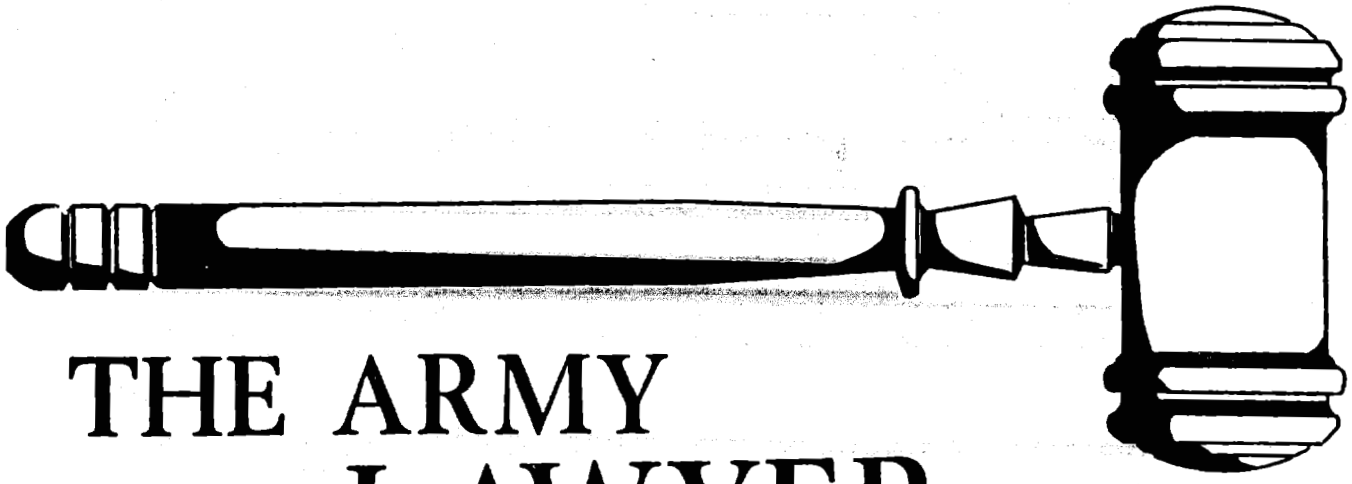

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Editor
Captain David R. Getz

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and the *Uniform System of Military Citation* (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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Presentation to the Commission on Continuing Legal Education, State of Tennessee

Colonel Paul J. Rice
Commandant, The Judge Advocate General's School

Over half the states in the Union now have Mandatory Continuing Legal Education (MCLE) requirements. As it is accredited by the American Bar Association, The Judge Advocate General's School is normally recognized as an approved MCLE provider. This recognition is not always automatic. The School must diligently pursue this status by providing information on its program of instruction to the state.

Most states require JAGC attorneys to meet MCLE requirements even though they are on active duty. Many of these officers meet their MCLE requirements by attending CLE courses at TJAGSA. Additionally, even in states that exempt active duty military, many Reserve Component attorneys and government civilian attorneys can receive MCLE credit for courses they attend at TJAGSA.

The following is the text of a presentation made in July of this year to the Commission on Continuing Legal Education, State of Tennessee, by the School's Commandant.

Thank you so much for giving me the opportunity to appear before this Commission on behalf of The Judge Advocate General's School, U.S. Army. As you look at me standing here in my uniform, it is easy to see an officer in the United States Army. But because of our own personal experiences and beliefs, it is much more difficult to picture the Dean of an American Bar Association accredited law school. But let me assure you I am both. We are extremely proud of our ABA status. In fact we are the only American Bar Association Accredited Law School that does not award a J.D. or LL.B. degree. That is because we are a graduate level law school and all of our students are already lawyers. And yet we still submit ourselves to the careful scrutiny of the ABA inspectors. We have been accredited since 1958.

On April 30th of this year we submitted our application for presumptively approved provider status. We have been telephonically notified of your initial decision to disapprove the School. In letters written to some Reserve officers in this State, your Commission indicated that the type of law we study in the military does not meet the Continuing Legal Education standards of Tennessee. I wanted to come here to clarify what today's military law is all about.

In the best of all worlds we would simply have all of you come to The Judge Advocate General's School in Charlottesville, Virginia, and sit through one of our Continuing Legal Education classes. That would favorably resolve the matter. But, of course, that isn't very practicable with the distance and the demands on your time. The next best thing is to bring the School here to you. I have a five minute videotape that I think will give you an excellent introduction to the School. If nothing else, it will disabuse you of the idea that we are teaching out of some World War II wood frame building.

I must confess that this video, produced by our Media Services Office, was made for a completely different purpose. We are in the final steps of obtaining congressional authority to award an LL.M. degree to our Graduate Course students. We had to gain approval from the Department of Education before we could go to Congress. This tape was part of our successful presentation. (Editor's Note: Colonel Rice then presented the tape on the School. A copy of the videotape is available to SJAs from the TJAGSA Media Services Office. Send a blank ¾ or ½ inch videocassette with your request.)

You know how sometimes you pick up a brochure on a vacation resort and it just looks great. Then when you visit the resort there is no resemblance to the brochure. Well, let me assure you that our facilities are as good if not better than what you saw in the video.

This State has advised that its primary objective is to improve the quality of legal services available to the citizens of the State. This is nothing unique to the State of Tennessee. I am sure that every state that has a mandatory CLE program is interested in improving the quality of legal services available to the citizens of their state. And yet the other twenty-four states that have finalized their continuing legal education rules have approved The Judge Advocate General's School as a provider.

I have read the standards for approval in the other states and they are all very similar to Tennessee (as they should be—for as I have said earlier the objective is the same).

Let me read you a few of the state standards for approval:

Washington: "The course shall have significant intellectual or practical content and its primary objective shall be to increase the attendee's professional competence as a lawyer."

Wisconsin: "The primary objective of any continuing legal education activity shall be to increase that attendee's professional competence as a lawyer."

Virginia: "The course must have significant intellectual or practical content. Its primary objective must be to increase the attendee's professional competence and skills as an attorney, and to improve the quality of legal services rendered to the public."

Oklahoma: "The program must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as an attorney."

And of course Tennessee which, as you know, states: "The activity must have significant intellectual or practical content and its primary objective must be to enhance the participant's professional competence as an attorney."

Again, while the standards for approval are almost identical, only this Commission has questioned our ability to be a presumptively approved provider. I strongly believe that I can convince you that we should be one of your providers.

The point has been raised that Tennessee exempts active duty military from the requirements of mandatory CLE.

Let me point out that Alabama, Mississippi, and South Carolina all exempt active duty military and yet, they all have accepted the JAG School as a provider. I submit to you that the reason states have exempted military attorneys has nothing to do with the type of law we practice, but is because of the recognized exigencies of military service.

I reviewed the package of materials we provided you in our 30 April mailing. While it complied with your request, it did not fully explain the range of law we presently practice in the military. It naturally follows that there would be confusion about what type of law we teach at the Army JAG School.

My position is that type of law we practice in the military is very similar to the law practiced in the State of Tennessee.

This statement may surprise you, particularly if you think of Army lawyers as devoting most of their time to putting AWOL soldiers in jail. While discipline is still an important function of our work, we are involved in many other tremendous and exciting areas of law.

We have four teaching Divisions:

The Criminal Law Division;
The Administrative & Civil Law Division;
The International Law Division; and
The Contract Law Division.

Criminal Law has changed dramatically through the years. The Rules of Evidence and Procedure taught and practiced in the military are quite similar to those in the Tennessee courts (Federal and State).

In August of 1980, we adopted the Federal Rules of Evidence which are applicable to all Federal courts. Tennessee's Rules of Evidence, like the Federal Rules, are based upon the common law, and the two sets of Rules are similar. In August of 1984, we adopted the Federal Rules of Criminal Procedure with slight modification. Again, Tennessee also has patterned its Rules of Criminal Procedure after the Federal Rules. And criminal trial advocacy is the same wherever it is practiced. Speakers, such as Race Horse Haynes, who have spoken at our Trial Advocacy Seminars, do not have to modify their presentations for the military.

We use the National Institute of Trial Advocacy method of teaching our advocacy courses and all of our Criminal Law instructors (except those coming on board this summer) are graduates of a NITA Course.

The Administrative and Civil Law Division is the "catch-all division" and teaches a myriad of legal subjects. It can best be described as the Division that isn't teaching Criminal Law, International Law, or Government Contract Law.

I hate to read off a laundry list, but I think I must so that you can see that we are teaching the same subjects that are significant to Tennessee lawyers and to Tennessee clients. All of these subjects have significant intellectual or practical content and enhance professional competence.

In the area of Legal Assistance, we teach family law, which includes marriage and divorce law, child support, adoptions, and divorce and garnishment jurisdiction problems. We teach parental liability for acts of minors, lemon laws and warranties, immigration and naturalization law, bankruptcy (can you imagine twenty years ago an Army lawyer advising a sergeant on bankruptcy law—but today it is part of our practice), landlord-tenant law, and consumer protection law. In your materials you have our outline for a two hour class in consumer protection law. Please look at the subtopics in the table of contents: Truth in Lending Act—Fair Credit Billing Act—down through cooling-off period for door-to-door sales. All of these laws are applicable to Tennessee attorneys and their clients.

We teach Estate Planning and Federal and State Income Tax Law. The pink-covered booklet in your material is a Federal Income Tax Supplement we put together at the School for our Legal Assistance Officers. As you can see, the information is as applicable to a civilian in Memphis as it is to a soldier at Fort Campbell.

We teach Environmental Law. I'll spare you the list of laws that apply in this area, but suffice it to say, they are all important to Tennessee and its people.

The list continues: Freedom of Information Act, Privacy Act, Federal Labor Relations, and Federal Employment Rights. For your information, there are 57,000 Federal employees in Tennessee. Each one of those 57,000 citizens should be able to find an attorney in Tennessee to represent him or her against the Government—whether it be a grievance or a termination of employment.

We teach the Federal Tort Claims Act and Federal Litigation. These subjects use the Federal Rules of Civil Procedure, which have been adopted in Tennessee as your civil rules.

You have in your materials the outline for four hours on Defensive Federal Litigation. I admit that the material is oriented to defending the Government's case. But I have always believed that the best criminal defense lawyers have been prosecutors and the best prosecutors have been defense counsel. So hearing how the Federal Government defends its cases isn't all bad.

I think by now you understand why I call the Administrative and Civil Law Division the catch-all division.

International Law is a well-recognized legal discipline. Our International Law Division provides students a broad range of instruction dealing with subjects in the traditional International Law areas of Law of Peace and Law of War. Topics examined include the Sources and Evidences of International Law, the Negotiation and Conclusion of International Agreements, State Responsibility, Nationality, the Relationship between International and Domestic Law, Jurisdiction and Jurisdictional Immunities, Status of Forces Agreements, and an in-depth analysis of both the Customary and Codified Law of War. In addition, the School's program affords students the opportunity to engage in concentrated study in specialized areas, such as Law of the Sea and Space Law. In structuring the International Law Curriculum in this manner, the School ensures that students receive instruction in both traditional and specialized international legal subject matters.

The Contract Law Division at The Judge Advocate General's School is recognized as the leader in teaching Government Contracting to attorneys. As a matter of fact, we don't have much competition. We have the lead for all military attorneys and all Government civilian attorneys. I'm not just talking about Department of Defense civilian attorneys. Many Federal agencies send their attorneys to

the JAG School for instruction in Government Contracting. The FAA, CIA, Department of Agriculture, Justice Department, and FBI all come to us. In fact, 60% of our students are civilians. What we teach is not something isolated to the military. I have also provided you with an outline for a four-hour Recent Developments Class in Government Contracting.

Is Government Contract Law important to Tennessee? Government contracting is a big dollar item. Last fiscal year, Department of Defense prime contracts of over $25,000 awarded in Tennessee came to a grand total of $1,156,601,000. When I requested this information, I was hoping for a figure around $300 million. Three hundred million sounds quite impressive, and it is more believable than over a billion. But $1,156,601,000 is the correct amount. That makes Government Contract Law of interest to Tennessee attorneys and their clients. And I state with great pride that no institution in this Country teaches Government Contract Law as well as we do.

That covers the four disciplines we teach. I hope by now that I have convinced you that the subjects we call Military Law are very similar to this Country's Federal and State Laws. We differ only in emphasis because of our military audience.

I have provided you with other publications of the School. These are only a small representation of the many publications we write. The *Military Law Review* is a quarterly publication and *The Army Lawyer* is our equivalent to a monthly bar journal.

Along with the Continuing Legal Education classes we teach in Charlottesville, we also have what we call The Judge Advocate General's School Continuing Legal Education (On-Site) Training. Each academic year we teach for a weekend at 23 different locations around the Country. At least two School instructors attend each On-Site and teach a total of six hours. This is the same high quality instruction that we teach at the JAG School. On the 12th and 13th of March 1988, we are scheduled to be here in Nashville to teach Criminal Law and Government Contract Law.

Let me close by making a few points. First, I am not here representing the entire military. While I believe that military law as taught by all the services should qualify, I am here only representing the Army Judge Advocate General's School. We are ABA accredited, and your rules specifically state that programs sponsored by accredited law schools will generally be approved. Secondly, I am not addressing classes put together by JAGC Reserve units for their weekend drills, except for those Continuing Legal Education On-Sites where JAG School instructors are teaching. Finally, if I have been unsuccessful, then I would ask that one of you, at our expense, come and inspect our School. I know it will sell itself.

Thank you for allowing me to make this presentation. At this time I would be delighted to entertain your questions.

Epilogue

Prior to the meeting, the Commission received numerous letters supporting the JAG School. Colonel Joe B. Brown, Commander, 139th Military Law Center, Nashville, Colonel John B. Nixon, USAR (Ret.), Nashville, and Major William L. Aldred, Jr., Clarksville, attended Colonel Rice's presentation and provided persuasive responses to the questions of the Commission. At the conclusion of the discussion, the Commission adopted a motion making The Judge Advocate General's School, U.S. Army, a presumptively approved provider. The School agreed to work closely with the Executive Directors of the Commission to ensure that Tennessee attorneys understand the number of hours for which they will receive credit.

The Role of Chiefs of Military Justice as Coaches of Trial Counsel

Colonel Dennis F. Coupe
Chief, Criminal Law Division, OTJAG
&
Major Charles E. Trant
Army Member, Working Group, Joint Service Committee on Military Justice

Introduction

Trial work is demanding, it is challenging, and it is the heart of our profession. Not everyone can be an outstanding trial lawyer, but with good schooling and proper coaching, most advocates can improve far more quickly than if left to a "minimum contacts" approach, where counsel essentially fend for themselves. Supervisors should do everything they can to help new counsel develop trial advocacy skills. This article suggests ways that chiefs of justice can better coach new trial counsel.

Most new counsel are attracted to the courtroom by the challenge and glamour of trial advocacy, yet are understandably apprehensive about their lack of experience. Even with the excellent preparation provided at The Judge Advocate General's School (TJAGSA) in the Basic Course trial preparation and advocacy programs, new counsel are under unfamiliar pressures when trying their first real world cases, where legal knowledge and trial skills are openly scrutinized. More importantly, mistakes can lead to a miscarriage of justice. This responsibility weighs heavily on counsel. After the initial trial, apprehension may be heightened by a self-perceived inability to live up to the mythical standard of the omniscient, invincible prosecutor, a myth sometimes perpetuated by self-proclaimed masters of the craft, who regale novices with exaggerated accounts of their courtroom successes while conveniently omitting their shortcomings.

Proper trial preparation and advocacy involve anticipation, organization, prompt reaction to dozens of systemic and case-unique requirements from judges, supervisors, witnesses, opposing counsel, and a multitude of administrative, legal, and organizational deadlines. Thus, initial uncertainties and additional stress can add to the natural tension of trial advocacy. The effect on inexperienced counsel can be overwhelming. Chiefs of justice are in the best position to assist their counsel to prepare and perform effectively, particularly during the initial learning stages.

With time-consuming preparation of post-trial reviews now greatly reduced, chiefs in most offices should have ample time to tutor trial counsel, to observe them in the court room, and to advise them on ways to improve advocacy skills. Chiefs should assure their young wards that some anxiety is a normal, healthy reaction to courtroom drama. When new counsel try their best but make mistakes, they are not alone; they are in the company of everyone who has ever tried an appreciable number of cases. Coaching from the chief can be pivotal to better advocacy during three integrated stages: local orientation, trial preparation, and post-trial critique based on trial observation.

Local Orientation

A local orientation program for new trial counsel should build on the moot court lessons of the Basic Course, be tailored to command policies and rules of court, and be designed to prepare counsel to practice their trade most efficiently. The U.S. Army Trial Judiciary has developed a "Bridging The Gap" program for judicial participation in orienting new counsel to local rules of court, docketing, and the mechanical aspects of courtroom procedures.[1] Efforts of the chief should be consistent with and supplement judicial orientations.

The first step in assisting new trial counsel to better trial advocacy is for the chief of military justice to stress the absolute and uncompromising need for above-board, ethical conduct, and to explain how such an approach is consistent with both the ends of justice and the legitimate interests of the command. Second, trial counsel should be queried to ensure a full understanding of unlawful command influence issues and how to deal with them, and an understanding of the effect of offenses in the context of the particular unit's wartime mission. It is not necessary that new counsel fully comprehend the strategic significance of a unit's existence, or that they are intimately familiar with the details of the unit's prescribed load of supplies and repair parts. Counsel should, however, have a basic understanding of the unit's wartime operational mission, how the unit prepares and trains for peak readiness in peacetime, how good the various commanders are at their jobs, and how crimes detract from the mission. By understanding what the mission is and how a unit works to accomplish it, counsel can ask more penetrating questions, and can better understand and explain the significance of crime in the unit.

Some understanding of how different military organizations work can be gained through prior military training or experience, or through professional military reading. A real understanding of a particular unit, however, is best gained through personal observation of interpersonal dynamics in the unit. This means spending time with the unit, preferably both in garrison and in the field, attending their briefings, and observing their training, the unit social events, and the daily routine life of the troops. Chiefs of justice, in conjunction with the staff judge advocate (SJA), should assign new trial counsel primary responsibility for a particular jurisdiction, such as a brigade, ensure that counsel are properly introduced to the commanders that they will be advising, and arrange for a time convenient to the unit for new counsel to pay a personal visit. The chief may wish to accompany new counsel or send along the outgoing trial counsel, assuming there is a positive, professional relationship with the commander.

Ideally, new counsel will develop a rapport with their commanders, building mutual understanding and confidence. Prior to visiting the unit, new counsel should be briefed by the chief on any noteworthy personalities or problems in the unit. The chief should inform counsel of the disciplinary track record of the unit, any abnormal disciplinary problems or trends, and any efforts to correct such problems. The chief should remind new counsel of the importance of first impressions, to include their professional appearance and decorum. Counsel must realize that commanders have numerous training, maintenance, and readiness problems and that disciplinary problems are viewed as detractors from combat readiness.

Trial counsel should understand that military justice does not operate in an ivory tower atmosphere, solely within the walls of the (SJA) office. Many external players routinely have important responsibilities in the system. Counsel must know the key players, how they operate, and how an effective communication net is established to expedite the time sensitive requirement of trial preparation.

The most common players outside the chain of command are the law enforcement representatives from the Criminal Investigation Division Command, the Military Police, and local civilian police officials. Counsel will spend a great deal of time working and coordinating with these individuals. As with the commanders, the chief can make appropriate introductions and should encourage new counsel to spend a day or two with these agencies to observe how they do business. Counsel need to know the background and training of these agents, how they are assigned cases, how they investigate them, how good they are at their jobs, how evidence is processed, and what reports are prepared. Also helpful is an awareness of the internal organization of the law enforcement offices, any personnel shortages, equipment or time limitations that exist, the terms of art (such as "subject" and "suspect") that are frequently used, and generally what the agency can and cannot do for the trial counsel. Counsel must know how the military law enforcement agencies interface with each other and with federal, state, local, and foreign agencies. In foreign countries, counsel especially need to understand the requirements for liaison with civilian prosecutors and law enforcement officials and how waiver of jurisdiction works. Familiarity with the forensic laboratory's capabilities and procedures and with the local confinement facility's requirements for pretrial and post-trial prisoners can be essential.

Medical and mental health departments are often called upon for assistance before and during trials. Medical experts are needed to establish such elements as cause of

[1] *See* Policy Letter 87-4, Office of The Judge Advocate General, U.S. Army, subject: Bridging the Gap, 11 Mar. 1987.

death, grievous bodily harm, or mental responsibility/capacity. Counsel need to know what medical specialists are available as expert witnesses, what lead time will be necessary for their presence, what demonstrative evidence will assist their testimony, and what reports are available. The requirement for medico-legal witnesses in urinalysis and technical forensic evidence cases may make a laboratory tour advisable. Mental hygiene personnel will be essential in insanity cases and their evaluations will be helpful to sentencing hearings in a variety of cases. Counsel need to know how sanity boards are requested and conducted, how much time they take, and what reports can be expected. Drug and alcohol counselors will often be encountered as defense witnesses, and counsel must know their levels of expertise and their responsibilities, capabilities, and limitations.

The local Adjutant General personnel records branch or personnel office and unit personnel action centers must provide sentencing evidence in virtually every case, and evidence of substantive offenses when needed in particular cases. Counsel should contact the custodian of personnel records to ascertain the proper procedures, forms, and time requirements to obtain local and official military personnel file records. Finance and the Army & Air Force Exchange Service will occasionally be required to provide financial records, such as in bad check cases. A basic understanding of what records can be obtained, who can provide them, and what it takes to obtain them (including Privacy Act issues) is essential to timely acquisition. The proper procedures for obtaining financial records from banks and credit unions, both in the U.S. and overseas (where problems are considerably more complex), must also be understood. This is a good time to ensure that counsel understand such matters as options with subpoenae, writs of attachment, representations on behalf of the command, and obligations under the Jencks Act.

While counsel are establishing an informal network with the necessary players, they must simultaneously gain an understanding of the organization and operations of the SJA office. The chief of justice should set priorities and indicate how success in meeting those priorities will be measured. The chief must ensure that counsel know the procedures: how military justice actions (such as pretrial advices, pretrial confinement, convening orders, and post-trial recommendations, and related administrative actions such as discharge/resignation in lieu of court-martial and letters of reprimand) are prepared and processed within the office. Counsel also need to know the extent to which they must keep the SJA, the deputy SJA, and the chief informed of actions in progress and what the SJA's general policies are on such matters as pretrial agreements, use of polygraphs, and the emphasis given to victim-witness assistance (a requirement under Army Regulation 27–10[2]). The functions and responsibilities of the legal administrator, chief legal noncommissioned officer, legal specialists (both in the office and with the units), court reporters, interpreters, paralegals, and the secretarial staff must be understood. It is imperative that counsel develop a professional working relationship with the military judges and Trial Defense Service attorneys. In addition to being responsible for trying cases, new counsel must manage their support personnel and supervise and assist their subordinates in their professional development. By advising counsel of the specific responsibilities and division of labor within the military justice division, the chief can reduce the potential for misunderstandings. With local orientation completed, counsel are in a better position to concentrate on their litigation responsibilities.

Trial Preparation and Observation

New counsel have a wealth of analytic training from more than three years of legal preparation, but seldom have any practical experience. Counsel are expected to be able to identify and analyze legal issues and to apply legal principles to the facts of their cases. That is, new counsel are expected to "think and act like lawyers." Yet, successful trial advocacy has always required considerably more than sound academic training. Advocacy is based on counsel's preparation, practice, experiences, and the helpful observation and advice of successful practitioners. It is in this last sphere that the chief of justice can best assist as a teacher, and is in a position to significantly shorten the period necessary for counsel to become a skilled advocate.

Counsel must learn a systematic, organized approach to trial preparation. Courtroom dramatics and flamboyance may make good theater, but proper preparation is the road to success in the courtroom. The opportunity to maximize strengths, minimize weaknesses, and achieve a just result through disclosure of the truth comes only through proper preparation. It is impossible to overprepare a case. There will always be some stone unturned or some change in the posture of the evidence. A few years ago, when levels of lower courts-martial were significantly higher, new counsel often had an opportunity to ease into the courtroom as assistant counsel or through exposure to relatively straightforward guilty plea special courts-martial. In that era, counsel sometimes went into the courtroom with "sink or swim" guidance or minimal assistance from their chiefs. Now, with inferior courts-martial caseloads generally lower due to simplified and expanded administrative alternatives, there is less opportunity for gradual development of trial skills. The good news, however, is that chiefs of justice now have more time to orient counsel and ensure that they are prepared.

Although trials are as varied as there are crimes and criminals, court-martial preparation has certain common requirements. Familiarity with the standard procedures in the local Rules of Court and the trial script[3] is essential to every trial. The chief should have a rule-by-rule, detailed discussion with counsel to minimize misunderstandings and resolve any procedural ambiguities. The trial guide and script should be studied, practiced, and followed. Counsel who merely receive a copy of the script may not readily acquire a mastery of the procedural aspects of their advocacy. Department of the Army Pamphlet 27–10[4] provides an excellent checklist and should be used by all counsel. The newly published Department of the Army Pamphlet

[2] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, ch. 18 (1 July 1984) (C3, 1 Oct. 1986) [hereinafter AR 27–10].

[3] Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook, ch. 2 (1 May 1982) (C2, 15 Oct. 1986).

[4] Dep't of Army, Pam. No. 27–10, Military Justice Handbook for Trial Counsel and Defense Counsel (1 Oct. 1982) (C1, 1 Mar. 1983).

27–153[5] contains an informative discussion of the important procedural court-martial rules and many of the critical substantive areas. It is highly recommended for study by new counsel. Along with the basic references of the Manual[6] and AR 27–10, these two DA Pams should be required for study and desktop reference. Another invaluable trial asset is the Trial Counsel Assistance Program (TCAP) Deskbook,[7] which provides counsel with a handy source of practice tips, advocacy suggestions, and legal references.

Trial counsel who fumble through their responsibilities project to the factfinder an appearance (perhaps an accurate one) of an unprepared, unprofessional advocate. The credibility of the entire office suffers. The simple act of correctly reciting the initial boilerplate information can instill a confidence that the trial counsel is ready and able to prosecute on behalf of the government. After counsel have a proper understanding of the rules of court and understand the need to follow their trial checklist and trial script, the chief should discuss the details of case management, from initial receipt of charges through completion of post-trial duties.

As noted above, it is essential that the new counsel have an organized system of case management. A detailed case log file annotated for dates of offenses, charges, restraint (if any), scheduled Article 39(a)[8] sessions and arraignment, pleas and motions (if known), recommendations, name of opposing counsel, etc., will allow counsel to control procedural and substantive pretrial requirements in a timely manner, rather than letting those requirements control counsel. Case files should be annotated as each preparatory step is taken. Charge sheets must be examined to ensure timely recognition of any technical or jurisdictional defects. It is not effective advocacy to wait until court is convened and have the judge ask for a reading of the charges—a clear signal that there is a problem with the charge sheet. The chief should ensure that new trial counsel understand the evidentiary basis for and legal significance of each element of proof. Counsel must be alert for potential conflicts of interest, ensuring that they do not become law enforcement investigators, that their role is official, rather than personal, and that emotions do not displace good judgment. Potential witnesses should be identified and interviewed at the earliest possible time. The presence of relevant witnesses at trial should be assured (or steps taken to preserve their testimony). When a defense counsel is appointed, trial counsel should ensure compliance with appropriate disclosure requirements and discovery requests. Now is the time for counsel to begin coordination with the appropriate government agencies to ensure that necessary services, funding, witnesses, and evidence will be available, and arrange with the unit commander for the accused's presence and required administrative support.

Counsel should thoroughly investigate their cases by reviewing all statements, investigating the backgrounds and character of the accused and all witnesses, visiting crime scenes, examining all real and documentary evidence, and preparing any useful demonstrative evidence. Counsel should organize the case file in checklist fashion that the chief can review independently, if necessary. The chief should strongly encourage trial counsel to use an alphabetized, expandable trial notebook. During this preparatory stage, the chief should advise counsel of evidentiary problems or ambiguities, discovery rights and obligations, and what notice requirements must be met under the Military Rules of Evidence. Timely, complete, and accurate disclosure to the defense usually will avoid delays and unnecessary motions, and will often facilitate client control by the defense. At Article 32, UCMJ, investigations, counsel should prepare for and attend all sessions, ensure that a neutral judge advocate legal advisor is available, and ensure that the investigation is completed in a timely manner. Counsel should immediately begin preparing their trial notes as this exercise will often help to identify evidentiary weaknesses that can be addressed and remedied through further investigation, use of expert witnesses, etc. The chief should discuss tactics and strategy with counsel and should encourage ready and open discussion with counsel on any points of uncertainty.

During the referral process, trial counsel must ensure that counsel have been properly detailed and that court members have been personally selected by the convening authority. Upon referral, the accused should be immediately served with a copy of the charge sheet and referral packet. Counsel should prepare for trial as quickly as feasible and then move to establish an early trial date and defense forum selection. Counsel should use the formal written docketing procedures to avoid possible misunderstandings with the defense concerning who is responsible for certain delays. Once the trial date is firmly set by the military judge, counsel should arrange for the presence of all necessary personnel. Court members should be notified in writing and then personally notified by the responsible trial counsel well before trial; no other method works as well. Most court members do not regard telephone calls from unknown enlisted soldiers with the same degree of importance as calls from the prosecuting attorney. Judges are unsympathetic with dilatory counsel or with court members when unjustified absences occur. The commanders of the accused and the witnesses should be notified in writing of the trial date. Counsel should arrange the presence of a legal specialist (to act as reporter in nonverbatim cases), an armed escort for the accused, a bailiff and, if necessary, a qualified interpreter. All participants should be advised of the proper uniform, appointed place and time, and courtroom prohibitions such as smoking, coffee drinking, photography, sound recording, and weapons. As the trial date approaches, the chief should have counsel present a synopsis of the proof and trial plan, including proposed voir dire questions and opening statement, and should review any stipulations, worksheets, exhibits, offers of proof, motions (written briefs are usually necessary), or proposed instructions. Issues that might be facilitated by pretrial conferences should be identified and all notice requirements should be checked for compliance.

After the case has been thoroughly investigated, the chief should discuss and evaluate any proposed pretrial agreements or potential alternative dispositions, such as

[5] Dep't of Army, Pam. No. 27–173, Trial Procedure (15 Feb. 1987).

[6] Manual for Courts-Martial, United States, 1984.

[7] Trial Counsel Assistance Program, United States Army Legal Services Agency, TCAP Deskbook (n.d.).

[8] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a) (1982) [hereinafter UCMJ].

administrative discharges or nonjudicial punishments. In appropriate cases, counsel should seek the views of the victims of the crimes and the views of the commanders concerned on the disciplinary impact on the unit of the proposed pretrial agreements or alternative dispositions. Pretrial agreements should be reduced to writing, cleared by the chief, and presented to the SJA in a timely fashion.

Just before counsel's first trial, the chief and counsel should personally inspect the courtroom facilities to check cleanliness and adequacy and positioning of furniture for unobstructed views by all parties, and to ensure that the deliberation room is free from unauthorized materials. They should also ensure that all parties are present and in their proper attire (but there is no point in having members outside the courtroom wait for an hour of motion litigation), that no improper commingling of witnesses with the accused or court members is occurring, that the bailiff and escort have been fully briefed, and that temperature and noise controls are appropriate. It is important that the chief observe new counsel during their first trial, and as necessary thereafter. The purpose of watching new counsel is not to give arm and hand signals or to gather materials for a "murder board," but to offer constructive comments after trial about effective and less than effective trial techniques. The post-trial critique by the chief can be critical to the proper development of new trial counsel.

Post-Trial Critique

JAG trial counsel receive excellent training in trial advocacy from TJAGSA and TCAP courses, seminars, and materials. SJA offices also often provide in-house continuing legal and ethical education, tailored to local concerns. Yet, counsel probably receive their most significant training while actually preparing and trying cases. Thus, to the maximum extent possible, the chief should be in the courtroom observing new counsel practice their trade. The chief may even try some cases with assistant counsel, to lead by example, and to maintain an edge in trial advocacy. Observation will allow the chief to note nuances that often are not apparent from reading the record of trial, and to more intelligently critique counsel after trial. Of course, the record of trial must be read for substantive review, and for further evaluation of advocacy skills. Constructive post-trial critiques immediately after trial, with followup after reading the record of trial, stretch the trial experience into a learning continuum.

Successful trial critiques require careful planning and preparation. By assisting counsel in preparing for a particular case, chiefs are simultaneously laying the foundation for a more meaningful appraisal of counsel's performance. Chiefs determine if counsel have identified and thoroughly analyzed all of the issues and problems in the case, from arraignment through sentencing, developed a sound strategy and approach to the case, recognized available resources, including possible facts, law, inferences, and common experiences that affect the issues, and organized specific approaches to each issue or problem. As counsel investigate their cases, chiefs must ensure that counsel are fully exploring all evidence, arranging it in a coherent sequence with clear and logical transitions in trial outline form, effectively addressing unfavorable evidence, and structuring clear and convincing arguments and examinations. Voice tone, volume and modulation, body gestures, movements, and eye contact may deserve a helpful comment. When these steps occur, there should be few surprises at trial and few remedial measures necessary for future cases. Many suggestions that the chief makes to counsel during pretrial preparation are derived from personal experiences in past trials and critiques. Certain tactics or techniques that may be successful for one advocate may or may not prove successful for this particular counsel because of individual styles and personalities. This is where the chief must allow reasonable flexibility for different styles and explain to new counsel that the case is theirs alone and no one else's. Trial counsel are not mere automatons of the chief, or anyone else. In the final analysis, it is the trial counsel's responsibility to try cases in a competent, ethical fashion.

As discussed, the post-trial critique should be based on the chief's observation of counsel in trial. It helps to have a system for recording what is observed to assist the chief in relating specific examples of what counsel was doing right or wrong. A checklist annotated with brief notes and conclusions will assure a systematic approach to critiques. Although a trial is an integrated process, the chief should focus observations on component parts to ensure that no phase of trial is overlooked. When critiquing counsel, categories that may be considered separately are: voir dire, opening statements; direct examination; cross-examination; exhibits; summations; and overall advocacy. Ideally, the sentencing phase of the trial should be as thoroughly prepared as the findings stage. Tactics and techniques relevant to examination of witnesses, effective use of exhibits, and closing argument at findings stage apply to the sentencing stage as well. Remember that advocacy skills are not accurately measured by convictions or acquittals, but by results that are relative to the particular case. Subtracting the guilty pleas and cases where the evidence is overwhelming, the remaining percentage of "close cases" is where counsel earn their pay. A just result for sentencing, as well as for findings, requires full preparation and skillful execution of trial responsibilities.

Where counsel has perused the personnel records of the members prior to trial, and especially where the panel has been assembled previously, counsel will enter the courtroom with some useful background information on the members. Counsel should be aware of what standard questions the military judge asks on voir dire in order to avoid repetition. Counsel may use their questions to probe members' attitudes, to set the stage for their case, to educate the members, and even to reveal and minimize any weaknesses in their case. Chiefs should note the following: where do counsel stand; do they project their voices and maintain eye contact; do they observe body language and the reactions of other members; do questions sound condescending, humiliating, embarrassing, overly mechanical, or aggressive; are objections proper, improper, or unnecessary; do counsel maintain variety in their questions and avoid repeating identical series of questions; are their questions to each member relevant and within permissible legal limits, especially when exploring legal questions; are the members confused as to whether an affirmative or negative response accurately indicates their answer; do counsel reflect nonverbal responses on the record; and perhaps most important, do counsel listen to the answers and react accordingly? When counsel make challenges for cause, their reasons should be evident.

The content of counsel's opening statement should be developed during trial preparation. The opening should

explain in brief narrative form the government's theory of the case, advise the members what the issues are (without arguing the case), and describe what witnesses and evidence will be produced and in what order. The opening should foster a favorable rapport with the members. Counsel should have notes on what their opening statement will cover, but a statement or argument should not be read to the members. In court, the chief should focus on the mechanics of opening, the effective or distracting use of gestures such as hand waving or pacing, and the advantageous use of visual aids, stipulated evidence, or the pleadings. If counsel have revised their statements based upon the outcome of pretrial motions, the chief should note whether the persuasiveness and organization have been lost and whether impermissible information has been eliminated. The chief should check to see if counsel are listening to and analyzing the defense opening statement for insight to the defense theory and strategy of the case.

Because counsel are dealing with their own witnesses on direct examination, the substance and organization of the questioning should be discussed prior to trial.[9] What the chief needs to look for in court is how effectively counsel executes the trial plan, including any alterations to the plan necessitated by trial developments. Counsel may wish to invite witnesses to view the courtroom prior to trial so that, when called at trial, the witnesses can enter knowing where to stand and knowing what will occur. The chief should observe how well counsel react to the uncertainty and nervousness of witnesses. Counsel should humanize their witnesses for the members, developing enough of their background to make their testimony as relevant and credible as appropriate. The chief should note whether counsel maintain the organization developed during trial preparation and whether counsel can keep witnesses from straying into tangential or irrelevant areas. Counsel should ask their witnesses short, simple questions that call for direct answers. This keeps the testimony understandable and under control, prevents rambling, and minimizes the potential for a witness blurting out inadmissible testimony. Counsel should anticipate evidentiary objections and should be attentive during defense cross-examination to interject timely, specific objections, as appropriate. Counsel should also know how to use redirect examination to rehabilitate witness, blow away any irrelevant "smoke," and refocus the members attention on the essential points of the witnesses' testimony.

Effective cross-examination may be the most difficult area for new counsel to prepare or to conduct with consistent success. Counsel are often dealing with hostile witnesses and some (including the accused) whom they have not interviewed. In pretrial preparation, the chief can assist counsel to develop probable lines of cross-examination for potential defense witnesses. There are numerous pitfalls to cross-examination, such as the "one question too many." The chief can review danger areas noted during cross-examination, even if presentation did not suffer at trial. Counsel must avoid telegraphing approaches to hostile witnesses, while also avoiding demeaning, argumentative, or abrasive questions. Hostile witnesses should not be allowed to become unresponsive or to unnecessarily repeat direct testimony. Counsel control witnesses best through careful questions and by keeping their brains in charge of their emotions. The effective cross-examiner knows that cross-examination should have a clearly defined purpose. Finally, counsel should sense when to shut up and sit down. New counsel often seem to expect a hostile witness to come around completely to counsel's points, and to, in effect, admit how wrong they may be or what fools they are. Such a result is extremely rare outside of a Hollywood studio.

The use of exhibits, as with all components of the trial, should be thoroughly developed by the chief and counsel during preparations. Counsel must decide which exhibits, including demonstrative evidence, will be helpful to their case and can be properly authenticated. At trial, the chief should note if counsel have exhibits properly marked and refer to them accurately by their number or letter, including reference to whether or not they have been received, if a proper foundation has been laid, if potentially objectionable exhibits are considered outside the hearing of the members, if the exhibits are timely offered into evidence, and, if admitted, are effectively presented to the members. As with all evidence, counsel should have their exhibits properly organized for smooth retrieval and presentation. The chief should also observe how effectively counsel react to the exhibits of their opponents.

Summations, like opening statements, should be outlined prior to trial, but unlike opening statements, they will usually undergo significant modifications during trial. Counsel should organize argument to emphasize specific points and goals. Argument should be based on the evidence, have persuasive structure, logical transitions, and omit hyperbole, overstatement, or redundancy. Obviously, only evidence that has actually been admitted at trial can be used. By adapting to evidence that has been offered but excluded, counsel show flexibility in their arguments without sacrificing persuasiveness.

The chief must keep certain points in mind when discussing the completed trial with new trial counsel. The chief must realize that there are dynamic forces inherent in the instructor-student relationship. To avoid a loss of confidence, positive points should be included as encouragement. There is tension and discomfort present whenever one attorney must sit down and discuss professional shortcomings with another attorney. Egos can get in the way. The chief must give thoughtful analysis to what will be said, before the critique begins. Comments must be objective and candid, but also constructive and specific. Thus, a profitable critique may commence with a comment on what the counsel did right. Everyone likes to hear something good; tension is relaxed and the counsel is reminded that the chief is there to help. Then the chief should review what counsel intended to accomplish at each phase of the trial and how effective counsel was. This will allow the chief to assess if counsel understood each phase of the trial plan and was able to execute it, or to understand the reasons for any modifications to the plan. It is important to know if counsel is doing something through ill-conceived choice or through reactive inadvertence. Counsel may articulate a perfectly sound reason for a questionable tactic. If the chief arrived at a different assumption while in court, the chief can contrast what was intended with what was perceived, and then diagnose any disconnection. As each phase of the trial is critiqued, the chief should offer summary comments from

[9] For a detailed discussion of witnesses, see Taylor, *Witnesses: The Ultimate Weapon*, The Army Lawyer, May 1987, at 12.

notes taken during trial, citing with specific examples. Reasons for conclusions should be explained and examples given of alternatives for counsel to consider in the future. A successful critique is enhanced by thoughtful and careful delivery and should be honest, constructive, neutral, and supportive. Counsel should be left with a prescription for improvement. The critique should include a discussion of how victims and witnesses were handled before, during, and after trial, as outlined in chapter 18, AR 27-10.

Conclusion

Sharing the trial experience of more seasoned counsel can be of significant assistance to new counsel. Proper coaching from chiefs of military justice will result in cases being tried more effectively and professionally. Assistance with procedural matters that are collateral to the central legal issues is particularly valuable to new JAGC counsel, because most are still unfamiliar with many facets of real world military life. Without replacing the prosecutor, an experienced chief of military justice can almost always raise pretrial and post-trial issues and offer suggestions on trial preparation that simply would not occur to new counsel. Frequently, substantive and procedural administrative requirements can seem overwhelming to new counsel. Conviction rate is not an accurate measure of advocacy skills. The government succeeds in the courtroom whenever the trial is focused on the issues, the factfinder understands the gravamen of the accused's and society's interests, and justice is accomplished in fact and in perception. Many defense victories occur outside the courtroom in getting reduced charges, fewer referrals, and alternative dispositions. Lighter sentences are also a measure of a defense success. When a case is not tried efficiently, there are many indirect costs. A convicted accused may feel less contrite and the inefficiency may reflect adversely on the office, the command, or even the Corps. Inefficient counsel who create needless issues waste their own time, their legal specialists time, the judge's time, the members' time, the witnesses' and other court personnel's time, the unit's time, and the time of those who must read the record, including the appellate courts. Chiefs of justice have an opportunity and an obligation to help develop trial counsel into effective advocates.

Legal Assistance and the 1986 Amendments to the Immigration, Nationality, and Citizenship Law

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As a legal assistance officer (LAO) you may confront immigration, naturalization, and citizenship questions in several situations, including:

—Sergeant Smith, stationed overseas, has just married a foreign national. He wants to know if his new spouse can return to the United States with him at the end of this tour. He has also asked if her child by a prior marriage can accompany them.

—First Lieutenant Jones, stationed stateside, inquires about bringing his alien fiancee to the United States to marry. He wants to know what to do.

—Captain Baker and her spouse plan to adopt an alien child during this overseas tour. Duly impressed by your succinct explanation of the complicated adoption procedure, they ask about immigration and naturalization for the child.

—Major Johnson wants to know if his dependent mother-in-law can qualify for amnesty. She has been in the United States without proper documentation since January, 1980.

