

# THE ADVOCATE

## A Monthly Newsletter for Military Defense Counsel

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THE ADVOCATE is intended to foster an aggressive, progressive and imaginative approach toward the defense of military accused in courts-martial by military counsel. It is designed to provide its audience with supplementary but timely and factual information concerning recent developments in the law, policies, regulations and actions which will assist the military defense counsel better to perform the mission assigned to him by the Uniform Code of Military Justice. Although THE ADVOCATE gives collateral support to the Command Information Program [Para. 1-21 d, Army Reg. 360-81], the opinions expressed herein are personal to the Chief, Defense Appellate Division, and do not necessarily represent those of the United States Army or of The Judge Advocate General

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### CONTENTS

The Partial Forfeitures Myth and the DoD Pay Manual	100
Statistical Comparison of Military Judge-Military Jury Conviction Rates and Sentence Differentials	114
Professional Conflict of Interest--Are Divorce Suits More Important Than Criminal Trials?	116
Recent Cases of Interest to Defense Counsel	117

THE PARTIAL FORFEITURES MYTH AND THE  
DoD PAY MANUAL

It is undisputed that many AWOL cases begin with the financial distress of a soldier and his family. A typical case received for appellate review will include the following facts:

The accused, Private B, has been convicted of a lengthy AWOL, which was occasioned by a severe domestic financial crisis. He was inducted into the Army on 1 February 1969, and after serving honorably for nearly 18 months of a two year obligation, he went AWOL on 30 September 1970. He was apprehended by military authorities and confined on 1 March 1971. Trial by general court-martial, consisting of a military judge alone, was held on 15 April 1971, and the accused was convicted, in accordance with his plea, of unauthorized absence for the above period.

During presentation of the defense case on extenuation and mitigation, the trial defense counsel, in full conformity with the accused's desires, argued for a bad conduct discharge so that Private B could "return home and rescue his family as quickly as possible from their deplorable state of poverty." Concurrently, the defense counsel beseeched the court to adjudge minimal confinement, if any, and no forfeitures. When the military judge announced sentence, he stated:

I cannot condone, nor excuse your absence without punishment; however, in light of your family's dire economic situation, I sentence you to receive a bad conduct discharge, to be confined at hard labor for five months, and to forfeit \$30.00 per month for three months.

In the post-trial review, the staff judge advocate recommended (and the convening authority approved), only the bad conduct discharge and confinement at hard labor for five months, because "approving forfeitures would do little to serve the ends of justice, and would needlessly harm his struggling wife and children."

There can be no doubt that the convening authority, the staff judge advocate, the military judge, and the defense counsel each realized the lack of financial resources precipitated the offense, and that money, in the form of pay

and allowances, would do much to alleviate further misery. The action taken by each officer to accomplish the commonly desired end was logical, compassionate, and *totally useless*.

It is apparent that these officers were not aware of Paragraph 10316b, DoD Pay and Entitlements Manual (1967), as amended. Judging from the nature of arguments made by defense counsel in other records, from statements made by some military judges, and from the language which appears in many post-trial reviews, such ignorance is widespread. Paragraph 10316b provides, in essence, that an absentee soldier who returns, and is confined, either in a pretrial or adjudged status, and has passed his normal ETS date without having been "restored to full duty status," is entitled to *no pay or allowances* for the duration of this period of confinement. Thus, despite the demonstrated good intentions of these statutory participants in sentencing to the contrary, the wife and children of Private B have been forced to endure for over half of a year in the absence of their sole breadwinner without any income in the form of military pay or allowances.

An analysis of the case of Private B, in light of Paragraph 10316b of the DoD Pay Manual, reveals some interesting and purely fortuitous inequities:

#### I. Pretrial.

A. Because Private B did not return to military control until after the passage of his normal, unadjusted ETS date (1 February 1971), the 45 days which he spent in pretrial confinement were without military pay or allowances (para. 10316b(3), DoD Pay Manual; 9 Comp. Gen. 323; MS Comp. Gen. B-113109, 30 Jan 53; 9 Bul. JAG 50).

B. If upon Private B's return to military control, or at some subsequent time prior to trial, the decision had been made to restore him to "duty status" pending his trial, Private B would have received full pay and allowances from the day of restoration until trial, despite the earlier expiration of his original term of service (para. 10316b(3) & (6), DoD Pay Manual; 9 Comp. Gen. 323; 9 Bul. JAG 50; 37 Comp. Gen. 380; 3 Comp. Gen. 676).

## II. Post-trial.

A. Despite the fact that no forfeitures had been approved by the convening authority, Private B was nonetheless obliged to forfeit all pay and allowances during his five months adjudged confinement, because he was beyond his normal ETS and had never been restored to duty (para. 10316b(3), DoD Pay Manual, and supporting Comp. Gen. decisions, supra).

B. If the military judge had adjudged no confinement, and Private B had been retained in the command in a duty status awaiting the execution of his bad conduct discharge, he would have drawn pay and allowances despite the prior passage of his ETS date (para. 10316b(5)(6), DoD Pay Manual).

C. In addition, had the convening authority deferred the sentence to confinement, or suspended it and ordered the accused restored to full duty status, Private B would have then been in full pay status as of the day he reported present for duty after trial (para. 10316b(5), DoD Pay Manual).

## III. Acquittal.

If Private B's trial had resulted in an acquittal, he would have been entitled to full pay and allowances for the 45 days that he spent in pretrial confinement (see 37 Comp. Gen. 380 (1957)). The finding of "not guilty" of AWOL in the court-martial proceeding, however, would not entitle Private B to full pay and allowances for the period alleged as an unauthorized absence. Despite his judicial acquittal, the burden would be upon him to show the finance people either: (1) that he was not absent, or (2) that his absence was "unavoidable" (see para. 10312a, b, DoD Pay Manual).

