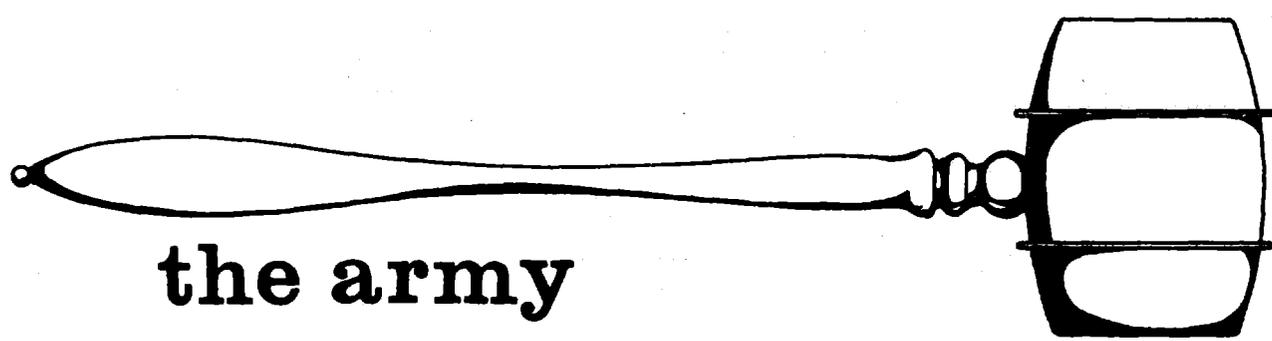


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**Minor Symposium On Enlistment  
Procedure and Personal Jurisdiction:  
Introduction**

**Table of Contents**

<b>Minor Symposium on Enlistment Procedure and Personal Jurisdiction: Introduction</b>	<b>1</b>
<b>Improving Quality Control of Enlistment Processing Since U.S. v. Russo</b>	<b>2</b>
<b>Wagner, Valadez, and Harrison: A Definitive Enlistment Trilogy?</b>	<b>4</b>
<b>Reductions for Inefficiency: An Overlooked Tool</b>	<b>14</b>
<b>A Look at the Army Contract Adjustment Board</b>	<b>15</b>
<b>Promotions in the JAGC, USAR</b>	<b>23</b>
<b>Administrative and Civil Law Section</b>	<b>24</b>
<b>Legal Assistance Items</b>	<b>26</b>
<b>CLE News</b>	<b>31</b>
<b>Judiciary Notes</b>	<b>34</b>
<b>Reserve Affairs Item</b>	<b>35</b>
<b>JAGC Personnel Section</b>	<b>35</b>
<b>Current Materials of Interest</b>	<b>36</b>
<b>Errata</b>	<b>36</b>

*All the services have experienced problems associated with lack of court-martial jurisdiction over servicemembers whose enlistments are void because they were required to choose between civilian jail or enlistment in the armed forces (United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974)), or because they had some disqualification for enlistment but, due to recruiter misconduct, were enlisted nevertheless (United States v. Russo, 1 M.J.R. 134 (C.M.A. 1975)).*

*On 1 July 1976, the United States Military Enlistment Processing Command (MEPCOM) was established in response to complaints by Congress and within DOD about lax quality control during enlistment processing. This joint command, which supervises the operation of the Armed Forces Examining and Entrance Stations (AFEES), has instituted new procedures to improve quality control and to remedy some of the evils perceived by the United States Court of Military Appeals in Russo. An article prepared by MEPCOM, detailing these procedures, is set forth below.*

*Following the MEPCOM article is a discussion of three recent opinions of the Court of*

*Military Appeals on the subject of enlistment and personal jurisdiction. This article, written by Captain David A. Schlueter, a criminal law*

*instructor at TJAGSA, discusses the various issues raised in the Wagner, Valadez and Harrison cases.*

## Improved Quality Control of Enlistment Processing Since *U.S. v. Russo*

### *United States Military Enlistment Processing Command (MEPCOM)*

On 1 August 1975 the United States Court of Military Appeals unanimously reversed the conviction of Private Louis W. Russo, United States Army.<sup>1</sup> The Court ruled that the court-martial that tried Private Russo did not have jurisdiction over him. He was not included in any of the categories in 10 U.S.C. § 802 (1970), because his purported enlistment was void. Mr. Russo suffered from dyslexia, and he could not read. He told the recruiter that he could not read; and the recruiter provided him with the answers to the Armed Forces Qualification Test (AFQT), the passing of which was a prerequisite to enlistment.

The Court was outraged more by the actions of the recruiter than by the actions of Mr. Russo. The recruiter violated 10 U.S.C. § 884 (1970), and Mr. Russo violated 10 U.S.C. § 883 (1970) and another criminal statute (that led to

his trial). Nevertheless, the Court chose to let Mr. Russo avoid any sanctions for his criminal activity. The Court reasoned that fraudulent enlistments are not in the public interest and that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute, the resulting enlistment is void as contrary to public policy.<sup>2</sup>

The rationale of the Court in *United States v. Russo* seemed to be relatively limited by the plain language of the opinion, but the Court also found void the enlistment of Private Ronald N. Little, United States Army.<sup>3</sup> Mr. Little's mother told his recruiter that Mr. Little was illiterate. The recruiter explained to Mr. Little the meaning of words and questions on the AFQT, but the recruiter did not provide any answers. The enlistment was deemed void,

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not because the recruiter had violated 10 U.S.C. § 884 (1970), but because the recruiter had destroyed the only vehicle available to determine literacy, an essential prerequisite for enlistment. *United States v. Russo* was cited as authority.<sup>4</sup>

*Russo* thus became the shibboleth to distinguish between enlistees who would be punished and those who would not be punished for crimes committed in the military service. Any enlistment irregularity in which the recruiter may have participated, by malfeasance or nonfeasance, put in peril the jurisdiction of the court-martial. The applicant for enlistment became a child of nature, bereft of free will and criminal animus and totally subject to manipulation by recruiters.

To answer complaints by Congress and within the Defense Department about lax quality control during enlistment processing, the United States Military Enlistment Processing Command (MEPCOM) was activated on 1 July 1976.<sup>5</sup> MEPCOM is a jointly staffed field operating agency under the control of the Deputy Chief of Staff for Personnel (DCSPER), Headquarters, Department of the Army. The Commander of the United States Army Recruiting Command is concurrently designated the Commander of MEPCOM. The mission of MEPCOM is to examine mentally and medically applicants for enlistment in all components of the Armed Forces, including the United States Coast Guard. The examinations and enlistments occur at Armed Forces Examining and Entrance Stations (AFEES). Sixty-six AFEES and three substations are located throughout the United States from Puerto Rico to Guam.

During the processing in the AFEES, the applicant is given at least three separate opportunities to reveal any recruiter malpractice or error that may have occurred in the recruiting station or recruiting service liaison section of the AFEES. The procedures at the AFEES are specified in a joint regulation of the principal Armed Forces—Department of the Army Regulation Number 601-270/Department of the Air Force Regulation Number 33-7/Department of the Navy Operational Instruction Number

1100.4/United States Marine Corps Order Number P1100.75, 20 October 1977. This regulation is recommended reading for those interested in learning about the entire quality control function of the AFEES.

Although honesty is the best policy is promoted throughout the processing, the first formal reminder to the applicant is given when he/she fills out a report of medical history (Standard Form 93). The form is completed under the direct supervision of medical personnel of the AFEES. The applicant is informed that concealing a disqualifying medical condition is a felony (18 U.S.C. § 1001 (1970)) and that a fraudulent enlistment effected by the concealment could result in trial by court-martial or an adverse administrative discharge. Appendix K, AR 601-270/AFR 33-7/OPNAVINST 1100.4/MCO P1100.75.