By regulation, the LAO is expected to assist soldiers and family members on matters such as these.[1] To do so, you must be knowledgeable of selected provisions of immigration, nationality, and citizenship law.[2] Three important laws[3] enacted in November, 1986, significantly affect those areas that the LAO routinely confronts, such as the immigration of relatives and nonimmigrant fiance(e)s.[4] This

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[1] Dep't of Army, Reg. No. 27-3, Legal Services—Legal Assistance para. 2-2*a*(9) (1 Mar. 1984); Dep't of Army, Reg. No. 608-3, Personal Affairs—Naturalization and Citizenship of Military Personnel and Dependents, para. 2-12 (15 May 1979); Dep't of Army, Reg. No. 608-61, Personal Affairs—Application for Authorization to Marry Outside of the United States, para. 10*a*(7) (15 Sept. 1983); Dep't of Army, Reg. No. 608-99, Personal Affairs—Family Support, Child Custody, and Paternity, para. 5-2*c* (4 Nov. 1985).

[2] Three excellent references on immigration, naturalization, and citizenship law are A. Fragomen, A. DelRey & S. Bell, 1987 Immigration Procedures Handbook—A How to Guide for Legal and Business Professionals (1987) [hereinafter A. Fragomen]; C. Gordon & H. Rosenfield, Immigration Law and Procedure (rev. ed. 1986); and A. Wernick, The Guide to Immigration Counseling: A Step-By-Step Legal Handbook (1985). *Immigration Law and Procedure*, the longtime "bible" on immigration law, is a multi-volume work that comprehensively covers the area. The other two references contain excellent practical guidance on specific matters of interest to the LAO. For an overview of resources on immigration law generally, see Pagel, *Research Guide to Immigration, Aliens and the Law*, 77 Law Libr. J. 465 (1984-85), *reprinted in* 1986 Immigr. & Naturalization L. Rev. 487.

[3] Existing immigration and naturalization laws are amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537; and the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655.

[4] 8 U.S.C. § 1101(a)(15)(K) (1982). This term means a nonimmigrant who seeks to enter this country for the purpose of marrying a United States citizen. A fiance(e) of a lawful permanent resident alien is not included within the statutory usage of "fiance(e)."

article highlights pertinent provisions of these laws, focusing on those encountered most frequently. Before discussing these changes, however, this article will present a brief overview of immigration, nationality, and citizenship law. Finally, the article will resolve the hypotheticals.

Overview

Immigration and nationality law in the United States[5] is a complex system designed to control alien[6] entry. Aliens are classified as either immigrant or nonimmigrant.[7] Although both categories are subject to qualitative requirements,[8] only the immigrant category is limited numerically.[9] Before an alien can enter the United States, he or she must previously have obtained either an immigrant visa[10] or a nonimmigrant visa[11] from a consular officer at an embassy or consulate overseas.[12]

Regarding immigrants, the LAO is concerned mainly with those who are related to either a soldier or a soldier's family member,[13] with the alien seeking to immigrate based on a relationship to the LAO's client. To do so, this alien relative must be either an immediate relative[14] of a citizen or a close family member of a citizen or permanent resident.[15]

Immigration Procedure

In either instance, an alien obtains immigrant status in the same general way.[16] First, an alien must be qualified for permanent residence based on this family relationship. This begins with the filing of INS Form I-130 (Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa).[17] This petition can only be filed by a citizen or alien resident already lawfully admitted for permanent residence.[18]

The Immigration and Naturalization Service (INS) adjudicates this petition. If approved, the petition is forwarded to the appropriate consulate for State Department action.[19] The American consulate serving the area where the alien relative resides abroad sends an immigrant visa application

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[5] Title 8, United States Code §§ 1101–1557 (1982 & Supp. III 1985) is the basic codification of immigration and nationality law. It is divided into three major parts: general provisions, immigration, and nationality and naturalization. Comprehensive definitions and the powers and duties of officials and agencies responsible for the administration of immigration and naturalization law are contained in the general provisions (§§ 1101–1106). The alien selection system, admission qualifications, travel control of citizens and aliens, entry, deportation, adjustment of status, and penalties for noncompliance are in the second part (§§ 1151–1362). Nationality, naturalization, and loss of nationality provisions comprise the third portion (§§ 1401–1503). Implementing administrative regulations are in Aliens and Nationality, Title 8 of the Code of Federal Regulations. Administrative regulations concerning issuance of visas are in Foreign Relations, Title 22 of the Code of Federal Regulations, parts 41 and 42.

[6] An alien is any person who is not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1982). The term includes both immigrants and nonimmigrants.

[7] 8 U.S.C. § 1101(A)(15) (1982). Defined by exclusion, an "immigrant" means every class of alien except one within the specifically listed groups of nonimmigrant aliens. Aliens who are foreign government officials, visitors for business or pleasure, students, temporary workers, fiance(e)s, and foreign correspondents are nonimmigrants. Nonimmigrant aliens enter the United States for a limited period and under limited conditions, while an immigrant seeks to become a permanent resident. An exception to this generalization is that fiance(e)s also enter intending to obtain permanent residence following marriage to a citizen.

[8] *See* 8 U.S.C. §§ 1182, 1251 (1982).

[9] 8 U.S.C. § 1151 (1982). Only 270,000 immigrant visas may be issued in each fiscal year. Immigrant visas for special immigrants, immediate relatives, refugees, and asylees are not counted in this ceiling. The total number of available immigrant visas is distributed on a percentage basis across six specific preference categories. The categories, in order of preference are: unmarried sons and daughters of citizens of the United States; spouses and unmarried sons and daughters of permanent resident aliens; professionals, scientists, and artists; married sons and daughters of United States citizens; siblings of citizens; and immigrant laborers. 8 U.S.C. § 1153(a) (1982).

[10] 8 U.S.C. § 1101(a)(16) (1982). The term is defined as an immigrant visa required under immigration law and properly issued by a consular officer outside the United States to an eligible immigrant.

[11] 8 U.S.C. § 1101(a)(26) (1982). The term "nonimmigrant visa" is a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in immigration law.

[12] 8 U.S.C. §§ 1181, 1201 (1982).

[13] Legal assistance clients may seek assistance and advice regarding their alien finance(e). The finance(e) obtains a nonimmigrant visa through a procedure similar to that applicable to alien relatives. C. Gordon & H. Rosenfield, *supra* note 2, §§ 2.16A, 41.01–.05. Briefly, this procedure begins when the citizen-petitioner submits INS Form I-129F (Petition to Classify Status of Alien Fiance or Fiancee for Issuance of Nonimmigrant Visa) to qualify the fiance(e)-beneficiary. 8 C.F.R. § 214.2(k) (1987). Following Immigration and Naturalization Service (INS) approval of this petition, the fiance(e) completes visa processing in a manner similar to relative aliens seeking entry into the United States. *See* 8 C.F.R. § 214.2(k) (1987), 22 C.F.R. § 41.66 (1986).

[14] 8 U.S.C. § 1151(b) (1982). A term of art, "immediate relative," encompasses the spouse, parents, and unmarried children under age twenty-one, of a citizen of the United States. Each of these terms also has a specific limited definition within the context of immigration law. C. Gordon & H. Rosenfield, *supra* note 2, § 2.18. For simplicity, the following definitions are used here. A "spouse" is a person presently legally married as a result of a marriage valid where performed. It does not include a person who married for purposes of conferring an immigration benefit. A "child" is an unmarried person under 21 years old who is a legitimate child, stepchild, legitimated child, illegitimate child, adopted child, or orphaned child as those descriptions are further defined in 8 U.S.C. § 1101(b)(1). The term "parent" means a parent based on the parent-child relationship arising by reason of a relationship to any of the defined uses of the term "child." 8 U.S.C. § 1101(b)(2)(1982). Parents of a citizen under age 21 are not immediate relatives. The LAO must remember to check the definitions of these terms when advising on family relationships.

[15] "Close family members" describes four relative preference groups: unmarried adult sons and daughters of citizens of the United States (1st preference); spouses and unmarried sons and daughters of lawful permanent residents (2d preference); married sons and daughters of citizens (4th preference); and siblings of adult United States citizens (5th preference).

[16] 8 U.S.C. § 1154(a) (1982). This explanation greatly oversimplifies a very complicated and often time consuming process. For a more complete discussion, see C. Gordon & H. Rosenfield, *supra* note 2; A. Fragomen, *supra* note 2, §§ 11.1–13.5; and A. Wernick, *supra* note 2, §§ 3.1–5.5.

[17] 8 C.F.R. § 204.1 (1987). The INS has primary responsibility for adjudicating petitions filed stateside, while the American consulate abroad evaluates petitions filed there.

[18] *Id.*

[19] A. Fragomen, *supra* note 2, §§ 11.3–11.5.

packet to the alien relative who has been determined qualified to become a lawful permanent resident.[20]

Visa processing is the second major step for aliens seeking permanent resident status.[21] During this phase, forms from the application packet must be submitted together with required documentation.[22] Thereafter, an immigrant visa interview of the alien is conducted. If everything is in order, and the consular officer is satisfied that the alien is not subject to exclusion, the immigrant visa is issued.[23]

After receiving a visa, the alien must apply for admission at the United States border before the visa expires.[24] If admitted, the immigrant alien eventually receives an "alien registration receipt card" or INS Form I-551. Commonly known as a "green card," it is proof of the permanent resident status granted to the alien.[25]

Naturalization

Aliens with permanent resident status may become United States citizens through naturalization,[26] although they can live here forever without becoming a citizen (provided they are not deported). Many aliens do seek citizenship, however, to confer immigration benefits on other members of their family.[27]

In brief, to become a naturalized citizen, the permanent resident alien must establish prior lawful admission, five years' continuous residence in the United States, and physical presence for at least one-half of the residence period.[28] In addition, the alien must be of good moral character, be attached to the principles of the Constitution, and be disposed to good order. Normally, the alien must also be able to read, write, and speak ordinary English.[29]

Alien permanent residents in the United States military may in some cases obtain expedited citizenship through their military service.[30] The alien family members of the citizen-soldier also may benefit from an expedited citizenship process.[31]

With this general overview of the immigration procedure for the alien relatives of the LAO's clients in mind, it is time to focus on the 1986 amendments to immigration and naturalization law. Each law is discussed individually.

Immigration Reform & Control Act of 1986

President Reagan has described the Immigration Reform and Control Act of 1986[32] as "the most comprehensive reform of our immigration laws since 1952."[33] More than six years in the making, IRCA has three major components: an employer sanctions program, a legalization program for unauthorized aliens, and other measures to increase enforcement of immigration laws.[34] Although the employer sanctions program is the keystone of IRCA,[35] the LAO is more likely to see clients with family members who could benefit from the legalization program. Accordingly, the following discussion concentrates on the temporary and permanent resident status adjustment procedures and requirements.

In general, this new legalization program is a limited, single-shot chance to obtain lawful permanent resident

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[20] *Id.*

[21] *Id.* at §§ 12.1–12.7

[22] Prior to issuance of the immigrant visa, the alien will be required to undergo a medical examination. 8 U.S.C. § 1201(d) (1982).

[23] A. Fragomen, *supra* note 2, §§ 12.1–12.7; A. Wernick, *supra* note 2, §§ 5.1–5.6. Some aliens are eligible to complete the permanent residence process, without leaving the United States, through a procedure known as "adjustment of status." 8 U.S.C. § 1255 (1982). Aliens not present, or who are in this country but ineligible for adjustment of status, must make their final application for the immigrant visa at a consulate outside the United States. *See* A. Fragomen, *supra* note 2, §§ 11.4, 13.1–13.5

[24] 8 U.S.C. § 1181 (1982). At the time of entry, the alien is inspected to determine if he or she is admissible. As part of this inspection, the alien must present a valid, unexpired immigrant visa and passport. An immigrant visa is usually valid for up to four months. 8 U.S.C. § 1201(c) (1982). As with so many other terms, "admissibility" is a term of art. It means, generally, that the alien has the required documentation and is not within any applicable exclusions contained in 8 U.S.C. § 1182 (1982).

[25] C. Gordon & H. Rosenfield, *supra* note 2, § 43.02.

[26] *See* 8 U.S.C. §§ 1401–1503 (1982).

[27] *See* A. Wernick, *supra* note 2, § 8–1; A. Fragomen, *supra* note 2, § 14.4. For specific procedures and forms used in this process, see 8 C.F.R. pts. 306–499 (1986).

[28] 8 U.S.C. § 1427 (1982); *see* A. Fragomen, *supra* note 2, § 14.4.

[29] 8 U.S.C. § 1427 (1982).

[30] 8 U.S.C. §§ 1439, 1440 (1982).

[31] 8 U.S.C. § 1430 (1982); *see* Dep't of Army, Reg. No. 608–3, Personal Affairs—Naturalization and Citizenship of Military Personnel and Dependents, paras. 2–4 to 2–17 (15 May 1979) (C1, 1 July 1980) [hereinafter AR 608–3].

[32] Pub. L. No. 99–603, 100 Stat. 3359, 55 U.S.L.W. 275 (1986) [hereinafter IRCA].

[33] Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. Pres. Doc. 1534 (Nov. 10, 1986).

[34] *Interpreter Releases,* a publication devoted to immigration law matters, contains a comprehensive five-part series of articles on the IRCA: *The Simpson-Rodino Act Analyzed: Part I—Employer Sanctions,* 63 Int. Rels. 991 (1986); *The Simpson-Rodino Act Analyzed: Part II—Legalization,* 63 Int. Rels. 1021 (1986) [hereinafter *Legalization*]; *The Simpson-Rodino Act Analyzed: Part III—The Antidiscrimination Provisions,* 63 Int. Rels. 1049 (1986); *The Simpson-Rodino Act Analyzed: Part IV—The Agricultural Worker Provisions,* 63 Int. Rels. 1127 (1986); and *The Simpson-Rodino Act Analyzed: Part V—Miscellaneous Provisions,* 63 Int. Rels. 1174 (1986). *See also The Immigration Reform and Control Act of 1986* (pts. 1 & 2), 5 Immigr. L. Rep. 73, 81 (1986). For a succinct discussion of the employer sanctions program, including suggested compliance actions, consult G. Tulacz, Focus—How to Comply with the Tough New Immigration Law (1987). For a more general discussion of IRCA, see Commerce Clearing House, Inc., New 1986 Alien Employment Controls with Law and Explanation (1986).

[35] Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. Pres. Doc. 1534 (Nov. 10, 1986).

status.[36] An alien must apply for legalization between May 5, 1987, and May 4, 1988.[37]

This program represents an additional path that an undocumented alien in the United States can follow to become a lawful permanent resident.[38] By its terms, qualifying aliens will receive adjustment of their status from illegal alien to lawful permanent resident. Thereafter, they will be authorized employment. Eventually, they can apply for citizenship as well. Those that do not take advantage of this program or who try but fail to meet its stringent requirements will not receive the status adjustment. Instead, they will still be undocumented aliens, subject to deportation.[39]

More specifically, this program details the establishment of temporary resident status, adjustment to permanent resident status, applications for adjustment of status, waiver of certain grounds for exclusion, administrative and judicial review, implementation of the program, public welfare assistance disqualification, and information dissemination. Collectively, these provisions enable some undocumented aliens to obtain permanent resident status through a two-phased procedure, which begins with temporary resident status.

Temporary resident status

An interested alien first must obtain temporary resident status before applying for adjustment to permanent resident status.[40] In this legalization program, only aliens who entered the United States before January 1, 1982, can obtain this status of "alien lawfully admitted for temporary residence."

An alien applying for this status must meet certain other conditions as well.[41] First, the alien must submit a timely application that establishes his or her pre-January 1, 1982, unlawful entry; continuous "residence" through the date the application is filed; and continuous physical "presence" since November 6, 1986, the date this law took effect.[42]

Also, the alien must establish that he or she is admissible as an immigrant.[43] In part, this means that the alien must not be excludable under the general exclusion provisions. Some of these exclusions, such as the documentary and literacy requirements, among others, will not render an otherwise admissible alien inadmissible.[44] Still other exclusions may be waived for humanitarian reasons, to assure family unity, or when a waiver is considered to be in the public interest.[45] Moreover, an alien who has been convicted of a felony or more than two misdemeanors while in the United States, has assisted in any form of persecution, or is not registered for military service, if required to be, will not be "admissible" as that term is used in this subsection.

The term "resided continuously," and the evidence required to establish continuous residence since January 1, 1982, are crucial in the application process. Although the amendment contains a preference for employment-related documents,[46] an undocumented alien is unlikely to have these simply because of his or her illegal status.[47]

Just what other evidence will be adequate is left to further definition in implementing regulations issued by the Attorney General. Proposed regulations issued by the INS address these and other matters.[48] They identify a wide variety of documents that can be used to prove that the alien has resided continuously in the United States since January 1, 1982. In addition to the employment-related documents, the following are among those that can suffice: utility bills; school records; hospital or medical records; and attestations

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[36] *Legalization, supra* note 34, at 1021.

[37] The INS has proposed extensive rules to implement IRCA § 201, the legalization program. 52 Fed. Reg 8753 (1987) (to be codified at 8 C.F.R. pt 245a) (proposed March 19, 1987). These proposed rules detail such key provisions as the application period, the documentation to file (INS Form I–687 and supporting evidence), and eligibility requirements. An alien subject to deportation proceedings initiated on or after November 6, 1986, has a shorter filing period that varies according to the case.

[38] *Id.* The others are the suspension of deportation, 8 U.S.C. § 1254, the adjustment of status, 8 U.S.C. § 1255, and the registry provisions, 8 U.S.C. § 1255. These provisions differ from this new one. Under them, even after an alien proved that he or she met the requirements of the particular provision, permanent residence status was discretionary. In the legalization program, however, the status adjustment is mandatory if the alien satisfies the statutory conditions.

[39] The legalization program provides that the INS cannot use the information submitted by the petitioning alien except to determine if the alien qualifies for legalization or for fraud prosecutions based on the petition. Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(c)(5)).

[40] Pub. L. No 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a).

[41] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(a)).

[42] An alien who takes a brief, casual, and innocent trip abroad after November 6, 1986, however, still meets the continuous physical "presence" requirement. Pub. L. No. 99–603, § 201(a)(3), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(a)(3)).

[43] Pub. L. No. 99–603, § 201(a)(4), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(a)(4)).

[44] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(d)(2)).

[45] *Id.* Other exclusion grounds, relating to aliens who are criminals; who are likely to become public charges; who deal in narcotics; or who pose risks to national security or public safety, may not be waived.

[46] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (to be codified at 8 U.S.C. § 1255a(g)(2)(D)(ii)).

[47] *The Immigration Reform and Control Act of 1986* (pt. 2), 5 Immigr. L. Rep. 81, 82 (1986).

[48] See *supra* note 37 and accompanying text. As proposed, evidence to support an alien's eligibility for the legalization program must include documents establishing proof of identity, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD–258), and a completed medical report of examination (Form I–693). 52 Fed. Reg. 8756 (1987) (to be codified at 8 C.F.R. § 245a.2(d)) (proposed March 19, 1987). The term "resided continuously" has been defined to mean that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

(i) No single absences from the United States has exceeded forty-five (45) days, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) the aggregate of all absence has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed;

(iii) the alien was maintaining residence in the United States; *and*

(iv) the alien's departure from the United States was not based on an order of deportation.

52 Fed. Reg. 8756 (1987) (to be codified at 8 C.F.R. § 245a.1(c)(1)) (proposed March 19, 1987).

by churches, unions, or other organizations to the applicant's residence.[49]

Once obtained, the temporary residence status may still be terminated under various circumstances: if the alien is determined not to have been eligible for that status when it was originally granted; if the alien commits an act that renders him or her inadmissible as an immigrant or is convicted of any felony or more than two misdemeanors; or if the alien does not file for adjustment to permanent resident status by the end of the thirty-first month beginning after the alien obtained temporary resident status.[50]

Permanent Resident Status

A lawful temporary resident may subsequently apply for adjustment to permanent resident status.[51] This will be granted if the following requirements are met. First, the application must be timely, which means it must be submitted within a one-year period beginning on the day after the alien has held his or her temporary resident status for eighteen months.

Second, the alien must establish continuous "residence" since approval of the temporary resident status.[52] An alien who takes brief, casual, or innocent trips abroad, however, will still meet the continuous "residence" requirement for permanent resident status.[53]

Third, the alien must have remained admissible as an immigrant.

Finally, the alien must possess basic citizenship skills (*i.e.*, a minimal understanding of ordinary English and a knowledge and understanding of American history and government).[54]

Related Legalization Matters

The legalization provisions of IRCA include two other noteworthy matters that the LAO might need to discuss with certain clients.

These amnesty provisions disqualify newly-legalized aliens from some forms of public welfare assistance for five years.[55] For example, Aid to Families with Dependent Children (AFDC), food stamps, and state medical assistance plans approved under title XIX of the Social Security Act, are not available to legalized aliens.[56] Moreover, there is no cancellation of this public assistance disqualification even though the alien is subsequently adjusted to permanent resident status within the five year period.[57]

IRCA also amends the seldom-used registry provision.[58] Aliens who entered the United States prior to January 1, 1972 may obtain permanent resident status at the discretion of the Attorney General. By proving that he or she entered the United States prior to January 1, 1972 (the previous cut-off date was June 30, 1948), an eligible alien may obtain permanent resident status.[59]

An alien seeking adjustment via the registry provision need not meet the strict time limits contained in the major portion of the legalization program. Thus, the registry provision is more beneficial to an alien who qualifies for legalization under both the registry and the two-phased legalization provisions, but fails to apply within the stringent time limits of the latter.

Immigration Marriage Fraud Amendments of 1986

Largely overshadowed by IRCA, the Immigration Marriage Fraud Amendments of 1986[60] intend to prevent

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[49] 52 Fed. Reg. 8756 (1987) (to be codified at 8 C.F.R. § 245a.2(d)) (proposed March 19, 1987). Additional documents to support the alien's claim may also include: money order receipts for money sent in or out of the country; passport entries; birth certificates of children born in the United States; letters of correspondence between the alien and another person or organization; social security card; Selective Service card; automobile license receipts, title, vehicle registration, etc.; deeds, mortgages, contracts to which the alien has been a party; tax receipts; insurance policies, receipts, or letters; and any other relevant document. In short, it appears that any *dated* document could support the alien's quest.

[50] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(b)(2)).

[51] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(b)).

[52] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(b)(1)). The language of this provision equates "residence" to "presence" as the latter term was used in the temporary residence status provisions. Because of this, an alien seeking permanent resident status will find it easier to meet this "residence" requirement than that required for temporary resident status.

[53] The proposed implementing regulations provide that an alien shall be regarded as having resided continuously in the United States for the purpose of this provision if, at the time of applying for adjustment from temporary to permanent resident status, no single absence from the United States has exceeded thirty (30) days, or the aggregate of all absences has not exceeded ninety (90) days between the date of granting of lawful temporary resident status and applying for permanent resident status unless the alien can establish that due to emergent reasons, the return to the United States could not be accomplished within the time period(s) allowed. 52 Fed. Reg. 8760 (1987) (to be codified at 8 C.F.R. § 245a.3(b)(2)) (proposed March 19, 1987).

[54] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(b)(1)(D)). An alien lacking these citizenship skills could be attending a class that will help him attain the minimal levels. This requirement resembles one of the requirements for attaining citizenship, discussed *supra* note 29 and accompanying text. Further elaboration of this requirement is in the proposed rules, 52 Fed. Reg. 8760 (1987) (to be codified at 8 C.F.R. § 245a.3(b)(4)(i)(A)) (proposed March 19, 1987).

[55] Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1255a(h)). This disqualification period begins when temporary resident status is obtained.

[56] *The Immigration Reform and Control Act of 1986* (pt. 2), 5 Immigr. L. Rep. 81, 83 (1986). Narrowly defined Medicaid benefits remain available for emergency services and pregnant women. The prohibition on medical assistance does not apply to aliens under age 18. Pub. L. No. 99–603, § 201(a)(1), 100 Stat. 3359 (to be codified at 8 U.S.C. § 1255a(h)(3)).

[57] Direct contact with the benefit-administering agency is appropriate when the question arises.

[58] 8 U.S.C. § 1259 (1982), *as amended by* Pub. L. No. 99–603, § 203, 100 Stat. 3359 (1986). The procedure for seeking permanent resident status via the registry provision is contained in 8 C.F.R. § 249.2 (1987). This provision will be changed to reflect January 1, 1972 as the new cut-off date.

[59] 8 U.S.C. § 1259 (1982), *as amended by* Pub. L. No. 99–603, § 203, 100 Stat. 3359 (1986). The other criteria in the former registry provision are unchanged. The alien must establish that he or she has continuously resided here since his or her initial pre-1972 entry, is a person of good moral character, is not ineligible for citizenship, and is not inadmissible based on criminal or drug records, subversive conduct, or smuggling of aliens. Even then, permanent resident status is not granted automatically. C. Gordon & H. Rosenfield, *supra* note 2, § 7.6.

[60] Pub. L. No. 99–639, 100 Stat. 3537 (1986) [hereinafter IMFA].

immigration-related marriage fraud.[61] The key provision is a new "conditional" permanent resident status for an alien spouse, son, or daughter.[62]

The creation of a "conditional" period between entry and conferral of permanent unconditional status makes it more difficult for certain alien spouses, sons, and daughters to obtain permanent resident status.

Other provisions contained in IMFA to deter fraudulent marriages include: revisions to "K" nonimmigrant fiance(e) provisions;[63] restrictions on future entry of aliens involved with marriage fraud;[64] restrictions placed on adjustment of status or petitions based on marriages entered while in exclusion or deportation proceedings;[65] and a new criminal penalty for marriage fraud.[66]

"Conditional" Residents

Before IMFA, alien spouses, sons, and daughters[67] lawfully admitted to the United States had "permanent" resident status.[68] This meant that their resident status was permanent when granted, usually at entry.[69]

Effective when enacted, IMFA changed the nature of the resident status granted to many of the relatives of legal assistance clients at the end of the immigration procedure. Now, permanent residence on a "conditional" basis is granted for certain aliens. Alien spouses of citizens, of previously-admitted lawful permanent resident aliens, or alien spouses who entered initially as a nonimmigrant fiance(e)[70] are affected by this new provision if they have not been married for at least two years when applying for permanent resident status. An alien spouse married more than two years before receiving permanent resident status, however, still obtains that status unconditionally as under the prior law.[71]

The conditional status lasts for two years beginning when permanent resident status is granted.[72] During this period, an alien can lose his or her "conditional" resident status for specified reasons.[73] The status is lost if the Attorney General determines that the qualifying marriage (*i.e.*, the marriage upon which the alien based his or her petition for relative status) was entered for the purpose of procuring an alien's entry as an immigrant or was judicially annulled or ended (other than by death of a spouse); or if a fee or other consideration was given for filing the petition to qualify the alien for permanent resident status.[74]

The status-terminating decision is reviewable in deportation proceedings, where the burden is on the INS to establish an improper qualifying marriage by a preponderance of the evidence. For qualifying marriages that ended in divorce or annulment, documentary proof that the divorce or annulment occurred before the second anniversary of when the alien obtained his or her conditional status is all that is required to terminate the conditional resident status.[75]

Thus, an alien spouse divorced from his or her husband-citizen is subject to deportation even if the marriage began as a legitimate one. The LAO must keep this in mind when

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[61] H.R. Rep. No. 906, 99th Cong., 2nd Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5978.

[62] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (to be codified at 8 U.S.C. § 1186a). Both IRCA and IMFA created a new Immigration and Nationality Act section 216. This problem was solved by the codifiers' assignment of the section 216 added by section 210 of IRCA to 8 U.S.C. § 1186 and the section 216 added by section 2 of the IMFA to 8 U.S.C. § 1186a. *See U.S. Code Citations Assigned to New Immigration Law Provisions*, 63 Int. Rels. 1159 (1986).

[63] 8 U.S.C. § 1184(d) (1982), *as amended by* Pub. L. No. 99–639, § 3, 100 Stat. 3537 (1986). *See infra* notes 91–94 and accompanying text.

[64] 8 U.S.C. § 1154(c) (Supp. II 1985), *as amended by* Pub. L. No. 99–639, § 4, 100 Stat. 3537. As amended, this provision prevents approval of a preference petition for an alien who has previously been accorded, or has sought to be accorded, a nonquota or preference status as the spouse of a citizen or alien permanent resident, by reason of or attempt to enter a marriage for the purpose of evading the immigration laws. Now, this ban also extends to an alien who has conspired to enter into a marriage for such a purpose. This change applies to petitions filed on or after November 10, 1986, the date of IMFA's enactment.

[65] Pub. L. No. 99–639, § 5(b), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1154(h)). This section prevents approval of a petition to qualify an alien for either an immediate relative or preference status by reason of a marriage that was entered while the alien was in exclusion or deportation proceedings until the alien has resided outside the United States for a two year period beginning after the date of the marriage. Similarly, a nonimmigrant alien seeking adjustment of status to that of lawful permanent resident may not receive that adjustment on the basis of a marriage entered while the alien was involved in exclusion or deportation proceedings. Pub. L. No. 99–639, § 5(a)(2), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1255a(e)).

[66] 8 U.S.C. § 1325 (1982), *as amended by* Pub. L. No. 99–639, § 2(d), 100 Stat. 3537 (1986). An individual who knowingly enters a marriage for the purpose of evading any provision of the immigration laws can be imprisoned for up to five years, or fined up to $250,000, or both, if convicted of this new crime.

[67] The term "alien spouse" means an alien who obtains permanent residence status through a qualifying marriage as: an immediate relative spouse of a citizen; a fiance(e) of a citizen; or a spouse of another alien already admitted for permanent resident status. A "qualifying marriage" is a marriage that was entered within two years before the date on which the alien spouse obtained permanent resident status. An "alien son or daughter" is an alien who obtains permanent resident status by virtue of being the son or daughter of an individual through a qualifying marriage. Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(g)).

[68] 8 U.S.C. § 1181 (1982).

[69] Nevertheless, permanent resident aliens did remain subject to deportation in certain circumstances. 8 U.S.C. § 1251 (1982). For a detailed treatment of deportation, see C. Gordon & H. Rosenfield, *supra* note 2, §§ 4.1–4.22.

[70] A fiance(e) of a citizen is still admitted as a K–1 nonimmigrant for 90 days. It is only when the fiance(e) applies to adjust from the nonimmigrant status to permanent residence that IMFA's conditional status applies. *INS Issues Further Instructions on Immigration Marriage Fraud Law*, 63 Int. Rels. 1077 (1986).

[71] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(a)(1)). In addition, derivative marriages (*i.e.*, those between aliens, one of whom is awaiting an immigrant visa under the 3rd, 4th, 5th, or 6th preference) are not covered by this new subsection. *See* H.R. Rep. No. 906, 99th Cong., 2nd Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5978. Accordingly, they receive permanent resident status unconditionally, as under prior law.

[72] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)).

[73] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(b)).

[74] *Id.* A fee paid to an attorney for assistance in preparing the petition for qualification does not render the qualifying marriage improper such that termination of the conditional status is warranted.

[75] *Marriage Fraud Amendments*, 5 Immigr. L. Rep. 86 (1986).

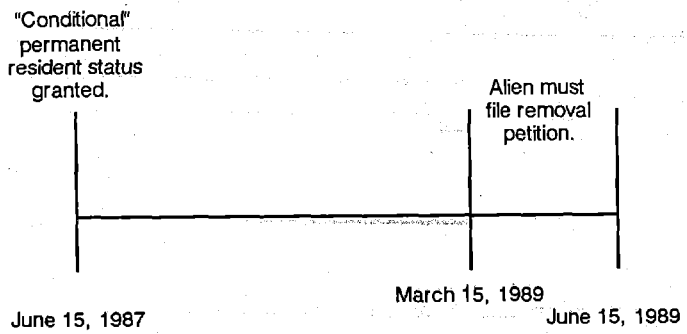
providing divorce-related counseling to a soldier or his or her alien spouse with conditional resident status.

Removal of Conditional Status

When conditional residence status is granted, the alien must be informed of the requirement to petition for removal of the conditional status.[76]

The alien spouse and the petitioning spouse (either a citizen or permanent resident) jointly must submit a timely removal petition to begin removal of the "conditional" basis of the permanent resident status.[77] This petition must be filed within a ninety-day period preceding the second anniversary of the date on which the alien obtained the conditional status of lawful admission for permanent residence.[78]

For instance, if permanent resident status on a conditional basis was granted on June 15, 1987, that status would ordinarily continue until June 15, 1989. The petition to remove conditional resident status must be filed during a ninety-day window that begins on March 15, 1989, as illustrated below:



Removal petitions filed after the deadline (June 16, 1989, or later in the illustration) need be considered only if the alien establishes to the satisfaction of the Attorney General good cause *and* extenuating circumstances for failure to file the petition within the specified time period.[79] When advising the alien on removal petitions, the LAO must stress this heavy burden imposed for missing the submittal deadline.

The contents of the removal petition are also specified. It must contain a statement that the marriage occurred in accordance with the laws where the marriage took place; that is has not been judicially annulled or terminated (other than by death of a spouse); that is was not entered into for the purpose of procuring an alien's entry as an immigrant; and that no fee or other consideration has been paid for the filing of the relative qualifying petition.[80]

In addition, this statement must contain the actual residence(s) of each party to the qualifying marriage since the date the alien spouse obtained permanent resident status on a conditional basis, the place(s) of employment of each party since such date, and the name(s) of the employer(s).[81]

After this petition is submitted, a personal interview at a local INS office will be held within ninety days.[82] Both the alien spouse and the petitioning spouse (unless deceased) must appear for the interview or else the alien risks deportation by virtue of loss of permanent resident status because of this failure.[83]

The INS has ninety days after the interview to determine the truth of the facts and information described in the conditional status removal petition.[84] A favorable determination on the petition results in unconditional permanent resident status as of the second anniversary of the date the alien obtained the status of lawful admission for permanent residence on a conditional basis.[85]

If the information in the petition is determined to be untruthful, the resident status is terminated as of the date of the decision.[86] During the ensuing deportation proceedings, the alien may contest the adverse determination. The burden of proof is on the INS to establish by a preponderance of the evidence that the facts and information in the removal petition are not true with respect to the qualifying marriage.[87]

Hardship Waiver

If the alien does not succeed in obtaining removal of the conditional basis through the petition process, he or she could try the "hardship" waiver provision[88] as a last resort. Here too, the alien must meet a heavy burden in order to prevail. The alien must demonstrate either that "extreme hardship" would result if he or she is deported, or that the qualifying marriage was entered in good faith by the alien spouse, but was ended by the alien spouse for "good

[76] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(a)(2)(A)). This provision also requires that an attempt be made to notify the alien at the beginning of the period during which the removal petition can be filed.

[77] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186(a)(c)(1)).

[78] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(d)(2)(A)).

[79] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C § 1186a(d)(2)(B)).

[80] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(d)(1)(A)). The "relative qualifying petition" is INS Form I–130, which is filed by a citizen or alien resident already lawfully admitted for permanent residence. *See supra* 17–18 and accompanying text.

[81] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(1)(A)).

[82] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(d)(3)). Either the deadline for the interview, or the interview itself, may be waived in the discretion of the Attorney General "as may be appropriate."

[83] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(1)(B)). Conditional immigration status may also be terminated if the couple fails to timely file the petition for removal of the conditional basis or fails, unless there is good cause shown, to appear for the interview.

[84] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(3)(A)).

[85] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(3)(B)).

[86] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(3)(C)).

[87] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(3)(D)).

[88] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(4)).

cause."[89] When the hardship waiver is based on the "good cause" ground, the alien must also establish that he or she was not at fault in failing to meet the requirements for the removal of the conditional basis.

In determining extreme hardship, the Attorney General is directed to consider circumstances occurring only during the period since the alien was admitted for permanent residence on a conditional basis.[90] In view of this limitation, the hardship waiver provision most likely will be of little use to most aliens seeking to remove the conditional basis of their resident status.

Nonimmigrant Fiance(e)s

Several changes are made to the nonimmigrant fiance(e) provisions.

Before a petition[91] to qualify an alien as a nonimmigrant fiance(e) will be approved, the petitioning citizen must establish that he and his alien fiancee have previously met in person within the two years before the petition is filed.[92] This new condition is in addition to the former requirements that the petitioner establish that the parties have a bona fide intention to marry and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien arrives.

Since November 10, 1986, the date IMFA was enacted, fiance(e) qualifying petitions without adequate proof that the parties have met have not been approved.[93]

Another change concerning fiance(e)s affects their adjustment of status to permanent residence. Formerly, an alien fiance(e) who completed the marriage to the citizen-petitioner within ninety days after arrival was adjusted to permanent residence status.[94] Section 3(c) of IMFA eliminated this procedure. Considered together with section 2 of IMFA, fiance(e)s can no longer adjust status under the general adjustment provisions. Nonimmigrant fiance(e)s now receive permanent resident status on a conditional basis under IMFA section 2, as discussed earlier.[95]

Restriction on Subsequent Petitioning

Section 2(c) of IMFA prohibits an alien permanent resident (based on marriage) from petitioning for another alien (under second preference) except in limited circumstances. The alien must establish that five years have passed after the date he or she acquired the permanent status, that the prior marriage was not entered for the purpose of evading any provision of the immigration laws, or that the prior marriage ended by the death of the alien's spouse.[96]

Naturalization and "Conditional" Residence

A conditional resident alien is still considered a lawful permanent resident of the United States for naturalization purposes.[97] Accordingly, the time spent as a conditional permanent resident may be applied to the total residence required for naturalization. Thus, the IMFA does not penalize the alien permanent resident on a conditional basis when it comes to naturalization.

More importantly, however, an alien permanent resident on a conditional basis remains eligible for immediate naturalization if the alien is otherwise eligible for naturalization via any provision that omits the requirement for prior residence or period of physical presence in the United States.[98]

One such provision applies to alien spouses of United States' citizens who are stationed abroad.[99] Provided the alien spouse meets the other naturalization qualifications,[100] he or she will not be required to meet the usual prior residence requirement for naturalization. In addition to the typical naturalization requirements discussed earlier,[101] the alien spouse must establish that he or she is married to a United States citizen and that he or she has a good faith intention to reside in the United States after overseas employment or service is completed by the citizen-spouse.

Immigration and Nationality Act Amendments of 1986

The Immigration and Nationality Act Amendments of 1986[102] became law on November 14, 1986. Their principal purpose is to promote consular efficiency with respect to

[89] *Id.* A strict interpretation of this provision would prevent a waiver when the conditional resident status is terminated at the initiative of the INS during the two-year period and before the petition is filed. *Marriage Fraud Amendments*, 5 Immigr. L. Rep. 86 (1986).

[90] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(c)(4)).

[91] INS Form I–129F; *see* 8 C.F.R. § 214.2(k) (1987).

[92] 8 U.S.C. § 1184(d), *as amended by* Pub. L. No. 99–639, § 3(a), 100 Stat. 3537 (1986). Previously, only administrative regulations dealt with this requirement. They provided that the failure of the petitioner to establish that he and his fiancee had met personally only received "considerable weight" in evaluating the petition. 8 C.F.R. § 214.2(k) (1987). Now this requirement is a statutory prerequisite to petition approval.

[93] State Department Cable No. 367241, Nov. 25, 1986, *reprinted in* 64 Int. Rels. 34 (1987).

[94] 8 U.S.C. § 1184(d) (1982).

[95] *Supra* notes 67–87 and accompanying text.

[96] Pub. L. No. 99–639, § 2(c), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1154(a)(2)(A)).

[97] Pub. L. No. 99–639, § 2(a), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186a(e)).

[98] *See* 63 Int. Rels. 1079 (1986).

[99] 8 U.S.C. § 1430(b) (1982). Another provision is 8 U.S.C. § 1430(d), which applies to the surviving spouse of a United States citizen. AR 608–3, paras. 2–4 to 2–17, contains a general discussion of the applicable procedures to follow. The applicant for naturalization files INS Form N–400 (Application to File Petition for Naturalization) in accordance with the instructions contained on the form. INS Form 405, the Petition for Naturalization, must be filed in duplicate. 8 C.F.R. § 319 (1987).

[100] *See supra* notes 26–29 and accompanying text.

[101] *Id.*

[102] Pub. L. No. 99–653, 100 Stat. 3655 (1986) [hereinafter INAA].

immigration-related duties.[103] To that aim, it includes provisions making fingerprinting discretionary and eliminating the necessity of retaining duplicate copies of visa applications.[104] Some substantive changes, however, are of more interest to the LAO advising on immigration, naturalization, or citizenship matters.

Adopted Child[105]

Section 2 of INAA amends the definition of "child"[106] as that term is used in immigration and naturalization law. Previously, an adopted child must have been in the legal custody of, and resided with, the adopting parent(s) for two years *following* the adoption in order to be recognized as a child for immigration or naturalization purposes.[107] The two-year requirement is retained, but is measured now from the date that legal custody is awarded instead of the date of the adoption decree. Thus, the waiting period for immigration benefits to adopted children is reduced when the adopted child was in legal custody of the adopting parent(s) before the adoption decree was issued.

Illegitimate Child[108]

The citizenship provision covering children born out of wedlock[109] is amended by section 13(b) of INAA. Now an illegitimate child of a United States citizen-father may acquire citizenship based on the relationship to the natural father without being legitimated first.

To qualify, several conditions must be met.[110] First, the blood relationship between the child and the father must be established by clear and convincing evidence.[111] Second, the father, if living, must state in writing, that he will provide financial support until the child reaches age eighteen. Finally, the child must be legitimated under the law of the child's residence or domicile, the father must acknowledge paternity in writing under oath, or paternity must be established by a competent court. Because legitimation is no longer the exclusive means of establishing a legal relationship for naturalization purposes, it is easier for the illegitimate child of a citizen-father to acquire citizenship.[112]

Naturalization Definition of "Child" Changed

Section 3 of INAA deletes the former definition of "child" used in the naturalization provisions.[113] Before this change, "child" was not uniformly defined for both immigration and naturalization purposes.[114]

This change necessitated conforming amendments to three naturalization provisions. In each, a specific requirement that the child be unmarried has been added.[115]

Citizenship for Child Born Overseas

In section 12 of INAA, the law concerning citizenship of a child born overseas to one United States citizen parent is changed.[116] Previously, citizenship was transmitted to the child (at birth) if the citizen-parent had been physically present in the United States for at least ten years, five of which were after the parent had reached age fourteen.[117] These periods are now reduced to five and two years, respectively.[118] Military service abroad still counts towards the satisfaction of the physical presence requirement.[119]

Citizenship Certificate for Adopted Child

The last section of interest is one that permits adoptive parents of certain children born outside the United States to

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[103] H.R. Rep. 916, 99th Cong., 2nd Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6182.

[104] Pub. L. No. 99–653, §§ 5, 6, 100 Stat. 3655 (1986).

[105] The immigration of a child, whether he or she be a stepchild, legitimate child, illegitimate child, adopter child, or orphaned child, is beyond the scope of this article. For a thorough discussion, see C. Gordon & H. Rosenfield, *supra* note 2, § 2.18b. The LAO confronted with questions pertaining to the immigration of an adopted child will find it helpful to obtain INS Form M–249, The Immigration of Adopted and Prospective Adopted Children (1984).

[106] 8 U.S.C. § 1101(b)(1)(E) (1982), *as amended by* Pub. L. No. 99–653, § 2, 100 Stat. 3655 (1986).

[107] 8 U.S.C. § 1101(b)(1)(E) (1982).

[108] For immigration purposes, the definition of "child" in 8 U.S.C. § 1101(b)(1)(D) is amended by section 315(a) of IRCA. This change expands the definition to include an illegitimate child who establishes a bona fide relationship to his or her natural father. Previously, an illegitimate child could obtain relative preference immigration status through his or her natural mother but not the natural father. At least one jurisdiction had concluded that the former definition prevented an illegitimate child from obtaining a relative preference based on his relationship to his natural father. Beltre v. Kiley, 470 F. Supp. 87 (S.D. N.Y. 1979).

