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How Far Can They Go: Should Commanders Be Able to Treat Hotel Rooms Like an Extension of the Barracks for Search and Seizure Purposes?

Major Alison Martin

A military barracks or berthing area may be a foxhole in a remote training or combat area or it may be the almost mythical condominiums referred to in recruiting brochures and motion pictures. It may be represented by elaborate areas of individual room configuration designed to accord to the service member a measure of personal privacy and protection from the more raucous environment of a ship's berthing area or an open squad bay. The range of such architectural designs does not represent a granting of sanctuary areas inconsistent with the control and discipline of a military organization.¹

Introduction

In the months following 11 September 2001, thousands of reservists and members of the National Guard were called to active duty.² This mass mobilization caused barracks shortages on many installations, and some of these mobilized forces were housed in hotel rooms either on or off the installation.³ Consequently, commanders struggled to set standards for mobilized forces living in hotel rooms that were commensurate with service members living in traditional barracks rooms.

Long before the development of the Uniform Code of Military Justice (UCMJ), there was a general principle that commanders could search military property within their control.⁴ “The basis for this rule of discretion lies in the reason that, since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate power to fulfill that responsibility.”⁵ It is also important to note that the type of search that would be considered reasonable in the military would not necessarily be reasonable in civilian society because of the “competing constitutional interest of military necessity.”⁶ Courts have consistently held that while “persons serving on active duty in the armed forces of our country are not divested of all their constitutional rights as individuals,”⁷ the unique customs, traditions, and mission requirements of the service are such that service members do not exercise the same degree of personal liberty as do civilians.⁸ There are exemptions clearly noted in the Constitution, as well as implied exceptions to the fundamental rights normally enjoyed by an individual in the civilian community.⁹

Since there is little question that a commander has both a unique responsibility and authority in the area of search and seizure, the focus then shifts to the extent of that authority. The Military Rules of Evidence (MRE)¹⁰ provide some guidance as to the limits of a commander's power to search and seize a service member's property, and the courts have further defined military property as distinct from an individual's property and the reasonable expectation of privacy.¹¹ Inventories and inspec-

1. United States v. McCormick, 13 M.J. 900, 903-04 (N.M.C.M.R. 1982).

2. U.S. Dep't of Defense, *National Guard and Reserve Units Called to Active Duty (Dec. 12, 2001)*, available at <http://www.defenselink.mil/news/Dec2001/d20011212active.pdf> (last visited Oct. 15, 2003) [hereinafter Defenselink] (providing statistics released by the Department of Defense indicating that as of 12 December 2001, 58,741 Soldiers, Sailors, Airmen, and Marines were activated from the reserves and the National Guard).

3. Fort Bragg, North Carolina is one of several major Army mobilization sites. As of 22 January 2004, Fort Bragg had 503 hotel rooms housing 648 Soldiers located on the installation and 1151 hotel rooms housing 1330 Soldiers off of the installation. E-mail from CW2 Tammy Wright, Housing Coordinator, 2125th Garrison Support Unit, Fort Bragg, North Carolina, to MAJ Alison Martin, Student, 52d Judge Advocate Officer Graduate Course, U.S. Army (Jan. 22, 2004) (on file with author).

4. See United States v. Doyle, 4 C.M.R. 137, 139 (C.M.A. 1952) (citing United States v. Kemerer, 28 B.R. 393 (1943); Dig. Op. JAG 1912-1940, sec. 395 (27); United States v. Worley, 3 C.M.R. (AF) 424 (1950)). In *United States v. Stuckey*, the court reviewed the history of search and seizure and noted that the commander's authority has traditionally been a critical part of military law:

On July 23, 1930, The Judge Advocate General stated in an opinion: Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command . . . such a search is not unreasonable and therefore not unlawful. J.A.G. 250.413.

United States v. Stuckey, 10 M.J. 347, 352 (C.M.A. 1981).

5. *Doyle*, 4 C.M.R. at 140.

6. United States v. Ezell, 6 M.J. 307, 328-29 (C.M.A. 1979).

tions, if conducted properly, are authorized in order to allow the commander to ensure the health and welfare of the unit. If commanders exceed the scope and purpose of the inspection or inventory, however, the intrusion may develop into an unlawful search. Although the Rules for Courts-Martial (RCM) separately address the concept of apprehension,¹² there is often a good deal of interplay between this concept and that of search and seizure.

First, this article addresses the limits of search and seizure, as well as the related issues of inspections, inventories, and apprehensions of Soldiers living in hotel rooms for the purposes of military duty. Second, the article provides an overview of the current military law regarding search and seizure, as well as a detailed analysis of why the definition of “under military control” should include hotel rooms. Third, this article discusses the current law regarding inspections, inventories, and apprehensions. These other areas of Fourth Amendment¹³ law raise a number of important issues that may impact a commander’s ability to conduct search and seizure off of the installation. Fourth, the article reviews the issues surrounding search and seizure in privatized housing as a basis for comparison to hotel rooms. Fifth, this article discusses the impact of the Posse Comitatus Act¹⁴ on the range of options available to the commander. Finally, the article analyzes the impact of these distinct areas of the law upon the ultimate question regarding a commander’s authority to search hotel rooms.

This article concludes that commanders can treat the service members’ hotel rooms as the legal equivalent of barracks rooms. The customs and traditions of the service combined with the concept of military necessity have throughout history

served as the basis for a commander’s authority to apprehend service members, inspect, inventory and search areas under military control, and seize evidence therein. The issue is how to define a location under military control. Military and civilian case law, as well as the evolving military environment, indicate that a hotel room can be considered a location under military control. There are numerous factors that a commander, with a judge advocate’s (JA) advice and assistance, should consider in making the determination. Though no single factor is likely to be dispositive, a critical one is whether the government, rather than the service member, directly leases the property. Search and seizure case law in the federal sector, military cases involving search and seizure, inspections, inventories, and apprehensions, and military practice, provide a framework for establishing the commander’s authority to search service members’ hotel rooms located off of the installation and seize evidence located in those rooms for use in judicial and nonjudicial proceedings.

Military Search and Seizure Law

The commander’s authority to conduct search and seizure has long been established. In a case decided just one year after the implementation of the UCMJ, the Court of Military Appeals (COMA) in *United States v. Doyle* noted, “[t]here has long existed in the services a rule to the effect that a military commanding officer has the power to search military property within his jurisdiction.”¹⁵ At the same time, courts have recognized that many Fourth Amendment protections provided to average citizens also apply to service members.¹⁶

7. *United States v. Kazmierczak*, 37 C.M.R. 214, 219 (C.M.A. 1967). The court noted that

Article I, Section 8, Clause 14, of the Constitution of the United States confers upon Congress the power to “make Rules for the Government and Regulation” of the military, but that power, like all the other powers of Congress enumerated in Section 8, must not be exercised in contravention of individual rights guaranteed by the Constitution.

Id.; see also *United States v. Reppert*, 76 F. Supp. 185, 189 (D. Conn. 1999) (noting that the Fourth Amendment applies to military searches); *United States v. Stringer*, 37 M.J. 120, 123 (C.M.A. 1993) (noting that the Fourth Amendment applies to searches of the property of service members upon entry onto an installation); *United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992) (finding that the Bill of Rights applies to members of the armed forces). But see FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE sec. 1-52.00, at 26 (1991) (noting that while the Supreme Court’s holdings seem to indicate that most of the provisions of the Bill of Rights apply to members of the armed forces, the Court has never directly addressed the issue); see U.S. CONST. amend. I-X.

8. See *Kazmierczak*, 37 C.M.R. at 219.

9. See *id.*

10. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. (2002) [hereinafter MCM].

11. The Court of Military Appeals (COMA) reiterated that in order for any person to claim a reasonable expectation of privacy, the person must meet the two pronged test outlined by the Supreme Court. That is, the person must have both a subjective and objective expectation of privacy. See *United States v. Ayala*, 26 M.J. 190-91 (C.M.A. 1988) (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States* 389 U.S. 347, 361 (1967)).

12. MCM, *supra* note 10, R.C.M. 302.

13. U.S. CONST. amend. IV.

14. 18 U.S.C.S. § 1385 (LEXIS 2004).

15. 4 C.M.R. 137, 139 (C.M.A. 1952).

Military Rule of Evidence 315

When commanders have probable cause, they may search persons “subject to military law,” and different types of property including military property, “location[s] under military control,” and certain property within a foreign country.¹⁷ The first question is whether, under certain conditions, a commander may consider hotel rooms located off of the installation to be under military control. The second step in the analysis is to determine whether or not the actions of the command were reasonable.

The Definition of Place Under Military Control

As the UCMJ matured, the military courts began to set the limits of the commander’s ability to search a service member’s property and helped to define the meaning of place under military control.

Authority to Search Service Members’ Personal Belongings

In *United States v. Murray*, the accused was a unit mail handler suspected of stealing items from the mail.¹⁸ The acting commander authorized a search of the accused’s room in the barracks and his personal belongings to look for the mail. The COMA found that a commander could authorize the search of the barracks room and personal belongings of the accused.¹⁹ In *United States v. Ayala*, the Army service court found that while members living in on-post housing enjoy a greater expectation

of privacy in their homes than do soldiers living in the barracks, the installation commander remains responsible for the use and safety of quarters located on the installation.²⁰ Therefore, military control also includes military family quarters.²¹ The COMA, now known as the Court of Appeals for the Armed Forces or CAAF, has not directly addressed this point, but their findings in cases in which the search of military housing is related to the major issue seem to agree with the Army court.²²

Expectation of Privacy in Barracks Room Diminished

“[R]easonable expectations of privacy within the military society will differ from those in the civilian society.”²³ Although service members do have a reasonable expectation of privacy in their barracks room, “a [S]oldier cannot reasonably expect the Army barracks to be a sanctuary like his civilian home.”²⁴ By analogy, RCM 302(e)(2), clearly distinguishes between the barracks and other private living areas for purposes of apprehension without a warrant.²⁵

In *United States v. McCarthy*, an Air Force security police officer ordered the charge of quarters (CQ), to open the door to a military dormitory room upon probable cause that the occupant assaulted three female service members.²⁶ Once the door was open, the officer apprehended the airman occupying the room.²⁷ The COMA determined that the accused airman “could not reasonably expect to avoid apprehension in this case by retreating to his room.”²⁸ In reaching its holding, the court relied on several factors. The court found that since the unit assigned the airman to his room, chose his roommate, and

16. See, e.g., *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981).

17. MCM, *supra* note 10, MIL R. EVID. 315(c). A commander must have the authority to search the affected areas. “Authorization to search is an express permission . . . issued by competent military authority to search a person or an area for specified property or evidence . . .” *Id.* MIL. R. EVID. 315(b). This authorization to search is distinct from a search warrant that is defined as an “express permission to search and seize issued by competent civilian authority.” *Id.* The search authorization is limited in scope to military property or locations under military control. *Id.* MIL. R. EVID. 315(c).

18. See 31 C.M.R. 20 (C.M.A. 1961).

19. See *id.* at 22-23.

20. See 22 M.J. 777, 784 n.14 (A.C.M.R. 1986), *aff’d on other grounds*, 26 M.J. 190 (C.M.A. 1988).

21. See *id.*; see also *United States v. Peters*, 11 M.J. 901, 903 (A.F.C.M.R. 1981) (stating that those living in military quarters have a reasonable expectation of privacy in their home).

22. See, e.g., *United States v. Alexander*, 34 M.J. 121, 124 (C.M.A. 1992) (finding that a dormitory room was an area under military control and that the search, which also involved the family housing areas, was lawful).

23. *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981); see also *United States v. Thomas*, 21 M.J. 928, 932 (A.C.M.R. 1986).

24. *Committee for G.I. Rights, et al. v. Callaway, et al.*, 518 F.2d 466, 477 (D.C. Cir. 1975).

25. MCM, *supra* note 10, RC.M. 302(e)(2).

26. 38 M.J. 398 (C.M.A. 1993).

27. *Id.* at 399.

28. *Id.* at 403.

maintained a good deal of control over his conduct while living in the dorm, the airman was on notice that his dorm room was not the same as a private home.²⁹ The court also noted that the Supreme Court has “recognized that the need for order and discipline may affect what is ‘reasonable’ under the Fourth Amendment,” and that a military commander’s responsibility to maintain the barracks in good order and provide for the safety and welfare of the service members residing there resulted in a lower expectation of privacy for those occupants.³⁰

In *United States v. McCormick*, investigators obtained entry into the accused sailor’s room using the master key and arrested the accused upon entry.³¹ The Navy-Marine Court of Military Review recognized that as the form of the military barracks evolves, the function remains essentially the same. Consequently, the commander’s authority in the barracks must remain constant, despite the changes to configuration of the area.³²

The individual’s expectations or possible perceptions of privacy, based on the design of the military barracks or the degree of freedom accorded therein by the military commander, does not establish a barrier against the exercise of military authority or police powers. To hold otherwise would impose upon military commanders the requirement to maintain wholly open, public berthing areas for their personnel. It would require military commanders to avoid any modern barracks construction in order to insure that their authority to maintain discipline and control over their on base barracks was judicially recognized.³³

From this, we can infer that a commander can treat a hotel room like a military barracks, despite the location. The key in making this determination is establishing that the hotel room is functioning in the same way as the barracks. Therefore, as the cases³⁴ suggest, the lease provision, the notice to the service members, and standard operating procedures at the hotel room must mirror those used in military barracks in order for the hotel to be considered an area under military control.

Expectation of Privacy in Temporary Lodging on the Installation

In *United States v. Ayala*, law enforcement officers obtained entry into a service member’s room in a military guesthouse in order to apprehend the occupant.³⁵ The Army court found that service members and their families enjoy a reasonable expectation of privacy in their family quarters and other military facilities that serve as temporary dwellings.³⁶ The court also distinguished barracks rooms from military guesthouses located on the installation such that service members and their families have a greater degree of privacy in a military guesthouse.³⁷ In its review of the case, the COMA did not directly address whether or not an occupant of a guest house has a higher expectation of privacy than someone living in the barracks, but nevertheless found that the entry into the room was lawful based on exigent circumstances and upheld the lower court’s ruling that probable cause existed to make the apprehension.³⁸ Thus, JAs can infer that the court also recognized that residents of a temporary guest house have a reasonable expectation of privacy. Absent the exigency, law enforcement would have had to obtain authority from the commander to authorize the apprehension.

29. *See id.*

30. *Id.*; *see also* *United States v. Curry*, 46 M.J. 733, 740 (N-M. Ct. Crim. App. 1997) (noting that a service member has a reduced expectation of privacy in his or her barracks room); *United States v. McCormick*, 13 M.J. 900, 904 (N.M.C.M.R. 1982) (finding that a service member does not have the same expectation of privacy in a barracks room as he might have in a civilian home).

31. *McCormick*, 13 M.J. at 904.

32. *See id.*

33. *Id.*

34. *See infra* notes 24 and 27.

35. 22 M.J. 777 (A.C.M.R. 1986), *aff’d on other grounds*, 26 M.J. 190 (C.M.A. 1988).

36. *Id.* at 783.

37. *Id.* at 789.

38. *United States v. Ayala*, 26 M.J. 190, 192 (C.M.A. 1988); *see also* *United States v. Salazar*, 44 M.J. 464, 467 (1996) (finding that a Soldier who was ordered to move from his temporary residence located off of the installation to the barracks still had a reasonable expectation of privacy in that home, even though it was only a temporary living arrangement).

Searches of Service Member's Home Located Off of the Installation

Initially, military courts held that “searches of a service member’s private dwelling located off-base in the United States are to be gauged by civilian standards and not military.”³⁹ More recent military cases upheld the rule. For example, in *United States v. Mitchell*, the COMA found that arrests made off of the installation, even if that installation is located overseas, require “prior authorization from a commander or a magistrate,”⁴⁰ because “the on-base housing of military personnel with their dependents and the voluntarily chosen off-post housing of individual service members do not embody that essential military character or the dictates of military necessity.”⁴¹ Therefore, any searches off of the installation must be conducted in conjunction with a valid search warrant if located in the United States and with a command authorization if located overseas.⁴²

Two different federal-courts rulings, however, seem to indicate that searches authorized by a commander of a service member’s housing located off of the installation in the United States may be permissible if the housing is leased and controlled by the military. In these cases, the housing falls within the definition of property under military control envisioned by Congress in MRE 315(c)(3).⁴³ The key to the courts’ holding in those cases seems to rest on the provisions of the lease agreement as well as the notice of military control provided to the tenant-service member.⁴⁴

In *Donnelly v. United States*, the plaintiff was a sailor in the U.S. Navy who resided in an apartment located off of the installation leased by the Navy.⁴⁵ Donnelly did not enter into a lease agreement with the owner of the apartment. He did not pay a security deposit or pay rent. The government supplied all fur-

nishings, linen, and kitchen supplies. The government remained liable for any damages to the dwelling or its furnishings.⁴⁶ All sailors living in the housing were briefed as to the rules and regulations governing conduct and were notified that the apartments would be subject to periodic inspections. A few months after Donnelly moved into the apartment, the commanding officer conducted a health and welfare inspection and found marijuana among Donnelly’s personal items.⁴⁷ Donnelly was given a Captain’s Mast under Article 15 of the UCMJ and the commanding officer found Donnelly guilty of possession of marijuana. Subsequently, Donnelly sought a declaratory judgment from the U.S. District Court for the Eastern District of Virginia declaring that the resulting punishment from the Captain’s Mast should be set aside because the search of the apartment violated the Fourth Amendment.⁴⁸ The matter went before the court in the form of a motion for summary judgment by the Assistant U.S. Attorney for Norfolk, Virginia.⁴⁹

The court held that the apartment was an “extension of Navy quarters . . . over which the Navy [had] control to inspect fully.”⁵⁰ The court based its decision on various factors including the degree of control the Navy retained over the apartment, and the clear notice to Donnelly and the other sailors as to the Navy’s ability to inspect the premises. There are two important points to take away from this case. First, the government regulated the conduct of the sailors living in the apartments, even though the housing was located off of the installation. Second, Donnelly was on notice of the command’s ability and intent to inspect by virtue of the Navy’s continued control over the housing and by the commanding officer’s publication of his intent to conduct periodic inspections.

In *United States v. Reppert*, the appellant was also a sailor in the U.S. Navy who resided in an apartment located off of the

39. *United States v. Walsh*, 21 C.M.R. 876, 883 (A.F.B.R. 1956) (citing *United States v. Doyle*, 4 C.M.R. 137, 139 (C.M.A. 1952); *United States v. Florence*, 5 C.M.R. 48, 51 (C.M.A. 1952)).

40. 12 M.J. 265, 269 (C.M.A. 1982).

41. *United States v. McCormick*, 13 M.J. 900, 904 (N.M.C.M.R. 1982).

42. *See Walsh*, 21 C.M.R. at 883.

43. *See United States v. Reppert*, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); *Donnelly v. United States*, 525 F. Supp. 1230, 1231 (E.D. Va. 1981); *see also* MCM, *supra* note 10, MIL. R. EVID. 315(c)(3) (stating “*Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located . . .”).

44. *See Reppert*, 76 F. Supp. 2d at 189; *Donnelly*, 525 F. Supp. at 1231.

45. *Donnelly*, 525 F. Supp. at 1231.

46. *See id.* at 1231-32.

47. *See id.* at 1232.

48. *See id.* at 1231-32.

49. *See id.* at 1231.

50. *Id.* at 1232.

installation.⁵¹ The Navy leased the apartment “on behalf of the U.S. Government for the benefit of U.S. Navy personnel.”⁵² The appellant’s roommate reported that he had child pornography on his computer in the apartment.⁵³ Based on this information, an investigator from Naval Criminal Investigative Service requested authority from the military commander to enter the apartment and seize the computer.⁵⁴ Upon searching the computer’s hard drive, investigators found images of child pornography.⁵⁵ The charges were originally referred to court-martial, but the Assistant U.S. Attorney for the District of Connecticut eventually decided to prosecute the case in federal court.⁵⁶ The matter before the court was a motion to suppress the evidence as a violation of the Fourth Amendment and the Federal Rules of Criminal Procedure.⁵⁷

The court relied on the lease provision to find that the apartment fell within the military control of the commander and that the evidence seized would not be suppressed. The lease in question stated:

In recognition of (1) the U.S. Navy’s need to ensure security, military fitness, and good order and discipline and (2) the U.S. Navy’s policy of conducting regularly scheduled periodic inspections, the Landlord agrees that while its facilities are occupied by ship’s force, the U.S. Navy and not Tenant has control over the leased premises and shall have the right to conduct command inspections of those premises.⁵⁸

The *Reppert* court broadly construed the language of MRE 315 and relied heavily on the lease to find that the apartment fell under the authority of the commanding officer. The court even went so far as to say, “Based on the lease, the defendant’s apartment was ‘property under military control.’”⁵⁹ The court implicitly notes that the lease provided notice to Reppert that he did not have the same expectation of privacy in the apartment as one would have in a home that the Navy did not lease.