An Entrance National Agency Check (ENTNAC) or National Agency Check (NAC) is initiated in the AFEES on all applicants. An essential part of this check is a comprehensive interview by an officer, noncommissioned officer (pay grade E-5 or above), or civilian employee (pay grade GS-5 or above). The applicant is fingerprinted and advised that federal and state agencies will be queried about arrests and convictions. The applicant is again advised that concealing information or providing false information could result in criminal prosecution or adverse administrative discharge. The applicant is specifically asked whether or not he/she has revealed all information concerning medical history, contacts with law enforcement agencies, educational level, prior military service, and previous attempts to enlist. The applicant is asked if anyone told him/her *not* to reveal information or to lie about anything. Finally, the applicant is asked if he/she understands the period of service and enlistment option written on the enlistment documents and any oral promises or commitments not reflected in the documents. Revelation of misunderstanding or additional information stops the processing of the applicant. Paragraph 6-11, AR 601-270/AFR 33-7/OPNAVINST 1100.4/MCO P1100.75.

The third formal check occurs just prior to the administration of the oath of enlistment. The enlisting officer explains to the applicants the general meaning of Article 83, Uniform Code of Military Justice (10 U.S.C. §883 (1970)) and the provisions for adverse administrative discharge for fraudulent enlistment. The applicants are then afforded an opportunity to discuss any withheld or falsified information with the briefer, and they are again asked if anyone instructed them to withhold or falsify information. Paragraph 6-7, AR 601-270/AFR 33-7/OPNAVINST 1100.4/MCO P1100.75.

The inauguration of the United States Military Enlistment Processing Command removed from the control of the recruiting services, the machinery for testing the mental ability and the medical condition of applicants for enlistment. Moreover, the procedures used in the AFEES have severed the nexus between the dishonest recruiter and the unqualified applicant. The applicant who raises his/her right hand, mouths the oath of enlistment, and signs the enlistment document (Department of De-

fense Form 4), has made his/her own decision. He/she knows what must be revealed and the consequences of not revealing the information, and he/she knows that the enlistment agreement is limited to the language on the signed documents. If an improper enlistment nevertheless occurs with the assistance of a recruiter, one might hope that the United States Court of Military Appeals would reconsider its opinion in *United States v. Russo*<sup>6</sup> in the light of the quality control measures adopted since that decision. The Court might view public policy as requiring punishment of both the recruiter and the enlistee for his/her own delicts.

#### Footnotes

<sup>1</sup>United States v. Russo, 1 M.J. 134 (C.M.A. 1975).

<sup>2</sup>*Id.* at 137.

<sup>3</sup>United States v. Little, 1 M.J. 476 (C.M.A. 1976).

<sup>4</sup>*Id.* at 478.

<sup>5</sup>Department of the Army General Order Number 7, 26 April 1976, and Department of the Army Regulation Number 10-52, 28 February 1977.

<sup>6</sup>1 M.J. 134 (C.M.A. 1975).

## Wagner, Valadez, and Harrison: A Definitive Enlistment Trilogy?

CPT David A. Schlueter, JAGC\*

### Introduction

Enlistments continue to generate judicial and administrative interest. Over the past few years the topic has been raised in a variety of forums and forms; in some instances the law of enlistments has been refined and questions answered. But in other areas, the law remains unsettled, open to continued speculation, and subject to a variety of interpretations. One area where enlistment law has received keen scrutiny is the subject of enlistment contracts *vis a vis* the question of personal jurisdiction.

A recent trio of Court of Military Appeals decisions, *United States v. Wagner*,<sup>1</sup> *United States v. Valadez*,<sup>2</sup> and *United States v. Harrison*,<sup>3</sup> sheds some dispositive light on that issue. This article will examine these three

cases and their potential impact on the law of enlistments. The first section reviews the three decisions and the remaining sections deal with some of the recurring issues raised in enlistment law and addressed by the Court in this most recent trilogy.

### The Decisions

We turn our attention first to the Court's decision in *United States v. Wagner*, which served in several respects as the keystone for the Valadez and Harrison decisions. Gregory Wagner was arrested in Michigan in 1974 for carrying a concealed weapon in the trunk of his car. After being arraigned and during a meeting with his mother and appointed attorney, Wagner learned that the charge might be

dropped if he were to join the Army.<sup>4</sup> Wagner subsequently met with Sergeant Olds, a recruiter in Coldwater, Michigan, and took the initial preenlistment mental examination before disclosing to the recruiter that he had a charge pending against him. Sergeant Olds told Wagner that he would have to suspend processing the enlistment application until "the court took proper disposition of the case."<sup>5</sup> Several weeks later Sergeant Olds was told by the prosecuting attorney that an "Order Nolle Prosequi" had been entered in Wagner's case. Shortly thereafter Wagner joined the Army. The Army Court of Military Review viewed Wagner's enlistment as void but ruled that jurisdiction existed because of a valid constructive enlistment.<sup>6</sup>

The Court of Military Appeals noted that three separate questions were raised: First, should Wagner's enlistment contract be considered void *ab initio* due to a purported lack of voluntariness?; second, was there sufficient recruiter misconduct in the case to void "from the beginning" the enlistment contract?; and third, did the disqualification by a nonwaivable service regulation constitute "an inherent vice" so as to disable Wagner from acquiring military status as a matter of enlistment contract law principles?<sup>7</sup>

Turning first to the issue of "voluntariness," the Court relied upon its earlier decision in *United States v. Lightfoot*,<sup>8</sup> and distinguished Wagner's entry from that in *United States v. Catlow*.<sup>9</sup> Here, as in *Lightfoot*, Wagner had entered the service upon advice of counsel and not because of intimidation, improper influence, or the "carrot and stick" method found in *Catlow*. Wagner's enlistment was therefore "voluntary."<sup>10</sup>

The second issue caused little concern. The Court stated:

We find no deliberate violation of recruiting regulations to allow the enlistment of an ineligible applicant in the present case, nor any negligence on the part of the recruiter sufficient to justify voiding the appellant's original enlistment contract. Accordingly, there was no recruiter mis-

conduct within the meaning of the *United States v. Russo* . . . which would require us on this ground to dismiss the charges . . . .<sup>11</sup>

The third issue received greater attention. Wagner had enlisted in violation of a nonwaivable regulatory disqualification which prohibited individuals from enlisting if criminal or juvenile charges had been filed by civil authorities or were still pending.<sup>12</sup> The "precise legal question," according to Judge Fletcher, was "whether this regulatory disqualification in and of itself voids the original enlistment contract for purposes of court-martial jurisdiction."<sup>13</sup> Turning to the Supreme Court's decision in *In re Grimley*,<sup>14</sup> the Court noted first that the Supreme Court had placed emphasis on the fact that Grimley had failed to disclose his disqualification to the recruiter prior to his enlistment. Secondly, the Court was "particularly struck by the public policy considerations articulated in 1890, which retain their viability in our mind with respect to our present day military situation."<sup>15</sup> Finally, the Court stated that the regulation in question was constructed for the benefit of both the government and recruit but again cited *Grimley* as support for the proposition that undisclosed violation of the Army recruiting regulations, in and of itself, was not sufficient to void Wagner's enlistment contract.<sup>16</sup>

In addition, the Court made, *inter alia*, the following points:

- a. There is no statutory prohibition against enlistment by a person, who through counsel, initiates a proposal of military service as an alternative to further prosecution for a civilian criminal offense.<sup>17</sup>
- b. The recruiting regulation in question, unlike insanity, idiocy, or infancy, does not render the contracting party *non sui juris* so as to prevent the recruit from changing his status through enlistment contract.<sup>18</sup>
- c. Where a mere regulatory disqualification exists, the enlistment contract remains "voidable," absent action by the recruit to void the contract, prior to the com-

mission of an offense. As such, it is a proper basis for court-martial jurisdiction.<sup>19</sup>