[109] 8 U.S.C. § 1409 (1982).

[110] 8 U.S.C. § 1409 (1982), *as amended by* Pub. L. No. 99–653, § 13(b), 100 Stat. 3655 (1986).

[111] Blood tests may be necessary when documents are insufficient. *See INS Gives Instructions on Implementation of Consular Efficiency Law*, 63 Int. Rels. 1186–87 (1986).

[112] *Id.*

[113] 8 U.S.C. § 1101(c)(1) (1982), *repealed by* Pub. L. No. 99–653, § 3, 100 Stat. 3655 (1986).

[114] *Compare* 8 U.S.C. § 1101(b)(1) *with id.* § 1101(c)(1) (1982).

[115] A child born abroad of an alien and a United States citizen (at the time of the child's birth) must be unmarried to acquire citizenship derivatively and automatically through the naturalization of his or her parent(s). 8 U.S.C. § 1431 (1982), *as amended by* Pub. L. No. 99–653, § 14, 100 Stat. 3655 (1986). A child born outside of the United States of alien parents also must be unmarried to acquire citizenship derivatively and automatically through the naturalization of his or her parents. 8 U.S.C. § 1432 (1982), *as amended by* Pub. L. No. 99–653, § 15, 100 Stat. 3655 (1986). Finally, the same unmarried requirement is added to children being naturalized on petition of their citizen parents. 8 U.S.C. § 1431 (1982), *as amended by* Pub. L. No. 99–653, § 16, 100 Stat. 3655 (1986).

[116] 8 U.S.C. § 1401(g) (1982), *as amended by* Pub. L. No. 99–653, § 12, 100 Stat. 3655 (1986).

[117] 8 U.S.C. § 1401(g) (1982).

[118] 8 U.S.C. § 1401(g) (1982), *as amended by* Pub. L. No. 99–653, § 12, 100 Stat. 3655 (1986).

[119] *Id.*

obtain a citizenship certificate on behalf of the adopted child.[120]

Under this new provision, the adopted child becomes a citizen when the certificate is issued if: the child is residing in the United States in the custody of the adoptive citizen-parent pursuant to a lawful admission for permanent residence; the child was adopted before age 16 and is under 18 years of age at the time of the application; and the adoptive parent and spouse, if married, are both citizens of the United States at the time of application for the certificate.

According to the INS, this provision applies only when the adopted child is in the United States.[121] Furthermore, it is an alternative and not a substitute for other existing citizenship acquisition provisions (8 U.S.C. §§ 1431(b), 1432(b), 1433(b)).[122]

The Hypotheticals

Sergeant Smith's new spouse and her child. As a United States citizen, Sergeant Smith can petition for Mrs. Smith as an immediate relative (although this petition would be filed at the consulate overseas because Sergeant Smith is currently overseas), just as he could before the recent legislation. Presuming the evidence is adequate to receive a favorable determination, Mrs. Smith undergoes the same visa processing as she would have previously.

When Mrs. Smith enters the United States, however, she feels the effect of IMFA. Now she will receive permanent resident status on a conditional basis. This is because she qualified as an immediate relative based on a marriage that has existed less than two years at the time Sergeant Smith petitioned for Mrs. Smith.[123]

As a permanent resident on a conditional basis, Mrs. Smith is subject to the terms added by IMFA. In particular, she faces deportation if her marriage ends during the two-year conditional period.

More information is required to determine the child's situation. Because Mrs. Smith is being admitted as an immediate relative and not under the family-based preference categories, the child is not eligible for admission derived through his mother.

Instead, a separate petition must be submitted for him. Assuming the child fits within one of the statutory categories of "child," Sergeant Smith could petition on behalf of the child to qualify him as an immediate relative. In the alternative, Mrs. Smith could petition for him as a second preference category relative (unmarried son of permanent resident) once she became a permanent resident. She could do so while her status is on a conditional basis.

In either circumstance, however, the child's permanent resident status is also conditional. (Of course, this presumes that the child meets all other requirements for immigration.) Once again, because the status is conditional, it can be terminated in the manner provided in the IMFA.[124]

Lieutenant Jones and fiancee. Lieutenant Jones should be advised to proceed in much the same manner as before. He can petition for his betrothed to qualify her as a nonimmigrant fiancee. He must be able to prove however, that he and she have met *personally* within two years prior to submission of the petition. Now a statutory prerequisite, this is a significant change from previous administrative regulations that only required considerable weight be given to the petitioner's failure to establish the meeting.

His fiancee, if admitted, enters the United States as a nonimmigrant fiancee. If the marriage is completed within the allowed ninety-day period, the new Mrs. Jones receives permanent resident status on a conditional basis.

Captain Baker's adopted child. The "child" qualifies as an immediate relative of a citizen if the adoption was legal, either Captain or Mrs. Baker is a citizen of the United States, and the child was under age sixteen when adopted. In addition, the adopted child must have been in the legal custody of, and resided with, the adopting parents for two years by the time that the qualifying petition is adjudicated. Before INAA, this two year period had to follow the completion of the adoption.[125]

The Bakers' adopted child can be naturalized in one of two ways. Before INAA, naturalization could occur through judicial proceedings if the adopted child was lawfully admitted to the United States as a permanent resident while under age eighteen and he was adopted before age sixteen (presuming of course, that he met the basic naturalization requirements).

INAA adds an alternative naturalization procedure specifically for adopted children in the United States at the time that naturalization is sought. The adoptive citizen-parent may apply to the Attorney General for a certificate of citizenship for the child under administrative procedures. The child shall become a citizen and be furnished with a certificate of citizenship if the Attorney General is satisfied that the parents are citizens; the child is present in the United States when the application is submitted; the child is under eighteen; the child was adopted before he reached age sixteen; and the child is residing in the custody of the adopting citizen-parent.

Major Johnson's mother-in-law. The LAO should advise Major Johnson about the legalization program and its stringent proof requirements. Presupposing his dependent mother-in-law can meet these, she can qualify. The local INS office should be contacted for the necessary forms and procedures to follow. The most important point to keep in

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[120] Pub. L. No. 99–653, § 22, 100 Stat. 3655 (1986) (to be codified at 8 U.S.C. § 1452(b)). The INS has issued an interim final rule implementing this change. 52 Fed. Reg. 13,229 (1987) (to be codified at 8 C.F.R. § 341.7) (proposed April 22, 1987).

[121] *See INS Gives Instructions on Implementation of Consular Efficiency Law*, 63 Int. Rels. 1188 (1986).

[122] *Id.*

[123] If the marriage has existed for at least two years when the petition is adjudicated, the permanent resident status will not be conditional.

[124] If Sergeant Smith is only a permanent resident and not a citizen, Mrs. Smith's immigration status would fit the second preference category (spouse of a permanent resident). Again, presuming she qualifies for immigration, she would be admitted as a permanent resident with conditional status.
In this variation, however, her child would be admitted derivatively with the same conditional status. A separate petition is not required.

[125] The immigrant visa issued in this instance would remain valid for up to three years while the adopting citizen is a member of the military. 8 U.S.C. § 1201(c) (1982).

mind here is that time may be of the essence. The legalization program will only last for a one-year period beginning not later than May 6, 1987. Major Johnson's mother-in-law must apply within that period or she will not receive the status adjustment.

Conclusion

As you have seen, the LAO routinely may receive questions of vital concern from soldiers and their family members regarding immigration, naturalization, and citizenship matters. This quick overview is only a first resort for the LAO confronting these crucial, and often complex, questions.

This article briefly highlighted the more commonly encountered provisions while focusing on recent legislation. Even though not exhaustive, it is an adequate starting point for more extensive research when the need arises.

Federal Criminal Prosecutions on Military Installations

Part I: Establishing the Fort Hood Program

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This article is based in part on the experiences of Fort Hood prosecutors trying civilian felonies in federal court. Part I deals with establishing a felony prosecution program on an installation within the United States. It describes the evolution of the Fort Hood program and is designed to provide staff judge advocates with basic insights and suggestions to assist them in considering the possibility of initiating such a program. Part II will cover several specific areas of federal practice.

Introduction

On November 19, 1986, in a memorandum addressed to the Service Secretaries,[1] The Honorable William H. Taft, IV, Deputy Secretary of Defense, issued instructions authorizing the Service Secretaries to assign or detail judge advocates to the Department of Justice (DOJ).[2] This authorization was directed specifically to cases of interest to the Department of Defense. The Honorable John O. Marsh, Jr., the Secretary of the Army, sent a memorandum to The Judge Advocate General on December 31, 1986, officially recognizing the authority of The Judge Advocate General to assign judge advocates to represent the United States in DOJ civil and criminal matters. Secretary Marsh charged Major General Hugh R. Overholt with the responsibility of continuing the tradition of judge advocates' expert and enthusiastic representation of the United States "through the assignment and detail of our judge advocates to the Department of Justice."[3] On January 7, 1987, The Judge Advocate General published Policy Letter 87-1. That letter addressed the subject of the DOJ Interface Program and committed the Judge Advocate General's Corps to "enhanced support in civil litigation and criminal prosecutions arising out of Army operations."[4] Citing the roles of judge advocates in felony prosecutions at installations such as Fort Hood, Fort Bragg, Fort Stewart, Fort Drum, and West Point, General Overholt directed installation staff judge advocates to consider the feasibility of felony prosecution programs at their installations.

The Foundation of the Program

In May 1985, a military attorney represented the United States for the first time in the United States District Court for the Western District of Texas, Waco Division. This was the culmination of the efforts of many people associated with the Army, DOJ, and the United States courts. Since that time, outstanding work done by Army attorneys at Fort Hood and elsewhere has firmly established the credibility of the judge advocate in capably prosecuting civilian felony crimes committed within the confines of U.S. Army installations.

A solid magistrate court program provides the foundation on which to build a felony program. Fort Hood's magistrate court program paved the way for the felony program by adhering to prosecution procedures fashioned after those employed by our United States Attorney's office. Fort Hood had a good magistrate court program established for

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[1] Hon. William H. Taft, IV, Deputy Secretary of Defense, Memorandum for Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, subject: Judge Advocate Representation of the United States in Civil and Criminal Cases, 19 Nov. 1986, *reprinted in* The Army Lawyer, March 1987, at 5.

[2] The authority for this memorandum was in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No 99-661, §§ 807-808, 100 Stat. 3816, 3909 (1986) (to be codified at 10 U.S.C. §§ 806(d), 973(b)(2)(B)). Section 806 is Article 6, Uniform Code of Military Justice [hereinafter UCMJ].

[3] Hon. John O. Marsh, Jr., Secretary of the Army, Memorandum for The Judge Advocate General, subject: Judge Advocate Representation of the United States in Civil and Criminal Cases, 31 Dec. 1986, *reprinted in* The Army Lawyer, March 1987, at 6.

[4] Policy Letter 87-1, Office of The Judge Advocate General, U.S. Army, subject: Department of Justice Interface Program, 7 Jan. 1987, *reprinted in* The Army Lawyer, March 1987, at 3.

several years prior to 1985.[5] Fort Hood military attorneys had worked diligently in establishing excellent relations with the United States Magistrate and the Deputy United States Marshals for the Waco Division. In addition, the Fort Hood office was fortunate to have the services of an extremely experienced and knowledgable magistrate court clerk permanently assigned to the SJA office at III Corps.[6]

Why should a magistrate's court program be considered almost a prerequisite for initiating a felony program? Experience is the key reason. A magistrate court is an excellent training ground for an attorney who is targeted to initiate a felony program. When compared to felony practice, misdemeanor prosecutions are relatively inconsequential; thus mistakes made as a result of inexperience are less costly. Magistrate court proceedings are generally conducted in a manner consistent with those of the federal district courts within a specified judicial district. In order to allow sufficient time for the magistrate court prosecutor to learn the basic rules of the trade and establish a prolific practice, we found that we needed to keep a magistrate prosecutor in place for nine to twelve months.

Building on the Foundation

Not only was the magistrate court a proving ground, but it also allowed the Office of the Staff Judge Advocate, III Corps and Fort Hood (OSJA III Corps) to establish relationships with the federal community. The former United States Magistrate at Fort Hood, The Honorable Walter S. Smith, Jr., was appointed as the United States District Judge for the Waco Division by President Reagan in the fall of 1984. His appointment preceded the establishment of our felony prosecution program by about two months. During Judge Smith's tenure as United States Magistrate, his petty offense and misdemeanor caseloads were usually the highest of any magistrate in the district. A sizeable portion of his caseload came from Fort Hood. Through numerous successful criminal prosecutions in the magistrate court, we enhanced Fort Hood's reputation with the United States Attorney's office and with personnel associated with the federal district court. Our successful prosecutions of gunnery range thieves helped us to get acquainted with our local FBI agents. An aggressive pretrial diversion practice, along with improved presentence informational support, brought increased interaction with a very supportive United States Probation Office.[7] In 1984, we prosecuted over 130 criminal cases in the magistrate court with only two acquittals.

Offering support to the United States Attorney helped to open lines of communication between our offices. The Assistant United States Attorneys (AUSA) in Austin were always available for telephonic advice. We saw a need to try to assist them more often. So, through the magistrate court prosecutor's office, we offered the services of the magistrate court prosecutor and administrative law attorneys for the purpose of testifying on jurisdictional issues raised in Fort Hood civilian trials. We also assisted the AUSAs in obtaining documentary evidence from military sources for their trials (e.g., court-martial conviction records). As time progressed, we found ourselves being consulted more often and becoming more involved in the plea negotiation process involved in Fort Hood crimes.

In September of 1984, the United States Attorney's office in Austin, which is responsible for handling the criminal and civil cases for both the Austin and Waco Divisions, had only two AUSAs assigned to it. The office was expecting an additional attorney who would assume responsibility for all of the Waco Division and also part of the Austin Division caseload. With Judge Smith soon to take the bench in Waco, the United States Attorney expected the Waco caseload to increase dramatically. Both attorneys in the Austin office were maintaining caseloads of over fifty cases. In October, Mrs. Helen Milburn Eversberg, the United States Attorney for the Western District of Texas, wrote to then-Colonel O'Roark and asked for support in the form of an attorney to prosecute the Fort Hood civilian felony caseload. They met at her office in San Antonio to discuss the proposal. Noting that both the Marine Corps and the Navy had established similar programs at Camp Lejeune and Norfolk, respectively, they agreed to proceed with a training and implementation program that would result in a judge advocate taking over the Fort Hood civilian felony caseload. The first prosecutor would stay in place for twelve months following the completion of his training period. The plan called for that attorney to be succeeded by another attorney who would have prosecuted in the magistrate court for a comparable period of time. The ultimate goal would be to keep the felony prosecutor in place for a period of roughly eighteen months.

The primary responsibility belonging to the OSJA III Corps was to dedicate one attorney full-time to the felony prosecution program. The United States Attorney would retain supervisory control over federal prosecutions, but would no longer be responsible for in-court representation. Only when the United States Attorney and the SJA agreed that a case would be better represented by the United States Attorney's Office would an AUSA try a Fort Hood case. OSJA III Corps accepted primary responsibility for providing administrative support for the new prosecution function. The United States Attorney assumed responsibility for training the prosecutor and for paying travel costs incident to the new position.

The FBI office in Waco has supported the program throughout its implementation. Agents assigned to the Waco office have provided valuable investigative assistance and instruction to our attorneys. Most of the criminal investigations conducted on military installations fall within the investigative jurisdiction of the FBI. The Army's Criminal Investigation Division (CID) conducts the initial investigation until a civilian suspect is identified. CID then coordinates with and turns the investigation over to the appropriate federal law enforcement agency. Other federal law enforcement agencies can also investigate on-post offenses, including the Immigration and Naturalization Service, the Bureau of Alcohol, Tobacco and Firearms, the

[5] Brigadier General Dulaney L. O'Roark, Jr., Judge Advocate, U.S. Army Europe and Seventh Army, was the Staff Judge Advocate, III Corps and Fort Hood, during this time period and at the outset of the civilian felony prosecution test program. Colonel Thomas M. Crean succeeded General O'Roark in June, 1985.

[6] A United States Magistrate's clerk is not employed by the Department of the Army, but is an individual in the employ of the United States Magistrate.

[7] The pretrial diversion program, a cooperative program administered by the United States Attorney's Office and the United States Probation Office, is a program that essentially offers probation without adjudication to minor offenders.

Drug Enforcement Administration, the Secret Service, the Postal Investigative Service, and the Internal Revenue Service.

Initially, the travel and finance issue was a major concern. Colonel O'Roark wanted to make certain that the felony prosecutor would be paid in a timely manner and would not lose money because of travel inherent in the new duty position. Travel proved to be extensive; Fort Hood is seventy miles from the supporting branch United States Attorney's office in Austin and sixty-five miles from the district court in Waco. There was a need to find an efficient method of having DOJ reimburse the Army prosecutor for travel expenses incurred in duty-related travel. The comptroller's office at Fort Hood and the United States Attorney's office came up with two alternatives. The options were direct reimbursement from DOJ and a reimbursable order system. The latter would have required submission of periodic estimates of temporary duty costs to DOJ. The administrative burden on our administrative section and finance personnel resulting from employing this option appeared to be prohibitive. Thus, we elected to use the direct reimbursement method. The processing burden was assumed by the prosecutor and the administrative personnel in the United States Attorney's office. The prosecutor is issued a DOJ government credit card, actually a Citicorp Diners Club card similar to that now in use in the Army. All travel expenses are to be charged on that card. Immediately after returning from temporary duty, the prosecutor prepares the requisite travel vouchers and mails them to the United States Attorney's office in San Antonio. The processing period takes about two weeks. A check is mailed to the prosecutor and then that money is used to pay a monthly bill sent to the attorney. The bill must be paid in full.

Many installations will not have the travel difficulties that Fort Hood has because of travel distances. The Navy Special Assistant United States Attorney stationed in Norfolk, Virginia, actually has an office in the main United States Attorney's office. There is a federal court in Norfolk. The Marine prosecutors at Camp Lejeune are paid through Marine Corps travel funds. The United States Attorney does not pay for their travel. Staff judge advocates need to be particularly sensitive to any concerns that their prosecutors have on reimbursement arrangements. If a prosecutor ends up using his or her own automobile, wear and tear may be another issue to consider (DOJ reimbursed me at the rate of 20.5 cents a mile). The job also has other out-of-pocket expenses that are not reimbursable. Appropriate civilian clothing, gratuitous minor emergency assistance to witnesses (*e.g.*, last-minute taxi transportation to court), and local business lunches are examples of these expenses. At Fort Hood, extensive use of government sedans has helped to keep travel expenses at a minimum.

Resources and Support Staff

Thus far, one might expect that the greatest hurdle to overcome in establishing a program is the money factor. That was not the case at Fort Hood. Administrative and clerical support, a responsibility that OSJA III Corps assumed, proved to be more trying. Fort Hood had no clerk-typists or legal technicians[8] who could be fully committed in support of the program. In a time when personnel dollars and positions were being reduced, creating a new position was considered but never actually accomplished. In 1985, we had two civilian legal clerks assigned to the magistrate court section. The magistrate court section and the felony prosecutor were assigned to the Administrative and Civil Law Branch of OSJA III Corps. The primary duty of the legal clerks was to provide general assistance to the public on matters involving traffic citations and minor offenses in the magistrate court. Their job description never included duties related to the felony prosecution program. On occasion, they performed additional duties in support of the program, mainly victim-witness assistance[9] and criminal process matters. Since my departure in June of 1986, both civilian positions have been eliminated and replaced by military enlisted legal specialists (71D) who were untrained in civilian legal matters.

An attorney implementing a felony prosecution program must have sufficient stenographical support. OSJA, III Corps has an outstanding word processing center that contributed significantly to the success of the program. This section prepared all of our indictments, motions, court orders, trial briefs, plea agreements, and victim-witness correspondence. The word processing center supervisor developed a federal practice manual that saved countless hours of work in areas where we were able to use standardized documents and forms. Outside of the word processing support, Fort Hood prosecutors have been on their own administratively, performing both prosecutor duties and the duties normally performed by legal technicians who support Assistant United States Attorneys.[10]

Legal technicians working in United States Attorneys' offices perform a variety of functions. They assist one or more AUSAs by providing them with direct legal clerical services. They review material that comes into the office to determine whether legal papers such as motions, orders, affidavits, pleadings, or subpeonas need to be prepared in response to the material received. They retrieve needed information from office files and prepare the appropriate legal papers in conformance with or as adaptations of approved forms (each United States Attorney's office usually keeps a file of pleadings and responses to pleadings on hand). Usually, the attorneys draft the pleadings and the legal technicians proof the drafts, type or print them, and verify citations and references. The legal technicians also compose letters used in the transmittal of legal matters and documents. They assemble and maintain current working files on cases. They assemble exhibits, affidavits, legal documents, and files for use by AUSAs in preparation for trial. Legal technicians handle all travel arrangements and documentation for AUSAs. They perform stenographical work as necessary.

At Fort Hood, the felony prosecutor does most of these tasks himself. This generates an average of ten to fifteen hours of work per week. On a week prior to going to trial

[8] Legal technicians are the DOJ counterparts to Army 71D legal specialists. There are some differences in the job/duty descriptions.

[9] 18 U.S.C. § 1512 (1982); 42 U.S.C. § 10603 (1982).

[10] Copies of the DOJ job description for legal technicians may be obtained from local United States Attorney's offices.

or grand jury, it is not unusual to spend twenty hours on legal technician tasks. The extra time is spent preparing items such as witness travel forms, personal travel forms, subpeonas, expert witness authorization requests, expert witness travel forms, victim-witness assistance requirements, and indictment packets. Doing this work takes away valuable trial preparation time, particularly when one is just learning how to try federal criminal cases. Fortunately, the legal technicians in the Austin office were able to provide some support in the victim-witness assistance and expert witness coordination areas. If an office has limited word processing assets and cannot commit substantial stenographical support to a felony prosecutor, it should attempt to negotiate for such support from the United States Attorney's office.

Telephone and Library Assets

All of the United States Attorneys' offices, DOJ divisions, and federal law enforcement offices are on the Federal Telecommunications System (FTS). The same is true for the United States courts. AUTOVON has only limited utility. If FTS is not available, a WATS line or commercial long distance will have to be used.

In order to have a successful program, you must have an adequate library (or access to one). There are certain publications that prosecutors must have at their disposal. Most important are annotated versions of certain titles of the United States Code.[11] The West key system in the United States Code Annotated is coordinated with key entries in West's Federal Practice Digest, which I used extensively. To complement the federal criminal code, you must have a copy of the state penal code applicable to your installation.[12] A United States Supreme Court Reporter is a must, as is the Federal Reporter. Fort Hood's law library did not have a full series of the Federal Reporter, which sometimes caused major research problems. The Federal Supplement series should be reasonably available. Fort Hood did not have the Federal Supplement in its post law library, but it was available at a nearby college. Check local law libraries to see the extent of their available resources. Your office could save a considerable amount of money if adequate public law libraries are accessible.

An updated Shepard's United States and Federal Citations series is also necessary. A copy of the paperback edition of the *Federal Rules of Criminal Procedure,* a book updated annually by West Publishing Company, is extremely useful.[13] That book was with me whenever I was in district court or grand jury. By the end of a month of use, it was dogeared and full of notations. This book contains not only the rules of procedure, but also the criminal statutes codified in Title 18 plus the drug offenses enumerated in Title 21. Another excellent source is *Federal Criminal Trials.*[14] That book provides the prosecutor with quick reference information and case citations applicable to every stage of the prosecution process. Do not overlook obtaining a copy of your district's local rules. They are usually available from your district court clerk's office.[15] These resources provide basic reference materials to support a felony practice.

The next group of resources are strongly recommended and should be acquired. First is the grand jury practice manual, published by the Criminal Division of the Department of Justice.[16] A new prosecutor should read through both volumes. The set details many practical aspects of grand jury work, including how to handle investigation targets and suspects when they appear before the grand jury. Although grand jury presentations generally go smoothly, there are some complexities inherent in the procedure that can be overlooked. Mistakes result in the embarrassment of quashed indictments. That did not happen at Fort Hood, but such occurrences are not unusual. Another important source is the trial advocacy notebook prepared by the Attorney General's Advocacy Institute for use in its trial advocacy program. It is an excellent reference for trial practice and provides checklists that we used for trial preparation. It contains a section on each stage of the trial process, from grand jury through sentencing. This book, which comes in looseleaf binder form, can be obtained through the Attorney General's Advocacy Institute or from an attorney who has attended the course.

You should also obtain copies of your United States Attorney's guidelines and policies for plea agreements and prosecution declinations. Because most United States Attorneys retain the final decision authority on cases that judge advocates are prosecuting, it is good to know the case assessment standards employed by other prosecutors in the district. Violations of these standards can result in sanctions by the United States Attorney against the prosecutor, including withdrawal of authorization to practice in federal court. Also obtain a copy of the pattern jury instructions for your circuit.[17] Another source of jury instructions is *Federal Jury Practice and Instructions.*[18] Other publications used at Fort Hood include the *Federal Rules of Evidence*

[11] If an office does not have a complete annotated version of the United States Code, it should have the following titles at a minimum: all constitutional volumes; title 5—Government Organization and Employees (this is necessary to cite authority on agency employee witness fees); title 10—Armed Forces; title 16—Conservation; title 18—Criminal Code and Rules of Criminal Procedure; title 21—Food and Drugs; title 26— Internal Revenue Code (includes criminal statutes under the investigative jurisdiction of the IRS and the Bureau of Alcohol, Tobacco and Firearms); title 28—Judiciary and Judicial Procedure, Federal Rules of Civil Procedure and Evidence; title 42—Public Health and Welfare; and title 50—War and National Defense.

[12] For crimes occurring on federal enclaves, prosecutors often employ the Assimilative Crimes Act, 18 U.S.C. § 13 (1982), in prosecuting state crimes not included in the federal criminal code.

[13] Federal Criminal Code and Rules (rev. ed. 1985).

[14] J. Cissell, Federal Criminal Trials (1983).

[15] An early visit to your district court clerk's office is also important. Get to know the deputy clerks in the clerk's office and, even more importantly, get to know your district judge's courtroom deputy clerk. The courtroom deputy clerk normally controls the judge's docket and, consequently, directly influences a prosecutor's schedule. The clerk's office will file all of your processes and pleadings; a visit will help in understanding local practices in filing documents and pleadings.

[16] United States Department of Justice, Criminal Division, Manual for Federal Grand Jury Practice, vols. I and II (Mar. 1983).

[17] An example is the Federal Judicial Center, Pattern Jury Instructions (1982). Each circuit produces its own pattern instructions that are usually published by West Publishing Co. Some of the instructions tend to be defense-oriented. Research may produce more favorable instructions for government use.

[18] E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (3d ed. 1978 & Supp. 1985).

Manual,[19] title 9 of the United States Attorney's Manual (case citations and discussions of various federal crimes), and a current series of the Code of Federal Regulations. Offices equipped with Westlaw or LEXIS will not need a number of the sources previously discussed if their prosecutors are properly trained and have access to terminals.

Training

My training began with a two day trip to the Western District of Texas United States Attorney's office in San Antonio. This took place about two months after the initial meeting between Colonel O'Roark and Mrs. Eversberg. In the interim, we explored and resolved money issues (travel and finance). The First Assistant United States Attorney briefed me on office functions and explained the relationships between AUSAs in the branch offices and the main office staff. Of particular usefulness were introductions to and briefings by the administrative officer and the chief legal technician. The administrative officer supervises the office travel section that processes AUSA travel claims. The chief legal technician, in addition to her regular duties, coordinated the victim-witness assistance program. During this visit, I also read numerous policy letters and memoranda concerning operating procedures of the United States Attorney's office. The First Assistant United States Attorney also gave me a detailed explanation of the plea negotiating and case declination policies established by the United States Attorney. I noted a significant difference between federal and UCMJ practice; there are very few "sentencing caps" used in plea agreements in the Western District of Texas and virtually no conditional guilty pleas. Both required special authorization from either the United States Attorney or DOJ.[20] Plea negotiations were generally limited to dismissing counts of indictments in exchange for guilty pleas. Thus, preparation for grand jury and proper indictment drafting gained paramount importance in our program.

Pursuant to the agreement with the United States Attorney, I attended the criminal trial advocacy course at the Attorney General's Advocacy Institute in Washington, D.C. The course was conducted at the Department of Justice building, and was paid for by DOJ. This proved to be the most valuable training that I received. The course is a comprehensive trial workshop program that covers every major stage of a trial from opening statement to closing argument. Each day's classes required extensive preparation. Every attending attorney was required to give at least one oral presentation in each daily workshop. Like the trial advocacy course at The Judge Advocate General's School, U.S. Army, attendees were required to have some trial experience prior to attending the course. Instructors were experienced Assistant United States Attorneys selected from offices across the country. The first week of the course consisted of workshops and lectures; the second week was dedicated to two mock trials. The second trial is presented to a United States district judge and a jury consisting of Washington area high school students. A third week focuses on grand jury practice.

Outside of the trial advocacy course, most of my training was on-the-job. From a practical standpoint, the training portion of the program ended about a month after I attended the trial advocacy course. Two short trips to the Austin office and courthouse enabled me to observe juvenile delinquency proceedings, an adult probation revocation hearing, arraignment proceedings, and a grand jury session. Observing a grand jury session is essential before prosecutors present their first cases to a grand jury. The new prosecutor should pay close attention to the presentation of a case by an experienced AUSA. Specifically, the form of questioning witnesses and the interaction between the prosecutor and the members of the grand jury should be noted.

The original plan for my introduction to trial work was to have me sit "second chair" for one trial prior to being lead counsel and prosecuting on my own. This part of my training was omitted. Indeed, other than my mock trial at the trial advocacy course, I never saw a federal trial prior to trying my first case. I was fortunate in that my first trial turned out to be successful, but the experience could have been considerably more comfortable had I been able to observe a criminal trial prior to trying my first case. When observing a case, a new prosecutor should carefully observe the demeanor of the attorneys, where the attorneys stand when addressing the court and jury, and procedures that may be peculiar to the particular court or district.[21] Misdemeanor jury trials in magistrate court provide excellent opportunities to gain valuable experience.

Implementation

On April 18, 1985, I presented two Fort Hood cases to the grand Jury for the Waco Division. This was the same grand jury that I presented cases to for the next fourteen months. First impressions in front of a grand jury are critical; grand juries may stay in session for as long as eighteen months. Both cases were indicted and subsequently both defendants pled guilty. One case involved a woman who was first apprehended for shoplifting and then offered a bribe to a military police investigator. The other case was a drunk driving vehicular homicide. These two cases seemed to set a pattern for cases our prosecutions that first year: most of the defendants pled guilty. In the month that followed, I handled two sentencing hearings and two guilty plea hearings (rearraignments).

The first Fort Hood case contested at trial involved the armed robbery of a small Army & Air Force Exchange Service convenience store. The defendant was the son of a noncommissioned officer who lived in the same housing area in

[19] S. Saltzburg & K. Redden, Federal Rules of Evidence Manual (4th ed. 1986).

[20] The Fifth Circuit has disapproved of pleas of guilty or nolo contendre conditioned on the right to appeal on non-jurisdictional grounds. *See* United States v. Swann, 574 F.2d 1316 (5th Cir. 1978); United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973). Other circuits allow this practice.

[21] A good source for information on specific practices and procedures for a judicial district is the local rules booklet for your district. Certain districts do things differently than others. For example, an AUSA from the District of Connecticut who I met at the trial advocacy course informed me that judges in that district did not allow opening statements in their trials!

which the convenience store was located. The same defendant had been charged in a misdemeanor assault case two years earlier.[22]

The case was a three-day trial.[23] The AUSA whose jurisdiction included the remainder of the Waco Division sat with me at the government's table and gave me advice during the course of the trial. The defendant was convicted and sentenced to twenty years in prison. To date, Fort Hood prosecutors have convicted four different armed robbers who have committed a total of five armed robberies. All but one received sentences of fifteen years or more.

Federal Criminal Offenses

Besides armed robbery cases, Fort Hood prosecutors have tried cases involving the following offenses: misappropriation of postal funds,[24] theft of personal property,[25] theft of government property,[26] rape,[27] possession and receipt of firearms by a convicted felon,[28] misapplication of bank funds by a bank officer,[29] bank larceny,[30] mail fraud,[31] fraudulent claim against the United States,[32] fraudulent statement against the United States,[33] use of a firearm in the commission of a crime of violence (usually involving armed robberies or assaults),[34] conversion of government funds,[35] murder,[36] manslaughter,[37] knowingly inflicting injury upon a child under the age of fourteen,[38] various assaults including the mailing of a pipe bomb to a soldier,[39] false entries made in federal credit union reports,[40] and drug offenses.[41]

A number of other criminal offenses have a significant potential for occurring on military installations. The aiding and abetting statute, 18 U.S.C. § 2, and the general conspiracy statute, 18 U.S.C. § 371, are two sections that will be used often. Both of these statutes are used in conjunction with a basic criminal offense. If a conspiracy is alleged in an indictment, the offense against the United States that would have been the objective of the conspiracy must also be alleged. At Fort Hood, the armed robbery case discussed above was an aiding and abetting case; the defendant was convicted on a theory that he was the watchdog outside the convenience store and thus aided and abetted in the commission of the robbery. Another criminal statute used at Fort Hood is the attempted murder statute.[42] In the case where we tried a defendant for mailing a bomb to a Fort Hood soldier, we initially charged the defendant on a criminal complaint with attempted murder. The defendant was then arrested on that complaint. The attempted murder charge carried a maximum penalty of only three years' imprisonment. Accordingly, we conducted further research to come up with better charging statutes for using in the indictment. He was subsequently indicted for mailing an injurious item, assault with intent to commit murder, and use of a firearm in the commission of a crime of violence.[43] Here is another good teaching point on federal criminal practice: do not end your research when you find an obvious charging statute. Probe for more applicable offenses with greater punishment potential. Because you deal mainly in counts when negotiating plea agreements, more counts with greater potential penalties will give greater leverage in plea negotiations. But be sure to avoid charging multiplicious counts.

Other offenses that may be encountered include use of the mails to transport firearms,[44] mailing obscene matter,[45] wire fraud,[46] destruction of national defense materials or

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[22] During the first year of the program, three defendants were prosecuted in district court who had been previously charged with misdemeanors in magistrate court. A valuable lesson can be learned here: do not ignore files from previous years. Such records can provide evidence and help lead to good witnesses.

[23] The first two years of the Fort Hood program indicates that you will seldom get through a federal contested trial in much less than three days.

[24] 18 U.S.C. § 1711 (1982).

[25] 18 U.S.C. § 661 (1982 & Supp. III 1985).

[26] 18 U.S.C. § 641 (1982 & Supp. III 1985).

[27] 18 U.S.C. § 2031 (1982).

[28] 18 U.S.C. app. § 1202 (1982 & Supp. III 1985); 18 U.S.C. § 3665 (Supp. III 1985).

[29] 18 U.S.C. § 656 (1982). Note that 18 U.S.C. § 657 (1982) is basically the same offense applying to federal credit union employees.

[30] 18 U.S.C. § 2113 (1982 & Supp. III 1985).

[31] 18 U.S.C. §§ 1341, 1342 (1982).

[32] 18 U.S.C. § 287 (1982 & Supp. III 1985); 18 U.S.C. § 1003 (1982).

[33] 18 U.S.C. § 1001 (1982 & Supp. III 1985).

[34] 18 U.S.C. § 924(c) (Supp. III 1985); 18 U.S.C. § 16 (Supp. III 1985) (this section defines the term "crime of violence").

[35] 18 U.S.C. § 641 (1982 & Supp. III 1985).

[36] 18 U.S.C. § 1111 (Supp. III 1985).

[37] 18 U.S.C. § 1112 (1982).

[38] 18 U.S.C. § 13 (1982); Texas Penal Code Ann. § 22.04(a)(1) and (2) (Vernon 1985).

[39] 18 U.S.C. § 113(a) (1982); 18 U.S.C. § 1716(h) (1982).

[40] 18 U.S.C. § 1006 (1982).

[41] 21 U.S.C. §§ 841–849 (1982 & Supp. III 1985).

[42] 18 U.S.C. § 1113 (1982).

[43] 18 U.S.C. § 1716(h) (1982); 18 U.S.C. § 113(a) (1982); 18 U.S.C. §924(c) (1982 & Supp. III 1985). The total maximum punishment for these sections is 45 years' imprisonment.

[44] 18 U.S.C. § 1715 (1982) (this statute generally applies to the unauthorized mailing of weapons concealable on a person).

[45] 18 U.S.C. §§ 1461, 1463 (1982 & Supp. III 1985).

[46] 18 U.S.C. § 1343 (1982 & Supp. III 1985) (this statute can be used in fraudulent credit card transactions completed over the telephone).

premises,[47] destruction of or damage to aircraft and automobiles used in interstate commerce,[48] gambling,[49] extortion (racketeering),[50] and obstruction of mails and theft of mail matter.[51] This list is not intended to be an all-inclusive list of everything that a felony prosecutor will encounter, but the offenses mentioned are more common than others.

Conclusion

The ultimate question for the staff judge advocate is whether the installation really needs a felony prosecution program. Not every installation needs one, and not every staff judge advocate has sufficient personnel assets to operate a program. A key factor in deciding whether to establish a program is whether you can afford to take an attorney away from another job.

There are other factors to consider. Look at the support that you are currently receiving from your United States Attorney's office. Are you and your installation commander satisfied with the number of civilian felonies being tried? Coordinate with your supporting law enforcement agencies and determine what percentage of solved felonies are being prosecuted. Find out what types of crimes are not being prosecuted. Discover the reasons why the United States Attorney is declining prosecution on those cases. If your law enforcement activities and commanders are satisfied with the way the United States Attorney's office is fighting crime on the installation, you may not need a program.

If you determine that a need for a felony prosecution program exists, talk to the United States Attorney and offer your assistance. Make certain that you can back up your offer with a good judge advocate who can be totally committed to the program. Another alternative is to offer the services of an attorney on a part-time basis. This might be an alternative if you have a magistrate court prosecutor who does not have a heavy caseload, and if you can afford to commit that officer to a full-time position handling both misdemeanors and felonies. This would be difficult to do on major installations with large misdemeanor and traffic court practices. Another possibility would be to offer the services of a judge advocate to assist in trials involving crimes committed on the military installation. This assistance could range from simple administrative support like obtaining court-martial documents and Department of the Army soldier and civilian witnesses to "second chair" functions at trial. Just make certain that, if you use your magistrate court prosecutor for this type of assistance, you do not decrease the effectiveness of your existing misdemeanor prosecution program.

The civilian court initiatives have much to offer to the installation commander and the staff judge advocate. A major part of the installation commander's responsibility is the welfare and safety of those people living on the installation that he or she commands. The felony program at Fort Hood has given the installation commander more influence in fighting *all* of the crime that occurs on the installation. It gives him more control over civilian offenders. It provides judge advocates with an opportunity to work more closely with their civilian counterparts in the prosecution field. Felony prosecution programs have opened up lines of communication with the Justice Department that, until recently, did not exist. The potential for developing programs and resources nationwide is limited only by the degree of initiative that commanders. Staff judge advocates, and United States Attorneys are willing to take. Existing programs are proven successes. Judge advocates have proven their abilities in federal court and will continue to do so when given the opportunity.

[47] 18 U.S.C. § 2155 (1982).

[48] 18 U.S.C. § 32 (1982 & Supp. III 1985); 18 U.S.C. § 33 (1982).

[49] 18 U.S.C. § 1955 (1982).

[50] 18 U.S.C. § 1951 (1982).

[51] 18 U.S.C. §§ 1701, 1702, 1708, 1709 (1982); 18 U.S.C. § 32 (1982 & Supp. III 1985).

A Legal Guide to Magistrate's Court

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Introduction

On most military installations, United States magistrates try civilian and military offenders for misdemeanors and petty offenses committed on post. The Army favors the use of magistrates for this purpose[1] and magistrates handle a

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[1] *See* Dep't of Army, Reg. No. 190–29, Military Police—Misdemeanors and Uniform Violation Notices Referred to US Magistrate or District Courts (1 Apr. 1984) [hereinafter AR 190–29]; *see also* Dep't of Army, Reg. No. 27–40 Legal Services—Litigation, para. 6–5*b* (4 Dec. 1985) [hereinafter AR 27–40]. ("If no U.S. Magistrate has been designated to try misdemeanors committed on an installation, the installation commander *will* request the U.S. Attorney to petition the U.S. District Court to designate a magistrate for that purpose.") (emphasis added); Training and Doctrine Command Message 041400Z Sept. 1981, subject: Article 15 Jurisdiction of Traffic Offenses (The U.S. Army Training and Doctrine Command (TRADOC) expects installation commanders to use the magistrate system to dispose of traffic offenses by soldiers); Forces Command (FORSCOM) Letter, subject: Support of Federal Magistrate System by Installation Commanders, 23 Jan. 1978 ("[I]t is the policy of the Commander, FORSCOM, that the procedures of the Federal Magistrate System be invoked wherever feasible.").

high volume of cases for the military.[2] The magistrate's court system provides a convenient and uniform method of enforcing misdemeanor laws on Army installations.[3] This article discusses the personnel, law, and procedures involved in operating the magistrate's court at the installation, along with some of the current problems in the area.

The United States Magistrate

Historical Overview

The "magistrate system" in the United States originated in 1793, when the Congress authorized the federal courts to allow designated "discreet persons learned in the law" to take bail in criminal cases.[4] In 1812, these "discreet persons" were given the power to take bail and affidavits in civil cases[5] and by 1817 they had been named "commissioners."[6] Congress established a fee schedule for their services and gave them four-year terms of office and the title "United States commissioner" in 1896.[7]

The modern development of the system began in 1940, when United States commissioners were empowered to try petty offenses committed on federal reservations.[8] The Federal Magistrates Act of 1968[9] abolished the office of United States commissioner and directed the appointment, by the district courts, of "United States magistrates" (magistrates), with significantly expanded duties.[10] The latest major change to the magistrate system came with the Federal Magistrate Act of 1979, which expanded the civil and criminal jurisdiction of magistrates and upgraded the process and standards used in selecting them.[11]

Appointment of Magistrates

Magistrates are appointed by the judges of the United States district court of the district in which they will serve.[12] Full-time magistrates are appointed to eight-year terms and part-time magistrates to four-year terms.[13] To qualify, they must be a member in good standing of the bar of the highest court in the state in which they will serve.[14] The district court is assisted in the nomination process by a merit selection panel composed of local citizens who recommend "persons who are best qualified to fill such positions."[15]

Jurisdiction of the Magistrate

When specifically designated by the district court to exercise criminal jurisdiction, magistrates may try all misdemeanors[16] committed within their district.[17] Defendants must consent to the magistrate's exercise of this jurisdiction and may instead elect trial in district court.[18] Further, special rules restrict the trial of juveniles by federal courts in general and by magistrates in particular.[19] In addition to their misdemeanor jurisdiction, magistrates handle a broad range of civil matters and may conduct specified

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[2] In 1982, over 70,000 petty offenses committed on military installations were prosecuted in front of United States magistrates by military attorneys acting as Special Assistant United States Attorneys. S. Rep. No. 174, 98th Cong., 1st Sess. 232, *reprinted in* 1983 U.S. Code Cong. & Admin. News 1081, 1122.

[3] AR 190–29, para. 6. In addition to the stated objectives, the system relieves commanders from the burden of enforcing minor traffic offenses by soldiers, and provides an alternative to punishing soldiers under the Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1982) [hereinafter UCMJ].

[4] Act of March 2, 1793, ch. 22,§ 4, 1 Stat. 334. *See generally* Lindquist, *The Origin and Development of the United States Commissioner System,* 14 Am. J. Legal Hist. 1 (1970).