Possibly the most disturbing and unjust aspect of the finance regulation is that it frequently operates to punish most harshly those who have served honorably for the longest period. Paragraph 10316b(6), DoD Pay Manual, provides in pertinent part:

The pay and allowances of an absentee who surrenders or who is apprehended before the expiration of his enlistment period will accrue from the date of his return to military control.

The above provision is effective regardless of whether the soldier is in pretrial or post-trial confinement, and regardless of whether he has ever been "restored to full duty status."

Therefore, in the instant case, if Private B, instead of spending over 18 months in the service of his country, had departed AWOL after but a single day on active duty, his entire period of confinement, both before trial and after, would have been in full pay status. Considering the importance of money to the accused's family, Private B's attempt to struggle through a year and a half of honorable service, rather than demonstrating an unwillingness to serve shortly after induction, ironically cost his poor wife and children military pay and allowances entitlements well in excess of \$1,000.00.

The inequitable treatment accorded a confined military accused who is beyond his ETS awaiting trial, when compared to one whose unadjusted ETS has not arrived, quickly brings to mind such concepts as "equal protection" and "fundamental fairness". Although the Fifth Amendment of the U.S. Constitution contains no "equal protection clause", as such, it does require regulations and statutes to embrace all persons in a like situation; any basis for a differing classification must be natural and reasonable, and not arbitrary, capricious, or baseless. Gulf, C & S.F.R.Co. v. Ellis, 165 U.S. 150, 155, 159 (1897). Arguably, the mere expiration of a term of service is neither a reasonable nor substantial difference warranting disparate pay treatment between two soldiers awaiting trial for the same crime. Nor is any distinction justified on the basis of being formally restored to duty as opposed to being ready to perform duty, but confined. Both men are soldiers, subject to military jurisdiction and law; both are present for duty, if needed; and both are presumed innocent under the law until duly convicted.

The pretrial provisions of Paragraph 10316b of the DoD Pay Manual have been assailed in a one-man crusade conducted by a senior Circuit Military Judge of the U.S. Army Trial Judiciary. Lest his singular efforts be dismissed as quixotic windmill jousting, his ideas merit some widespread publicity among defense counsel. The validity of the regulation is challenged on three fronts:

(1) the regulation constitutes illegal command influence in violation of Article 37, Uniform Code of Military Justice;

(2) the regulation results in a deprivation of property without due process, in violation of the Fifth Amendment of the U.S. Constitution; and

(3) the regulation is prohibited pretrial punishment, contrary to the absolute prohibitions against such punishment found in Article 13, Uniform Code of Military Justice.

#### Command Influence

Article 37, Uniform Code of Military Justice, unequivocally admonishes that:

"No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts".

Although a reading of the above provision which encompasses the pretrial provisions of Paragraph 10316b within its prohibitions is admittedly broad, it is, nonetheless, entirely consistent with the obvious legislative intent of Congress. There can be no doubt that Congress intended that those responsible for determining and approving court-martial sentences, be given the widest latitude possible (within the legal maximums) in arriving at a sentence, unincumbered by the spectre of punishments preordained from above. And yet, in a staggering number of cases (all of those where the accused is beyond his ETS and has never been restored to duty), both the court and the convening authority are effectively precluded from approving any sentence which includes a combination of some confinement with partial or no forfeitures. For no matter how logical such a combined sentence may seem in reconciling the needs of the Government for punishment with those of feeding the accused's family during incarceration, these judicial officers are, in effect, coerced, by the purely administrative operation of Paragraph 10316b, into relegating the accused to total forfeitures, whenever they deem appropriate, and impose, a period of accompanying confinement.

#### Due Process

The fifth amendment, of course, proscribes the deprivation "of life, liberty, or property, without due process of law".

Fundamentally, in military law, as well as civilian, any accused is presumed innocent until convicted in a properly constituted court of law. Thus, for a military accused to be compelled to forfeit pay and allowances, to which he would otherwise be entitled, merely because he has been incarcerated beyond his ETS for a crime yet unproved, strikes at the heart of fundamental due process. Closely related to the "equal protection" argument mentioned earlier, is the right to both substantive and procedural "due process" in administrative determinations. Heiner v. Donnan, 285 U.S. 312 (1932). The regulation, in selecting as its crucial factors, the ETS date and restoration to duty, rather than some other more relevant standard such as the length of creditable service, or the likelihood of completing the initial service obligation, leaves itself open to a wide range of imaginative "due process" challenges based upon its apparent arbitrariness.

### Illegal Pretrial Punishment

Article 13, Uniform Code of Military Justice provides that "no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him". The obvious argument in the instant case would be that the several hundred dollars unpaid to Private B while in pretrial confinement constituted illegal "punishment or penalty". Interestingly enough, the issue here presented is not a question of first impression. The relationship between Paragraph 10316b and Article 13 was of concern to the Secretary of the Army as early as 1951. He was concerned that the then-effective pay regulation which deprived a military accused pay and allowances while confined awaiting trial and beyond his term of enlistment, was in conflict with the 16th Article of War, and Subparagraph 19a, Manual for Courts-Martial, 1949, verbatim predecessors to the cited language in Article 13. It was the opinion of the Judge Advocate of the Army that the words in A.W. 16 which prohibited "punishment or penalties other than confinement prior to sentence", meant that the period of pretrial confinement was "at the convenience of the Government", and that the accused must be paid for that period, regardless of whether he was later convicted of the crime charged. However, noting that the question involved the "expenditure of public funds",

he deferred his judgment to any later "authoritative ruling" made by government accounting officers. This "authoritative ruling" came in the form of a decision of the Comptroller General (30 Comp. Gen. 449 (1951)). The Comptroller General, in an opinion remarkable for its total lack of legal or statutory citations, "concluded" that A.W. 16 was not violated by a finance regulation which disallowed pay and allowances during pretrial confinement unless the accused was later acquitted. Incredibly, this opinion has apparently gone without judicial challenge for over two decades!