Recruiting regulations and recruiter conduct again appeared as key issues in *United States v. Valadez*.<sup>20</sup> Valadez had erringly entered service in the Navy due to an oversight on the part of a recruiter who failed to note that Valadez's age and failure to graduate from high school, cojoined with a low entrance test score, disqualified him.<sup>21</sup> The Court cited *Wagner, supra*, and again noted that although a regulatory violation may provide the recruit with standing to void his enlistment contract, the enlistment remains voidable.<sup>22</sup> Here Valadez's enlistment was not void merely because it violated a particular service regulation. Remaining was the issue of whether the recruiter's negligence in this case voided the enlistment contract. No, said the Court, citing its decision in *United States v. Russo*.<sup>23</sup> Simple negligence did not rise to a level sufficient to violate public policy.<sup>24</sup>

While the Court rejected the lower court's application of constructive enlistments in both *Wagner* and *Valadez*, it approved application of that doctrine in *United States v. Harrison*.<sup>25</sup> Harrison had enlisted while sixteen years of age, but after reaching seventeen received pay and benefits and indicated to his commanding officer an intent to perform his assigned duties—evidence, said the Court, which could be “construed as an offer on his part, when conditionally capable, to enlist or to mislead the Navy into accepting him as a regular servicemember.”<sup>26</sup>

The question raised in *Harrison* was whether the recruiter had been negligent in not discovering that Harrison was a minor and, therefore, ineligible. When Harrison could not produce a birth certificate the recruiter unsuccessfully checked with the state's bureau of vital statistics. As an alternative, the recruiter checked with what Harrison claimed to be a family Bible which only confirmed Harrison's lie.<sup>27</sup> A telephonic check with a woman identifying herself as Harrison's grandmother also failed to disclose the sham. Satisfied that the

recruit was eighteen, the recruiter completed the necessary paperwork.

Using its decision in *United States v. Brown*<sup>28</sup> as a template, the Court did not consider the recruiter's action “unfair”:

It is true, however, that the recruiter was negligent to the extent that he failed to recognize the apparent age ineligibility from the appellant's record of juvenile involvement. We hesitate, however, to equate such apparent inadvertent mistake by this recruiter with the failure to perform affirmative recruiting practices designed by regulation to prevent such enlistments, so apparent in the *Brown* case.<sup>29</sup>

The Government was, therefore, not estopped to argue constructive enlistment as a basis for court-martial jurisdiction over Harrison.

In effect, this recent trio of cases tracks in many respects with another trio of enlistment cases—*Catlow* (voluntariness), *Russo* (regulations), and *Brown* (constructive enlistment). The trios differ in one main respect. In this latest round of decisions the individual was considered amenable to court-martial jurisdiction. Several oft-confronted themes run throughout all these cases and provide further clarification of the present Court's posture on enlistment contracts. In the following sections, we will briefly examine those themes.

#### *The Enlistment: Voluntary Execution of a Contract*

In these three cases, the Court evidenced a continued reliance on principles of contract law.<sup>30</sup> One of the core elements in any contract, of course, is voluntariness. In *Wagner*, the court emphasized that the recruit was *sui juris* and had not been coerced into joining the Army.<sup>31</sup> Whatever other defects may have existed in *Wagner's* enlistment, *Wagner* could not claim that he was incapable of contracting with the Government. The court did not specifically delineate what statutory or regulatory provisions would render the recruit ineligible, but the thrust of the opinion on this point was that *Wagner* possessed the legal capacity to contract.<sup>32</sup> However, if the qualifying statute

or regulation goes to the very power, or ability to contract (insanity, minority) then the enlistment contract may be invalid even if the Government can show voluntariness.<sup>33</sup>

The fact that the Court is relying on federal contract law is itself instructive and marks another instance in an overall shift from the position taken by this Court's predecessors, that the enlistment is primarily a change in status.<sup>34</sup> In so relying, the Court is swinging into a posture more in line with the civilian judicial treatment of the enlistment process—at least on the question of valid formation of an enlistment contract.<sup>35</sup>

### *Recruiting Regulations*

The recurring problem of what impact, if any, recruiting regulation qualifications have on enlistments was raised both in *Wagner* and *Valadez*. You will recall that the regulatory disqualification in *Wagner* involved the "join-the-Army-or-go-to-jail" disqualification. In *Valadez*, the regulatory provisions on mental proficiency of the recruit were questioned. In both instances the court stated that the violation of a recruiting regulation, in and of itself, would not void the enlistment. The enlistment would instead be voidable.<sup>36</sup>

In so holding, the Court emphasized that it had never held that an undisclosed violation of a recruiting regulation would void an enlistment.<sup>37</sup> Whatever the court may have not held, its earlier decisions seemed to clearly predict a rule inextricably binding the Government to follow its recruiting regulations: failure to follow the recruiting regulations would result in a void enlistment.<sup>38</sup> The Court's refinement of the role of recruiting regulations is welcomed and the adoption of a rule which treats a regulatorily deficient enlistment as "voidable" falls more in line with prevailing contract law principles.

The disqualified recruit is still able to take advantage of the regulatory disqualification prior to, but not after, an offense has been committed. This last point raises some questions, however. In *Wagner*, the Court noted

that "absent action by the recruit to void an enlistment suffering from mere regulatory disqualification, and prior to the commission of the offense, his enlistment contract remains merely voidable and is a proper basis for court-martial jurisdiction."<sup>39</sup> But in *Valadez*, the Court opined (when speaking of a regulatory violation) that the enlistment contract remains voidable "until the recruit takes action to void the contract, prior to his commission of an offense and action taken by the Government with a view towards trial."<sup>40</sup> The latter quote appears inconsistent with the first. According to the language in *Wagner*, the recruit's right to avoid the enlistment is clearly cut off at the commission of an offense. The language in *Valadez* indicates that the commission of the offense and "action by the Government with a view towards trial" are the cut-off points. The two events do not necessarily, or normally, take effect on the same date. Which rule applies? The cases cited by the court to support both quoted rules, *Morrissey v. Perry*<sup>41</sup> and *United States v. Beans*,<sup>42</sup> dealt respectively with situations where the enlistees questioned their status before and after charges had been preferred. The Supreme Court's opinion in *Morrissey, supra*, and the public policy considerations so heavily relied upon in *Wagner* would demand that the recruit may not void the contract after an offense has been committed.<sup>43</sup> To allow the recruit to void his contract after the offense but before the Government acts, would give the recruit an effective "get-out-of-jail-free" ticket.

In summary, although the ultimate impact on the court's position on regulatory deficiencies in the enlistment contract is yet to be seen, several conclusions can be drawn. First, regulatory deficiencies in the enlistment will not necessarily void the enlistment. The Court has noted:

It is only when the recruiting regulation also amounts in fact and law to either a lack of voluntariness, a statutory incapacity to contract, or a disability embraced within the enlistment contract principles intimated by the Supreme Court in *Grimley* . . . will such a disqualification be found

sufficient to void the enlistment contract *ab initio* as a basis for court-martial jurisdiction.<sup>44</sup>

Second, the Court, perhaps in a shift of philosophy or analysis, is allowing the Government a little breathing room in applying the myriad of technical recruiting regulations, at least in those cases where the defect is not disclosed.

Third, the recruit's right to invalidate the enlistment must be timely. Commission of an offense cuts off his standing and presents the Government with the option of exercising court-martial jurisdiction; an option many felt was abrogated after *Russo*.

#### *Recruiter Conduct*

Another common thread in the three cases is the action, or inaction, of the recruiters. The decisions on this point reveal no new or startling revelations but do offer some refinement of existing principles.

The recruiter conduct issue usually arises in one of two settings: in determining whether an enlistment is void *ab initio* under *Russo*<sup>45</sup> and/or in determining whether the Government is later estopped from arguing the existence of a constructive enlistment.<sup>46</sup> Both settings were present in this latest trio of decisions. In *Wagner*, the Court questioned the recruiter's conduct and found no deliberate violation of recruiting regulations nor any negligence on his part. In *Valadez*, the recruiter's simple negligence in not discovering a regulatory disqualification did not void the enlistment. And in *Harrison*, the Government was not estopped from showing a constructive enlistment because the recruiter had not acted unfairly.