[5] Act of 20 February, 1812, ch. 25, 2 Stat. 679.

[6] Act of 1 March, 1817, ch. 30, 3 Stat. 350.

[7] Act of 28 May, 1896, ch. 252, §§ 19–21, 29 Stat. 184. The fee for issuing a warrant of arrest was seventy-five cents.

[8] Act of October 9, 1940, Pub. L. No. 76–817, 54 Stat. 1058 (1940). The impetus for this change developed in the early 1930s when violations of the prohibition laws flooded the federal courts with petty prosecutions. Lindquist, *supra* note 4, at 15.

[9] Pub. L. No. 90–578, 82 Stat. 1107 (1968).

[10] *Id.* § 101 (amending 28 U.S.C. §§ 631–639 (1964)).

[11] Pub. L. No. 96–82, 93 Stat. 643 (1979). 28 U.S.C. § 636 was amended to allow magistrates, with the consent of the parties, to try any civil matter. 18 U.S.C. § 3401(a) was amended to allow magistrates to try all misdemeanors, not just petty offenses.

[12] 28 U.S.C. § 631(a) (1982).

[13] *Id.* § 631(e). Magistrates may be removed only for incompetency, misconduct, neglect of duty, or a physical or mental incapacity. *Id.* § 631(i).

[14] *Id.* § 631(b)(1). Magistrates must also have been a member in good standing of a state bar for at least five years. Where a district court finds no otherwise qualified individual who is a member of the bar available, it may waive the bar membership requirement when appointing a part-time magistrate.

[15] *Id.* § 631(b)(5).

[16] 8 U.S.C. § 1 (1982 & Supp. III 1985) classifies offenses as follows: "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony. (2) Any other offense is a misdemeanor. (3) Any misdemeanor, the penalty for which . . . does not exceed imprisonment for a period of six months . . . is a petty offense." 18 U.S.C. § 1 is currently scheduled to be repealed on November 1, 1987. Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, §§ 218(a)(1), 235, 98 Stat. 1837, 2027, 2031, *as amended by* the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99–217, § 4, 99 Stat. 1728, 1728. It will be replaced by a scheme of graded offenses contained in proposed 18 U.S.C. § 3559 and summarized in pertinent part as follows, based on the maximum term of imprisonment authorized:

(1) one year or less but more than six months—Class A misdemeanor.
(2) six months or less but more than thirty days—Class B misdemeanor.
(3) thirty days or less but more than five days—Class C misdemeanor.
(4) five days or less—infraction.

In a report to Congress on April 13, 1987, the newly-formed United States Sentencing Commission recommended that "Congress enact legislation staying the implementation of the . . . new Sentencing Reform provisions of the Title 18, U.S. Code, for an additional nine-month period until August 1, 1988." Sentencing Guidelines and Policy Statements for the Federal Courts, 41 Crim. L. Rep. (BNA) 3087, 3088 (May 6, 1987).

[17] 18 U.S.C. § 3401(a) (1982). As the new misdemeanor grading scheme, discussed *supra* note 16, parallels the imprisonment authorized for misdemeanors and petty offenses under current law (18 U.S.C. § 1), it should not significantly alter practice in magistrate's court.

[18] *Id.* § 3401(b).

[19] *See infra* note 71 and accompanying text.

pretrial hearings in criminal cases or serve as a special master.[20]

The Magistrate Court Prosecutor

Army attorneys prosecute the majority of cases tried in magistrate's courts serving Army installations.[21] The United States Attorney (U.S. Attorney) for their district appoints them as Special Assistant United States Attorneys (SAUSA) and supervises them; but SAUSA may only perform duties specifically authorized by regulation and do not become a personnel asset of the U.S. Attorney's office.[22] The appointment as a SAUSA has no effect on an Army attorney's status as a commissioned officer, and does not violate the Posse Comitatus Act.[23]

The staffing of the office that supports the magistrate's court varies between locations. Magistrates usually have their own clerical and secretarial assistants,[24] but most posts commit additional personnel resources and establish an office to administer the magistrate's court system on the installation.[25] Although some magistrates hold court off post, the staff judge advocate typically provides a courtroom for the magistrate on the days that court is held; normally once a week.[26]

The Applicable Law

What law does the magistrate enforce? Generally, the crimes tried in magistrate court are either misdemeanors under federal statutes or are violations of state law made punishable on the installation through the operation of the Assimilative Crimes Act.[27]

The Assimilative Crimes Act

Violations of the Assimilative Crimes Act (ACA) account for the majority of the offenses tried by the magistrate.[28] Under the ACA, crimes committed on a place within the special territorial jurisdiction of the United States that are punishable in the state in which that place is located are considered federal offenses.[29] All federal lands under exclusive or concurrent legislative jurisdiction are areas of special territorial jurisdiction,[30] making the ACA

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[20] 28 U.S.C. § 636 (1982 & Supp. III 1985). Civil matters, which often constitute the bulk of a magistrate's work, are beyond the scope of this article. All further references to magistrates, magistrate's court, and the magistrate system in this article refer to the persons and the system operating to enforce misdemeanor laws on military installations.

[21] Military attorneys prosecute these misdemeanors due to the heavy workload of the U.S. Attorneys and the low priority they can give such cases. S. Rep. No. 174, 98th Cong., 1st Sess. 233, *reprinted in* 1983 U.S. Code Cong. & Admin. News 1081, 1123. When the Department of Justice (DOJ) does not provide an attorney, staff judge advocates are to designate military attorneys (Judge Advocate General's Corp officers when available) to prosecute before the magistrate. AR 27–40, para. 6–6. The use of a non-attorney sergeant by the Air Force to prosecute a case in magistrate's court has been held to be merely a defect in practice and not grounds for relief. United States v. Glover, 381 F. Supp. 1139 (D. Md. 1974). This practice is not recommended, however, and installations should consider the appointment of an alternate SAUSA to prosecute in the absence of the regular magistrate court prosecutor.

[22] AR 27–40, para. 6–6.

[23] 18 U.S.C. § 1385 (1982). A 1983 DOJ opinion expressed the view that the appointment of a regular commissioned officer as a SAUSA violated the "dual office" prohibition of 10 U.S.C. § 973(b) (1982). Congress responded by amending § 973(b) to specifically authorize the practice. S. Rep. No. 174, 98th Cong., 1st Sess. 233, *reprinted in* 1983 U.S. Code Cong. & Admin. News 1081, 1123. The 1986 amendment of UCMJ art. 6, which expressly permits judge advocates to represent the United States in civil and criminal litigation, when detailed under 10 U.S.C. § 973(b)(2)(B), obviates any claim that such representation violates the Posse Comitatus Act. UCMJ art. 6(d)(1).

[24] 28 U.S.C. § 635 (1982) authorizes payment of expenses incurred by magistrates, including compensation of legal assistants.

[25] Fort Carson, Colorado uses a noncommissioned officer-in-charge (NCOIC), an administrative clerk, and a military police traffic accident investigator. Standard Operating Procedure for U.S. Magistrate Court, Office of the Staff Judge Advocate, Fort Carson, Colorado, para. 2 (u.d.) [hereinafter Ft. Carson Mag. Ct. SOP]. In addition to an NCOIC, Fort Hood, Texas uses two military legal clerks to assist the civilian court clerks provided by the magistrate. United States Magistrate Court Division, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas, Standard Operating Procedure, para. 2c (u.d.) [hereinafter Ft. Hood Mag. Ct. SOP].

[26] In April 1987, the author conducted an informal telephone survey of the magistrate court programs at Ft. Benning, GA, Ft. Campbell, KY, Ft. Hood, TX, and Ft. Lewis, WA. [hereinafter survey]. At Ft. Benning, civilian offenders are tried in a grand jury room at the federal courthouse in Columbus, GA, and military offenders are tried on post in the courtroom. Ft. Campbell, Ft. Hood, and Ft. Lewis hold magistrate court for all offenders in a courtroom on the installation.

[27] 18 U.S.C. § 13 (1982).

[28] The ACA assimilates state criminal laws onto federal reservations; of these, traffic offenses make up most of the magistrate's case load. *See generally* Dep't of Army, Pamphlet No. 27–21, Legal Services—Military Administrative Law, para. 2–19c (1 Oct. 1985) [hereinafter DA Pam 27–21]. Noncriminal traffic codes are not assimilated but are enforced using authority delegated from the Administrator, General Services Administration. Dep't of Defense Directive No. 5525.4, Enforcement of State Traffic Laws on DOD Installations, para. c (Nov. 2, 1981) (codified at 32 C.F.R. § 634.4(c)(4) (1986)). Dep't of Army, Reg. No. 190–5, Military Police—Motor Vehicle Traffic Supervision, para. 4–3*d* (1 Aug. 1973) (I02, 1 Mar. 1982) [hereinafter AR 190–5], which implements this directive, expired on March 1, 1983. Dep't of Defense Directive No. 5525.4 remains in effect, however, and will be included in the new version of AR 190–5, scheduled to be published in the summer of 1987. Telephone interview with Major Stephen Curry, U.S. Army Military Police Operating Agency, Falls Church, VA. The penalty for violation of noncriminal traffic codes enforced in this manner is a fine of $50 or imprisonment for no more than thirty days, or both. 40 U.S.C. § 318c (1982).

[29]

> Whoever, within or upon [those places within the special territorial jurisdiction of the United States], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated . . . shall be guilty of a like offense and subject to a like punishment."

18 U.S.C. § 13 (1982).

[30] The special territorial jurisdiction of the United States includes:

> Any lands reserved or acquired for the use of the United States, and under the *exclusive or concurrent jurisdiction* thereof, or any place purchased or otherwise acquired by the United States by the consent of the legislature of the State in which the same shall be, for the creation of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7 (1982) (emphasis added). *See generally* DA Pam 27–21, para. 2–5. (The terms "exclusive" and "concurrent" jurisdiction refer to legislative jurisdiction; the authority to legislate within a geographically defined area. Exclusive legislative jurisdiction vests the federal government with all the authority of the state to legislate with no reservation by the state of any authority except the right to serve civil and criminal process. Concurrent legislative jurisdiction vests the same authority in the federal government as does exclusive; however, the state reserves the right to exercise such powers concurrently.).

applicable on many Army installations. The ACA incorporates the state's punishment along with the substantive offense. Thus the level of punishment set by the state will determine whether an ACA offense is a felony or a misdemeanor.

Not all state criminal laws are assimilated. State laws prohibiting acts already punishable by an enactment of Congress are not assimilated as federal law.[31] Neither are state laws that are contrary to federal policies or regulations.[32] Army regulations have the force of law and block assimilation of contrary state law,[33] but installation-level regulations do not.[34]

Federal Misdemeanors

Magistrates also try individuals accused of federal misdemeanors. Simple assault,[35] assault and battery,[36] and theft of personal property of a value under $100[37] are misdemeanors when committed within the special territorial jurisdiction of the United States. Theft[38] or damage[39] of government property of a value or loss of under $100, wherever occurring, are also federal misdemeanors. Civilians who commit minor drug offenses on the installation, such as simple first time possession of a controlled substance[40] or free distribution of a small amount of marijuana,[41] fall within the magistrate's jurisdiction, as do persons who trespass[42] upon military installations.

Proof of Legislative Jurisdiction

Because all ACA offenses and many federal misdemeanors are only punishable when committed in an area of exclusive or concurrent jurisdiction, the jurisdictional status of an installation must frequently be proved in magistrate's court prosecutions. Furthermore, installations on land under exclusive or concurrent jurisdiction frequently contain significant areas under some other form of jurisdiction. This places in issue the jurisdictional status of the specific piece of ground upon which the offense is alleged to have occurred.[43] At a minimum, legislative jurisdiction should be proved by judicial notice,[44] and when necessary, by evidence presented on the merits.

Magistrate Court Procedure

Trials in magistrate's court are governed by the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.[45] Additionally, the Federal Rules of Criminal Procedure apply to all proceedings except those concerning "petty offenses for which no sentence of imprisonment will be imposed."[46]

The Trial Document

Trial can proceed on an indictment, information, complaint, or, for petty offenses, a citation or violation notice.[47] The Army uses Department of Defense Form 1805 to initiate action in petty offense cases.[48] The DD 1805, usually issued by the law enforcement officer making the citation, informs the violator if a court appearance is mandatory,

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[31] 18 U.S.C. § 13 (1982).

[32] *See* Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611, 612 (E.D. Va. 1949). (ACA did not override federal policy prohibiting maintenance of racial segregation at the Washington National Airport and force the assimilation of Virginia statute compelling separation of "white and colored races in areas of public assemblage.").

[33] *See* Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942); *see also* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 390 (1944) (suggesting that valid Army regulations that have the force of law would block assimilation of conflicting state laws); *cf.* United States v. Baker, 603 F.2d 104, 105 (9th Cir. 1979) (Veteran's Administration regulation blocked assimilation of state law).

[34] JAGA 1964/4031, 12 June 1964. (relying on *Standard Oil*). *Contra* DA Pam 27–21, para. 2–19c n.953.

[35] 18 U.S.C. § 113(e) (1982).

[36] *Id.* § 113(d).

[37] *Id.* § 661.

[38] *Id.* § 661.

[39] *Id.* § 1361.

[40] 21 U.S.C. § 844(a) (1982).

[41] 21 U.S.C. § 841(b)(4) (Supp. III 1985).

[42] 18 U.S.C. § 1382 (1982). The maximum punishment for trespass is six months imprisonment and a fine of $500.

[43] *See* United States v. Williams, 17 M.J. 207, 214 (C.M.A. 1984) (existence of special territorial jurisdiction could not be judicially noticed on appeal where facts showed that 49,578.72 acres on Fort Hood, Texas had never been subject to any Federal jurisdiction); United States v. Irvin, 21 M.J. 184 (C.M.A. 1986) (appellate court unable, on facts in record, to take judicial notice of territorial jurisdiction).

[44] Fed. R. Evid. 201. A new magistrate might benefit from an explanation of the installation's jurisdictional status using maps and an aerial tour.

[45] 18 U.S.C. § 3402 (1982) [hereinafter Mag. R. P.].

[46] Mag. R. P. 1(b). "The term 'petty offenses for which no sentence of imprisonment will be imposed' . . . means any petty offenses . . . as to which the magistrate determines that, in the event of a conviction, no sentence of imprisonment will actually be imposed in the particular case." Mag. R. P. (1)(c).

[47] Mag. R. P. 2(2). An indictment is required to prosecute an offense punishable by over one year's imprisonment. Any other offense may be prosecuted by information or complaint. Fed. R. Crim. P. 7(a). An information is a "plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government." Fed. R. Crim. P. 7(c)(1). A complaint is a written statement of the essential facts constituting the offense charged, made upon oath before a magistrate. Fed. R. Crim. P. 3. A complaint is usually made by a police officer having personal knowledge of the matters alleged in it. Because Mag. R. P. 2(2) allows petty offenses to be prosecuted by citation or violation notices, the information and complaint are left to operate in the gap between six months and one year. The use of the information instead of the complaint is preferred because the defendant has the right to ask for a preliminary hearing if the prosecution is on a complaint and is for a misdemeanor other than a petty offense. Mag. R. P. 2(2)(b)(7). Mag. R. P. 9 will conform the "petty offense" language within the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates to the new grading scheme contained in proposed 18 U.S.C. § 3559. *See supra* note 16.

[48] Dep't of Defense, Form No. 1805, United States District Court Violation (Jan. 1982) [hereinafter DD 1805].

and depending on local practice, the time and place of the court appearance.[49]

Forfeiture of Collateral Procedures

The forfeiture of collateral procedures allow a violator to mail in or otherwise make payment for an offense without an appearance in court.[50] This reflects a policy of convenient termination of proceedings as to minor traffic offenses and similar infractions and "is intended to apply only to misdemeanors of the *malum prohibitum* variety."[51]

Military law enforcement officials coordinate with the local magistrate to determine what offenses are covered by the forfeiture of collateral procedures and what amount of collateral has been set for each offense.[52] This information is entered on the DD 1805 by the law enforcement officer when he or she issues the violation notice. The offender may then mail in payment (using the DD 1805), saving time and money for all concerned.

Securing the Defendant's Appearance

The magistrate has the option of using a graduated response to secure the appearance of a defendant who fails to forfeit collateral, request a hearing, or appear after receiving a violation notice. The court could choose to issue a notice to appear before the magistrate and mail it to the defendant.[53] The notice to appear is in the nature of a reminder or warning letter[54] and may offer the defendant an additional chance to forfeit collateral in lieu of appearing.[55]

The magistrate is not obligated to issue such a notice and could instead immediately issue a summons or an arrest warrant, both of which require a showing of probable cause.[56] Alternatively, the magistrate could follow a defendant's failure to answer a notice with a summons, and, if the defendant fails to answer the summons, summarily issue an arrest warrant.[57] The use of a graduated response is at the discretion of the magistrate and is not a right of the defendant.

Consent

Although appearance before the magistrate can be compelled, trial before a magistrate may only proceed if the defendant consents in writing and specifically waives the right to be tried in district court.[58] During the initial appearance in court, the magistrate must inform the defendant of the right to be tried and sentenced by a district court judge.[59] Even after consenting to the magistrate's jurisdiction, the defendant may request a jury trial for other than petty offenses.[60]

Many magistrates divide the court day into an arraignment phase and a trial phase. During the arraignment phase, defendants make their initial appearance before the magistrate. If they consent to jurisdiction and plead guilty, their trial is usually completed immediately, to include sentencing. During the trial phase, the magistrate hears the cases of those who consented to jurisdiction but pleaded not guilty on an earlier date.[61]

Representation

A defendant in a trial before a magistrate can always retain counsel for representation, and in certain situations, indigent defendants have a right to assigned counsel.[62] The right to assigned counsel always attaches when an indigent is charged with greater than a petty offense.[63] Additionally, no indigent may be sentenced to imprisonment unless afforded the right to the assistance of appointed counsel in his or her defense.[64] Indigent soldiers may request court-appointed counsel to represent them in magistrate's court, but they will not be defended by military attorneys.[65]

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[49] AR 190–29, para. 9.

[50] Mag. R. P. 4(a). Forfeiture of collateral amounts to the payment of a fine. Instead of paying, a violator can request a court appearance. AR 190–29, para. 7b.

[51] Mag. R. P. 4(a) advisory committee's note.

[52] AR 190–29, para. 8*b*(1).

[53] Mag. R. P. 4(b).

[54] Mag. R. P. 4(b) advisory committee's note.

[55] Mag. R. P. 4(b).

[56] Mag. R. P. 4(c). Probable cause can be shown through a citation or violation notice, complaint, information, or indictment. A law enforcement officer may make a statement of probable cause under oath on the DD 1805. This allows the magistrate to use the DD 1805 as a basis for issuing a summons (or an arrest warrant) without further paperwork or an appearance of the officer before the magistrate. A summons orders a named individual to appear before the magistrate on a date certain. An arrest warrant commands a federal marshal to arrest a named individual and bring him or her before the nearest federal magistrate. At Ft. Hood, when a warrant has been issued for the arrest of a defendant who was offered the forfeiture of collateral procedures, but failed to pay or appear, the federal marshal issues a "notice of arrest." The notice gives the offender an additional 10 days to pay his or her fine in lieu of arrest. Ft. Hood Mag. Ct. SOP, para. A–17.

[57] Mag. R. P. 4(c).

[58] 18 U.S.C. § 3401(b) (1982); Mag. R. P. 2(2)(c).

[59] 18 U.S.C. § 3401(b) (1982); Mag. R. P. 2(2)(b)(5).

[60] Mag. R. P. 2(2)(b)(6).

[61] Ft. Hood Mag. Ct. SOP, para. 8.

[62] Mag. R. P. 2(2)(b).

[63] 18 U.S.C. § 3006A(a)(1) (1982 & Supp. III 1985); Mag. R. P. 2(2)(b)(3).

[64] Scott v. Illinois, 440 U.S. 367, 374 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[65] Active duty legal assistance officers are prohibited from representing clients in civilian criminal court. Dep't of Army, Reg. No. 27–3, Legal Services—Legal Assistance, para. 2–5*b*(1)*(e)* (1 Mar. 1984). Representation of clients in magistrate's court is not one of the duties of trial defense counsel, as enumerated in Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 6–3*h* (1 July 1984).

Appeal

Defendants have a right to appeal a conviction by the magistrate to the district court.[66] They are not, however, entitled to a trial de novo in the district court.[67] The scope of any appeal is the same as that of an appeal from a judgment of a district court taken to a court of appeals.[68] The magistrate's ruling will only be overturned if, when viewed in a light most favorable to the government, it is clearly erroneous.[69]

Juveniles

Juveniles accused of criminal acts receive special treatment under federal law.[70] A magistrate's jurisdiction to try juveniles extends only to petty offenses, and the magistrate is never authorized to impose any imprisonment.[71] In addition, prior to a juvenile delinquency proceeding in federal court, the United States Attorney must file a certification stating why the case should be handled by federal, rather than state, authorities.[72] The certification requirement no longer applies to petty offenses committed within the special territorial jurisdiction of the United States.[73] Therefore, on an installation under exclusive or concurrent jurisdiction, this certification requirement will have only an occasional impact.[74]

Some Problem Areas

This section highlights some of the areas in which there are current questions or problems concerning the magistrate's court system. These problems are not present at all installations and, where they are, the solutions vary widely.

Jurisdiction Over On-Post Drunk Driving by Soldiers

United States v. Smith[75] held that state drunk driving laws cannot be assimilated as federal law when applied to on-post drunk driving by soldiers. The district court reasoned that because UCMJ art. 111 specifically proscribed drunk driving, it blocked assimilation of that crime as to soldiers.[76] Under this analysis, the magistrate was divested of jurisdiction, leaving the military commander with action under the UCMJ or nonpunitive disciplinary measures as the only available options.

Fortunately, *Smith* was vacated by the First Circuit,[77] and the Fourth[78] and Ninth[79] Circuits have also held that soldiers can be prosecuted under the ACA for violations of state drunk driving laws. It therefore appears that *Smith* was an aberration and that both the commander and the magistrate will continue to have jurisdiction over such offenses.[80]

Crime Victim Fund Assessments

In 1984, Congress directed the federal courts to levy special assessments on any person convicted of an offense against the United States.[81] These assessments, which are in addition to any other fine or penalty imposed, are twenty-five dollars for misdemeanor offenses and fifty dollars for

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[66] 18 U.S.C. § 3402 (1982); Mag. R. P. 7(b).

[67] Mag. R. P. 7(e); *see* United States v. Welsh 384 F. Supp. 531 532 (D. Kan. 1974).

[68] Mag. R. P. 7(e).

[69] United States v. Hughes, 542 F.2d 246, 248 (5th Cir. 1978).

[70] United States v. Frasquillo-Zomoza, 626 F.2d 99, 101 (9th Cir. 1980); *see* 18 U.S.C. §§ 5031–5042 (1982 & Supp. III 1985). A "juvenile" is a person under 18 or a person under 21 who is being proceeded against for an act of juvenile delinquency. "Juvenile delinquency is a violation of the law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." *Id.* § 5031.

[71] 18 U.S.C. § 3401(h) (1982). The Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, §§ 223(j), 235, 98 Stat. 1837, 2029, 2031, *as amended by* the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99–217, § 4, 99 Stat. 1728, will, once effective, conform the current "petty offense" language in 18 U.S.C. 3401(h) to the new grading scheme in proposed 18 U.S.C. § 3559, and maintain the "six month line" as the limit of magistrate court jurisdiction over juveniles. *See supra* note 16. Subsection (h) will also be redesignated subsection (g).

[72] 18 U.S.C. § 5032 (Supp. III 1985). Because there is a preference for state, rather than federal action, the U.S. Attorney must certify to the district court that there is a "substantial federal interest" in prosecution and that the state lacks or declines jurisdiction, state facilities or programs are inadequate, or the juvenile is accused of a violent felony or major drug offense.

[73] 18 U.S.C. § 5032 (Supp. III 1985). In amending § 5032 to delete the certification requirement for petty offenses committed within the special territorial jurisdiction of the United States, Congress did not change the policy that diversion of juveniles to state authorities is preferred where possible. Congress intended to cure the practical problem of juvenile violations of driving and littering ordinances within national parks. S. Rep. No. 225, 98th Cong., 2d Sess. 388, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3528.

[74] Because the magistrate can only try juveniles for petty offenses, at an installation with exclusive or concurrent jurisdiction, the certification requirement will almost never be required for a magistrate court prosecution. It would still apply to any nonpetty offenses that the installation wanted tried in district court.

[75] 614 F. Supp. 454 (D. Me. 1985), *vacated sub nom.* United States v. Mariea, 795 F.2d 1094 (1st Cir. 1986).

[76] 614 F. Supp. at 459. The court felt that UCMJ art. 111 was an "enactment of Congress" for purposes of the ACA. *See supra* note 27.

[77] United States v. Mariea, 795 F.2d 1094 (1st Cir. 1986).

[78] United States v. Walker, 552 F.2d 566 (4th Cir.), *cert. denied,* 434 U.S. 848 (1977).

[79] United States v. Debevoise, 799 F.2d 1401 (9th Cir. 1986). The most logical treatment of this issue is found in United States v. Fulkerson, 631 F. Supp. 319 (D. Haw. 1986).

[80] Installation commanders are expected to establish policies covering the disposition of misdemeanors within the magistrate's jurisdiction that are also violations of the UCMJ. AR 190–29, para. 14.

[81] Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, § 1405(a), 98 Stat. 1837, 2174–75 (codified as amended at 18 U.S.C. § 3013 (Supp. III 1985)). The purpose of the assessments is to raise money to partially support the Crime Victim's Assistance Fund. S. Rep. No. 497, 98th Cong., 2d Sess. 13, *reprinted in* 1984 U.S. Code Cong. & Admin. News, 3607, 3619.

felony offenses.[82] While it is clear that the assessments apply to proceedings in magistrate's court, their application in ACA cases is less certain.

The Tenth Circuit has held that the the assessments are "punishment" and cannot be collected for ACA offenses unless the state's law contains a similar form of "punishment."[83] This analysis, depending on a state's law, might thwart the collection of the assessments in the majority of the cases tried by the magistrate: ACA traffic offenses. Two other circuits have held that the assessments are not punishment, but are instead a revenue measure.[84] This seems the better view and negates any potential issue regarding the collection of the assessments in ACA cases.[85]

No-Shows

The failure of soldiers to appear in magistrate's court can be solved through a vigorous notification program and the help of the chain of command.[86] Civilian "no-shows" are more difficult to handle and may impair the efficiency of even the most well-run magistrate's court. The response to civilian no-shows varies with the magistrate; some are willing to resort to warrants for the arrests of repeated delinquents, but others are reluctant to use their arrest powers to enforce minor traffic offenses.[87] Irrespective of the particular magistrate's approach, the installation commander has some tools to enforce attendance. At least one post issues "bar letters" to civilians who refuse to appear in magistrate's court.[88] A post commander could also suspend or revoke the on-post driving privileges of the offenders.[89] While steps like these will not completely solve the problem of civilian no-shows, they are preferable to ignoring it.

The Uncooperative Magistrate

What should the command do when saddled with a magistrate who will not try certain kinds of cases or offenders? In *United States v. Lee,*[90] the Air Force's answer was to sue. The magistrate in *Lee,* following local district court policy, refused to hear civilian traffic cases from air bases on Hawaii. The policy was based on the perceived "disparate treatment" accorded civilians by the Air Force's handling of military traffic violators "within the command," instead of in magistrate's court.[91]

The Air Force sued for mandamus and, not surprisingly, lost in the district court; however, it prevailed at the Ninth Circuit.[92] The Ninth Circuit ruled that the Air Force was not engaging in the impermissible selective prosecution of civilians and directed the magistrate to hear the civilian cases.[93] *Lee* illustrates that when relations with the magistrate deteriorate past the point where better communications or a compromise can bring about a resolution, a lawsuit, while a drastic option, could be considered.

The Unsupportive Commander

Although the magistrate system frees commanders from dealing with minor traffic offenses, it also reduces their influence in the disposition of more serious misdemeanors. Drunk driving is receiving increased attention across the nation and within the Army. As a result, it is not surprising to see that many commanders at the brigade level and below are frustrated by the fact that while they are held accountable for the misdeeds of their drunken soldiers, the disciplinary action taken against the offenders is meted out by a civilian magistrate.

To avoid having subordinate commanders agitate for the transfer of all military drunk driving cases to themselves, judge advocates should emphasize the benefits of the magistrate's court system in the handling of such offenses.[94] Along with the standard benefits of magistrate's court disposition, the referral to the magistrate of soldiers who drive drunk upholds the Army's responsibilities to the overall law enforcement system by disposing of the cases in a forum that will interface with civilian law enforcement, traffic, and insurance record-keeping systems. Additionally, prosecution in magistrate's court avoids the perception, evidenced in *Lee,* that the Armed Forces are "protecting" their members by disposition under the UCMJ. Commanders should be reminded that, irrespective of any trial in magistrate's court, they can directly influence a drunk driver's military

[82] 18 U.S.C. § 3013(a) (Supp. III 1985). The assessments are made on a "per count" rather than a "per defendant" or "per case" basis. United States v. Dobbins, 807 F.2d 130, 132 (8th Cir. 1986); United States v. Donaldson, 797 F.2d 125, 128 (3rd Cir. 1986); United States v. Pagan, 785 F.2d 378, 381 (2nd Cir. 1986).

[83] United States v. Mayberry, 774 F.2d 1018, 1020 (10th Cir. 1985). A district court in another circuit, faced with the issue, wanted to apply the assessments without reference to the ACA, but reluctantly followed *Mayberry. See* United States v. Robinson, 638 F. Supp. 1202 (E.D. Va. 1986).

[84] United States v. Dobbins, 807 F.2d 130, 131 (8th Cir. 1986); United States v. Donaldson, 797 F.2d 125, 127 (3rd Cir. 1986).

[85] A telephone survey of four U.S. installations determined that the assessments are only being applied when the defendant makes a court appearance, and are not being collected where the violator opts for the forfeiture of collateral procedure. Survey, *supra* note 26.

[86] Survey, *supra* note 26. A soldier may be ordered to appear in magistrate's court, but an order to consent to the magistrate's jurisdiction would be illegal.

[87] Survey, *supra* note 26. If the magistrate does issue summonses or warrants, they must be served by Federal marshals. The use of military police to serve summonses or warrants of arrest violates the Posse Comitatus Act. DAJA–AL 1975/3890 (5 June 1975).

[88] Ft. Carson Mag. Ct. SOP, para. 8. A person who reenters an installation after being barred can be charged with criminal trespass. 18 U.S.C. § 1382 (1982).

[89] Although not specifically addressed by AR 190–5, failure to submit to the process of the court arguably violates the requirement in para. 2–1, AR 190–5, to "[c]omply with laws and regulations governing motor vehicle operation on the installation." It would thus be a ground for revocation under AR 190–5, para. 2–2*b*(2) (IO6, 17 July 1985).

[90] 604 F. Supp. 416 (D. Haw. 1985), *rev'd,* 786 F.2d 951 (9th Cir. 1986).

[91] 604 F. Supp. at 418.

[92] United States v. Lee, 786 F.2d 951 (9th Cir. 1986). The magistrate tried to avoid judicial review by couching his refusal to hear the cases as an order "remanding" the cases to the commander. Because military commanders have no jurisdiction over civilians, the practice had the effect of dismissing the cases. 786 F.2d at 956.

[93] *Id.* at 958.

[94] Most commanders readily see the benefits associated with the magistrate's disposition of more minor traffic offenses. *See supra* note 3.

career through letters of reprimand,[95] comments on efficiency reports, and if appropriate, administrative, separation.

On the other hand, not all military offenders processed through magistrate's court "channels" should end up before the magistrate. For example, issuing a DD 1805 when a routine traffic stop for speeding turns into a drunk driving charge that includes an assault on the arresting officer does not rule out subsequent transfer of the case to the commander on motion of the commander or the prosecutor. Clear procedures should be in place to enable commanders to remove appropriate cases from magistrate's court and exercise their UCMJ jurisdiction. The commander can thereby be assured that he or she has not lost "control" of his or her soldiers, but has merely gained an ally in maintaining discipline within the ranks and on the installation.

Conclusion

Magistrates have been part of the judicial system of the United States since 1793, and since 1940, they have played an increasing role on federal enclaves. Judge advocates, appointed as SAUSA, prosecute both federal misdemeanors and violations of the Assimilative Crimes Act before magistrates. Together, federal magistrates and SAUSA operate the magistrate court system on our military installations. Although some problem areas exist, the system is a valuable tool for enforcing the law. The forfeiture of collateral procedures and the simplified rules for trial allow for resolution of a quantity of cases that could not be handled as efficiently by military commanders alone. A well-run program will operate synergistically with other disciplinary and administrative measures to cover the gamut of offenses and offenders. The ultimate success of the magistrate court system at an installation depends on the cooperation and communication between magistrates, judge advocates, law enforcement officials, and commanders.

[95] A general officer letter of reprimand is required in some cases. *See* AR 190–5, para. 4–5*h*(1) (I06, 17 July 1985).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Defense Counsel's Responsibilities When the Client Desires a Punitive Discharge

It sometimes happens that a client indicates to the trial defense counsel a desire to ask the court for a punitive discharge. In these cases the client usually wants to leave the military as quickly as possible, and considers a punitive discharge the least grave of the possible punishments. He or she may have already been pending administrative elimination when charges were preferred, and may have even submitted a request for discharge under chapter 10 of Army Regulation 635–200.[1] The client may also have other reasons for wanting to leave the military quickly (*e.g.*, civilian employment already secured). Counsel may also believe, for tactical reasons, that it would be in the client's best interest to concede the appropriateness of a punitive discharge. Whatever the reason for the defense asking for or otherwise conceding the appropriateness of a punitive discharge, counsel should be aware that this tactical decision may be subjected to heightened scrutiny by the appellate courts.

In *United States v. Kadlec,*[2] the defense counsel conceded the appropriateness of a punitive discharge. There was nothing in the record to indicate that the accused in fact desired such a discharge, or understood the lifelong consequences such punishment carries. Chief Judge O'Roark, speaking for the court, outlined the criteria to be applied in these cases.

The Court outlined several factors that should be considered in determining whether a defense request for a discharge is reasonable.[3] These factors are: whether the possible punishment includes a dishonorable discharge, so that a bad-conduct discharge concession may allow the client to avoid the more serious punishment; whether in light of the seriousness of the facts a punitive discharge is highly likely; whether the point is integrated logically in the sentence argument; and whether the objective (*i.e.*, less confinement) justifies the concession.[4]

Even if trial defense counsel should find it tactically advantageous to argue for a punitive discharge, they must

[1] Dep't of Army, Reg. No. 635–200, Personnel Separation—Enlisted Personnel, chap. 10 (5 July 1984) [hereinafter AR 635–200].

[2] 22 M.J. 571 (A.C.M.R. 1986).

[3] *Id.* at 572–73. This analysis was based substantially on the two leading cases out of the Court of Military Appeals; United States v. Volmar, 15 M.J. 339 (C.M.A. 1983), and United States v. McNally, 16 M.J. 32 (C.M.A. 1983).

[4] *Kadlec*, 22 M.J. at 572–73.

remember that ultimately this is the clients' choice,[5] just as it is the clients' choice to make decisions "regarding counsel, forum, plea, and whether to testify."[6] This point was recently emphasized by an unpublished decision of the Army Court of Military Review,[7] where the court found that a statement by the accused that she "did not want to stay in the Army" by itself failed to show that she wanted a punitive discharge or had authorized her counsel to argue for it. Defense counsel should of course be sure that the client knows the full effect of all punishments that can be imposed.[8]

Where it does not appear that a punitive discharge concession or request is in an accused's best interest, the military judge is under a sua sponte duty to advise the accused of the consequences of such a discharge.[9] Many times the client will indicate his or her desire for a punitive discharge in a sworn or unsworn statement. This will show consent, as long as the client specifically states that he or she does in fact want a punitive discharge (as opposed to an ambiguous statement such as the one cited above), but it will not show that the client was fully informed of the ramifications of such punishment. In order for the court to find there was an informed decision, there must be a showing that the client realizes that a punitive discharge is in fact serious punishment (that it will generally result in the loss of all veteran's benefits, prejudice in civilian life, etc.).[10] Defense counsel may find it to their tactical advantage to have the client express these facts through an unsworn statement so as to avoid the military judge making his or her own inquiry and possibly hearing extraneous facts that may prejudice the client.

In cases where a full inquiry is not part of the record, and for one reason or another there is an appellate issue as to whether it was in the client's best interest to argue for a punitive discharge, trial defense counsel should remember that the attorney-client privilege is not waived unless and until ineffective assistance of counsel is specifically raised. A full recitation of the facts on the record is generally in the best interest of all parties in light of the court's inclination to subject "tactical decisions in this area to more rigorous scrutiny than usual."[11] Captain James O'Hare.

Wild Youth to Stay Buried in the Past

The Court of Military Appeals, in its recent decision of *United States v. Slovacek*,[12] held that juvenile adjudications are not convictions for sentencing purposes under Rule for Courts-Martial 1001(b)(3)(A).[13] In *Slovacek*, however, the error was found to be harmless because the appellant had gratuitously confessed his juvenile offenses in a sworn statement previously admitted on the merits.[14]

In deciding the issue, the court flatly rejected the government's argument on appeal that R.C.M. 1001(b)(3)(A) be interpreted to conform to sentencing practice in federal civilian courts.[15] Instead, the court turned to Military Rule of Evidence 609(d) for an interpretation of "conviction." Military Rule of Evidence 609 "implicitly recognizes a difference between a conviction and a juvenile adjudication."[16] The court further cautioned that "excessive reliance on federal civilian sentencing practices is misplaced" because sentencing by members is commonplace in the military and a "reluctance to expose lay members to such a broad range of sentencing information is understandable."[17]

In *Slovacek*, The prosecution had successfully introduced, over objection, copies of the records themselves from the juvenile division of a civilian court.[18] The appellant had already admitted his juvenile offenses in his own sworn statement admitted on the merits.[19] The Court held only that the admission of the juvenile records during sentencing was in error.[20]

Trial defense counsel need to object to consideration of juvenile convictions wherever they may surface. Commonly, they appear in enlistment forms within personnel records. Other possible sources of juvenile indiscretions are the attachments to a bar to reenlistment. Wherever the problem may rear its ugly head, defense counsel need to be aware that evidence of a wild youth need no longer come back to haunt a client. Captain Lida A. S. Savonarola.

Tilting At Inferences

In the typical case where the government relies on a urinalysis test to prove the wrongful use of a controlled substance, there is usually no eyewitness who can testify to

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[5] *Id.* at 573; *see Volmar*, 15 M.J. at 341; *see also* United States v. Williams, 21 M.J. 524 (A.C.M.R. 1985), *petition denied*, 22 M.J. 82 (C.M.A. 1986).

[6] *Kadlec*, 22 M.J. at 573; ABA Standard for Criminal Justice, Standard 4–5.2(a) (2d ed. 1982).

[7] United States v. Allen, ACMR 8700628 (12 June 1987). It is especially interesting to note that the court reviewed this issue pursuant to its powers under Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c) (1982), as it was not raised by appellate counsel. Although this decision has little precedential value, it does indicate that appellate courts are very concerned about the interests of clients in this area.

[8] For a more complete discussion on the responsibilities of defense counsel and the military judge to advise an accused as to possible collateral consequences of a conviction, see United States v. Berumen, ACMR 8601281 (A.C.M.R. 12 June 1987). That case involved an alien accused who alleged an improvident guilty plea resulted from his not being informed that the conviction could have immigration and naturalization consequences.

[9] *Kadlec*, 22 M.J. at 573 (analyzing *McNally*, 16 M.J. at 33).

[10] *See, generally Volmar*; *McNally*.

[11] *Kadlec*, 22 M.J. at 573.

[12] 24 M.J. 140 (C.M.A. 1987).

[13] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(3)(A) [hereinafter R.C.M.].

[14] 24 M.J. at 142

[15] *Id.* at 141–42.

[16] *Id.* at 141.

[17] *Id.* at 141–42. This language is *Slovacek* may prove to be useful to defense counsel concerning other evidence objected to on sentencing.

[18] *Id.* at 141.

[19] *Id.*

[20] *Id.* at 142.

the accused's use of the substance. In such a case, the government can prove with direct evidence (laboratory report) that the accused consumed, by undetermined means, some amount of the controlled substance. The government cannot rely on direct evidence to prove that such ingestion was wrongful, however, but instead must rely on a permissive inference to prove the element of wrongfulness.[21] A permissive inference does not relieve the government of the burden of proof, but merely allows the members to decide if a suggested conclusion may be logically inferred from the facts proven and common experience and reason.[22] Although the decision in *United States v. Ford* is not favorable to the accused, it is not definitive on the issue of permissive inferences and defense counsel should not concede the use of an inference without a fight.

In a case where the government relies on a "permissive inference" to prove the element of wrongfulness, the military judge should be requested to give instructions corresponding to the provision of the Manual for Courts-Martial allowing such an inference.[23] These instructions should inform the members that the inference must be justified and how the inference may be rebutted. Defense counsel may wish to argue to the military judge, pursuant to a motion for a finding of not guilty, that the facts proven by the government (ingestion of a controlled substance by undetermined means) do not justify an inference of wrongfulness and therefore, without independent evidence proving wrongful use, a finding of not guilty is warranted.[24] A careful reading of the decision in *United States v. Ford* indicates that a permissive inference of wrongfulness is not automatically allowed in every urinalysis case, but must be justified by the facts of each case using the standard of reasonable doubt.[25] It is within the military judge's prerogative to find that a reasonable juror would not make such an inference from the facts in evidence and common experience and reason, and thus enter a finding of not guilty.[26] Should the military judge refuse to grant the motion for a finding of not guilty, defense counsel may argue to the members, based on the judge's instructions, that the facts proven by the government do not justify the member's use of a permissive inference.

The Manual provides that the government may rely on a permissive inference in the absence of evidence to the contrary.[27] In a case where the defense has presented evidence of passive inhalation or ingestion, the defense may argue in a motion for a finding of not guilty that the government is not entitled to a permissive inference because the defense presented evidence to the contrary. This argument may fail, however. The *Ford* court stated that whether to draw an inference of wrongfulness is a question for the factfinder, and that an inference may be drawn where contrary evidence is admitted.[28] Should the military judge refuse to grant the defense a motion, the defense may argue to the members that, based on the defense evidence, the inference should not be drawn, and that the government has not met its burden of proof.[29] Captain Scott A. Hancock.

Jencks, but No Jencks

Trial defense counsel must be careful to avoid waiver of otherwise applicable law. Merely identifying a problem at trial may not be enough to invoke the most advantageous law for the accused.

In *United States v. White*[30] the Army Court of Military Review held application of the Jencks Act[31] was waived by trial defense counsel's failure to make a specific objection based on either the Jencks Act or Rule for Courts-Martial 914.[32] Defense counsel's on-the-record "affirmative adoption" of the military judge's interpretation of his motion to produce certain notes of a government witness as being based on Mil. R. Evid. 612[33] was a factor in this decision.

Trial defense counsel requested an Article 39(a) session to discuss "possible Jencks Act motions"[34] when it became apparent that a government witness was basing his testimony on certain notes he had written earlier. Defense counsel requested production of the notes, thereby performing all that is required of counsel under the language of the Jencks Act and R.C.M. 914. Despite this, and despite the fact that the military judge ordered the government to produce certain of the notes, the Army court found that all parties "intended and were proceeding under the assumption that Mil. R. Evid. 612 was controlling in the resolution of the issue."[35] This finding was based in part on the military judge's statement on the record indicating his belief that the

[21] United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

[22] Francis v. Franklin, 471 U.S. 307, 315 (1985); Ulster County v. Allen, 442 U.S. 140 (1979).

