCENY/WRONGFUL USE OF ID CARD TO COMMIT LARCENY	NO	-	16 M.J. 393 (C.M.A. 1983)
LARCENY/WRONGFUL DISPOSITION OF THE STOLEN PROPERTY	NO	NO	22 M.J. 743 (N.M.C.M.R. 1986) 21 M.J. 695 (A.C.M.R. 1985) 20 M.J. 166 (C.M.A. 1985) 18 M.J. 102 (C.M.A. 1984) 17 M.J. 145 (C.M.A. 1984) 17 M.J. 1058 (A.F.C.M.R. 1983) 23 C.M.R. 242 (C.M.A. 1957)
LARCENY OF DRUG/ WRONGFUL POSSESSION OF DRUG	YES	-	21 M.J. 113 (C.M.A. 1985)
LARCENY (by successive withdrawals from different accounts via bank machine)	NO	-	20 M.J. 712 (A.C.M.R. 1985)
LARCENY/VIOL. OF REG./ FAILURE TO PAY DEBT	YES	-	21 M.J. 969 (A.C.M.R. 1986)
MAIL THEFT			
MAIL THEFT (of several letters at same time)	YES	-	22 C.M.R. 772 (A.F.B.R. 1956)
MISSING MOVEMENT			
MISSING MOVEMENT/AWOL	(*see* "Absences")		
MISSING MOVEMENT/ DISOBEDIENCE OF ORDER	YES	-	39 C.M.R. 78 (A.B.R. 1968)
MURDER/HOMICIDE			
MURDER OF TWO VICTIMS AT SAME TIME	NO	NO	5 C.M.R. 281 (A.B.R. 1952)
FELONY MURDER/ PREMEDITATED MURDER/ RAPE	YES	-	16 M.J. 68 (C.M.A. 1983) *see also* 15 M.J. 1056 (N.M.C.M.R. 1983)
FELONY MURDER/ PREMEDITATED MURDER	YES	-	21 M.J. 345 (C.M.A. 1986) 28 M.J. 1024 (A.F.C.M.R. 1989)
FELONY MURDER/ UNPREMEDITATED MURDER	YES	-	28 M.J. 27 (C.M.A. 1989)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
MURDER/HOMICIDE (Con't)			
INVOLUNTARY MANSLAUGHTER OF TWO VICTIMS AT SAME TIME	NO	NO	20 M.J. 957 (A.F.C.M.R. 1985)
NEGLIGENT HOMICIDE/ NEGLIGENT DISCHARGE OF FIREARM	YES	-	26 M.J. 852 (A.C.M.R. 1988)
OBSTRUCTION OF JUSTICE			
OBSTRUCTION/ SOLICITATION TO COMMIT MURDER	YES	-	29 M.J. 709 (A.C.M.R. 1989)
SOLICITING FALSE TESTIMONY FROM TWO WITNESSES AT SAME TIME	-	YES	28 M.J. 223 (C.M.A. 1989)
RAPE			
RAPE/ADULTERY	YES	-	16 M.J. 485 (C.M.A. 1983)
RAPE/COMMUNICATION OF THREAT	YES	-	16 M.J. 164 (C.M.A. 1983)
RAPE/INDECENT ACTS	YES	-	18 M.J. 721 (A.F.C.M.R. 1984)
	-	YES	31 M.J. 535 (A.C.M.R. 1990)
RAPE/ATTEMPTED SODOMY	NO	NO	17 M.J. 997 (A.C.M.R. 1984)
RAPE/EXTORTION	NO	-	24 M.J. 3 (C.M.A. 1987)
RECEIPT/BUYING/ CONCEALING STOLEN PROPERTY			
CONCEALING STOLEN PROP./WRONGFUL DISPOSITION	NO	-	19 M.J. 174 (C.M.A. 1985)
RESISTING APPREHENSION			
RESISTING APP./ASSAULT	YES	-	15 M.J. 433 (C.M.A. 1983)
RESISTING APP./ DISOBEDIENCE/ ASSAULT	NO	-	17 M.J. 132 (C.M.A. 1984)
RESISTING APP./BREACH OF PEACE	YES	-	29 C.M.R. 750 (C.G.B.R. 1962)

MULTIPLICIOUS FOR

OFFENSE	FINDINGS?	SENTENCING?	CITATION
ROBBERY			
ROBBERY/AGG. ASSAULT	YES	-	15 M.J. 284 (C.M.A. 1983)
	-	YES	25 C.M.R. 144 (C.M.A. 1958)
	-	NO	19 M.J. 788 (A.C.M.R. 1985)
ROBBERY/ASSAULT	YES	-	20 M.J. 301 (C.M.A. 1985)
ROBBERY/ATTEMPTED ROBBERY (of different victims at same time)	-	NO	38 C.M.R. 347 (C.M.A. 1968)
ROBBERY (of three victims at same time)	NO	-	2 M.J. 773 (A.C.M.R. 1976)
	-	NO	38 C.M.R. 343 (C.M.A. 1968)
			38 C.M.R. 348 (C.M.A. 1968)
			39 C.M.R. 392 (A.B.R. 1968)
ROBBERY/LARCENY	-	YES	19 M.J. 788 (A.C.M.R. 1985)
SODOMY			
ANAL SODOMY/ORAL SODOMY (same incident)	-	YES	CM 442519 (A.C.M.R. 18 Mar. 1983) (unpub.)
FELLATIO/ CUNNILINGUS (on same victim)	-	YES	15 M.J. 1090 (A.C.M.R. 1983)
SODOMY/INDECENT ACTS	NO	NO	32 M.J. 455 (C.M.A. 1991)
			18 M.J. 72 (C.M.A. 1984)
SODOMY/ASSAULT W/ INTENT TO COMMIT SODOMY	-	YES	24 C.M.R. 151 (C.M.A. 1957)
TWO ACTS OF SODOMY ON SAME VICTIM BY TWO PEOPLE	NO	NO	16 M.J. 532 (A.C.M.R. 1983)
SODOMY/INDECENT EXPOSURE	YES	-	21 M.J. 160 (C.M.A. 1985)
SODOMY/ASSAULT W/DANGEROUS WEAPON	NO	-	22 M.J. 538 (N.M.C.M.R. 1986)
SODOMY/VIOLATION OF ORDER TO REFRAIN FROM ACTS OF HOMOSEXUALITY OR SODOMY	YES	-	27 M.J. 630 (A.F.C.M.R. 1988)
ORAL SODOMY/ ATTEMPTED ANAL SODOMY	-	NO	27 M.J. 798 (A.F.C.M.R. 1988)
SODOMY/CARNAL KNOWLEDGE	-	NO	25 M.J. 136 (C.M.A. 1987)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
VIOLATION OF ORDERS & REGULATIONS			
VIOLATION OF REG. (by possessing firearm)/ VIOLATION OF REG. (by failing to register firearm)	NO	-	17 M.J. 415 (C.M.A. 1984)
VIOLATION OF GENERAL REG./UNLAWFUL ENTRY INTO PROHIBITED AREA (entry prohibited by same regulation)	YES	-	15 M.J. 403 (C.M.A. 1983) for facts, see 14 M.J. 954 (A.C.M.R. 1982)
VIOLATION OF REG./ COMMISSION OF OFFENSE UNDER UCMJ THAT THE REG. PROHIBITS	YES	-	28 M.J. 419 (C.M.A. 1989) 19 M.J. 894 (A.C.M.R. 1985) 14 M.J. 489 (C.M.A. 1983) 16 M.J. 451 (C.M.A. 1983)
VIOLATION OF TWO SEPARATE PARAGRAPHS OF THE SAME REG.	NO	-	17 M.J. 809 (A.C.M.R. 1984)
FAILURE TO OBEY ORDER/WILLFUL DISOBEDIENCE OF ORDER	YES	-	15 M.J. 333 (C.M.A. 1983)
VIOLATION OF REG./ CONSENSUAL SODOMY	YES	-	30 M.J. 757 (A.C.M.R. 1990)
VIOLATION OF REG. BY MAKING UNAUTHORIZED PHONE CALLS (each phone call charged separately)	NO	NO	30 M.J. 236 (C.M.A. 1990)
VIOLATION OF REG./ COMMUNICATING INDECENT LANGUAGE	YES	-	30 M.J. 917 (A.C.M.R. 1990)
VIOLATION OF REG. (by illegal transfer of duty-free goods)/VIOLATION OF REG. (by purchasing goods for illegal transfer)	YES NO	- YES	27 M.J. 832 (A.C.M.R. 1988) 27 M.J. 885 (A.C.M.R. 1989) 27 M.J. 914 (A.C.M.R. 1989) 26 M.J. 963 (A.C.M.R. 1988) 25 M.J. 557 (A.C.M.R. 1987) 29 M.J. 712 (A.C.M.R. 1989)
VIOLATION OF REG. BY FAILING TO SAFEGUARD CLASSIFIED INFO/ WILLFULLY RETAINING CLASSIFIED INFO	NO	YES	33 M.J. 802 (N.M.C.M.R. 1991)

OFFENSE	MULTIPLICIOUS FOR FINDINGS?	SENTENCING?	CITATION
VIOLATION OF ORDERS & REGULATIONS (Con't)			
VIOLATION OF BLACK MARKETING REG./ FALSE OFFICIAL STATEMENT	NO	-	29 M.J. 1027 (A.C.M.R. 1990)
VIOLATION OF REG. (by possessing knife)/ CARRYING CONCEALED WEAPON	NO	-	29 M.J. 972 (A.C.M.R. 1990)
WRONGFUL APPROPRIATION			
WRONGFUL APPR./ UTTERING BAD CHECK	YES	-	17 M.J. 1078 (A.F.C.M.R. 1984)
WRONGFUL APPR./ FAILURE TO PAY DEBT	YES	-	28 M.J. 310 (C.M.A. 1989)

Does the Fourth Amendment Apply to a *Locked* Locker? "No," Says the Court of Military Appeals in *United States v. Britten*

Although the courts traditionally favor probable cause and warrants in deciding Fourth Amendment questions, practitioners quickly learn that these factors are important only when the Fourth Amendment's protection "covers" a search or seizure. Nongovernment[6] and foreign[7] searches and seizures, for example, do not trigger any Fourth Amendment protections.[8] Consequently, the absence of probable cause or a warrant does not render inadmissible any evidence obtained by these means. Moreover, in some cases, a warrantless search or seizure will not violate the Fourth Amendment even if it is performed by United States law enforcement officials. A government intrusion runs afoul of the Fourth Amendment only if: (1) it offends the accused's expectation of privacy in the place that is searched or the item that is seized; and (2) society accepts the accused's privacy expectation as objectively reasonable.[9] A prisoner, for instance, may believe that he or she has a right to privacy in a cell, but society does not recognize this privacy interest as reasonable. Accordingly, prison authorities may search a prisoner's cell and seize items in it without violating the Fourth Amendment.[10]

Last year, in *United States v. Britten*,[11] the Court of Military Appeals examined the reasonableness of an accused's expectation of privacy in a locked gymnasium locker. The court concluded that, although the accused might have had an expectation of privacy in the locker, this privacy interest was not one that "society [was] prepared to recognize as reasonable."[12]

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[6] *See* United States v. Jacobsen, 466 U.S. 109 (1984) (holding that no government search occurred when Federal Express opened a damaged package); United States v. Hodges, 27 M.J. 754 (A.F.C.M.R. 1988) (no government search occurred when a United Parcel Service employee opened package during a random inspection).

[7] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not apply to search by United States agents of property that belongs to a foreign national and is located in a foreign country); United States v. Coleman, 25 M.J. 679 (A.C.M.R. 1987), *aff'd*, 26 M.J. 451 (C.M.A. 1988), *cert. denied*, 488 U.S. 1035 (1989) (Fourth Amendment and Military Rule of Evidence 311(c)(3) do not apply to German *polizei*'s search of an off-post apartment). The Military Rules of Evidence provide that a foreign search is unlawful only if the accused is subjected to "gross and brutal maltreatment," or if United States law enforcement agents participated in the search. *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 311(c)(3), 315(h)(3).

[8] *See also* TJAGSA Practice Note, *Search and Seizure–Situations Where the Fourth Amendment Does Not Apply: A Guide for Commanders and Law Enforcement Personnel*, The Army Lawyer, June 1988, at 57.

[9] United States v. Katz, 389 U.S. 347, 361 (1967).

[10] *See* Hudson v. Palmer, 468 U.S. 517 (1984).

[11] 33 M.J. 238 (1991).

[12] *Id.* at 239-40.