In each case, the court further defined and refined its prior holdings in *Catlow*, *Brown*, and *Russo*. Several points may be gleaned from the Court's language. First, where a recruiter's actions in completing the enlistment process are in question, misconduct approaching that found in *Russo*—intentional violation of Article 84—must normally be present before the enlistment will be voided *ab initio* on the ground of recruiter misconduct. Enlistments resulting

from mere recruiter negligence or good faith actions, according to the court, are not normally considered void because of public policy. In reaching that decision, the Court stated that such enlistments are not in the best interests of the public, the military, or the recruit, but "delicate" public policy considerations must be valued:

Moreover, we can hardly classify simple negligence as a natural wrong in the manner of establishment of an enlistment contract, or conduct on the level of compulsion, solicitation or misrepresentation condemned by implication in *Grimley*. Finally, we believe that the interest of the primary society in the effective and disciplined fighting force significantly outweighs any possible concern on its part with an enlistment of an ineligible recruit inadvertently caused by simple negligence.<sup>47</sup>

But, the court also stated that actions amounting to something less than intentional misconduct and something more than mere negligence might nonetheless void an enlistment:

Moreover, it is conceivable that negligence of a higher degree, *e.g.* wanton and willful, which is employed to avoid discovering recruiting disqualifications, coupled with the existence of such a regulatory disqualification, may be sufficient recruiter misconduct to justify declaring an enlistment contract so procured void *ab initio* for purposes of court-martial jurisdiction.<sup>48</sup>

A troubling facet of the recruiter conduct issues is the reliance placed by the Court on "unknowning" actions by the recruiter. In *Wagner* especially, the Court spoke in terms of undisclosed regulatory disqualifications.<sup>49</sup> However, in examining the thrust of the opinion, one can see that a recruiter might very well be aware of the deficiency, but inadvertently misread or misapply the appropriate regulatory provision, as in *Valadez*. Whether the Court assesses the recruiter's conduct as intentional, grossly negligent or merely negligent will determine whether the enlistment is valid. Reading

*Wagner* and *Valadez* together we see that the mere fact that a deficiency is "disclosed" does not always render the enlistment void *ab initio*. More is required.<sup>50</sup>

The degree of recruiter, or Government, misconduct necessary to estop argument of constructive enlistments is another matter. Apparently, less is required. In constructive enlistment situations, the Government is estopped if the actions of the recruiter, or the Government, are not "fair." What is "fair"? The court noted the amorphous nature of the term in *Harrison*<sup>51</sup> and rather than present detailed guidelines, the court instead relied on *Brown*, *supra*, to "elicit the boundaries" of the principle of estoppel.<sup>52</sup>

Thus, it seems that if recruiter misconduct, at the time of enlistment, amounts to an intentional violation of Article 84, UCMJ, the enlistment is void *ab initio* and the Government is also estopped from later showing a constructive enlistment. If the enlistment is void *ab initio*, for some reason other than recruiter misconduct, subsequent "unfair" or "unreasonable" actions on the part of the Government<sup>3</sup> may prevent the Government from relying on the concept of constructive enlistment.

#### *Constructive Enlistment*

In *Wagner* and *Valadez*, the Courts of Military Review had rested court-martial jurisdiction on constructive enlistments. Because the Court of Military Appeals found no evidence that the original disqualifying features were ever cured, it rejected application of that concept and instead turned its attention, as discussed in preceding sections, to the question of whether the enlistments in question were ever void *ab initio*.

In *Harrison*, the Court directly confronted the issue and stated that it was satisfied with the lawfulness of the doctrine of constructive enlistment.<sup>54</sup> But, the Court added that its decision should not be "misconstrued to sanction the carte blanche determinations by the lower courts of the constructive enlistments."<sup>55</sup>

While recognizing the validity of the concept, the Court nonetheless continued to restrict its

application to situations where the Government has acted fairly. The conduct of the Government in *Harrison* was not unreasonable; the "apparent inadvertent mistake by the recruiter" did not amount to a failure to perform affirmative recruiting practices as was the case in *Brown*.<sup>56</sup> For the moment, the lower courts are tasked with determining on a case by case basis whether the actions or inactions of the recruiter were "unreasonable" or "unfair."

The *Harrison* case does little to remedy any of the uneasiness resting on the constructive enlistment question. The Court, instead of drawing some definitive guidelines, simply cited *Brown* as a pattern for the lower court's use in those cases in which improper recruiting practices are involved. The root of the problem in applying the concept of constructive enlistment to any given fact pattern is that the "fairness" requirement looks good on paper but poses numerous practical problems. The question often is reduced to whom the Court believes. If the Court believes that the Government has been consistently legitimate in its attempt to establish the military status of an accused, then personal jurisdiction will vest. One means of alleviating the troublesome concept of fairness which, as the Court recognized, "may give rise to misuse of the doctrine of constructive enlistment either in favor of the Government or the accused,"<sup>57</sup> is to create a statutory constructive enlistment in those cases where the individual has committed an offense.<sup>58</sup>

One point raised in both *Wagner* and *Valadez* should be addressed. In rejecting the need to apply the constructive enlistment concept in those cases, the court stated that there was no showing by the Government that the disqualifying conditions had ceased to exist.<sup>59</sup> That may have been the case in *Valadez*<sup>60</sup> but not in *Wagner*. The Court in *Wagner* cited *Catlow* for the continuing disability proposition. But in *Catlow*, the Court had stated that *Catlow* might have perfected a constructive enlistment if he had subsequently served voluntarily.<sup>61</sup> Assuming, as the Army Court of Military Review did, that *Wagner's* enlistment was void, then a valid constructive enlistment could ripen because, as the Court itself acknowledged in

*Wagner*, there was voluntary service by a party not suffering from "insanity, idiocy, or infancy."<sup>62</sup> The disability had dissipated.<sup>63</sup>

### Public Policy

Although mentioned briefly in *Russo*, the court deals at some length in these three decisions with the concept of public policy. There are repeated references to the Supreme Court's reliance in *Grimley* on public policy considerations. With ever so subtle shifts in its reading of the delicate "public policy" or fairness, the court is free to validate or void any enlistment or constructive enlistment before it. In this trilogy it has chosen to validate the enlistments, and, therefore, the military status of the individuals.

In *Wagner*, the Court examined the recruiting regulation prohibiting enlistment of someone pending criminal charges and stated:

[P]ublic policy considerations inherent in the maintenance of a disciplined and effective military to protect society at large dictate against construing such a regulatory disqualification as inherent in the substance of the contract and requiring automatic voiding of the enlistment contract without some action of the appellant prior to the commission of the offense.<sup>64</sup>

In *Valadez* the interest of the primary society in a disciplined fighting force outweighed any possible concern with an enlistment caused by inadvertent recruiter actions.<sup>65</sup> And in *Harrison* the Government was not estopped from showing a constructive enlistment because it had acted fairly.

In short, the Court applied, whether intended or not, a balancing test: it considered the individual's constitutional protections and the "constitutional interest in the protection of the primary society by an effective and disciplined fighting force."<sup>66</sup>

### Conclusion

As noted at the outset, this most recent series of enlistment decisions provides some answers and solutions to enlistment contract

questions. However, the decisions also raise new issues<sup>67</sup> while at the same time leaving others yet untouched.<sup>68</sup>

Counsel faced with issues similar to those raised in *Wagner*, *Valadez*, and *Harrison* will find guidance in those decision and may expect to raise, among others, the following issues and questions:

1. Does the disqualification in question go to the recruit's ability to contract (e.g. insanity, intoxication, minority)? See *Wagner*.
2. If so, the contract is probably void. If not, was the disqualification (statutory or regulatory) disclosed to the recruiter or other Government representative? If not, see *Wagner*. If so, counsel should be prepared to litigate whether subsequent recruiter or Government actions were intentional (violations of Article 84, UCMJ), wanton, willful, or merely negligent.<sup>69</sup> See *Valadez*.
3. If the disqualification was not disclosed and no recruiter misconduct was involved, did the recruit take any action to void his enlistment prior to committing an offense? See *Wagner* and *Valadez*.
4. Was the enlistment voluntarily entered?
5. If contract is void for some reason other than Government misconduct, was a constructive enlistment formed? If so, does fairness prevent the Government from asserting it? See *Harrison*.