Commercial Property Located on the Installation

In *United States v. Moreno*, the Air Force Court of Military Review found that leased, commercial property on the installation also falls under the commander’s purview for purposes of search and seizure.⁶⁰ “This includes buildings occupied by credit unions, commercial banks, and other nonmilitary activities.”⁶¹ In *Moreno*, law enforcement officers believed the accused mistakenly received deposits into his credit union account and, when he realized the error, transferred the money to another account. Based on this information, the installation commander authorized a search of the records maintained by the credit union.⁶² The Air Force court found that although the credit union building was properly under military control, The Right to Financial Privacy Act (TRFPA)⁶³ governed the search of the bank records.⁶⁴ Therefore, only a “federal magistrate or a judge of a state court of record” sitting in the district where the property is located may issue a search warrant for the bank records.⁶⁵ Despite the court’s finding that the government violated Rule 41 of the Federal Rules of Criminal Procedure,⁶⁶ TRFPA, and the Air Force investigation regulation, it upheld the installation commander’s search authorization.⁶⁷

51. See 76 F. Supp. 2d 185 (D. Conn. 1999).

52. See *id.* at 187.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 191.

57. *Id.*

58. *Id.* at 188.

59. *Id.*

60. See 23 M.J. 622, 623 (A.F.C.M.R. 1986), *review denied*, 24 M.J. 348 (C.M.A. 1987).

61. *Id.* at 624.

62. *Id.* at 623.

63. 12 U.S.C. § 3406 (2000).

64. See *Moreno*, 23 M.J. at 624.

65. *Id.*

In making its finding, the court determined that the scope of the search was reasonable. First, the commander had law enforcement authority over the credit union. Second, the provisions of the lease “authorized base law enforcement personnel to enter the credit union at any time for inspection and inventory and when necessary for protection of the interests of the government.”⁶⁸ Again, courts will look to the lease itself to help determine whether a place is properly under military control. Therefore, it is critical that installations contracting for hotel rooms ensure the provisions of the lease allow for search and seizure by the command and clearly provide notice to service members of that authority.

Searches of Property Located Off of the Installation Overseas

Military Rule of Evidence 315(c)(4) has carved out an exception to the general rule regarding searches of nonmilitary property within a foreign country. The rule requires commanders to coordinate with a representative of the appropriate agency that occupies the property if it is “owned, used, occupied by, or in possession of an agency of the United States other than the Department of Defense [DOD].”⁶⁹ The rule also requires commanders to reference the appropriate treaty or agreement before conducting a search of “other property situated in a foreign country.”⁷⁰ Both provisions specifically state that failure to comply with the coordination directions does not “render a search unlawful within the meaning of MRE 311.”⁷¹

Military courts have noted that “[a] search of an off-base dwelling occupied by a military person in an overseas area where authorized by the commander has been held lawful.”⁷² In order to help determine the lawfulness of the entry and search into an off-post dwelling, courts routinely look to the language of the applicable Status of Forces Agreement (SOFA).⁷³ The military courts have also held that they will strictly construe the language of the SOFA. Unless the SOFA or other applicable

treaty create a personal right with respect to search and seizure, any search and seizure provisions of the document cannot “be enforced by invoking the exclusionary rule.”⁷⁴

The overseas cases raise two important issues. First, the warrant requirement does not apply, and a commander may authorize search, seizure, or apprehension at a private dwelling located off of the installation occupied by a service member, subject to the limitations and guidance provided by applicable treaties or agreements. Therefore, the area off of the installation overseas is treated similarly to the “location under military control” language that addresses property located in the United States and covered by MRE 315(c)(3). Second, in determining the reasonableness of the search, the courts will strictly construe the language of the governing agreement. Much like the holdings in *Moreno*, *Reppert*, and *Donnelly*, in cases located overseas, the courts are willing to allow the military a certain degree of discretion to set their own regulations on how to conduct reasonable searches and seizures. The courts, however, will hold the services to the provisions of the regulations or the lease when evaluating the lawfulness of the search and use the provisions to help determine whether or not the search was reasonable.

Reasonableness

Once the court determines that the area is properly under military control, the next step is to evaluate the reasonableness of the search itself. “The constitutional line for admission at courts-martial of evidence produced by such searches and seizures is that such command action must be reasonable.”⁷⁵

In *United States v. Stringer*, the COMA used a number of factors to help determine if the command’s actions during an inspection upon exit of an installation were reasonable. The case took place in Korea and the inspections were focused on

66. FED. R. CRIM. P. 41.

67. *Moreno*, 23 M.J. at 624.

68. *Id.*

69. MCM, *supra* note 10, MIL. R. EVID. 315(c)(4)(A).

70. *Id.* MIL. R. EVID. 315(c)(4)(B).

71. *Id.* MIL. R. EVID. 315(c)(4)(A), (B).

72. *United States v. Walsh*, 21 C.M.R. 876, 883 (A.F.B.R. 1956) (citing *United States v. Higgins*, 20 C.M.R. 773 (C.M.A. 1955); *United States v. DeLeo*, 17 C.M.R. 148 (C.M.A. 1954), *overruled on other grounds by* *United States v. Jordan* 50 C.M.R. 664 (C.M.A. 1975); *cf.* *United States v. Heck*, 6 C.M.R. 223 (C.M.A. 1952); *United States v. Trolinger*, 5 C.M.R. 447 (C.M.A. 1952)).

73. *See, e.g.*, *United States v. Mitchell*, 12 M.J. 265, 268 (C.M.A. 1982); *United States v. Bunkley*, 12 M.J. 240, 245 (C.M.A. 1982).

74. *Mitchell*, 12 M.J. at 268.

75. *United States v. Stringer*, 37 M.J. 120, 126 (C.M.A. 1993). The court also stated, “In addition, we note that this Court has long recognized a service member’s Fourth Amendment right to protection against unlawful searches and seizures (citations omitted). Likewise, we have recognized the military commander’s authority to search persons and places within his control (citations omitted).” *Id.*

the problems associated with the black-marketing of high-value items.⁷⁶ The court found that although a written inspection policy is preferred, it is not required because a commander always has the responsibility and the authority to maintain the good order and discipline of a unit or an installation.⁷⁷ In *Stringer*, the court also reviewed the manner of the execution of the inspection. Specifically, the degree of intrusiveness of the search balanced against the individual's expectation of privacy.⁷⁸ The gate guard initially detained the accused, and then walked the Soldier to the desk sergeant at the military police station, who asked the accused his unit of assignment and other administrative information to help verify the documentation relating to the Soldier's purchases.⁷⁹ Another factor the court evaluated was the amount of individual discretion given to the Soldiers conducting the inspections.⁸⁰ The court found that the gate guard was given specific instructions as to how to stop a vehicle, verify the Letter of Authorization for all persons who carried high value items and escort the Soldier to the MP station should questions arise as to the authenticity of the Letter of Authorization.⁸¹ Thus, the court concluded the gate guard had very little discretion and was simply implementing the commander's policy.⁸²

It is only unreasonable searches and seizure against which a service member—or a civilian—is protected by the Fourth Amendment. What is unreasonable depends substantially on the circumstances of the intrusion; and this Court has recognized that, in some instances, an intrusion that might be unreasonable in a civilian context not only is reasonable but is necessary in a military context.⁸³

Therefore, the focus of this prong of the search analysis is the command action in executing the search in light of the surrounding facts and circumstances. Although the "Fourth Amendment protects people, not places,"⁸⁴ the location of the search is one of the factors a court may use to help determine if those actions by the command, were, in fact, reasonable. The

location of the hotel room may be cause to believe that the search is unreasonable unless the service member has notice that the room will be treated like a barracks. Additionally, courts will evaluate the actual conduct of those conducting a search as well as their degree of discretion. Like a search in a traditional barracks, the command must establish clear guidelines and ensure those conducting the search stay within those guidelines.

Implications for Search and Seizure in Hotel Rooms

The plain language of MRE 315 provides the commander authority to authorize a search of military property. In particular, the phrase "or any other location under military control, wherever located," would seem to indicate that that authority should be broadly construed.⁸⁵ The holdings of various military appellate courts, however, demonstrate that military search and seizure law is riddled with qualifications of the basic language of the rule. Therefore, we must not only look to search and seizure law in the barracks, but we must evaluate a variety of different areas of the law, to find the outer limit of the definition of "location under military control."

Several cases have demonstrated that living spaces located on the installation fall under military control. This can include barracks, military quarters, or temporary lodging. Additionally, leased commercial property located on the installation can also be considered under military control and as such, does not require a search warrant.

Interestingly, cases decided by two different federal district courts show an evolution towards a more liberal interpretation of command authority off of the installation than the holdings of the military courts. Federal courts relied on several factors to arrive at their holdings, including (1) the government rather than the individual leased the property; (2) clear language in the lease reserving the right of the military to conduct inspections; (3) the fact that the property within the housing was furnished by the government; (4) the fact that the government remained

76. *Id.* at 122.

77. *Id.* at 126.

78. *Id.* at 129.

79. *Id.* at 129 n.4.

80. *Id.* at 129.

81. *Id.*

82. *Id.*

83. *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989).

84. *Katz v. United States*, 389 U.S. 347, 351 (1967).

85. MCM, *supra* note 10, MIL. R. EVID. 315(c)(3).

liable to the owner of the property for any damages; and (5) the degree of notice provided to the service member as to possible inspections of the property by the military.⁸⁶

The federal cases also comport with military practice regarding searches of service members' homes located off of the installation overseas. Military courts have used SOFAs and other diplomatic agreements rather than relying on traditional Fourth Amendment jurisprudence as the basis for their analysis as to the reasonableness of the search.⁸⁷ The findings in the federal cases also follow a military court's ruling that the search of private, leased buildings was valid. The court based its finding, in part, on the authority granted to the command by the lease itself.⁸⁸

Taken together, several similarities emerge. Areas "under military control" have traditionally been limited to locations on the installation. In certain circumstances, however, military control can be extended to private dwellings occupied by service members living off of the installation. Two federal courts have found that leased property located off of the installation can also be considered an area under military control.⁸⁹ Courts will look to the service's own guidelines and practices to help determine whether or not the location of the search was under military control, the reasonableness of the search, and the notice provided to the service members that the area was controlled by the military. Therefore, it would not be unreasonable to extend the reach of MRE 315(c)(3) to hotel rooms leased by the government provided it met certain criteria. Specifically, that the lease allowed for searches of the property, service members were notified as to the possibility of inspections and searches, and the government maintained a high degree of control over the property. This control should include assigning rooms and roommates, regulating conduct in the hotel, setting limitations on visitors, and assigning a unit representative to act as a liaison between the unit and the hotel. Finally, commanders must adhere to basic search and seizure rules, including providing clear guidance to those conducting the search and insuring they remain within the stated search parameters.

Inspections, Inventories, and Apprehensions

Inspections

Once a command determines that the hotel room is an area under military control, the command can conduct inspections and inventories, but the unique location of the room gives rise to some special considerations.

Purpose

Inspections may be conducted "as an incident of command" when the primary purpose is "to determine and to ensure the security, military fitness, or good order and discipline of the unit."⁹⁰ Commanders may inspect the equipment as well as the person of a service member.⁹¹ Additionally, when conducting inspections, commanders may use "any reasonable natural or technological aid," and may conduct no-notice inspections.⁹² "Due to the critical and unique nature of the military mission, inspections of many sorts are reasonable under the Fourth Amendment and are everyday facts of military life."⁹³ The Army Court of Military Review gave a detailed list of indicia of reliability for a health and welfare inspection. The Court of Military Review adopted these criteria in *United States v. Middleton*:

A military inspection is an examination or review of the person, property, and equipment of a [S]oldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of individuals, the presence and condition of equipment, the state of repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.

86. See generally *United States v. Reppert*, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); *Donnelly v. United States*, 525 F. Supp. 1230, 1231-32 (E.D. Va. 1981).

87. See generally *United States v. Mitchell*, 12 M.J. 265, 268 (C.M.A. 1982); *United States v. Walsh*, 21 C.M.R. 876, 883 (A.F.B.R. 1956).

88. See *United States v. Moreno*, 23 M.J. 622, 624 (A.F.C.M.R. 1986), review denied, 24 M.J. 348 (C.M.A. 1987).

89. See generally *Reppert*, 76 F. Supp. at 185; *Donnelly*, 525 F. Supp. at 1230.

90. MCM, *supra* note 10, MIL. R. EVID. 313(c).

91. *Id.*; see also *id.* MIL. R. EVID. 312.

92. *Id.*

93. *United States v. Alexander*, 34 M.J. 121, 127 (C.M.A. 1992).

Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographic area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.⁹⁴

Scope

Commanders are allowed a good deal of leeway in conducting the inspection once they have established a proper purpose for that inspection. Conversely, commanders and those conducting the inspections do not have unfettered discretion simply because the original, stated purpose was proper. The scope of the inspection must also be within the bounds of that originally stated.

For instance, if the only purpose of an inspection is to make sure that all stereos and televisions are identified with a personal marking, it logically would be outside the scope of that inspection to look into the pockets of pants and jackets of a [S]oldier whose barracks was being inspected.⁹⁵

Without restrictions as to both scope and purpose, previously announced inspections could easily become a subterfuge

for a search.⁹⁶ “Accordingly, commanders and persons conducting such inspections must be ever faithful to the bounds of a given inspection, in terms both of area and purpose.”⁹⁷

Inventories

Purpose

In a case involving the inventory of a Soldier who was apprehended, the COMA in *United States v. Kazmierczak* pointed out that while “the private possessions of a member of the military are not open to indiscriminate search for evidence of criminal conduct,”⁹⁸ military inventories are “‘a legitimate, normal, and customary routine’ in military administration.”⁹⁹ Just as commanders cannot use an inspection as a subterfuge to search, “inventory procedures may not be used as a subterfuge to conduct an illegal search.”¹⁰⁰ Military Rule of Evidence 313(c) provides that contraband found while conducting an inventory for the primary purpose of administrative requirements, may be seized.¹⁰¹

Additionally, a lawful inventory must meet two remaining requisites that are derived from the purpose requirement.¹⁰² First, the inventory must be “legitimately based.”¹⁰³ That is, there must be a clear, administrative procedure for the inventory based on the valid purpose. For example, the courts have found that a regulation that required the unit to inventory an absentee’s clothing, along with the traditional need for readiness inspections, were proper bases for an inventory.¹⁰⁴ Second, the government must conduct the inventory properly and not exceed the scope of the inventory purpose.¹⁰⁵

94. *United States v. Hay*, 3 M.J. 655, 656 (A.C.M.R. 1977), *quoted in* *United States v. Middleton*, 10 M.J. 123, 128 (C.M.A. 1981).

95. *United States v. Brown*, 12 M.J. 420, 423 (C.M.A. 1982).

96. *See id.*

97. *Id.*

98. 37 C.M.R. 214, 220 (C.M.A. 1967) (citing *United States v. Battista*, 33 C.M.R. 282, 285 (C.M.A. 1963)).

99. *Id.* at 221 (quoting *United States v. Coleman*, 32 C.M.R. 522 (A.B.R. 1962)).

100. *United States v. Mossbauer*, 44 C.M.R. 14, 16 (C.M.A. 1971); *see also* MCM, *supra* note 10, MIL. R. EVID. 313(c).

101. MCM, *supra* note 10, MIL. R. EVID. 313(c).

102. *United States v. Hines*, 5 M.J. 916, 919 (C.M.A. 1978), *aff'd*, 11 M.J. 88 (C.M.A. 1981) (citing *United States v. Kazmierczak*, 37 C.M.R. 214 (1967); *United States v. Welch*, 40 C.M.R. 638 (A.B.R. 1968), *aff'd*, 41 C.M.R. 134 (C.M.A. 1969)).

103. *Kazmierczak*, 37 C.M.R. at 219-20.

104. *Id.* at 220.

105. *Id.* at 224.

*Inventory of Personal Property Incident to Arrest or
Unauthorized Absence*

In *United States v. Kazmierczak*, the court held that regulations “providing for the inventory of an arrested serviceman’s personal property, w[ere] not *per se* contrary to the constitutional prohibition against unreasonable searches and seizures.”¹⁰⁶ In order to be valid, “[a]n inventory regulation must strike a fair balance between legitimate governmental need and the right of the individual to privacy.”¹⁰⁷ Furthermore, “the test remains one of reasonableness.”¹⁰⁸

In *United States v. Jasper*, the COMA found that the commander has a “legitimate interest” in inventorying the personal property of a Soldier who has left the unit due to an unauthorized absence.¹⁰⁹ The need for a prompt inventory may be elevated if the Soldier lives in an off-post dwelling when assigned overseas.¹¹⁰ “There is an important governmental interest in safeguarding military property overseas, particularly in light of the rise in international terrorist activities.”¹¹¹ The court is more likely to find that the inventory is valid when the command follows regulations and other policies to inventory the belongings of absent personnel.¹¹²

These cases present two important points for commanders who intend to conduct inventories of the personal belongings of service members residing in hotel rooms. First, commanders must follow service and installation regulations if they apply. The JA should also work with the unit to develop standing operating procedures (SOP) and other guidance for how such inventories will be conducted in hotel rooms. Second, in at least one case, the COMA was willing to broadly construe a commander’s ability to conduct an inventory of property located off of the installation due to an “important government interest.”¹¹³

It is important for JAs to realize that even if a court finds that a leased hotel room is an area properly “under military control,” a commander has less physical control over such property. Therefore, JAs must understand and articulate the argument that the military has an important government interest in inventorying a Soldier’s property believed to be located in a hotel room in the event of an unauthorized absence or other valid administrative purpose.

Apprehensions

Rule for Courts-Martial 302

Apprehension is an important sub-set of search and seizure law. Rule for Courts-Martial 302(c) allows for the seizure of persons when there is probable cause to believe “that an offense has been or is being committed and the person to be apprehended committed or is committing it.”¹¹⁴ Evidence seized by an unlawful apprehension is inadmissible.¹¹⁵

Due to the invasive nature of an apprehension made at the home of the suspect, absent exigent circumstances or consent, authorities must either obtain a warrant or provide authorization under RCM 302(e)(2)(C) before making an arrest or an apprehension in a private dwelling.¹¹⁶ Rule for Courts-Martial 302(e) provides that private dwellings can be located either on or off of the installation and include “single-family houses, duplexes, and apartments.”¹¹⁷ Several different military courts have gradually refined the application of the rule to the armed forces and have recognized that service members do not have the same expectation of privacy in their barracks as do those residing in civilian homes.¹¹⁸ Military courts have held that a private dwelling can include military quarters, Bachelor Officer

106. *Id.* at 220; *see also* *United States v. Mossbauer*, 44 C.M.R. 14, 16 (C.M.A. 1971).

107. *Kazmierczak*, 37 C.M.R. at 220.

108. *United States v. Welch*, 41 C.M.R. 134, 136 (C.M.A. 1969).

109. 20 M.J. 112, 114 (C.M.A. 1985).

110. *Id.*

111. *Id.* at 115.

112. *Id.* at 114. *See, e.g.*, U.S. DEP’T OF ARMY, REG. 700-84, ISSUE AND SALE OF PERSONAL CLOTHING para. 12-12 (28 Feb. 1994) [hereinafter AR 700-84] (providing detailed guidance as to proper inventory procedures for absentee personnel); *see also* *United States v. Law*, 17 M.J. 229, 237 (C.M.A. 1984) (finding that if a unit follows Marine Corps regulations regarding inventory procedures, then despite the fact there was suspicion of contraband, the inventory is not necessarily unlawful).

113. *Jasper*, 20 M.J. at 114.

114. MCM, *supra* note 10, R.C.M. 302(c); *see also id.* MIL. R. EVID. 316(c).

115. MCM, *supra* note 10, MIL. R. EVID. 311; *see also* *United States v. Dunaway*, 442 U.S. 200 (1979).

116. *See* *Payton v. New York*, 445 U.S. 573, 603 (1980); *see also* MCM, *supra* note 10, R.C.M. 302(e)(2)(C).

117. MCM, *supra* note 10, MIL. R. EVID. 315(e)(2).

118. *See, e.g.*, *United States v. McCarthy*, 38 M.J. 398, 401 (C.M.A. 1993).

Quarters (BOQ) or Bachelor Enlisted Quarters (BEQ) rooms, and hotel rooms located off of the installation.

Military Quarters and BOQ or BEQ Rooms

In *United States v. Roberts*, the COMA held that occupants of military quarters, though having both elements of military property and a civilian home, are entitled to a reasonable expectation of privacy, because “military quarters have some aspects of a dwelling or a home and in those respects the military member may reasonably expect privacy protected by the Fourth Amendment.”¹¹⁹ In *United States v. Ayala*, however, the Army court held that, “their expectation [of privacy] is not the same level of privacy that a civilian enjoys when residing in a rented apartment.”¹²⁰

Despite the courts’ findings that military quarters for either single service members or those living with families offer a greater expectation of privacy than the barracks, the areas are still “under military control.”¹²¹ A commander can authorize the apprehension of a service member living in military housing and an arrest warrant is not required.¹²²

Hotel Rooms Located Off of the Installation

In a line of cases that helped to formulate the modern rules regarding search and seizure, the Supreme Court held that occupants of hotel rooms have an expectation of privacy. “No

less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.”¹²³ This is true even if a hotel manager or desk clerk allows law enforcement access to the room.¹²⁴ Hotel guests do not lose their expectation of privacy even if they give “‘implied or express permission’ to ‘such persons as maids, janitors or repairmen’ to enter [his] room ‘in the performance of their duties.’”¹²⁵

Taken together, these Court cases as well as the holdings in the military courts show that individuals staying in hotel rooms receive the full protections of the Fourth Amendment and that hotel rooms are considered to be private dwellings for the purposes of military apprehensions under RCM 302.¹²⁶ An arrest in a hotel room off of the installation ordinarily requires an arrest warrant. Therefore, in order to shift the analysis so that a commander can authorize entry into a hotel room of a service member for the purposes of an apprehension, the room must be considered to be an extension of the barracks and “under military control.”