[23] Manual for Courts-Martial, United States, 1984, Part IV, para. 37c(5) [hereinafter MCM, 1984].

[24] *See* Turner v. United States, 396 U.S. 398 (1970) (statute stating that unexplained possession of cocaine allows inference that accused trafficked in illegally imported narcotics was not justified because cocaine is both imported and produced in United States for legal purposes; and for similar reasons a statute stating that the absence of tax stamps is prima facie evidence of violations of another statute prohibiting trafficking of illegally imported cocaine was not constitutional).

[25] *Ford*, M.J. at 335.

[26] *See generally* Ulster County v. Allen, 442 U.S. 140.

[27] MCM, 1984, Part IV, para. 37c(5); *see also* Mullaney v. Wilbur, 421 U.S. 684 (1975) (an evidentiary inference may be employed to satisfy an element unless it is contradicted by other properly presented evidence).

[28] *Ford*, 23 M.J. at 335.

[29] *Ford* may not be the last word on this issue. Several cases based on this reasoning in *Ford* have been petitioned to the Supreme Court. *See, e.g.*, Douglas v. United States, 24 M.J. 129 (C.M.A. 1987), *petition for cert. filed*, No. 86–1893 (U.S. May 29, 1987).

[30] 23 M.J. 891 (A.C.M.R. 1987).

[31] 18 U.S.C. § 3500 (1982).

[32] R.C.M. 914 tracks the language of the Jencks Act.

[33] Mil. R. Evid. 612 concerns "writing used to refresh memory."

[34] *White*, 23 M.J. at 892.

[35] *Id.* at 893.

Jencks Act did not apply and the defense counsel's apparent acquiescence with that position, as well as the defense counsel's choice of words tending to frame the issue under Mil. R. Evid. 612.

Thus to avoid the risk of waiver, trial defense counsel should specifically cite the Jencks Act or R.C.M. 914 and make it clear on the record that they are invoking their rights under those statutes. Captain William E. Slade.

Trial Judiciary Note

Impeachment by Contradiction

Lieutenant Colonel Charles H. Giuntini
Military Judge, Third Judicial District, Fort Polk, Louisiana.

An accused is charged with one instance of distributing drugs in violation of Article 112(a), Uniform Code of Military Justice.[1] The trial counsel knows of several other instances of the accused's distribution of drugs but has decided, for evidentiary reasons, that additional charges should not be preferred. Further, the trial counsel has determined that the other instances of drug distribution, *i.e.*, the uncharged misconduct, are not admissible on the merits under Mil. R. Evid. 404(b), as "other crimes, wrongs, or acts."

On direct examination, the accused denies committing the charged offense. During cross-examination, he reiterates his denial of involvement in the charged offense and also testifies that he has "never distributed drugs." In order to impeach the accused, may the trial counsel cross-examine him about the uncharged misconduct? If so, and the accused denies any involement, may the trial counsel introduce extrinsic evidence to prove the uncharged misconduct? It depends.

Mil R. Evid. 608(b) prohibits impeaching a witness by use of extrinsic evidence to prove specific instances of a witness' conduct, other than convictions of crime under Mil. R. Evid. 609. Also, Mil. R. Evid. 608(b) only permits cross-examination of a witness about specific instances of misconduct if, in the military judge's opinion, they are probative of truthfulness or untruthfulness.[2] In the example, the uncharged misconduct (distribution of drugs) did not result in a conviction and does not involve the type of conduct bearing on the issue of whether a witness is truthful or not. So, should the trial counsel be allowed to cross-examine the accused about, and/or introduce extrinsic evidence of, the uncharged misconduct to impeach the accused by contradiction? It still depends.

In *United States v. Bowling*,[3] the Navy court held that the trial counsel could introduce extrinsic evidence of uncharged misconduct to contradict a collateral assertion made by a witness during cross-examination[4] if the assertion was volunteered by the witness and not elicited[5] by the cross-examiner, and if the military judge determined that the evidence was not otherwise violative of Mil. R. Evid. 403.

In our example, if the military judge determines the accused was not trapped by the cross-examiner, further cross-examination probably would be allowed, and if denials were forthcoming, extrinsic evidence of the uncharged misconduct, not violative of Mil. R. Evid. 403, would be admissible to impeach the accused by contradiction, as an exception to Mil. R. Evid 608(b).[6] Of course, the military judge should give a limiting instruction so that the members understand that this information is presented only as it may bear on the accused's credibility as a witness.

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[1] Uniform Code of Military Justice art. 112(a), 10 U.S.C. § 112(a) (Supp. III 1985).

[2] For example, in United States v. Owens, 21 M.J. 117 (C.M.A. 1985), the government was allowed to cross-examine the accused as to whether he had omitted prior convictions for possession of marijuana and possession of an unlicensed firearm and a prior arrest for assault and battery from his warrant officer application. Also, in United States v. Cantu, 22 M.J. 819 (N.M.C.M.R. 1986), the Navy court held that, although it was harmless error, the defense should have been allowed to cross-examine a government witness about a prior incident wherein the witness had tried to submit a urine sample that was not her own.

[3] 16 M.J. 848 (N.M.C.M.R. 1983)

[4] In United States v. Crumley, 22 M.J. 877, 878 n.3 (A.C.M.R. 1986), the Army court noted that it is immaterial whether the denial comes on direct or cross-examination.

[5] *See generally* United States v. Maxwell, 21 M.J. (C.M.A. 1986), where the court said it was improper for the trial counsel, after unsuccessfully trying to get the accused to admit he used force to rape the victim and had, in related incidents, sexually assaulted and abused female soldiers, to try to place the accused's character for peacefulness in issue by asking him, "Do you consider yourself a peaceful person?" The Court contrasted this situation with the one in United States v. Shields, 20 M.J. 174 (C.M.A. 1985), where the accused actively pictured himself as a peacemaker, thus opening the door for the government's evidence that he was not.

[6] *Crumley*, 22 M.J. at 878.

Officer Eliminations: A Defense Perspective

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Introduction

Army defense counsel rarely confront a more challenging client than the officer who is being involuntarily eliminated from the service. Frequently, the officer whose career is at risk substantially outranks the counsel from whom he or she seeks advice, giving rise to a classic case of "client control." In addition, the officer-client is likely to: already be thoroughly familiar with the regulations pertaining to eliminations; quickly learn every aspect of the procedure; and/or second-guess every statement that counsel makes by the use of one or more "shadow counsel." Finally, most officers will want the fact that they are being considered for elimination kept under tight wraps, a secret hidden even from their friends.

The defense counsel's predicament in earning his or her client's trust is made worse by the relative infrequency of officer elimination cases. Unlike courts-martial or enlisted administrative eliminations, officer eliminations can be few and far between, and the defense counsel with little experience in the area is at a disadvantage when confronted with the tangle of law and regulations involved. While many of the answers can be found after a little research, other questions can be answered only after the defense counsel acquires a basic familiarity with the elimination process.

This article will look at the procedures currently used to eliminate officers, examining the elimination of both probationary and nonprobationary officers.[1] It surveys the laws and regulations involved, and alerts defense counsel to critical stages in the elimination process. Additionally, it will provide an overview of the processing, both formal and informal, that the elimination action normally follows through Department of the Army (DA).

Officer eliminations will be examined from the perspective of the defense counsel, giving particular attention to those stages at which the defense counsel can influence the process to the client's advantage. Some of the considerations addressed are the administrative consequences of elimination, diversion from the process by resignation, and pending revisions to the officer elimination regulations. The article's scope is generally limited to adverse elimination actions arising from substandard duty performance or misconduct. Not considered are eliminations resulting from two-time nonselections for promotion, and procedures under which an officer is eliminated for medical reasons.[2]

Army Regulation 635–100 is the basic regulation pertaining to officer eliminations.[3] Like its counterpart for enlisted soldiers,[4] the regulation encompasses both favorable and unfavorable eliminations. As of this writing, the basic officer eliminations regulation is separate from the regulation pertaining to officer resignations, discharges, and separation pay.[5] It is expected that the two regulations will be merged when produced in an UPDATE format, bringing it in line with the enlisted separations regulation.[6] Other, more substantive, changes will likely be made to the procedure whereby tenured officers are eliminated, shortening the procedure and decentralizing the responsibility to convene boards of inquiry. Succeeding paragraphs will contrast the procedures currently used with the procedures expected to be used under the new regulation. Significant changes will be highlighted.

Considerations

The concerns of an officer pending elimination mirror to a degree those facing the enlisted soldier who is being administratively eliminated: all favorable personnel actions are suspended upon initiation of the action;[7] if separated, the officer will receive a discharge and characterization of service;[8] and he or she will receive a DD Form 214 listing the authority and narrative reason for the separation and coded to bar later reappointment.[9] Unlike the enlisted soldier, an officer may be entitled to separation pay. On the

[1] For an overview of laws and procedures relating to officer eliminations, see Wagner, *Officer Eliminations—The Emphasis on Quality*, The Army Lawyer, Apr. 1984, at 9.

[2] Dep't of Army, Reg. No. 624–100, Promotions—Promotion of Officers on Active Duty (10 July 1984) [hereinafter AR 624–100], and Dep't of Army, Reg. No. 635–40, Personnel Separations—Physical Evaluation for Retention, Retirement, or Separation (15 Feb. 1980).

[3] Dep't of Army, Reg. No. 635–100, Personnel Separations—Officer Personnel (19 Feb. 1969) [hereinafter AR 635–100].

[4] Dep't of Army, Reg. No. 635–200, Personnel Separations—Enlisted Personnel (5 July 1984), [hereinafter AR 635–200].

[5] Dep't of Army, Reg. No. 635–120, Personnel Separations—Officer Resignations and Discharges (1 Aug. 1982) [hereinafter AR 635–120].

[6] Telephone interview with Major Richard Stokely, Chief, Personnel Management Branch, Officer Personnel Management Directorate, Military Personnel Center (MILPERCEN), Department of the Army [hereinafter Stokely interview].

[7] Dep't of Army, Reg. No. 600–31, Personnel—General—Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings, para 5*a*(2) (1 July 1984).

[8] AR 635–100, paras. 1–4 and 1–5.

[9] Dep't of Defense, Form No. 214, Certificate of Release or Discharge from Active Duty (July 1979) [hereinafter DD Form 214]. See AR 635–100, para. 1–6. The Separation Program Designator listed on the DD Form 214 of an officer who has been eliminated bars later reappointment not only in the Active Army, but also in the Reserve Components. For a listing of Separation Program Designators, see Dep't of Army, Reg. No. 635–5–1, Personnel Separations—Separation Program Designators (1 Oct. 1982.)

other hand, where the officer has served for only a short period of time and has not yet completed his or her Active Duty Service Obligation (ADSO), early release from active duty might result in the officer owing the government for part of the cost of his or her education.

Nonprobationary officer eliminations take a long time. Under the current regulation, most actions take at least six to eight months from the date the officer is initially notified until he or she is finally discharged. Moreover, it is not uncommon for elimination actions to remain unresolved for well over a year. Even once the elimination procedures are revised and the new regulation goes into effect, DA-level action on the elimination will still be necessary. As a consequence, officer elimination actions will still take substantially longer than the normal enlisted elimination. A major consideration for the officer facing elimination, then, is the duration of the action. With this in mind, the defense counsel must assist the client in deciding whether to fight the elimination or resign, balancing the likelihood of the officer's retention against the time lost on a second career should the officer be eliminated, while at the same time considering the officer's family's need for a paycheck in the short term future.

Recoupment

One consideration common to many officer elimination actions is the threat of recoupment. Where an officer being eliminated has previously participated in certain advanced education programs, the officer must reimburse the government for the cost of that education if he or she fails to complete that education, or if he or she fails to complete the Active Duty Service Obligation he incurred as a result of benefiting from the advanced education program. Recoupment provisions apply even if an officer is involuntarily eliminated.[10] The amount to be recouped is calculated by prorating the cost of the advanced education against the obligated period of service, and excusing the proportionate share corresponding to that part of the obligated service already performed; *e.g.*, if an officer has served only one-tenth of his service obligation at the time he is eliminated, he must pay back nine-tenths of the cost of his education.[11]

Not all officers who have benefited from an advanced education program are subject to the recoupment process. Arguably, recoupment could be initiated against any officer who received educational benefits and thereafter failed to complete his or her service obligation. As a practical matter, though, DA is excusing recoupment for officers who had not executed written recoupment agreements prior to the implementation of the current policy.[12] The recoupment procedures were implemented in May, 1984, and apply to such programs as Senior Reserve Officers Training Corps (SROTC) scholarships, the education provided by the United States Military Academy (USMA), various health science programs, and the Judge Advocate General Advanced Education Program. For SROTC scholarship recipients, recoupment procedures apply to students entering a civilian educational institution in academic year 1981/1982 and thereafter.[13] For USMA cadets, recoupment procedures are effective beginning with the class of 1985.[14] Specific costs of advanced education programs vary. Calculations are made by Advanced Program Education Accountants in the command sponsoring the particular funded education program; *e.g.*, for the cost of an educational program funded under the SROTC the costs are calculated by the Commander, Training & Doctrine Command; for the cost of an education at the Military Academy, costs are calculated by the Superintendent, USMA.[15]

If a defense counsel is uncertain whether the client has entered into a recoupment agreement, there are several places to look. Orders assigning the officer to active duty should be annotated with the ADSO incurred.[16] In addition, references to the possibility of recoupment are made on the officer's Officer Record Brief (ORB). The officer's Leave and Earnings Statement (LES) sometimes shows the precise dollar amount owing as a result of the officer's participation in the advanced education program, and a copy of the original education agreement signed by the officer is maintained in the Official Military Personnel File (OMPF).[17] If the officer has agreed to the recoupment of education costs, the terms will be spelled out on the original education agreement.

Recoupment must be initiated prior to the officer's departure from active duty. As a debt owing the government, it is collectible against the officer despite the termination of the officer's military status. The amount owing may be waived

[10] Dep't of Army, Circular No. 600-87-1, Recoupment of Federal Funds for Certain Advanced Education Programs, para. 5c (15 May 1987) [hereinafter DA Cir. 600-87-1].

[11] *Id.*

[12] *See, e.g.*, DA Cir. 600-87-1, para. 5; Message, DAPE-MPD, DA, Washington, D.C., to All Army Activities (ALARACT), subject: FY 87 Officer Early Transition Program (17 Feb. 1987) [ALARACT 011/87]. In the context of the early transition program, the message provides for the initiation of recoupment for officers who voluntarily leave active duty if they have "previously executed written agreements providing for the reimbursement of federal funds expended for their participation in certain advanced education programs." Paragraph 2.D. further provides that "officers who executed written agreements that do not contain monetary reimbursement provisions will *not* be subject to recoupment of educational expenses. In each case, the specific terms of the officer's agreement must be reviewed to determine that officer's obligations under the agreement." (emphasis supplied)

[13] DA Cir. 600-87-1, para. 6b.

[14] *Id.*, para. 6a.

[15] For a complete listing of Advanced Education Program Accountants, *see* DA Cir. 600-87-1.

[16] For the length of ADSOs generally, *see* Dep't of Army, Reg. No. 350-100, Training—Officer Active Duty Service Obligations (1 Feb. 1982).

[17] Dep't of Army, Reg. No. 37-104-3, Financial Administration—Military Pay and Allowance Procedures, Joint Uniform Military Pay System—Army (JUMPS—Army), para. 71101c (15 June 1973) (C34, 15 Sept. 1986) [hereinafter AR 37-104-3]. Although the regulation requires that all LESs be annotated with the cost of an officer's education, the requirement is more often honored in the breach than the observance. If an officer's LES does not contain a total education cost, the information can sometimes be obtained at the local Finance and Accounting Office. Otherwise, the officer will have to contact the education program accountant for the Major Command sponsoring the funded education program.

on a case-by-case basis,[18] but discharge of the debt in bankruptcy is not a viable alternative for at least five years after the expiration of the obligated service period.[19]

Separation Pay

An equally important consideration for officers pending elimination is the possibility of receiving separation pay. Officers are entitled to separation pay if they have completed more than five, but less than twenty years service.[20] Officers, whether commissioned or warrant, Regular Army or Reserve, are entitled to separation pay in most adverse elimination actions, so long as they meet the minimum time in service requirement and receive an Honorable or General Discharge.

The key consideration in assessing entitlement to separation pay is the voluntariness of the separation. Where the officer leaves active duty at his or her own request, no separation pay is owing.[21] Additionally, no separation pay is due if an officer is separated under Other than Honorable conditions.[22] Regardless of the reasons for which the officer is separated, the Secretary of the Army can determine on a case-by-case basis that the payment of separation pay is not warranted under the circumstances.[23]

The amount of separation pay is limited by law to a maximum of $30,000.[24] The maximum of $30,000, however, applies only to those officers separated for reasons other than misconduct or substandard performance (*e.g.*, two-time nonselection for promotion). For officers separated as the result of an adverse elimination action, the maximum amount of separation pay is only $15,000. Separation pay for officers eliminated as the result of misconduct or substandard duty performance is calculated as follows: one-half of 10% of twelve months basic pay multiplied by years or fractions of years of service, but in any event no more than $15,000.[25]

Elimination of Probationary Officers

Faculty Boards

New Other than Regular Army (OTRA) officers who fail their Officer Basic Course at a training installation for academic reasons, because of misconduct, or for demonstrated leadership deficiencies face the prospect of involuntary release from active duty. In many cases, these officers will be decommissioned, resulting in the termination of the officer's military status and the revocation of his or her commission. The process of decommissioning an officer is normally triggered by a Review of Student Status initiated by the school the new officer is attending.[26] Reviews of Student Status are begun as a result of a variety of circumstances, but most frequently come about because of academic deficiencies. Where an officer does not receive passing grades on three or four subjects, fails to maintain an overall grade-point average, or demonstrates poor English language skills, the course manager may recommend that the officer be eliminated from the course and declared a nongraduate. Once this is accomplished, the next step is usually a faculty board.

The faculty board process may also be started where an officer engages in misconduct, or where his or her behavior indicates poor leadership ability. The Officer Basic Course is frequently the junior officer's first encounter with the high standards of personal conduct and integrity required of an officer. The standards are strictly enforced, sometimes to the surprise of the Basic Course attendees. For example, a Review of Student Status can be initiated for a pattern of tardiness in attending physical training formations. Any conduct evidencing an integrity flaw, such as cheating on a classroom examination, receiving unauthorized help with a take-home exam, failing to report offenses committed by other attendees, or misrepresenting facts to a faculty member may result in a Review of Student Status. Certain acts of misconduct, such as drunken driving or drug use, may result in an automatic Review of Student Status, regardless of whether the act occurred on or off of the installation, and despite any extenuating circumstances.

In those cases where the Review of Student Status results in the officer being declared a nongraduate, a faculty board may be convened to recommend whether the officer should be decommissioned. The majority of those attending branch familiarization courses are OTRA officers,[27] and the procedures for faculty boards pertaining to them are spelled out in chapter 3, section II of AR 635–100.[28] The general court-martial convening authority (GCMCA) is the approval authority for the discharge of Reserve officers, and

[18] DA Cir. 600–87–1: AR 37–104–3, para. 71104.

[19] 10 U.S.C. § 2005(d) (1982)

[20] 10 U.S.C. § 1174 (1982); Dep't of Defense Military Pay and Allowances Entitlements Manual, para. 40411. (1 Jan. 1967) (C85, 30 Apr. 1986) [hereinafter DODPM].

[21] DODPM, para. 40413a(1).

[22] *Id.* para. 40413a(12).

[23] *Id.* para. 40413a(9).

[24] *Id.* para. 40413b.

[25] *Id.* para. 40412; Table 4–4–6.

[26] Dep't of Army, Reg. No. 351–1, Schools—Individual Military Education and Training (3 Dec. 1986) [hereinafter AR 351–1]; *see also* AR 635–100, chapter 3, section II. Paragraph 1–10 of AR 351–1 directs commanders of Army schools to establish procedures for dismissing students from courses. While this requires the establishment of basic procedural due process safeguards, no formal adjudication of guilt (*e.g.*, Article 15, civil court conviction) is necessary to support removal from a course for reasons of misconduct. Schools usually implement the requirements of the regulation through memorandums outlining the review procedure as it is applied at that particular school.

[27] Includes Obligated-Volunteers and those in a Voluntary Indefinite or Conditional Voluntary-Indefinite status. RA officers who fail to complete service schools are eliminated under the provisions of AR 635–100, chapter 5.

[28] *See, e.g.*, Fort McClellan, Reg. No. 15–2, Faculty Boards (7 Apr. 1986), which establishes procedures to implement AR 635–100, chapter 3, section II. The regulation provides for 48 hours notice to the respondent and an opportunity to appear and present matters on his or her behalf. The regulation specifically limits the faculty board's discretion by making its recommendations non-binding; the GCMCA retains the authority to disapprove a recommendation that an officer be retained, and to order his or her discharge.

no DA review is necessary prior to his or her action. Where students are discharged pursuant to the recommendation of a faculty board, DA need only be notified after the fact what action was taken. In cases where a Reserve officer has more than three years commissioned service, the GCMCA cannot direct the officer's discharge, but may only release him or her from active duty. Such an officer may be discharged only on the approved recommendations of a series of boards appointed pursuant to Army Regulation 135–175.[29]

In the case of National Guard officers on active duty to attend a branch familiarization course, the GCMCA's power is also limited. Given the National Guard officer's status as both a state and federal officer, the GCMCA cannot order the officer's discharge; however, he or she can direct the officer's release from active duty.[30] Thereafter, the case is forwarded to the National Guard Bureau for withdrawal of federal recognition of the officer's commission.[31] This action by the National Guard Bureau, while not amounting to termination of the officer's state commission, results in the officer's elimination from the National Guard of the United States, the federal component of the officer's commission in the Guard. Withdrawal of federal recognition leaves the officer with only a state appointment. The lack of federal recognition of an officer's status could prevent the officer from holding certain positions in a Guard unit that are required to be filled by a federally recognized officer.[32]

The summary nature of eliminations by way of a faculty board make it a useful tool for the training installation. At the same time, it provides some measure of due process for the junior officer called to appear before it, without exposing him or her to the risk of an adverse characterization of service.[33] In addition to the right to present his or her case before the board, the officer may request transfer to a different branch, a useful alternative if the subject matter of a particular branch is considered unusually difficult. As a practical matter, though, such transfers rarely occur.

Officers separated as the result of a faculty board are not eligible for separation pay unless they have five years of active duty at the time of their separation. On the other hand, they are liable to reimburse the government for the cost of their education where they participated in certain advanced education programs.[34]

Faculty board eliminations present a limited opportunity for the defense counsel to represent the officer-client. In each case, the defense counsel can act as counsel for consultation, advising the client of the procedures and consequences of a faculty board and assisting him or her in fashioning a response to the allegations. The guarantee of an honorable characterization of service and the lack of any regulatory requirement for representation at the board by an officer of the Judge Advocate General's Corps, however, limits the need for defense counsel. As a Priority III duty, faculty boards generally do not involve Trial Defense Service counsel in a representative role unless the counsel is available.[35]

Non-Selection for Promotion to First Lieutenant

The next elimination hurdle an officer faces subsequent to his or her completion of the Officer Basic Course is at the point of eligibility for promotion to first lieutenant. The defense counsel's role in these eliminations is also limited, as the actions hinge entirely on the promotion event. As with faculty board eliminations, the relatively short period of time the officer has been in the Army results in a summary elimination procedure. But also as with the faculty board procedure, the limited opportunity to contest the elimination action is counterbalanced by the guarantee, in most cases, of an Honorable Discharge.

Consideration for elimination for failure of promotion to first lieutenant is automatic, being part of the procedure whereby promotion is accomplished.[36] Not less than sixty days before the officer's promotion to first lieutenant is due, a DA Form 78 (Recommendation for Promotion of Officers) issues from the installation Personnel Service Center (PSC) and is forwarded to the officer's first O–5 commander. The form is then provided to the officer's rater (recommending officer) for a recommendation of promotion or nonpromotion. If nonpromotion is recommended, full justification for that recommendation must be given, as well as a recommendation for approval or disapproval of a six-month retention during which time the officer can improve his or her performance.[37] Upon completing this portion of

[29] 10 U.S.C. §§ 1162, 1163(a) (1982); Dep't of Army, Reg. No. 135–175, Army National Guard and Army Reserve—Separation of Officers, paras. 1–13*d*, 2–3*a* and *c* (22 Feb. 1971). Even though involuntarily released from active duty, the officer has the right to present his case before several boards of officers to determine whether he should lose his reserve commission. These boards are managed by the Commander, U.S. Army Reserve Personnel Center (ARPERCEN).

[30] AR 635–100, para. 3–21*a*.

[31] 10 U.S.C. § 3820 (1982); 32 U.S.C. § 323 (1982); Nat'l Guard, Reg. No. 635–100, Termination of Appointment and Withdrawal of Federal Recognition (8 Sep. 1978) [hereinafter NGR 635–100]; Nat'l Guard, Reg. No. 635–101, Efficiency and Physical Fitness Boards (15 Aug. 1977).

[32] NGR 635–100, paras. 5a(18) and (20) require states to terminate the commission of Guard officers who fail branch familiarization courses because of disciplinary reasons, academic deficiencies, or leadership problems. Technically, though, only the state granting the appointment may terminate it, and at times state laws or regulations may be in conflict with NGR 635–100. Regardless of the state's action when an officer fails a basic course, federal recognization of the officer's appointment will be withdrawn by the Chief, National Guard Bureau. Additionally, the Secretary of the Army, acting through the Commanding General, ARPERCEN, can discharge the officer from the Reserve of the Army.

[33] If an Other than Honorable characterization of service is deemed appropriate by the initiating commander or the GCMCA, the case must be routed through the entire legal process. As a practical matter, this requirement results in virtually every case being disposed of at the installation level with the award of an Honorable characterization of service, regardless of the extent of the probationary officer's misconduct.

[34] *See* DA Cir. 600–87–1.

[35] The need for Trial Defense Service (TDS) counsel to represent probationary officers at faculty boards will, in all likelihood, be addressed in a memorandum of understanding entered into by the training installation staff judge advocate and the servicing TDS field office. As there is no statutory or regulatory right to counsel, faculty boards are a Priority III duty with defense counsel representing clients on an "as available" basis. On most installations, the volume of Priority I and II duties make defense counsel unavailable to do faculty boards at all.

[36] AR 624–100, chap. 3.

[37] *Id.* para. 3–5*d*(1).

the form, the recommending officer forwards it to the first O–5 commander (approval authority), who either approves the officer's promotion, or recommends disapproval, with or without a six-month retention.[38] Again, adverse recommendations must be fully justified.

The promotion review authority (PRA) is the GCMCA, or the first general officer with a judge advocate advisor in the second lieutenant's chain.[39] The PRA may elect to promote the officer, direct a six-month retention or, if warranted by the officer's performance, direct his or her discharge.[40] Prior to final action by the PRA, the officer concerned must be afforded an opportunity to submit matters pertinent to the question of his or her promotion, and either request immediate promotion or ask for a six-month probationary period during which the officer can demonstrate his or her worthiness for promotion. As with the faculty board, the GCMCA is the discharge authority for Reserve officers. The regulation makes no provision for consideration of the officer's case by a board of officers, and there is no DA review of the PRA's decision, so long as an Honorable Discharge is to be awarded.[41]

As with faculty boards, the defense counsel's role in these eliminations is limited to acting as counsel for consultation and, if time permits, assisting in the preparation of comments on the client's behalf for consideration by the PRA. Where an officer is separated for failure to be promoted to first lieutenant, it is unlikely that he or she will be eligible for separation pay because of the five-year time in service requirement; however, the DODPM recognizes that there will be cases where second lieutenants who are nonselected for promotion to first lieutenant will have five years continuous active duty prior to the date of discharge. Where this is the case, the officer will be eligible for separation pay.[42] As discussed previously, arrangements will be made to recoup education costs where the officer participated in an advanced or funded civilian education program.

Probationary Officers

Even though an officer has completed his or her branch basic course, or has achieved the rank of first lieutenant or captain, or even has been awarded career status, he or she is not necessarily protected from a summary elimination action. In most cases, officers who are still in a probationary status can be eliminated without the need to send their case to a board. Included within the category of "probationary officers" are Regular Army (RA) officers with less than five years active service, and OTRA officers with less than three years commissioned service.[43]

The elimination of a probationary officer is usually initiated for substandard duty performance or misconduct. The officer's commander begins the action by notifying the officer in writing of the reasons why the commander is recommending the officer's elimination, and alerting him or her to the character of service being recommended. If an Honorable Discharge is recommended, the officer is not entitled to present his or her case before a board. Instead, the officer is provided seven days within which to consult with a judge advocate or civilian lawyer and prepare a rebuttal. The action and rebuttal are then forwarded to the GCMCA, who may either disapprove the recommendation or forward it to DA recommending approval. If the GCMCA approves the recommendation for elimination, and thereafter the officer elects not to resign, the case is forwarded to the Assistant Secretary of the Army for Manpower and Reserve Affairs (Assistant Secretary (M&RA)) who may either direct retention, discharge the officer, or refer the case for consideration by a field board of inquiry.

If an Honorable Discharge is not recommended, the record and any rebuttal submitted by the officer are referred to an Elimination Selection Board meeting at Department of the Army.[44] The officer has no right to personally appear before this board. If the board recommends either an Honorable or General Discharge (Under Honorable Conditions) the case is forwarded to the Assistant Secretary (M&RA), who may either approve the officer's discharge or refer the case to a board of inquiry. Where the Elimination Selection Board recommends an Other than Honorable Discharge, the case must be referred to a board of inquiry.

A significant consideration for defense counsel assisting the probationary officer is the authority exercised at the Secretariat level. Regardless of the facts of the case, the Secretary[45] or the Assistant Secretary can choose to refer a probationary officer elimination back to the field for consideration by a board of inquiry. Where the client has a good case on the facts, or where mitigating factors outweigh the adverse information contained in the record at DA, the Secretary should be urged to afford the officer an opportunity to present his or her case before a board. On a case-by-case basis, the Secretary does refer probationary officer cases back to the field for a board. It is up to defense counsel, then, to build a record supporting a request that the Secretary do so.

In addition to being used to eliminate probationary officers for misconduct or unsatisfactory duty performance, the expedited procedures are used for Regular Army officers with less than five years active service who fail to satisfactorily complete a course of instruction at a service school. If at any time during the processing of a probationary officer's elimination the officer achieves a nonprobationary status (*e.g.*, an RA officer goes over five years active service, or an OTRA officer goes over three

[38] *Id.* para. 3–5*d*(2).

[39] *Id.* para. 3–2*b*.

[40] *Id.* para. 3–5*d*(3).

[41] Similar procedures are used for promotion from warrant officer to chief warrant officer 2, except that there is no provision for a six month retention.

[42] DODPM, Table 4–4–6, note 4.

[43] 10 U.S.C. § 630 (1982); procedures for the elimination of probationary officers under the regulation currently in effect can be found at AR 635–100, section IX.

[44] AR 635–100, para. 5–30*b*(3).

[45] No precise statement can be made with regard to when action will be taken personally by the Secretary. Many personnel matters are delegated to either the Assistant Secretary (M&RA) or a Deputy Assistant Secretary. The Secretary, himself, can and does take action in a variety of personnel actions, however.

years commissioned service), the entire "legal process"[46] must be used. By its very nature, the elimination procedure is generally limited to officers who have fewer years of service than is needed to be eligible for separation pay. Where the officer is otherwise qualified for separation pay, however, he or she will receive separation pay when eliminated as a probationary officer.

Recoupment will be initiated where appropriate. National Guard officers with state appointments or Reserve of the Army commissions, and Reserve officers with more than three years service, are afforded the safeguards guaranteed them by virtue of their status.

Release from Active Duty of OTRA Officers: Qualitative REFRAD

OTRA officers face yet another series of reviews of their records at DA and in the field to determine whether they should be released from active duty (REFRAD).[47] MILPERCEN career branch managers annually screen OTRA officer records to identify those officers whose service has been characterized by misconduct or substandard performance of duty. Promotion selection boards look for the same things, considering OTRA officers above, below, and in the zone of consideration for release from active duty. In cases where the career branch manager or promotion selection board determines that the officer's record warrants REFRAD, the case is sent to the Director, Officer Personnel Management Directorate, who notifies the officer in writing that he or she is being considered for REFRAD. The officer is given thirty days within which to review his or her OMPF and submit matters on his or her behalf. Thereafter, the case is submitted to a Department of the Army Active Duty Board (DAADB).

Review of an OTRA officer's record may also be initiated at any time by the officer's commander. Prior to forwarding the action to DA, the commander must first refer it to the officer concerned, specifying the reasons for the recommendation, and affording the officer an opportunity to respond. Once the officer has responded, no further reasons justifying REFRAD may be added without first providing the officer another opportunity to respond.

Whether the action is initiated by a commander, by a career branch manager, or by a promotion selection board, the case is referred to a DAADB. If, after considering the officer's file along with the matters he or she has submitted, the board designates the officer for release from active duty, the recommendation is forwarded to the Secretary of the Army for approval or disapproval of the board's recommendation.[48] Where the Secretary approves the DAABD's recommendation that an officer be released from active duty, the officer is notified that he or she will be released within ninety days, if the release is recommended for unsatisfactory duty performance, or fourteen days, if for misconduct. If the DAADB recommends the officer's retention, his or her file is purged of any reference to consideration by the DAADB. An officer who is retained cannot again be considered for REFRAD for unsatisfactory performance for one year. Where the officer was considered for REFRAD as a result of misconduct, he or she will not be reconsidered for REFRAD solely because of the same misconduct.[49]

Once the board has issued its recommendation that an officer be released from active duty and the Secretary has approved that recommendation, the GCMCA becomes the separation approval authority. The officer has the option of delaying his or her release until the passage of the fourteen or ninety days, or the officer may request to be released at an earlier date. If the officer has more than five years time in service, he or she is entitled to separation pay. Eligibility for separation pay vests upon the officer's receipt of notification by the DAADB that he or she has been designated for release from active duty.[50] Recoupment procedures may apply where the officer has failed to complete an ADSO.[51]

Quantitative REFRAD

A distinction can be drawn between a qualitative REFRAD, such as is described above, and a quantitative REFRAD. The latter comes about as the result of budgetary constraints, and is better known as a Reduction in Force (RIF). Because RIFs come about solely as the result of a need for the overall reduction in the number of officers on active duty, an officer's designation for release from active duty as the result of a quantitative REFRAD is not an adverse action to which defense counsel would normally be assigned.

The last RIF occurred during the spring of 1975. Recently, the need to reduce fiscal year 87 officer end strength has generated discussion of whether to conduct a RIF of OTRA officers. So far, the need for such a reduction has been avoided. One argument advanced in favor of avoiding a RIF is that it would unfairly affect OTRA officers. This is

[46] It is called this because the procedures are mandated by 10 U.S.C. §§ 1181–1187 (1982) (Chapter 60: Separation of Regular Officers for Substandard Performance of Duty or For Certain Other Reasons). It is usually to the client's advantage to be entitled to the protection of the legal process. As succeeding paragraphs will show, the legal process affords substantially greater protection to the officer facing elimination. OTRA officers become eligible for the legal process much sooner than RA officers. An OTRA officer need only have three years *commissioned* service, while the RA officer must have at least five years *active* service. Note that there is no requirement that an OTRA officer's three years of service be active. In calculating the OTRA officer's commissioned service, simply count forward from the basic date of appointment. For ROTC graduates, for example, the basic date of appointment falls on or near the date of their college graduation. So, for example, if an ROTC cadet is declared a Distinguished Military Graduate and is sent to three years of graduate school at Army expense, the entire time counts toward qualification for the protections of the legal process. If the officer subsequently reports for active duty and shortly thereafter engages in misconduct, he or she cannot be eliminated under the probationary officer elimination procedures because he or she has three years of *commissioned* service. By contrast, the ROTC graduate's West Point counterpart holds an RA commission. This being the case, he or she can be eliminated under the expedited procedures for the elimination of probationary officers at any time during his or her five year active duty service obligation.

[47] AR 635–100, chapter 3, section XV.

[48] Currently, Secretary Marsh personally reviews and approves or disapproves the recommendations for elimination or retention of each DAABD. Stokely interview, *supra* note 6.

[49] AR 635–100, para. 5–4*b*1.

[50] DODPM, para. 40411 and Table 4–4–6.

[51] 10 U.S.C. § 2005 (1982).

because there is currently no statutory mechanism for eliminating RA officers for quantitative reasons; if a RIF of RA officers became necessary, Congress would first have to enact appropriate legislation. The Army leadership has announced that, should a RIF become necessary, it would seek appropriate legislation to ensure that the RIF includes both RA and OTRA officers.[52]

Elimination of Nonprobationary Officers: The Legal Process

The elimination procedure most frequently encountered by the defense counsel is the legal process prescribed by chapter 5 of AR 635-100. Chapter 5 incorporates the procedures mandated by title 10, United States Code, and provides the framework for the conduct of elimination boards for nonprobationary officers.

The pending revisions to the officer personnel separations regulation will most affect the legal process, shortening and decentralizing parts of the procedure. In order to place the changes to the procedure in their proper context, and also because the effective date of the new regulation is uncertain,[53] it is helpful first to examine the legal process as it currently works.

The various elimination procedures discussed up until now apply only to officers in certain limited categories. The chapter 5 legal process, however, may be used for all officers, commissioned or warrant, regardless of component. Because the legal process is so time-consuming and cumbersome for the command, its use is avoided except for those cases where the officer has more than five years continuous active service, (more than three years for OTRA officers) or in the cases of officers with less than five (three) years service where the command believes an Other than Honorable characterization of service is warranted. The regulation currently requires consideration of an officer's case by three separate boards: a Department of the Army Elimination Selection Board, a Board of Inquiry held in the field, and a Board of Review conducted at Department of the Army. The voting members of all three boards must be in the rank of colonel or above, and in any case superior in rank to the respondent.

The legal process is begun in one of two ways, either by a field commander or by the Department of the Army.[54] While the two procedures are similar, they are different enough to warrant separate treatment. Both methods will be examined in the following paragraphs, and the progress of an elimination action will be traced from its initiation to Department of the Army.

Substantive Reasons for Elimination

The substantive reasons for the initiation of a separation action can be many, but generally they can be classified as either unsatisfactory duty performance or misconduct. Common examples of unsatisfactory duty performance include failure to remain competitive for promotion (generally two or more unfavorable officer evaluation reports (OER)); failing officer basic or advanced courses (for officers with more than five years service); failure to perform duties in a manner commensurate with the officer's grade and experience, failure to achieve satisfactory progress in a weight control program; and failure to respond to drug or alcohol rehabilitation.[55]

Misconduct warranting elimination can include: travel fraud; sexual misconduct; personal misconduct involving drug or alcohol abuse; mismanagement of personal affairs to the discredit of the service or that detrimentally affects the duty performance of the officer (*e.g.*, spouse or child abuse); discreditable or intentional failure to meet personal financial obligations; personal misconduct; neglect of duties; intentional misrepresentation of facts in official statements; or loss of professional status or withdrawal of accreditation.[56] Homosexuality or conduct making the officer's retention on active duty inconsistent with the interests of national security can also be separate grounds for separation.[57]

The grounds for a proposed elimination can be mixed; that is, both misconduct and unsatisfactory performance can be alleged as bases for separation. Allegations, or "reasons" are generally alleged in a variation of the charge and specification format, and it is not uncommon for the reasons to be alleged multipliciously, with the same conduct recited as the basis for multiple grounds for elimination. Generally, a recommendation for elimination will also contain a synopsis of the evidence in support of each reason justifying elimination.

EXAMPLE:

2. This recommendation is based on the following specific reasons for elimination:

a. Failure to exercise necessary leadership required of an officer of your grade. Specifically, you engaged in an extramarital affair with a female soldier under your command. This is supported by a Relief for Cause Officer Evaluation Report for the period 860413-860801, and a Letter of Reprimand dated 19 September, 1986, given to you by Major General Livid, in which he remarks that your "conscious disregard of the high standards of conduct and integrity required of a field grade officer has caused significant damage ot the morale of this command."

b. Acts of personal misconduct, as substantiated by 2a.

c. Conduct unbecoming an officer, as substantiated by 2a.

d. Low record of efficiency when compared with other officers of the same grade, branch, and length of service. Specifically, Officer Evaluation Report for the period 830105-831023, in which your rater indicates that you were apathetic in the performance of your duties and often failed to meet requirements.

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[52] Army Personnel Bulletin (ODCSPER) No. 3-87, March/April 1987, at 2.

[53] It is projected that the new regulation will be published in the fall of 1987, although pre-publication staffing could cause further delay.

[54] AR 635-100, para. 5-14. A chart illustrating the legal process may be found in Wagner, *supra* note 1, at 14.

[55] *Id.* para. 5-11.

[56] *Id.* para. 5-12.

[57] *Id.* paras. 5-12*a*(7) and (12).

The Legal Process: Field Initiated

As with administrative eliminations for enlisted soldiers, officer eliminations are frequently a fallback position for the command where jurisdiction is lacking or proof is too weak for a court-martial. An elimination action can be initiated by any commander against an officer in his or her command. The action is begun when the commander notifies the officer of his or her intent to recommend elimination, and advises the officer of the reasons for that recommendation. The officer must be given seven days in which to acknowledge receipt of the recommendation and to prepare a written response.[58] Officers have a regulatory entitlement to the assistance of a judge advocate in preparing their response.

The commander's recommendation and the officer's response are forwarded to the General Court-Martial Convening Authority. The GCMCA may close the case or approve the recommendation, allowing the officer five days to either (1) tender his or her resignation in lieu of elimination, (2) request discharge (RA officers only), (3) apply for retirement in lieu of elimination, or (4) elect to show cause why he or she should be retained.[59]

At this point in the elimination action, some clients express concern that if they choose not to resign in lieu of elimination, they will have foregone their only opportunity to do so, and will be required to proceed through the entire elimination action even if they have a change of heart. This is not the case. The regulation clearly provides that a respondent may choose to resign at any time prior to final elimination action, regardless of an earlier election to "show cause."[60] Moreover, under the current regulation, there are compelling reasons why an officer should *not* resign at this stage in the proceedings.

First, to resign prior to consideration of the case by an elimination selection board deprives the officer of the possibility of receiving separation pay.[61] This is so because at this point the resignation is considered to be voluntary, and not compelled by a pending "show cause" board. Secondly, the officer who submits a request for resignation in lieu of elimination is exposed to the risk, in misconduct cases, of an Other Than Honorable Discharge.[62] No guarantee can be offered that a board of inquiry will not award the same characterization of discharge, but by electing to show cause the officer and counsel are at least afforded the chance to personally present the case before an impartial body having the power to close the case. Even where overwhelming evidence can be introduced against the officer, it is tactically sound to elect to show cause: if the board recommends an honorable characterization of service, the recommendation is binding on the Secretary, and no lesser characterization can be awarded. Additionally, if the officer is unsuccessful at the board of inquiry, he or she will get another shot at winning when the board of review looks at the case. Electing to show cause, then, increases the number of independent considerations an officer receives on the questions of retention and characterization of service, thereby increasing the likelihood either of closing the case altogether or avoiding an unfavorable character of service. Finally, an election to show cause preserves the officer's freedom of action. As a practical matter, a resignation, once submitted, is irrevocable.[63] The officer is discharged, and his or her DD Form 214 is coded to bar later reappointment. Electing to show cause, on the other hand, costs the officer nothing, retains the option of resigning at any time, and keeps open the possibility of winning the case entirely.