In all situations counsel should be familiar with all three cases and prepared to argue the competing interests (i.e. balancing test) and public policy considerations. Both facets were continuing threads through and around the three decisions.

This most recent trio provides further catalyst for future enlistment decisions and administrative rulings.<sup>70</sup> It will no doubt continue to stir the varied interpretations and debates that surround the present Court of Military Appeals.

### Footnotes

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- <sup>1</sup> United States v. Wagner, 5 M.J. 461 (C.M.A. 1978).
- <sup>2</sup> United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).
- <sup>3</sup> United States v. Harrison, 5 M.J. 476 (C.M.A. 1978).
- <sup>4</sup> Stipulated testimony at trial indicated that it was standard procedure in Wagner's county to give individuals, who were charged with offenses not considered heinous, the option of joining the Army in lieu of prosecution. United States v. Wagner, 5 M.J. at 464, citing the Army Court of Military Review's decision at 3 M.J. 898, 899 (A.C.M.R. 1977).
- <sup>5</sup> United States v. Wagner, 5 M.J. at 464.
- <sup>6</sup> United States v. Wagner, 3 M.J. 898, 901 (A.C.M.R. 1977). The Army Court of Military Review found ample evidence to support the constructive enlistment; Wagner had enlisted for a three versus two year (minimum) tour; he pursued an offered advance course in generator operation; performed all his normal duties and received benefits; received an accelerated promotion to Private E-2; took advantage of the Army's drug counseling program; did not protest his status and told his mother several times during basic training that "he really liked the Army." 3 M.J. at 901.
- <sup>7</sup> United States v. Wagner, 5 M.J. at 465.
- <sup>8</sup> United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1978). Lightfoot was charged with burglary several months before his enlistment in the Navy. Through his attorney and with his parents' blessings, he advised the court of his desire to join the service. He was adjudicated a juvenile and placed on probation. The recruiter, not involved in these proceedings, was not aware that the charges had been dismissed contingent on Lightfoot's entry into the service, when he processed his enlistment.
- <sup>9</sup> United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974).
- <sup>10</sup> United States v. Wagner, 5 M.J. at 465. See also United States v. Stengel, NCM 77 2128 (N.C.M.R. 23 June 1978); United States v. Westphal, NCM 77 1259 (N.C.M.R. 23 Nov. 1977), *pet. denied* 5 M.J. 85 (C.M.A. 1978).
- <sup>11</sup> United States v. Wagner, 5 M.J. at 466.
- <sup>12</sup> Army Reg. No. 635-210, Personnel Procurement, Regular Army Enlistment, para. 4-11 (C6, 28 July 1976), prohibits individuals from enlisting if criminal or juvenile court charges by civilian authorities are filed or pending. Footnote 2 to Line 5 of Table 2-6 (C8, 24 June 1971) prohibits enlistment of:  
Persons who, as an alternative to further prosecution, indictment, trial, or incarceration in connection with the charges, or to further proceedings relating to adjudication as a youthful offender or juvenile delinquent, are granted a release from the charges at any stage of the court proceedings on the condition that they will apply for or be accepted for enlistment in the Regular Army.
- <sup>13</sup> United States v. Wagner, 5 M.J. at 466.
- <sup>14</sup> *In re Grimley*, 137 U.S. 147 (1890).
- <sup>15</sup> United States v. Wagner, 5 M.J. at 467.
- <sup>16</sup> United States v. Wagner, 5 M.J. at 467. The Court's holding should not have offered any real surprises. In a footnote in *Lightfoot*, the court stated that "[a] failure to conform with applicable statutes and regulations in and of itself has been held by the Supreme Court (*In re Grimley, supra*), as a matter of public policy, not to void the original contract on grounds of illegality." United States v. Lightfoot, 4 M.J. at 263, n. 3. See also United States v. Mills, NCM 78 0325 (N.C.M.R. 1978); United States v. Picou, CM 436169 (A.C.M.R. 1978); United States v. Feneback, NCM 77 1186 (N.C.M.R. 1977); United States v. Harris, 3 M.J. 627 (N.C.M.R. 1977).
- <sup>17</sup> United States v. Wagner, 5 M.J. at 668.
- <sup>18</sup> *Id.*
- <sup>19</sup> United States v. Wagner, 5 M.J. at 469.
- <sup>20</sup> United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).
- <sup>21</sup> Marine Corps Order 5310.2J, para 5(a)(1) (17 May 1972); Military Personnel Procurement Manual, Volume 4, Enlisted Procurement, Section 2011, para. 1c. The regulations provided that a person seventeen years of age, not a graduate of high school, must attain an AFQT score of 50. Valadez scored 40. The Court noted that although a recruiting official, other than the original recruiter was responsible for reviewing the AFQT scores at the testing station, the negligence would be chargeable to the government for purposes of court-martial jurisdiction. United States v. Valadez, 5 M.J. at 471, n.3.
- <sup>22</sup> United States v. Valadez, 5 M.J. at 472.
- <sup>23</sup> United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975).
- <sup>24</sup> United States v. Valadez, 5 M.J. at 474.
- <sup>25</sup> United States v. Harrison, 5 M.J. 476 (C.M.A. 1978).
- <sup>26</sup> United States v. Harrison, 5 M.J. 476, 480.
- <sup>27</sup> As noted by the Navy Court of Military Review in its decision, the Bible was not a "family Bible," but rather a Bible Harrison had found in his home and into which he had simply copied the information from his grandmother's family Bible, except for his correct birthdate. 3 M.J. 1020, 1026, n.7 (N.C.M.R. 1977). Before ac-