Areas That Are Not Private Dwellings

Some areas are also clearly identified as falling outside the definition of private dwelling for purposes of apprehension. These areas include “living areas in military barracks,¹²⁷ vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places.”¹²⁸

119. 2 M.J. 31, 36 (C.M.A. 1976). In *United States v. Kaliski*, the COMA found that the expectation of privacy extended to the cartilage surrounding his BOQ room similar to what a civilian might expect outside of a private residence. *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993).

120. 22 M.J. 777, 784 n.14 (A.C.M.R. 1986), *aff’d on other grounds*, 26 M.J. 190 (C.M.A. 1988). While the COMA did not directly address the issue of the diminished expectation of privacy in military quarters during their review, one can infer that the Army court’s finding on this issue is valid. Additionally, other cases have shown that military quarters are an area “under military control” and thereby subject to military authority. *See, e.g.*, *United States v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992) (holding that a commander “had a substantial basis for concluding that probable cause existed to search appellant’s quarters.”).

121. *See United States v. Reppert*, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999); *Donnelly v. United States*, 525 F. Supp. 1230, 1231 (E.D. Va. 1981); *see also MCM, supra* note 10, MIL. R. EVID. 315(c)(3) (stating “*Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located . . .”).

122. *United States v. Stuckey*, 10 M.J. 347, 359 (C.M.A. 1981).

123. *United States v. Stoner*, 376 U.S. 483, 490 (1964) (citing *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948)).

124. *Id.* at 489 (citing *Lusting v. United States*, 338 U.S. 74 (1949); *United States v. Jeffers*, 342 U.S. 48 (1951)).

125. *Id.* (citing *Jeffers*, 342 U.S. at 51.).

126. *United States v. Ayala*, 22 M.J. 777, 789-90 (A.C.M.R. 1986).

127. MCM, *supra* note 10, R.C.M. 302(e)(2); *see also United States v. McCarthy*, 38 M.J. 398, 400 (C.M.A. 1993).

128. MCM, *supra* note 10, R.C.M. 302(e)(2). In *United States v. Khamsook*, the court noted:

As a matter of terminology, under R.C.M. 302(a)(1), . . . “the taking of a person into custody” is referred to as “apprehension” and not arrest. Apprehension is the equivalent of “arrest” in civilian terminology. (In military terminology, “arrest” is a form of restraint. (citations omitted) However, apprehensions by military personnel are unlawful if they violate the Fourth Amendment as applied to the armed forces.

57 M.J. 282, 287 (2002) (citations omitted).

Military barracks need not be treated like private dwellings.¹²⁹ Indeed,

[t]he Fourth Amendment correctly, in our view, has been extended by *Payton* over private dwellings. A military barracks, no matter the manner or design of its construction, is *not*, however, a private dwelling. Its military character is distinct and necessary to the effective functioning of any military unit. We are not reluctant, therefore, when balancing the individual liberties of our military personnel against the needs of military command and control, to subordinate in such clearly defined areas, the individual to the greater, unique needs of the military society.¹³⁰

In *United States v. McCarthy*, the court found that a service member living in a military barracks room has substantially less expectation of privacy than a person living in civilian housing.¹³¹ Some factors the *McCarthy* court considered included the following: (1) service members are usually assigned their room and their roommate; (2) they are not allowed “to cook in [their] room[s], have overnight guests, or have unaccompanied underage guests”; (3) that service members are aware that they are “subject to inspection to a degree not contemplated in private homes”; and (4) that “the CQ [has] a key to the room and [is] authorized to enter the room on official business.”¹³² While in a civilian dormitory, the residents have some degree of control and choice, “[b]arracks occupants have no way to avoid noisy, abusive, violent, or unclean occupants, and “[e]viction of undesirable ‘tenants’ is not an option.”¹³³ The court in *McCarthy* went on to note that “[w]hat is tolerated in the barracks sets the level of discipline in the unit,” and that a military commander has a responsibility for the safety and well being of all those service members who reside in the barracks.¹³⁴

129. See *McCarthy*, 38 M.J. at 401.

130. *United States v. McCormick*, 13 M.J. 900, 904 (N.M.C.M.R. 1982).

131. See *McCarthy*, 38 M.J. at 403.

132. *Id.* (citing *United States v. Baker*, 30 M.J. 262, 267 n.2 (C.M.A. 1990) (“Prior notice is a factor relevant to the reasonableness of a search and tends to reduce the intrusion on privacy occasioned by the search.”)). Additionally, the court notes that the factors listed are “not in themselves determinative.” *Id.* But rather, they impact whether the service member can meet the subjective prong of having a reasonable expectation of privacy. *Id.*

133. *Id.*

134. *Id.* (“In the barracks, the impact that one service member can have on other persons living or working there demands that a commander have authority to regulate behavior in ways not ordinarily acceptable in the civilian sphere.”). Captain John S. Cooke, *United States v. Ezell: Is the Commander a Magistrate? Maybe*, ARMY LAW., Aug. 1979, at 19 n.46, quoted in *United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993).

135. See, e.g., AR 700-84, *supra* note 112; see also *United States v. Mossbauer*, 44 C.M.R. 14, 16 (C.M.A. 1971) (discussing the balancing test between legitimate government need and reasonable expectation of privacy).

136. *United States v. Hines*, 5 M.J. 916, 920 (C.M.A. 1978).

137. *McCarthy*, 38 M.J. at 403.

Implications for Searches and Seizures in Hotel Rooms

Issues raised by the cases involving inventories, inspections, and apprehensions can be applied to searches and seizures of service members living in hotel rooms. First, the command must have a legitimate purpose for conducting the inspection and or the inventory. For example, regularly scheduled health and welfare inspections and furniture inventories are commonly accepted reasons for military, administrative examinations. Second, clear notice must be provided to the service member that although they may be temporarily residing in an off-post hotel room, they are still subject to the standard military health and welfare inspection and or administrative inventories. The lease and a well-publicized SOP can provide such notice. The lease itself can provide actual notice to the service member and the hotel that the area is under military control. Therefore, under both the objective and subjective standard, a service member has a lower expectation of privacy in the hotel. Third, commanders should follow applicable regulations and policies and ensure their examinations are reasonable by weighing the legitimate government need against the service member’s reasonable expectation of privacy.¹³⁵ Fourth, commanders must ensure that those conducting inspections or inventories in the hotel room stay within the stated scope.¹³⁶ Finally, it is imperative that commanders treat the hotel room just like a barracks in certain respects. Commanders should continue to control room assignments, set clear limitations on visitors, and provide guidance on smoking, cooking, noise control, and all of the normal conduct that would be expected of a service member living in traditional barracks.¹³⁷

Search and Seizure in Privatized Housing

Generally

As military communities began to show signs of neglect and age, Congress developed a resolution to build military housing

using the expertise of the private sector.¹³⁸ The new approach was very popular with military installations, and as of February 2002, thirty-nine percent of the existing 300,000 military housing units were in some stage of the Military Housing Privatization Initiative (MHPI).¹³⁹ The MHPI project becomes a potential search and seizure issue for commanders because of the project format. That is, “[t]he developer will own, operate and maintain the houses, and lease the underlying land from the agency for a term of fifty years.”¹⁴⁰ Therefore, the commander’s authority to authorize searches within MHPI housing units is not clearly delineated. A review of the problems and proposed solutions for search and seizure in privatized housing areas are informative for comparison purposes.

Commander’s Authority to Authorize Searches

Search and Seizure

While courts recognize that commanders have the responsibility and the authority to provide for the safety of the installation and the welfare of its residents, there are currently no decisions addressing the search and seizure issue as it applies to privatized housing in the United States.¹⁴¹ There is an older military case, however, that dealt with contract housing located off of the installation overseas.¹⁴² In *United States v. Carter*, the accused lived “off the military reservation . . . [in] housing created and owned by a private French corporation under guarantee arrangements for full occupancy by the U.S. Government with lodging assignments being held by American authorities.”¹⁴³ The court also noted that the French corporation was only authorized to provide housing to American service members, American civilian workers, and their families. The court held that the search of the accused’s housing by American military law enforcement was lawful. In making its findings, the court found that although different, the search provisions of the

SOFA and the *Manual for Courts-Martial (MCM)* were comparable.¹⁴⁴

*A series of subsequent cases relied almost exclusively on the applicable SOFA to determine whether or not the search was lawful.*¹⁴⁵ For example, in *United States v. Mitchell*, the COMA recognized that while the *MCM* allows for searches of property located overseas, the provisions do not detail the extent of the commanders’ authority in this area. Instead, the court noted that “[t]he question of whether and under what condition a military commander can lawfully authorize an off-post search of a private dwelling in a foreign country is dependent upon international agreement or arrangement between the involved countries, where such exists.”¹⁴⁶

Thus, the idea of using the contract, or in the case of housing overseas, the international agreement, to clarify the authority of the military commander is not new. This concept can be applied to privatized housing and to hotel rooms occupied as barracks and to fill in the gaps of the language of MRE 315 to expand the common definition of area under military control.

The Authority of the Contract

One way to address the ambiguity is to include a provision in the contract between the developer and the government relating to the military authority in the housing area.¹⁴⁷ Another way to deal with the issue is to require a provision in the lease between the developer and the service member “stating that MHPI houses are in an area of exclusive federal jurisdiction and the premises are under military control.”¹⁴⁸ One commentator has stated that two federal cases suggest that “clear language in the agreement between the [g]overnment and the developer may be sufficient to extend the commander’s authority to search property not owned by the [g]overnment.”¹⁴⁹

138. Major Jeff Bovarnick, *Looking at Private Parts: Can a Commander Authorize Searches and Seizures in Privatized Housing Areas*, 5 n.6 (2001) (unpublished manuscript, on file with the Professional Writing Program, The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia) (quoting National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended at 10 U.S.C. §§ 2871-2885 (2000))).

139. *Id.* at 10.

140. Captain Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. REV. 1, 24 (2002).

141. *Id.* at 28; *see also* U.S. DEP’T OF DEFENSE, DIR. 5200.8, SECURITY OF DOD INSTALLATIONS AND RESOURCES para. 5.1 (25 Apr. 1991) [hereinafter DOD DIR. 5200.8] (designating the military installation commander as the person authorized to issue regulations for the protection and security for property and places under military control).

142. *See, e.g., United States v. Carter*, 36 C.M.R. 433 (C.M.A. 1966).

143. *Id.* at 435.

144. *See id.* at 437.

145. *See, e.g., United States v. Bunkley*, 12 M.J. 240, 242-43 (C.M.A. 1982); *United States v. Mitchell*, 45 C.M.R. 114, 116 (1972).

146. *Mitchell*, 45 C.M.R. at 116.

147. *See Vest, supra* note 140, at 27-28.

A key difference between leased hotel rooms and privatized housing is land ownership. The focus of the MHPI is to work with private developers to upgrade current housing or to build new housing on the installation.¹⁵⁰ Therefore, although the government will lease the housing to the developer, the government will retain ownership in the property. The ownership is a trigger for legislative jurisdiction. "When the Federal Government has legislative jurisdiction over a particular land area, it has the power and authority to enact, execute, and enforce general legislation within that area."¹⁵¹ Since the government will not have ownership of the underlying land in the hotel rooms, they cannot acquire legislative jurisdiction. Instead, we must rely on the commander's authority over the person and the property under military control language.

Implications for Search and Seizure in Hotel Rooms

There are several lessons the installation JA should take away from the privatized housing initiative. For example, the government should include provisions in the lease with the hotel that clarify its authority and put the service member on notice as to the government's responsibility in terms of law enforcement. A sample lease provision that details the service's authority to search the hotel room and access the property is provided at the Appendix.¹⁵² The lease incorporates many of the issues raised by the comparison to the MHPI as well as the

other areas of search and seizure law as detailed in several sections of this article. The government should also provide the service member with information regarding the rules and procedures in the hotel. A lease with the service member is not necessarily required, but the command should provide the occupants with clear guidance as to government authority when the service members sign for the room key. An SOP that addresses service members in hotel rooms and provides notice as to the commander's authority over the property is also important to provide notice to service member occupants and guidance to their leaders. The JA will have to work with military law enforcement and their civilian counterparts to develop clear guidance as to which agency will respond in the event of an incident. Military law enforcement must be trained as to the proper response and the limitations of authority off of the installation, especially in regards to a civilian's actions within a government-leased hotel.

Posse Comitatus and the Need for a Memorandum of Understanding (MOU)

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁵³

148. *Id.*; see also Fort Carson Privatized Housing Tenant Lease, stating

RIGHT OF REENTRY. Landlord, its agents, and employees, and the United States Government, the Army, and Fort Carson military authorities, may enter the Premises at reasonable times with a pass key, or otherwise, to make needed repairs or installations of equipment, pipes, wires, and other appliances, or to inspect the premises. However, Landlord or the Government is required to give prior notice of at least 24 hours to Tenant of its desire to enter the Premises. In emergency situations, Landlord or the Government may enter the Premises without any such prior notice. Landlord shall indemnify Tenant for any damages caused by its negligence or misconduct during such entry. If entry is under emergency conditions, Landlord or the Government shall leave written notice of the entry in a conspicuous place in the premises immediately after the entry. Tenant and Landlord recognize: that the Army needs to ensure security, military fitness, and good order and discipline; that the premises remain on a military installation of exclusive federal jurisdiction; and that all areas owned or leased by Landlord under its contract with the Army are within military control. In recognition of these facts, the Army retains the ability to authorize and conduct inspections in all areas leased or owned by the Landlord on Fort Carson.

Fort Carson Privatized Housing Tenant Lease (forthcoming Summer 2004) (draft at para. 13, on file with Office of the Staff Judge Advocate, Administrative Law Office, Fort Carson, Colorado).

149. See Vest, *supra* note 140, at 27-28. The author refers to *United States v. Reppert*, 76 F. Supp. 2d 185, 188-89 (D. Conn. 1999) (finding that the language of the lease was sufficient to find that property leased by the Navy but located off the installation was an area under military control for purposes of MRE 315(c)(3)); *Donnelly v. United States*, 525 F. Supp. 1230, 1231 (E.D. Va. 1981) (finding that property leased by the Navy but located off of the installation was an area under military control based on the degree of control exercised by the Navy over the property and the notice to the service members that the premises was controlled by the Navy).

150. See generally Office of the Deputy Under Secretary of Defense (Installation and Environment), *Military Housing Privatization*, at <http://www.acq.osd.mil/housing> (last visited Jan. 19, 2004); see also E-mail from Lisa Tychen, Attorney, Housing and Competitive Sourcing Office, Office of the Under Secretary of Defense (Installations and Environment), to MAJ Alison Martin, Student, 52d Judge Advocate Officer Graduate Course, U.S. Army (Mar. 5, 2004) (on file with author) (stating that the focus of MHPI is on privatization, so the purchase of new land and or the acquisition of exclusive jurisdiction where it did not exist before would be incompatible with the goals of the project).

151. U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 3a (21 Feb. 1974) [hereinafter AR 405-20]. When the United States acquires property, the government has absolute possession and control. The government, however, does not acquire partial, concurrent, or exclusive jurisdiction until notice of acceptance of jurisdiction is given under 40 U.S.C. § 255 (2000); see also *Adams v. United States*, 319 U.S. 312 (1943).

152. See Appendix, Sample Lease Provision.

History

Although “[a] firmly rooted constitutional principle of American government is that the federal armed forces shall be subordinate to civil authorities,”¹⁵⁴ during the Civil War and Reconstruction, Congress greatly expanded the ability of the President to use the military to enforce civil law.¹⁵⁵ Due in part to partisan politics and in part to the government’s excessive use of the Army in the southern states,¹⁵⁶ the Posse Comitatus Act was enacted in 1878 and forms the foundation of the limitation of the use of the military in law enforcement against civilians.¹⁵⁷ In response to several cases that arose in the 1970s and congressional modification of the act in 1981,¹⁵⁸ the DOD issued a directive to the armed forces detailing permissible and impermissible assistance to civilian law enforcement.¹⁵⁹

Evolution of the Current Standard

In 1973, the American Indian Movement forcibly occupied the village of Wounded Knee at the Pine Ridge Indian Reservation in South Dakota.¹⁶⁰ An Army colonel provided advice to law enforcement personnel during the uprising.¹⁶¹ A series of cases came out of the incident at Wounded Knee that provided a framework to analyze Posse Comitatus issues.¹⁶² The final case in the series, *United States v. McArthur*, developed the current standard.

In *United States v. McArthur*, the judge found that the standard applied by previous courts was either “too vague” or “too mechanical.”¹⁶³ The new standard stated that the use of military personnel in civilian law enforcement operations will violate the Posse Comitatus Act if the “military personnel subjected the citizens to the exercise of military power which was *regulatory, proscriptive, or compulsory* in nature,”¹⁶⁴ This is the current standard applied by the courts in determining whether or not an action by the armed forces violates 18 U.S.C. § 1385.

Military Purpose Doctrine

Courts have carved out an exception to the Posse Comitatus Act for some actions by the armed forces.¹⁶⁵ For example, in *United States v. Chon*, the Ninth Circuit found that the Navy’s investigation of a civilian living off of the installation did not violate the Posse Comitatus Act because its primary purpose was to recover DOD equipment allegedly stolen by the appellant.¹⁶⁶ This exception is further detailed in the *DOD Directive 5525.5*.¹⁶⁷

Implications for Search and Seizure in Hotel Rooms

Commanders must take steps to ensure that searches and seizures off of the installation clearly fall within the military purpose doctrine outlined by various court rulings and further

153. 18 U.S.C. § 1385.

154. Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off of the Federal Installation*, 161 MIL L. REV. 1, 5 (1999).

155. Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting the Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 273 (2003).

156. See Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 101, 111 (1984).

157. See Porto, *supra* note 155, at 273.

158. See Rice, *supra* note 156, at 112 (citing *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974); *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974); *United States v. Jaramillo et al.*, 380 F. Supp. 1375 (D.Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975)).

159. See U.S. DEP’T OF DEFENSE, DIR. 5525.5, DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (20 Dec. 1989) [hereinafter DOD DIR. 5525.5].

160. *Jamarillo*, 380 F. Supp. at 1376-77.

161. See *United States v. McArthur*, 419 F. Supp. 186, 189 (D.N.D. 1975).

162. See *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974) (finding that the correct standard was totality of the evidence, but not providing a clear standard as to the application of the Act to the actions by members of the armed forces); *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975) (holding that the “direct and active use of troops for the purpose of executing the laws”, would run afoul of the act, but that the armed forces could provide “materials, supplies, or equipment of any type or kind in execution of the law” without violating the Act).

163. *McArthur*, 419 F. Supp. at 194.

164. *Id.* (emphasis added).

165. See, e.g., *United States v. Allen*, 53 M.J. 402, 407 (2000) (finding that investigators had an independent, continuing military interest in an investigation and could therefore turn over the results of that investigation to civilian law enforcement under the Military Purpose Doctrine).

166. 210 F.3d 990, 994 (9th Cir. 2000).

codified in *DoD Directive 5525.1* in order to avoid a violation of the Posse Comitatus Act. The JA should work with military and civilian law enforcement to establish an MOU detailing an appropriate military response as well as assistance from civilian law enforcement in the event civilians are involved in an incident at a service member's hotel room. The JA should also assist military law enforcement to ensure the installation security regulation contains detailed guidance for conducting law enforcement off of the installation. Military police must be well-trained on the tactics, techniques, and procedures for entering hotel rooms located off of the installation and understand the limits of their duties and responsibilities. Above all, commanders and military law enforcement must understand that any law enforcement activity off of the installation must be for the primary purpose of enforcing the UCMJ and the interests of the military, rather than for the enforcement of civilian laws.¹⁶⁸

Suggested Methods to Expand the Definition of Area Under Military Control

The Continuing Problem

Since December 2001, the U.S. military has almost tripled the number of service members mobilized.¹⁶⁹ Many of these units are deployed and are conducting operations overseas, while others fill critical shortages at installations across the United States. Many more have completed their mobilization and stay at various installations during their demobilization process. Installations will continue to grapple with the housing shortage and many will look to the local economy to provide temporary housing. The issue of command authority in hotel rooms will continue to cause concern as commanders attempt to maintain good order and discipline for all service members, regardless of where they are housed.

Implications for the Future

As early as 1967, the COMA noted that as Fourth Amendment law changed, then so must the legal review and the analysis of command activities.