Where the officer recommended for elimination elects to show cause, the case is forwarded directly to the Department of the Army. All adverse officer elimination actions received at DA are overseen by the Personnel Management Branch, MILPERCEN[64] The Personnel Management Branch reviews the recommendation and forwards it to the officer's career management division for preparation of a synopsis of the evidence. The career branch manager of the appropriate division (*e.g.*, Combat Service Support Division; Combat Arms Division; Combat Support Arms Division) then forwards the recommendation and synopsis to the DA Secretariat for consideration by the first of three boards to consider the officer's case, the Department of the Army Elimination Selection Board (DAESB).

A DAESB is made up of the members of a promotion, command, or school selection board that has completed its normal business. The board is convened as a DAESB and considers the allegations against the officer, his or her overall record, and any statement submitted by the officer to determine whether he or she should be required to "show cause."[65] The board may determine that there is no factual basis for the recommendation or that the allegations are factually supported, but do not warrant elimination. In either case, the board may then disapprove the recommendation and close the case. Where this occurs, the officer may not again be considered for elimination based

[58] *Id.* para. 5–14*b*(2).

[59] *Id.* para. 5–19*b*. RA officers may choose to be separated by either requesting discharge in lieu of elimination or by resigning in lieu of elimination. Technically, the law provides that RA officers who wish to avoid elimination can request discharge in lieu of elimination. As a matter of policy, however, RA officers, like OTRA officers, are allowed to avoid the elimination process by resigning in lieu of elimination, as well. The two methods of avoiding the elimination process result in different Separation Program Designators being coded on the officers' DD 214s. Both SPDs, though, bar later reappointment, and aside from the difference between the codes themselves, there is no real distinction between the two.

[60] *Id.* para. 5–21.

[61] AR 635–120, para. 1–6*b*(3)(a).

[62] *Id.* para 4–3.

[63] AR 635–120, para. 2–4, outlines the procedure to be followed when an officer wishes to withdraw his or her resignation. The request must be forwarded through channels to DA, with indorsements recommending approval or disapproval; final authority to allow for withdrawal rests with DA.

[64] The Branch comes under the Accession, Reserve Appointment, and Management Division of the Officer Personnel Management Directorate, MILPERCEN. It is the "DAPC–OPP–MA" referred to in AR 635–100. The office symbol has now been shortened to "DAPC–OPP–M" Defense counsel should consider this office their point of contact when inquiring into the progress of their client's case while it is at DA (AUTOVON 221–9765/9766).

[65] AR 635–100, para. 5–14*g*(3).

solely on the same allegations supported by the same evidence.[66] If the DEASB concludes that the factual allegations are founded and that the reasons support elimination, however, the officer will be required to "show cause." The case will then be forwarded for consideration by the second and third boards in the process, the board of inquiry and the board of review.

The Legal Process: DA Initiated

As with enlisted soldiers, bad paper placed in an officer's OMPF may not be enough to terminate a career immediately, but in the long run, it is bound to catch up with the officer. As a result of the Defense Officer Personnel Management Act (DOPMA),[67] boards considering officers for promotion were given the additional task of recommending which officers should be eliminated.[68] Although not required by DOPMA, DA, as a matter of policy, has directed that the same screening be performed by service school boards (*e.g.*, boards selecting officers for attendance at the Command and General Staff College, Armed Forces Staff College, Army War College, and Industrial College of the Armed Forces) and by command boards (*e.g.*, boards considering officers for battalion or brigade command, or for selection as project managers). Additionally, periodic screenings are conducted by career management divisions at MILPERCEN.

While it is impossible to say with certainty what sort of records will result in a board or career branch manager recommending that an officer be considered for elimination, the documentation triggering the recommendation usually comes as no surprise to either the officer or counsel. Letters of reprimand, records of nonjudicial punishment, denials of a security clearance, and civil court convictions are obvious red flags.[69] So, too, are comments by raters or senior raters that an officer has no potential for further service, or that he or she should be considered for elimination. A weak OER, on the other hand, might not be enough to justify the officer's outright elimination, even if it clearly tells the board that the officer should not be promoted. Generally, a bad OER (*e.g.*, a relief for cause OER for misconduct) is necessary to trigger an elimination action by itself. Where the basis for elimination is unsatisfactory duty performance, a pattern of two or more poor performance ratings usually must exist before a board will recommend immediate elimination. Absent a pattern, officers are usually allowed to compete again for promotion. If they are nonselected a second time, they will be eliminated for failure of selection for promotion, but they will also be eligible for separation pay of up to $30,000.[70]

Once the promotion, command, or school board recommends elimination, the file is returned to the officer who originally issued the selection board its letter of instruction (LOI).[71] This may be the Secretary of the Army or an officer on the DA staff (*e.g.*, the Chief of Staff of the Army or the Deputy Chief of Staff for Personnel.) That official or officer may disapprove the board's recommendation that an officer be required to show cause. If he or she does so, no further action is taken on the recommendation, and no jeopardy attaches. On the other hand, the official or officer may approve the board's recommendation that an officer be required to show cause. In the case of boards convened pursuant to an LOI issued by the Secretary of the Army, for example, the Secretary approves the recommendation by personally initialling the elimination memorandum, and returning it to MILPERCEN. The Director of the Officer Personnel Management Directorate then formally notifies the officer of the board's recommendation. The officer is afforded an opportunity to rebut the reasons for the proposed elimination, and, if the rebuttal is considered insufficient to warrant closing the case, the recommendation is returned to the Secretariat for consideration by a DAESB.

Where the action is initiated because a career branch manager has identified an officer as being a candidate for elimination, the Director of Officer Personnel Management (OPMD) notifies the officer of his intent to recommend elimination, and provides the officer an opportunity to submit matters in his or her own behalf. Upon receipt of the officer's rebuttal at DA, the Director, OPMD reconsiders the evidence in light of the rebuttal. If the Director is not persuaded that the officer's rebuttal warrants closing the action, he or she forwards the case to the Personnel Management Branch for referral to a DAESB.

Just as with the field-initiated elimination, the client in a DA-initiated elimination may be well aware that his or her days in the Army are numbered. While the officer might wish to avoid further anxiety by submitting a resignation in lieu of elimination, the defense counsel should point out that at this stage no separation pay is owing to an officer who resigns, as the resignation is considered voluntary in nature.[72] Not until a DAESB considers the case and recommends elimination does the right to separation pay accrue, and then only at a rate half that owing to an officer eliminated as the result of a two-time nonselection for promotion.[73] Prudence, then, will dictate that the officer who is skeptical of his or her chances of being retained on active duty nevertheless resist the temptation to submit a resignation until offered the opportunity to "show cause."

A further reason for not resigning at this point is that the case can be closed prior to submission to a DAESB. Because AR 635-100 is not binding on DA,[74] no firm rules guide the routing of an action at DA or control who may direct that an elimination action be stopped. The Secretary can terminate an action at any time and, in fact, he or his

[66] *Id.* para. 5-4*b*.

[67] Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified as amended in scattered sections of 10 U.S.C.).

[68] 10 U.S.C. §§ 617(b), 618(b)(2) (1982); *see* AR 624-100, para. 2-8*c*.

[69] AR 635-100, para. 5-13.

[70] DODPM, Table 4-4-6.

[71] AR 624-100, para. 2-5*c*.

[72] AR 635-120, para. 1-6*b*(3)(a).

[73] DODPM, Table 4-4-6.

[74] AR 635-100, para. 1-2.

delegates occasionally terminate actions where sufficiently meritorious reasons are advanced for doing so.

EXAMPLE: A field grade officer is relieved for cause by his general officer/rater as a result of an investigation establishing the officer's sexual harassment of subordinates. A relief for cause OER is completed, with the general officer/rater recommending that the rated officer not be promoted. No field-initiated chapter 5 action is begun, and at the normal expiration of his tour, the officer is reassigned to another installation. Based on the relief for cause OER, a promotion selection board considering the officer's file recommends that he be eliminated. The promotion board's recommendation is forwarded by the DA Secretariat to the Personnel Management Branch. The Director, OPMD, then notifies the officer in writing that he has been recommended for elimination, and the officer is afforded an opportunity to respond. The officer consults with a trial defense counsel, and fashions a response addressing the allegations on which the recommendation for elimination is based. At the end of his rebuttal, the officer asks that the case be closed, and attaches the recommendations of other senior officers joining in that request. Additionally, the officer contacts the general officer/rater who originally relieved him, and obtains a clarification of the rater's intent; *i.e.*, that the officer's actions warranted relief and nonselection for promotion, but that he should not be eliminated. Based on the officer's rebuttal and the general officer/rater's recommendation, the case is closed.

As a practical matter, an institutional bias operates in favor of processing a recommendation for elimination through to a DAESB. This is primarily because administrative jeopardy protections do not attach unless a case has first been considered by a DAESB.[75] If a case is closed prior to consideration by a DAESB, the same adverse information in the officer's file can give rise to a new recommendation for elimination when the officer's file is considered by another selection board. The same thing can happen as the result of a periodic screening of the officer's record by his or her career management division. Interests of economy of effort, then, dictate that where an officer's case is already at DA for consideration for elimination, the action should be processed through to the point where jeopardy attaches. Thus, in most cases, both for the benefit of the Army and the officer involved, once an elimination action is begun, it will not be closed prior to being considered by a DAESB.

Upon receipt of a rebuttal from the officer, the case is forwarded by the Personnel Management Branch to the Secretariat for assignment to a DAESB. The fact that a case might have been initiated in the first place by a command, promotion, or school board does not eliminate the need for another board to be convened to sit as the DAESB. The first board only recommends that an elimination action be initiated, whereas the DAESB is part of the formal legal process.

Counsel who have examined the records of DAESB proceedings in a number of actions may have noticed that the proceedings appear to be relatively perfunctory. The DAESB, comprised of at least three officers in the rank of colonel or above, may be in formal session for only a few hours, sometimes less, before recommending that an officer show cause. If the board recommends that the officer show cause, the case goes back to the Personnel Management Branch for forwarding to the officer's Major Army Command (MACOM) and the convening of a board of inquiry.

Appointing the Board

Regardless of how an elimination action is initiated, it is considered by a DAESB, and subsequently forwarded to the officer's MACOM. Unlike enlisted separation actions, which are usually convened at either the special court-martial or general court-marital jurisdiction levels, the board of inquiry is convened by the MACOM. As a practical matter, the administrative legwork, such as identifying a recorder and selecting qualified colonels as candidates for appointment to the board, is still performed by the Adjutant General's (AG) office on the installation where the board will be held. The actual appointment of the board members, as well as the appointment of the recorder, legal advisor, and defense counsel, is done by the MACOM Commander. As with the processing at DA, the MACOM processing of the elimination action consumes time, contributing to the duration of officer elimination actions. In an effort to reduce the dead time, MACOM AGs, along with MILPERCEN, establish suspenses to keep the action moving along.

Upon the MACOM's receipt of the packet and prior to appointment of a board, the officer is again notified of the options of either requesting discharge, resigning in lieu of elimination, retiring, if eligible, or showing cause. If the officer elects to show cause, a board of inquiry will be appointed.

Board of Inquiry

The board is the officer's only opportunity to personally appear in the elimination process. Contrary to the burden of proof suggested by the name "show cause" board, the officer/respondent need not "show" anything, as the burden of proof rests on the government to demonstrate the officer's unfitness for further service.[76] Still, the officer is not relieved of the responsibility of going forward with evidence in his or her own behalf.[77]

A board of inquiry is similar to a board convened pursuant to chapters 13 or 14 of AR 635–200, but there are certain important differences. The board may be convened not less than thirty days after the officer is notified to "show cause."[78] The recorder must provide written notice not less than ten days before the board of the time and place of the

[75] *Id.* para. 5–4*b*.

[76] *Id.* para. 5–32.

[77] *Id.*

[78] *Id.* para 5–33*b*.

hearing.[79] Under the current regulation, a verbatim transcript is required.[80] The recorder and the legal advisor must be JAGC officers, and the legal advisor must be present during the entire proceedings.[81] Unlike other hearings, the proceedings are closed to the public.[82] No spectators are allowed unless their presence has been specifically requested by the respondent, or allowed by the appointing authority. As with administrative elimination actions for enlisted soldiers, the respondent enjoys the right to counsel and to challenge board members for cause; the standard of evidence is a broad rule of relevancy; hearsay is allowed; and the respondent does not have the right to personally confront the witnesses against him.

While there is no discovery right coextensive with that provided for trials under the Manual for Courts-Martial, the respondent and counsel are provided a copy of the entire packet considered by the DAESB, including a copy of the officer's OMPF.[83] The regulation requires the recorder to introduce a copy of the same file for consideration by the board of inquiry, and calls for full and free disclosure by the recorder of documentation pertinent to the case.[84] Where the officer's misconduct or substandard duty performance occurred in a different command, the defense counsel should assist his or her client in immediately submitting a Freedom of Information or Privacy Act request, if necessary, to ensure that the documents are available for case preparation.[85] Similar requests for information should be made where an investigation has been conducted by an Inspector General,[86] in connection with a suspension of security clearance, pursuant to Army Regulation 15–6,[87] or as part of a Commander's Inquiry into an unfavorable efficiency rating.

Because of the possibility of prejudice arising from the consideration of different information by the three boards required in the legal process, the regulation forbids the board of inquiry from considering separate reasons for elimination not previously considered by the DAESB; this rule, however, does not preclude the recorder from gathering new evidence of the same reasons considered by the DAESB.[88]

The standard of proof that the government must meet at the board of inquiry is a simple preponderance. Nevertheless, it should be pointed out to the board members that this relatively low burden of proof does not allow for conclusions to be drawn as the result of speculation or conjecture. Instead, the findings and recommendations must be supported by "substantial evidence."[89] If, at the conclusion of the evidence, the Board of Inquiry finds that insufficient evidence exists to support the allegations, or, even though finding that the allegations are true, concludes that the evidence does not warrant elimination, administrative jeopardy attaches and the case is closed.[90] The officer may not again be considered for elimination solely for the reasons considered by the board of inquiry. Where elimination is recommended, the board also recommends a characterization of service. No lesser characterization of service than that recommended by the board may be approved by the Secretary of the Army.

MACOM Review

An important step following the board of inquiry is the case review performed at the MACOM. Unlike the appointing authority in an administrative elimination action for enlisted soldiers, the MACOM Commander has no authority to grant clemency in the form of upgrading a characterization of service or suspending a separation. He may, however, recommend retention where the board recommended elimination, or he may recommend a more favorable characterization of service than that recommended by the Board.[91] Although he cannot grant clemency, the MACOM Commander can disapprove the recommendation because of defects in the procedure. The regulation provides for a seven-day time period from the date of receipt of the transcript of the hearing during which the officer and counsel can prepare a brief for consideration by the MACOM commander.[92] Where the officer or counsel believes that there are substantial defects in the conduct of the board of inquiry that materially prejudiced the respondent's rights, a brief is the proper vehicle for urging disapproval of the board's findings and recommendations, and the appointment of a new board of inquiry.[93] The opportunity to submit this brief should be viewed as a chance to influence not only the MACOM Commander's decision, but also the decisions of those who subsequently consider the case. The next major consideration of an officer's elimination, and one where the brief can also be persuasive, is the board of review.

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[79] *Id.* para. 5–34*a*.

[80] *Id.* para. 5–45.

[81] *Id.* paras. 5–35*h* and *i*, 5–42.

[82] *Id.* para. 5–40.

[83] *Id.* paras. 5–20*d*, 5–37*b*(6).

[84] *Id.* para. 5–34*b*.

[85] Dep't of Army, Reg. No. 340–17, Office Management—Release of Information and Records from Army Files (1 Oct. 1982); Dep't of Army, Reg. No. 340–21, Office Management—The Army Privacy Program. (5 July 1985).

[86] Dep't of Army, Reg. No. 20–1, Assistance, Inspections, Investigations, and Followup—Inspector General Activities and Procedures, para. 1–30 (6 June 1985).

[87] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) [hereinafter AR 15–6].

[88] AR 635–100, para. 5–42.1.

[89] AR 15–6, para. 3–10*b*; *see* AR 635–100, appendix B, Board of Inquiry Data Sheet, line 42. This checklist refers extensively to the applicability of AR 15–6 to officer elimination actions.

[90] AR 635–100, para. 5–22*a*.

[91] *Id.* para. 5–22*b*(1).

[92] *Id.* para. 5–20*e*.

[93] *Id.* para. 5–22*c*(3).

Board of Review

Upon completion of the MACOM review, the case is forwarded along with the recommendations of the MACOM Commander and any post-board matters submitted by the respondent or counsel to the Personnel Management Branch at MILPERCEN. From there, the case goes to the Army Council of Review Boards for assignment to a board of review, which recommends appropriate disposition of the case to the Secretary of the Army.[94] As with the DAESB and the board of inquiry, the board of review is comprised of at least 3 officers, all of whom are in the rank of colonel or above. The Army Council of Review Boards comes under the office of the Assistant Secretary of the Army (M&RA), and the officers who are appointed to sit on boards of review are assigned there as a regular duty tour. Frequently, the assignment comes late in the officer's career when he or she is nearing retirement; to an extent, then, boards of review are insulated from outside influences.

Boards of review reconsider the merits of the case. They do so by thoroughly reexamining both the evidence introduced at the board of inquiry and the brief submitted by the respondent. As with a favorable result at the DAESB or board of inquiry, a recommendation by the board of review that an officer be retained is binding in favor of the officer. The case must be closed, and administrative jeopardy attaches.[95] If the board recommends elimination, but feels that the circumstances of the case warrant clemency in the form of a more favorable characterization of service than that recommended by the board of inquiry, its recommendation is not binding on the Secretary.[96] Where the board of review recommends elimination, the case is forwarded directly to the Deputy Assistant Secretary of the Army for action on the recommendation.

Action is normally taken on behalf of the Secretary of the Army by the Deputy Assistant Secretary of the Army (Department of the Army Review Boards, Personnel Security, and Equal Employment Opportunity Compliance and Complaints Review), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) [hereinafter Deputy Assistant Secretary]. Clemency may be recommended by anyone but, short of the favorable findings by the various boards, may only be granted by the Deputy Assistant Secretary acting on behalf of the Secretary of the Army. The respondent and counsel have no right to personally appear before the Deputy Assistant Secretary, but may submit written matters for consideration. The Deputy Assistant Secretary is not bound by the board's recommendations of separation and may direct retention. Action on behalf of the Secretary is final.

Grade Determination Review Board

A final step in the process is taken prior to action by the Deputy Assistant Secretary in cases involving retirement-eligible officers. Normally, a career officer who is twice non-selected for promotion is "locked in" for retirement purposes when he or she has completed eighteen years of active federal service.[97] By contrast, officers facing elimination do not reach a "safe harbor" until nineteen and a half years of service.[98] Thereafter, regardless of the recommendations of elimination boards, an OTRA officer may apply for retirement. The officer does so by submitting a standard retirement application specifically using the words "in lieu of elimination." Upon receipt of the application for retirement at DA, the elimination process is suspended and the officer is retired. RA officers do not have to submit an application for retirement. If they are recommended for elimination from the service and they are retirement eligible, they "shall . . . be retired."[99] The important consideration here for defense counsel is that OTRA officer-clients who have more than nineteen and a half years of service must be instructed to submit an application for retirement. If they do not, they will be discharged. On the other hand, if they request retirement, that request will always be granted. Where an officer is retired in lieu of elimination, the characterization of service on his DD 214 is listed as Honorable.

To an extent, the elimination procedure becomes a cumbersome and futile procedure for the command desiring to eliminate a retirement-eligible officer. The command can use the legal process to prevent the officer from continuing to serve on active duty, but does not get the satisfaction of awarding an unfavorable characterization of service. In one respect, though, the elimination process does threaten the retirement eligible officer, and that is the grade in which he or she is retired.

Cases of retirement-eligible officers that have been processed through the three boards required by the legal process are referred by the Personnel Management Branch to an intra-MILPERCEN three-officer panel, the DA Special Review Board.[100] If that board concludes that grade reassessment is warranted, the case is referred to the Army Council of Review Boards for consideration by a Grade Determination Review Board.[101] As with other DA boards, the officer concerned has no right to personally appear before the Grade Determination Review Board; the officer or counsel may, however, submit a brief or other matters for the board's consideration. If the board determines that the officer should be retired in a lower grade, the recommendation is forwarded to the Deputy Assistant Secretary, who takes action on behalf of the Secretary of the Army.

The Secretary has broad discretion to determine the grade in which an officer should be retired. The law appears to limit his discretion by providing that where an officer has performed satisfactorily in his or her current grade for six months, he or she will be retired in that grade, assuming that the officer meets DOPMA time in grade requirements. This apparent limitation is qualified, though, in that the six

[94] *Id.* para. 5–24*a*.

[95] *Id.* para. 5–25*a*(1).

[96] *Id.* para. 5–25*b*.

[97] 10 USC §§ 631, 632 (1982); AR 635–100, para. 3–111*d*.

[98] AR 635–100, para. 4–11 (IC 6, 25 May 1984).

[99] 10 USC § 1186(b) (1982).

[100] Stokely interview, *supra* note 6.

[101] Dep't of Army, Reg. No. 15–80, Boards, Commissions, and Committees—Army Grade Determination Review Board. (28 Oct. 1986).

months of satisfactory active duty is calculated "as determined by the Secretary."[102] As applied by MILPERCEN, the six month requirement is not a mere calendar test whereby an officer is safe from grade reduction if he or she can show any six-month period of satisfactory service in his or her current grade. Rather, the Secretary may approve any retirement-grade recommendation made by the Grade Determination Review Board, to include retirement in the officer's current grade, so long as the Secretary concludes that at least six months of that time is satisfactory. In practice, officers recommended for elimination are often retired in a lower grade than the one they currently hold, even if they have served in that grade for many years.

Review of Changes to be Made by the New Regulation

In response to criticism of the lengthy three-board system, Congress has taken steps to streamline the procedures for eliminating tenured officers. Finding the current procedure "cumbersome," the Senate Armed Services Committee recommended elimination of the requirement that a board of officers review an officer's case to recommend that he or she show cause.[103] Instead, it recommended that Service Secretaries be allowed to devise procedures whereby substandard officers could be recommended for elimination. A similar recommendation was made by the House. The resulting legislation amended section 1181 of title 10, directing Service Secretaries to prescribe regulations for the review "at any time" of the records of commissioned officers to determine whether, because of poor duty performance or misconduct, the officer should be required to show cause for retention on active duty.[104] The law became effective in December, 1984, but has not yet affected Army officer eliminations pending a revision of AR 635–100 to comport with the amendment.

On February 12, 1986, Department of Defense Directive No. 1332.30[105] was issued to implement the change mandated by Congress. It directs the military services to prescribe policies and procedures consistent with the Directive. As with the amendment to title 10, though, implementation of the changes effected by the Directive must await a change to the Army regulation. The changes to be incorporated into the regulation from the Directive include the elimination of the requirement that a case be considered by a DAESB. Once the regulation becomes effective, only two boards will be required in order to eliminate an officer: The board of inquiry and the board of review.[106]

Other changes will include elimination of the requirement that a verbatim transcript be made of the board of inquiry's proceedings, substituting a summarized transcript for that requirement.[107] Once elimination actions are initiated, they will be forwarded to a "Show-Cause Authority" (SCA), for decision as to whether the officer should be required to show cause for retention on active duty. The creation of a "Show Cause Authority" is perhaps the most significant change effected by the DOD Directive. The SCA can be viewed as essentially combining the functions of the GCMCA, the DAESB, and the MACOM Commander. The Directive allows Secretaries to vest show-cause authority in the following positions: officers exercising general court-martial authority; general officers who have a judge advocate or legal advisor; the Secretary; or a major general or above designated by the Secretary to review officer records.[108] After an evaluation of the case, the SCA may either close the case or refer it to a board of inquiry for its consideration.

The DOD Directive grants substantial discretion to the Service Secretaries in implementing the specific procedures to be followed in officer eliminations. But, with the exception of combining the functions of the GCMCA, the DAESB, and the MACOM Commander in the Show Cause Authority, it can be expected that the procedures to be followed will differ little from the current process. The enclosures to the DOD Directive addressing such issues as reasons for separation, action by the Secretary, board composition, board of inquiry procedures, characterization of discharge, and elimination of probationary officers make it clear that the new procedures will be substantially unchanged from those currently in use.

In addition to the changes mandated by the Directive, it is expected that AR 635–100 and AR 635–120 will be merged.[109] Combining the two regulations will make the rules of officer eliminations more accessible to the user, and hopefully will present them in a more orderly and convenient fashion. Another expected change will be that notification of the officer concerned by the SCA that he or she must show cause will trigger the right to separation pay by the officer.

Resignation and Retirement in Lieu of Elimination

Inevitably, some clients will choose to avoid the lengthy elimination procedure by resigning or retiring in lieu of elimination. Aside from the practical irrevocability of the resignation once submitted, the primary issues for consideration by the officer and counsel are characterization of service, separation pay, and recoupment.

Unqualified Resignation

The most desirable type of resignation from the officer's point of view is, of course, the unqualified resignation.[110]

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[102] 10 U.S.C. § 1370 (1982).

[103] 1984 U.S. Code Cong. & Admin. News, 4205, 4269.

[104] Department of Defense Authorization Act, 1985, Pub. L. No. 98–525, Title V, § 524(b)(1), 98 Stat. 2492, 2524 (1984) (codified at 10 U.S.C. § 1181 (Supp. III 1985).

[105] Dep't of Defense Directive No. 1332–30, Separation of Regular Commissioned Officers for Cause (Feb. 12, 1986).

[106] *Id.* Encl. 3.

[107] The transcript will be summarized "unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned." *Id.* Encl. 5, para. F.

[108] *Id.* Encl. 1, para. 14.

[109] Stokely interview, *supra* note 6.

[110] AR 635–120, chap. 3.

An officer may submit an unqualified resignation at any time, although it will usually be rejected where there is a remaining Active Duty Service Obligation. Acceptance of an unqualified resignation is always discretionary with DA, and once processed beyond the GCMCA, it may be withdrawn only with DA consent.[111] An important consideration for the defense counsel advising a client about resignations is that DA will sometimes accept an unqualified resignation even where its submission was prompted by the officer's misconduct. The key concern here is that the officer's command support acceptance of the resignation. Local command recommendations, while not binding on DA, are frequently persuasive if they operate to the advantage of the officer concerned.

Although the unqualified resignation is desirable, it is not always a possibility. Once the chapter 5 process is initiated, the officer no longer has the option of submitting it. Thereafter, his or her choices narrow to either enduring the elimination process, or resigning in lieu of elimination.

The characterization of service resulting from an unqualified resignation will be either Honorable or Under Honorable Conditions. In circumstances involving serious misconduct, a General Discharge (Under Honorable Conditions) is appropriate. Because either type of discharge results in an Honorable characterization of service, authority to approve these discharges has been delegated to the Commanding General, MILPERCEN. Separation pay is never owing as the result of an unqualified resignation because the resignation is considered voluntary. A recoupment action will be begun, however, against an officer who benefited from a funded advanced education program, but who has not completed the service to which he or she became obligated.

Resignation in Lieu of Elimination

For those familiar with enlisted separation board procedures, the resignation in lieu of elimination may be thought of as being similar in effect to waiving the right to have one's case heard by a board of officers.[112] One difference is that the approval authority for the resignation in lieu of elimination is DA instead of the local separation authority. Another is that an enlisted soldier may withdraw a waiver of a board at any time before action by the separation authority. An officer, on the other hand, may withdraw a resignation only with the approval of DA.

As with the unqualified resignation, a resignation in lieu of elimination is forwarded to DA for acceptance or denial. Upon receipt of the packet at the Personnel Management Branch, the file is referred first to a DA Special Review Board for recommendation as to characterization of discharge. For some resignations in lieu of elimination, such as those triggered by elimination of overweight officers, no board recommendation on character of service is necessary, because the only discharge certificate that can be awarded is an Honorable. In other cases, such as where the officer tenders a resignation in lieu of elimination because of substandard duty performance, the DA Special Review Board recommends whether to accept the resignation, and if acceptance is recommended, votes on an Honorable or Under Honorable Conditions character of service. The Commanding General (CG), MILPERCEN acts on the board's recommendation, accepting the resignation and directing a characterization of service. In those cases where an officer tenders a resignation in lieu of elimination because of misconduct, the case, again, is considered first by the DA Special Review Board. Where the board recommends acceptance and an Honorable or Under Honorable conditions discharge certificate, the CG, MILPERCEN, takes action on that recommendation.

Where the DA Special Review Board recommends an Other than Honorable Discharge, the case is referred to the Army Council of Review Boards for consideration by an Army Ad Hoc Review Board. This board also recommends approval or disapproval of the resignation and, if approval is recommended, the characterization of service to be awarded.[113] If an Other than Honorable character of service is recommended, action is taken by the Deputy Assistant Secretary, who may approve or disapprove the Ad Hoc Board's recommendation. The obvious danger in submitting a resignation in lieu of elimination for the officer accused of misconduct is the possibility of an adverse characterization of service. Depending on the circumstances of the case, and at the sole discretion of DA, the officer may be awarded either an Honorable, Under Honorable Conditions, or Other than Honorable characterization of service.

Regardless of the characterization of service awarded, the post-approval routing of the resignation after its acceptance is the same. MILPERCEN returns the case to the installation AG with instructions to issue the appropriate discharge certificate and a DD Form 214 coded to bar later reappointment.

Previous sections have discussed the pitfall under the current regulation concerning the timing of the resignation as it relates to separation pay. Counsel should caution those clients facing chapter 5 elimination not to submit a resignation in lieu of elimination until a DAESB recommends that the officer "show cause." The initial letter an officer receives from MILPERCEN (DA initiated) or from the GCMCA (field initiated) refers to a possible right to separation pay. No such right accrues, however, until a DAESB directs that the officer "show cause." A resignation submitted before that time will be considered voluntary and the officer will not be entitled to separation pay.[114]

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[111] *Id.* para. 2–4.

[112] Resignations in lieu of elimination are governed by AR 635–120, chapter 4.

[113] *See, e.g., United States v. Woods,* 21 M.J. 856 (A.C.M.R. 1986). Although this decision deals with appellate jurisdiction where a Resignation for the Good of the Service is accepted on behalf of the Secretary, it is illustrative of the handling a Resignation in Lieu of Elimination would receive. The resignation is first considered by the Ad Hoc Review Board, and, where an Other Than Honorable Discharge is recommended, action is taken by the Deputy Assistant Secretary. The handling of the resignation in *Woods* also illustrates the primary drawback of a tender of resignation: once it is submitted, the officer loses control over the processing of it (Captain Woods submitted his tender of resignation on 9 Nov. 1984; the GCMCA did not forward it to DA until 7 Feb. 1985.).

[114] AR 635–120, para. 1–4*b*. Officers are entitled to separation pay (up to a maximum of $15,000) if they resign in lieu of elimination and meet the time in service requirement. No separation pay is owing if an Other than Honorable Discharge is awarded.

Retirement in Lieu of Elimination

Officers pending chapter 5 elimination who are retirement-eligible may retire in lieu of elimination. As previously discussed, OTRA officers who have nineteen and a half years of service can apply for retirement in lieu of elimination, and, if they do so, they will be retained on active duty until they become retirement eligible, even if their elimination action is processed through all boards and to the Secretariat.[115] While OTRA officers must apply for retirement in lieu of elimination, retirement-eligible RA officers pending elimination who chose not to request retirement in lieu of elimination are automatically retired. By law, the Secretary has no discretion; the officer "shall . . . be retired."[116] As in other cases, recoupment is initiated to collect the cost of advanced education programs where the officer has not completed the service to which he or she was obligated as the result of his or her attendance at the course. No separation pay is owing where the officer is eligible for retired pay.

Conclusion

Officer elimination procedures parallel to an extent the procedures used to separate enlisted soldiers. Even for probationary officers, though, the process will usually be lengthier and require more contact with Department of the Army than would be the case with enlisted separations. The chapter 5 legal process is the most commonly used elimination procedure, and the one defense counsel are most likely to encounter. Before the defense counsel can properly advise his or her client, counsel must become familiar with the patchwork of laws and regulations pertaining to officer eliminations. Pending revisions and consolidation of the regulations should go a long way toward making the search easier, and the counsel's advice more comprehensive.

[115] AR 635-100, para. 4-11 (IO 6, 25 May 1984).

[116] 10 U.S.C. § 1186(b) (1982).

Clerk of Court Notes

Speedy Retrials

Two recent decisions of the Army Court of Military Review highlight the need to proceed expeditiously with rehearings and new trials.

In the first case, *United States v. McFarlin,* 24 M.J. 631 (A.C.M.R. 1987), the court held that, under R.C.M. 707(a), "a rehearing . . . following appellate reversal of a non-confined individual . . . must be held within 120 days of the date the convening authority is notified of the final decision authorizing a rehearing." 24 M.J. at 635. Because the *McFarlin* rehearing did not begin until the 121st day, the court set aside the rehearing findings of guilty and sentence and dismissed the charges pursuant to R.C.M. 707(e).

The second case, *United States v. Rivera-Berrios,* 24 M.J. 679 (A.C.M.R. 1987), applied the same rule when a new trial was not begun until 136 days after the convening authority was notified of The Judge Advocate General's decision granting a new trail.

Presumably, these rules may apply to a combined rehearing as well as to full rehearings, apply whether the new trial is granted by The Judge Advocate General or by an appellate court, and also apply to the occasional "other trial" as defined in R.C.M. 810(e). In all of these cases, the letter prepared by the Clerk of Court promulgating the decision to the convening authority will include the customary speedy retrial reminder. Obviously, it is a reminder that should be heeded.

Appellate Processing Times

The average number of days required by the Defense Appellate Division to file an Assignment of Error and Brief on Behalf of Appellant with the Army Court of Military Review is eighty-five days in contested trials and fifty-six days in guilty-plea cases. Those figures were arrived at by averaging the figures for the twelve-month period from June 1986 to May 1987 as shown in the monthly Army Judiciary Consolidated Workload Report.

Answer briefs were then filed by the Government Appellate Division in an average of forty-four days in those cases in which issues were raised in the Assignment of Error (thirty-two percent of the cases). When no error was assigned, the government's pro forma response was filed within three days.

Decisions of the Army Court of Military Review were issued an average of forty days after the government's filing in those cases in which the decision was announced in an opinion. Decisions without opinion (generally called short-form affirmances) were issued in thirteen days on the average.

Typographic Quality of Records of Trial

Evidently, these notices have a useful life of approximately one year. In the August 1986 issue of *The Army Lawyer,* we set forth readability standards for records of trial to be reviewed by the Army Court of Military Review. The standards were designed to preclude use of dot-matrix printers in the production of records. Now, a year later, we have begun again to receive records with dot-matrix type. A solid imprint is required instead.

Regulatory Law Office Note

The Regulatory Law Office Note in the September 1986 issue of *The Army Lawyer*, at 41, reviewed federal agency liability for state-imposed administrative penalties for violations of the Resource Conservation and Recovery Act and the Clean Air Act. We noted that the Air Force had challenged Ohio's effort to levy such a penalty and that the case was pending in federal court. *Ohio v. Dep't of the Air Force*, Civ. No. 86–CV–01–366 (S.D. Ohio). On behalf of the defendants (the Air Force) the U.S. Department of Justice (DOJ) had filed a Motion to Dismiss or for Summary Judgment. The district court recently denied DOJ's motion.

The litigation arose from activities at Rickenbacker Air National Guard Base, Ohio, and a facility known as Air Force Plant 85, also located in that state. Plaintiff alleged that six boilers at Rickenbacker and four boilers at Plant 85 had been operated without permits required by state law and that they had emitted particulates in excess of that allowed by state rules. The state sought over $1 million in administrative penalties for these alleged violations.

In its motion, DOJ argued that the waiver of sovereign immunity embodied in the Clean Air Act (CAA) did not render federal agencies liable for such civil penalties. The operative statutory language is found at 42 U.S.C. § 7418, and in relevant part it provides as follows:

> Each department . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . (c) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, . . . under any law or rule of law. No officer . . . of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

DOJ's position was that section 7418 should be read to limit the term "sanctions" to civil penalties imposed by a court for violation of a court order. Further, DOJ argued that section 7418 should be interpreted *in pari materia* with the waivers of sovereign immunity in other major environmental statues, such as the Clean Water Act, 33 U.S.C. § 1323; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6961; and the Safe Drinking Water Act, 42 U.S.C. § 300j–6(a). The court reviewed these statues and determined that Congress, by its enactment of the federal compliance provision of the CAA, intended federal facilities to be subject to the type of civil penalties sought by Ohio. The waiver language of RCRA, the court noted, defined "sanctions" as those that a court may impose to enforce injunctive relief. The court held the specific language in section 7418 did not support DOJ's arguments, finding that the various statutes were distinguishable. The case is proceeding on the merits on the assumption that the defendants will not seek an interlocutory appeal of the denial of the motion.

For now, the general guidance for Army lawyers contained in the September 1986 issue of *The Army Lawyer*, at 43, remains the same. The Regulatory Law Office should be advised and consulted on all attempts by state and local governments to imposed administrative penalties under the CAA, the RCRA, or any other federal or state environmental statute.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Notes

Digests of Opinions of The Judge Advocate General

DAJA–AL, 1987/1118, 2 March 1987. Official Participation of an Active Duty Soldier in a Commercial Business Activity.

The Judge Advocate General was asked whether an active duty soldier could participate in his official capacity on an advisory group for a commercial business enterprise. The purpose for participation was to advise the business on the needs of military personnel.

The opinion found that participation in such activity by an active duty soldier in an official capacity would be improper. AR 600–50, para. 1–4*e* provides that DA personnel are prohibited from engaging in any action that might result in or would reasonably be expected to create the appearance of giving preferential treatment to any entity. *See also* AR 360–61, para. 3–3*a*. In addition, the proposed participation in the business advisory group would necessarily result in the soldier and his rank being associated with the business. This would violate AR 600–50, para. 2–5*a*, which prohibits DA personnel from using their titles or positions in conjunction with any commercial enterprise.

If a soldier wished to participate in a private business concern in his private capacity, it would be permissible so long as the guidelines in AR 600–50, para. 2–5, were complied with. Prior to engaging in this type of activity, the individual should seek advice from his Ethics Counselor.

DAJA–AL 1986/3176, 12 December 1986. Standards of Conduct.

The Judge Advocate General was asked whether secretarial employees of the Department of the Army could be used to prepare papers for DA personnel enrolled in a

nongovernment funded educational program and for educational programs sponsored or paid for by the government. In addition, the requestor inquired as to the propriety of accepting compensation for articles prepared by DA personnel and submitted for publication to government and nongovernment sources.

AR 600–50, para. 2–4 states in part that "Government facilities, property, and work assistance will be used only for official government business. This includes but is not limited to stationery, stenographic services, typing assistance, duplication, and chauffeur services." In addition, Section 204, Executive Order 11222, May 10, 1965, prohibits the use of any kind of federal property for anything other than officially approved activities.

According to The Judge Advocate General, the term "official government business" is not broad enough to include nongovernment funded educational pursuits. This remains so even if the educational program enhances the employee's knowledge and performance and is thus indirectly beneficial to the government. The prohibition does not include government funded courses that are related to the employee's duties.

In regard to the use of government personnel to prepare papers for publication in professional journals, the opinion pointed out that AR 600–50, para. 2–4, prohibits the practice unless the paper was prepared in the course of official duties.

Concerning the submission of articles to professional journals for payment, The Judge Advocate General noted that 18 U.S.C. § 209 prohibits members of the Executive Branch, which includes the military, from receiving any salary or supplementation of salary for their government service. This would prohibit acceptance of payment for articles prepared pursuant to official duty. For papers prepared in a private capacity, the requirements of AR 600–50, para. 2–6 must be followed.

DAJA–AL 1986/3165, 10 December 1986. Frequent Flyer Benefits.

In response to a question regarding frequent flyer programs, The Judge Advocate General noted that current DA policy is contained in HQDA (ODCSLOG) message, dated 4 September 1986.

The opinion stated that seat upgrade stickers earned after flying an unspecified number of miles annually may be used only if their use does not result in the loss of any free ticket, discount, or other benefit that could be used by the government. Seat upgrades may not be used if they are earned as a bonus for accumulating mileage and if their use results in a loss of bonus points or credits that could be used by the government to obtain discounts or free tickets. All travel bonuses, including those with expiration dates, and transferable and nontransferable travel coupons earned as a result of official travel, must be relinquished to the government, even if they cannot be used by the government for future official travel.

AR 600–50, para. 2–2*c*(8)(c) provides that DA personnel may accept travel upgrades (*e.g.*, airline seat upgrade, rental car upgrade, hotel room upgrade) under circumstances where upgrades are generally available to the public as a whole. Such upgrades may be the result of overbooking, overcrowding, or for customer relations purposes. This provision does not allow for acceptance of any other benefits such as a free flight, hotel room, or rental car, all of which accrue to the benefit of the government. DA personnel are generally obligated to account for any gift, gratuity, or benefit received from private sources when performing official travel. *See* JTR, para. M–1200.

The opinion distinguished these benefits from those received from an airline carrier for voluntarily giving up a seat on an overbooked flight and taking a later flight. Under these circumstances, the traveler may keep the benefits, provided the resultant delay does not interfere with the performance of official duty and the government does not incur any additional costs. If, however, the traveler is involuntarily denied a seat on an overbooked flight, any benefit received must be turned in to the government. *See* AR 600–50, para. 2–2*c*(8)(b); AR 55–355, para. 47–13; and JTR, para. M–1200.

Contract Law Notes

Small Disadvantaged Business Set Asides

Everyone knows about small business set asides and labor surplus area concern set asides, which are used to help small businesses and labor surplus area concerns respectively by setting aside all or part of a proposed buy of goods or services for competition by only qualified small businesses or labor surplus area concerns. *See* FAR Subparts 19.5 and 20.2. If you are reading this note, then you are probably also familiar with the Section 8(a) program under the Small Business Act, 15 U.S.C. § 637(a) (1982), a program that encourages minority-owned small businesses, called "8(a) contractors," by authorizing the Small Business Administration to enter into contracts with other agencies and let subcontracts for performing those contracts to these businesses. *See* FAR Subpart 19.8.

On 1 June 1987, however, a new set aside program came into being, providing yet another socioeconomic program for practitioners to consider. This one is for "small disadvantaged business concerns" (SDBs), which are defined in the same manner as those firms qualifying as 8(a) contractors: they must be owned and controlled by socially and economically disadvantaged persons. Why the new program when we already have all the others? Because § 1207 of the 1987 National Defense Authorization Act, Pub. L. No. 99–661, established an objective for the Department of Defense (DOD) to award five percent of its contract dollars during Fiscal Years 1987, 1988, and 1989 to SDBs and to maximize the numbers of these concerns participating in DOD contracts. Prior to FY 1987, DOD was nowhere near this goal using only the 8(a) program. The SDB set aside program became the hoped-for solution to reaching the goal.

Interim rules issued on 4 May 1987, which amend the DFARS where appropriate, established the SDB set aside program. The text of these rules may be found in 52 Fed. Reg. 16,263 (1987) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, and 252). Effective for all solicitations issued on or after 1 June 1987, the SDB set aside program is similar to those for labor surplus area concerns and for small businesses. The set aside is total (as opposed to partial), meaning that DOD must limit competition to 1) small disadvantaged business concerns, 2) historically Black colleges

and universities, and 3) minority institutions if the three conditions that follow are met.

First, the contracting officer must determine that there is a reasonable expectation of competition (i.e., bids or offers) from two or more SDB concerns. This "rule of two" should be familiar: it is similar to that used for total small business set asides. FAR § 19.502–2.