- cepting this alternative verification, permitted by regulations, the recruiter checked with recruiting authorities and made further efforts to verify its entries. 5 M.J. at 482.
- <sup>28</sup>United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).
- <sup>29</sup>United States v. Harrison, 5 M.J. at 482.
- <sup>30</sup>United States v. Valadez, 5 M.J. at 473. In *Wagner*, the Court indicated at several points the applicability of contract law principles, especially in reference to those principles relied upon by the Supreme Court in *United States v. Grimley*, 137 U.S. 147 (1890). Recent federal court decisions have continued to apply contract law principles in assessing the validity of enlistment contracts. See, e.g., *Jackson v. United States*, 573 F.2d 1189 (Ct. Cl. 1978); *Frentheway v. Bodenhamer*, 444 F. Supp. 275 (D. Wyo. 1977); *Febus Nevarez v. Schlesinger*, 440 F. Supp. 741 (D. P.R. 1977); *Dubeau v. Commanding Officer, Naval Reserve*, 440 F. Supp. 747 (D. Mass. 1977). See generally, *Schlueter, The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 13-24 (1977).
- <sup>31</sup>United States v. Wagner, 5 M.J. at 465.
- <sup>32</sup>United States v. Wagner, 5 M.J. at 466. Here the Court relied on the language in *Grimley*, supra, which indicated that insanity, idiocy, infancy, or other disability which, in its nature, disables a party from changing his status or entering into new relations, might render the party incompetent. 137 U.S. at 152.
- <sup>33</sup>Unanswered is the question of the validity of enlistment entered through coercion, but otherwise in conformity with an applicable statutes and regulations. Under principles of contract law, the enlistment would probably be considered void. But to avoid establishment of a valid constructive enlistment, the recruit would have to show the continuing disability of coercion. *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974); *United States v. Wagner*, 5 M.J. at 467.
- <sup>34</sup>See generally *Schlueter, The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 26-28 (1977).
- <sup>35</sup>See note 20 supra.
- <sup>36</sup>In doing so, the Court apparently made no distinction between waivable and nonwaivable regulatory requirements. In both *Wagner* and *Valadez*, the regulations in question were nonwaivable.
- <sup>37</sup>United States v. Valadez, 5 M.J. at 472.
- <sup>38</sup>See, e.g., *United States v. Little*, 1 M.J. 476 (C.M.A. 1976); *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (1975). In *Little* the Court, citing *Russo*, ruled that a "technical violation" of the recruiting regulations voided the enlistment. Without ruling that the recruiter had intentionally violated Article 84, UCMJ, the Court's decision could logically be read as a harbinger of absolute fidelity to the pertinent regulations. In *Valadez* the Court cites *Little* for the proposition that "negligence of a higher degree, e.g., wanton and willful" joined with a regulatory disqualification might conceivably void an enlistment. Again, in *Little* there was no indication that the recruiter was either wanton or willful in his conduct. However read, *Little* does not fit neatly into the Court's new rule. Cf. *United States v. Gonzalez*, 5 M.J. 770 (A.C.M.R. 1978) (providing assistance in translating test question makes enlistment voidable); *United States v. Shastid*, NCM 77 2225 (N.C.M.R. 1977) (Recruiter used practice materials which were similar to actual AFQT test. Court distinguished *Little*).
- <sup>39</sup>United States v. Wagner, 5 M.J. at 468, 469.
- <sup>40</sup>United States v. Wagner, 5 M.J. at 472, 475 (emphasis added).
- <sup>41</sup>United States v. Perry, 137 U.S. 157 (1890).
- <sup>42</sup>United States v. Beans, 13 C.M.A. 203, 32 C.M.R. 203 (1962).
- <sup>43</sup>The Court may have been thinking of a recent series of cases in which the timing of the termination of a servicemember's status was crucial to a finding of personal jurisdiction. Action by the Government with a view toward trial is, in those cases, the critical point. See, e.g., *United States v. Hudson*, 5 M.J. 413 (C.M.A. 1978); *United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978); *United States v. Smith*, 4 M.J. 265 (C.M.A. 1978). See also *United States v. Torres*, 3 M.J. 659 (A.C.M.R. 1977).
- <sup>44</sup>United States v. Valadez, 5 M.J. at 472.
- <sup>45</sup>United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (1975).
- <sup>46</sup>United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).
- <sup>47</sup>United States v. Valadez, 5 M.J. at 475.
- <sup>48</sup>*Id.*
- <sup>49</sup>United States v. Wagner, 5 M.J. at 467. The recruiter knew that charges were pending against Wagner, but according to the Court, citing the holding of the Army Court of Military Review, he did not know of the agreement between the prosecutor, defense counsel, and Wagner to have the charges dropped. 5 M.J. at 466.
- <sup>50</sup>Contributing to the possible confusion here is the Court's use of a number of terms to describe recruiter misconduct (e.g., deliberate fraud, knowing, active misconduct, and misconduct). Reading all three cases together, it seems that the rule might be stated thusly: when the recruiter is actually aware of a statutory or regulatory disqualification, the enlistment will be voi-

ded if the recruiter *intentionally* smoothed the path to the enlistment.

<sup>51</sup> United States v. Harrison, 5 M.J. at 481. In addressing the fairness issue the court cited *Reid v. Covert*, 354 U.S. 1, 22, 23 (1957) for the proposition that "court-martial jurisdiction should be restricted to those persons who can 'fairly' said to be actual members or part of the armed forces." 5 M.J. at 480. Reading *Reid*, however, in context leads one to conclude that the Supreme Court was not speaking to the issue of whether the individual was in the service because of "fair actions" on the part of the Government but rather from a "fair appraisal" of the facts, the person could be considered in the service. 354 U.S. at 42 (J. Frankfurter, concurring).

<sup>52</sup> United States v. Harrison, at 479, 481.

<sup>53</sup> The "fairness" standard is not limited to just recruiters. Theoretically, any Government agent (commanding officer, clerk-typist, platoon sergeant) is bound by the fairness argument. See *United States v. Brown*, 23 C.M.A. 162, 48 C.M.R. 778 (1974).

<sup>54</sup> United States v. Harrison, 5 M.J. at 480, n.9. The Navy Court of Military Review's decision in *Harrison* is discussed in Steritt, *Military Law: In Personam Jurisdiction: Recruiter Misconduct Sufficient to Preclude a Constructive Enlistment*. *United States v. Harrison*, 3 M.J. 1020 (N.C.M.R. 1977), 30 JAG J. 105 (1978).

<sup>55</sup> United States v. Harrison, 5 M.J. at 483.

<sup>56</sup> United States v. Harrison, 5 M.J. at 482.

<sup>57</sup> United States v. Harrison, 5 M.J. at 481.

<sup>58</sup> See Schlueter, *supra*, 34 at 56 for proposal to amend the UCMJ. The Joint Service Committee on Military Justice has under consideration a proposed amendment to provide for jurisdiction in such cases.

<sup>59</sup> United States v. Wagner, 5 M.J. at 465; United States v. Valadez, 5 M.J. at 473.

<sup>60</sup> In *Valadez*, the disability went to the question of the recruit's mental proficiency. Even so, if the Government could have shown that subsequent to the enlistment *Valadez* had shown a sufficient mental proficiency to satisfactorily perform his military duties, a valid constructive enlistment could have been established. See notes 61, 62 *infra*.

<sup>61</sup> The Court in *Catlow* assumed that after the civilian charges were dismissed the recruit could effectuate a constructive enlistment. However, *Catlow* made subsequent active and varied protestations against continued service. *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974). *Wagner*, after his charges were dropped, voluntarily performed his duties. See *N. 6, supra*.

<sup>62</sup> United States v. Wagner, 5 M.J. at 465. The Court in a

footnote stated that "[t]he cases from this Court relying on *Catlow* have not held that the violation of a regulation in and of itself voids the enlistment contract, but instead have relied on a combination of factors, the primary factor being coercion, in the invalidation of the enlistment contract." [Emphasis added.] 5 M.J. at 468, n.14 See also n. 6, *supra*.

<sup>63</sup> A similar result may occur in those cases where the disqualified recruit completes his first enlistment and then reenlists. See *e.g.*, *United States v. Ivery*, 5 M.J. 508 (A.C.M.R. 1978) (Recruit assumed to have illegally entered the Army, but two years of honorable service had proved him to be "fully capable of functioning effectively in the military environment"). Cf. *United States v. Long*, 5 M.J. 800 (N.C.M.R. 1978) (Recruiter misconduct in first enlistment carried over to second enlistment executed only 27 days later).

<sup>64</sup> United States v. Wagner, 5 M.J. at 468.

<sup>65</sup> United States v. Harrison, 5 M.J. at 475.

<sup>66</sup> United States v. Harrison, 5 M.J. at 479. For a discussion of public policy considerations and their application through a balancing test, see Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 46-49 (1977).

<sup>67</sup> See notes 30 through 43 *supra* and accompanying text.

<sup>68</sup> For example, the burden of proof question was not addressed although it has been considered by the Courts of Military Review. See, *e.g.*, *United States v. Jessie*, 5 M.J. 573 (A.C.M.R. 1978); *United States v. Loop*, 4 M.J. 529 (N.C.M.R. 1977).

<sup>69</sup> In *Valadez*, the Court stated:

Despite the salutary or beneficial effects which our decision in *United States v. Russo*, 1 M.J. 134 (C.M.A. 1975), may have had on recruiting practices, its primary concern was not to punish recruiters for violations of Article 84, Uniform Code of Military Justice, 10 U.S.C. § 884, by voiding enlistment contracts.