In recent decades, the scope of constitutionally protected rights and privileges of the individual has been substantially redefined. Many practices evolved on the basis of the old, and more circumscribed, concepts have failed to meet the challenges of the new definitions. A thick coat of tradition, therefore, is no assurance of constitutional acceptability.¹⁷⁰

Later, the COMA acknowledged that the traditional concept of barracks life was evolving. While commanders still had the responsibility to ensure the health and welfare of service members occupying the barracks, commanders' authority to carry out their duties must change to keep pace with the new challenges arising from giving Soldiers more privacy than they enjoyed in the past.¹⁷¹ The cases demonstrate that while courts will continue to respect the traditions and customs of the service, the military must adjust its practices and procedures to both the evolving laws impacting personal liberties and the changing environment of military service.

One way to adjust military practices to the changing environment is to allow commanders to treat hotel rooms like barracks rooms when housing shortages force units to locate Soldiers off of the installation. There are several obstacles that commanders will have to overcome in order to accomplish this goal. Judge advocates will have to work with contracting officers, military and civilian law enforcement, and the command to ensure that leased agreements with commercial entities allow the command maximum flexibility in dealing with this type of property.

In reviewing several diverse areas of law in this article, a number of factors that favor an expanded definition of area under military control emerge. These factors include the following: (1) rooms that are leased and paid for directly by the government rather than the service member; (2) language in the lease containing specific provisions for search, seizure, inventory, inspection, and apprehension by military authorities; (3) the existence of an SOP that puts service members on notice as to possible inspections and the authority of the command to search rooms; (4) command control of unit assignments, conduct in the hotel rooms, and enforcement of other administra-

167. DOD DIR. 5525.5, *supra* note 159, encls. 4, para. E4.1.2.1.2-6. Permissible military purposes include: (1) "[i]nvestigations and other actions relating to enforcement of the UCMJ"; (2) "[i]nvestigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding"; (3) "[i]nvestigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility"; (4) "[p]rotection of classified military information or equipment"; (5) "[p]rotection of DoD personnel, DoD equipment, and official guests of the [DOD]"; and (6) "[s]uch other actions that are undertaken primarily for a military or foreign affair's purpose." *Id.*

168. *See* *United States v. Thompson*, 33 M.J. 218, 221 n.4 (C.M.A. 1991).

169. Statistics released by the DOD indicate that as of 15 October 2003, 164,014 Soldiers, Sailors, Airmen, and Marines were activated from the reserves and the National Guard. *See* AKO, The U.S. Army Portal, 2 June 2004, available at <http://www.us.army.mil/usar/main.html>. Other statistics released by the DOD, however, indicate that as of 12 December 2001, only 58,741 service members were mobilized. *See* DefenseLink, *supra* note 2.

170. *United States v. Kazmierczak*, 37 C.M.R. 214, 219 (C.M.A. 1967).

171. *See* *United States v. Middleton*, 10 M.J. 123, 127-28 (C.M.A. 1981).

tive regulations in the hotel; (5) the existence of installation regulations that outline practices and procedures to be used to search hotel rooms and also provide notice to service members as to military authority; (6) provisions in the lease that allow for command access to each room without the permission of the service member; (7) the existence of a prior, written memorandum of agreement with local law enforcement addressing military authority; and (8) the existence of a legitimate military interest within the meaning of the Posse Comitatus Act.¹⁷²

The JA must keep in mind that neither the lease nor an SOP nor installation regulations, standing alone, create the authority for the commander to search. Instead, these documents put the member on notice that the command considers the hotel room to be an area “under military control.” This notice is a critical component in determining both the subjective and the objective prong of an individual’s reasonable expectation of privacy. When a unit maintains a high degree of control in the hotel regarding room assignments and expected conduct, service members are more likely to understand that they have a lower expectation of privacy than they would in a typical, civilian hotel room. Clear military law enforcement regulations and guidelines for proper procedures will reduce the chance that military law enforcement will overstep their authority and violate the Posse Comitatus Act. Judge advocates must also be clear that military necessity is the driving force for command action rather than location.

The case law supports a greater emphasis on military necessity in the barracks and those areas that “embody that essential military character”¹⁷³ Judge advocates must be able to articulate reasons why hotel rooms used as barracks should fall under the broad umbrella of military necessity and be able to show that although located off of the installation, the rooms still have an “essential military character.” For example, commands must assign service members to rooms, have rules and regulations that govern visitation and conduct in the hotel, and have access to the rooms through an appointed unit representative. Commanders should inspect and inventory the rooms on a regular basis and have policies and regulations that govern those actions.

There are other practical considerations not addressed by the courts that would also favor more authority by commanders. Judge advocates should consider the reason for and the duration of the occupation of the hotel rooms as well as whether or not the hotel has limited the access to the hallways and entryways

to the service members’ rooms from other hotel guests. When a Soldier occupies a hotel room for a longer period of time (perhaps sixty days or more), there is better notice to the occupant that this location is more than just a temporary duty destination, it is long-term housing akin to a barracks room. Additionally, courts would more readily find that the property was under military control if the government made arrangements for service members to occupy distinct areas of the hotel separate and apart from other hotel guests. A separation would serve two important purposes. First, it would eliminate many of the problems with civilians becoming involved in incidents that would require intervention by military law enforcement. Second, it would reinforce the notice to the service member that although they are living in a hotel, the location is really just an extension of the barracks.

Conclusion

While the physical trappings of a modern barracks or military dormitory may be more comfortable and private than an open bay barracks, the need for discipline and readiness has not changed. A [S]oldier may lawfully be ordered to move from private family quarters into the barracks, for reasons related to military discipline or military readiness. While a civilian may retreat into the home and refuse the entreaties of the police to come out, a [S]oldier may lawfully be ordered to come out of his or her quarters. In short, the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home.¹⁷⁴

As the Global War on Terror continues into its third year, the military will continue to struggle to find housing for troops.¹⁷⁵ Housing members of the armed forces in hotel rooms is a reasonable alternative, and with careful planning and coordination, commanders can treat hotel rooms like an extension of the barracks for purposes of search and seizure. The commander’s authority to conduct search and seizure has always been an integral part of the responsibility of command. Extending the definition of that authority to hotel rooms off of the installation is simply a new way to address an age-old facet of command.

172. See *United States v. Thompson*, 33 M.J. 218 (1991), *cert. denied*, 502 U.S. 1074 (1992); U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-1(a) (30 Oct. 1985).

173. See, e.g., *United States v. Mitchell*, 12 M.J. 265, 269 (C.M.A. 1982).

174. *United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993) (citations omitted).

175. Mass mobilizations and temporary housing in hotels are not unique to the Global War on Terror. Indeed, during WWII, Soldiers, Sailors, and Marines were also placed in hotels during basic training and while waiting to be shipped into theatre. See Andrea Stone, *WWII Veterans’ Kids Keep Reunions, Memories Alive*, USA TODAY, Nov. 11, 2003, at 5a. Over 160,000 reservists were mobilized during World War I, approximately 200,000 reservists served on active duty during the Korean War, and 85,276 reservists were called to duty for Desert Shield/Storm. U.S. ARMY COMMAND & GEN. STAFF C., RES. PLANNING AND FORCE MGMT. 9-15 (2002).

Appendix

Sample Lease Provisions

“In recognition of the U.S. [Army’s] need to ensure security, military fitness, and good order and discipline, . . . the Landlord agrees that while its facilities are occupied by [service members assigned to the installation], the U.S. [Army] and not Tenant has control over the leased premises and shall have the right to conduct command inspections of those premises.”¹⁷⁶ The Landlord further agrees to recognize the Army’s authority for purposes of search, seizure, and apprehension “when necessary for protection of the interests of the government,”¹⁷⁷ and that the leased property is an area under military control.

The Landlord agrees to provide keys and access to all leased rooms to the U.S. Army for purposes of internal control and distribution. The Landlord further agrees to address all concerns about room cleanliness, access for repair, and any other problems to the designated unit representative for the service member. In the event of any serious misconduct by a service member on the premises, the Landlord agrees that in addition to notifying the proper civilian authorities, the Landlord will contact the designated unit representative.¹⁷⁸

176. *United States v. Reppert*, 76 F. Supp. 2d 185, 188 (D.Conn. 1999).

177. *United States v. Moreno*, 23 M.J. 622, 623 (A.F.C.M.R. 1986), *review denied*, 24 M.J. 348 (C.M.A. 1987).

178. *See United States v. McCauley* (Special Operations Support Command (ABN), Fort Bragg, North Carolina, 4 Oct. 2002) (unpublished) (on file with the Office of the Staff Judge Advocate, Special Operations Command (ABN), Fort Bragg, North Carolina) (containing a Barracks/Hotel Standard Operating Procedure from Special Operations Support Command (ABN), Fort Bragg, North Carolina).

A Soldier's Road to U.S. Citizenship—Is a Conviction a Speed Bump or a Stop Sign?

Major Michael Kent Herring

*Citizenship obtained through naturalization is not a second-class citizenship . . . [I]t carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.*¹

Introduction

“Sir, what happens to my citizenship if I am convicted?”² Without doubt, all legal assistance attorneys and defense counsel will come into contact with immigrant service members during their client services tenure. While this client contact might not deal with the issue of how a criminal conviction will impact their chances of becoming a naturalized U.S. citizen, the sheer number of immigrants³ in the armed forces makes this type of contact a likely reality for the client-service practitioner.⁴

The purpose of this article is to provide the legal assistance or defense counsel practitioner with information to answer common questions that might arise from a Soldier who is facing a court-martial or administrative separation for misconduct and who is naturalized or who is not yet naturalized but hopes to become a naturalized U.S. citizen. In addition, this article provides contextual material on congressional immigration policy as it pertains to non-citizen service members and Department of Defense (DOD) and Department of the Army (DA) policy.

Since 1862, naturalization⁵ laws have recognized the contributions of aliens⁶ who served in the U.S. Army.⁷ Under the 1862 statute, the benefits were available only to those with service in the “armies” of the United States, a term deemed not to include the Marine Corps⁸ or the Navy.⁹ Subsequent legislation, however, and judicial interpretation remedied this issue and included members of other branches of the armed forces.¹⁰ Citizenship by naturalization is a privilege to be given, qualified, or withheld as Congress may determine, and an individual may claim it as a right only upon compliance with terms Congress imposes.¹¹

1. *Osborn v. Bank of the United States*, 22 U.S. 738, 827 (1824).

2. This question came from a then recently naturalized U.S. citizen who was originally from Nigeria and on trial at a general court-martial in Hanau, Germany, in 2003, for rape and other offenses. Like any good defense counsel who doesn't know the answer to his client's question, I replied, “I'll get back to you on that during the break.” See *United States v. Ayeni* (Hanau, Germany 2003) (unpublished) (on file with author).

3. See Appendix. As of April 2003, statistics provided by the Department of Defense's (DOD) Manpower Data Center to the Migration Policy Institute show 35,211 naturalized citizens and 33,615 non-citizens on active duty in the U.S. Armed Forces. Cumulatively this number represents approximately five percent of the total active force. Migration Policy Institute, DOD's Manpower Data Center, 1 July 2003, at <http://www.migrationpolicy.org/news/Foreign-Born%20Armed%20Forces%20Data.pdf>.

4. While this article focuses on the results of a criminal conviction on naturalization, an article outlining the immigration and naturalization process was recently written by Lieutenant Colonel Pamela Stahl, *The Legal Assistance Attorney's Guide to Immigration and Naturalization*, 177 MIL. L. REV. 1 (2003). See also The Immigrant Legal Resource Center, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*, available at <http://www.ilrc.org/ccp/A%20Guide%20for%20Legal%20Practitioners%20and%20Other%20Community%20Advocates.pdf> (last visited June 15, 2004) (providing a comprehensive guide to the immigration and naturalization process); U.S. Citizenship and Immigration Services, *Naturalization Information for Military Personnel*, at <http://uscis.gov/graphics/services/natz/MilitaryBrochurev7.pdf> (last visited June 15, 2004) [hereinafter U.S. Citizenship and Immigration Services] (providing a naturalization guide for military personnel).

5. 8 U.S.C. § 1101(a)(23) (2000). The term naturalization means the conferring of nationality of a state upon a person after birth, by any means whatsoever. *Id.*

6. *Id.* § 1101(a)(3). The term alien means any person not a citizen or national of the United States. *Id.* A national is a person owing permanent allegiance to the United States. *Id.* § 1101(a)(21).

7. Act of July 17, 1862, 12 Stat. 594.

8. *In re Bailey*, F. Cas. No. 728 (1872).

9. *In re Chamavas*, 21 N.Y.S. 104 (1892).

10. U.S. Citizen & Immigration Services, *INS Interpretations 328.1(a)*, available at <http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-54258?f=templates&fn=document-frame.htm#slb-interp> (last visited May 25, 2004) [hereinafter *INS Interpretations 328.1(a)*].

11. *United States v. Macintosh*, 283 U.S. 605, 615 (1931); *Fong Yue Ting v. United States*, 149 U.S. 698, 707-08 (1893).

Immigration Policy and the Armed Forces

The U.S. Supreme Court defines naturalization as the “act of adopting a foreigner, and clothing him with the privileges of a native citizen.”¹² While the naturalized citizen does enjoy her newly acquired citizenship to the same extent as a native born citizen, she will never become President.¹³ The Constitution contemplates that there will be two sources of citizenship and two only—birth and naturalization.¹⁴

The body of statutory immigration law is commonly referred to as the Immigration and Nationality Act (INA).¹⁵ The federal agency delegated the responsibility to administer programs under this act is the United States Citizenship and Immigration Service (USCIS), also known as the Bureau of Citizenship and Immigration Services (BCIS). This bureau of the Department of Homeland Security (DHS) was formerly known as the Immigration and Naturalization Service, a component of the Department of Justice (DOJ), until the federal government reorganized after the 11 September 2001 terrorist attacks.¹⁶ The BCIS administers services such as immigrant and nonimmigrant sponsorship; adjustment of status; work authorization and other permits; naturalization of qualified applicants for U.S. citizenship; and asylum or refugee processing.

United States immigration policy makes special allowances for immigrant service members who wish to become citizens through naturalization.¹⁷ To be eligible to enlist, a service member must first be “lawfully admitted for permanent residence.”¹⁸ Statutory provisions for the Army¹⁹ and Air Force²⁰ specifically state that to be eligible for enlistment, an individual must be a citizen or a lawful permanent resident. While no such statutory limiting language exists for the Navy or Marine Corps, the same requirements are applied to those services by regulation.²¹ The requirement for enlistment into any Armed Forces Reserve component is the same as for the active component.²² In the case of officers, federal law requires that a Regular officer of any service be a citizen;²³ a Reserve component officer may be a citizen or a lawful permanent resident.²⁴ National Guard (NG) officers must be citizens.²⁵ Moreover, active or reserve service in any branch of the Armed Forces is recognized for purposes of the INA.²⁶ Service in the NG is recognized under the INA, but only for periods of time during which the service member is activated for federal service.²⁷

12. *Boyd v. Nebraska ex. rel. Thayer*, 143 U.S. 135, 162 (1892).

13. U.S. CONST. art. II, § 1.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen years a resident within the United States.

Id.

14. *Id.* amend. XIV, § 1.

15. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1557 (1982)).

16. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2297. On 1 March 2003, the BCIS began to administer the nation’s immigration laws as a bureau of the DHS. *See id.*

17. 8 U.S.C. § 1255 (LEXIS 2004).

18. *Id.* § 1101(a). “Lawfully admitted for permanent residence” applies to individuals who have been accorded the privilege of residing permanently in the United States, as an immigrant, under immigration laws. For purposes of this article, and the discussion that follows, it is important to recognize that most immigrant service members must be lawful permanent residents before they are allowed to enlist. Only those residing in “geographic territory of the United States” are not required to obtain this status before enlisting. *See infra* note 73.

19. 10 U.S.C. § 3253.

20. *Id.* § 8253.

21. U.S. DEP’T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION encl. 1, para. E1.2.2.1 (21 Dec. 1993).

22. 10 U.S.C. § 12102(b). “No person may be enlisted as a Reserve unless (1) he is a citizen of the United States or (2) has been admitted to the United States for permanent residence under the Immigration and Nationality Act” *Id.*

23. *Id.* § 532.

24. *Id.* § 12201.

25. 32 U.S.C. § 313.

26. 8 C.F.R. § 328.1(1) (LEXIS 2004).

There are two primary INA provisions that service members may take advantage of in their pursuit to become naturalized. The first provision permits expedited processing of naturalization applications for service members who have served honorably for a one-year period.²⁸ The second provision applies to service members who have served during presidentially specified periods of hostilities.²⁹ In a widely publicized use of 8 U.S.C. § 1440, President Bush on 3 July 2002, signed an executive order, Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, which expedited the naturalization of those immigrants on active duty beginning on or after 11 September 2001, as part of the war against terrorism.³⁰

A lesser-known provision of the INA permits granting posthumous citizenship to service members who die while on active duty. This provision was used to confer citizenship on two Marines killed early in Operation Iraqi Freedom.³¹ Under a separate provision enacted after 11 September 2001, if a service member citizen is married to a lawful permanent resident at the time of the service member's death, then his spouse would be eligible for expeditious naturalization, with the residency and physical presence requirements waived.³² Additionally, derivative benefits now flow to family members of those granted posthumous citizenship.³³ Effective 1 October 2004, non-citizen service members applying for naturalization under 8 U.S.C. § 1439 or 8 U.S.C. § 1440 will be exempted from paying the otherwise applicable federally-mandated fee.³⁴ This provision will save service members \$320 when filing their Form N-400,

27. *Id.* § 328.1(2).

28. 8 U.S.C. § 1439; 8 C.F.R. § 328.

29. 8 U.S.C. § 1440; 8 C.F.R. § 329.

30. Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2002). The order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) (the "Act"), and solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States during the period of the war against terrorists of global reach, it is hereby ordered as follows: For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order. Those persons serving honorably in active-duty status in the Armed Forces of the United States, during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 329 of the Act. Nothing contained in this order is intended to affect, nor does it affect, any other power, right, or obligation of the United States, its agencies, officers, employees, or any other person under Federal law or the law of nations.

Id.

31. 8 U.S.C. § 1440-1. Lance Corporal Jose Gutierrez, twenty-two years old, Lomita, California, and Corporal Jose A. Garibay, twenty-one years old, Costa Mesa, California, were killed in action on 21 March and 23 March 2003, respectively. Lance Corporal Gutierrez was a citizen of Guatemala, and Corporal Garibay was a citizen of Mexico. Chelsea J. Carter, *Posthumous Citizenship Granted to Marines*, ASSOCIATED PRESS ONLINE, Apr. 2, 2003, at 1, available at <http://pqasb.pqarchiver.com/ap/599374791.html?did=599374791&FMT=ABS&FMTS=FT&date=Apr+3%2C+2003&author=CHELSEA+J.+CARTER&desc=Posthumous+citizenship+granted+to+two+Marines+killed+in+Iraq>. Under § 1440-1(d), once posthumous citizenship is granted, the "Director [of the BCIS] shall send to the next-of-kin of the person who is granted citizenship, a suitable document which states that the United States considers the person to have been a citizen of the United States at the time of the person's death." 8 U.S.C. § 1440-1(d).

32. *Id.* § 1430(d).

Any person who is the surviving spouse, child, or parent of a United States citizen, whose citizen spouse, parent, or child dies during a period of honorable service in an active duty status in the Armed Forces of the United States and who, in the case of a surviving spouse, was living in marital union with the citizen spouse at the time of his death, may be naturalized upon compliance with all the requirements of this title except that no prior residence or specified physical presence within the United States, or within a State or a district of the Service in the United States shall be required.

Id.

33. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703, 117 Stat. 1392, 1691 (2003).

34. 8 U.S.C. §§ 1439-1440; § 1701, 117 Stat. at 1691. This provision states:

[N]otwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing the application, or for the issuance of a certificate of naturalization upon being granted citizenship, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

Id.

application for naturalization,³⁵ and also the \$50 fingerprinting fee.³⁶

While the purpose of this article is to focus primarily on the ramifications of a criminal conviction upon an immigrant service member's naturalization aspirations, it is important to discuss the two main statutory provisions commonly used by service members to become citizens. This is because under both 8 U.S.C. § 1439 and 8 U.S.C. § 1440, service members who naturalize but later receive an other than honorable discharge³⁷ before completing five years of honorable military service stand to have their citizenship revoked. This fact alone could affect how counsel choose to advise a client facing a separation board since an other than honorable discharge may be awarded at such a board. Both statutes commonly used by military members to naturalize will now be addressed, in-turn, as well as Army administrative policies as they pertain to immigrant Soldiers and the effect of a possible separation from the service on their naturalization.

Persons with One Year of Service in the Armed Forces of the United States³⁸

Title 8 U.S.C. § 1439 provides special benefits to non-citizens who have served honorably for one year in the military. The statute applies to service members who serve in war or peacetime.³⁹ The service need not be active duty, but may be a combination of active and reserve service⁴⁰ or simply reserve service.⁴¹ Military policy is that non-citizen service members be given every opportunity to be retained in the service to allow them to complete the requisite one year of service to be eligible for naturalization under 8 U.S.C. § 1439.⁴² Once separated from the military, the service member must have been discharged under honorable conditions,⁴³ to include an honorable⁴⁴ or general discharge certificate.⁴⁵ The service member must be a lawful permanent resident at the time of applying for naturalization under this provision.⁴⁶ A certified copy of an honorable service discharge is conclusive evidence of the nature of one's service.⁴⁷

The service member may obtain the benefits of naturalization under this provision, if he requests them, while he is still

35. 8 C.F.R. § 103.7(b)(1) (LEXIS 2004); U.S. Dep't. of Justice, Immigration, & Naturalization Service, OMP No. 115-0009, Form N-400, Application for Naturalization (July 23, 2002).