At present, this decision of the Comptroller General appears to be the only "law" in the area. The United States Court of Military Appeals, the "military supreme court", the only judicial body with the unique responsibility to rule authoritatively upon what constitutes a violation of the Uniform Code of Military Justice, has never had occasion to determine whether the pretrial denial of military pay and allowances is a violation of Article 13, Uniform Code of Military Justice.

The post-trial provisions of Paragraph 10316b appear to operate illegally by automatically increasing the severity of certain sentences adjudged by courts-martial. In United States v. Simpson, 10 USCMA 229, 27 CMR 303 (1959), the United States Court of Military Appeals ruled that Paragraph 126e, Manual for Courts-Martial, United States, 1951, as amended by Executive Order 10652, 10 January 1956, which provided for automatic reduction to the lowest pay grade upon approval of certain court-martial sentences, (those which included either a punitive discharge, confinement, or hard labor without confinement), was invalid because it operated as a judicial act to increase the severity of the court-martial sentence. Although the above provision for automatic reduction is presently with us, because Congress clearly demonstrated its legislative intent by later incorporating the provision into the Uniform Code of Military Justice (Article 58a, 10 U.S.C. § 858a), the law of Simpson as it pertains to the instant case is still viable.

In reaching its decision in Simpson, the Court rejected the Government's contention that the automatic reduction, although tied to certain adjudged sentences, was "purely administrative in nature and outside the judicial operation of the court-martial system." The Court noted that "it is within the sound discretion of the court-martial to include a proper reduction . . . in its sentence", and further, that the reduction provision is included within the discussion of punishments which may be imposed by courts-martial. The majority opinion unequivocally ruled that the automatic reduction was "so interwoven with the courts-martial process that it cannot be regarded as anything but judicial in purpose and effect", and "as a judicial act, it operates improperly to increase the severity of the sentence of the court-martial . . . and is invalid".

The question arises: how does the operation of Paragraph 10316b qualify as a procedure "so interwoven with the courts-martial process" that it rises to the level of an illegal "judicial act"? First, the regulation never requires the application of forfeitures toward any soldier who returns from AWOL after his ETS date, who is returned to duty instead of being tried by court-martial. Thus, forfeitures are applied upon return to military control only against those who are to be later subjected to a military criminal trial, whether or not they are placed in pretrial confinement. Second, the application of forfeitures, like reduction in Simpson, is a sentence within the discretion of a court-martial, and is included in the discussion of properly imposed punishments. Third, the provision operates automatically, only after the court-martial has imposed certain sentences under certain factual situations. The key is "confinement": if the court-martial adjudges only partial forfeitures, and no confinement, then the accused will be restored to duty at partial forfeitures; however, if confinement accompanies the partial forfeitures as part of the adjudged sentence, then the imposition of that confinement alone, will result in all pay and allowances being forfeited automatically. Finally, the action of the convening authority is crucial to the operation of Paragraph 10316b. Even if confinement and forfeitures less than total have been adjudged, the convening authority, by deferring the sentence to confinement, can prevent automatic total forfeitures from being exacted. Deferment of sentence, of course, is only a temporary remedy, and even this tool does not meet the needs of a commander who considers both confinement and partial forfeitures appropriate. Clearly, the

judicial ties enumerated above, existing in the absence of an express congressional intent to the contrary, are sufficient to show that the automatic total forfeitures provisions are "judicial acts" which operate impermissibly to "increase the severity" of court-martial sentences.

In addition, there are other areas in which the provisions of the DoD finance regulation may be seen to operate illegally. For instance, Congress has established by statute the absolute maximum sentence legally imposable by a special court-martial. (Arts. 19 and 56, UCMJ, (10 U.S.C. § 819, 10 U.S.C. § 856) and Para. 15b, MCM). Unquestionably, this sentencing limitation has been established for the protection of accused soldiers, expressing the intent of Congress that no soldier who has been subjected to, and convicted by a special court-martial, be compelled to forfeit more than two-thirds of his pay per month for six months as a result of such conviction. Furthermore, soldiers who have additional financial obligations evidenced by "Class Q" allotments receive an additional break in determining the maximum forfeitures imposable by a special court-martial. (Para. 126h(2), MCM, 1969 (Rev.)). Thus, the effect of this "administrative" determination that accused soldiers who are in post-trial confinement, and beyond their service termination dates, will receive no pay of allowances as a result of their special court-martial, exceeds the maximum sentence imposable by statute, and is patently illegal.

In Article 64, Uniform Code of Military Justice, Congress grants to the convening authority absolute discretion in determining what sentence should be approved. However, this wide discretion is rendered unemployable in any case where the convening authority determines that it is in the best interests of justice to approve some confinement, coupled with partial forfeitures or no forfeitures. By virtue of his approval of such a sentence and the automatic operation of the "administrative regulation", total forfeitures will be levied, despite his express intention otherwise.