Britten may be helpful to practitioners for two reasons. First, it demonstrates clearly how a government search and seizure can be outside the scope of the Fourth Amendment's protection. Second, the different analytical approaches that the trial judge and the appellate courts took in discussing where and when an accused may claim "a legitimate expectation of privacy" provide helpful guidance to practitioners seeking to contest the legalities of government searches and seizures.

In *Britten*, a warrant officer named Umfress saw the accused shoplift two radios from the post exchange. Umfress followed Britten into the post gymnasium. He then saw Britten "just after he heard a locker door shut."[13] Surmising that the accused had concealed the stolen radios in a locker, Umfress notified an exchange employee. This employee returned with Umfress to the gymnasium and confronted the accused, who denied taking any radios from the exchange. Military police officials were alerted. When they arrived, Umfress gave them some keys he had found on a table near the accused. These keys were similar to a set of keys that Umfress previously had seen in the accused's possession. The "police then tried locks on lockers until the fateful locker . . . opened."[14] Inside, the military police found the shoplifted radios.

The trial judge found specifically that Britten "displayed an expectation of privacy in [the] locker by locking that locker with his lock, the key to which was on his key ring and his key pouch."[15] This locker was assigned not to the accused, but to another soldier. The judge noted, however, that this soldier never used the locker. Because the locker was open and empty when the accused found it, the trial judge concluded that the accused did not know that the locker belonged to another person. Consequently, the accused's expectation of privacy in the locker was "not . . . unreasonable."[16]

The trial judge, however, held that the accused's actions at the crime scene negated any expectation of privacy he had in the locker. The judge noted that "the accused denied having a locker" and that "he abandoned the keys to the locker in a public place."[17] Anyone could have found the keys, concluded that they opened a padlock on one of the gymnasium lockers, found the locker, and opened it. Accordingly, although the trial court found that the accused's expectation of privacy in the locker was objectively reasonable, it admitted the seized radios into evidence because the accused had *abandoned* his right to privacy.

The Army Court of Military Review affirmed in an unpublished opinion.[18] Like the trial judge, the Army court concluded that the accused had an expectation of privacy in the locker, but "abandoned his privacy interest . . . before the police opened it."[19]

Interestingly, the Court of Military Appeals analyzed Britten's expectation of privacy in a different manner entirely. Eschewing the abandonment rationale of the two lower courts, the Court of Military Appeals focused on the objective reasonableness of the accused's expectation of privacy.[20] After examining the record, the court determined that, although the person to whom the locker was assigned did not use it, Britten's "use of this locker was plainly unauthorized and wrongful."[21] "Society," wrote Chief Judge Sullivan, "does not recognize as legitimate a thief's expectation of privacy in another's locker that he wrongfully appropriates to conceal his ill-gotten gains, any more than it recognizes a burglar's expectation of privacy in a house which he is burglarizing."[22]

The Court of Military Appeals affirmed the Army court's decision. The end result—upholding the admission of the evidence at trial—remained the same, although the legal analyses were decidedly different. Only Senior Judge Everett discussed the differing methodologies. Declaring in his concurring opinion that the Fourth Amendment analysis used by the trial court and the Army Court of Military Review was "entirely acceptable,"[23] he declined to accept Chief Judge Sullivan's and Judge Cox's conclusion that "Britten lacked

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[13] *Id.* at 239.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] CM 8802943 (A.C.M.R. 31 May 1990) (unpub.), *aff'd*, 33 M.J. 238 (C.M.A. 1991).

[19] *Id.*

[20] *Britten*, 33 M.J. at 239 ("[a] preliminary, yet unavoidable question in this case is whether 'society is prepared to recognize as reasonable' appellant's expectation of privacy in someone else's locker simply because he precipitately placed a lock on it").

[21] *Id.* at 240.

[22] *Id.*

[23] *Id.* (Everett, J., concurring).

any expectation of privacy from the outset, despite his putting a lock on the locker."[24] Senior Judge Everett noted in particular that the trial judge and Army Court of Military Review expressly found that the accused's expectation of privacy was both subjectively and objectively reasonable. Asserting that he was "unconvinced that the military judge was wrong,"[25] Senior Judge Everett concluded that this factual finding was binding on the Court of Military Appeals. Accordingly, he concurred only in the result.

United States v. Britten demonstrates how trial and appellate courts can analyze the same Fourth Amendment issue in markedly different ways. In light of these differences in methodologies, trial counsel and defense counsel should endeavor to develop search and seizure issues fully at courts-martial. When seven judges approach the same issue differently, counsel should too. Major Borch.

Contract Law Note

May a Government Employee File a *Qui Tam* Suit? "Yes," Says Eleventh Circuit

Under the False Claims Act (FCA),[26] any person[27] may file a civil action on behalf of the United States against individuals or businesses that submit false claims to the government. These private attorney general suits, called "*qui tam*" suits,[28] "encourage any individual knowing of fraud to bring that information forward."[29] As a reward for assisting the government in its efforts to fight fraud, the filer of a *qui tam* suit—commonly known as the "relator"—may claim a share of any monies the United States recovers as damages. Under certain circumstances, the relator may receive up to thirty percent of the award.[30] To date, *qui tam* actions under the FCA have arisen almost exclusively from allegations of government contract fraud. These actions, however, may be brought against any person or organization that makes a false claim of any kind against the United States.[31]

From the outset, a key issue in *qui tam* litigation has been whether a government employee may file a *qui tam* suit.[32] For example, if a federal employee, acting within the scope of his or her employment, discovers evidence that a government contractor has engaged in bidrigging and defective pricing, may the employee use this information to file a *qui tam* suit? The Department of Justice (DOJ) argues that *qui tam* suits are not available to government employees[33] because a government employee ought not to profit personally from the information he or she gains in the course of public employment. Several commentators agree.[34]

That an employee should not use information obtained in the course of his or her duties to file a *qui tam* suit—particularly when the employee's duties expressly require the employee to investigate or to monitor contract performances—seems axiomatic. The First Circuit followed this logic in *United States ex rel. LeBlanc v. Raytheon Co.*[35]

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[24] *Id.*

[25] *Id.*

[26] 31 U.S.C. §§ 3729-3733 (1988).

[27] A "person" includes individuals, partnerships, corporations, organizations, associations, and political subdivisions of states. S. Rep. No. 345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.C.A.N. 5273.

[28] The term "*qui tam*" derives from the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" ("who brings the action for the king as well as for himself").

[29] S. Rep. No. 345, *supra* note 27, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67.

[30] Under the *qui tam* provisions of the False Claims Act, a relator may file a civil complaint against the maker of the false claim. *See* 31 U.S.C. § 3730(b)(4)(1) (1988). The complaint is filed under seal in a United States district court. *Id.* §§ 3730(b)(2), 3732(a). Only the DOJ is served; the defendant is not. *Id.* § 3730(b)(2). The DOJ has 60 days to decide whether to enter the suit on behalf of the United States. *Id.* If DOJ enters the suit, it has primary responsibility for the litigation. *Id.* § 3730(c)(1). The relator, however, must receive notice of, and may object to, any proposed settlement or dismissal of the suit. *Id.* § 3730(c)(1),(2). If the United States does not take over the *qui tam* action, the relator may receive up to 30% of the proceeds recovered from the defendant. *Id.* § 3730(d)(2). If the United States intervenes in the suit, the relator receives from 15% to 25% of the recovered monies. *Id.* § 3730(d)(1). If the action is based primarily on disclosures of specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, or a Government Accounting Office report, hearing, audit, or investigation, the court may award the relator a sum not to exceed 10% of the proceeds. *Id.* The relator also may recover his or her attorneys' fees and other reasonable costs of litigation. *Id.*

[31] For an excellent general discussion of the FCA's *qui tam* provisions, see J. Kunich, *Qui Tam: White Knight or Trojan Horse?*, 33 A.F. L. Rev. 31, 40-42 (1990).

[32] For an excellent general discussion of this and other key *qui tam* issues, see K. Brody, *Recent Developments in the Area of "Qui Tam"*, 37 Fed. B. News & J. 592 (1990); J. Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 Pub. Cont. L.J. 56 (1990).

[33] *Justice to Seek Legislative Bar on Government Employee Qui Tam Suits*, 53 Fed. Cont. Rep. (BNA) 488 (Apr. 9, 1990).

[34] *See, e.g.*, P. Hanifin, *Qui Tam Suits by Federal Government Employees Based on Government Information*, 20 Pub. Cont. L.J. 556 (1991). Hanifin argues that Congress meant to prohibit "parasitical" *qui tam* suits when it amended the FCA in 1988. *See generally id.* Accordingly, he asserts that government employees should be barred from "expropriat[ing] non-public governmental information for private use and profit." *Id.* at 616.

[35] 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991).

The court decided that LeBlanc was barred from filing a *qui tam* action because his job as a government employee expressly required him to uncover contract fraud.[36] Recently, however, another circuit court of appeals explicitly rejected the First Circuit's reasoning and reached an opposite result. In *United States ex rel. Williams v. NEC Corp.*,[37] the Eleventh Circuit decided that the FCA permits government employees to file *qui tam* suits, even when an employee acquires the information that forms the basis of the suit while working for the government. This case is important for judge advocates and other military attorneys working in Alabama, Florida, and Georgia—three states that contain many large military installations. After *Williams*, any government employee in these states may file a *qui tam* suit based on information obtained in the course of his or her official duties. Consequently, any installation contracting officer, contracting officer's representative, or inspector is a potential *qui tam* litigant. Even a contract attorney may qualify as a *qui tam* plaintiff.

Williams was an Air Force civilian contract attorney who uncovered "bidrigging on the part of a corporation seeking telecommunications contracts with the United States."[38] He filed a *qui tam* complaint in the United States District Court for the Middle District of Florida.[39] The Justice Department moved to dismiss the complaint, asserting that the FCA "jurisdictionally bars any suit by a government employee [that is] based upon information acquired in the course of his [or her] government employment."[40] The district court agreed and dismissed Williams' complaint for lack of subject matter jurisdiction.[41]

On appeal, Williams argued that no provision of the FCA precludes government employees from filing *qui tam* suits. The Eleventh Circuit agreed and reversed. In an interesting opinion, the court carefully examined the language of the FCA's *qui tam* provisions to determine whether the language of the FCA prohibits a *qui tam* suit by a government employee.

The DOJ argued that 31 U.S.C. § 3730 bars these suits. That section provides, *inter alia*, that a court lacks subject matter jurisdiction over a *qui tam* complaint "based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, *unless* the Attorney General . . . or . . . an original source of the information" files the suit.[42] The Justice Department claimed that Williams' suit was barred because it derived from publicly disclosed information and because Williams was not an "original source" of that information.

To support this argument, the DOJ asserted that a public disclosure had occurred when Williams used official information for purposes outside the scope of his employment. It reasoned that, when a "government employee uses official information as a private citizen, he [or she] has disclosed the information to himself [or herself] so that a 'public disclosure'"[43] has occurred.

The Eleventh Circuit, however, rejected this reasoning, finding that "it ignore[d] the plain language of section 3730(e)(4)(A)."[44] The court concluded that the "list of methods" of "public disclosure" enumerated in section 3730(e)(4)(A) is both exclusive and exhaustive. Because Williams' report on the defendant's bidrigging scheme was not issued by Congress, an administrative agency, or the GAO, it was not a "public disclosure" within the meaning of the Act.[45]

The circuit court refused to examine the Justice Department's second argument, that Williams' *qui tam* suit was barred because he was not an "original source" of the information in his complaint. It noted that an original source inquiry is necessary only after a court determines that a *qui tam* suit is based on publicly disclosed information.[46]

The court also considered the legislative history of the FCA in reaching its conclusion. It found no clear indication that Congress meant to prohibit a *qui tam* suit by a government employee. Consequently, the court refused to infer this prohibition.

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[36] LeBlanc worked as a quality assurance specialist for the Defense Contract Administration Service.

[37] 931 F.2d 1493 (11th Cir. 1991).

[38] *Id.* at 1494. In particular, NEC Corporation and its wholly owned subsidiaries were bidrigging on Air Force "contracts in Japan." *Id.* at 1495 n.5.

[39] United States *ex rel.* Williams v. NEC Corp., No. 89-209-Civ-Orl-18 (M.D. Fla. 12 May 1989) (unpub.), *rev'd*, 931 F.2d 1493 (11th Cir. 1991).

[40] *Williams*, 931 F.2d at 1494.

[41] *Williams*, No. 89-209-Civ-Orl-18, slip op. at 1.