36. 8 C.F.R. § 103.7(b)(1).

37. See *infra* notes 54 and 66 and accompanying text. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-7c (19 Dec. 2003) [hereinafter AR 635-200]. "A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, homosexual conduct, security reasons, or in lieu of trial by court martial . . ." *Id.*

38. 8 U.S.C. § 1439. The one-year service period may be continuous or discontinuous as long as the aggregate total is one year. *Id.*

39. Jung v. Barber, 184 F.2d 491, 492 (9th Cir. 1950).

40. U.S. Citizenship & Immigration Services, *INS Interpretations 328.1(b)(4)*, available at <http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-54258?f=templates&fn=document-frame.htm#slb-interp> (last visited May 25, 2004).

41. 8 C.F.R. § 328.1 (LEXIS 2004).

42. 8 U.S.C. § 1439; 32 C.F.R. § 94.4(a)(4).

Caution shall be exercised to ensure that an alien's affiliation with the Armed Forces of the United States, whether on active duty or on inactive duty in a reserve status, is not terminated even for a few days short of the [] statutory period, since failure to comply with the exact [] requirement [] will automatically preclude a favorable determination by the [Citizenship and Immigration Service] on any petition for naturalization based on an alien's military service.

32 C.F.R. § 94.4(a)(4).

43. 8 C.F.R. § 328.1. Under this provision, "[h]onorable service means only that military service which is designated as honorable service by the executive department under which the applicant performed that military service. Any service that is designated to be other than honorable will not qualify under this section." *Id.*

44. AR 635-200, *supra* note 37, para. 3-7a. An honorable discharge "is a separation with honor. The honorable characterization is appropriate when the quality of the soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate." *Id.*

45. *Id.* para. 3-7b. A general discharge "is a separation from the Army under honorable conditions. When authorized, it is issued to a soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge." *Id.*

46. 8 C.F.R. § 328.2(c).

47. 8 U.S.C. § 1439(b)(3) (2000); see U.S. Citizenship and Immigration Services, *Operations Instructions*, at <http://uscis.gov/graphics/lawsregs/INSTRUC.HTM> (last visited June 15, 2004).

on active duty or in the reserve, or discharged from the service, but he must make the request no later than six months after separation from the military.⁴⁸ The requirement that the service member be a lawful permanent resident is not waived under this provision.⁴⁹ Further, the service member must be able to show that for five years before the date of application for naturalization, he or she has, and continues to be of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed towards the good order and happiness of the United States.⁵⁰ The service member is presumed to satisfy the requirements listed in the preceding sentence during periods of honorable military service.⁵¹

Once the requirements are met, the service member is eligible to apply for the benefits of this statutory provision. The service member need not have a residence within a particular state and can file his application in any state, regardless of his actual residence.⁵² The normally applicable five-year residency requirement and physical presence in the United States, with three months in a state do not apply either.⁵³

Yet, a service member who naturalizes using this provision runs the risk that misconduct on his part resulting in an other than honorable discharge before completing five years of honorable service may result in his citizenship being revoked.⁵⁴ Consequently, when advising⁵⁵ a Soldier with misconduct issues, it is important to know the expiration of his term of service, and also to attempt to negotiate an outcome that prevents the possible issuance of an other than honorable discharge. If unable to avoid such an outcome, then counsel must inform the

separating authority or convening authority of the collateral consequences of such a discharge on the Soldier-client. The next common provision that non-citizen service members use to obtain citizenship pertains to those with service during specific periods of hostilities.

Active Duty Service in the U.S. Armed Forces During Specified Periods of Hostilities⁵⁶

This U.S. Code section provides special recognition and benefits to service members desiring to naturalize as a result of honorable service during periods of hostilities, as defined by the President. More benefits are available to service members using this statutory provision to naturalize than 8 U.S.C. § 1439.⁵⁷ To be eligible, the service member must establish that she served honorably,⁵⁸ while a noncitizen, during such period “as may be designated by the President in an Executive Order . . .”⁵⁹

Currently, service members on active duty are serving in such a period of hostilities under Executive Order 13,269, of 3 July 2002, which terminates only on the issuance of a future executive order ending this period of hostilities.⁶⁰ Following President Bush’s executive order, the BCIS published updated implementing guidance, which directs eligible service members to file their application with the Lincoln, Nebraska service center.⁶¹ The department to which the service member belonged determines whether the service was honorable and whether it was considered active duty.⁶² A service member who

48. 8 U.S.C. § 1439(a).

49. 8 C.F.R. § 328.2(c) (LEXIS 2004).

50. *Id.* § 328.2(d).

51. *Id.* § 328.2(d)(1).

52. 8 U.S.C. § 1439(b)(1); 8 C.F.R. § 328.3.

53. 8 U.S.C. § 1439(a). Applicants for naturalization who cannot take advantage of the military-related statutory provisions must, for example, establish residence in the United States for five-years *and* be physically present in the United States. The applicant must also live in the district or state where he will apply for three months before applying. *Id.*

54. *Id.* § 1439(f).

55. As a practice pointer, should defense counsel have an administrative separation board at which the non-citizen service member is facing an other than honorable discharge characterization, it is imperative that counsel inform the service member, fact-finder, and commander of the collateral consequences of such a discharge. Further, counsel should be structuring the case for the best chance of appeal to the service member’s discharge review board or board of corrections for military records under 8 U.S.C. § 1553 and 8 U.S.C. § 1552, respectively. *Id.* §§ 1552-1553.

56. *Id.* § 1440; 8 C.F.R. § 329.

57. Many service members will now be eligible under both 8 U.S.C. § 1439 and 8 U.S.C. § 1440, though their application may only be filed under one provision. 8 U.S.C. §§ 1439-1440.

58. *Id.* § 1440(a); 8 C.F.R. § 329.2(b).

59. 8 C.F.R. § 329.2(a).

60. Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002).

has had his citizenship revoked may not use this provision of law to apply for naturalization again based upon the same period of service.⁶³ Individuals who have been separated from the service based on their nationality, conscientious objector status, or who refused to wear the uniform are barred from applying for naturalization under this statutory provision.⁶⁴

Service members granted citizenship under this expedited provision also bear the risk that future misconduct in subsequent enlistments could jeopardize their naturalization status. For example, a Soldier naturalized under the War on Terror Executive Order⁶⁵ who commits misconduct before completing five years of honorable service that results in a characterization of service of less than honorable, could be placing himself at risk of revocation of his U.S. citizenship status.⁶⁶ When revocation is predicated on this statutory provision, and no automatic statutory grounds for revocation are involved, it is permissive rather than mandatory that a court revoke the naturalization, and the court may⁶⁷ or may not⁶⁸ do so.

For the service member that meets these qualifications, she may be naturalized regardless of age.⁶⁹ If there is an outstand-

ing deportation order or proceeding that would otherwise preclude naturalization, it will not apply.⁷⁰ The naturalization restrictions against citizens of nations with which the United States might be at war, pursuant to 8 U.S.C. § 1442, do not apply to an individual under this statutory provision.⁷¹ The normal requirements of five years residence and physical presence in the United States do not apply.⁷² If at the time the individual joins the military, she was in the “geographic territory of the United States,” then she is exempt from the requirement of first having attained lawful permanent resident status.⁷³

The time period that a service member must show good moral character, and attachment to the principles of the Constitution of the United States, and a favorable disposition towards the good order and happiness of the United States, is reduced from five years to one year before the date of the naturalization application.⁷⁴ If the service member is no longer on active duty, she can file her naturalization application in any BCIS office, regardless of her place of residence, at any time after separation.⁷⁵

61. Memorandum, U.S. Dep’t. of Justice, Immigration & Naturalization Service, to Regional Directors, District Directors, Officers-in-Charge, Senior Service Directors, subject: Implementation of Executive Order 13269 (July 17, 2002), available at http://uscis.gov/graphics/lawsregs/handbook/PolMem88_Pub.pdf.

62. 8 U.S.C. § 1440(a), (b)(4).

63. *Id.* § 1440(a). This provision prevents service members from using it a second time in cases in which their citizenship has previously been revoked. *Id.* § 1440(c).

64. 8 C.F.R. § 329.1(1)-(3).

65. *See supra* note 30.

66. 8 U.S.C. § 1440(c).

Citizenship granted pursuant to this section may be revoked in accordance with section 340 [8 USCS § 1451] if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years. Such ground for revocation shall be in addition to any other provided by law, including the grounds described in section 340 [8 USCS § 1451]. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation. Any period or periods of service shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service.

Id.

67. *U.S. v. Sommerfield*, 211 F. Supp. 493 (E.D. Pa. 1962).

68. *U.S. v. Meyer*, 181 F. Supp. 787 (E.D. N.Y. 1960).

69. 8 U.S.C. § 1440(b)(1).

70. *Id.*

71. *Id.*

72. *Id.* § 1440(b)(2).

73. 8 C.F.R. § 329.2(c)(2) (LEXIS 2004). The geographic territory of the United States includes “the Canal Zone, American Samoa, Midway Island (prior to 21 August 1959), or Swain’s Island, or in the ports, harbors, bays, enclosed sea areas, or the three-mile territorial sea along the coasts of these land areas.” Conversely, 8 C.F.R. § 329.2(c)(1) makes clear that if the individual was not in the United States, Canal Zone, American Samoa, or Swain Islands at the time of enlistment, then she must subsequently gain lawful permanent resident status. *Id.*

74. *Id.* § 329.2(d).

Army Policy Regarding Noncitizen Soldiers

The client-service attorney should be aware of key provisions in Army regulations pertaining to non-citizen Soldiers when providing advice on naturalization matters. Non-citizen Soldiers should know that they must obtain U.S. citizenship by their eighth year of service in order to remain in the Army.⁷⁶ The Army enforces this requirement in its regulations by the inclusion of a non-waiverable condition to reenlistment.⁷⁷ These requirements are important for commanders and reenlistment personnel to know since a Soldier can be separated for fraudulent reenlistment⁷⁸ or defective reenlistment⁷⁹ based on his naturalization status. Soldiers, however, may request a twelve-month extension of their enlistment to complete the naturalization process under certain circumstances.⁸⁰

Further, Army regulations prescribe procedures for notifying the BCIS in cases in which Soldiers are separated under other than honorable conditions.⁸¹ This notice is currently⁸² only required in the cases of Soldiers who were naturalized

under 8 U.S.C. § 1440 for service during periods of hostilities.⁸³ The regulation places the onus on the commander to effectuate this notice to the BCIS.⁸⁴ Having established the pertinent naturalization background information, and possible administrative separation consequences, it is time to turn to the collateral consequences of a criminal conviction relative to a service member's hopes of becoming a U.S. citizen.

Effects of a Criminal Conviction⁸⁵ on the Naturalization Process

It is important to keep the naturalization requirements⁸⁶ discussed above in mind in order to understand the kind of conviction that will bar a service member from naturalizing. This article focuses on common aspects of criminally-related issues that may impact on a service member's ability to naturalize.

75. *Id.* § 329.3.

76. U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM para. 2-4a(5) (28 Feb. 1995) [hereinafter AR 601-210].

77. U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 3-8b (31 Mar. 1999) [hereinafter AR 601-280]. This provision states that a soldier who wishes to reenlist must be a lawful permanent resident. Soldiers who will have in excess of eight years of federal service at the expiration of the period, which they are seeking to reenlist, are disqualified from reenlistment. *Id.*

78. AR 635-200, *supra* note 37, para. 7-17. Under paragraph 7-19d, a separation for fraudulent enlistment can result in an other than honorable discharge, further effecting the soldier's chances of being naturalized. *Id.* para. 7-19d.

79. *Id.* para. 7-16a(2). Even in cases in which the soldier does not know of this reenlistment restriction, she can still be separated under paragraph 7-16a(2) for defective reenlistment. Paragraph 7-16j states that soldiers discharged for defective reenlistments will be awarded an honorable characterization of service discharge. *Id.* para. 7-16j.

80. AR 601-280, *supra* note 77, para. 4-9k.

Aliens who will have in excess of 8 years of Federal Military Service at the expiration of the period for which they are seeking to reenlist will be permitted to extend their current enlistment for a period not to exceed 12 months, provided they have filed for citizenship and are awaiting a court date. Extensions will not be allowed to exceed the expected court date by more than 90 days. These soldiers must provide documentary evidence of their citizenship application status. Extensions will not exceed a total of 12 months without approval of HQDA (DAPE-MPE-PD). Soldiers from the Republic of the Marshall Islands and the Federated States of Micronesia may reenlist and pursue a career in the U.S. Army without being required to become U.S. citizens.

Id.

81. AR 635-200, *supra* note 37, paras. 1-37, 39.

82. *See supra* note 54. 8 U.S.C. § 1439(f) now provides for revocation of citizenship based on the issuance of an other than honorable discharge if issued before the service member completes five years of honorable service and mirrors 8 U.S.C. § 1440 in this regard. *Army Regulation 635-200* was written before the statutory addition of (f) and the practitioner should expect the regulation to be updated to require notice to the BCIS of other than honorable discharges issued to soldiers naturalized under 8 U.S.C. § 1439 and § 1440. 8 U.S.C. §§ 1439-1440 (2000); *see* AR 635-200, *supra* note 37.

83. AR 635-200, *supra* note 37, para. 1-38.

The citizenship of soldiers of the United States Armed Forces who were naturalized through active duty service in the Armed Forces during designated periods of military hostilities (8 USC § 1440) may be revoked if such soldiers are later separated from the military service under other than honorable conditions. The Immigration and Naturalization Service, [DOJ], is responsible for initiating citizenship revocation proceedings in such cases.

Id.

84. *Id.* para. 1-39.

Statutory and Regulatory Bars to Proving Good Moral Character⁸⁷

Under INA § 101(f), Congress has listed criminal offenses that form a statutory bar to a finding of good moral character when any eligible non-citizens, including non-citizen service

members, apply for naturalization.⁸⁸ This list of offenses is not exhaustive.⁸⁹ An applicant for naturalization bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character.⁹⁰ This includes the period between the examination and the administration of the oath of allegiance.⁹¹

85. 8 U.S.C. § 1101(a) (48)(A).

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Id.

86. 8 C.F.R. § 316.2(a) (LEXIS 2004).

General. Except as otherwise provided in this chapter, to be eligible for naturalization, an alien must establish that he or she:

- (1) Is at least 18 years of age;
 - (2) Has been lawfully admitted as a permanent resident of the United States;
 - (3) Has resided continuously within the United States, as defined under § 316.5, for a period of at least five years after having been lawfully admitted for permanent residence;
 - (4) Has been physically present in the United States for at least 30 months of the five years preceding the date of filing the application;
 - (5) Immediately preceding the filing of an application, or immediately preceding the examination on the application if the application was filed early pursuant to section 334(a) of the Act and the three month period falls within the required period of residence under section 316(a) or 319(a) of the Act, has resided, as defined under § 316.5, for at least three months in a State or Service district having jurisdiction over the applicant’s actual place of residence, and in which the alien seeks to file the application;
 - (6) Has resided continuously within the United States from the date of application for naturalization up to the time of admission to citizenship;
 - (7) For all relevant time periods under this paragraph, has been and continues to be a person of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States; and
 - (8) Is not a person described in Section 314 of the Act relating to deserters of the United States Armed Forces or those persons who departed from the United States to evade military service in the United States Armed Forces.
- (b) Burden of proof. The applicant shall bear the burden of establishing by a preponderance of the evidence that he or she meets all of the requirements for naturalization, including that the applicant was lawfully admitted as a permanent resident to the United States, in accordance with the immigration laws in effect at the time of the applicant’s initial entry or any subsequent reentry.

Id.

87. While there is no statutory definition of “good moral character,” Judge Learned Hand stated in *Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961), that it is a “test, incapable of exact definition; the best we can do is to improvise the response that the ‘ordinary’ man or woman would make, if the question were put whether the conduct was consistent with a ‘good moral character.’” *Id.*

88. 8 U.S.C. § 1101(f) (2000). For the purposes of this Act—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--

- (1) a habitual drunkard;
- (2) [Repealed]
- (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act [8 USC § 1182(a)]; or subparagraphs (A) and (B) of section 212(a)(2) [8 USC § 1182(a)(2)] and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
- (4) one whose income is derived principally from illegal gambling activities;
- (5) one who has been convicted of two or more gambling offenses committed during such period;
- (6) one who has given false testimony for the purpose of obtaining any benefits under this Act;
- (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
- (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

Id.

89. *Id.* (“The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”).

90. 8 C.F.R. § 316.10(a).

The BCIS is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application. It may consider the applicant's conduct and acts at any time before that period, if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.⁹² The immigration regulations list additional offenses and acts that will lead to a finding of a lack of good moral character.⁹³ Failure to pay one's taxes in the five years preceding an application might be raised by the Bureau as evidence of lack of good moral character.⁹⁴ It is clear that some of the listed offenses and acts are analogous to crimes found in the Uniform Code of Military Justice (UCMJ). Anyone convicted of an aggravated felony after 29 November 1990, is forever barred from showing the requisite good moral character and is subject to expedited removal as well.⁹⁵

Commission of an aggravated felony will also bar an applicant from naturalization.⁹⁶ Aggravated felonies can result from what many consider relatively minor crimes.⁹⁷ Aggravated felonies include, but are not limited to, such offenses⁹⁸ as murder,

rape, sexual abuse of a minor, drug or firearms trafficking, and crimes of violence carrying a sentence of one year.⁹⁹

In some jurisdictions, driving under the influence of alcohol or controlled substances could be considered an aggravated felony. In cases arising in circuits where the federal court of appeals has not decided whether the offense of driving under the influence is a crime of violence under 18 U.S.C. § 16(b), an offense will be considered a crime of violence if committed recklessly and if there is a substantial risk that the offender may resort to the use of force to carry out the crime. If the circuit court has already ruled on the issue, then apply that law to cases arising in that jurisdiction.¹⁰⁰

In determining whether a particular crime is an aggravated felony, federal law, not state law controls.¹⁰¹ For state drug crimes, the BCIS will defer to federal circuit courts when determining whether a state drug conviction should be considered an aggravated felony.¹⁰² Even crimes that are not statutorily defined as an aggravated felony can serve as a bar to naturalization if the crime is deemed to be a "crime of moral turpitude."¹⁰³

91. *Id.* § 316.10(a).

92. *Id.* § 316.10(a)(2).

93. *Id.* § 316.10(b). An applicant will be found to lack good moral character if she has been, among other offenses: convicted of murder at any time; convicted of an aggravated felony on or after 29 November 1990; committed one or more crimes involving moral turpitude; committed two or more offenses for which she was convicted and the aggregate sentence actually imposed was five years or more; violated any law of the United States, any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of thirty grams or less of marijuana; is or was involved in prostitution or commercialized vice; has or is practicing polygamy; committed two or more gambling offenses; or is or was a habitual drunkard. *Id.* § 316.10(b)(1)-(2).

Unless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant: willfully failed or refused to support dependents; had an extramarital affair which tended to destroy an existing marriage; or committed unlawful acts that adversely reflect on the applicant's moral character, or was convicted or imprisoned for such acts, although the acts do not fall within the purview of § 316.10(b)(1) or (2). *Id.* § 316.10(b)(3).

94. *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996); *Gambino v. Pomeroy*, 562 F. Supp. 974 (D.C. N.J. 1982).

95. 8 U.S.C. §§ 1227-1228. 8 U.S.C. § 1227 lists classes of deportable aliens, while 8 U.S.C. § 1228 provides for the expedited deportation of those convicted of an aggravated felony. *Id.*

96. *Id.* § 1101(a)(43).

97. *See United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). In this case, the court determined that the defendant's misdemeanor conviction for theft of a ten-dollar video game and assaulting his wife, for which he received a one-year suspended sentence, was an "aggravated felony." *Id.* Consequently, when advising a non-citizen Soldier in such a case, the client service practitioner should consult current law in order to best advise the client on the potential results of any conviction or guilty plea.

98. Other offenses include the following: counterfeiting; prostitution; child pornography; theft or burglary for which the term of imprisonment is at least one year; fraud or deceit in which the loss to the victim(s) exceeds \$10,000; and obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43).

99. The sentence provision refers to the possible penalty of at least one year in prison, as opposed to actual sentence served or imposed. *Aquino-Encarnación v. INS*, 296 F.3d 56 (1st Cir. 2002); *Burr v. Edgar*, 292 F.2d 593 (9th Cir. 1961).

100. *In re Ramos*, 23 I&N Dec. 336 (BIA 2002). Before this decision, the Board of Immigration Appeals almost had a *per se* rule that driving while intoxicated by alcohol or impaired by a controlled substance was an "aggravated felony." After four federal circuit courts disagreed, the Board issued the Ramos ruling. *See United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

101. *See In re Matter of Small*, 23 I&N Dec. 448 (BIA 2002).