Despite the plethora of seemingly valid challenges to the DoD Pay Regulation which have been suggested thus far, we would be remiss if we did not mention that in the past legal challenges concerning pay regulations and finance statutes have met with little success before the Court of Military Appeals. See United States v. Cleckley, 8 USCMA 83, 23 CMR 307 (1957); United States

v. Bolden, 18 USCMA 119, 39 CMR 119 (1969); United States v. Halvorsen, 19 USCMA 107, 41 CMR 107 (1969); Hurt v. Cooksey, et al, 19 USCMA 584, 42 CMR 186 (1970). Despite the fact that none of the cited cases reached the same issues raised herein, nor dealt with constitutional questions, the interpretation of the Uniform Code of Military Justice prohibitions, or Paragraph 10316b of the Pay Manual, a careful reading and understanding of each will be rewarding. No doubt there will be those who would seek to seize upon language used in those opinions to attempt to refute certain challenges to Paragraph 10316b, but the well-prepared defense counsel will have no difficulty distinguishing them and the questions treated therein from the issues raised above in the case of Private B. What is of concern in those cases, however, is that they appear to reveal a discernible trend away from the Court's Simpson role, that of bold protector of the accused soldier from the prejudicial workings of judicially-interwoven "administrative" regulations. The role has shifted more to that of passive observer, with an increased willingness to employ such terms as "purely administrative matter" to avoid reaching difficult questions concerning the rights of accused servicemen under the Code vis-a-vis administrative regulations which seek to erode away or to dilute those rights. It is hoped that the vigorous and professional efforts of trial defense counsels in raising issues and protecting the record for appeal in cases involving challenges to Paragraph 10316b will be instrumental in both obtaining the desired relief for their clients, and in reversing the current role of the "military supreme court" in this area of the law.

#### How and When to Raise the Partial Forfeitures Myth

In cases where a defense counsel realizes that his client has passed his ETS while AWOL, or will pass his ETS at some point during the judicial process, he should make his client aware of the provisions of Paragraph 10316b of the DoD Pay Manual and its various ramifications. An effort should be made to determine just exactly what impact these provisions will have on the accused. For instance, does he have a wife and children; is he supporting anyone else; is he in debt; for how much? When it appears that substantial harm will occur if this accused is deprived of his pay and allowances for any appreciable period,

then every effort should be made to thwart the automatic operation of the regulation. Obviously, the more compelling his need is for the money, the better the chances are for his success. The alternatives suggested below may all be attempted, or due to tactical considerations or the desires of the accused, only one or two may be employed; each case should dictate its own course of action. Needless to say, each motion, request, or objection filed on behalf of the accused should be made in writing or otherwise scrupulously recorded in the record.

If the accused has been placed in pretrial confinement, the confining or convening authority should be petitioned to release him from confinement to full duty status, or, at least, to substitute pretrial restriction, Para. 20b, MCM, 1969 (Rev.), for pretrial confinement. The petition could include such things as the financial hardship to the accused's family (state tangible dollar amounts); likelihood of accuseds remaining for trial (if he surrendered); "equal protection", "due process", and "Article 13 arguments". (If the convening authority displays sympathy towards the accused's economic plight and continued financial deprivation after trial but is reluctant to restore him to duty because he is afraid that the accused will not remain in the command until trial he may be persuaded to order restoration to duty effective on the date of trial.) A second alternative would be to file a writ of habeas corpus with the military judge, stressing due process and illegal pretrial punishment arguments. Thirdly, a writ of mandamus may be sought from some appropriate tribunal to compel the local finance office to pay the accused. Lastly, an Article 138 complaint on behalf of the accused may be lodged against the commander who ordered pretrial confinement. Additional tactical moves are certain to suggest themselves in view of the unique factors in every case.

If pretrial attempts to obtain the accused's release from confinement have met with no success, once the accused is brought to trial the defense counsel should be concerned with getting the charges dismissed, or if more appropriate, having the pretrial "forfeitures" (post-ETS termination of pay) considered for sentencing purposes. In this regard, see United States v. Williams, 10 USCMA 615, 28 CMR 181 (1959); United States v. Bayhand, 5 USCMA 762, 21 CMR 84 (1956); United States v. Nelson, 18 USCMA 177, 39 CMR 177 (1969); United States v. Coffey, 40 CMR 929 (NCOMR 1969).

The possibility exists that the trial will reach findings of guilty with the accused still in a situation where he is entitled to no pay or allowances, and is still in confinement. In a trial by military judge alone, at this point appropriate arguments should be made, pointing out that although the compelling financial difficulties of the accused would seem to indicate little or no forfeitures be adjudged, Paragraph 10316b has effectively precluded this option from the military judge unless he adjudges no confinement and recommends restoration to duty. If the accused cannot afford restoration to duty and desires the earliest possible release, logic would dictate arguing for a straight BCD with a recommendation by the judge that the accused be allowed to return home on Excess Leave.

Alternatively, one might consider arguing for a sentence which includes either no forfeitures, or partial forfeitures, accompanied by a short period of hard labor without confinement. Hard labor without confinement is a consideration which might sway a judge or a military jury who are sympathetic to the accused's economic situation, but hesitant to adjudge a sentence which does not in some way physically limit the accused. Para. 126k, MCM, 1969 (Rev.), provides that "hard labor without confinement, as adjudged as punishment by courts-martial, shall be performed in addition to other regular military duties which fall to enlisted members". (Emphasis added.) Presumably, when hard labor without confinement is either adjudged by the court, or approved by the convening authority, then an accused is considered to be "restored to duty" and eligible for pay. Restoration to duty need not be as a result of a specific order, but can occur, de facto, simply by resuming regular military duties within the command, while being treated as any other soldier. (9 Bul JAG 50 (1950); MS Comp. Gen. B-23804, (1 Feb 42).