[42] 31 U.S.C. § 3730(e)(4)(A) (1988) (emphasis added). The legislative history of the FCA indicates that the "public disclosure" prohibition was designed to combat "parasitical" suits. In the 1930's, many plaintiffs filed "numerous" *qui tam* suits using "information copied from government files or indictments." *Williams*, 931 F.2d at 1497. Congress amended the FCA in 1943 to stop these "copy cat" suits. *See id.; see also* 31 U.S.C. § 232(c) (Supp. III 1943) (repealed 1982); United States *ex. rel.* Wisconsin v. Dean, 729 F.2d 1100, 1104 (7th Cir. 1984). The key issue before the Eleventh Circuit in *Williams* was whether the 1986 FCA amendments continued this legislative intent.

[43] *Williams*, 931 F.2d at 1499.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1500.

What is particularly interesting about *Williams* is the court's evaluations of several public policy arguments advanced by the DOJ. First, the Eleventh Circuit rejected the DOJ's argument that Williams' *qui tam* suit was barred because he had "used official time and government resources"[47] to investigate the bidrigging. Although the court initially noted that Williams maintained that he had performed his investigations during "non-work hours," it ultimately dismissed these considerations as irrelevant, stating that the FCA clearly does not prohibit the "use of information obtained and developed in the course of government employment."[48] Second, the court rejected the DOJ's argument that to allow Williams' *qui tam* suit would interfere with ongoing government fraud investigations and would encourage government employees to race the government to the courthouse to file *qui tam* suits. Again, the court rejected these arguments, finding that the plain language of the statute and its legislative history did not support the DOJ's position. The Eleventh Circuit seemed sympathetic to the Government's argument that allowing government employees to file *qui tam* actions would make the administration of *qui tam* litigation more difficult. The court, however, determined that it was "charged only with interpreting the statute . . . and not with amending it to eliminate administrative difficulties."[49] Accordingly, the court reversed the district court, remanding Williams' *qui tam* suit "for proceedings consistent with this opinion."[50]

Government attorneys may find several other aspects of *Williams* interesting. First, the decision probably will be followed in the Fifth Circuit—Louisiana and Texas—because the Senior Circuit Judge for that circuit sat by designation in the *Williams* case and therefore is intimately familiar with the reasoning of the decision. In light of this familiarity and of the close historical relationship between the Fifth and Eleventh Circuit Courts of Appeal,[51] arguments similar to those that Williams presented on appeal very well could prevail in a *qui tam* action in the Fifth Circuit.

Second, the Supreme Court will not likely consider the issue in *Williams* in the near future. The Court signaled its unwillingness to address the question when it recently denied certiorari in *LeBlanc*. Although the Supreme Court's decision to deny review in that case initially may have appeared favorable to the DOJ, the Court's refusal to determine conclusively who may qualify as a *qui tam* relator has left the other ten circuits free to reach their own conclusions on this issue. The immediate results may be seen in the new rule in *Williams* in the Eleventh Circuit, and in a similar holding in the Ninth Circuit. In *United States ex rel. Hagood v. Sonoma County Water Agency*,[52] the Ninth Circuit allowed a *qui tam* suit by a lawyer who based his suit on information he obtained while working for the Army Corps of Engineers. As in *Williams*, the Ninth Circuit refused to find that any "public disclosure" occurred. Absent evidence of public disclosure, the Ninth Circuit would not consider whether Hagood was an "original source."

The impact of *Williams* and *Hagood*, may be short-lived. The Justice Department presently is seeking an amendment to the FCA to override the results in these cases. Apparently, the DOJ's position has attracted strong support in Congress.[53] Nevertheless, unless Congress amends the FCA, *Williams* and *Hagood* will permit a government employee to file a *qui tam* suit against any person making a false claim against the United States within the jurisdictional limits of the Eleventh or Ninth Circuits. Major Borch and Major Cameron.

International Law Note

Center for Law and Military Operations: an Update

Request for Submissions

The Center for Law and Military Operations (CLAMO), located at the Judge Advocate General's School, U.S. Army (TJAGSA), is seeking contributions from attorneys in the field on legal issues associated with all categories of operational law (OPLAW). All judge advocates are encouraged to submit contributions to be considered for publication in either *The Army Lawyer* or the *Military Law Review*. In particular, individuals who participated in the recent Gulf War are urged to submit contributions or to recommend issues that are worth pursuing.

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[47] *Id.* at 1495 n.5, 1503.

[48] *Id.*

[49] *Id.* at 1504.

[50] *Id.*

[51] The Fifth Circuit was divided in 1980, and a new circuit, the Eleventh Circuit, was created. Decisions rendered by the Fifth Circuit before its division are binding in the Eleventh Circuit. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[52] 929 F. 2d 1416 (9th Cir. 1991).

[53] *Justice to Seek Legislative Bar on Government Employee Qui Tam Suits*, 56 Fed. Cont. Rep. (BNA) 267 (Aug. 19, 1991). Congressional support for the DOJ apparently reflects a perception that a government employee should not get "a windfall for merely doing his [or her] job." The facts underlying the *Williams* litigation may accentuate this perception. As one commentator pointed out, when the Justice Department eventually "negotiated a $34 million dollar [sic] settlement with the contractor, . . . the relator [Williams] . . . [stood] to gain up to 30 percent of that settlement." *Id.* The DOJ essentially complained that "[i]n a case where there is no allegation of any coverup and the government was pursuing the very activity that Williams sought to free ride on, Williams [was seeking] a windfall for merely doing his job." *Id.*

Submissions may be of any length. They may comment on use of force issues, ongoing bilateral or multilateral negotiations, civil affairs, intelligence oversight, security assistance, exercise-unique legal issues, rules of engagement, terrorism, arms control, low-intensity conflict, or other topical issues that are worth highlighting. The faculty of the International Law Division, TJAGSA, is available to assist in the editing process. Submissions should be sent to the following address:

The Center For Law and Military Operations
LTC H. Wayne Elliott
International Law Division
Judge Advocate General's School
Charlottesville, VA 22903-1781

Goal and Functions of CLAMO

The Center for Law and Military Operations was established by then-Secretary of the Army John O. Marsh, Jr., in December 1988. The Center's goal is to examine current and potential legal issues attendant to military operations through the use of symposia, the publication of professional papers, and the creation of a joint-service OPLAW library.

A working definition of operational law reveals the extraordinary breadth of an OPLAW attorney's duties. Operational law includes all of "[t]hat body of law, both domestic and international, [that] impact[s] specifically upon legal issues associated with the planning for, and deployment of, United States forces overseas in both peacetime and combat environments."[54] The Center helps judge advocates by identifying, discussing, and implementing legal doctrines essential to evolving missions in the field.

Attorneys involved in OPLAW in both peace and war realize the critical need to disseminate lessons learned. Judge advocates who have faced and dealt with various OPLAW issues unquestionably must make their knowledge available to the entire Regiment. Lieutenant Colonel Elliot.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

New Designation Procedures for Special Legal Assistance Attorneys (SLAAs)

The Chief, Army Legal Assistance, recently announced new designation procedures for special legal assistance attorneys. The text of the February message appears in this edition of *The Army Lawyer* in *Guard and Reserve Affairs Items, infra* page 82.

Tax Notes

The Armed Forces Tax Council

The Department of Defense (DOD) created the Armed Forces Tax Council (AFTC) on 1 December 1988.[55] The AFTC is comprised of three members and one chair,[56] who represent the Army, Navy, Air Force, and Marine Corps. The council coordinates current and proposed DOD publications and requests comments on tax proposals and rulings on tax questions from the Treasury Department, the Internal Revenue Service (IRS), and state tax authorities. It also makes legislative proposals affecting the federal and state tax obligations of service members and the military departments, requests interpretations of tax laws, and provides advice on tax matters to service members.

The AFTC currently is involved in several federal, state, and local legislative tax proposals. These proposals include:

- Amending Internal Revenue Code (I.R.C.) § 217 to permit service members to claim "above the line" deductions for moving expenses.[57]

- Amending I.R.C. § 32 to extend earned income credit to military families overseas, to clarify nontaxable earned income, and to incorporate into the statute several administrative improvements—such as listing a service member's significant, nontaxable earned income on his or her Form W-2.[58]

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[54] International Law Division, The Judge Advocate General's School, ADI-22, The Operational Law Handbook, at 1-1 (Feb. 1989).

[55] *See* Dep't of Defense Directive 5124.3, Armed Forces Tax Council (Dec. 1, 1988).

[56] Pursuant to DOD Directive 5124.3, the Assistant Secretary of Defense (Force Management and Personnel) designates the AFTC chair. *Id.* The current chairman is Commander Patrick Kusiak. The service secretaries each designate one member. *Id.*

[57] At present, military moving expenses must be itemized on Schedule A to Form 1040. *See* I.R.C. § 217 (1988).

[58] This income includes basic allowance for quarters and basic allowance for subsistence. *See id.* § 134.

- Extending to eight years the period in which a service member can claim the benefits of I.R.C. § 1034[59] for replacement of a principle residence when the service member must occupy government quarters incident to his or her military service.

- Providing favorable tax treatment to service members who receive Housing Assistance Program benefits because of base closures.

- Allowing rollovers of voluntary separation incentives and special separation benefits into individual retirement accounts (IRAs).

- Increasing an officer's combat zone exclusion from $500 to $2000 for each month an officer serves in a combat zone.[60]

- Clarifying Puerto Rico income tax requirements for soldiers domiciled in Puerto Rico.

- Opposing California's recent attempts to expand its definition of residence to include many service members who are stationed in California or are assigned to units based there, but who claim domi-ciles in other states.

Legal assistance attorneys (LAAs) should note that the DOD General Counsel recently issued a memorandum requiring DOD attorneys to obtain approval from the DOD Office of General Counsel, and from the general counsel of their military departments, before requesting rulings or opinions on matters of general military applicability from agencies outside the DOD.[61] Army attorneys should send requests concerning tax matters to the AFTC, through the Office of the Judge Advocate General (DAJA-LA). Lieutenant Colonel Forrester.[62]

Change in Federal Income Tax Withholding Rates

The IRS recently announced[63] that it will apply new wage withholding tables to salaries paid on or after 1 March 1992. In general, the new rates reduce the Federal income taxes withheld from wages paid to low- and middle-income employees and retirees. The IRS Notice indicates that an employee from whom taxes are withheld at the married rate may see the withholding from his or her salary reduced by as much as $345 per year. The amount withheld from a married couple when both spouses work could drop by as much as $690. An employee whose taxes are withheld at the single rate will see a smaller adjustment, but his or her withholding still may decrease by as much as $172 annually.[64] The same withholding reductions will apply to retirees whose federal income taxes are withheld from periodic payments from pensions, IRAs, or annuities.[65]

An employee who does not want to take advantage of the lower withholding rates must ask his or her employer to withhold additional amounts. The employee may do so by filing a new Form W-4. The IRS Notice explains:

> Employees withheld at the married rate should divide $345 by the total number of pay periods in the year and [should] enter that amount (plus any additional withholding already requested) on Line 6 of Form W-4. Employees withheld at the single rate should divide $172 by the total number of pay periods in the year and [should] enter that amount (plus any additional withholding already requested) on Line 6 of Form W-4.[66]

The IRS advises taxpayers who have questions about the new withholding tables, or about completing new Forms W-4, to call (800) 829-1040 for assistance. Employees who desire

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[59] Provisions of section 1034 of the Internal Revenue Code permit a taxpayer to offset the gain from the sale of a principle residence against the cost of purchasing a new home if he or she purchases the new residence within two years of selling the old residence. *See id.* § 1034(a). Section 1034 currently suspends this two-year limitation "during any time that [the] taxpayer . . . serves on extended active duty with the Armed Forces . . . after the . . . sale of the old residence . . . except that any . . . time . . . so suspended shall not extend . . . [more than] 4 years [beyond] . . . the sale of the old residence." *Id.* § 1034(h).

[60] *See generally id.* § 112.

[61] The approval requirement does not apply to requests for rulings or opinions on behalf of individual clients.

[62] Lieutenant Colonel Vance M. Forrester, the Deputy Chief of Army Legal Assistance, is the Army delegate to the AFTC.

[63] I.R.S. Notice 92-6, Change in Withholding Tables, 1992-7 I.R.B. 18 [hereinafter Notice].

[64] The actual reduction in withholding will vary, depending on when each employer implements the new withholding rates.

[65] Notice, *supra* note 63, 1992-7 I.R.B. at 18.

[66] *Id.* Employees need not change the number of allowances they previously claimed on their Forms W-4.

information on determining their correct withholdings should order Publication 919, *Is My Withholding Correct for 1992?*,[67] by calling (800) 829-3676. Major Hancock.