Second, the contracting officer must reasonably expect that the award price will not exceed the "fair market price" by more than ten percent. "Fair market price" is defined in the interim rules as a price based on reasonable costs under normal competitive conditions and not on lowest possible costs. 52 Fed. Reg. 16,265 (to be codified at 48 C.F.R. 219.001 (DFARS § 19.001)). Just how the contracting officer can determine whether the award price will be within ten percent of this, however, is unclear, especially if no historical data from past acquisitions exists. Compare this determination, for example, to that in total small business set asides, where the contracting officer must only determine that prices will be reasonable (FAR § 19.502–2), or that in partial set asides for labor surplus area concerns, which require the non-set aside portion to establish the fair market price that, within DOD, the price on the set aside portion may not exceed (DFARS § 20.7003(b)). As you can see, these standards are much easier for the contracting officer to apply than the "within ten percent of the fair market price" standard for SDB set asides.

The final condition is that small purchase procedures (for contracts not expected to exceed $25,000, *see* FAR Part 13) must not be used. Small purchases must be totally set aside for small businesses anyway (FAR § 13.105), and to allow SDB set asides for these would in effect penalize small businesses as a class.

The SDB set aside program is not intended to displace the Section 8(a) program, although in some cases, such as when two 8(a) contractors request that the acquisition be placed in the 8(a) program, the contracting officer must set it aside for SDB concerns. 52 Fed. Reg. 16,266 (to be codified at 48 C.F.R. 219.502–72(b)). If the SDB set aside program is successful in helping DOD attain its five percent goal, however, we may be seeing the beginning of the end of the Section 8(a) program, a program that has been severely criticized in some circles for, among other things, its lack of competition. At least the SDB set aside program has that to some extent, and it is not limited to only those contractors who have managed to get in (and stay in?) the 8(a) program. Perhaps Congress ought to postpone its current attempt to revamp the 8(a) program (*see Rep. Mavroules Introduces Bill to Curb 8(a) Abuses, Improve Competitiveness*, Fed. Cont. Rep. (BNA) No. 47, at 530 (March 30, 1987)), and watch what happens to this one. Major McCann.

ASBCA Jurisdiction Over NAF Contract Disputes

The Armed Services Board of Contract Appeals (ASBCA) ruled in *Recreational Enterprises*, ASBCA No. 32176, 87–1 B.C.A. (CCH) ¶ 19,675 (Feb. 20, 1987) that DOD Instruction 4105.67 requires all DOD nonappropriated fund (NAF) contracts to include a disputes clause granting a contractor a right of appeal of "all disputes." Accordingly, the board held that it had subject matter jurisdiction over appellant's breach of contract claim, even though the contract between the NAF and appellant did not contain the required disputes clause. The government's motion to dismiss for lack of jurisdiction was denied.

The appeal to the board was from a contracting officer's final decision denying the contractor's properly certified claim for breach of contract damages in the amount of $421,150. The breach claim arose from the termination of the contract between appellant and the Base Recreation Fund (Fund), Camp Pendleton, California, a non-exchange NAF. The contract between the parties did not contain the mandatory disputes provision.

The ASBCA had previously held that the Contract Disputes Act does not apply to non-exchange NAF contracts. The jurisdiction of the board is limited to those appeals taken by contractors pursuant to provisions of the contract (the disputes clause) or "pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure." *Commercial Offset Printers, Inc.*, ASBCA No. 25302, 81–1 B.C.A. (CCH) ¶ 14,900. The board in *Recreational Enterprises* held the circumstances of the appeal fell within the second jurisdictional category.

Boards have jurisdiction over disputes involving NAF contracts where the contract contained a disputes clause. *COVCO Hawaii Corp.*, ASBCA No. 26901, 83–2 B.C.A. (CCH) § 16,554. Until now, however, if the contract did not contain a disputes provision, the ASBCA would not hear the appeal. *See Dawn Cleaners, Inc.*, ASBCA No. 20653, 76–2 B.C.A. (CCH) ¶ 12,198. In *Commercial Offset Printers*, the board determined there were no "directives of the Department of Defense or of the Department of the Army which grant [the contractor] a right of appeal to this Board under the circumstances of this case."

This was a harsh result for contractors who, it must be remembered, cannot appeal contracting officer's final decisions to the courts. There is no judicial review because NAFs are government instrumentalities entitled to sovereign immunity, which the Tucker Act (41 U.S.C. § 1342 (1982)) does not waive for NAFs. Thus, a disgruntled contractor's only alternative was to seek redress from the contracting officer's higher headquarters.

The contract in *Recreational Enterprises* did not have a disputes provision. Instead of granting the government's motion to dismiss, however, the ASBCA fashioned a jurisdictional basis for entertaining appeals from NAF contracting officer final decisions. Relying upon the acquisition policy of DOD Instructions 4105.67, which required the contract to contain "adequate provision for contractor appeals" of disputes, the board held appellant was entitled to the disputes procedures mandated by the DOD Instruction.

The board's decision in *Recreational Enterprises* is soundly based on its jurisdiction as set forth in its Charter (rev. 1 July 1979). The surprising aspect of the decision is that the board until now had never stated that the provisions of any DOD directive granted a right of appeal not in the contract. In any event, practitioners should understand that the absence of a disputes clause in a NAF contract will no longer defeat the jurisdiction of the board. Captain Munns.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer.*

Legal Assistance Resources

The following list of legal assistance resources, organized by topic, includes regulations, pamphlets, *All States Guides,* articles from *Military Law Review* and *The Army Lawyer,* policy letters, video tapes, and other materials that might assist legal assistance officers. Video tapes are available in both ¾ inch and ½ inch (VHS) format by sending a blank tape along with the requested tape's title and number to: The Judge Advocate General's School, U.S. Army, ATTN: Media Services Office (JAGS-ADN-T), Charlottesville, Virginia 22903-1781. Copies of *All States Guides,* the *Legal Assistance Officer's Deskbook and Formbook,* and other publications produced by The Judge Advocate General's School are available through the Defense Technical Information Center (DTIC). For information about the DTIC system and a list of the publications available through this system, see page 74 of this issue. 1987 editions of the *All States Guides* and the *Legal Assistance Officer's Deskbook and Formbook* will be available through DTIC in the fall. An announcement will be included in *The Army Lawyer* when these publications are sent to legal assistance offices and are available through DTIC.

Legal Assistance—Generic

10 U.S.C. §§ 1044 and 1054.

AR 27-3, Legal Assistance.

AR 27-1, Judge Advocate Legal Services.

AR 600-14, Preventive Law.

AR 612-2, Preparation of Replacements for Overseas Movement.

AR 190-24, Armed Forces Disciplinary Control Board.

AR 210-51, Army Housing Referral Service Program.

AR 600-21, Equal Opportunity Program in the Army.

AR 27-55 (formerly AR 600-11), Authority of Armed Forces Personnel To Perform Notarial Acts.

AR 27-10, Military Justice.

AR 27-20, Claims.

AR 27-40, Litigation.

AR 600-50, Standards of Conduct.

AR 600-33, Line of Duty Investigations.

AR 735-11, Reports of Survey.

Officer Ranks Personnel—UPDATE.

Enlisted Ranks Personnel—UPDATE.

DA Pam 27-166, Soldiers' and Sailors' Civil Relief Act.

Legal Assistance Officer's Deskbook and Formbook.

Uniformed Services Almanac (published annually by Uniformed Services Almanac, Inc., P.O. Box 76, Washington, D.C. 20044).

All States Law Summary (Volumes I, II, and III).

Proactive Law Materials.

Preventive Law Series.

First Legal Assistance Symposium, 102 Mil. L. Rev. 1 (1983).

Second Legal Assistance Symposium, 112 Mil. L. Rev. 1 (1986).

All States Guide to State Notarial Laws.

USAREUR Legal Assistance Handbook.

Heffelfinger, *An Analysis of Army Regulation 27-3, Legal Assistance,* The Army Lawyer, Feb. 1984, at 1.

Policy Letter 84-1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Legal Assistance, 16 Feb. 1984, *reprinted in* The Army Lawyer, Mar. 1984, at 2.

Policy Letter 84-2, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance for OER/EER Appeals, 2 Aug. 1984, *reprinted in* The Army Lawyer, Oct. 1984, at 2.

Policy Letter 85-9, Office of The Judge Advocate General, U.S. Army, subject: Army Legal Assistance Program, 17 Dec. 1985, *reprinted in* The Army Lawyer, Jan. 1986, at 5.

Policy Letter 85-10, Office of The Judge Advocate General, U.S. Army, subject: Army Preventive Law Program, 17 Dec. 1985, *reprinted in* The Army Lawyer, Jan. 1986, at 6.

Policy Letter 85-11, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance Representation of Both Spouses, 30 Dec. 1985, *reprinted in* The Army Lawyer, Feb. 1986, at 4.

Policy Letter 86-8, Office of The Judge Advocate General, U.S. Army, subject: Comprehensive Legal Assistance, 29 July 1986, *reprinted in* The Army Lawyer, Sept. 1986, at 3.

Policy Letter 86-9, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance for Reserve Component Personnel, 8 July 1986, *reprinted in* The Army Lawyer, Sept. 1986, at 4.

Letter, DAJA-LA, Office of The Judge Advocate General, U.S. Army, subject: Will Preparation and Execution, 21 Feb. 1986.

Video Series:

JA-87-0010A Oct 86 55:00	*Legal Assistance Overview.* Guest Speaker: Brigadier General Donald W. Hansen, Assistant Judge Advocate General for Military Law. General Hansen discusses methods by which legal assistance attorneys may improve the delivery of legal assistance services to soldiers and their families, enhance the image of the legal assistance office, and improve their ratings in officer evaluation reports.
JA-86-0039A Mar 86 43:14	*Legal Assistance Overview.* Guest Speaker: Brigadier General Donald Wayne Hansen, Assistant Judge Advocate General for Military law. General Hansen discusses the Army Legal Assistance Program today, highlighting areas of current interest at Department of the Army. He gives practical suggestions to students as to how to develop creative proactive law programs to best serve both the client and the judge advocate.
JA-86-9940A Mar 86 52:00	*Legislative Initiatives for Military Families, Part I.* Guest Speaker: Representative Patricia Schroeder, Representative for the First District of Colorado. Mrs. Schroeder discusses the past, present, and potential future initiatives by the Armed Services Committee and the Congress to improve the quality of life of military families. She gives particular attention to provisions of the recently passed Military Family Act of 1985.
JA-86-0040A Mar 86 27:00	*Legislative Initiatives for Military Families, Part II.* A continuation of Part I.

Rules of Professional Conduct

Model Code of Professional Responsibility

Model Rules of Professional Conduct

Volume I, Chapters 2–4, Legal Assistance Officer's Deskbook and Formbook (1987).

Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers*, The Army Lawyer, Feb. 1987, at 19.

Video Series:

JA–87–0014A
Oct 86
46:00
Model Rules of Professional Conduct, Part I.
Guest Speaker: Major Thomas LeClair, Criminal Law Division, Office of The Judge Advocate General. Major LeClair discusses provisions of the proposed Military Model Rules of Professional Conduct and their impact on legal assistance attorneys. Major LeClair is the Army representative on the DOD Working Group which developed the proposed rules.

JA–87–0014A
Oct 86
27:00
Model Rules of Professional Conduct, Part II.
A continuation of Part I.

Family Law

(Including Child Support Enforcement)

AR 608–99, Family Support, Child Custody, and Paternity.

AR 608–61, Application for Authorization to Marry Outside the United States.

All States Marriage and Divorce Guide.

All States Guide to Garnishment Laws and Procedures.

Legal Assistance Officer's Deskbook and Formbook.

Essentials for Attorneys in Child Support Enforcement, Office of Child Support Enforcement (prepared by the National Institute for Child Support Enforcement).

Paternity Establishment, Office of Child Support Enforcement (prepared by the National Institute for Child Support Enforcement).

Interstate Child Support Enforcement Laws Digest, Office of Child Support Enforcement. (2 volume set).

Arquilla, *Family Support, Child Custody, and Paternity*, 112 Mil. L. Rev. 17 (1986).

Arquilla, *Changes in Army Policy on Financial Nonsupport and Parental Kidnapping*, The Army Lawyer, June 1987, at 18.

Policy Letter 84–5, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance Representation of Both Spouses, 30 Dec. 1985, *reprinted in* The Army Lawyer, Feb. 1986, at 4.

Video Series:

JA–84–0008A
Nov 83
51:55
Family Law, Part I.
Guest Speaker: Professor Walter J. Wadlington, James Madison Professor of Law, University of Virginia School of Law. Dr. Wadlington discusses the most recent developments in the field of family law. He looks at case law involving the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act. Other areas discussed are: custody, visitation rights, decrees, role of the judge, emergency exceptions, residency, and modifications to decrees.

JA–84–0008A
Nov 83
50:42
Family Law, Part II.
A continuation of Part I above.

JA–86–0042A
Mar 86
50:00
Child Support Enforcement, Part I.
Guest Speaker: Mr. Robert E. Keith, Attorney Adviser, Office of Child Support Enforcement. Mr. Keith discusses Federal laws concerning enforcement of child support orders. He gives practical pointers on enforcing child support and explains what assistance is available from the Office of Child Support Enforcement.

JA–86–0042A
Mar 86
38:05
Child Support Enforcement, Part II.
A continuation of Part I.

JA–85–0077A
Mar 85
48:15
Considerations in Drafting Separation and Property Settlement Agreements.
Speaker: Colonel George Kalinski, Senior Instructor, Individual Mobilization Augmentee (IMA), Administrative and Civil Law Division, TJAGSA. Colonel Kalinski, who is a presiding Superior Court Judge in Long Beach, California, discusses practical aspects of negotiating separation and property settlement agreements in divorce cases from the viewpoint of a presiding judge. He lists both courses of action that attorneys should take and those they should avoid when negotiating these agreements, and he notes some of the pitfalls of which attorneys should be aware when negotiating such agreements.

Consumer Law

AR 600–4, Remission or Cancellation of Indebtedness.

AR 600–15, Indebtedness of Military Personnel.

All States Consumer Law Guide.

Legal Assistance Officer's Deskbook and Formbook.

Preventive Law Series.

National Consumer Law Center Reports.

Consumer's Resource Handbook (published by the United States Office of Consumer Affairs).

"Lemon Litigation" Manual (published by The Center for Auto Safety).

Video Series:

JA–87–0013A
Oct 86
41:00
Current Issues in Consumer Affairs, Part I.
Guest Speaker: Philip Telfer, Assistant Attorney General, North Carolina. Mr. Telfer discusses how to identify and how to assist legal assistance clients in resolving the consumer problems which occur most frequently, including: "home" solicitations, telephone solicitations, mail orders, health spas, home improvements/repairs, new home construction, and improper advertising schemes.

JA–87–0013A
Oct 86
51:00
Current Issues in Consumer Affairs, Part II.
Guest Speaker: Thomas Gallagher, President, Central Virginia Better Business Bureau. Mr. Gallagher discusses the role of the Better Business Bureau in identifying and resolving consumer complaints, including the ways in which coordination between the legal assistance office and the local Better Business Bureau can benefit legal assistance clients.

JA-86-0033A
Mar 86
15:32

Consumer Information Series: Applying for Credit.
This videotape, which is oriented toward the credit problems of the young soldier and which is to be shown by legal assistance officers at unit preventive law classes or in legal assistance waiting rooms, explains the basics of how to apply for credit. It describes how to apply for credit, how to maintain good credit, factors for which lenders look in deciding whether or not to extend credit, and certain basic rights provided to consumers when applying for credit or when credit is denied.

JA-83-0012A
Sep 83
11:07

Consumer Information Series: The Cost of Credit.
Speaker: Major William C. Jones, Instructor, Administrative and Civil Law Division, TJAGSA. This videotape is designed to be shown to legal assistance clients either in legal assistance waiting rooms or in unit preventive law classes. The tape discusses in general terms how servicemembers can "comparison shop" for the best credit terms and how the federal Truth in Lending Act is designed to aid them.

JA-86-0069A
Jun 86
17:51

Consumer Information Series: Credit Billing Errors.
Speaker: Major Gerard St. Amand, Senior Instructor, Administrative and Civil Law Division, TJAGSA. This videotape provides a basic explanation of consumer rights under the Fair Credit Billing Act. It describes the dispute resolution procedures soldiers must follow when raising billing errors and the sanctions to which creditors are subject for failing to comply with the law.

JA-84-0061A
Mar 84
48:30

Consumer Information Series: Debt Collection.
Speaker: Major Charles Hemingway, Instructor, Administrative and Civil Law Division, TJAGSA. This videotape examines the major areas in which administrative law attorneys receive inquiries from commanders and staff sections concerning offsets against and deductions from servicemembers' pay. These areas include nonsupport, letters of indebtedness, and the Debt Collection Act of 1982.

JA-87-0016A
Oct 86
47:00

"Lemon" Law, Part I.
Guest Speaker: Mr. Clarence M. Ditlow, Executive Director, Center for Auto Safety. Mr. Ditlow explains both the federal Magnuson-Moss Warranty Act and state "lemon" statutes, discusses to what situations the remedies afforded by these statutes are applicable, and describes the mechanics of seeking relief under these statutes.

JA-87-0016A
Oct 86
39:00

"Lemon" Law, Part II.
A continuation of Part I.

JA-87-0015A
Oct 86
53:00

Bankruptcy, Part I.
Guest Speaker: W. Stephen Scott, Paxon, Smith, Gilliam, and Scott, Charlottesville, Virginia. Mr. Scott provides an overview of Chapters 7 (straight bankruptcy) and 13 (adjustment of debts of an individual with regular income) and discusses the mechanics and implications of petitioning for bankruptcy.

JA-87-0015A
Oct 86
47:00

Bankruptcy, Part II.
A continuation of Part I.

JA-85-0079A
Mar 85
53:04

Bankruptcy, Part I.
Speaker: Major David W. Wagner, Senior Instructor, Administrative and Civil Law Division, TJAGSA. Major Wagner presents a two-hour overview of the federal bankruptcy system and law surrounding bankruptcy. Emphasis is given to the recent changes in the bankruptcy law.

JA-85-0079A
Mar 85
50:36

Bankruptcy, Part II.
A continuation of Part I.

JA-285-4A
Mar 83
52:00

Bankruptcy, Part I.
Guest Speaker: Honorable Thomas M. Moore, U.S. Bankruptcy Judge, Eastern District of North Carolina.

JA-285-5A
Mar 83
53:00

Bankruptcy, Part II.
A continuation of Part I.

Estate Planning

(Including Estate and Gift Taxation, Wills, and SBP)

AR 608-9, The Survivor Benefit Plan.

AR 600-10, The Army Casualty System.

AR 608-2, Servicemen's Group Life Insurance (SGLI)—Veteran's Group Life Insurance (VGLI).

AR 608-25, Retirement Services Program.

AR 638-1 through AR 638-42, Disposition of Personal Effects of Deceased Personnel, Graves Registration, Care and Disposition of Remains.

AR 930-4, Army Emergency Relief—Authorization, Organization, Operations, and Procedures.

DA Pamphlet 600-5, Handbook on Retirement Services.

DA Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members.

DA Pamphlet 608-33, Casualty Assistance Handbook.

DA Pamphlet 360-539C, Survivor Benefit Plan.

Veterans Administration Pamphlet, Federal Benefits for Veterans and Dependents.

SBP Made Easy (prepared by The Retired Officers Association, 201 North Washington Street, Alexandria, VA 22314).

All States Will Guide.

Legal Assistance Officer's Deskbook and Formbook.

Letter, DAJA-LA, Office of The Judge Advocate General, U.S. Army, subject: Will Preparation and Execution, 21 Feb. 1986.

Message: DAJA-LA, 100830Z Feb 87, subject: Review of Will Preparation and Execution.

Video Series:

JA-87-0012A
Oct 86
48:00

Estate Planning and Advanced Will Drafting, Part I.
Guest Speaker: Derek Smith, McGuire, Woods, and Battle, Richmond, Virginia. Mr. Smith discusses the estate planning needs of legal assistance clients and the implications of various estate planning schemes, as well as how to draft wills and trusts in order to effect these schemes.

JA-87-0012A
Oct 86
49:00

Estate Planning and Advanced Will Drafting, Part II.
A continuation of Part I.

JA–84–0047A
Mar 84
47:08

Estate Planning, Part I.
Guest Speaker: Mr. C. Richard Whiston, Principal Deputy General Counsel and Chief of Legal Services Office of the General Counsel, Department of the Army. Mr. Whiston, formerly a partner in the law firm of Mullen, McCaughey, and Henzell, Santa Barbara, California, discusses practical and personal aspects of estate planning for military personnel, particularly for senior officers or enlisted personnel. He discusses the use of Crown Notes, Clifford Trusts, unified credit bypass trusts, and other aspects of estate planning which can be used by legal assistance officers to render a broader range of client services.

JA–84–0047A
Mar 84
41:02

Estate Planning, Part II.
A continuation of Part I.

JA–84–0009A
Nov 83
37:20

Estate Planning, Part I.
Guest Speaker: Clayton D. Burton, Esq., Clearwater, Florida. Mr. Burton discusses estate planning in a broad manner and examines: the cost of dying; general estates; wills; estate taxes; means and methods for reducing death taxes and probate costs; estate assets; trusts; gifts; exclusions; qualified terminal interest property; and methods to reduce taxes, including IRAs, stocks, bonds, personal property leases, and discount brokerage.

JA–84–0009A
Nov 83
55:30

Estate Planning, Part II.
A continuation of Part I.

JA–82–0001A
Dec 81
7:20

An Introduction to Writing Your Will.
This videotape is designed to be shown to legal assistance clients either in legal assistance waiting rooms or in unit preventive law classes. The videotape discusses the need (or lack of a need) for a will, legal terms and concepts used in wills, and duties of those given responsibilities under a will.

JA–84–0085A
Sep 84
21:05

Survivor Benefit Plan.
This videotape is designed to be shown to senior service members nearing retirement. The videotape is suitable for showing both in conjunction with pre-retirement counselling programs sponsored by installation retirement services offices and in legal assistance waiting rooms.

JA–85–0078A
Mar 85
61:23

Drafting Survivors' Trusts.
Guest Speaker: Major Susan McMakin, USAR, is in private practice in Richmond, Virginia, and holds an LL.M. in taxation. Major McMakin discusses the law of trusts and identifies issues which should be considered when drafting trusts designed to provide for care of minor children upon the death of both parents. Major McMakin presents sample trust provisions which may be included in wills.

Tax

(Including Federal Income Taxation and State Taxation)

Federal Income Tax Supplement.

Model Tax Assistance Program.

IRS Publication 17 (annual).

IRS Tax Information Publications, Volumes 1–4.

Prentice Hall or CCH "Master Tax Guide."

Internal Revenue Code and Regulations (Title 26 U.S. Code).

The RIA Complete Analysis of the '86 Tax Reform Act.

Letter, DAJA–LA, Office of The Judge Advocate General, U.S. Army, subject: Army Tax Assistance Program, 18 Oct. 1985.

Letter, DAJA–LA, Office of The Judge Advocate General, U.S. Army, subject: Tax Status of Personnel Who Die as a Result of Terroristic or Military Action Against the U.S., 15 May 1985 (For the text of a letter of understanding regarding this subject, see The Army Lawyer, Aug. 1985, at 43.).

Video Series:

JA–87–0011A
Oct 86
41:00

Tax Reform Act of 1986, Part I.
Guest Speaker: John O. Colvin, Chief Counsel, Senate Finance Committee. Mr. Colvin discusses the background behind passage of the Tax Reform Act of 1986 and the major changes effected by the Act, including respects in which the Act will have particular impact on military members.

JA–87–0011A
Oct 86
58:00

Tax Reform Act of 1986, Part II.
A continuation of Part I.

JA–84–0048A
Mar 84
47:15

State Taxation, Part I.
Speaker: Major Michael E. Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Major Schneider discusses the scope of coverage, the types of property protected, and other aspects of the provision of the SSCRA which precludes the multiple taxation of service members by various states. Major Schneider also discusses recent case law developments in this area.

JA–84–0048A
Mar 84
44:00

State Taxation, Part II.
A continuation of Part I.

Soldiers' and Sailors' Civil Relief Act

DA Pam 27–166, Soldiers' and Sailors' Civil Relief Act.

Legal Assistance Officer's Deskbook and Formbook.

Reinold, *Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation—Where's the Relief?*, The Army Lawyer, June 1986, at 1.

Chandler, *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 Mil. L. Rev. 169 (1983).

Video Series:

JA–82–0003A
Aug 82
6:45

An Introduction to the Soldiers' and Sailors' Civil Relief Act.
This videotape is designed to be shown to legal assistance clients either in legal assistance waiting rooms or in unit preventive law classes. The videotape discusses the rights provided by the Act to both servicemembers and their family members.

JA–84–0048A
Mar 84
47:15

State Taxation, Part I.
Speaker: Major Michael E. Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Major Schneider discusses the scope of coverage, the types of property protected, and other aspects of the provision of the SSCRA which preclude the multiple taxation of service members by various states. Major Schneider also discusses recent case law developments in this area.

JA–84–0048A *State Taxation, Part II.*
Mar 84 A continuation of Part I.
44:00

Powers of Attorney

Legal Assistance Officer's Deskbook and Formbook.

All States Notarial Guide (1987).

Video Series:

JA–82–0002A *An Introduction to Powers of Attorney.*
June 82 This videotape is designed to be shown to legal assistance clients either in legal assistance waiting rooms or in unit preventive law classes. The videotape discusses the two basic types of powers of attorney and the dangers and benefits inherent in each.
7:47

Immigration and Naturalization

AR 608–3, Naturalization and Citizenship of Military Personnel and Dependents.

AR 600–290, Passports and Visas.

Immigration and Nationality Act (codified as amended in title 8, U.S. Code).

8 C.F.R. Chapter 1 (INS regulations).

22 C.F.R. Parts. 41 and 42 (State Department regulations on issuing visas).

Guide to Immigration Benefits, M–210, Immigration and Naturalization Service (published by the U.S. Government Printing Office).

Hancock, *Legal Assistance and the 1986 Amendments to the Immigration, Nationality, and Citizenship Law,* The Army Lawyer, Aug. 1987, at 11.

Video Series:

JA–86–0005A *An Overview of Immigration and Naturalization Law, Part I.*
Oct 85 Guest Speaker: Mr. Richard "Mike" Miller, Deputy Assistant-Commissioner, Adjudication, U.S. Immigration & Naturalization Service. Mr. Miller discusses various provisions of the Immigration and Nationality Act, including exclusion and deportation of aliens, visa number allocation, relative and finance(e) visa petitions, orphan petitions, adjustment of status, adoptive children derivative citizenship, and regular naturalization.
54:41

JA–86–0005A *An Overview of Immigration and Naturalization Law, Part II.*
Oct 85 A continuation of Part I.
40:41

Interviewing and Counseling

Volume I, Chapter 10, Legal Assistance Officer's Deskbook and Formbook (1987).

Video Series:

JA–279–4A *Interviewing and Counseling, Part I.*
Nov 81 Guest Speaker: Professor Richard B. Tyler of the University of Missouri discusses techniques of interviewing clients and application of those techniques to the military legal assistance setting.
48:00

JA–279–5A *Interviewing and Counseling, Part II.*
Nov 81 A continuation of Part I.
46:00

JA–272–1A *Interviewing and Counseling Clients, Part I.*
Jan 81 Guest Speaker: Morton Spero, Esq., Petersburg, Virginia.
52:00

JA–272–2A *Interviewing and Counseling Clients, Part II.*
Jan 81 A continuation of Part I.
36:00

Alternative Dispute Resolution

Letter, DAJA–ZA, Office of The Judge Advocate General, U.S. Army, subject: Alternative Disputes Resolution, 8 May 1987, *reprinted in* The Army Lawyer, July 1987, at 3.

Video Series:

JA–86–0043A *Alternative Dispute Resolution.*
Mar 86 Guest Speaker: Mr. Charles A. Bethel, Director of Accord Associates. Mr. Bethel discusses Alternative Dispute Resolution, giving the student an overview of the needs for and development of alternative dispute resolution systems. Mr. Bethel discusses the types of cases for which resolution through mediation is appropriate, focusing his remarks on the mediation of family disputes, and explains the roles attorneys play in the mediation system.
52:38

Consumer Law Notes

Lock in Your Loan

Fluctuating interest rates on mortgage loans exacerbate the importance of locking in a favorable rate. For example, an interest rate that increases from 9.25 to 10.6% would cause the monthly fixed-rate mortgage payment on a $100,000 house to increase from $822 to $922. Unfortunately, some borrowers who believe they have locked in a favorable rate later discover that the lender can increase the rate pursuant to escape clauses buried in fine print or because an oral lock-in agreement was never reduced to writing. In addition, because most lock-ins are limited to a specific time period such as 60 or 90 days, some lenders avoid lock-ins by dragging out the approval process.

State attorneys general have recently become more aggressive in their efforts to require lenders to comply with lock-in agreements, initiating suits against offenders and sponsoring legislation that mandates additional disclosures. Legal assistance officers should coordinate with the attorney general's office to seek judicial enforcement of lock-in agreements when appropriate. Major Hayn.

The Cost of Credit Reports

Have you seen the commercial in which Peter Graves asks whether you know what your credit report says about you? The commercial advertises a package of services provided by TRW, one of America's largest credit reporting agencies (Credit Bureau Inc. and Trans Union Credit Information Co. claim to have credit information on more individuals than TRW). The package, called the "TRW Credentials" program, costs $35 per year and provides access to your credit report, the identity of those who request your credit report, protection against lost or stolen credit cards, and a credit/loan application that can be sent electronically to any creditor to speed loan processing. Sound good? Don't send in your money yet.

With respect to the credit/loan application, the July 1987 issue of *Consumer Reports* reveals that TRW was asked what lenders would accept the TRW form as a substitute for their own form and TRW furnished the names of four companies. When a *Consumer Reports* staffer phoned these companies, each informed the staffer that applicants would be required to complete the company's form as well as the TRW form in order to apply for a loan.

Access to one's credit report is another nice feature of the package. Unfortunately for those who have paid their $35, which TRW claims 300,000 people have, 15 U.S.C. § 1681g (a provision of the Federal Fair Credit Reporting Act) provides that consumer reporting agencies must disclose to any requesting consumer the nature and substance of the information in its files on the consumer, the sources of the information, and the recipients of reports on the consumer furnished within the past two years for employment purposes and within the past six months for other purposes.

The last feature of the program is protection against lost or stolen credit cards. While this protection is important, it is provided by the Federal Truth in Lending Act (*see* 15 U.S.C § 1643(a)(1)), pursuant to which cardholders are liable for the unauthorized use of credit cards only until they notify the card issuer of the loss, and then liability is limited to $50.00. Notwithstanding the advertised protection, TRW will not reimburse members for the $50.00 loss if it is incurred.

While consumers do not benefit from the advertised aspects of the program, there is one significant result of membership that is unadvertised: the consumer can expect to receive direct mail solicitations from companies that purchase the membership list from TRW unless the consumer requests otherwise, as the credit/loan applications contain personal and financial information of great interest to companies seeking "hot prospects." Prospective members are advised to consider all the consequences of "TRW Credentials" membership before signing on the dotted line. Major Hayn.

Restrictions on Credit Services Organizations

In an effort to protect consumers from those who offer to obtain credit on behalf of consumers or to improve the consumer's credit rating, Oklahoma has recently enacted the Credit Services Organization Act (Okla. Stat. tit. 24, § 131, effective April 20, 1987). Under the new law, such organizations (which are defined as *not* including consumer reporting agencies as defined in the Fair Credit Reporting Act, 15 U.S.C. § 1681, attorneys when acting within the scope of practice as an attorney, and certain other organizations) must provide an information statement that describes the terms of the agreement, the services to be performed, the total amount the consumer will be required to pay, the consumer's right to review any credit reports maintained on that consumer by any consumer reporting agency, the consumer's right to dispute the completeness or accuracy of any item contained in the consumer's credit report, any other consumer protections.

In addition, the statute requires that such organizations obtain surety bonds of $10,000, establish trust accounts at federally insured Oklahoma banks or savings and loan associations, and take other measures that protect consumers. Consumers also have the right to cancel the agreement within five days of the transaction and are prohibited from waiving any of the rights provided by the Act. The remedies provided under the act include actual damages (in no event less than the amount paid by the buyer to the credit services organization), punitive damages, reasonable attorney's fees, costs, and any remedies available pursuant to other laws. Major Hayn.

Restrictions on the Use of Recorded Messages

Minnesota is part of a growing trend toward enactment of state laws prohibiting collection agencies and collectors from using recorded messages without consumer consent. Pursuant to Minn. Stat. § 332.37, effective August 1, 1987,

> No collection agency or collectors shall . . . (13) communicate with a debtor by use of a recorded message utilizing an automatic dialing announcing device unless the recorded message is immediately preceded by a live operator who discloses prior to the message the name of the collection agency and the fact the message intends to solicit payment and the operator obtains the consent of the debtor to hearing the message.

The new statute also provides that the term "collector" includes all those who act under the authority of or on behalf of collection agencies. Legal assistance attorneys should expect to see more states adopting such protective legislation and should mention any statutory changes in preventive law classes and weekly bulletins. Major Hayn.

If It Sounds Too Good to Be True . . .

How many letters have you received notifying you that you were a "finalist," had won a "valuable prize," or were "selected" to hear a sales presentation and *then* receive a "free prize." Did it sound too good to be true? Then it probably was. This column has previously included several examples of consumer scams pursuant to which the unwary paid high prices, both figuratively and literally, for items that bore little resemblance to those advertised or promised. California is currently dealing with one more.

The California Attorney General has charged the Harmony Ridge Resort with using false and deceptive advertising to entice consumers to travel long distances to hear campground sales presentations. Harmony Ridge had allegedly used direct-mail solicitations to consumers throughout Northern California implying that the recipients were "finalists" in a competition and that they had been "selected" to receive "valuable free prizes" if they would travel to Nevada City (a round trip of six to eight hours from the Bay area) to hear a sales presentation.

The attorney general's investigation revealed that there was no competition and that everyone on the mailing list received the same solicitation identifying them as a "selected finalist." The investigation also revealed that the "valuable free prizes" were neither valuable nor free. For example, a "45-inch Grand-Screen Projector TV System" was actually a plastic lens for projecting the enlarged image of a small TV on the wall; a "1986 color television" was a cheap, five-inch, battery-operated model that used up its batteries in two hours, required an AC adaptor for which consumers were required to pay $35, and was only delivered to consumers after they paid a $39.95 delivery fee; and a gold necklace "worth $79" that was appraised at no more than $4 retail.

Consumers who receive solicitations such as this should investigate the firm and its offer as thoroughly as possible before making a financial commitment. Often, a phone call to the Better Business Bureau located nearest the seller will confirm the consumer's suspicions that responding to the solicitation would not be wise. For example, a letter from Marketing Survey Associates in San Antonio, Texas, was recently received by a TJAGSA staff member. The letter promised the recipient a free "new 10 foot Electra sport fishing boat and outboard motor."

Because an article had recently appeared in the *Consumer Protection Report* that described an advertised "freshwater sport fishing boat" with an "inboard motor" as "simply a rubber raft," the San Antonio Better Business Bureau was contacted. While Better Business Bureaus often decline to reveal how many complaints have been received with respect to a given firm, the San Antonio Bureau advised that "the list of complaints [with respect to Marketing Survey Associates was] quite long." An alert consumer and an efficient Better Business Bureau make a dangerous team for those attempting to perpetrate consumer scams. Legal assistance officers can do a great deal to ensure that this team functions effectively. Major Hayn.

Long Distance Telephone Service

Deceptive ploys of some networking corporations can be very costly to taxpayers. The Matrix Interconnect Network Corporation (MINC) has been charged with misrepresentation of its services and employing a pyramid scheme. According to the Attorney General in Illinois, this scheme has cost taxpayers roughly $2 million. The company apparently assured prospective customers of unlimited long distance service at reduced rates through Illinois Bell Company, when actually they did not have a contract with Illinois Bell. In addition to this fraudulent misrepresentation, the company was accused of perpetuating an illegal pyramid scheme in which all marketing supervisors could decide to have their subscription renewal fee automatically withheld from the commission checks they earned by recruiting other subscribers.

In a suit filed against MINC, the Illinois Attorney General sought severe remedies: injunction to stop the company from participating in such deceptive contracts; freeze on all the company's assets; rescission of all deceptive contracts; and payment of civil penalties amounting to $150,000 per violation. Legal assistance officers are reminded to remain alert to fraudulent misrepresentations such as these and to seek the assistance of the state attorney general for enforcement. Miss Lynn Blasingame, Legal Intern.

Restrictions on Defenses to Student Loan Collection

As noted previously in this column, there are several defenses to student loan collection that protect victims of the unfair and deceptive acts of lending institutions. Recently, however, Congress has put substantial limitations on these defenses by amending the federal education loan laws. For example, Congress has eliminated the defense that a debtor was underage at the time of signing for the loan. Although states have a minimum age below which one does not have the capacity to be a party to a contract, rendering contracts signed by minors unenforceable, this defense has been eliminated for those contracting for federal education loans.

Also, failure to make the necessary disclosures under the Truth in Lending Act could be used as a defense against loan collection prior to the recent amendment. As of October 15, 1982, however, debtors cannot use Truth in Lending Act violations as a defense to collection of federally insured student loans. This restriction on loan collection defenses works retroactively, affecting all those who signed for federal loans, including those made prior to enactment.

There also have been restrictions placed on dischargeability of loans pursuant to bankruptcy petitions. Under the new law, a federal education loan is dischargeable only if the debtor is able to show that repayment of the loan would impose undue hardship upon him or his dependents, or that the loans became due more than five years before the petition for bankruptcy was filed. Even more stringent restrictions have been placed on defenses to collection of health education loans. Absent a showing of unconscionable contract terms, no bankruptcy discharge can be granted for Health Education Assistance Loans (HEAL) within five years after the date repayment was scheduled to begin. These substantial limitations on loan collection defenses require a great deal of thought on the part of those seeking loans, and a great deal of caution on the part of those contemplating default on such loans. Miss Lynn Blasingame, Legal Intern.

Rent-to-Own Plans

This column has previously noted that leasing automobiles may not always be in the consumers' best interests. Payment plans that allow the consumer to lease an automobile for a specified time period, gaining ownership after making the requisite number of payments, initially appear ideal for low-income consumers. Often, however, purchasers ultimately buy the car for almost double the market purchase price. This problem is not confined to the automobile industry; it is a major problem encountered in renting many products, particularly furniture and appliances.

These payment plans are known as "rent-to-own" agreements. This controversial subject has recently received a great deal of publicity due to the increasing number of states enacting laws to protect the consumer against unfair rental practices. Iowa and Indiana have joined a trend toward state legislation requiring certain disclosures to consumers regarding the actual market price of the products they are renting pursuant to rent-to-own agreements. Connecticut has also recognized a need to protect consumers from such practices. In a recent Connecticut class action suit against a rental company, it was alleged that the company, disguising credit sales as lease transactions, sold furniture for a price well above its retail value.

The National Social Science and Law Center conducted a study to develop a profile of those who became victims of rent-to-own plans between 1980 and 1983. The study consisted of two parts: personal information about the customer such as residence, income, and credit information; and the actual terms of the agreement between the company and these customers. The portion of the study dealing with personal data revealed very interesting statistics. Most of those victimized by rent-to-own plans were low income consumers, under the age of forty, residing in rental housing units, non-white, living in areas where a majority of

people had not completed high school, and living in households with income levels well below the area average.

The second part of the study also revealed interesting information. Although the actual terms of the rental agreements varied a great deal, most required that the consumers make payments for over a year before being eligible to purchase merchandise. Most purchasers paid approximately $200 to the rental company and did not ultimately purchase the item. Several of the customers paid in excess of $1,000 to the company, and many paid interest rates in excess of 100 percent. Statistics such as these highlight the importance of thoroughly investigating convenient rent-to-own agreements before agreeing to unfavorable terms. Miss Lynn Blasingame, Legal Intern.

Fraudulent Due-on-Sale Clauses

In addition to the more typical consumer scams to which this column usually alerts legal assistance officers, you should additionally watch for deceptive and unfair bank practices. The Indiana Court of Appeals has recently held that a bank fraudulently misrepresented the terms of a contractual agreement for a loan, and awarded punitive damages to the plaintiffs. In so holding, the court found that the bank had made fraudulent misrepresentations by negotiating specific terms of the loan contract with the borrowers and later adding a "due-on-sale" clause without the borrowers' knowledge. This clause provided for loan-repayment upon any sale or transfer of the land. When the borrowers contracted to sell their property, the bank tried to enforce the clause by giving them a choice between repaying the loan or renegotiating the interest rate. The Indiana court found that this activity met the standards of fraud: material misrepresentation; knowledge of falsity; and reliance to the borrower's detriment. The court's decision to award punitive damages may reflect its desire to deter such practices and should encourage aggressive pursuit of such offenders by legal assistance attorneys. Miss Lynn Blasingame, Legal Intern.

Family Law Notes

The Demise of Grant v. Grant

The list of states that divide military retired pay as marital property has again expanded, and advice to soldiers that they should get a divorce in Kansas is no longer valid. Effective July 1, 1987, Kan. Stat. Ann. § 23–201(b) was amended to read as follows.

> All property owned by married persons, *including the present value of any vested or unvested military retirement pay* . . . shall become marital property at the time of commencement . . . of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court. . . . (italicized portion is new).

The sponsor of the bill that added the new language commented that "there is a need for the [change] since the case of *Grant v. Grant*," 9 Kan. App. 2d 671, 685 P.2d 327 (1984). While this remark is a little cryptic, the intent clearly seems to be to overrule *Grant*, which had held that military retired pay was not "property" within the meaning of state law. Let the battle over the constitutionality of retroactive application of this new law begin (*i.e.*, the division of military retirement benefits "accrued" prior to July 1, 1987), and may the best spouse win. Major Guilford.

International Child Support Obligations

Soldiers living abroad are not the only victims hit hard by the declining value of the dollar. Consider the predicament of a soldier obligated to support a child living in a foreign country when the amount of support is stated in the foreign currency. For example, a support order requiring payment of DM400 per month at an exchange rate of 3 Marks to the dollar would cost the obligor $133 monthly. As the exchange rate plummets to 1.8:1 the monthly cost of the obligation increases to $222.

Is any relief for the obligor possible? Ronald L. Brown, the editor of *Fair$hare*, suggests in a recent note in that publication that courts are most concerned about the spending power of support recipients; resulting burdens on the obligor usually have little effect in persuading judges to reduce support obligations because of currency fluctuations. In support of this conclusion, he discussed an unreported case involving an obligor living in England who challenged a support order requiring payment of $448 per month to support a child living in the U.S. The obligor argued that the court's use of the then-existent exchange rate in establishing a fixed dollar amount was improper because it would result in a fluctuation in his support obligation. The court rejected his contention, however, and upheld the use of a fixed dollar amount despite the likelihood of future exchange rate changes.

More to the point, there is the case of *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431 (D.C. App. 1972), wherein a child support obligee living in Poland challenged a U.S. court order requiring a U.S. resident to pay a fixed amount of Polish currency. It should be noted, however, that in this case the court presumed the obligor would at some point have to depart the U.S. due to the type of visa he held.

The bottom line seems to be that, in most cases, currency exchange rate fluctuations that adversely affect support obligors are not viewed as a sufficient basis for reducing the amount of support. Major Guilford.

Another "Gross" Case: Grier v. Grier *Revisited*

The Family Law Notes in the May issue of *The Army Lawyer*, at 56, discussed whether state courts can divide gross military retired pay, as opposed to being restricted by the Uniformed Services Former Spouses' Protection Act (the Act) to dividing disposable retired pay. The only reported case we were aware of that had ruled in favor of the soldier on this issue was *Grier v. Grier*, out of a Texas Court of Appeals.