If the trial is before members, and financial hardship of a compelling nature has been introduced, it seems reasonable that the court might consider partial or no forfeitures as one of their options. In such cases, the defense counsel should draft a requested instruction, informing the court of the practical effect of any sentence where confinement is adjudged but only partial forfeitures, or no forfeitures. The court is entitled to know when and how their obvious intent toward extending clemency may be later thwarted by the finance regulation, and what practical effect their sentence will have upon the

future of the accused. For example, a court is always informed as to the debilitating and lifelong effects of a punitive discharge. (If the military judge refuses a request for the above instruction an imaginative defense counsel can, of course, "educate" the panel during final arguments.) The case of United States v. Halvorsen, 19 USCMA 107, 41 CMR 107 (1969) prompts a word of caution. There Judge Darden indicated it would do a disservice to the accused to alert a military jury to an accused's no-pay status because that would evoke greater punishment of another kind. Aside from the value of the case for its insight into Judge Darden's talmudic view of sentencing, the case should surely be no barrier when the defense adequately lays the groundwork for an instruction on the regulation's impact on forfeitures when confinement is adjudged. Hopefully, elimination of the type of callous person envisioned by Judge Darden can be effectively accomplished on voir dire.

At this point in the trial, after findings, the defense counsel may consider raising the issue of command influence under Article 37 of the Code. The argument would go something like this. Paragraph 10316b of the DoD Pay Manual as interpreted by military finance authorities unlawfully interferes with a court-martial's power to adjudge only partial forfeitures, or no forfeitures at all, in a certain group of cases. The practical impact of this pay regulation in these cases is no different than a convening authority's directive that a court-martial may impose any lawful sentence in rape cases so long as a punitive discharge is also adjudged. Additionally, Simpson-type errors and Article 19 and 64 errors may be raised at this stage.

After trial, every effort should be made to inform the convening authority of the severe limitation imposed both on the court-martial in adjudging the sentence and upon himself in approving one by virtue of Paragraph 10316b. Hopefully, staff judge advocates in the interest of justice will do so in their post-trial review. If the staff judge advocate either refuses or neglects to do so the defense counsel should incorporate such information in a petition for clemency along with other matters relating to a plea for a reduction in the sentence. If the accused desires, and if applicable, the petition should include a request for deferment of confinement and restoration to duty, stressing that approval would (1) prevent an extrajudicial increase

in the sentence; (2) give effect to the expressed intentions of the court in reaching an appropriate sentence; and (3) demonstrate confidence in the abilities of his fellow officers, (if a full court, officers which he appointed), in reaching a just sentence. Finally, in these cases as in all others the value of an Article 38c brief cannot be overestimated, and the preparation of such a brief is highly recommended.

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DEFENSE APPELLATE DIVISION  
HAS NEW PHONE NUMBERS

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	756-1625
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	756-1087
5	756-1561

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MILITARY JUDGE SUBSCRIBERS PLEASE NOTE

From time to time in the course of routine duties, military judges have occasion to prepare and promulgate formal opinions and memoranda in their cases. Unless such a case is assigned to an appellate defense attorney, we do not learn of these decisions, some of which may have important precedential value. Recently, one military judge has written that he will forward to THE ADVOCATE a copy of his written opinions. We would encourage all of our military judges to do likewise. Of course, trial defense counsel should also be aware of our interest in these written decisions.

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**STATISTICAL COMPARISON OF MILITARY JUDGE-MILITARY JURY CON-  
VICTION RATES AND SENTENCE DIFFERENTIALS**

Since publication of "Trial by Military Judge Alone--Danger" THE ADVOCATE, Vol. 3, No. 3, March 1971, additional information has come to light on the disparities in conviction rates and sentence differentials in trial by military judge alone in contrast with trial by military jury. In the Report to General William C. Westmoreland, Chief of Staff, United States Army by The Committee for Evaluation of the Effectiveness of the Administration of Military Justice, dated 1 June 1971, data as to conviction, discharge, and confinement in general court-martial cases are compiled for the periods 1 January 1970 - 30 June 1970, 1 July 1970 - 31 December 1970, and 1 January 1971 - 31 March 1971. Although cases are not categorized by plea, which would permit contested cases to be separately evaluated, the statistics as a whole are striking for the uniformity of result in disproving the notion that military judges are lenient: military judges convict at a higher rate than military juries; military judges adjudge punitive discharges at a higher rate than military juries; and military judges adjudge confinement in a greater percentage of cases than do military juries. Judges are more lenient only when it comes to the length of confinement in cases where confinement is adjudged. The tables prepared for the committee's study are herewith presented. THE ADVOCATE has requested that this information be reclassified according to plea and those results will be published in a future issue. The data here presented, however, are too valuable to allow delay in publication to await more refined tabulation. Statistical information like this is truly indispensable to the criminal defense counsel faced with advising clients about waiving a military jury.

**TABLE 1**

**ARMY-WIDE GENERAL COURT-MARTIAL DATA\*  
1 January 1970 - 30 June 1970**

	Court Members	Military Judge Alone
Persons tried	178	1085
Persons convicted	148 (83%)	1038 (96%)
Punitive discharge adjudged**	97 (65%)	958 (92%)
Confinement adjudged**	119 (74%)	990 (95%)
1-12 Months***	62 (52%)	677 (68%)
13-24 Months***	19 (16%)	187 (19%)
25-60 Months***	29 (24%)	111 (11%)
61-120 Months***	3 (3%)	9 (1%)
Over 120 Months***	2 (2%)	6 (0.5%)
Life***	4 (3%)	0

See Legend under Table 2

TABLE 2

ARMY-WIDE GENERAL COURT-MARTIAL DATA\*  
1 January 1970 - 30 June 1970

	Court Members	Military Judge Alone
Persons tried	193	1271
Persons convicted	151 (78%)	1219 (96%)
Punitive discharge adjudged**	95 (63%)	1114 (91%)
Confinement adjudged**	122 (81%)	1158 (95%)
1-12 Months***	68 (56%)	821 (71%)
13-24 Months***	15 (12%)	228 (20%)
25-60 Months***	27 (22%)	86 (7%)
61-120 Months***	3 (2%)	15 (1%)
Over 120 Months***	7 (6%)	6 (0.5%)
Life***	2 (2%)	2 (0.1%)

\* Data based on all GCM records received in the US Army Judiciary during period indicated. Figures do not include any cases that were tried prior to 1 August 1969, the effective date of the Military Justice Act of 1968.