102. *See In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002).

There are certain acts, mostly connected to military service, that render a service member permanently ineligible to naturalize.¹⁰⁴ These acts include desertion from the armed forces during a time of war, which results in a conviction by a court-martial or other court.¹⁰⁵ Other acts are related to war-time drafts and are currently inapplicable.

Obtaining Criminal Records

Most automatic bars under 8 U.S.C. § 1101(f) involve criminal conduct.¹⁰⁶ In advising a client on the ramifications of any past criminal conduct, it is imperative to obtain accurate records. Obtaining records for criminal convictions occurring in some other country present their own logistical challenges, but obtaining criminal records for events occurring in the United States are relatively simple.

Recommend that the client contact the court where she appeared and request a copy of the record in her case, sometimes known as a “summary abstract” of the court’s disposition. If any confusion remains, the client can contact the state’s equivalent of the DOJ, or if a federal matter, the Federal Bureau of Investigation for a criminal record check.¹⁰⁷ If the client does

have a conviction on her record that is not a statutory or automatic bar to showing good moral character, advise the client that she may want to postpone applying for naturalization in order to establish a subsequent track record of good moral character before actually applying to naturalize.

Advising the Client of the Collateral Consequences Upon A Conviction

Professional and competent practice dictates that a defense counsel advise his client on the possible negative repercussions¹⁰⁸ of a finding of guilty or guilty plea as it relates to the naturalization process.¹⁰⁹ Direct consequences are “consequences of the sentence [the judge] imposes,” while collateral consequences are those “possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty.”¹¹⁰ Courts have determined that failure to provide such advice is not ineffective assistance of counsel.¹¹¹ When advising clients on the consequences of any criminal misconduct, courts have held that the failure to advise that removal from the country could result from a conviction following a guilty plea did not constitute ineffective assistance of counsel.¹¹² Conversely, wrongly advis-

103. 8 C.F.R. § 316.10(b)(2)(i) (LEXIS 2004).

104. 8 U.S.C. § 1101(a)(19) (2000).

105. *Id.* § 1425 (LEXIS 2004).

106. *Id.* § 1101(f).

107. Federal Bureau of Investigation, at <http://www.fbi.gov/hq/cjisd/fprequest.html> (last visited May 25, 2004) (providing instructions for requesting a copy of your client’s criminal record). The current fee for processing the request is eighteen dollars. *Id.*

108. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 2-1 (1 May 1992). This paragraph, entitled “Advisor,” requires the attorney to advise the client not only on the law in the case, but on other considerations as well. The comment to the rule states that in offering advice,

A lawyer is not expected to give advice until asked by the client. Yet, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client’s course of action is related to the representation.

Id.

109. *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002). The court stated:

Moreover, recent Supreme Court authority supports this broader view of attorney responsibility as well. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 323 n.50, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) (“Even if the defendant were not initially aware of [possible waiver of deportation under the Immigration and Nationality Act’s prior] § 212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.” (emphasis added) (citing *Amicus Br. For Nat’l Assoc. Criminal Defense Lawyers et al.* at 6-8)); *id.* at 322 n.48 (noting that “the American Bar Association’s Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel ‘should fully advise the defendant of these consequences’” (citing *ABA Standards for Criminal Justice*, 14-3.2 Comment, 75 (2d ed. 1982))).

Id. *See* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-8c (6 Sept. 2002). *Army Regulation 27-10* makes the ABA’s Standards for Criminal Justice (current edition) applicable to counsel to the extent they are not inconsistent with the UCMJ, *Manual for Courts-Martial*, directives, regulations, or rules governing provision of legal services in the Army. *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM].

110. *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1365-66 (4th Cir. 1973).

111. *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992); *United States v. Del Rosario*, 902 F.2d 55, 57-58 (D.C. Cir. 1990).

ing your client that he may not be removed from the United States upon conviction of an aggravated felony has been held to be ineffective assistance of counsel.¹¹³

A trial judge accepting a guilty plea must be certain that it is knowing and voluntary¹¹⁴ in order to protect a criminal defendant's due process rights, and to ensure this, a court must advise the defendant of the direct consequences¹¹⁵ of his guilty plea. If the consequence is collateral to the finding of guilt, however, a trial court is not required to advise the defendant.¹¹⁶ Neither is a court required to advise the accused of the possibility that his offense might result in his removal as the result of his guilty plea. Case law indicates that deportation is a collateral rather than direct consequence of the guilty plea, negating any claim that the guilty plea was involuntary.¹¹⁷ An ineffective assistance of counsel claim will not succeed for failure to advise a client on the negative ramifications to his immigration status as the result of a guilty plea or finding of guilt. The wise practitioner, however, will take the time to research and advise his client on the possible consequences of a conviction.

What Happens to Your Client if Found Guilty?

If your client is already naturalized at the time of her conviction, and has completed five years of honorable military service, then she will not be in jeopardy of losing her citizenship, unless it is discovered that she illegally procured the naturalization certificate through fraud, concealment of material facts, or willful misrepresentation, but if so, she will be subject to revocation of the naturalization.¹¹⁸ As a naturalized citizen, she may only lose her citizenship in two ways: through denaturalization,¹¹⁹ only applicable to naturalized citizens, or expatriation, which applies to all citizens.¹²⁰ On the other hand, as discussed above, if your client is in the military but not yet naturalized, a criminal conviction may serve as a statutory or automatic bar to naturalization.

112. *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988).

113. *Couto*, 311 F.3d at 187-88, 191.

114. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

115. *Id.* at 244; *see also* FED. R. CRIM. P. 11; MCM, *supra* note 109, R.C.M. 910(c).

116. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

117. *United States v. Nagaro-Garbin*, 653 F. Supp. 586 (E.D. Mich. 1987).

118. 8 U.S.C. § 1451(a) (2000).

119. *Id.* § 1451. Denaturalization is the judicial or administrative process of canceling an individual's naturalization certificate, and therefore, citizenship. *Id.*

120. *Id.* § 1481. Expatriation has been defined as the "voluntary relinquishment of one's allegiance to the United States." *See Vance v. Terrazas*, 444 U.S. 252 (1980).

121. *Id.* § 1227(a)(2)(A)(v).

122. *U.S. v. Meyer*, 181 F. Supp. 787, 788 (E.D. N.Y. 1960).

123. *United States v. Couto*, 311 F.3d 179, 190 (2d Cir. 2002).

Only through reference to statutory and case law will the legal service practitioner be able to provide appropriate guidance on the probable effect of a criminal conviction upon the service member's hopes of becoming a U.S. citizen. Finally, for "aggravated felonies" and criminal convictions reflecting an applicant's "moral turpitude," and therefore "good character," there is slight chance for post-conviction relief from the negative consequences. Typically, only when there has been a full and unconditional pardon will the bar to naturalization, and often removal, be waived.¹²¹

Conclusion

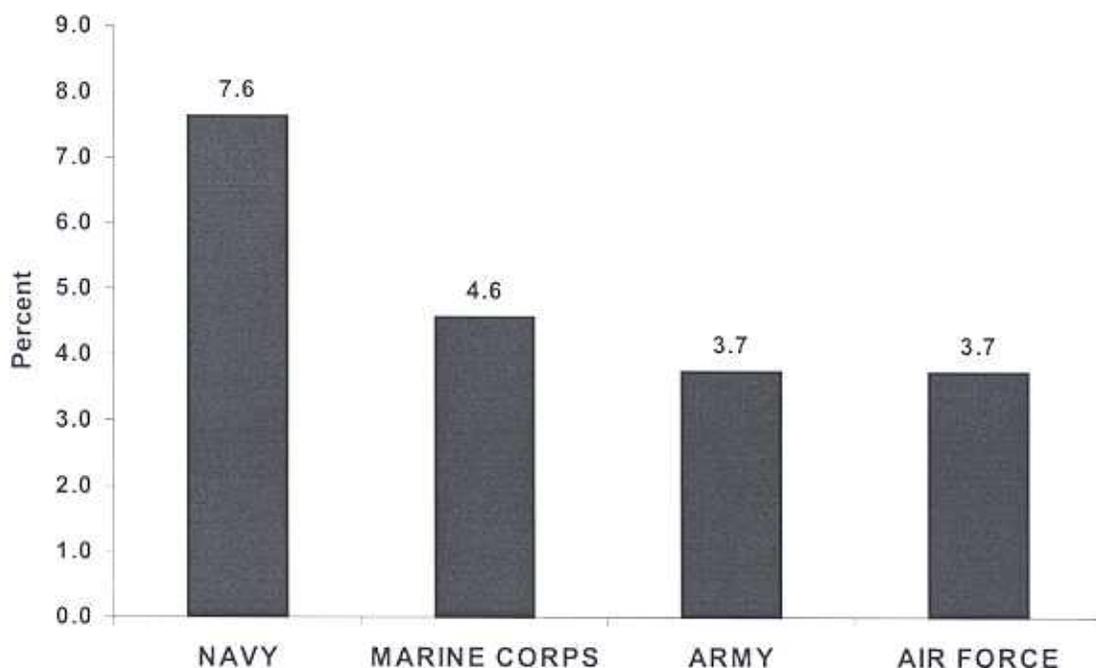
Immigration laws are complex and often changing. When dealing with a criminal conviction issue, as a matter of course, the legal practitioner will be required to consult statutes and case law in order to provide competent advice to the client. As discussed, even an other than honorable discharge at an administrative separation board may have a negative impact on the Soldier's chances of becoming a citizen.

Understanding the client's citizenship status and the effect of immigration laws is the key to providing the client with the knowledge he will need to make informed decisions. From legal research to obtaining copies of any relevant past criminal histories, such a case may be a time demanding endeavor. Though Congress has long recognized the benefit of military service by aliens through conferring "citizenship in exchange for satisfactory military service,"¹²² Congress has also established procedures to bar or revoke naturalized citizenship. Currently, while immigration consequences are considered "collateral," some courts believe this area "deserves careful consideration"¹²³ since convictions for "aggravated felonies," for example, may automatically bar someone from naturalization.

Wise counsel will fully research this ever-changing body of statutory and case law, and treat the client's case as seriously as if it were a criminal case. Only through diligent research and

preparation will counsel be able to assist the client in fully navigating the intricacies of immigration law and its impact on our Soldiers' lives.

**Percent of total in the armed forces (active duty)
who are foreign born, by service, for the
United States: April, 2003**



Fifteen countries with largest number of immigrants on active duty in the U.S. armed forces: April 2003

Immigrant group	Total		Naturalized citizen		Non-citizen	
	Number	Percent of total	Number	Percent of group	Number	Percent of group
TOTAL	68,826	100.0	35,211	51.2	33,615	48.8
Philippines	17,373	25.2	10,548	60.7	6,825	39.3
Mexico	6,994	10.2	2,618	37.4	4,376	62.6
Jamaica	4,091	5.9	1,818	44.4	2,273	55.6
Republic of Korea	2,227	3.2	1,560	70.0	667	30.0
Dominican Republic	2,031	3.0	833	41.0	1,198	59.0
Colombia	1,613	2.3	749	46.4	864	53.6
Trinidad and Tobago	1,488	2.2	672	45.2	816	54.8
El Salvador	1,473	2.1	519	35.2	954	64.8
Vietnam	1,446	2.1	986	68.2	460	31.8
Haiti	1,410	2.0	434	30.8	976	69.2
Germany	1,188	1.7	924	77.8	264	22.2
United Kingdom	1,089	1.6	758	69.6	331	30.4
Guyana	1,088	1.6	552	50.7	536	49.3
Peru	1,021	1.5	386	37.8	635	62.2
Panama	1,017	1.5	714	70.2	303	29.8

Notes from the Field

The Judge Advocate Recruiting Office: The Gateway to Service

Captain Eugene Y. Kim

“Congratulations! On behalf of The Judge Advocate General, I am pleased to offer you a commission in the U.S. Army Judge Advocate General’s Corps!”¹

Introduction

When the U.S. Army Judge Advocate General’s Corps (JAG Corps) was established on 27 July 1775, it consisted of a handful of attorneys-in-uniform.² Over 228 years later, the JAG Corps has evolved into the nation’s oldest and second-largest law firm, encompassing judge advocate (JA) officers, paralegal enlisted soldiers, civilian attorneys, and civilian support staff.³ The success of the JAG Corps is attributable in part to its dedicated efforts to recruit attorneys of the highest caliber to serve within its ranks. The Judge Advocate Recruiting Office (JARO) is responsible for spearheading these efforts. The purpose of this note is to provide an overview of the JARO and its three primary action areas: the JA accessions process; the JAG Corps Summer Intern Program; and outreach and training activities.

The Judge Advocate Recruiting Office

The forerunner to the JARO, the Judge Advocate General’s Corps Professional Recruiting Office (PRO), became operational on 1 July 1980.⁴ Before PRO’s inception, the JAG Corps did not have an office dedicated exclusively to recruiting. Instead, the Personnel, Plans, and Training Office (PP&TO) of the Office of The Judge Advocate General (OTJAG) recruited new JAs.⁵ The PRO’s primary mission was to expand recruiting efforts to eliminate a personnel shortfall of approximately 120 JAs.⁶ Also, the PRO was tasked with training the JAG Corps’ field screening officers (FSOs), developing more effective recruiting literature and advertising programs, and coordinating the JAG Corps Summer Intern Program (then in its eighth year of operation).⁷ Although the PRO was created as an activity within the U.S. Army Legal Services Agency (USALSA), PP&TO retained supervisory control over the PRO’s operations.⁸

During the years that followed the PRO’s activation, the office was re-located and re-named several times.⁹ In 2001, the PRO’s most recent successor, the JARO, moved to its current location in Rosslyn, Virginia.¹⁰ By this time, the JARO had assumed responsibility for Army National Guard and Army Reserve JA recruiting and accessions.¹¹ Currently, the JARO operates as a division of the PP&TO and is staffed by five JAs and three Department of the Army civilian employees.¹² Tasked with the mission of coordinating the recruitment, selec-

1. Letter from U.S. Army JAG Corps, to Selectee for Active Duty Service from Lieutenant Colonel Laurel L. Wilkerson, Chief, Judge Advocate Recruiting Office (JARO) (Apr. 6, 2004) (on file with author). This article also incorporates information provided by Lieutenant Colonel Wilkerson during an interview with the author. Interview with Lieutenant Colonel Laurel L. Wilkerson, Chief, JARO, Rosslyn, Virginia (June 16, 2004) [hereinafter Wilkerson Interview] (on file with author).

2. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975 7-31 (1975) [hereinafter HISTORY OF THE JAG CORPS].

3. See JARO, JAGC Resume, Frequently Asked Questions, Civilian Attorneys, available at <http://www.jagcnet.army.mil/JARO> (last visited June 16, 2004) [hereinafter JARO Web Site]. As of this writing, there are over 1,500 JAs serving on active duty, and over 2,500 JAs serving in the reserve components (RC) (Army National Guard and Army Reserve). *Id.* The JAG Corps also has approximately 400 civilian attorneys. *Id.* The U.S. Department of Justice is generally recognized as the largest law firm in the nation. See U.S. Dep’t. of Justice, Office of Attorney Recruitment and Management, at <http://www.usdoj.gov/oarm/index.html> (last visited June 16, 2004).

4. Memorandum, Major General Hugh J. Clausen, Acting The Judge Advocate General, U.S. Army, to all members of the Judge Advocate General’s Corps, subject: JAGC Professional Recruiting Office (12 July 1980).

5. Memorandum, Major General Alton H. Harvey, The Judge Advocate General, U.S. Army, to the Director of the Army Staff, subject: Establishment of a JAGC Recruiting Office (27 Mar. 1980).

6. See *supra* note 4.

7. See *supra* note 5.

8. *Id.*

9. See Wilkerson Interview, *supra* note 1. The JARO has had several homes, including Fall Church, Virginia (the “Nassif Building”), Fort Belvoir, Virginia (where the name of the office was changed from PRO to the Judge Advocate Recruiting and Placement Service (JARAPS)), and Arlington, Virginia (where the name of the office was changed from JARAPS to JARO). See *id.*

10. 1777 North Kent Street, Suite 5200, Rosslyn, Virginia 22209-2194. See JARO Web Site, *supra* note 3.

tion, and assignment of new JAs, the JARO has served as the gateway to service for thousands of Soldier-lawyers.

The Judge Advocate Accessions Process

Recruiting

The first member of the JAG Corps that law school students or lawyers usually encounter is an FSO, an active duty JA who has been hand-picked and specially trained to represent the JAG Corps and evaluate potential applicants.¹³ Annually, approximately seventy to eighty JAs are selected to serve as FSOs.¹⁴ Since FSOs are, literally and figuratively, the face of the JAG Corps, they are among the regiment's most capable and promising officers.

The arrival of autumn marks the unofficial beginning of the JARO's on-campus interview (OCI) campaign. During the fall and spring semesters, the JARO sends FSOs to almost all of the 188 law schools that are accredited by the American Bar Association (ABA).¹⁵ Field screening officers primarily engage in two activities during the OCI periods: informational briefings and application interviews. These activities are coordinated through law school career service offices (CSOs). Informational briefings are designed for groups of students and are intended to educate them on the benefits of service. Application interviews are designed for individual students and are a required component in the application process for either a commission in the JAG Corps or a summer intern position.¹⁶ Field

screening officers submit a report to the JARO for each applicant they interview; these reports are intended to be honest, thorough, and straight-forward assessments of an applicant's potential for service. In addition to their interview reports, FSOs must also submit an after-action report (AAR) for each law school they visit. When FSOs relinquish their duties, their successors use these AARs to maintain seamless transitions. These AARs are also used to document cases in which a CSO treats an FSO in a manner that is not equal to that experienced by other legal employers. Episodes of unequal CSO treatment or campus hostility towards FSOs are memorialized in FSO AARs, which are reviewed by Department of Defense (DOD) officials to determine whether a law school has violated the statutory requirement for equal treatment of military recruiters.¹⁷ When the FSOs submit their interview reports and AARs, they have, effectively, discharged their responsibilities—at least until the next OCI period.

Since most applicants for a reserve component (RC) JA commission are already practicing attorneys, the recruiting process for RC JAs takes a different route. Reserve component JA applicants must first locate an RC unit that has a vacant JA position that needs to be filled. Once an RC unit identifies an opening, a member of that unit (usually the commander or staff judge advocate) must interview the applicant. Interview reports and application materials are then submitted to the JARO for administrative review before forwarding to a selection board for consideration. Applicants for an RC JA commission must submit, among other things, security clearance and physical examination results.¹⁸

11. Memorandum, Colonel Barry M. Woofter, Chief, RC Judge Advocate Accessions, JARO, U.S. Army, to Lieutenant Colonel Janice Johnson, Officer Division, Deputy Chief of Staff, G1, subject: Recruitment Initiatives for Reserve Judge Advocate Recruitment and Retention (3 Sept. 2002). The JARO assumed responsibility for RC JA recruiting in 1999. *Id.*

12. See JAG Corp, U.S. Army, JAGCNET, *JAGCNET Directory*, at <https://www.jagcnet.army.mil/JAGCNetIntranet/Personnel/JAGDirect.nsf> (last visited June 16, 2004). The JARO's military staff consists of the Chief, JARO (an active duty lieutenant colonel), the Chief, RC Judge Advocate Recruiting (an Active Guard and Reserve major), and three Recruiting Officers (active duty captains). *Id.* Judge advocates are normally detailed to JARO for tours of duty that last between one to two years. For command and control purposes, USALSA serves as the unit of assignment for JAs detailed to the JARO. The JARO's civilian staff consists of an Active Duty Accessions Manager, an RC Accessions Manager, and an Assistant Summer Intern Program Coordinator. *Id.*

13. See JAG PUB 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES app., sec. II, para. 2-5, at 4 (2003-2004) [hereinafter JAG PUB 1-1]. The JARO coordinates the FSO appointment process. Judge advocates (usually captains and majors) are nominated for FSO duty by their staff judge advocates (SJAs) and confirmed by TJAG. After the spring selection boards have adjourned, the JARO solicits nominations from SJAs.

14. In most cases, FSOs retain their responsibilities until they undergo a permanent change of station (PCS).

15. See American Bar Association, *ABA-Approved Law Schools*, available at <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited June 16, 2004).

As of August, 2003, a total of 188 institutions are approved by the American Bar Association: 187 confer the first degree in law (the J.D. degree); the other ABA approved school is the U.S. Army Judge Advocate General's School, which offers an officer's resident graduate course, a specialized program beyond the first degree in law.

Id. The Judge Advocate General's Legal Center and School is the *only* military law school accredited by the ABA to confer an LL.M degree in Military Law. *Id.*

16. See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 13 (30 Sept. 1996) [hereinafter AR 27-1].

17. 10 U.S.C. § 983 (2000) [hereinafter The Solomon Amendment]. The Solomon Amendment (named after the legislation's sponsor, Congressman Gerald B.H. Solomon of New York) provides for the withholding of federal funding from an "institution of higher education (including any subelement of such institution)" if the Secretary of Defense determines that the institution or its subelements has a policy or practice that prohibits, or in effect prevents military recruiters from gaining entry to campuses or access to students (who are at least seventeen-years-old) for military recruiting purposes. See *id.*

The passing of the application deadlines signals the end of the recruiting phase. But there is no downtime for the JARO staff members, because they must prepare for the next phase in the process that turns lawyers into JAs—the selection boards.