Family Law Note

Using the AFDC Program as a Supplemental Means of Child Support

Army Regulation (AR) 608-99[68] requires soldiers to provide "family members"[69] with "adequate and continuous support."[70] In the absence of a court order or a written support agreement, AR 608-99 prescribes "minimum support requirements" for maintenance of a soldier's family members, including children.[71]

Despite the mandate of AR 608-99, some soldiers are remarkably recalcitrant in their refusals to provide voluntary support to family members. When these soldiers are stationed overseas, establishing or enforcing judicial orders for support can be very difficult. Faced with this situation, an LAA must be prepared to discuss with the custodial parent the possibility of seeking public assistance until the soldier provides support.

In 1935, Congress passed title IV-A of the Social Security Act,[72] creating the Aid to Families with Dependant Children (AFDC) program. Congress originally intended AFDC to assist families with minor children after the deaths of the families' primary wage earners. Over time, however, the program has come to be used primarily when a primary wage earner has deserted his or her family or otherwise is living separate from the family and is not providing support. By the mid-1980's, nearly ninety percent of all children receiving AFDC assistance had a living parent who was absent from the home.[73]

Under the AFDC program, each state determines its own eligibility criteria, subject to certain federally imposed requirements.[74] Each state also establishes its own monthly grant scale. Income from a state grant typically does not exceed the minimal subsistence level.[75] Larger payments are discouraged by a per capita ceiling on federal contributions to state AFDC programs.[76]

To receive AFDC assistance, a grant recipient must assign to the state his or her rights to collect support from the noncustodial parent.[77] The grant recipient also must assign any arrearage that has accrued under an existing support order.[78] As long as the custodial parent remains enrolled in the AFDC program, any support provided by the noncustodial parent must be paid directly to the state.[79]

The first fifty dollars that a state collects from a noncustodial parent is added to the AFDC recipient's regular AFDC payment and is paid directly to the recipient.[80] This "pass through" does not affect the recipient's entitlement to further AFDC payments.[81] Any amounts in excess of fifty dollars that the state receives from the obligor then are distributed according to the following priority scheme: (1) the state and federal governments recover an amount equal to their contributions to the total AFDC assistance the custodial parent has received that month;[82] (2) the family receives from any money remaining the amount of the current, court-

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[67] Internal Revenue Serv., Pub. 919, Is My Withholding Correct for 1992? (1991).

[68] Army Reg. 608-99, Family Support, Child Custody and Paternity (22 May 1987) [hereinafter AR 608-99].

[69] As defined in AR 608-99, the term "family member" includes: (1) a soldier's present spouse; (2) a soldier's former spouse, if a court has ordered the soldier to pay support to the former spouse; (3) a soldier's natural and adopted minor children; (4) the illegitimate, minor child of a female soldier; (5) the illegitimate, minor child of a male soldier, if a court has ordered the soldier to support the child; and (6) any other person that a soldier is obliged to support under the laws of the soldier's domicile or the laws of the domicile of the person to be supported. *See id.*, glossary, sec. II.

[70] *Id.*, para. 1-5*a*(1).

[71] *See id.*, para. 2-4*b*.

[72] 42 U.S.C. §§ 601-615 (1988).

[73] Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, History and Fundamentals of Child Support Enforcement 1 (2d ed. 1986).

[74] *See* 45 C.F.R. § 233.20 (1991).

[75] In 1986, for example, California was awarding an eligible parent and child with no other income a grant of $498 per month. The federal poverty level for a two-person household in 1986, however, was $603 per month. *See* M. Greenberg, Protecting Rights to Public Benefits for Parents and Children (1987).

[76] *See* 42 U.S.C. § 603 (1988).

[77] *See* 45 C.F.R. § 232.11 (1991).

[78] *Id.* When an arrearage is substantial and the custodial parent has a realistic chance of collecting it from the obligor, an LAA should consider counseling the custodial parent to defer applying for AFDC until the arrearage has been collected. Otherwise, the custodial parent would have to assign the arrearage to the state.

[79] 45 C.F.R. § 302.32 (1991).

[80] *Id.* § 302.51(b)(1).

[81] *Id.*

[82] *Id.* § 302. 51(b)(2).

ordered, monthly support obligation;[83] (3) the state claims any arrearage the support obligor owes it for prior AFDC payments;[84] and (4) the custodial parent receives the remainder of the payment to satisfy any arrearage owed by the support obligor.[85] The assignment of support terminates when AFDC payments stop; but even then, the state may recover any support arrearage that accrued while the custodial parent was receiving AFDC.[86]

Children of soldiers are eligible to receive AFDC. Since 1982, however, AFDC assistance has not been available to children deprived of support if their parents' continued absences from home are "occasioned solely by reason of the performance of active duty in the uniformed services of the United States."[87] Accordingly, to claim AFDC for a child, a custodial parent married to a soldier must prove that he or she would not live with the soldier even if the soldier's military duty did not force the spouses to live apart. Most states, however, are not overzealous in requiring custodial parents to prove the reasons for their separations from their military spouses.

Clearly, AFDC is not a panacea for every difficult child support case that an LAA may encounter. In many cases, the AFDC program should be used only as a last resort—particularly, when a substantial arrearage has accrued under an existing support order. Nevertheless, despite its limitations and the stigma that often is associated with its use, AFDC is a valuable safety net that should not be disregarded when other means of obtaining support for a soldier's dependant children have failed. Major Connor.

Survivor Benefit Plan Note

Payment of Survivor Benefit Plan Annuities to Representatives of Legally Incompetent Beneficiaries

Last year, Congress directed the military services to develop regulatory procedures for paying Survivor Benefit Plan (SBP) annuities to representatives of legally incompetent beneficiaries.[88] The new regulations must establish procedures for paying annuities to persons for whom guardians or other fiduciaries have been appointed, as well as to minors, mental incompetents, and other legally disabled persons for whom guardians or other fiduciaries have not been appointed. Moreover, the regulations may require the payee of an annuity to spend or to invest payments for the benefit of the annuitant, to post a surety bond to protect the annuitant's interests, to maintain an accounting of expenses and of investments of the annuity payments, and, upon request, to provide this accounting to the appropriate service secretary.[89] The regulations also may authorize a payee to withhold a reasonable fee, not exceeding four percent of the annuity, for the payee's fiduciary services.[90]

The regulations may include procedures for payment of an annuity to any person who, in the judgment of the service secretary concerned, is responsible for the care of an annuitant for whom no guardian or other fiduciary has been appointed.[91] If promulgated, these procedures must afford due process to annuitants. They must establish standards for determining incompetency and for selecting a payee. They also must provide annuitants with opportunities to review evidence already presented and to submit their own evidence before final determinations are made.

Legal assistance attorneys should monitor the new regulations as they are promulgated by the services. They also should remember that payment to a person on behalf of an annuitant in accordance with these regulations will discharge the federal government's obligation to pay the annuitant. Major Hostetter.

Student Loan Collection Note

Statutes of Limitation Temporarily Eliminated for Federally Guaranteed Student Loan Collections

The Higher Education Technical Amendments Act of 1991[92] temporarily eliminated statutes of limitation on the

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[83] *Id.* § 302.51(b)(3).

[84] *Id.* § 302.51(b)(4).

[85] *Id.* § 302.51(b)(5).

[86] 42 U.S.C. § 602 (a)(26)(A) (1988); *see also* 45 C.F.R. §§ 302.51(b)(4), 302.51(f) (1991).

[87] 42 U.S.C. § 606(a) (1988).

[88] National Defense Authorization Act for Fiscal Years 1992-1993, Pub. L. No. 102-190, § 654, 105 Stat. 1290, 1389 (1991) (amending 10 U.S.C. § 1455 (1988)).

[89] *Id.* § 654(a) (adding subsection (c) to 10 U.S.C. § 1455 (1988)).

[90] *Id.* (adding subsection (c)(4) to 10 U.S.C. § 1455 (1988)). The payee, however, may claim a fee for fiduciary services only if a court appointment order provides for payment of this fee or if the service secretary determines that payment of the fee is necessary to obtain the payee's services. *Id.*

[91] *Id.*, 105 Stat. at 1390 (adding subsection (c)(7) to 10 U.S.C. § 1455 (1988)).

[92] Pub. L. No. 102-26, 105 Stat. 123.

collections of defaulted, federally guaranteed student loans.[93] To "ensure that obligations are enforced without regard to any federal or state statutory, regulatory, or administrative limitation on the period within which debts may be enforced,"[94] the Act provides that "no limitation shall terminate the period in which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action [may be] initiated or taken" by an educational institution, its guaranty agency, the Secretary of Education, the Attorney General, or the administrative head of any other federal agency.[95] This change in the law applies to any actions pending on or after 9 April 1991, that are brought before 15 November 1992.[96]

Of particular interest to LAAs is the consequential removal of the ten-year statute of limitation on IRS offset collections, which often are used against legal assistance clients who have defaulted on student loans. Although these provisions of the Act will expire on 15 November 1992, Congress will reconsider them when it reauthorizes the Higher Education Act[97]—and it eventually may eliminate statutes of limitation permanently. Major Hostetter.

Administrative and Civil Law Notes

Toward a Quality Force

The Army long has had policies telling commanders how to manage soldiers who are overweight, have used illegal drugs, have failed drug and alcohol rehabilitations, have failed Army physical fitness tests (APFTs) repeatedly, have been barred from reenlistment, have been removed for cause from Noncommissioned Officer Education System courses, or have been subject to actions that cause them to lose required professional licenses. Most of these policies accorded commanders some discretion in dealing with these soldiers. Last year, however, the Department of the Army (DA) promulgated several interim changes to Army regulations that affect the manner in which commanders may handle these problems. In most instances, these changes reduce command discretion, expressly directing commanders to take specific actions. The Department of the Army intended these changes to shape the character of a smaller Army by leaving us with the highest quality active force.[98]

The 1991 changes modify six regulations.[99] Some affect only enlisted soldiers; some affect only officers; some affect both. Judge advocates must be familiar with these changes and with the interrelationships between the regulations they modify. Accordingly, this article will discuss the effects of the regulatory changes and how they interact.

Overweight Soldiers

Changes to Army Regulation (AR) 600-9,[100] AR 635-100,[101] and AR 635-200[102] significantly affect the ways that commanders may handle overweight soldiers. Although the changes to AR 600-9 are effective only upon receipt of the interim change,[103] the changes to other regulations contain similar provisions that took effect on those changes' respective implementation dates. As amended, the regulations require a commander to initiate a bar to reenlistment or separation proceedings against any enlisted soldier who, after six months, fails to progress satisfactorily in a weight control program.[104] Similarly, a commander must initiate proceedings to separate an officer who fails "to achieve satisfactory progress after enrollment in the Army weight control program."[105]

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[93] *See id.* § 3(a), 105 Stat. at 124 (amending 20 U.S.C. § 1091a(a) (1988)).

[94] *Id.* (amending 20 U.S.C. § 1091(a)(a)(1) (1988)).

[95] *Id.* (amending 20 U.S.C. § 1091(a)(a)(2) (1988)).

[96] *Id.* § 3(c), 105 Stat. at 125.

[97] 137 Cong. Rec. H1808-02 (daily ed. Mar. 19, 1991) (statement of Rep. Coleman).

[98] Message, HQ, Dep't of Army, DAPE-ZA, 051105Z Jun 91, subject: Enhancement of Quality to Support Army Builddown.

[99] Army Reg. 600-9, The Army Weight Control Program (1 Sept. 1986) [hereinafter AR 600-9]; Army Reg. 635-100, Personnel Separations: Officer Personnel (1 May 1989) [hereinafter AR 635-100]; Army Reg. 635-200, Personnel Separations: Enlisted Personnel (17 Sept. 1990) [hereinafter AR 635-200]; Army Reg. 601-280, Personnel Procurement: Total Army Retention Program (17 Sept. 1990) [hereinafter AR 601-280]; Army Reg. 350-15, The Army Physical Fitness Program (3 Nov. 1989) [hereinafter AR 350-15]; Army Reg. 600-85, Personnel–General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) [hereinafter AR 600-85].

[100] Army Reg. 600-9, The Army Weight Control Program (1 Sept. 1986) (I01, 15 Nov. 1991) [hereinafter AR 600-9 (I01, 1991)].

[101] Army Reg. 635-100, Personnel Separations: Officer Personnel (1 May 1989) (I01, 25 July 1991) [hereinafter AR 635-100 (I01, 1991)].

[102] Army Reg. 635-200, Personnel Separations: Enlisted Personnel (17 Sept. 1990) (I01, 1 Oct. 1991) [hereinafter AR 635-200 (I01, 1991)].

[103] Message, HQ, Dep't of Army, DAPE-HR, 311700Z Oct 91, subject: AR 600-9, The Army Weight Control Program (directing commanders to "[i]mplement the policy changes only upon receipt of the interim change").