\*\* Percentages based on number convicted.

\*\*\* Percentages based on number of cases in which confinement adjudged.

TABLE 3

ARMY-WIDE GENERAL COURT-MARTIAL DATA  
1 January 1971 - 31 March 1971

	Court Members	Military Judge Alone
Persons tried	93	589
Persons convicted	79 (85%)	561 (95%)
Punitive discharge adjudged*	54 (68%)	509 (91%)
Confinement adjudged*	65 (82%)	518 (92%)
1-12 Months**	34 (52%)	371 (72%)
13-24 Months**	17 (27%)	88 (17%)
25-60 Months**	8 (12%)	44 (8%)
61-120 Months**	0	6 (1%)
Over 120 Months**	0 (9%)	9 (2%)

\* Percentages based on number convicted.

\*\* Percentages based on number of cases in which confinement adjudged.

PROFESSIONAL CONFLICT OF INTEREST--ARE DIVORCE SUITS  
MORE IMPORTANT THAN CRIMINAL TRIALS?

In Borden v. Borden, 39 U.S.L.W. 2623 (D.C.Ct. App. 5 May 1971), it was held that professional conflict of interest considerations prohibited Neighborhood Legal Services Program (NLSP) attorneys from representing both parties in a divorce action. The court rejected claims that the need of poor people for legal services outweighs the allegedly remote possibility of a conflict of interest by their attorneys, as well as claims that there was no economic conflict of interest because adversary litigants are not paying the same law firm since NLSP representation is without charge. While agreeing NLSP is not a law firm, it found many structural analogies to a large firm, such as the board of directors functioning like managing partners, and supervision occurring in the fashion of a senior partner-associate relationship.

"Lawyers who practice their profession side by side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest. In addition, the appointment of attorneys who work together presents an impression scarcely consistent with the bar's efforts to maintain public confidence in law and lawyers."

The court supported its holding by reference to the ABA Code of Professional Responsibility (Final Draft, July 1, 1969), p. 67, fn. 2, and pp 70-1, fn. 29, and the ABA Standards Relating to the Prosecution and Defense Function (Tent. Draft, March, 1970), p. 214. In addition, no grounds could be found to distinguish attorneys in private practice from those who are not, insofar as matters of professional ethics are concerned. Further support is found in the legal services enabling legislation, 42 U.S.C. § 2809(a)(3), which requires that "legal advice and representation shall be carried on in a way that assures maintenance of a lawyer-client relationship consistent with the best standards of the legal profession." Reference was also made to legislation in New Jersey and Florida which specifically prohibits anti-poverty lawyers from representing adverse parties in domestic relations litigation.

The case is relevant, of course, to the military lawyer as legal assistance officer. But it should also prompt a reconsideration of the conflict of interest possibilities which inhere in military court-martial practice. If lawyers who practice together cannot appear against each other in civil matters, a fortiori they cannot do so in criminal matters. Because the stakes are so much higher, it is all the more necessary to insulate military criminal proceedings from the inevitable subtle pressures in the typical staff judge advocate office which may substantiate the appearance of evil involving conflicting interests between prosecution and defense lawyers. The nature of the military community, wherein military lawyers are assigned and work together and may have only each other and their families as close friends, is cause for even greater concern than the NLSP situation where lawyers are largely practicing in their home communities and have community roots and interest far wider than only their colleagues at work. The youth and inexperience of the average military defense counsel is another factor demanding institutional structures which will insure his single-minded devotion to the interests of his client. The adversary criminal system is far too delicate a mechanism to withstand the subtle pressures generated by the friendships and camaraderie among the young lawyers in the typical staff judge advocate office.

Borden v. Borden, supra, thus may be viewed as additional support for an independent defense corps in the military services. THE ADVOCATE hopes to report on the Air Force pilot program in a future issue.

#### RECENT CASES OF INTEREST TO DEFENSE COUNSEL

PROCEDURE -- ARTICLE 39(a) SESSION AFTER ANNOUNCEMENT OF SENTENCE -- During the preparation of the post-trial review, a staff judge advocate informed the trial defense counsel corrective action would be necessary because appellant's testimony in extenuation and mitigation was inconsistent with his guilty plea. Trial defense counsel requested an Article 39(a) session supposedly to clarify the ambiguities and protect the pretrial agreement. The staff judge advocate arranged the "session" at which the same military judge found the plea provident and entered findings. The Army Court of Military Review noted disapproval of the action of the staff judge advocate in contacting trial defense counsel and the "session" which followed. The Court observed that it is for the convening authority to determine whether statements made in extenuation and mitigation raise a question as to the providency of the plea and whether a rehearing under Article 63 is practicable. The Court held that the military judge's reconsideration of findings

of guilty after sentence was announced was unauthorized and void (citing United States v. Gibson, CMR (ACMR 15 April 1971). The findings of guilty and the sentence were set aside and a rehearing authorized. United States v. Donelson, No. 424604 (ACMR 14 May 1971).

CONFESSIONS AND ADMISSIONS -- ARTICLE 31, MIRANDA-TEMPIA -- Appellant was convicted of absence without leave which the Government attempted to prove through the testimony of the unit legal clerk to corroborate a questionable morning report inception date. The trial defense counsel objected to the receipt of the testimony. Military police brought appellant to the unit and the clerk, Sergeant F, who received him was both the unit legal clerk and the senior noncommissioned officer in the orderly room and as such was required to both receipt for appellant and obtain proper morning reports and insure that the reports supported the charges.