Selections

Active duty JA selection boards are convened during the fall and spring of every fiscal year.¹⁹ Applications received on or before 1 November are considered by the fall active duty selection board; applications received on or before 1 March are considered by the spring active duty selection board. Before the selection boards are convened, the JARO staff members undertake an administrative review of each application to ensure that all are ready to be evaluated on their substantive merits.²⁰ Incomplete applications and applications submitted by ineligible candidates are removed during the administrative review stage.²¹ The selection board then considers applications that clear the administrative review stage.

The Judge Advocate General (TJAG), who appoints voting board members and non-voting board recorders, chooses selection board members.²² Selection boards are comprised of officers who are diverse in terms of their rank, gender, and ethnicity; this ensures that each application is reviewed from a wide variety of viewpoints. The extensive information that is provided in each application permits selection board members to assess an applicant's strengths and weaknesses from the "total person" perspective, an evaluation method that is more expansive than review techniques that focus on a single factor (e.g., grades).²³

After the selection board has reviewed each application, it provides one of three recommendations on an applicant's qualifications: best qualified; fully qualified; and non-select.²⁴ Best qualified applicants are offered commissions as JAs in the U.S. Army Reserve with a concurrent call to active duty. Fully qualified applicants are also offered commissions as JAs in the U.S. Army Reserve, but are not brought onto active duty due to the limited number of new active duty JA positions.²⁵ After TJAG adjourns a selection board, the board members may discuss the procedural aspects of their deliberations with the general public.

The JARO prepares the selection board's recommendations and presents them to TJAG for approval. The Judge Advocate General has the authority to accept or reject a selection board's recommendations on any applicant.²⁶ After TJAG has approved a list of best qualified, fully qualified and non-select applicants, the JARO notifies them via postings on its web site and by regular written correspondence. The selection phase is over; the third and final phase—accessions—now begins.

Accessions

Before selectees for active duty service with the JAG Corps can take their oath of office, they must successfully navigate an accessions process that confirms their eligibility for service. Selectees must graduate from law school, pass the bar, be medically approved for service, and receive a secret security clearance.²⁷ The JARO is responsible for assisting selectees through this process, which includes extensive coordination with local

18. See JARO Web Site, *supra* note 3, *Reserve Component*. This is another distinguishing characteristic of the RC JA application process. As explained later in this note, active duty JA applicants must obtain security clearance and physical examinations after they have been selected for accession.

19. See JAG PUB 1-1, *supra* note 13, app., sec. III, para. 3-1b, at 6. The JARO also coordinates RC JA selection boards, which are generally convened on a monthly basis. In addition, PP&TO coordinates two career status selection boards which consider active duty JA applications from former JAs, U.S. Army officers who have at least three-years time-in-grade as a captain, and officers from other branches who have career status. Career status board application deadlines are 1 October and 1 April. See *id.* 3-1d.

20. Wilkerson Interview, *supra* note 1. During the administrative review, the JARO staff members sort, arrange, and inspect thousands of documents, including (but not limited to) application forms, FSO interview reports, photographs, resumes, personal statements, undergraduate and law school transcripts, recommendation letters, writing samples, and military records (for applicants with current or prior military service). See *id.*

21. See AR 27-1, *supra* note 16. An applicant is ineligible to apply for service as an active duty JA if he or she: (1) is not a U.S. citizen; (2) is not enrolled in (or a graduate of) an ABA-approved law school; or (3) is not a third-year law school student (in the case of full-time students), fourth-year law school student (in the case of part-time students), or a law school graduate. *Id.*

22. See *supra* note 19.

23. Wilkerson Interview, *supra* note 1.

24. *Id.*

25. Interview with Colonel Barry M. Woofter, Reserve Component Judge Advocate Accessions, Reserve Recruiting, Rosslyn, Virginia (June 16, 2004) (on file with author). In order to obtain an RC JA commission, fully qualified applicants must satisfy several requirements for RC service, including (but not limited to) finding a vacant RC JA position, clearing a medical evaluation process, and obtaining a security clearance. *Id.*

26. See AR 27-1, *supra* note 16. The Judge Advocate General also has the authority to grant or deny waivers in cases in which an applicant (1) is or would be thirty-five years of age or older at the time of commissioning, (2) has failed a bar examination twice, or (3) has been convicted of a civilian or military offense. *Id.*

27. See *id.*

recruiters and Military Entrance Processing Stations (MEPS).²⁸ The two most common reasons why selectees fail to become JAs are failing the bar exam and being medically unfit for service.²⁹ An offer of a commission will be withdrawn if a selectee fails the bar exam twice, or if a selectee is found to have a non-waivable medical condition that disqualifies him from service.³⁰ In cases in which a selectee has a disqualifying medical condition that is waivable, the JARO works with the selectee and the servicing MEPS to obtain a waiver.³¹

Before reporting to their Judge Advocate Officer Basic Course (JAOBC)—and before they incur a legal obligation to serve—selectees coordinate their first assignment with the JARO. Following coordination with the PP&TO company-grade assignments officer, the JARO provides selectees with a list of available assignments. Upon receiving this list, selectees submit their top five location and subject matter preferences and discuss their assignment options with the Chief of the JARO. The assignment process is a challenging balancing exercise that takes into account the needs of the Army and the personal circumstances of each selectee.³² Once assignments have been finalized, the JARO coordinates the issuance of orders with PP&TO and the U.S. Army Human Resources Command.³³

With orders in hand, the new accessions report to their JAOBC. Courses are held in January, June, and September.³⁴ The JAOBC currently lasts fourteen weeks and consists of two phases: a military orientation phase held at Fort Lee, Virginia, and a military law phase held at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Vir-

ginia.³⁵ While the new accessions are at Fort Lee, they receive orientation briefings from the Chief of the JARO and the PP&TO assignments officer. From that point forward, personnel management of the new accessions becomes PP&TO's responsibility. The accessions process is over, and the JARO has accomplished its mission: it has opened the gateway to service for a new group of Soldier-lawyers.

The U.S. Army JAG Corps Summer Intern Program

The U.S. Army JAG Corps Summer Intern Program was established in 1972.³⁶ The program was originally instituted as part of the JAG Corps' efforts to increase the number of minority JAs within its ranks.³⁷ Thanks in part to the success of the Summer Intern Program, over fifteen percent of the JAG Corps' active duty force is composed of minority members.³⁸ In addition to its original diversity recruiting mission, the program has assumed two additional functions: it provides a means for evaluating future prospective applicants for active duty service, and it provides the JAG Corps with a pool of student "ambassadors" who can publicize the benefits of service at their respective law schools.

Out of deference to a generally accepted practice among legal employers, the JARO recruits first year (1L) and second year (2L) law school students for the Summer Intern Program at different times during the fiscal year.³⁹ Field screening officers interview 2L summer intern applicants during the fall, and 1L summer intern applicants during the spring. Application deadlines are 1 November for 2L summer intern applicants, and

28. Wilkerson Interview, *supra* note 1.

29. *Id.*

30. See AR 27-1, *supra* note 16; see also U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ch. 2 (12 Apr. 2004).

31. Wilkerson Interview, *supra* note 1.

32. See JAG PUB 1-1, *supra* note 13, app., sec. V, para. 5-1b, at 21. The most-often requested assignment locations are Hawaii, Germany, Colorado, Washington (state), and the Washington, D.C. area. In recent years, South Korea has also become a popular assignment preference. See Wilkerson Interview, *supra* note 1.

33. *Id.*

34. *Id.*

35. See JAG PUB 1-1, *supra* note 13, app., sec. VI, para. 6-2, at 28.

36. See Lieutenant Colonel James Mundt, *The Personnel Picture*, ARMY LAW., Nov. 1972, at 11. The first Summer Intern Program Coordinator was Captain (later Major General) Kenneth D. Gray. Major General Gray retired from the U.S. Army on 30 April 1997 as The Assistant Judge Advocate General. *Id.*

37. See HISTORY OF THE JAG CORPS, *supra* note 2, at 251-52.

38. The author obtained this information from searching the PP&TO Database. As of 24 May 2004, 245 of the 1584 JAs serving on active duty identified their ethnicity as being other than Caucasian. *Id.*

39. See National Association of Law Placement (NALP), *Principles and Standards for Law Placement and Recruiting Activities, Part V, General Standards for the Timing of Offers and Decisions, Part D* (2004), available at <http://www.nalp.org/pands/pands.htm#PART5>. The JAG Corps is a member of the NALP, which provides "research, education, and direction for the career planning, recruitment and hiring, employment, and professional development of law students and graduates." *Id.* The NALP guidelines stipulate that legal employers and 1L law school students "should not initiate contact with one another and employers should not interview or make offers to first year students" before 1 December. *Id.*

Outreach and Training Activities

1 March for 1L summer intern applicants.⁴⁰ Once the applications are received, the JARO coordinates the selection process, which is similar to that used to select JAs. First, the JARO conducts an administrative review of each application. Second, a selection board convened by TJAG and comprised of JAs reviews the merits of each application and provides recommendations on whether an applicant should be designated a select, alternate, or non-select.⁴¹ Third, TJAG takes final action on an applicant's disposition by accepting, rejecting, or modifying a selection board's recommendations.⁴²

Currently, seventy-five 2L and twenty-five 1L law school students are recruited for the Summer Intern Program.⁴³ The program typically lasts for nine weeks and generally runs from the beginning of June to the beginning of August. Summer interns are assigned to work in JA offices throughout the continental United States and overseas, and they are responsible for travel and lodging costs during their service. Summer interns perform a variety of paralegal duties during their internship and, whenever possible, are rotated through an office's various practice areas so that they can obtain a well-rounded substantive experience.⁴⁴

The success of the Summer Intern Program is substantiated by the glowing testimonials provided by former summer interns that highlight a variety of reasons for the program's effectiveness, including the opportunity for immediate responsibility and the chance to work with great people.⁴⁵ The impact of the Summer Intern Program as a recruiting tool was probably best reflected in this recent testimonial: "This internship was the best two months of my life."⁴⁶

In addition to the recruitment of JAs and summer interns, the JARO is responsible for coordinating four outreach and training activities: the JAG Corps' advertising campaign; the Diversity Recruiting Program; the annual Career Services Directors Conference; and the annual JA Recruiting Conference. These activities are designed to promote greater awareness of service opportunities within the JAG Corps.

The JAG Corps Advertising Campaign

In 2001, the Army unveiled its recruiting slogan for the new millennia: "An Army of One." Developed by the Army's advertising agency, Leo Burnett USA, "An Army of One" has served as the central theme for an aggressive and successful recruiting campaign that has been featured in television, print, Internet, and other information and entertainment forums.⁴⁷

Before 2003, the JAG Corps relied primarily on three advertising mechanisms to broadcast its recruiting messages—print advertisements; recruiting brochures; and the JAG Corps' official recruiting web site, law.goarmy.com.⁴⁸ These recruiting tools were created during the era of the Army's old recruiting slogan, "Be All You Can Be," and needed to be replaced with products that would align the JAG Corps' recruiting message with "An Army of One."⁴⁹ In the spring of 2003, after extensive coordination with the U.S. Army Accessions Command and the JARO, Leo Burnett USA began producing a new range of advertising products for the JAG Corps.⁵⁰ The first "Army of One"-based recruiting vehicles launched for the JAG Corps were a series of (what would eventually become) five new print advertisements. Dramatically different in appearance from the

40. See DAJA-PT Form 13, Application for the U.S. Army JAG Corps Summer Intern Program 1 (1 Jan. 2004).

41. Wilkerson Interview, *supra* note 1. The Judge Advocate General approves the designation of fifty 2L and twenty-five 1L summer intern applicants as alternates. Internship offers are made to alternates if there are any declinations among summer intern selectees. *Id.*

42. *Id.*

43. See JARO Web Site, *supra* note 3, *Summer Intern Program*. Selectees are hired as temporary federal civilian employees. Second year summer interns are hired in the grade of GS-7, Step 1, and 1L summer interns are hired in the grade of GS-5, Step 1. *Id.*

44. See JAG PUB 1-1, *supra* note 13, app., sec. II, para. 2-3, at 4. A summer intern evaluation report (SIER) is generated for each summer intern. The JARO retains SIERs and includes them in subsequent applications. *Id.*

45. See JARO Web Site, *supra* note 3, *Summer Intern Program*.

46. *Id.* This quotation is an excerpt from a recruiting testimonial provided by Mr. Gilbert Brosky, who served as a 2L summer intern during FY03. Mr. Brosky was assigned to the Office of the Staff Judge Advocate, 25th Infantry Division (Light) and U.S. Army Hawaii. *Id.*

47. See U.S. Army News Release, Jan. 10, 2001, subject: *Army to Launch New Advertising Campaign*.

48. Wilkerson Interview, *supra* note 1. Before the summer of 2004, the JAG Corps relied on two recruiting brochures, also known as "recruiting publication, individual" or RPI: "The Whole Truth About Army Law" (RPI 134), which focused on active duty and RC JA service; and "The Immediate Experience" (RPI 129), which focused on the Summer Intern Program. *Id.*

49. *Id.*

50. *Id.*

old print advertisements, the new print advertisements highlight the JAG Corps' significant accomplishments, both past and present. The publication of the new print advertisements paralleled the re-engineering of the JAG Corps' official recruiting website. In the summer of 2003, law.goarmy.com was relaunched with new images and features.⁵¹ During the same period, a direct mail campaign was initiated; correspondence was sent to thousands of law school students and graduates inviting them to consider active duty and summer intern service with the JAG Corps.⁵² Leo Burnett USA and the JARO also coordinated several public speaking engagements involving JAs. Rounding out the list of new advertising products is the consolidated JAG Corps recruiting brochure, which is currently scheduled to be introduced at the 2004 JA Recruiting Conference. The new recruiting brochure will feature, among other things, the JAG Corps' new active duty and summer intern application forms and a new recruiting CD-ROM.⁵³

The Diversity Recruiting Program

Since the early 1970s, the JAG Corps has made a concerted effort to increase the number of ethnic minority JAs.⁵⁴ The JAG Corps engages in diversity recruiting activities to boost the number of active duty and summer intern applications from minorities. The effectiveness of these efforts has manifested itself in several "firsts" within the DOD, including the first Asian-American TJAG, the first African-American in the position of The Assistant Judge Advocate General, and the first Asian-American female to attain general officer rank (she was also the first female JA to attain general officer rank).⁵⁵

The most effective diversity recruiting activities in which the JARO participates are minority bar association conventions and job fairs. Every year, a member of the JARO staff accompanies a senior JA, who is a minority, to the annual conventions of the three largest bar associations for ethnic minorities: the National Bar Association (NBA), the Hispanic National Bar Association (HNBA), and the National Asian-Pacific American Bar Association (NAPABA).⁵⁶ The NBA, HNBA, and NAPABA conventions are excellent recruiting venues; in addition to offering the opportunity to "show the flag" and interact with large groups of minority attorneys, these conventions also feature job fairs where law school students can obtain FSO interviews and JAG Corps recruiting literature. With the JARO's support, JAs have coordinated and participated in seminars during these conventions. During the 2003 NBA Convention, Captain William Brown coordinated and co-chaired a panel discussion on the Military Commissions that featured remarks from the Honorable Larry Thompson, Deputy Attorney General of the United States.⁵⁷ The JAG Corps' commitment to gender and ethnic diversity was highlighted during the 2003 NAPABA Convention, when Brigadier General Coral Wong-Pietsch, Chief Judge, U.S. Army Court of Criminal Appeals (Individual Mobilization Augmentee) delivered the convention's keynote address.⁵⁸

Career Services Directors Conference

The career services director (CSD) of a law school can play a pivotal role in influencing and facilitating the career choices of students. These directors provide a variety of career counseling and job search services. In addition, CSDs also coordinate the OCI period for legal employers.⁵⁹ It is crucial that

51. *Id.*

52. *Id.*

53. *Id.* In the spring of 2004, the JARO introduced new versions of the active duty application form (U.S. Dep't of Army, DA Form 3175, Preliminary Application for Active Duty Service with the JAG Corps (Jan. 2004) and summer intern application form (DAJA-PT Form 13, January 2004). *Id.*

54. See HISTORY OF THE JAG CORPS, *supra* note 2, at 251-52. One example of the Diversity Recruiting Program's success is the number of African-American JAs serving on active duty. In 1972, there were just fifteen African-American JAs in a JAG Corps that numbered over 1,600 officers. See *supra* note 36. In 2004, there are 124 African-American JAs on active duty in a JAG Corps that has less than 1,600 officers. See *supra* note 38.

55. See Rudi Williams, *An Asian Pacific American Timeline*, AM. FORCES INFO. SERVICE NEWS ARTICLE, May 19, 1999. Major General John L. Fugh, TJAG from July 1991 to June 1993, was the first Asian-American to serve in the JAG Corps' highest office and the first Chinese-American to achieve general officer rank in the U.S. Army. *Id.*; see also Lieutenant Colonel Frederic L. Borch, Notes from the Field, *Judge Advocate "Firsts,"* ARMY LAW., July 1997, at 37. Major General Kenneth D. Gray, The Assistant Judge Advocate General from October 1993 to April 1997, was the first African-American JA to attain general officer rank. *Id.*; see also Lieutenant Colonel Randy Pullen, *Waterloo to Washington: The Long Journey of Coral Wong-Pietsch*, AM. FORCES INFO. SERVICE NEWS ARTICLE, Apr. 24, 2001. Brigadier General Coral Wong-Pietsch, Chief Judge (Individual Mobilization Augmentee), U.S. Army Court of Criminal Appeals, was promoted to her current rank in July 2001. Pullen, *infra* note 55.

56. Wilkerson Interview, *supra* note 1.

57. See *National Bar Association 78th Annual Convention Guide*, Aug. 2-9, 2003. Captain Brown is currently serving as the Chief, Military Justice, Office of the Staff Judge Advocate, Headquarters, First U.S. Army, Fort Gillem, Georgia.

58. See *NAPABA 15th Annual Convention Guide*, Nov. 11-15 2003. During the 2003 NAPABA Convention, the author coordinated and participated in a panel discussion entitled "Military Lawyers: Where the Profession of Law Joins the Profession of Arms." Brigadier General Pietsch moderated the panel discussion, which featured JAs from all of the military departments. The panel members discussed the professional opportunities offered by their respective JA services and fielded recruiting-related questions from the audience. See *id.*

CSDs possess a thorough understanding of the JAG Corps' mission and recruiting objectives. Every year in June, the JARO hosts the CSD Conference in the Washington, D.C. area. Following the spring OCI period, the JARO extends conference invitations to approximately ten percent of the nation's 187 CSDs.⁶⁰ During the CSD Conference, the JAG Corps leadership and the JARO staff provide attendees with information briefings that focus on career opportunities in the JAG Corps and the benefits of service. In view of the dramatic increase in the Army's operational tempo following the events of 11 September 2001, and in light of the recent introduction of new JAG Corps recruiting and application materials, the need to provide CSDs with current, detailed, and accurate information on the JAG Corps' accession procedures and goals has become an even greater priority. The most recent CSD Conference was held at the USALSA headquarters in Arlington, Virginia from 24 to 25 June 2004.⁶¹

Judge Advocate Recruiting Conference

Approximately one month after the CSD Conference, the JARO hosts the annual Judge Advocate Recruiting Conference (also known as the "Recruiting Conference" or the "FSO Conference") at TJAGLCS. The Recruiting Conference serves as a training forum for new FSOs. The JARO staff conducts the training, which consists of classroom instruction, a mock selection board exercise, and simulated interview sessions with real JAG Corps summer interns. Classroom instruction focuses on

the recruiting and accessions process, interview procedures and techniques, interview reports, the Summer Intern Program, the Diversity Recruiting Program, and the JAG Corps' advertising campaign. Attendees from the reserve components also receive training on recruiting procedures and accession issues that are unique to their components. Each attendee receives a Recruiting Conference CD-ROM as well as copies of applications and brochures for distribution to applicants and law schools. The next Recruiting Conference will be held at TJAGLCS from 13 to 15 July 2004.

Conclusion

On 26 April 2004, Major General Thomas J. Romig, TJAG, announced that the JAG Corps would study, develop, and implement changes to its force structure.⁶² These changes are necessary to ensure that the JAG Corps, like the rest of the Army, remains relevant and ready.⁶³ Options under consideration include civilianizing certain positions, expanding the number of JA positions in the operational Army, and increasing the size of the JAG Corps' combined military and civilian force.⁶⁴ Although the transformation of the JAG Corps' force structure is still in the planning stages, there is at least one personnel requirement that will remain unchanged: the need for new, high-quality attorneys and law school students to serve as JAs and summer interns. For almost twenty-five years, the JARO and its predecessor activities have satisfied this need by finding and accessing outstanding Soldier-lawyers.

59. Wilkerson Interview, *supra* note 1.

60. *Id.* The CSD invitation list is determined primarily by two factors: (1) recommendations provided by FSOs; and (2) the availability of funding to cover invitee travel costs and per diem. *Id.*

61. *Id.*

62. E-mail from Major General Thomas J. Romig, TJAG, to all members of the JAG Corps (Apr. 26, 2004) (on file with author).