[104] AR 635-200, para. 5-15 (I01, 1991); Army Reg. 601-280, Personnel Procurement: Total Army Retention Program, para. 6-4*e* (17 Sept. 90) (I01, 27 Sept. 1991) [hereinafter AR 601-280 (I01, 1991)]; AR 600-9, para. 21*g*(2) (I01, 1991). This provision does not apply if a medical reason exists that prevents the soldier from losing weight.

[105] AR 635-100, para. 5-10 (I01, 1991). This provision of AR 635-100 does not apply to "officers who have incurred a *statutory* active duty service obligation for participating in Army sponsored education and training programs such as Armed Forces Health Professions Scholarship Program or the Uniformed Services University of the Health Sciences." *Id.* Commanders also should consider the provisions of AR 600-9 defining satisfactory progress before initiating proceedings to separate an officer.

A commander has even less discretion when a soldier fails to maintain body-fat composition standards in the twelve-month period after his or her removal from the weight control program. Under these circumstances, the commander may not choose between a bar to reenlistment or the initiation of separation proceedings. Rather, he or she *must* initiate separation proceedings against the soldier.[106]

The amendments do not affect the requirement that a soldier may be separated under the provisions of paragraph 5-15, AR 635-200,[107] only if the *sole* basis for administrative separation is weight control failure. When another basis for separation exists, the commander still must pursue separation on that basis instead.[108]

Changes to the weight control regulation also will affect an overweight soldier's eligibility for professional military schooling. Previously, overweight soldiers officially were ineligible to attend service schools, but a soldier who was overweight when he or she first reported to a school usually enjoyed a grace period during which he or she could try to comply with standards.[109] Now, an overweight soldier not only is ineligible for most professional military schools, but also must be disenrolled if he or she arrives overweight.[110]

All soldiers who are to attend professional military schools must be screened for compliance with weight control standards before they depart from their permanent stations.[111] The soldier's height and weight must be recorded on his or her temporary duty (TDY) orders or permanent change of station (PCS) packet.[112]

If the soldier is to attend a DA board-select school or is to attend a professional military school on PCS orders, and arrives overweight, he or she will be processed for disenrollment or for removal from the DA select list.[113] The soldier must receive written notice of the proposed action and must be advised of the consequences of disenrollment or removal from the selection list.[114] The soldier then must be given a reasonable opportunity—but no more than five working days—to submit matters in rebuttal.[115] If the soldier's general court-martial convening authority concludes that the soldier failed to comply with body fat standards because he or she "lack[ed] . . . that level of self-discipline expected of a soldier of similar rank and experience," the soldier *must* be disenrolled or removed from the select list.[116]

A soldier who is overweight when he or she arrives at a professional military school that does not condition attendance upon a student's selection by a DA board or require students to attend in PCS status will be disenrolled immediately. The soldier will not receive written notice of the action, nor will he or she have an opportunity to respond.[117]

After a soldier is disenrolled or removed from a select list, a memorandum addressing the soldier's failure to maintain

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[106] AR 600-9, para. 21*k*(1)(a) (I01, 1991); AR 635- 200, para. 5-15 (I01, 1991); AR 635-100, para. 5-10 (I01, 1991); *cf.* AR 600-9, para. 21*f*, *amended by* I01, 15 Nov. 1991 (before regulatory changes were promulgated, proceedings to separate a soldier who failed to make satisfactory progress in a weight control program or failed to maintain acceptable body-fat composition could be initiated at the commander's discretion).

[107] AR 635-200, para. 5-15 (setting forth the procedures to separate enlisted soldiers from the Army for failure to meet Army body-fat composition or weight control standards).

[108] *Id.*

[109] AR 600-9, para. 20*d*, *amended by* I01, 15 Nov. 1991.

[110] AR 600-9, para. 20*d* (I01, 1991). As amended, AR 600-9 states that overweight soldiers "are not authorized to attend professional military schooling." *Id.*, para. 20*d*(3). The change further declares that

> TRADOC [(Training and Doctrine Command)] school commandants and commandants/commanders of U.S. Army Reserve Forces (USARF) schools, the Army Reserve Readiness Training Center and/or ARNG-conducted schools (regional NCO academies, State military academies, or the ARNG Professional Education Center courses) will take the actions in paragraph 20*d* upon determining that a student arrived for a professional military school . . . overweight.

Id., para. 12.1. Professional military schooling includes "all individual training courses beyond Initial Entry Training (IET). It does not include unit training involving crews and teams. Initial Entry Training includes basic branch course or equivalent for officers; warrant officer entry course for non-prior service personnel; and basic training, AIT, OSUT, and OST for enlisted personnel." AR 600-9, glossary. Thus, although the regulation defines "professional military school" broadly, within the active Army, only TRADOC commandants are responsible for implementing the new guidance. The applicability of the new provisions to a soldier who arrives overweight at a non-TRADOC school is unclear.

[111] AR 600-9, para. 20*d*(3) (I01, 1991).

[112] *Id.*

[113] *Id.*, para. 20*d*(4).

[114] *Id.*, para. 20*d*(4)(a).

[115] *Id.*, para. 20*d*(4)(b).

[116] *Id.*, para. 20d(4)(c).

[117] *Id.*, para. 20*d*(5).

standards, as well as the unit commander's possible failure to identify and act upon the soldier's weight control problem, will be sent to the first general officer in the soldier's former chain of command.[118] If the soldier arrived at the school in a PCS status, the soldier's gaining chain of command also will be informed of his or her failure to comply with standards. The gaining command must screen the soldier upon arrival and must enroll the soldier in the weight control program if he or she still is not in compliance with body-fat composition standards.[119]

APFT Failures

A soldier who repeatedly fails the APFT will be barred from reenlistment or processed for separation, unless his or her failures resulted from a medical condition.[120] Army Regulation 350-15 defines a repetitive failure as a single failure of a record test followed by a subsequent failure after the soldier has had adequate time and assistance to improve his or her performance.[121] In other words, if a soldier fails two consecutive physical fitness tests, his or her commander must initiate a bar to reenlistment or separation proceedings against the soldier. If a commander wishes to separate an enlisted soldier, he or she must ensure that the soldier first is counselled in accordance with paragraph 1-18 of AR 635-200.

An officer may not receive a bar to reenlistment. Therefore, commanders generally will have to initiate separation actions against officers who repeatedly fail physical fitness tests.[122]

Bars to Reenlistment

In addition to changes that require commanders to initiate bars to reenlistment against certain soldiers, several significant changes affect how commanders may manage soldiers who already are barred. Previously, a commander had to review a soldier's bar to reenlistment every six months.[123] If the commander decided to leave the bar in place after the first six-month review, the commander had to advise the soldier that he or she could request voluntary administrative separation.[124]

If the commander decided not to lift the bar after the second six-month review, he or she must commence separation proceedings against the soldier, unless the soldier already had completed eighteen years active federal service and would have completed twenty years' service by the expiration of his or her term of service.[125]

The new provisions shorten the periods for review. Commanders now must conduct reviews at three-month intervals.[126] Accordingly, a commander will make the second review after the bar has been in place for only six months. Because the Army regulation requires commanders to initiate separation proceedings immediately after their second reviews,[127] judge advocates should advise commanders to lay the groundwork for separations early on. At a minimum, a commander should ensure that soldiers' deficiencies are noted on counseling forms and that the soldier is counseled in accordance with paragraph 1-18 of AR 635-200.[128]

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[118] *Id.*, para. 20*d*(10).

[119] *Id.*

[120] Army Reg. 350-15, The Army Physical Fitness Program. para. 12*d* (3 Nov. 1989) (I01, 1 Oct. 1991) [hereinafter AR 350-15 (I01, 1991)]. Commanders also must ensure that soldiers who fail an APFT for the first time, or who fail to take an APFT within the required period, are flagged in accordance with Army Regulation 600-8-2, Personnel—General: Suspension of Favorable Personnel Actions (1 Mar. 1988). *See* AR 350-15, para. 11*b*(4); *see also* AR 635-200, para. 13-2*f* (I01, 1991) (commanders must initiate either a bar to reenlistment or separation proceedings against a soldier who fails two consecutive APFTs); AR 601-280, para. 6-4*e*(2) (I01, 1991) (commanders must initiate either a bar to reenlistment or separation proceedings against a soldier who fails two consecutive APFTs); AR 635-100, para. 5-10 (I01, 1991) (commanders must initiate separation proceedings against an officer who fails two consecutive APFTs). This provision of AR 635-100 does not apply to "officers who have incurred a *statutory* active duty service obligation for participating in Army sponsored education and training programs such as Armed Forces Health Professions Scholarship Program or the Uniformed Services University of the Health Sciences." AR 635-100, para. 5-10 (I01, 1991).

[121] AR 350-15, para. 12*d* (I01, 1991). A commander may allow a soldier to retest as soon as the commander and the soldier feel ready. The commander should not try to coerce the soldier to take the retest before the soldier feels ready; however, the commander must administer the retest not later than three months after the soldier's initial APFT failure, unless the soldier has a medical profile. AR 350-15, para. 11*b*(4) (I01, 1991).

[122] *See supra* note 120 (discussion of AR 635-100, para. 5-10 (I01 1991)).

[123] AR 601-280, para. 6-5*i*, *amended by* I01, 27 Sept. 1991. The regulation also required the commander to review the bar 30 days before the soldier departed from the unit or permanently changed stations. *See id.*

[124] *Id.*, para. 6-5*i*(6).

[125] *Id.*, para. 6-6. Separation proceedings must be initiated under either chapter 13 or 14 of AR 635-200. *See* AR 635-200, para. 1-49, *amended by* I01, 1 Oct. 1991.

[126] AR 601-280, paras. 6-5*i*, 6-6 (I01, 1991).

[127] The Department of the Army also amended AR 635-200 to require a commander to initiate proceedings to separate a soldier against whom the commander has imposed a bar to reenlistment if the commander does not lift the bar after the second three-month review. AR 635-200, para. 1-49 (I01, 1991). As before, separation must be under either chapter 13 or chapter 14 of AR 635-200. *Id.; see supra* note 125.

[128] Commanders must comply with paragraph 1-18. AR 635-200, para. 1-49, *amended by* I01, 1 Oct. 1991. Paragraph 1-18 requires commanders to counsel soldiers at least once before initiating separation for, *inter alia*, unsatisfactory duty performance, *id.*, ch. 13, minor disciplinary infractions, *id.*, para. 14-12*a*, or patterns of misconduct, *id.*, para. 14-12*b*; *see id.*, para. 1-18. Before the command may initiate a separation proceeding under these provisions, the commander must have offered the soldier a rehabilitative transfer or the separation authority must have waived the requirement of a rehabilitative transfer. *Id.* If the basis for separation is commission of a serious offense, para. 14-12*c*, the provisions of paragraph 1-18 do not apply.

Drug Offenses

The interim changes to AR 635-200, "Personnel Separations: Enlisted Personnel,"[129] and AR 600-85, "Personnel—General: Alcohol and Drug Abuse Prevention and Control Program,"[130] direct commanders to act against new categories of drug offenders. These categories include drug distributors, certain first-time drug users, and soldiers who fail the drug rehabilitation program. The 1991 changes do not amend existing provisions that require commanders to initiate separation proceedings against officers involved in drug offenses and soldiers that have been diagnosed as drug-dependent.[131]

As initially promulgated, AR 600-85 required commanders to *consider* initiating separation procedures against any soldier involved in illicit trafficking, distribution, or sales of drugs.[132] Now, a commander *must* initiate separation proceedings against any soldier involved in this misconduct.[133]

Army regulations formerly required a commander to initiate separation proceedings against an enlisted soldier who had been identified as a user of illegal drugs only if the soldier was a sergeant or a second-time drug offender.[134] This requirement is still valid, but it has been supplemented to mandate separations of a new category of illegal drug users. The interim changes to both AR 600-85 and AR 635-200 require a commander to initiate separation proceedings against any soldier with three or more years of service who uses illegal drugs, whatever the soldier's grade.[135]

Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Failures

Commanders now must initiate separation actions against enlisted soldiers who are declared to be alcohol or drug rehabilitation failures.[136] Before DA promulgated the interim change to AR 600-85, commanders only needed to consider these soldiers for separation.[137] Similarly, an officer's failure to respond to drug or alcohol rehabilitation once was a discretionary basis for initiation of administrative separation,[138] but initiation of separation proceedings is now mandatory.[139]

Alcohol-Related Misconduct

The Department of the Army also has recognized the adverse effect of alcohol abuse on mission readiness and mission accomplishment[140] and has identified this as a criterion that must be considered in reducing the size of the Army. Accordingly, it directed that soldiers who are involved in serious instances of alcohol-related misconduct now must be considered for separation.[141] Army Regulation 600-85 specifically mentions "[r]epetitive instances of drunk on duty or instances of DWI" as two examples of alcohol-related misconduct.[142]

Noncommissioned Officer Education Course Failures

The regulatory changes list a new, mandatory basis for either a bar to reenlistment or initiation of separation. Commanders now must bar enlisted soldiers who are removed for cause from noncommissioned officer education courses;

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[129] AR 635-200 (I01, 1991).