*United States v. Valadez*, 5 M.J. at 473, n. 7. Nonetheless, recruiters have been punished. See *United States v. Hightower*, 5 M.J. 717 (A.C.M.R. 1978). Recruiter conduct continues to provide spirited discussion and notwithstanding the Court's foregoing disclaimer, the Government, in order to establish jurisdiction is often tasked with showing the innocence of the recruiter. Consider the language from the decision in *United States v. Loop*, 4 M.J. 529 (N.C.M.R. 1977):

This case illustrates a continuing problem in recruiter misconduct cases. We believe that the recruiter's lack of specific recall, as in this case some two years after the event, is not unusual and to be expected. A recruiter sees innumerable applicants for enlistment as a natural consequence of his job. To expect recall in detail of conversations which

take place in routine situations does not comport with reason or experience. The measure of proof of a negative fact which can be mustered and the expenditure of effort in money and manpower places a particularly onerous burden on the Government once an issue has been raised by a bald but detailed assertion of an accused seeking to avoid criminal penalties. 4 M.J. at 530.

<sup>70</sup>It is no secret that the Court's decisions in *Russo*,

*Catlow*, and *Brown* generated a great deal of discussion, debate, and attempts to abate what many felt was a series of onerous and ill-conceived rules. Indeed, even the Comptroller General has indicated that a military court's determination that it does not have jurisdiction over an individual does not automatically void the enlistment for purposes of terminating the individual's entitlement to pay and allowances. See 57 Comp. Gen. 132 (1977).

## Reductions for Inefficiency: An Overlooked Tool

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As enlisted members move up through the ranks, most do so with dedication. They know their abilities; they have confidence in their potential; they are proud of their stripes. Too often, however, the value of those stripes and the morale of a unit are diminished because of a command failure to act swiftly to reduce members who demonstrate their unworthiness for the grade they hold.

There is a tendency to think of inefficiency in terms of incompetence on the job—the inept mechanic, the clerk who cannot type. Inability to perform the duties of a grade or MOS is only one form of inefficiency. Besides inability to perform military duties satisfactorily, other examples of inefficiency include: failure to maintain acceptable standards of physical conditioning; financial mismanagement as evidenced by failure to support dependents or to satisfy long-standing personal indebtedness; and violations of the Uniform Code of Military Justice (UCMJ). This latter category is of particular concern because it appears commanders rarely consider reductions for inefficiency when they decide that court-martial charges are appropriate. Apparently there is a myth that reduction action at such a time is double jeopardy or that it would somehow be unfair. Such administrative actions prior to trial are perfectly legal.

Servicemembers who are suspected of crimi-

nal offenses are subject to nonjudicial punishment (Article 15, UCMJ), court-martial action, or civilian prosecution. Because reduction for inefficiency is an administrative procedure (para 7-64b, AR 600-200, Enlisted Personnel Management System), it is not to be used in lieu of Article 15 or for a single act of misconduct where performance of duty is otherwise satisfactory. However, conduct warranting action under the UCMJ also warrants a commander's immediate consideration of whether the member's total performance justifies retention in grade. A commander, knowing the pertinent facts of an incident and the prior record of the individual, may decide that a servicemember should not be retained in his or her current grade regardless of whether the soldier in question may later be proven a criminal (which involves more stringent rules of evidence and a different standard of proof). If the commander decides to act under AR 600-200, he may do so without regard to later action taken, or not taken, under the UCMJ.

Proper use of reduction authority not only ensures the ranks are filled with qualified personnel but also instills greater respect for and pride among those who conscientiously live up to their responsibilities. Subordinate commanders should be informed that they should consider administrative reduction in addition to other possible actions for misconduct.

## A LOOK AT THE ARMY CONTRACT ADJUSTMENT BOARD

*Lieutenant Colonel Daniel A. Kile\**

### INTRODUCTION

On September 14, 1976, President Ford signed Public Law 94-412 which declared an end to past national emergencies.<sup>1</sup> During national emergencies, there are many laws which authorize the Executive Department to act in a streamlined manner because time is of the essence and the overriding requirement is to get the job done. Pub. L. No. 85-804 is one such law.<sup>2</sup> However, it was spared extinction for a period of time in order to study the situation to see if its authority needed to be continued in peacetime.<sup>3</sup>

### PUBLIC LAW 85-804

Public Law 85-804 has its genesis in Title II of the First War Powers Act of 1941. The essence of the power is contained in Section 1 which provides:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contract heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense . . . . (50 U.S.C. Section 1431 (1970))

President Eisenhower delegated this power to the Department of Defense (DOD) by Executive Order.<sup>4</sup> In furtherance of this authority, DOD prescribed, in Section XVII of The Defense Acquisition Regulation (DAR),<sup>5</sup> uniform rules governing entering into and amending or modifying contracts, and authorizing the formation of Contract Adjustment Boards. The other authority contained in Pub. L. No. 85-

804, to make advanced payments, and the residual powers, will not be discussed in this article since the Army Contract Adjustment Board (ACAB) has not been delegated these powers.

### ARMY CONTRACT ADJUSTMENT BOARD

The Army Contract Adjustment Board was initially established on 5 January 1959, reestablished on 22 January 1975, and again reestablished on 11 October 1977. The Board's original and present charter states in part that it shall be:

. . . The central authority in the Army to consider, adjust, and determine requests for adjustment under the authority cited in paragraph 1 hereof (Pub. L. No. 85-804, E.O. 10789, dated 14 November 1958, as amended, and DAR), referred to it by any duly authorized officer or official including, but not limited to, those listed in Section 17-203 of the (Defense Acquisition Regulation).

### ACAB MEMBERSHIP

The Board consists of seven members with four members—one who shall be an attorney—constituting a quorum. The Board may sit in panels of four; however, it normally does not in practice. There are three alternate members. All members are appointees from the Office of the Secretary of the Army.

There is also one person who is a Recorder, without vote, and Counsel to the Board.

### TYPES OF CASES ACAB HEARS

The types of cases which the ACAB hears are amendments without consideration, which includes both essentiality and Government action; mistakes; informal commitments; and those within its "general powers". Standards for deciding these cases, except the "general power" cases, are set forth in DAR Section 17-204.

**AMENDMENTS WITHOUT  
CONSIDERATION—ESSENTIALITY<sup>6</sup>**

A contractor who is determined to be essential, either as a source of supply, or on a particular contract, may have its contract amended without consideration when its productive ability will be impaired by an actual or threatened loss under a defense contract. The key to this relief is the discretionary determination of essentiality to the national defense.

**AMENDMENTS WITHOUT  
CONSIDERATION—GOVERNMENT  
ACTION<sup>7</sup>**

If a contractor suffers a loss on a defense contract as a result of Government action, even though there is no legal liability, the ACAB may grant relief. An example, of relief being granted for Government action, is if the Government exercises an option when it is on notice that to do so would result in a disastrous financial situation to the company. (*Alabama Industries, Inc.*, ACAB No. 1150, 6 November 1973.)

**MISTAKES**

A contract may be amended or modified to correct or mitigate the effect of a mistake. The mistake may be the failure to express the agreement as both parties understood it; or a mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; or a mutual mistake as to a material fact. This gives the Board the power of reformation which is not available, in the strict legal sense, under the contract administrative disputes provisions. An example of relief being granted for mistake, is where the contractor and Government believe that the wage determination applicable to a particular contract is accurate; thereafter, Department of Labor reconsiders its position and reverses itself after the contract is formed. The Board has the power to reform the contract to reflect the proper wage determination. (*Voss Machinery Company*, ACAB No. 1161, 30 July 1974.)