On the day in question, the clerk, Sergeant F, entered into "conversation" with appellant without giving a warning during which the sergeant learned when appellant had initially left his unit. The clerk testified there was no official interrogation but only a friendly discussion. The Court of Military Review exercised its fact-finding powers and concluded that the clerk was acting for the unit in preparing morning reports when he questioned appellant about the absence and that a Miranda-Tempia warning was required. United States v. Rit, S6621 (ACMR 20 May 1971).

NOTE: It might be profitable for our readers to read this case in conjunction with the Article "AWOL AND ITS DEFENSE" appearing in THE ADVOCATE, Vol. 2, No. 2, March 1970.

SEARCH AND SEIZURE -- INVENTORIES -- Three recent cases on inventory searches were won by the defense. In Mozzetti v. Superior Court, (Cal. Sup. Ct. 1971); 9 Crim. L. Rep. 2164, an automobile which had been involved in an accident was left blocking the road. The car was towed to a police storage facility where its contents were inventoried. When police opened a closed, but unlocked, suitcase on the back seat of the car, they found a small plastic bag containing marijuana. The California Supreme Court held that this evidence is not admissible on a possession charge. This warrantless search "was not incident to lawful arrest, based on probable cause to believe the vehicle contained contraband, or justified by the peculiar nature of the police custody involved." 9 Crim. L. Rep. 2165. The Court noted the conflict between protecting the car owner's property and safeguarding him against invasions of privacy:

"In weighing the necessity of the inventory search as protection of the owner's property against the owner's rights under the Fourth Amendment, we observe that items of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property. In the instant case, because the automobile involved was a convertible, adequate protection of valuables could be achieved by raising the top or, if necessary, by moving visible items, like the small suitcase, into the trunk for safekeeping." 9 Crim. L. Rep. 2164

The court also noted that the contraband was not in plain view.

In Mayfield v. United States, \_\_\_ F.2d \_\_\_, (D.C. Cir. 1971); 9 Crim. L. Rep. 2115, an automobile was properly impounded when the defendant was being booked for a traffic violation (driving without a valid driver's license). Although the arrest, impoundment, and inventory are all found lawful, the contraband found during the inventory is nevertheless inadmissible. The court held that "resort to impoundment procedure does not make admissible--at least for the prosecution of wholly different offenses--articles thereby uncovered which would be otherwise inadmissible on fourth amendment principles."

In United States v. Mosshauer, No. 23,685, \_\_\_ USCMA \_\_\_, \_\_\_ CMR \_\_\_ (1971), the Court of Military Appeals invalidated as "unreasonable" an inventory search which was conducted upon notice that the defendant had been arrested by civilian authorities on marihuana and indecent exposure charges. From the circumstances of the search, the Court gleaned "the abiding impression that the entire proceedings were designed to effectuate a search of the accused's belongings for the purpose of determining whether marihuana was present." Among such circumstances were the failure to ascertain when the accused would be released by the civilian authorities; the failure to await the usual normal interval (8-24 hours) before initiating the search; the thoroughness of the inventory which went beyond normal practice; and, lastly, the failure to list other items on the inventory.

INSTRUCTIONS -- INFORMER'S CREDIBILITY -- The Alaska Supreme Court recently stated that an informer instruction paralleling the more customary accomplice instruction, already a requirement in federal practice, will henceforth be required in appropriate state cases. The requested instruction denied by the trial court was the one normally used by the federal courts:

"The testimony of an informer, or any witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should always be considered with caution and weighed with great care." 9 Crim. L. Rep. 2126

The Alaska Supreme Court observed that when a witness is a paid or coerced police informer, a defendant will be entitled to instruction on the inherently suspect nature of his testimony. The court draws a line, however, between such witnesses and solid citizen who do voluntary undercover work simply out of a desire to stop crime. On that basis, the court upheld a trial court's denial of an informer instruction to a marihuana-selling defendant in a case where the informer, was not a professional informer, was unpaid, not under pending charges, had never used marihuana herself, and had no interest in currying police favor except the protection of her husband from a "drug problem." Fresnada v. State, 483 P.2d 101 (Ala. Sup. Ct. 1971); 9 Crim. L. Rep. 2126.

SEARCH AND SEIZURE -- DETENTION AND FRISK -- In reversing a conviction for possession of heroin the District of Columbia Court of Appeals recently declared that policemen who observed two individuals suspiciously lurking in an apartment house garage entrance at 2.00 a.m. were not justified detaining them as they tried to leave the garage, interrogating them, or taking them to the apartment office to be checked out. An officer observed appellant and another man about two o'clock in the morning walking down the street. He had never seen appellant before and there was no report of any crime having been committed at that time in that area. The officer headed in the opposite direction from the two men he passed, proceeded on his motor scooter to the next block, made a U-turn and returned to see where they were going. When the officer did not see them on the street he turned into an alley which ran alongside an apartment building to look around. The two were

standing in an apartment house garage, and walked out, ignoring police orders to wait. The officer had his partner stop and identify the men while he made inquiries of the apartment desk clerk. The officer returned and asked the appellant what he was doing in the garage and was told that the appellant had come to meet a resident. Without telling the appellant that he need not obey, the policeman had him go back to the apartment front desk. After patting the appellant down, he stopped appellant from reaching into a leather belt pouch, which he thought might contain a weapon. Having removed appellant's empty hand from it, the officer reached in and found heroin.

The Court of Appeals noted:

"We are not persuaded that appellant's detention on the street by the officers was 'the kind of momentary contact' which we have heretofore approved, even though probable cause to arrest was lacking. . . . In this case, appellant was detained for a period of time and then asked by the officers to accompany them to the apartment building one-half block away. Yet the officers had no complaint or report of a crime, had never seen appellant before and did not observe him engage in unlawful conduct.