[130] Army Reg. 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) (I01, 1 Oct. 1991) [hereinafter AR 600-85 (I01, 1991)].

[131] *See generally* AR 600-85, para. 1-11 (providing that officers, warrant officers, and soldiers diagnosed as physically dependent on drugs other than alcohol will be processed for separation); AR 635-200, para. 14-12*c*(2)(c) (providing that medically-diagnosed, drug-dependent, enlisted soldiers will be processed for separation); AR 635-100, para. 5-13 (providing that officers who medically are diagnosed as drug-dependent, or who are identified as having committed an act of personal misconduct involving drugs, will be processed for separation).

[132] AR 600-85, para. 1-11, *amended by* I01, 1 Oct. 1991.

[133] AR 600-85, para. 1-11*b*(1) (I01, 1991). A commander, however, need not initiate separation proceedings against a soldier who has committed these offenses if charges against the soldier have been referred to a court-martial empowered to adjudge a punitive discharge. *Id.*

[134] AR 600-85, para. 1-11*b*, *amended by* I01, 1 Oct. 1991; AR 635-200, para. 14-12*c*, *amended by* I01, 1 Oct. 1991.

[135] AR 600-85, para. 1-11*b*(3) (I01, 1991); AR 635-200, para. 14-12*c*(2)(a) (I01, 1991).

[136] *See* AR 600-85, para. 1-11*d*(4) (I01, 1991) ("[t]hese soldiers should not be provided another opportunity for rehabilitation except under the most extraordinary circumstances"); AR 635-200, para. 9-2*c* (I01, 1991) (soldiers who are declared to be drug or alcohol abuse rehabilitation failures must be processed for separation). Another amendment to AR 600-85 provides that soldiers who are enrolled in ADAPCP must have their records flagged. AR 600-85, para. 1-11*d*(3) (I01, 1991). This new provision will not be effective until a change is published to AR 600-8-2.

[137] AR 600-85, para. 4-26, *amended by* I01, 1 Oct. 1991.

[138] AR 635-100, para. 5-10*g*, *amended by* I01 , 25 July 1991.

[139] AR 635-100, para. 5-10 (I01, 1991).

[140] AR 600-85, para. 1-11*a* (I01, 1991).

[141] *Id.*, para. 1-11*c*.

[142] *Id.*

otherwise, they must initiate proceedings to separate them administratively.[143] The interim changes apparently reflect DA's belief that soldiers who are eliminated from these courses have little potential for further service by providing an expedient mechanism to discharge them.

Losses of Professional License

A corresponding amendment expanded previous provisions pertaining to officers who are required to maintain professional licenses. Prior provisions permitted commanders to separate officers who lost or abandoned their professional licenses; now a failure to *obtain* the requisite professional license, endorsement, or certification, or—for Army Medical Department (AMEDD) officers—a failure to obtain appropriate clinical privileges, now can serve as a basis for administrative separation.[144] Similarly, a suspension, limitation, or revocation of an AMEDD officer's clinical privileges also can serve as a ground for separation.[145] Again, DA intended these provisions to ensure retention of only the best qualified military personnel.

Personality Disorders

Before DA implemented its new policies, a commander who wished to separate a soldier who suffered from a personality disorder had to obtain a diagnosis of a qualifying disorder from a physician trained in psychiatry and psychiatric diagnosis.[146] Perhaps in recognition of the difficulty some commanders faced in attempting to have their soldiers evaluated by a "physician trained in psychiatry and psychiatric diagnosis," DA changed chapter 5, AR 635-200, to allow separations based on the diagnoses of "licensed clinical psychologist[s]."[147] This should permit more timely diagnoses and separations of soldiers who have personality disorders, not amounting to disabilities, that interfere with their assignments to, or performances of, military duties.[148]

Conclusion

The new policies should allow the Army to down-size by retaining the best soldiers and eliminating poor performers. Judge advocates, whether advising commanders or soldier-clients, will play an important role in accomplishing this objective. Major Emswiler.

The Patient Self-Determination Act

Buried within the Omnibus Budget Reconciliation Act of 1990[149] are provisions that directly affect health care providers and health care administrators.[150] These provisions, collectively known as the "Patient Self-Determination Act" (PSDA), require all hospitals, health maintenance organizations, nursing homes, and home health care providers that receive payment from Medicare or Medicaid to provide their patients with written information describing a patient's rights under state law to accept or to reject treatment and to execute advance directives, such as living wills or durable powers of attorney.[151]

In hospitals, administrators must provide this information to a patient upon his or her admission as an inpatient.[152] Moreover, they must annotate the patient's record to reflect whether he or she has executed an advance directive.[153] A patient, however, may not be required to prepare an advance directive.[154]

Application of the provisions of the PSDA to a health care facility is conditioned upon the facility's receipt of payments from Medicare or Medicaid. Accordingly, these provisions do not apply directly to military hospitals. The Joint Commission on Accreditation of Hospitals (JCAH), however, has responded to the PSDA by adopting similar requirements in its accreditation manual. Because Army hospitals are accredited by the JCAH, they will have to abide by the new requirements.

The *Accreditation Manual for Hospitals, 1992*[155] (*AMH*) includes a new chapter entitled "Patient Rights." The provisions of the new chapter are "consistent with the require-

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[143] AR 635-200, para. 13-2*f* (I01, 1991); AR 601-280, para. 6-4*e* (I01, 1991).

[144] AR 635-100, para. 5-11*a*(9) (I01, 1991).

[145] *Id.*

[146] AR 635-200, para. 5-13*a*, *amended by* I01, 1 Oct. 1991.

[147] AR 600-235, para. 5-13*a* (I01, 1991).

[148] *See* AR 635-200, para. 5-13.

[149] Pub. L. No. 101-508, 1990 U.S.C.C.A.N. (104 Stat.) 1388.

[150] *Id.* § 4206, 1990 U.S.C.C.A.N. (104 Stat.) 1388 at [291] (adding subsection (a)(1)(Q) and subsection (f) to 42 U.S.C. § 1395cc (1988)).

[151] *Id.* (codified at 42 U.S.C.A. § 1395cc(f)(1)(A) (West 1992)); *see also* 42 U.S.C.A. § 1395cc(f)(3) (West 1992).

[152] 42 U.S.C.A. § 1395cc(f)(2)(B) (West 1992).

[153] *Id.* § 1395cc(f)(1)(B).

[154] *See id.* § 1395cc(f)(1)(C).

[155] Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals, 1992 (1991).

ments of the Patient Self Determination [sic] Act."[156] These new provisions require hospital personnel to inform a patient, upon admission, of the patient's rights—consistent with applicable state law—to accept or reject treatment and to execute advance directives.[157]

The JCAH will check hospitals for compliance with the new standards when they conduct reaccreditation surveys. Many state agencies charged with implementing local hospital policies have prepared written guidelines to help health care providers to comply with the PSDA. Army hospitals should contact these agencies to obtain specific guidance on state laws and policies. Major Emswiler.

[156] *Id.* at xiv.

[157] *Id.* § RI.1.1.5.

Claims Report

United States Army Claims Service

Claims Policy Note— 1992 Table of Adjusted Dollar Value

This table replaces both the 1991 table of adjusted dollar value (ADV) previously printed in The Army Lawyer[1] *and table 2-1, Department of the Army Pamphlet (DA Pam.) 27-162. The 1989 multipliers and notes in the new table differ from those printed in table 2-1; moreover, multipliers for 1990 and 1991 have been added to the 1992 table. In accordance with paragraph 11-13c, Army Regulation 27-20, and paragraph 2-39e, DA Pam. 27-162, claims personnel should use this table only when no better means of valuing property exists.*

Year Purchased	Multiplier 1991 Losses	Multiplier 1990 Losses	Multiplier 1989 Losses	Multiplier 1988 Losses
1991	-	-	-	-
1990	1.04	-	-	-
1989	1.10	1.05	-	-
1988	1.15	1.10	1.05	-
1987	1.20	1.15	1.09	1.04
1986	1.24	1.19	1.13	1.08
1985	1.27	1.21	1.15	1.10
1984	1.31	1.26	1.19	1.14
1983	1.37	1.31	1.24	1.19
1982	1.41	1.35	1.28	1.23
1981	1.50	1.44	1.36	1.30
1980	1.65	1.59	1.50	1.44
1979	1.88	1.80	1.71	1.63
1978	2.09	2.00	1.90	1.81
1977	2.25	2.16	2.05	1.95
1976	2.39	2.30	2.18	2.08
1975	2.53	2.43	2.30	2.20
1974	2.76	2.65	2.52	2.40
1973	3.07	2.94	2.79	2.66
1972	3.26	3.13	2.97	2.83
1971	3.36	3.23	3.06	2.92

[1] *See* Claims Policy Note, The Army Lawyer, Apr. 1991, at 53.

Year Purchased	Multiplier 1991 Losses	Multiplier 1990 Losses	Multiplier 1989 Losses	Multiplier 1988 Losses
1970	3.51	3.37	3.20	3.05
1969	3.71	3.56	3.38	3.22
1968	3.91	3.76	3.56	3.40
1967	4.08	3.91	3.71	3.54
1966	4.20	4.03	3.83	3.65
1965	4.32	4.15	3.94	3.76
1964	4.39	4.22	4.00	3.82
1963	4.45	4.27	4.05	3.87
1962	4.51	4.33	4.11	3.92
1961	4.56	4.37	4.15	3.96
1960	4.60	4.42	4.19	4.00

Notes:

1. This table should be used *only* when no better means exists to determine the value of an item. It should *not* be used to value ordinary household items for which average catalog prices can be determined, nor should it be used when the claimant cannot substantiate a purchase price.

2. To determine an item's ADV, find the column for the calendar year in which the loss occurred, then multiply the purchase price of the item by the "multiplier" in that column for the year in which the item was purchased. *Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG).* For example, to find the value of a comforter that was purchased in 1980 for $250 and was destroyed in 1988, multiply $250 times the 1980 "year purchased" multiplier of 1.44 in the "1988 losses" column. This gives an "adjusted cost" of $360. Then depreciate the comforter as expensive linen (item 88, ALDG) for eight years at a five percent yearly rate, which results in a value of $216 for the item.

3. The Labor Department calculates cost of living at the end of each year. For losses occurring in 1992, use the "1991" column. *The 1989 multipliers in table 2-1, DA Pam. 27-162, were based on midyear statistics and are incorrect.* Use the figures in the 1992 table instead.

Criminal Law Division Note

OTJAG Criminal Law Division

Amending the Manual for Courts-Martial

Introduction

The 1984 Manual for Courts-Martial[1] probably is a judge advocate's most important and most frequently used legal resource. The Manual pertains equally to all services, addressing virtually every aspect of military justice: the incipient investigative stages, pretrial and trial procedures, elements of proof, lesser included offenses, punishment, and appellate litigation. The Manual is a comprehensive guide for applying the United States Constitution to members of the Armed Forces. It implements the Uniform Code of Military Justice[2] (UCMJ) and incorporates into military law the jurisprudence of the Supreme Court and other civilian and military courts.

As a legal resource, the Manual is nearly universal. It is comprised of binding rules,[3] a discussion that serves as a treatise, and an analysis that serves as an interpretive guide.[4]

[1]Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984]. For a detailed discussion of the history of the Manual see *id.*, app. 21, at A21-1 through A21-2.

[2]10 U.S.C. §§ 801-946 (1988) [hereinafter UCMJ].

[3]"Each rule [in the Manual] states binding requirements except when the text of the rule expressly provides otherwise. Normally, failure to comply with a rule constitutes error." MCM, 1984, app. 21, at A21-2; *see also* UCMJ art. 59 (describing the effects of errors).

[4]For a more detailed discussion of the function of discussion and analysis in the Manual, see MCM, 1984, app. 21, at A21-2 to A21-3.

Its appendices include trial guides and forms. The Manual, in short, is both the cookbook and the bible for military criminal lawyers.

The Manual is prescribed by the President pursuant to his or her statutory authority[5] to establish pretrial, trial, and posttrial procedures[6] and to limit the maximum punishments that may be adjudged for violations of the UCMJ.[7] It is divided into five major components: the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and the Nonjudicial Punishment Procedures. It also contains numerous appendices.