63. *Id.*

64. *Id.*

Utilizing, Overseeing, and Negotiating with the Local Child Support Enforcement Office

First Lieutenant Darrell Baughn
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The time is 1630, and your client arrives. She is a custodial parent who needs help in locating a noncustodial parent, establishing paternity and child support on one child, enforcing a prior child support judgment on another child, obtaining a proper dependent identification card, defending nonsupport contempt charges on her current husband, and dealing with the local child support enforcement office.

Of the many issues facing a legal assistance attorney (LAA), perhaps the most complex is family support, especially child support. The purpose of this article is to help LAAs enhance relations with local child support enforcement offices (CSEO) to achieve quicker and better results for legal assistance clients. To build this relationship, LAAs should do the following:

- (1) Learn federal and state law, as well as the tools available to the client to maximize use of the CSEO;
- (2) Cultivate a relationship with the local CSEO and recognize *its* responsibilities under federal and state laws to oversee the case; and
- (3) Ensure that the local CSEO properly understands the federal law, state law, and military regulations.

This article provides tips in dealing with the local CSEO, summarizes the federal requirements imposed on these offices, outlines the tools available to clients through these offices, and reviews resources available to LAAs.

Use the Services of the Local Child Support Enforcement Office

To use the CSEO's services, LAAs must understand the clients' needs and the CSEO services available. First, a client may be the custodial parent (CP) who needs to establish paternity or child support, modify the support order, or locate the noncustodial parent (NCP). Second, a client may be an adult dependent who needs to establish paternity or collect child support arrearages. Finally, a client may be a military member who needs a genetic test, or assistance in setting a fair amount of child support, modifying a child support order, or defending against the enforcement tools often used in the collection of child support. For certain issues, LAAs may refer the case or seek assistance from the CSEO for a CP, NCP, or the child(ren).

As a result of the dramatic increase in the number of divorces and illegitimate births in the United States,¹ Congress created the child support enforcement program² and mandated that it obtain a vast arsenal of powers,³ offer a wide range of services, and improve their services each year.⁴ The state CSEO's main mission is to locate NCPs, establish paternity, set child support, modify child support, and enforce the provisions of child support orders. Depending on the judge and the state involved, these cases may also include life insurance, educational expenses, medical support, recreational expenses, and alimony. Anyone who is receiving public assistance or who has completed an application qualifies to receive these services.

The federal office of child support enforcement provides support and direction to state CSEOs.⁵ The federal government's role is to interpret federal law concerning child support, mandate the duties of the CSEO, conduct audits to ensure compliance with federal law and regulations, provide assistance implementing mandates, and measure the results.⁶

Oversee the Case with the Local Child Support Enforcement Office

When a CP legal assistance client has child support needs, the LAA should consider referring the case to the local CSEO, and monitor the progress of the case. The first step is to contact the local CSEO and complete their application process. Some

1. NAT'L CTR. FOR HEALTH STATS., 47 MONTHLY VITAL STATS. REP. 21 (provisional 1998 data); NAT'L CTR. FOR HEALTH STATS., 48 MONTHLY VITAL STATS. REP. 16, NON-MARITAL CHILDBEARING IN THE UNITED STATES, 1940-1999 (Oct. 2000).

2. 42 U.S.C. §§ 651-669 (2000).

3. *Id.*; see Legal Assistance Items, Legal Assistance Branch, Admin. & Civil L., The Judge Advocate General's School, U.S. Army, *The Child Support Enforcement Amendments of 1984*, ARMY LAW., Dec. 1984, at 11.

4. *Office of Child Support Enforcement*, Preliminary FY 2000 Data Report (2000) (on file with author).

5. 42 U.S.C. § 652.

6. *Id.* § 608(a)(3). To ensure child support enforcement is successful, the CSEO has an unlimited sixty-six percent federal grant for matching state funds spent in fulfilling its child support mission. At present, the CSEO receives an unlimited ninety-percent federal grant for matching state funds spent for the cost of genetic testing. *Id.* § 655.

states' applications are on-line and others direct clients to local offices. While this process will differ from state-to-state, at a minimum, a CP will need to provide all applicable supporting documentation and information (if known), including the following:

- birth certificates for all of the children;
- marriage license;
- other proof of paternity;
- location information of an NCP;
- the social security number of an NCP;
- his or her place of employment and address; and
- any court papers obtained under a divorce or child support hearing.⁷

With this information, the state will locate and contact an NCP, schedule an appointment, arrange for genetic testing if requested, encourage the NCP to sign stipulated agreements or agreed judgments for paternity and child support, serve an NCP with process or obtain a waiver,⁸ and proceed to establish paternity, if necessary. The costs of genetic testing are dramatically lower for the CSEO due to the sizeable volume discount offered by large genetic testing labs. An LAA should ensure that the CP or CSEO takes all necessary steps to modify the dependent's birth certificate, as necessary, since certain benefits may require the modified birth certificate, and the CSEO may not routinely correct birth certificates.⁹

Next, the court or the CSEO sets the child support obligation. Each state's child support guidelines focus either on an NCP's income or a combination of both spouses' income with other factors.¹⁰ Since states must reexamine these guidelines every few years, LAAs should monitor the guideline statute closely. Also, the LAA may want to explain the leave and earnings (LES) statement to a CSEO so it properly establishes the child support based on the military member's income.¹¹

A child support obligation also includes providing for the medical support needs of the child(ren). The local CSEO should ensure the proper spouse provides for the medical needs of the child(ren). The CSEO sends a national medical support notice to the employer who forwards it to the plan administrator. If the court or the CSEO determines that private medical insurance is not available at a reasonable cost, a CP may look to some form of Medicaid or state-sponsored medical insurance. The definition of reasonable cost will vary from state-to-state. The CSEO, however, may also need assistance from an LAA to understand when and how the child(ren) qualify for medical insurance through the military.¹²

Every three years, upon the request of either parent, the CSEO will review and modify the order, if appropriate.¹³ A CP needs to document all of the increased expenses in raising the child(ren) and provide proof of an NCP's present income. The modification process may be either administrative or judicial, depending on the state guidelines. A request for review and adjustment outside the three-year cycle requires proof of a substantial change in circumstances.¹⁴

The CSEO also assists CPs in enforcing child support orders and spousal support orders. First, the state agency will most likely exhaust any administrative remedies available. For example, the CSEO will administratively withhold and seize the child support from an NCP's income, any state and federal income tax, unemployment benefits, workers' compensation benefits, and any account at a financial institution. In addition, the CSEO can suspend any of an NCP's licenses, revoke passports, report arrearages to the credit bureau, and file an order of contempt against an NCP either administratively or judicially (depending on the state) and seek, among other things, an adjudication of the arrears and incarceration. The CSEO can also turn certain cases over to the District Attorney, Attorney General, or the U.S. Attorney's Office for possible criminal prosecution.¹⁵

7. See ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT HANDBOOK, DEP'T. OF HEALTH AND HUM. SERVICES ADMIN. FOR CHILD. AND FAMS. OFF. OF CHILD SUPPORT ENFORCEMENT 19 (3d ed. Aug. 2002) [hereinafter CHILD SUPPORT ENFORCEMENT HANDBOOK].

8. Major Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members*, 155 MIL. L. REV. 153 (1998).

9. See generally *id.*

10. LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION 1.03 (1996, supp. 2001).

11. See *A Quick Guide to Working with Military as an Employer*, 2003, at <http://www.acf.hhs.gov/programs/cse/pol/IM/im-03-03a.htm> (2003) (providing an excellent summary of child support issues in the military from the CSEO's perspective).

12. See *id.*

13. 42 U.S.C. § 666(a)(10) (2000).

14. *Id.*

15. Major Janet Fenton, TJAGSA Practice Note, Fam. L. Note, *The Child Support Recovery Act: Criminalization of Interstate Nonsupport*, ARMY LAW., Dec. 1997, at 26. Since this note, Congress passed the Deadbeat Parent's Act creating a presumption of ability to pay upon proof of a legal obligation and nonpayment. See 18 U.S.C. § 228.

If a CP does not have sufficient information about an NCP's location, income, or situation, the CSEO uses a considerable number of data matches to assist in information gathering. For instance, the CSEO exchanges information electronically with many relevant state, federal, and private agencies like the financial institutions, employment commission, the tax commission, workers' compensation commission, social security administration, and unemployment agency.¹⁶ Because locator tools available to the military, such as the World Wide Locator,¹⁷ are often superior to those of the CSEO, LAAs can greatly assist clients in this area. The state may also administratively subpoena information for entities like the telephone company, water company, cable, and any other necessary entity. Perhaps the single most rewarding information source is the New Hire Directory—an electronic compilation of all new hires in every state, which the federal office of child support enforcement compiles and matches with each state's computer system.¹⁸

If an NCP leaves the state, the CSEO can send its income withholding order directly to any employer in the United States under the terms of the Uniform Interstate Family Support Act (UIFSA).¹⁹ Under the UIFSA, the CSEO may refer a case to any state to perform any services required. For example, one state may request another state to assist them with one of the following types of actions:

- serving an NCP with process;
- copying the court file;
- seizing an account from a financial institution;
- performing a quick location search for an NCP; or
- performing any other service not requiring the CSEO to open a full case on an NCP.

Legal assistance attorneys may need to explain to the CSEO the difference between the income withholding order (garnishment) and an involuntary allotment. The CSEO is one of the "authorized persons" allowed to request an involuntary allotment; BAH and BAS are added sources of income available under the allotment.²⁰

Despite a federal grant, most of the CSEOs are understaffed and underfunded. Thus, if the LAA refers the CP to one of these agencies, it may take longer to receive help than it would through a local private attorney. To save time, the LAA should consider contacting the CSEO directly for a CP if it is not working the case in a timely manner. The federal office of child support enforcement has encouraged local CSEOs to work with private attorneys to ensure that these cases are processed in a timely manner.²¹ Some CSEOs, however, have concerns about certain private collection agencies that may appear to use questionable practices in collecting child support at a percentage of the arrearages owed.²² In some states, the CSEO may not even address certain issues. For example, the CSEO may not address escalation clauses, life insurance, college expenses, tax consequences, visitation, and custody. Instead, the LAA should consider them.²³ As a CSEO may not be familiar with military laws and regulations, an LAA should counsel a CP about the various military benefits available to child(ren) and thoroughly explain *Army Regulation (AR) 608-99*.²⁴ This is even more crucial due to the recent changes to *AR 608-99*.²⁵ Also an LAA may want to invite some key officials from the local CSEO to the legal assistance office and establish a relationship with them. This may help the LAA more easily get assistance for his clients in the future.

The LAA may also represent the grown dependent as a client who wants to establish paternity or collect child support from an NCP who has never paid, and the CSEO may be able to help the child in one of these areas. The CSEO should contact a CP and make him a party to any action the CSEO initiates, if pos-

16. 42 U.S.C. § 666(c)(1)(D).

17. U.S. Army Human Resources Command, *World Wide Locator*, at <http://www.erec.army.mil/wwl/> (last visited June 16, 2004) ("As a result of the September 11, 2001 terrorist attack, other suspected terrorist's events, on-going and potential military action, the Department of the Army has deemed it necessary to temporarily suspend its World Wide Locator service, except from military (.mil) network domains only, until further notice.").

18. 42 U.S.C. § 653a.

19. Uniform Interstate Family Support Act, § 501 (amended 2001), 9 U.L.A. 336 (1999).

20. 32 C.F.R. § 54.3(a) (2003).

21. See CHILD SUPPORT ENFORCEMENT HANDBOOK, *supra* note 7, at 40; see also Office of Child Support Enforcement, *Policy Interpretation Questions 02-02*, at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/piq-02-02.htm> (last visited June 17, 2004).

22. Captain Drew A. Swank, *Child Support, Private Enforcement Companies, and the Law*, ARMY LAW., July 2002, at 57.

23. See Lieutenant Colonel Mark E. Sullivan, *Child Support: Shopping for Options*, ARMY LAW., July 1992, at 4 (providing an excellent treatment of many important child support issues that LAAs need to consider).

24. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 Oct. 2003) [hereinafter AR 608-99]; see Major David B. Howlett, *Illegitimate Children and Military Benefits*, 132 MIL. L. REV. 5 (1991); see also Major Michael Boehman, *A Guide to Child Support Enforcement and Military Personnel* (Mar. 2003), available at <http://www.supportguidelines.com/articles/art200303.html>.

sible. Finally, the CSEO will provide services to anyone who is on public assistance or anyone who fills out an application and pays the required application fee.²⁶

Negotiate with the Local Child Support Office

Periodically, LAAs also assist NCPs who are facing child support issues and need assistance in negotiating with the local CSEO. An NCP, like a CP and the child(ren), can contact the local CSEO and request a genetic test in the paternity establishment process.²⁷ Many states will allow a paternity test even after a child support judgment, regardless of res judicata and collateral estoppel issues.²⁸ A negative result may stop the child support in some states. If the test is positive, the CSEO will establish child support. An LAA may need to contact the CSEO and negotiate with them to provide this test.

In some instances, the local CSEO will file a modification at the request of an NCP if a change in circumstances has occurred.²⁹ An LAA may need to inform an NCP as to his or her options if a child support arrearage has developed through

nonpayment. Possible defenses to a contempt complaint include the NCP is unable to pay due to injury, the NCP made the payments, or the child received Social Security Benefits. An LAA, however, should be wary of any bankruptcy issue since child support is nondischargeable and a priority debt.³⁰ An LAA may want to contact the CSEO and negotiate any arrearages on behalf of the NCP.

An NCP will need assistance negotiating with the local CSEO. Often, the local CSEO does not know how to read the LES to determine the proper income at which to set child support.³¹ Also, the LAA should carefully explain the Servicemembers Civil Relief Act³² to the local CSEO to avoid default paternity, child support, modification, and contempt cases and to properly set the interest rate, if any.³³

Many child support reference and resource tools are available to LAAs. First, the federal office of child support enforcement has an impressive web site that contains a wealth of information on federal law, regulations, contact information for the federal, regional and state offices, and the basic child support laws for all the various states.³⁴ Their interstate roster and

25. AR 608-99, *supra* note 24; see John T. Meixell, *Revisions to Army Regulations 27-55, Notarial Services and 608-99, Family Support, Child Custody, & Paternity*, ARMY LAW., Dec. 2003, at 37. The following is a list of significant changes to AR 608-99:

- (1) Clarifies the responsibility of Staff Judge Advocates to establish office policies to avoid conflicts of interest in implementing this regulation (para. 1-4h(2)).
- (2) Substitutes "Basic Allowance for Housing" for "Basic Allowance for Quarters" (para. 1-7 and throughout).
- (3) Clarifies what actions trigger a command's obligation to take action under this regulation (para. 2-1b).
- (4) Clarifies a soldier's obligation to provide support in the case of paternity orders that do not include a financial support obligation (para. 2-2a).
- (5) Expands the definition of "court order" for paternity purposes to include the functional equivalent of court orders as established under state law (para. 2-2b).
- (6) Clarifies a soldier's obligation to provide support in the case of a foreign paternity order (para. 2-2c).
- (7) Eliminates the interim support requirement for families residing in government family housing (para. 2-6d).
- (8) Defines the events that begin or end an obligation to provide support under the terms of this regulation (para. 2-7).
- (9) Defines interim support requirements for periods of less than one full month (para. 2-8).
- (10) Creates an exception authority for a battalion commander to release a soldier from the interim support requirements to a spouse if the soldier (without children) has been separated from his or her spouse for eighteen months and has not acted to prevent a court from establishing a financial support obligation (para. 2-14b(6)).
- (11) Creates procedures whereby the Special Court-Martial Convening Authority (SPC-MCA) may grant exceptions to this regulation (para. 2-15).

Meixell, *infra* note 25, at 37; see AR 608-99, *supra* note 24, ch. 2.

26. 45 C.F.R. § 302.33 (2003).

27. See Paula Roberts, *Truth and Consequences: Paternity Disestablishment and the Plight of the Non-Marital Children, Part II: Questioning the Paternity of Marital Children, Part III: Who Pays When Paternity Is Disestablished* (June 2003), at <http://www.clasp.org/>. If an NCP has access to the child(ren) and the mother is not cooperating, an NCP can still obtain a test. See generally *id.*

28. See *id.*

29. 45 C.F.R. § 303.8.

30. Captain Connor, Legal Assistance Items, Fam. L. Note, *Can the Use of the Bankruptcy Code Avoid a Court-Ordered Division of Military Retired Pay?*, ARMY LAW., Dec. 1990, at 45.

31. See Boehman, *supra* note 24.

32. Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (to be codified at 50 U.S.C. app. 501).

33. Lieutenant Colonel Paul Conrad, TJAGSA Practice Note, SSCRA Note, *Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996*, ARMY LAW., June 1998, at 13.

referral guide link contains phone numbers, addresses, and e-mails that should make it easier for LAAs to contact CSEOs in any state. Much of the basic child support law from paternity to child support establishment and enforcement for each state is available in this referral guide. This site also contains power point presentations that LAAs can download and adapt for legal training. Also, the *Essentials for Attorneys in Child Support* is an excellent publication by the federal office of child support enforcement, designed especially for attorneys practicing in this area of the law; it is a resource every LAA should use.³⁵ Another good resource containing many state child support calculators, articles, case law updates, and interesting child support stories is the *Support Guidelines* web site.³⁶ Also,

JAGCNET has preventive law information on child support garnishment. This information, however, may need modifying to include state specific laws since this area of the law changes regularly.³⁷

In conclusion, LAAs should use the local CSEO's services as much as possible. There will be many opportunities to do so—referring a CP to the local CSEO for the full range of child support services; assisting the child(ren) in establishing paternity; enforcing the support provisions; or advising an NCP in an action involving the child support agency. By understanding the resources and tools available through the CSEO, LAAs will better serve their clients.

34. U.S. Dep't of Health & Human Services, *Federal Office of Child Support Enforcement Home Page*, at <http://www.acf.hhs.gov/programs/cse/> (last visited June 16, 2004).

35. DEP'T OF HEALTH AND HUM. SERVS. ADMIN. FOR CHILD & FAMS., *ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT* (3d ed. 2003).

36. *Support Guidelines.com*, at <http://www.supportguidelines.com/> (last visited June 17, 2004).

37. U.S. Dep't of Army, Legal Assistance Policy Division, *For Counsel*, available at <http://www.jagcnet.army.mil/> (last visited Jan. 7, 2004) ("Our goal: to regularly provide LA-related items of interest to you, your LA personnel, and/or the community you support"). Also, review the preventive law information sheets on various legal assistance web sites for more information on child support.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPER-CEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorney's Course 5F-F10

Class Number—155th Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2003 - September 2005)

Course Title	Dates	ATRRS No.
GENERAL		
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 8 October 04 (Phase I - Ft. Lee) 8 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 28 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)

17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
183d Senior Officers Legal Orientation Course	13 - 17 September 04	(5F-F1)
184th Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185th Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186th Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187th Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)
188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)

16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOC	25 October - 10 November 04	
5th 27D ANCOC	10 - 28 January 05	
6th 27D ANCOC	25 April - 13 May 05	
7th 27D ANCOC	18 July - 5 August 05	
5th JA Warrant Officer Advanced Course	12 - 30 July 04	(7A-270A2)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)
55th Legal Assistance Course	27 September - 1 October 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)

2004 USAREUR Administrative Law CLE	13 - 17 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 16 September 05	(5F-F24E)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2005 Hawaii Income Tax CLE	10 - 14 January 05	(5F-F28H)
2005 PACOM Income Tax CLE	3 - 7 January 05	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

1st Operational Contracting Course	28 February - 4 March 05	
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2004 Government Contract Law Symposium	7 - 10 December 04	(5F-F11)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	

CRIMINAL LAW

10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24th Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)
28th Criminal Law New Developments Course	15 - 18 November 04	(5F-F35)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL LAW

4th Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84th Law of War Course	11 - 15 July 05	(5F-F42)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44th Operational Law Course	8 - 19 August 05	(5F-F47)
2005 USAREUR Operational Law CLE	10 - 14 January 05	(5F-F47E)

3. Civilian-Sponsored CLE Courses

For further information, see the March 2004 issue of *The Army Lawyer*.

2004, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2005 (“2005 JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is *NLT 2400, 1 November*

This requirement is particularly critical for some officers. The 2005 JAOAC will be held in January 2005, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2004). If the student receives notice of the need to re-do any examination or exercise after 1 October 2004, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2004 will not be cleared to attend the 2005 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney’s birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January

Vermont	2 July annually	Wyoming	30 January annually
Virginia	31 October annually	* Military Exempt	
Washington	31 January triennially	** Military Must Declare Exemption	
West Virginia	31 July biennially	For addresses and detailed information, see the March 2003 issue of <i>The Army Lawyer</i> .	
Wisconsin*	1 February biennially		

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2004 issue of *The Army Lawyer*.

2. Regulations and Pamphlets

For detailed information, see the March 2004 issue of *The Army Lawyer*.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

- (1) Using a Web browser (Internet Explorer 4.0 or

higher recommended) go to the following site: <http://jagcnet.army.mil>.

- (2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2004 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-

mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.Lavering@hqda.army.mil.

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