. . . .

"It may be that presence on the streets of this city at an early hour in the morning is suspicious conduct, given present crime statistics, but something more than that is required to justify police detention and interrogation." Robinson v. United States, F.2d \_\_\_ (D.C.Cir. 1971); 9 Crim. L. Rep. 2278.

SEARCH AND SEIZURE -- PROBABLE CAUSE, HANDWRITING EXEMPLAR -- The U.S. District Court for Northern Illinois has recently held that even though the fifth and sixth amendments do not bar seizure of handwriting exemplars from criminal suspects and defendants, the fourth amendment can. In the court's view the seizure or

compulsion of personal identifying characteristics such as fingerprints, voice exemplars and handwriting samples, is within the fourth amendment and must be justified, whether the standard be probable cause or overall reasonableness. The court holds that probable cause is not established by the mere fact that the defendant whose exemplars are sought has been indicted. United States v. Barley, \_\_\_ F.Supp. \_\_\_ (D. N. Ill. 1971); 9 Crim. L. Rep. 2279.

SEARCH AND SEIZURE -- ABANDONED PROPERTY -- A majority of the Indiana Supreme Court notes that abandonment which is induced by illegal police activity is not for fourth amendment purposes, abandonment at all. Marihuana in an envelope thrown from a car that police officers stopped for an unjustified early-morning curfew check was properly suppressed at a trial for possession when the record was devoid of any evidence that the police had reason to suspect that the car's occupants were juveniles violating an 11 p.m. curfew. State v. Smithers, \_\_\_ N.E.2d \_\_\_ (Ind. Sup. Ct, 1971); 9 Crim. L. Rep. 2261.

SEARCH AND SEIZURE -- DISQUALIFICATION OF COMMANDER -- The authority of a commanding officer under Paragraph 152, Manual for Courts-Martial, United States, 1969 (Revised edition) to authorize a search in a case in which he is the accuser, or in the course of a criminal investigation which he is personally directing, is brought into question by the recent case of Coolidge v. New Hampshire, \_\_\_ U.S. \_\_\_ (1971); 39 U.S.L.W. 4795. At issue was the seizure and subsequent search of the accused's automobile. The court held that the warrant authorizing its search was not issued by a "neutral and detached magistrate." In this case the warrant was signed by the state attorney general "acting as a justice of the peace." Previously, the attorney general "had personally taken charge of all police activities relating to the murder." He later served as chief prosecutor at the trial." The Supreme Court could find "no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all."

CONFESSION AND ADMISSIONS -- CUSTODIAL INTERROGATION, VOLUNTARINESS -- Despite the protestations of federal agents that an illegal gun defendant was not under arrest when they interrogated him in his pawn shop, the U.S. Court of Appeals for the Fifth Circuit was of the opinion that the interrogation was custodial. The defendant was given Miranda warnings when the officers discovered an illegal weapon in a showcase and although the defendant indicated he did not want a lawyer and that he knew his rights he refused to sign a waiver. However, the defendant subsequently made incriminating statements to the agents. In dealing with the Government's contention that the defendant was not in custody the Court observed:

"Evaluating the present case in light of . . . prior decisions, we think that Phelps was entitled to the privileges and protections of Miranda. Four policemen with prior knowledge of a firearms infraction went to the defendant's place of business, and, as they testified, 'were expecting trouble.' They clearly sought out Phelps for the purpose of investigating him in particular for these specific crimes. This was no general on the scene questioning of bystanders to determine whether a crime had been committed; this was accusatory questioning. Moreover, if the investigation was not focused on the defendant when the officers entered the building, it certainly focused on him a few seconds later when the investigators discovered the illegal weapon in the showcase. We think that the presence of four officers in a man's place of business holding a weapon which they discovered on the premises and which they have announced is illegal, presents a situation which is intimidating enough to warrant the application of the Miranda privileges and protections. The investigators had probable cause to arrest Phelps, and he had reason to believe that they

would do so. Once the officers found the illegal weapon the investigation focused on Phelps, and the panoply of rights enunciated in Miranda became applicable. 9 Crim. L. Rep. 2202.

The record was not clear whether, after the defendant refused to sign the waiver, the interrogation had ceased as required, whether defendant thereafter voluntarily initiating subsequent conversation, or whether the questioning was initiated by the officers without any instigation by the defendant. An evidentiary hearing was ordered on this question of whether the defendant voluntarily waived his right to remain silent. United States v. Phelps, 5 Cir. 1971; 9 Crim. L. Rep. 2202.

WITNESSES -- GOVERNMENT-PAID DEFENSE PSYCHIATRIST -- In Theriault v. United States, (5th Cir. 1971); 9 Crim. L. Rep. 2067, the Court of Appeals ordered a United States District Court to authorize employment of a psychiatrist by the defense pursuant to 18 U.S.C. § 3006A(e). An ex parte hearing must be held on such a request, although not here necessary because of the clarity of the issue. In addition, the prior appointment of a psychiatrist, pursuant to 18 U.S.C. § 4244 and Fed. R. Crim. P. 28, even at the instigation of the defense, does not preclude appointment of another under 18 U.S.C. § 3006A (e). The former is a witness for the court, "neutral and detached." The Section 3006A(e) expert fills a different role, whose services necessary to an adequate defense include pretrial and trial assistance to the defense as well as testimony at trial.

Military defense counsel may well argue that this federal law supports the proposition that Paragraph 116, Manual for Courts-Martial, United States, 1969 (Revised edition) authorizes similar defense psychiatric services. Paragraphs 115a and 137, Manual, supra, on the relevancy of procedural rules of the federal courts, also support this argument.

  
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