Naturally, any document as comprehensive and as complex as the Manual must be amended over time. Indeed, the Manual has been amended several times since 1984.[8] The most recent set of amendments, commonly referred to as Change 5, was prescribed by President George Bush when he signed Executive Order 12,767 on 27 June 1991.[9]

By adopting these periodic changes to the Manual, the President intends to "improve the efficiency and effectiveness of the military justice system."[10] Each change is designed to "ensure that the Manual fulfills its fundamental purpose as a comprehensive body of law governing military justice procedures and as a guide for lawyers and nonlawyers in the operation and application of such law."[11]

How the Manual Is Amended[12]

The process of amending the Manual involves input from a variety of sources and compliance with extensive regulatory procedures.[13] Executive Order 12,473, as amended by Executive Order 12,484, provides that "[t]he Secretary of Defense shall cause [the] Manual to be reviewed annually and . . . [shall] recommend to the President any appropriate amendments." To implement this executive order, the Secretary of Defense established the Joint Service Committee on Military Justice (JSC).[14]

The JSC is comprised of five voting members, representing the Army, Navy, Marines, Air Force and Coast Guard,[15] and a nonvoting representative from the Court of Military Appeals.[16] Each year, the JSC must "review the Manual (including the Discussion and Appendices) in light of judicial and legislative developments in civilian practice," to ensure

> that the Manual, the Discussion, and the Appendices apply the principles of law

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[5]Although the President's authority to prescribe the Manual generally is discussed in terms of statutory authority delegated by Congress, *see infra* notes 6, 7, the President also has relied upon his constitutional authority as Commander in Chief. *See* Exec. Order No. 12,473, 49 Fed. Reg. 17,152, *amended by* Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (1984). *See generally* United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) (discussing the President's authority as Commander in Chief). Practically speaking, however, this presumed independent constitutional authority to prescribe the Manual likely will arise as an issue in litigation only if a provision of the Manual is challenged for inconsistency with federal statutes.

[6]UCMJ art. 36. The Court of Military Appeals long has recognized the President's authority to prescribe court-martial procedures pursuant to UCMJ article 36. *See, e.g.*, United States v. Curtis, 32 M.J. 252, 261 (C.M.A. 1991) (capital sentencing procedures); United States v. Kelson, 3 M.J. 139 (C.M.A. 1977) (timing of motions). Conversely, the court quite properly has not considered itself bound by language in the Manual that addresses substantive criminal law because these matters fall within the purview of Congress, not the President. *See, e.g.*, United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not encompass fleeing from apprehension, despite language in the Manual to the contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by including language in the Manual designed to eliminate the defense of partial mental responsibility). *See generally* Eugene R. Milhizer, *Battery Without Assault*, The Army Lawyer, Oct. 1991, at 4, 11.

[7]UCMJ art. 56 ("[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense"); *see* United States v. Scranton, 30 M.J. 322, 325-26 (C.M.A. 1990).

[8]Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984) (the basic MCM), *amended by* Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (1984) (Change 1), Exec. Order No. 12,550, 51 Fed. Reg. 6497 (1986) (Change 2), Exec. Order No. 12,586, 52 Fed. Reg. 7103 (1987) (Change 3), Exec. Order No. 12,708, 55 Fed. Reg. 11,353 (1990) (Change 4).

[9]Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991).

[10]Thomas O. Mason & Francis A. Gilligan, *Analysis of Change 5 to Manual for Courts-Martial*, The Army Lawyer, Oct. 1991, at 68.

[11]Dep't of Defense Directive No. 5500.17, Review of Manual for Courts-Martial, para. C (Jan. 23, 1985) [hereinafter DOD Dir. 5500.17].

[12]In many respects, the process for amending the UCMJ is similar to the process for amending the Manual. A detailed discussion of this topic, however, is beyond the scope of this note.

[13]Interested readers may find a detailed examination of the process of drafting and amending the Manual in the following sources: Frederic L. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 Mil. L. Rev. 5 (1990); and H. Lawrence Garrett, III, *Reflections on Contemporary Sources of Military Law*, The Army Lawyer, Feb. 1987, at 38. Professor Lederer wrote his article from the perspective of a participant in the initial drafting of the 1984 Manual. Mr. Garrett's address, reprinted in the February 1987 issue of *The Army Lawyer*, was given from the perspective of the General Counsel, Department of Defense, an individual who regularly reviews proposed amendments. The author has written this note from the perspective of a participant in the process of proposing amendments to a well-established, comprehensive, and complex legal resource. Nevertheless, he wishes to acknowledge the above-cited works by Professor Lederer and Mr. Garrett and to recommend them to anyone interested in the process of drafting and amending the Manual.

[14]*See* DOD Directive 5500.17, para. D.1.

[15]Each member of the JSC acts as a delegate for the judge advocate general—or equivalent senior legal officer—of his or her service. The Army is represented by the Chief, Criminal Law Division, OTJAG. The other services are represented by persons serving in equivalent positions.

[16]DOD Directive 5500.17, para. D.1.a.

> and rules of evidence generally recognized in the trial of criminal cases in United States District Courts to the extent practicable and to the extent that such principles and rules are not contrary to or inconsistent with the UCMJ.[17]

It is assisted in this task by the "Working Group"—a small team of attorneys that works under the Committee's supervision.[18]

In connection with these requirements, the JSC and the Working Group must endeavor to make the Manual "workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions."[19] They also must ensure that the Manual "reflect[s] current military practice and judicial precedent."[20]

Individual members of the JSC submit proposed changes to the Manual to the committee as a whole. Suggested revisions may originate from any number of sources, including judge advocates in the field. The JSC then votes to decide whether to refer proposed changes to the Working Group for study. Referred proposals are assigned priorities and given suspense dates. The Working Group also may recommend to the JSC whether an amendment to the Manual would be appropriate. If an amendment is needed, the Working Group may draft a proposed amendment of its own. The Working Group normally meets weekly. Its recommendations and draft proposals are the products of a highly cooperative enterprise.

The JSC meets periodically—generally, once every two months—to consider the recommendations and draft proposals of the Working Group. Draft proposals are approved, disapproved, or modified by a majority vote of the committee. The JSC publishes approved proposals in the *Federal Register* and provides them to legal offices in the field. The committee then considers any comments it receives, often responding to suggestions and constructive criticism by changing its proposals.

Next, the JSC incorporates the proposed changes into its annual review and forwards them to the Office of the General Counsel, Department of Defense (DOD). The proposals then are circulated throughout DOD for legal and policy reviews. After these reviews are complete, the DOD staffs the proposed changes through the Office of Management and Budget for executive branch coordination. The Department of Justice and the Department of Transportation conduct especially detailed reviews. Finally, the proposed changes are forwarded to the White House Counsel's Office.

A proposed change may be modified at any stage of the review process. Only after these extensive procedures does a proposed change go to the President to be signed.

Pending Changes

At present, several prospective changes to the Manual have reached various stages in the amendment process.[21] The JSC initially approved proposed Change 6 on 15 May 1990, incorporating it into its 1990 Annual Review of the Manual. It then published the proposed change in the *Federal Register* for public comment on 29 June 1990. After the public comment period ended on 12 September 1990,[22] the Working Group reviewed the comments received. The JSC adopted the group's recommended amendments at its 14 November 1990 meeting, then forwarded the revised proposal to the DOD General Counsel's Office, where it still was being reviewed when this note was submitted for publication.

The committee initially approved proposed Change 7 on 19 April 1991, including it as part of the 1991 Annual Review of the Manual. It added an additional change on 24 June 1991. Proposed Change 7 was published in the *Federal Register* on 23 July 1991 and its public comment period ended 7 October 1991.[23] Again, the Working Group reviewed the comments from practitioners in the field and other interested parties and it prepared recommendations for amendments to the proposed change. These amendments were adopted by the JSC at its 12 December 1991 meeting.

In addition to posting proposed changes in the *Federal Register*, The Criminal Law Division, Office of The Judge Advocate General, mails copies of the proposed changes to over 100 judge advocate offices worldwide. In particular, it seeks comments from sources that frequently participate in the military justice process, such as the judiciary, staff judge advocates, the Trial Defense Service, the managers and instructors of the Trial Counsel Assistance Program, and the appellate divisions.

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[17] *Id.*, para. D.1.b.(1) (citation omitted).

[18] The Working Group, like the JSC, is comprised of a representative from each service and the Court of Military Appeals. Members of the Working Group are supervised by their respective JSC members. The author currently represents the Army in the Working Group.

[19] DOD Dir. 5500.17, para. D.1.b.(1).

[20] *Id*, para. D.1.b.(2).

[21] This note will not discuss the substance of the pending changes because the proposed amendments may be modified during the reviewing and staffing process.

[22] 55 Fed. Reg. 26,740 (1990).

[23] 56 Fed. Reg. 33,746 (1991).

Conclusion

The Manual is an evolving resource. The JSC and the Working Group presently are completing the initial draft of proposed Change 8. They soon will begin work on proposed Change 9.

Amending the Manual should be a cooperative process that incorporates input and ideas from a variety of interested sources. All persons concerned with the quality of the military justice system are encouraged to submit to the JSC their suggestions for amending the Manual. Army personnel and interested civilians should send their suggestions to the following address:

Office of The Judge Advocate General
Criminal Law Division
Attention: Major Milhizer
Pentagon, Room 2D434
Washington, DC 20310-2200

Take the time to help improve military justice. It certainly is worth the effort. Major Milhizer.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Army Management Staff College

As part of a continuing effort to enhance the career opportunities of Army legal personnel, The Judge Advocate General has sought to obtain appropriate Army training for civilian attorneys. Accordingly, the Commandant, Army Management Staff College (AMSC), acting on the recommendations of several successive Personnel Command (PERSCOM) selection boards, has selected eight civilian attorneys to attend AMSC courses since the Personnel, Plans, and Training Office first solicited civilian attorneys to apply in the autumn of 1989.

Army Management Staff College is a fourteen-week resident course, in which Army leaders are trained in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to instruction at the military intermediate service school level.

The Judge Advocate General encourages civilian attorneys to include AMSC as an integral part of their individual development plans. Local civilian personnel offices are responsible for providing civilian attorneys with applications and instructions. Interested personnel also may obtain information by contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1356).

Army Management Staff College Class 92-3 will be held at the Radisson Mark Plaza Hotel in Alexandria, Virginia, from 14 September 1992 to 18 December 1992. **The PERSCOM application deadline for Class 92-3 is 4 May 1992.**

Note that the listed deadline is the date the application must reach PERSCOM. Major commands and local civilian personnel offices may establish earlier deadlines for applications to be processed in their commands. United States Army, Europe, (USAREUR) attorneys are reminded that their applications must be routed through Headquarters, USAREUR and Seventh Army, because that headquarters is their source of funding for the course.

Please note that the civilian application requirements for academic year 1992 have changed. Applicants should submit the following documents, providing one original and three copies:

A. AMSC application form.

B. Current DA Form 2302-R/230Z-1-R. (Do not submit SF 171, Application for Federal Employment).

C. Copies of three latest performance appraisals (no original is required).

Each attorney also should forward one copy of his or her application, with an attached endorsement by the supervising staff judge advocate or command legal counsel, to the following address:

Headquarters, Department of the Army
(DAJA-PT)
ATTN: Mr. Buckner
Pentagon, Room 2E443
Washington, DC 20310-2206

Executive Office Note

Executive Office, OTJAG

The Robinson O. Everett Award

Last year, at the annual judicial conference sponsored by the Court of Military Appeals, Chief Judge Sullivan and Judge Cox announced the creation of the Robinson O. Everett Award for Excellence in Legal Writing. To be considered for the award, an author must have written an article or commentary about some aspect of military justice that was published, or was accepted for publication, during a specific competitive period. Work written in pursuit of advanced degrees in the study of law or to satisfy other academic requirements also will be considered.

An entry need not be made by the author, but may come from any source. The Court of Military Appeals will accept an entry that meets the criteria set forth above for the 1992 Everett Award if it was completed or published between 1 October 1990 and 31 March 1991. In future years, each competitive period will begin on 1 April of one year and will end on 31 March of the next.

The Judge Advocate General joins the Court of Military Appeals in encouraging judge advocates and other members of the military legal community to submit suitable entries to the court for review. Outstanding legal scholarship deserves to be recognized; military law practitioners should ensure that no worthy candidate is overlooked.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Designation of Special Legal Assistance Attorneys

Editor's note—The following message addresses the recent change to designation procedures for special legal assistance attorneys. It is reprinted here to ensure its dissemination to interested Reserve Component judge advocates.

DAJA-LA Message 101200Z Feb 92.