As pointed out in a letter from Colonel John Compere, USAR, this aspect of *Grier* was reversed in a rehearing by the Supreme Court of Texas. *See Grier v. Grier*, Case No. C–5736 (May 6, 1987). The Texas court noted that *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 107 S. Ct. 659 (1987), and *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. App. 1984), had come to the same conclusion.

In holding that state judges may apportion a soldier's gross retired pay, no merely his or her disposable retired

pay, the court must justify ignoring the unambiguous language of a federal statute. Given this burden, the *Grier* opinion is not persuasive. The difficulty starts with the fact that the court purports to ask the wrong question. Properly stated, the issue is, "If a spouse has a 37.45% community interest in the soldier's military retired pay, may a state court award 37.45% of the gross retired pay, or is it limited by the Act to awarding 37.45% of 'disposable retired pay?' " The court did indeed address this very question, but it distorted the matter by erroneously casting the issue as whether the Act "prohibit[s] state courts from apportioning more than 50% of the service spouse's 'disposable pay.' " If this were the issue, the answer would be simple, and it would be "No." The Act does not limit the amount of disposable retired pay a court may award a spouse. *See* 10 U.S.C. § 1408(c)(1); *cf.* 10 U.S.C. § 1408(d), (e)(1).

The court's erroneous phrasing of the issue demonstrates either a surprising imprecision in language or a basic confusion about how the parts of the Act interrelate. Section 1408(c)(1) should be controlling. The court, however, muddied the waters by discussion sections 1408(d) and 1408(e) as well. The result is confusion and an erroneous decision.

Recall that the Act empowers states to "treat *disposable retired or retainer pay* . . . as [marital] property." 10 U.S.C. § 1408(c)(1) (emphasis supplied). Congress defined "disposable retired pay" in section 1408(a)(4) and then proceeded to employ the term throughout sections 1408(c), 1408(d), and 1408(e). The upshot of the Texas opinion, however, is that Congress meant its definition to apply in sections 1408(d) and 1408(e)(1) but not in section 1408(c)(1). Ignoring clear statutory language, the court effectively redefined "disposable retired pay" to mean *gross* retired pay in section 1408(c)(1) while leaving the congressional definition intact for sections 1408(d) and 1408(e).

Besides the apparent illogic of this approach, there are at least four other problems with the opinion. First, it fails to recognize that section 1408(c)(1) stands alone as the Act's "anti-*McCarty*" weapon. Section 1408(d) has a merely ancillary purpose, that of providing expeditious enforcement of a former spouse's right to a portion of retired pay, limited by the 50% ceiling created in section 1408(e)(1). Through section 1408(c)(1), Congress said, "States, do what you want with disposable military retired pay in divorce proceedings," while in section 1408(d) it went on to say, "And, we will make it easy for the former spouse to collect her share of the disposable retired pay you award by directing the military finance center to pay the money directly to her." The statutory language provides no support for the conclusion that "disposable retired pay" means one thing for sections 1408(d) and 1408(e)(1) while having entirely the opposite meaning in section 1408(c)(1).

Moreover, the court's cavalier treatment of statutory language substantially undercuts its reasoning. For example, it states that disposable retired pay is gross pay "less certain . . . deductions . . . which may be elected at the option of the service spouse." As defined by section 1408(a)(4), however, disposable retired pay is calculated by deducting from gross pay such items as local, state, and federal tax withholdings, forfeitures, fines, and debts owed the government. None of these reductions in retired pay are "elected at the option of the service spouse."

It is true that the retiree does have the power to control some deductions. The most significant of these are Survivor Benefit Plan premiums (the benefit of which usually inures to the former spouse) and a waiver of a portion of longevity retired pay to receive Veterans' Administration disability pay instead (note, however, that some courts consider the amount of such disability pay to be marital property; this moots issues arising from its deduction in calculating "disposable retired pay." *See, e.g., Campbell v. Campbell*, 474 So. 2d 1339 (La. Ct. App. 1984); *In re Stenquist*, 145 Cal. App. 3d 424, 193 Cal. Rptr. 590 (1983).

Thus it is both inaccurate and misleading to suggest that manipulation of disposable retired pay is entirely within the retiree's power or that it always visits an injustice upon the former spouse.

The court's reasoning is faulty in other respects as well. It quotes section 1408(c)(1) and then observes, "This section . . . is not concerned with limiting the amount of retired pay available for division by state courts, but is instead designed to limit the amount of retired pay which can be garnished and paid out . . . for child support, alimony, property division, and the like." The statement is again replete with error. To be brief, it may be pointed out that section 1408(d) creates the "direct payment" provisions the court speaks of, while garnishment provisions are contained in section 1408(e). Not only does the court fail to distinguish between the crucial section 1408(c) and other provisions of the Act, but it also fails to understand that the broad direct payment provisions in section 1408(d) are completely different from the limited garnishment power in section 1408(e).

The court finds comfort in the fact that section 1408 bears the statutory title "Payment of Retired Retainer Pay in Compliance With Court Orders." In some way the court finds here a license to ignore the plain language of the statute. It is almost as if the court believes that this title means that *any* court order is valid, whether or not it makes an attempt to comply with Congress' directives. Such an approach, however, is patently invalid.

In the final analysis, the main problem with the opinion is that it seeks to "interpret" perfectly clear language. Section 1408(c)(1) says, "a court may treat disposable retired or retainer pay . . . as [marital or community] property." There is neither patent nor latent ambiguity in the section itself nor in its harmony with the remainder of the Act. A basic precept of statutory interpretation is that there is no need to resort to legislative history, much less to an analysis of a statutory title, when the wording used by the legislature admits no question. Congress certainly *could* have said that states may treat "[all] retired or retainer pay as marital property" and left the term "disposable retired pay" to be used elsewhere in the Act, but it did not. This should control state court actions.

The gross versus disposable issue can involve a fair amount of money, and astute counsel representing soldiers in states that have not yet resolved the question will press for a literal reading of the Act. The weight of Congress' formulation is on their side, but the weight of authority runs against them. This note has explored some of the weaknesses in the argument for division of gross pay. Major Guilford.

Claims Report

United States Army Claims Service

Whose Claim Is It?

Joseph H. Rouse
Attorney-Advisor, Tort Claims Division

Normally, claims for loss of or damage to household goods during shipment, which are cognizable under chapter 11, Army Regulation 27–20,[1] are processed by the claims office nearest the duty station or residence of the soldier filing the claim. Tort claims are usually processed by the claims office with immediate investigative responsibility over the place of the occurrence.

Telling a prospective claimant who has come to his or her nearest claims office to file a claim at another claims office is improper. Absent extraordinary circumstances, a claim should be received at the office where the prospective claimant makes an inquiry. A soldier on temporary duty (TDY) or a visitor from another state or country should not be advised to file upon his or her return home.

If the inquiry concerns a claim which, on its face, does not appear to be incident to service or the result of an unusual occurrence, as defined by chapter 11, AR 27–20 or guidelines published pursuant thereto, the claimant should be furnished a Standard Form 95[2] and not DA Form 1842.[3] The reasons the claimant considers that the United States is liable should be sufficiently set forth thereon to permit investigation.

There is authority[4] to transfer a claim to another claims office for all or part of the processing provided there is agreement to do so, or absent agreement, upon the direction of the Commander, U.S. Army Claims Service (USARCS). Claims that can be paid under the provisions of chapter 11 should be paid under that chapter and not transferred, except with permission of the Personnel Claims and Recovery Division, USARCS, or a Command Claims Service.[5] Claims that are not payable under chapter 11 should not be disapproved without consideration of other chapters under which they may be cognizable and payable. For claims that are not payable under chapter 11, normally the claim should be transferred to the office in whose geographic jurisdiction the occurrence arose, even where the claimant resides in the vicinity of the office transferring the claim. If personal contact with the claimant is necessary to obtain testimony or carry out negotiations, the office nearest the claimant can furnish such assistance upon request.

The foregoing procedure is important to ensure that: only one claim per claimant is paid for a particular incident: the claim is considered under all chapters of AR 27–20 under which it is cognizable, *e.g.*, decisions concerning what is incident to service or an unusual occurrence under chapter 11 are best made at the office in whose area the incident occurred as are decisions as to whether the same claim is payable under chapters 3 or 4; the same office processes all claims arising out of a particular incident and thereby applies the same local policies; and the total amount of claims arising out of one incident does not exceed the monetary jurisdictions of a particular office or of the Army itself and, where necessary, is brought to the attention of the Commander, USARCS.

The importance of the above guidelines will be highlighted by the provisions of the revised AR 27–20 in that the area claims office (ACO), that is, the claims office with responsibility for the investigation of claims arising in a specific geographic area (CONUS) or command (OCONUS), will have authority for the first time to take final action on a tort claim or claims arising out of a single incident, the stated amount of such claims being within the monetary jurisdiction of the ACO. Claims transferred under the above guidelines from a claims office located in another area should be transferred to an ACO and not to a claims processing office. The ACO can decide whether to further transfer the claim to a claims processing office in its area, if indicated. [NOTE: claims for civil works activities are the responsibility of the various districts of the Corps of Engineers].

The following examples will help illustrate these policies:

a. A unit from Fort Stewart debarks at San Diego and proceeds by military convoy to Fort Irwin. A collision between a military vehicle and a civilian vehicle occurs in Fort Irwin's area of responsibility. The civilian vehicle is driven by a resident of Northern California whose San Francisco attorney files a claim for serious personal injuries, *e.g.*, quadriparesis, in the amount of $1 million, at the Presidio of San Francisco. The claim should be transferred to Fort Irwin for processing and a copy sent to USARCS. Fort Stewart should be requested to furnish investigative assistance.

b. A Louisville, Kentucky, Reserve unit's vehicle runs into an office building in eastern Tennessee while enroute to Fort Bragg for two weeks' annual training. A claim is filed for damage to the building with the Reserve unit, but the unit does not respond. A congressional inquiry made to the

[1] Dep't of Army, Reg. No. 27–20, Legal Services—Claims, chap. 11 (10 July 1987) [hereinafter AR 27–10].

[2] Standard Form No. 95, Claim for Damage, Injury, or Death (June 1978).

[3] Dep't of Army, Form No. 1842, Claim for Personal Property Against the United States (1 Mar. 1979).

[4] AR 27–20, para. 2–6*a*.

[5] AR 27–20, para. 11–9*c*.

Pentagon is referred to Fort Campbell, Kentucky. The claimant should be contacted by Fort Campbell and directed to the correct ACO, which is Fort McPherson.

c. Two soldiers on TDY from different posts are mugged while enroute to a training course near their motel. They go to a nearby Army post as they lost their plane tickets in the mugging. They also inquire where they may file a claim for their wallets and their contents. As the post nearest the place of the incident, that claims office should determine whether the claims arose from an unusual occurrence, and both claims should be accepted by the post for action. They should *not* be told to file their claims at their home stations.

Where other uniformed services claims offices are involved, the same general guidelines should apply, keeping in mind that a claim under chapter 11 is payable by the Army only when filed by a member of the Army or by a civilian employee of the Department of Defense. If a claim by a member of another uniformed service is payable under chapter 3 or 4 and also may be payable under the chapter 11 equivalent of the other uniformed service, the claim should be referred to that service for a determination as to whether it is so payable and, if not, for return to the Army for consideration. Finally, mutual assistance between uniformed services claims offices in the investigation and processing of claims is a longstanding policy and should be followed.

Claims Input to Commanders

Robert A. Frezza
Attorney-Advisor, Personnel Claims & Recovery Division

Risk management is an important part of an installation's claims program. While limiting the Army's exposure is essential to any tort claims program, it also plays a vital role in an office's personnel claims program.

Staff judge advocates are reminded that their claims judge advocates should review local regulations, directives, standing operating procedures (SOPs), and policies to provide commanders with the best professional guidance. Commanders should view their claims judge advocates not merely as claims administrators, but as staff officers who assess the impact of policies. Preventive law is not confined to legal assistance. Claims judge advocates, by taking an interest in the problems and the overall operation of units on the installation, can effectively minimize or prevent losses from occurring.

The following are areas of particular concern:

Installation Parking Policies. Vehicle theft and vandalism ranks second only to shipment claims in number of claims filed. Bicycles and motorcycles are particularly vulnerable. Policies that limit the number of fixed or immovable objects to which bikes and motorcycles can be secured should be reviewed. Where bike racks are not installed, directives that prohibit securing bicycles to trees and similar objects present an unacceptably high level of risk. Recreational vehicle, resale vehicle, or non-operational vehicle storage lots are also a focus for concern, and thought should be given to declaring these areas high-risk areas where the command cannot provide appropriate security.

Services Contracts. The Act that provides for the payment of personnel claims, 31 U.S.C. § 3721 (1982), is not intended to provide a remedy for soldiers' losses that are caused by the negligence of government contractors. Laundry, spray-painting, and quarters renovation contracts are particularly prone to generate problems. The only way to assure adequate redress for soldiers whose property is damaged by the contractor's negligence is to assure that the contract has an adequate claims clause that provides for the contracting officer to offset the contractor, and assure that the contractor is adequately insured for this risk.

Physical Security. In many units, barracks theft is rife and represents an intolerable aspect of service life. Proper SOPs reduce the risk considerably; combined with the installation of security devices, they can almost eliminate the problem. Directives that disseminate information about Article 139, UCMJ, and assure efficient handling of Article 139 complaints assume particular importance in this regard.

Accounting for Personal Property. Unit commanders of soldiers who are absent on emergency leave, hospitalized, or jailed, are responsible for properly inventorying and safeguarding that soldier's property. In some commands, commanders almost universally fail to do so, generating a veritable flood of claims, both valid and spurious.

Effective claims payment is not a panacea. Reviewing policies that affect claims is an important and necessary step to an effective claims prevention program that, combined with a strong publicity program, can affect the flow of claims funds in an era of tight fiscal constraints, as well as the overall quality of life on the installation. This can only occur if the staff judge advocate and claims judge advocate are activists in all aspects of risk management.

Affirmative Claims Note

Congress has passed new legislation that *may* provide a secondary means of medical care recovery in limited situations. The new law is codified at 10 U.S.C. § 1095. This statute allows Department of Defense (DOD) hospitals to collect the reasonable cost of *inpatient* care provided to *dependents* and *retirees* when such individuals have insurance, medical service, or a health plan. The statute does not concern itself as to why the care was rendered. This may be important in Medical Care Recovery Act (MCRA) situations where the tortfeasor is uninsured or underinsured. The statute is limiting in that it excludes active duty personnel and covers only inpatient treatment. It does, however, specifically state that insurance companies or health providers may not exclude from coverage the cost for care provided in a DOD treatment facility. One final limiting factor is that the insurance, medical service, or health plan must be entered into, amended, or reviewed on or after 30 September 1986. Recovery judge advocates are advised to become familiar with this new statute and consider its use in specific cases when making an MCRA assertion. Coordination with military hospitals to avoid "double" assertions will be necessary.

Management Notes

Special Mail Services

By memorandum dated 1 June 1987, subject: Use of Special Mail Services, The Judge Advocate General has granted an exception under paragraph 4–4, AR 340–3, to authorize use of certified mail with return receipt for letters denying or making final offers in claims under the Federal Tort Claims Act and the Military Claims Act. USARCS will furnish each claims settlement and approving authority with a copy of this memorandum, which reconciles official mail cost controls with long-standing practice among claims offices.

Mailings to Claims Offices

As a cost-saving measure, USARCS has been in the practice of including letters and other communications intended for all claims settlement and approving authorities with the monthly mailing of the automatic data processing (ADP) report. From time to time, various offices advise that they have not received such items. While some of these misconnections might arise from error or oversight at USARCS, despite its best efforts, it is equally possible that the monthly ADP mailing gets only perfunctory notice in certain offices, with the result that items enclosed with that report remain undiscovered. For its part, USARCS intends to continue its batch mailings to CONUS offices, even after the ADP printout is discontinued as claims automation comes on line. Claims personnel in CONUS are advised to review all USARCS mailings with care for taskers or important information that might be included and which should be brought to the attention of the claims judge advocate and/or the staff judge advocate. For overseas claims offices, USARCS intends to dispatch information and action documents (except for changes to the Claims Manual) to the overseas command claims services and to rely on the latter to effect appropriate distribution within the theater. As long as it remains in use, the ADP printout will continue to be mailed directly to each claims office; the same applies to Claims Manual Changes.

Claims Manual Change 5

Change 5 to the Claims Manual was released on 23 June 1987 and effects the following changes:

Chapter 1, Bulletins 3, 16, 70 and 77 updated. Bulletins 94, 95, 96, 97, 98 and 99 added.

Chapter 2, Bulletins 6 and 7 added.

Chapter 4, Bulletin 3 added.

Chapter 7, Bulletin 3 added.

USARCS is mailing copies of Change 5 to all Claims Manual holders of record.

Personnel Claims Note

This note is designated to be published in local command information publications as part of a command preventive law program. This note should be adapted to include local policies.

Thefts of personal property are more than an annoyance. They can be prevented. Although many units have specific guidelines on securing valuables, the following are general guidelines for theft prevention:

Money. One hundred dollars in cash is a reasonable amount to have on hand. Although each claim for the theft of money will be examined on its individual merits, a claims for the theft of money will not be approved for an amount in excess of $100 except in extraordinary circumstances. The best place for money is in a bank, or in an unit or motel safe. Even small amounts of cash must be properly safeguarded; normally it should be kept on you or in a locked container that cannot be easily removed, inside a locked room.

Small, easily pilferable items. Small, valuable items, especially jewelry, must also be secured in a locked container that cannot easily be moved, inside a locked room. Do not keep jewelry of extraordinary value in a barracks or motel room; store it in a safe.

Vehicles. The passenger compartment of a vehicle is not a proper place to keep personal property except for things like maps and seat cushions. Items may be left in the trunk of a vehicle for a short period of time, but a trunk is not a proper place to store property other than a small number of tools necessary for emergency road repair; do not leave other things in the trunk overnight. Permanently attach items like stereos, CB radios, or car "bras" to the vehicle with bolts or screws.

Bicycles and motorcycles. Bicycles and motorcycles left outside must be secured with a chain to be fixed, immovable object, such as a bike rack or tree, even if this necessitates walking an extra block. It is not enough to chain the bike to itself or to secure the "fork lock" on a motorcycle. Helmets left with a motorcycle should be secured with a wire locking device run through a hole cut in the helmet, not by the chin strap.

In general. Keep purchase receipts and appraisals on expensive items. Maintain an updated list with your unit of all valuable property to verify your claim if your property is

stolen. Consider engraving identifying markings on stereos and similar items to deter thieves. If you are staying in a room whose door or windows do not lock, report this immediately and avoid leaving your valuables inside. Finally, if your property is stolen, report the theft to the proper authorities immediately.

Automation Notes

Information Management Office, OTJAG

Troubles?

Is there trouble in River City? Is your printer acting out its hostilities by spitting reams of paper at you while refusing to print the simplest job? Does your hard disk grumble, rumble, and wheeze? If that's what is bothering you, or if any other piece of equipment that you purchased from the Joint Microcomputer Contract (No. F19630–86–D–0002) is giving you a headache, there is something you can do about it.

If the cause of the problem is not immediately obvious, run the Diagnostics Disk that came with the computer. First, disconnect any peripherals or other components that were not purchased on the contract. Write down the results of the diagnostic tests, so when you call for repair, the technician can bring the right parts. To prevent damage to the machine while the technician works on it, you should "park" your hard drive by using the SHIP command at the DOS prompt.

Astronautics Corporation of America is directly handling all warranty work on the Joint Microcomputer Contract. Check with your local Director of Information Management (DOIM) for guidance on warranty repair procedures. If it is your responsibility to get in touch with them, call:

Wisconsin	414–447–8200
All other CONUS	800–423–6114
AUTOVON	736–8828/8829
Europe	49–8948–4073
Pacific	808–537–6129
Far East	82–2797–0267

Before you call, collect the following information and be ready to give it to the dispatcher: your ZIP Code; commercial phone number; model number of the computer or peripheral; serial number of the computer or peripheral; site name; site address; city, state, country; and point of contact's name and phone number.

When you call, be familiar enough with the problem to discuss it with the dispatcher; otherwise, the technician will bring the wrong parts and will not be able to fix the machine on the first try.

While these PCs have proven to be fairly reliable, warranty work is not uncommon. Minimize the pain and lost time by following these hints.

REMEMBER: The best technician in the world cannot recover your data if your hard disk "crashes." The *only* way to protect yourself is to make regular backups of your files.

Jammed Up on the Alps?

Have self-adhesive labels been jamming in your Alps P2000 Printer, wrapping themselves around the platen so that they are impossible to scrape off without dismantling the machine? If so, try this:

Position the tractor feed mechanism correctly, then set the paper thickness lever to its highest level (5). According to the Zenith Marketing Support Bulletin, #5 dated 8 June 1987: "If the paper thickness level on the ALPS printer is set at any position other than '5,' there is a possibility that the labels may become jammed."

High Capacity Hard Disks & A Tape Backup

Some new items have been added to the Joint Microcomputer Contract No. Z19630–86–D–0002; they may be useful to you.

40 and 140 Megabyte Internal Hard Disks. If you are running out of space on your 20 megabyte (MByte) hard disk, then a 40 MByte disk, such as CLIN 0006AB ZD–400, ($699.00), may be the answer. For operations with very large data storage requirements, the 140 MByte drive (CLIN 0006AC ZD–1200, $2,125.00) could be the solution. These additions to the contract may be ordered when you order your system or they may be added to your system later.

You can install the new disk drives yourself (if you are so inclined) with Interface Cables from the contract ($10.00, CLIN 0006 AD Z–417–2). There is no need to remove your existing hard disk because the Z–248 can accommodate two hard disks and two floppies simultaneously.

NOTE: Disk Operating System (DOS) is the set of basic control programs that lets the various parts of your computer talk to each other. DOS, however, can address a maximum of only 32 MByte per disk. To overcome this limitation and fully use your high capacity drives, you must perform the PARTITION procedure described in your DOS manual. PARTITION can make your computer think that instead of one 40 MByte hard disk, it has got two 20 MByte disks or any other combination adding up to 40.

New Tape Backup Unit. Nobody likes to make backups, but it is crucial insurance against loss of data resulting from mechanical failure of your hard drive, or from human error. The Interdyne Tape Backup System (CLIN 0016, $297.00) can reduce the time-consuming task of backing up your hard drive to floppy disks. Because a single unit can be shared among many users, the cost per user is relatively low. Best of all, it is easy to operate, encouraging users to actually make backups.

Bicentennial Update: The Constitutional Convention—September 1787

This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January, April, May, June, and July issues of The Army Lawyer.

By September 8, 1787, the delegates to the Constitutional Convention had resolved the major issues facing them. They appointed a "committee on style" to place the Constitution in its final form. On September 12, the committee submitted its draft to the Convention. That same day, George Mason broached the idea of including a bill of rights as part of the Constitution. He felt that the new document would be far more acceptable if it included protection for individual liberties, such as a trial by jury. Roger Sherman presented the opposing view: a bill of rights was unnecessary, because the states could adequately protect individual rights. Sherman noted that eight states already had such provisions in their state constitutions. After a brief debate, the Convention voted, 10 to 0, against incorporating a bill of rights. George Mason's concerns, however, proved to be prophetic. When the state ratifying conventions later considered the Constitution, several demanded the inclusion of a bill of rights, and one of the early actions of the new Congress was approving the Bill of Rights and forwarding it to the states for ratification.

As they neared the vote to adopt or reject the new Constitution, the delegates did not feel they had created a perfect document. The Constitution was a product of numerous compromises; no state delegation had prevailed on every issue. James Madison was especially gloomy. He had had the highest hopes for the original Virginia Plan and saw the various compromises as a defeat. It was left to Benjamin Franklin to review the delegates' work and urge them to make their final approval of the Constitution unanimous.

Franklin addressed the Convention on September 17. James Wilson read his speech, because Franklin's age and illness made him too weak to deliver it himself. He urged the delegates to consider how they had resolved their various competing interests into a document that all should support:

> I confess that there are several parts of this Constitution which I do not at the present approve . . . [But] the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others . . . I agree with this Constitution with all its faults . . . because I think a general Government necessary for us . . . I doubt . . . whether any other Convention we can obtain, may be able to make a better Constitution . . . .
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> . . . On the whole . . . I can not help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity put his name on this document.

On September 17, the state delegations voted to endorse the Constitution; no state voted against it. Thirty-eight of the forty-one individual delegates present signed the Constitution. That same day, George Washington forwarded the document to the Continental Congress, with the Convention's recommendation that Congress forward it to the states for ratification. Washington's forwarding letter illustrates how the delegates viewed their work:

> We have now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which had appeared to us the most adviseable.
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> . . . .
>
> It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignity to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. . . .
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> In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. . . . [T]he Constitution, which we now present, is the result of a spirit of amity, and of mutual deference and concession which the peculiarity of our political situation rendered indispensible.
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> That it will meet the full and entire approbation of every state is not perhaps to be expected; but each will doubtless consider, that had her interest alone been consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most urgent wish.

The Constitution arrived in New York on September 20 and was read in the Continental Congress. Reports the next day indicated that every state was disposed to adopt it. On September 26, Congress debated the Constitution; almost immediately, however, there were calls to censure the Constitutional Convention for straying beyond its charter to revise the Articles of Confederation. Congress brushed aside these calls, and on September 27 passed a resolution to submit the Constitution to special state ratifying conventions. (Further Bicentennial Updates will appear in future issues of *The Army Lawyer.*)

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

1988 JAG Reserve Component Workshop

The 1988 JAG Reserve Component Workshop will be held at The Judge Advocate General's School in Charlottesville, Virginia from 12–15 April 1988. As in the past, attendance will be by invitation only. Attendees should expect to receive their invitation packets by the beginning of December 1987. It is important that invitees notify TJAGSA of their intention to attend by the suspense date set in the invitation. Any suggestions as to theme, topics, or speakers for the 1988 Workshop are welcome. Additionally, any materials or handouts that might be appropriate for distribution at the workshop are also welcome. Because the planning process for the 1988 agenda is currently in progress, early input from the field is necessary. Send all comments and materials to The Judge Advocate General's School, Attention: Guard and Reserve Affairs Department, Charlottesville, VA 22903–1781.

Officer Evaluation Report Requirement for U.S. Army Reserve Officers on Active Duty for Training

All active component judge advocates who supervise U.S. Army Reserve (USAR) officers serving on active duty for training (ADT) are reminded of the requirement to evaluate the performance of the USAR officers with an officer evaluation report (OER) at the end of the USAR officer's tour of duty. Per AR 623–105, paragraph 7–6, USAR officers must be evaluated for periods of active duty of 11 or more consecutive days. Rating officials must be designated and notified of the OER requirement whenever USAR officers are assigned to the unit. Coordination should be made with local Personnel Service Centers/Companies to ensure that local inprocessing and outprocessing procedures, with suspense dates, are established and complied with for completion of required OERs for USAR officers on ADT.

Enlisted Update

Sergeant Major Dwight Lanford

The Seventh Chief Legal NCO and Senior Court Reporter Conference was held at The Judge Advocate General's School from 8–12 June 1987. The course proved to be dynamic, informative, and, because it was so well attended, constructive. Past courses examined changes within the enlisted ranks of the Corps, such as the development of the Legal Specialist Handbook, the rewrite of AR 611–201 for MOS 71D and 71E, and the development of BNCOC. Of course, plans do not immediately leap off the drawing board and crystalize into action overnight. This year, the course took a slightly different direction in an attempt to hasten the process of concept to execution. Several of the steps taken to facilitate this goal were: to develop and solidify next year's agenda so that the planning process can begin earlier; to appoint standing committees so members may continue working on assigned projects throughout the year; and to implement a plan of follow-up on projects so that they do not languish.

This article is a result of a "follow-up" plan. In the past we have neglected to adequately inform all JAG enlisted personnel of our ongoing projects and long-range plans. We hope that through our efforts of steady progress, constant visibility, and emphasis on our goals, the JAG Corps will be able to realize our goals more quickly and reap the benefits of the resultant improvements.

Five committees have been appointed. The committees and their purposes are as follows.

1. Steering Committee. The Steering Committee discussed and evaluated long-range goals and ideas, two of which were transferring enlisted training proponency to OTJAG and paralegal certification. The issue of transferring training proponency has been studied in the past. The committee determined that any problems resulting from not possessing training proponency could best be resolved by a formal Memorandum of Agreement between the AG School and OTJAG. The idea of paralegal certification is being explored and researched. Next year's agenda and course topics will be developed by the Steering Committee and announced earlier so that course attendees may better prepare.

2. Education/Historical Committee. The Education and Historical Committee studied issues of enlisted JAG education (current and proposed) and made recommendations for minor modifications in the agenda, content, and execution of next year's Chief Legal NCO and Senior Court Reporter Conference. Ongoing projects include the development of a subcourse on administrative eliminations in the Law for Legal NCO Correspondence Course and the monitoring of the BNCOC course. The committee also has an ongoing project of collecting historical data on the enlisted JAG Corps. In support of this effort, we ask that all members of the JAG Corps contribute old photos and/or information regarding legal clerk courses, names of honor graduates, NCOES courses, etc. This information should be sent to SGM Roquemore, OSJA, III Corps, Fort Hood, TX 76544 or to SGM Breinholt, 2540 Gunlock Drive, Salt Lake City, UT 84118, if it pertains to National Guard or Army Reserve enlisted personnel. A recommendation to be decided upon was the idea of having a series of presentations by Chief Legal NCOs at the AIT, BNCOC, and ANCOC courses to educate students in the realities of life as a legal specialist.

3. Reserve Affairs Committee. The Reserve Affairs Committee discussed the continuing problem of lack of time for quality training and lack of control of MOS accessions. Work continues on developing a combination of nonresident/resident training courses that dovetail with Active Component courses such as 71D/E BNCOC.

4. Court Reporter Committee. The Court Reporter Committee discussed the pending changes in AR 611-201 that will cap 71E at grade E7 and then allow them to compete for promotion to E8 with 71D. Immediate emphasis must be given to affording 71Es an opportunity to train for MOS 71D50, particularly in such areas as personnel management, property management, leadership, and training skills. 71Es who do not possess the potential or desire to function as an E8 71D50 must be identified through the EER process. We recognize that there are 71Es who are satisfied with their jobs as a 71E and do not desire to be promoted out of the MOS.

5. Publication/Literature Committee. The Publication/Literature Committee reviewed and blessed the pending DA Pam 600-25 and will consider if the JAG Corps needs to supplement the Pamphlet. The committee will review the Legal Specialist Handbook, AR 27-10, AR 27-20, etc., each year and will make recommendations for updates.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted 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 unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. 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 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

September 14-25: 113th Contract Attorneys Course (5F-F10).

September 21-25: 9th Legal Aspects of Terrorism Course (5F-F43).

October 6-9: 1987 JAG Conference.

October 19-23: 7th Commercial Activities Program Course (5F-F16).

October 19-23: 6th Federal Litigation Course (5F-F16).

October 19-December 18: 114th Basic Course (5-27-C20).

October 26-30: 19th Criminal Trial Advocacy Course (5F-F32).

November 2-6: 91st Senior Officers Legal Orientation Course (5F-F1).

November 16-20: 37th Law of War Workshop (5F-F42).

November 16-20: 21st Legal Assistance Course (5F-F23).

November 30-December 4: 25th Fiscal Law Course (5F-F12).

December 7-11: 3d Judge Advocate and Military Operations Seminar (5F-F47).

December 14-18: 32d Federal Labor Relations Course (5F-F22).

1988

January 11-15: 1988 Government Contract Law Symposium (5F-F11).

January 19-March 25: 115th Basic Course (5-27-C20).

January 25-29: 92nd Senior Officers Legal Orientation Course (5F-F1).

February 1-5: 1st Program Managers' Attorneys Course (5F-F19).

February 8-12: 20th Criminal Trial Advocacy Course (5F-F32).

February 16-19: 2nd Alternate Dispute Resolution Course (5F-F25).

February 22-March 4: 114th Contract Attorneys Course (5F-F10).

March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).

March 14-18: 38th Law of War Workshop (5F-F42).

March 21-25: 22nd Legal Assistance Course (5F-F23).

March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Legal Administrators Workshop (512-71D/71E/40/50).

July 18–29: 116th Contract Attorneys Course (5F–F10).

July 18–22: 17th Law Office Management Course (7A–713A).

July 25–September 30: 116th Basic Course (5–27–C20).

August 1–5: 95th Senior Officers Legal Orientation Course (5F–F1).

August 1–May 20, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	on or before 30 July annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	31 December in even or odd years depending on admission

For addresses and detailed information, see the January 1987 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

November 1987

1–6: NJC, Evidence for the Non-Lawyer Judge, Reno, NV.

1–6: NJC, Introduction to Computers in Courts, Reno, NV.

1–6: NJC, Search and Seizure, Reno, NV.

2–4: FPI, Construction Contract Litigation, Orlando, FL.

2–6: FPI, Concentrated Course in Government Contracts, Washington, D.C.

2–6: GCP, Cost Reimbursement Contracting, Washington, D.C.

3–6: FPI, Procurement for Secretaries & Administrators: Government Contracts, Seattle, WA.

4–6: FPI, Government Contract Claims, Washington, D.C.

5: UMC, Tax Preparer Liability, Compliance & IRS Practice, Kansas City, MO.

5–6: MBC, Mid-America Tax Conference, St. Louis, MO.

5–6: BNA, Patents Conference, Washington, D.C.

5–7: PLI, Institute on Securities Regulation, New York, NY.

6: UMC, Individual Income Tax Refresher, Kansas City, MO.

6: PLI, Alternative Dispute Resolution, New York, NY.

6: USCLE: Probate & Trust Conference, Los Angeles, CA.

6–7: PLI, Deposition Skills Training, Los Angeles, CA.

6–7: NCLE, Counseling the Closely Held Corporation, Lincoln, NE.

6–7: LSU, Debtors and Creditors, Baton Rouge, LA.

6–7: PLI, Managing the Small Law Firm, New York, NY.

8–13: NJC, Sentencing Misdemeanants, Reno, NV.

8–13: NJC, Alcohol & Drugs & the Courts, Reno, NV.

8–13: AAJE, The Judge as a Public Speaker, Orlando, FL.

8–13: NJC, Case Management: Reducing Court Delay, Reno, NV.

9–10: PLI, Managing the Medium Law Firm, New York, NY.

9–10: FPI, Working with the F.A.R., Washington, D.C.

9–10: PLI, Managing the Corporate Law Department, New York, NY.

9–11: PLI, Practical Negotiation of Government Contracts, San Diego, CA.

12–13: ABA, Construction Law & Practice, New York, NY.

13: UMC, Individual Income Tax Refresher, St. Louis, MO.

13–14: NITA, Advocacy Teachers Training, Berkeley, CA.

13–14: LSU, Environmental Law, Baton Rouge, LA.

16–17: FPI, The Competition in Contracting Act, San Diego, CA.

16–17: ABA, Criminal Tax Fraud, Los Angeles, CA.

16–18: FPI, Understanding Overhead in Government Contracts, Marina del Rey, CA.

16–18: FPI, Changes in Government Contracts, Marina del Rey, CA.

16–18: FPI, Cost Estimating for Government Contracts, Washington, D.C.

16–19: FPI, Fundamentals of Government Contracting, Washington, D.C.

16–20: GCP, Construction Contracting, Washington, D.C.

19: UMKC, Real Estate, Kansas City, MO.

20: SBNM, Family Law Conference, Albuquerque, NM.

20: UMKC, Workers' Compensation, Kansas City, MO.

20–21: NCLE, Evidence, Lincoln, NE.

23–24: FPI, Rights in Technical Data & Patents, Marina del Rey, CA.

30–2: FPI, Government Contract Costs, Williamsburg, VA.

30–2: FPI, Contracting for Services, Washington, D.C.

30–2: GCP, Competitive Negotiation Workshop, Washington, D.C.

30–4: FPI, Concentrated Course in Construction Contracts, Orlando, FL.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484–4006.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775–0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988–6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348–6280.

AICLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201. (501) 371–2024.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute—American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE–NEWS; (215) 243–1600.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501) 371–2024.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262–4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, D.C. 20007. (800) 424–2725; (202) 965–3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026. (216) 729–7996.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800) 424–9890 (conferences); (202) 452–4420 (conferences); (800) 372–1033; (202) 258–9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642–0223; (213) 825–5301.

CCLE: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303) 871–6323.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608) 262–3833.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944–0575.

FB: The Florida Bar, Tallahassee, FL 32301.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638–0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20003.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, D.C. 20036. (202) 337–7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676–6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GULC: Georgetown University Law Center, CLE Division, 25 E Street, N.W., 4th Fl., Washington, D.C. 20001. (202) 624–8229.

HICLE: Hawaii Institute for Continuing Legal Education, c/o University of Hawaii, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, 2395 W. Jefferson Street, Springfield, IL. 62702. (217) 787–2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 1926 Arch Street, Philadelphia, PA 19103. (215) 732–6999.

KBA: Kansas Bar Association CLE, P.O. Box 1037, Topeka, KS 66601. (913) 234–5696.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257–2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421–5722; (504) 566–1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388–5837.

MBC: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635–4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109. (800) 632–8077; (617) 720–3606.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906. (800) 446–3410; (804) 295–6171.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109–1215. (313) 764–0533; (800) 922–6516.

MNCLE: Minnesota CLE, 40 North Milton, St. Paul, MN 55104. (612) 227–8266.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBAF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749–1571.

NCJJ: National College of Juvenile Justice, University of Nevada, P.O. Box 8978, Reno, NV 89507–8978. (702) 784–4836.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924–3844.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225–6482; (612) 644–0323 in MN and AK.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784–6747.

NJCLE: New Jersey Institute for Continuing Legal Education, 15 Washington Place, Newark, NJ 07102–3105.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41011. (606) 572–5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452–0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243–6003.

NUSL: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908–8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463–3200; (800) 582–2452 (books only).

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038. (212) 349–5890.

NYULS: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598–2756.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580–5200.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201–0220. (614) 421–2550.

PBI: Pennsylvania Bar Institute, 104 South Street, Harrisburg, PA 17108–1027. (800) 932–4637 (PA only); (717) 233–5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765–5700 ext. 271.

PTLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

SBA: State Bar of Arizona, 234 North Central Avenue, Suite 858, Phoenix, AZ 85004. (602) 252–4804.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475–6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080–0707. (214) 690–2377.

SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214) 692–2644.

SPCCL: Salmon P. Chase College of Law, Committee on CLE, Nunn Hall, Northern Kentucky University, Highland Heights, KY 41076 (606) 527–5380.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TLS: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118. (504) 865–5900.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036, (202) 337–7000.

UDCL: University of Denver College of Law, Program of Advanced Professional Development, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004. (713) 749–3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506. (606) 257–2922.

UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MD 65211.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372–0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276–1648.

UMSL: University of Miami School of Law, P.O. Box 248105, Coral Gables, FL 33124. (305) 284–5500.

USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111.

USCLE: University of Southern California Law Center, University Park, Los Angeles, CA 90007.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705 (512) 471–3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924–3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, Continuing Legal Education, 505 Madison Street, Seattle, WA 98104. (206) 622–6021.

Current Material of Interest

1. JAG Conference Reminder

The 1987 Judge Advocate General's Conference and Annual Continuing Legal Education Program will be held from 6–9 October 1987. As in the past, attendance will be by invitation only. Invitations were mailed on 12 August 1987. It is important that invitees notify TJAGSA of their intention to attend by the suspense date set in the invitation.

2. 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 not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense

Technical Information Center (DTIC). There are two ways an office may obtain this material. 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. New this month are revised versions of the contract law deskbook. The criminal law evidence deskbooks have been replaced by DA Pam 27–22 (15 July 1987). The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications

Contract Law

AD A181445	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All States Guide to State Notarial Law/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).
AD B110134	Preventive Law Series/ JAGS–ADA–87–4 (196 pgs).

Claims

AD B108054	Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016	Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs).

Criminal Law

AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 15-97	Joint Committee on Aviation Pathology		1 Jun 87
AR 37-51	Financial Administration Accounting and Reporting	I01	15 Jun 87
AR 37-108	Financial Administrative General Accounting	I01	15 Jun 87
AR 37-111	Financial Administrative Working Capital Funds	I01	15 Jun 87
AR 40-66	Medical Record Quality Assurance Administration		1 Apr 87
AR 190-5	Motor Vehicle Traffic Supervision	I09	15 June 87
AR 190-10	Threats to the President and Other Government Officials Reporting Requirements		24 Jun 87
AR 210-20	Master Planning for Army Installations		12 Jun 87
AR 210-51	Installations, Family Housing Management	I01	15 Jun 87
AR 310-34	Military Publications	I01	15 Jun 87
AR 420-41	Utilities Contracts	I01	15 Jun 87
AR 420-54	Air Conditioning, Evaporating, Cooling, Dehumidification	I01	15 Jun 87
CIR 360-87-1	Annual Meeting of the Association of the U. S. Army		1 Jun 87
CIR 600-87-1	Recoupment of Federal Funds for Certain Advanced Education Programs		15 May 87
CIR 601-87-5	Medical Service Corps & Veternarian Corps Active Duty FY 87		15 May 87
DA Pam 27-22	Military Criminal Law Evidence		15 July 87
DA Pam 40-14	Your ___ Calorie Diet		1 Oct 87
DA Pam 608-41	The Army Family Action Plan IV		19 Jun 87
DA Pam 608-46	A Guide to Widowed Support Groups		15 Jun 87
DA Pam 640-1	Officers' Guide to the Officer Record Brief		1 Apr 87
DA Pam 690-40	Supervisors' Guide to Filling Job Vacancies		15 Jun 87
JFTR	Joint Federal Travel Regulations, Volume 1	6	1 Jun 87
JFTR	Joint Federal Travel Regulations, Volume 1	7	1 Jul 87
	Manual for Courts-Martial	3	1 Jun 87
UPDATE 10	Maintenance Management Update		27 May 87
UPDATE 11	All Ranks Personnel		10 Jun 87
UPDATE 11	Enlisted Ranks Personnel		3 Jun 87

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Albert, *Dissolution of Marriage When One Spouse Holds a Professional Degree—A Call to Fairness*, 36 Drake L. Rev. 1 (1986–1987).

Boswell, *Defending Against Punitive Damages in Texas*, 28 S. Tex. L. Rev. 503 (1987).

Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 Nw. U.L. Rev. 1407 (1986).

Brown, Kohn & Kohn, *Conscientious Objection: A Constitutional Right*, 21 New Eng. L. Rev. 545 (1985–1986).

Christol, *The Role of Law in the United States–Soviet Arms Control and Disarmament Relations*, 21 Int'l Law. 519 (1987).

Corwin, *The Legality of Nuclear Arms Under International Law*, 5 Dick. J. Int'l L. 271 (1987).

McChesney, *Problems in Calculating and Awarding Compensatory Damages for Wrongful Death under the Federal Tort Claims Act*, 36 Emory L.J. 149 (1987).

Edwin Meese III, *Address on Tort Reform Given Before the National Legal Center for the Public Interest*, 23 Idaho L. Rev. 343 (1986–1987).

Edwin Meese III, *Promoting Truth in the Courtroom*, 40 Vand. L. Rev. 271 (1987).

Moore, *The Secret War in Central America—A Response to James P. Rowles*, 27 Va. J. Int'l L. 272 (1987).

Mulinen, *Law of War Training Within Armed Forces—Twenty Years Experience*, 257 Int'l Rev. Red Cross 168 (1987).

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