SUBJECT: New Designation Procedures for Special Legal Assistance Attorneys (SLAA's)

1. References:

a. Army Regulation 27-3 dated 10 Mar 89.

b. Draft revision of Army Regulation 27-3 dated 20 Dec. 91.

c. HQDA Message dated 051830Z Mar 91, subject: Desert Storm/Demobilization Legal Assistance Implementation Policy.

d. HQDA Message dated 191530Z Apr 91, subject: Designation of Special Legal Assistance Attorneys.

e. JAGC Reserve Officer Legal Assistance Directory dated 19 Aug 91.

2. This message announces new procedures for designating Special Legal Assistance Attorneys (SLAA's). It also requires Staff Judge Advocates (SJA's) to provide information on SLAA's they have designated and to inform those SLAA's of the new procedures announced in this message.

3. Reference A, para 2-2, empowers The Judge Advocate General (TJAG) or TJAG's delegate to designate United States Army Reserve (USAR) and Army National Guard (ARNG) Judge Advocates (JA's) as SLAA's to the Commandant, The Judge Advocate General's School (TJAGSA). (Applications for designation were processed through the Chief, Guard and Reserve Affairs (GAR).)

4. During Operations Desert Shield/Storm the authority to designate SLAA's was further delegated by Reference C to The Staff Judge Advocate (SJA) of each continental United Stated Army (CONUSA) and of each installation having a

Casualty Assistance Command (CAC). This was done as a temporary measure in order to facilitate rapid augmentation of legal assistance services available at installations having responsibility for casualty assistance. Later, Reference D also delegated this authority to the Chief, Army Legal Assistance. Since Aug 91 the Commandant, TJAGSA has stopped designating SLAA's and has referred those JA's requesting SLAA appointment to the Chief, Army Legal Assistance.

5. There is no longer a need to decentralize the appointment of SLAA's given the cessation of hostilities in Southwest Asia and the completion of almost all legal assistance services arising from Desert Storm. IAW with para 6 of this message, the Chief, Army Legal Assistance will redesignate those JA's who are presently serving—and desire to continue to serve—as SLAA's, and will take action on all applications submitted by JA's to be designated as SLAA's in the future. This new procedure will facilitate the following goals:

a. Identification of all SLAA's.

b. Development of up-to-date and complete records on all JA's serving as SLAA's.

c. Communication between the Chief, Army Legal Assistance and those designated as SLAA's.

d. Standardization of SLAA Designation procedures.

e. Standardization of other procedures for SLAA's not assigned to the ARNG or to USAR Troop Program Units (TPU's) (*e.g.*, supervision, evaluation of legal assistance performed, supporting documentation required, recommendations on the award of retirement points).

f. The inclusion of all SLAA's in the reserve officer legal assistance directory (Reference E). (This will make the names and legal specialties of SLAA's known to JA's throughout the Army and increase the opportunity of SLAA's to earn retirement points.)

6. On and after 15 Feb 92 only the Chief, Army Legal Assistance will designate SLAA's. Those SLAA's who have been designated by SJA's prior to 15 Feb will be redesignated by the Chief, Army Legal Assistance. Unless redesignated, those SLAA's will no longer have authority to serve as SLAA's after 31 May 92. Applications by JA's to be designated as SLAA's in the future will be sent to the Chief, Army Legal Assistance for action. Each SJA who has designated SLAA's prior to 15 Feb 92 will take the following actions regarding those SLAA's NLT 30 Mar 92:

a. Advise all SLAA's currently designated of the contents of this message.

b. Determine which SLAA's desire to continue serving as SLAA's

c. Report the rank, full name, reserve status (i.e., individual ready reserve (IRR), individual mobilization designee (IMA), TPU, ARNG), mailing address, and day-time telephone number of each SLAA who desires to continue serving as an SLAA to:

(1) HQDA (DAJA-LA), Wash D.C. 20310-2200, and

(2) U.S. Army Reserve Command (ATTN: AFRC-JA), FT McPherson, GA 30330-6000.

7. SLAA's who have not been designated as SLAA's by the Chief, Army Legal Assistance may also apply directly to HQDA (DAJA-LA), Wash D.C. 20310-2200 for such designation. The same procedure applies to initial applications by eligible JA's to be designated as SLAA's. A SLAA application form is contained in Reference E. The form may also be obtained by mail from HQDA (DAJA-LA), Wash D.C. 20310-2200 or by telephone at (703) 697-3170 or DSN 227-3170.

8. This HQ publishes Reference E and now requires the agreement of a reserve component JA to be included in Reference E as a precondition to designation as a SLAA. Shortly after 31 May 92 Reference E will be republished and will contain the names of all JA's in the Army who are authorized to provide legal assistance for retirement points. Reference E will continue to include the names of other USAR and ARNG JA's who wish to be listed in the directory, and hence be part of the network of Army Attorneys who assist each other on legal assistance cases and issues.

9. Retirement points may be obtained for legal assistance in accordance with AR 140-185 and NGR 680-2. Reserve component JA's authorized to provide legal assistance when not on active duty may obtain retirement points for work performed by submitting a completed DA Form 1380, Record of Individual Performance of Reserve Duty Training—

a. Through their unit if assigned to the ARNG or a USAR Troop Program Unit (TPU).

b. Through HQDA (DAJA-LA), Wash, D.C. 20310-2200 if not assigned to the ARNG or a USAR TPU.

10. Reference B which is presently being staffed throughout the Army, incorporates these new procedures. POC for HQ, Wash D.C. is Col Fred Arquilla, DSN 227-3170.

Quotas for JATT and JAOAC for Academic Year 1992

Quotas for Judge Advocate Triennial Training (JATT) and the Judge Advocate Officers Advanced Course (JAOAC)

quotas for academic year 1992 are available on ATRRS (Army Training Requirements and Resource System). To qualify for JATT, you must be a United States Army Reserve judge advocate in a court-martial trial team, court-martial defense team, or a military judge team. To qualify for JAOAC, you must be a Reserve Component judge advocate, currently enrolled in the advanced course, who has not completed any portion of the military justice subcourses (Phase II). Quotas are available *only* through ATRRS, the Army's automation system for the allocation of training spaces. If you are an Army Reservist in a troop unit or a National Guardsman, you should contact your training noncommissioned officer to request a quota. If you are an individual mobilization augmentee or an individual Ready Reservist, you should contact the Army Reserve Personnel Center, Judge Advocate General Personnel Management Office at 1-800-325-4916 or (314) 538-3762. When you request a quota, advise your point of contact that the school code for The Judge Advocate General's School (TJAGSA) in ATRRS is 181. The course number for JATT is 5F-F57 and the course number for JAOAC is 5F-F55. The class number for both JATT and JAOAC is 092.

All quotas for courses at TJAGSA now are available only through ATRRS. Do not call TJAGSA to obtain a quota for any course, including JATT and JAOAC, because TJAGSA cannot enter you into ATRRS.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their units or, if they are nonunit Reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: autovon 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1992

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

July 1992

2-5: NIBL, Western Mountains Bankruptcy Law Institute, Jackson Hole, WY

4-10: AAJE, Fact Finding and Decision Making, Harvard Law School, Cambridge, MA

11-17: AAJE, The Judge and the "Community"—Relations and Leadership, Jackson Lake Lodge, WY

11-17: AAJE, Domestic Relations: Philosophical Ethics and Decision Making, Jackson Lake Lodge, WY

12-17: AAJE, A Judge's Philosophy of Law and Judging, Harvard Law School, Cambridge, MA

19-24: AAJE, Constitutional Criminal Procedure, Charlottesville, VA

19-31: AAJE, Trial Judges' Academy, Charlottesville, VA

20-21: TPI, 401(k) Plan Administration, New York, NY

21-24: ESI, Negotiation Strategies and Techniques, San Diego, CA

25-31: AAJE, Sources of Law, Charlottesville, VA

26-31: AAJE, Civil Litigation, Charlottesville, VA

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1992 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
*California	36 hours over 3 years
Colorado	Any time within three-year period
Delaware	31 July biennially
*Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
**Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February of succeeding year
North Dakota	31 July annually
*Ohio	31 January biennially
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth--new admittees and reinstated members report after an initial one-year period; thereafter every three years
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1992 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, autovon 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203 Government Contract Law Deskbook Vol 1/JA-505-1-91 (332 pgs).

AD A239204 Government Contract Law Deskbook, Vol 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD B135492 Legal Assistance Consumer Law Guide/ JAGS-ADA-89-3 (609 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD B147096 Legal Assistance Guide: Office Directory/ JA-267-90 (178 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

*AD A244874 Legal Assistance Wills Guide/ JA-262-91 (474 pgs).

AD A241652 Office Administration Guide/ JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/ JA 275-91 (66 pgs).

*AD A244032 Family Law Guide/JA 263-91 (711 pgs).

*AD A245381 Tax Information Series/ JA 269/92 (264 pgs).

Administrative and Civil Law

AD A239554 Government Information Practices/ JA-235(91) (324 pgs).

AD A240047 Defensive Federal Litigation/ JA-200(91) (838 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD A239202 Law of Federal Employment/ JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B137070	Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).
AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).
AD A236860	Senior Officers Legal Orientation/ JA 320-91 (254 pgs).
AD B140543L	Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).
AD A233621	United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC,

2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) ROTC *elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the para-graphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	*Title*	*Date*
AR 10-25	United States Army Logistics Evaluation Agency	16 Dec 91
AR 25-55	Information Management Records Management, Change I01	30 Sep 91
AR 611-60	Assignment to Army Attache Duty	1 Oct 91
FM 22-9	Soldier Performance in Continuous Operations	Dec 91

3. LAAWS Bulletin Board System.

a. Numerous TJAGSA publications are available on the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the LAAWS BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing LAAWS BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board System.*

(1) Log-on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the LAAWS BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter pkz 110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the LAAWS BBS.* Below is a list of publications available through the LAAWS BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the LAAWS BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, February 1992
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, February 1992
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, November 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991
ALAW.ZIP	*The Army Lawyer* and *Military Law Review* Database in ENABLE 2.15. Updated through 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAW-MEM.WPF

CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
JA301.ZIP	Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)
V1YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 1
V2YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 2
V3YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 3
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared excess by the Office of the Staff Judge Advocate, U.S. Army Garrison, Fort Sheridan, Illinois, and is available for transfer:

- American Jurisprudence, 2d ser.
- American Law Reports 2d, 3d, 4th eds.
- Auerbach on Immigration Law
- Bureau of National Affairs
  Criminal Law/General Law/
  Supreme Court Cases/Decisions
  of the Supreme Court/
  Environment Reporter (vols. 25-56)
- Burn's Indiana State Statutes
- Cases and Materials on Insurance
- Code of Federal Regulations (1972, 1990, 1991)
- Commerce Clearing House
  Federal Tax Reporter (1983-1988)
  U.S. Tax Cases
- U.S. Code Congressional and Administrative News (through Dec. 1991)
- Decisions of the Comptroller General (through 1991)
- Federal Digest (1955)
- Federal Register
- Federal Reporter, 2d ser.
- Federal Reporter Supplement (1943)
- Illinois Law and Practice
- Latman's Copyright Law
- Legal Issues in Addict Diversion (Drug Abuse Council & ABA)
- Lowenstein Immigration Law
- Martindale-Hubbell, vol. 9
- Martindale-Hubbell International
- Maxwell-Macmillan Complete Internal Revenue Code (1991)
- Mental Disorder as a Criminal Defense
- Modern Federal Practice (1961)
- Modern Legal Forms
- Northwestern Reporter, 2d ser.
- Northeastern Reporter, 2d ser.
- Rabkin and Johnson Legal Forms
- Shafter's Legal Interview and Counseling
- Shepard's (Standard) (1943, 1969, 1975, 1979, 1984, 1988, 1991)
- Shepard's Northwestern Citations
- Shepard's Northeastern Citations
- Smith and Hurd Illinois State Statutes
- Study of Public Law (Murphy and Tannenhaus)
- Supreme Court Digest (through 1990)
- Supreme Court Reports (through vol. 107 (1991))
- United States Code (U.S.C.) (1976, 1982) (titles 43-50 (1970))
- U.S.C. Supplement (through 1985)
- U.S.C. Annotated (1982)
- U.S.C. Annotated Supplement (through 1990)
- U.S. Statutes at Large (through 1980)
- West's Federal Practice (through July 1987)
- West's Wisconsin State Statutes
- West's Illinois State Statutes
- West's Military Justice Digest
- Wigmore on Evidence

Anyone interested in acquiring any of these materials should direct his or her request to the following address: Headquarters, U.S. Army Garrison, ATTN: AFZO-JA, Fort Sheridan, IL 60037-5000 (DSN: 459-3848/3967).

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
01137

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