**INFORMAL COMMITMENTS<sup>9</sup>**

Because of the vastness of the Government, there are times when individuals employed by the Government, who do not have any actual or implied contractual authority, will give instructions to someone outside the Government to provide goods or services. Under the principles of government procurement law, the individuals providing the goods or services would not be able to receive redress except through Congress. The courts do not even have power in this type of case. (See *Federal Crop Insurance Corporation v. Merrill*, 322 U.S. 380 (1949)) The Board, however, has been given this power by Pub. L. No. 85-804. The Board must determine that at the time the commitment was made it was impracticable to use normal procurement procedures.<sup>10</sup> An example of this type of case occurred when educational services contracting function was transferred to a new contracting office and the request for tuition for ROTC cadets were not submitted to the universities by that office. The universities enrolled the students upon the representation of the ROTC units, which do not have any contractual authority. The Board in this case provided redress. (*Oklahoma State University, et al.*, ACAB No. 1162, 7 August 1974).

**“GENERAL POWERS”**

Finally, the Board has so-called “general powers”. These powers are derived from the language in DAR Section 17-204.1. Following the examples of available relief, DAR states: “These examples are not intended to exclude other cases where a Contract Adjustment Board determines that the circumstances warrant action”. The case of the Italian fisherman who *voluntarily* retrieved a drone airplane which crashed in the Adriatic Sea expressed the use of the ACAB’s “general powers”. He presented a bill to the United States Government for his costs. Even though a volunteer is not legally entitled to any consideration, extraordinary relief was provided on the basis of international goodwill. (*Giancarlo Guidi*, ACAB No. 1044, 31 May 1962.)

**FACILITATE THE NATIONAL DEFENSE**

Before extraordinary relief may be granted there must be a finding that the action will facilitate the national defense. DAR provides for a "built-in" finding for Government action (DAR Section 17-204.2(b)), mistakes (DAR Section 17-204.3) and formalizing informal commitments, (Section 17-204.4).

It should be noted the "built-in" finding in DAR uses the word "normally" or "may make appropriate". If a corporation is bankrupt, or out of business, for all intents and purposes, then the granting of relief cannot be said to facilitate the national defense (*Barlow Manufacturing Company*, ACAB No. 1158, 1 August 1974). Also, during a situation such as existed just before the fall of the government of South Vietnam, it would be difficult to imagine justifying relief on any grounds to a business organized in that country. (See *LAM Brothers & Associates*, ACAB No. 1157, 31 May 1974, and *VINCOSA*, ACAB No. 1156, 31 May 1974. Both were cases of essentiality and both were denied relief on grounds of mismanagement; but the situation in Vietnam at that time cannot be discounted.)

Amendments without consideration for essentiality also require a finding that it will facilitate the national defense in addition to determining that the business is essential. This is no problem, because this particular finding is normally an integral part of finding the business essential.

**DELEGATION OF AUTHORITY TO HEADS OF PROCURING ACTIVITIES**

The Heads of Procuring Activities (HPA) in the Army have been delegated limited authority with respect to the above forms of relief.<sup>11</sup> Generally, the HPA may deny any type of request for relief, but only may approve a request for relief in the case of mistake, and informal commitment if it is under \$50,000. When an HPA decides to recommend approval, but relief is not within his authority to approve, *e.g.*, amendments without consideration, "general powers", and the other types of cases which exceed his dollar ceilings, the case is submitted to

the ACAB. In addition, the HPA may submit to the ACAB those cases which he considers doubtful or unusual.

**NEED FOR PUBLIC LAW 85-804 DURING PEACETIME**

The need for Pub. L. No. 85-804 during national emergencies, as expressed in the House Report on the bill, is the same need which exists today and has existed since its inception. The House Report expressed the need as follows:

Testimony and reports received by a subcommittee of the House Judiciary Committee demonstrated a need for statutory authority which would allow the Government to meet situations which will inevitably arise in a multibillion-dollar defense procurement program and for which normal procurement authority is inadequate. With the expiration of Title II on June 30, 1958, the authority granted in this bill is required to assure uninterrupted performance of defense contracts through fair and expeditious Government treatment of procurement problems.<sup>12</sup>

DOD wanted to have Pub. L. No. 85-804 to be a permanent law not restricted to periods of national emergencies; however, the Bureau of the Budget prevailed in its view that it should be so restricted. Its position was adopted as the Administration's position.<sup>13</sup>

The Subcommittee which held the hearings on the bill clearly understood the need for this authority was not limited to national emergencies. Mr. Drabkin, counsel to Subcommittee No. 4, summed it up in his question in this manner:

When something becomes a matter of course it ceases to be an emergency. Many people have expressed the view that the national emergency we are in now is a rather artificial device. It is now 7 years and 1 war after it was first declared.

Is it necessary that this legislation be predicated upon a national emergency or is this something which has now become a

matter of course as a result of our new status in the world?<sup>14</sup>

After several apparent attempts to avoid the question, the DOD witness, Mr. James Nash, Office of General Counsel, Department of Defense, finally stated,

We would hope, Mr. Chairman and Mr. Drabkin, that during our current buildup and our increased procurement programs that the national emergency would continue in effect for the indefinite future.<sup>15</sup>

After several intervening questions the following colloquy took place:

Mr. Drabkin. In respect to the national emergency situation, suppose the national emergency, as reluctant as you are to concede it, is terminated next week or next month, and you still have a \$40 billion military budget, would you still think it necessary to have the powers that you are asking for here?

Mr. Nash. Yes, sir.

Mr. Drabkin. So it is not a question of a national emergency, it is really the extent of the procurement in which you are involved that is the real criterion?

Mr. Nash. That is correct.<sup>16</sup>

Since the passage of Pub. L. No. 85-804, 19 years and one more war have intervened. The DOD budget has grown from \$40 billion to \$110 billion for fiscal year 1978. Expanded procurement programs are bound to have mistakes and unexpected situations which require extraordinary authority in order to obtain needed defense items. The need for this authority continues.

#### ACAB RULES AND PROCEDURES

Assuming the need for Pub. L. No. 85-804 exists in peacetime, the next question is whether there should be any changes to the Army Contract Adjustment Board. To determine the answer to this question, it is appropriate to examine the rules and procedures of the ACAB.

A request for relief, submitted to the ACAB, will contain the documentation required by DAR Section 17-207 prior to the Board deciding the case. The ACAB rules for deciding a case are very simple. From this simplicity comes the essence of the Board's value to the procurement process. Paragraph 2, Rule II *Army Contract Adjustment Board, Rules of Procedure*, (which are basically the same rules of procedure that have been in existence since the creation of the Board), states:

2. *Operation.* There shall be no inflexible procedure for the consideration of matters referred to the Board for disposition. Normally any such matter will be assigned by the Chairperson to the Recorder or another member of the Board, or to the Counsel, for preliminary analysis. After such analysis, the designated individual will present the matter to the Board with a statement summarizing the facts and issues involved. In the discretion of the Chairperson or a member designated by him/her, a hearing may be held with respect to any matter before the Board. The concurrence of at least four members shall be required in any decision of the Board. Matters of administration affecting the Board may be disposed of by the Chairperson without referral to the Board.

Paragraph 1, Rule V-*Hearings* provides: "1. *Notice.* If the Chairperson or his/her designee determines that a hearing should be held the applicant will be notified of the time and place thereof."

From the above extracts, it is clearly seen that the procedures are simple, informal, and flexible which is consistent with the intent of Congress in enacting Pub. L. No. 85-804. The Board's proceedings are non-adversary. The Chairperson decides whether to hold a hearing. Normally the Recorder will contact the contractor to determine if he desires one. The hearing will be held without cross-examination or rules of evidence. Common sense and good judgment are the hallmarks of the Board's inquiry. If time is of the essence, the Board can decide the case via telephone. Also, the Chair-

person may circulate the draft decision for approval, if he decides a hearing is unnecessary.

Because of the flexible and simple procedures, applicants who appear before the Board without lawyers have no difficulty. Lawyers representing contractors are oft-times perplexed by the procedures. They come equipped with their *stare decisis*, and long typed legal briefs ready to do battle. Thus prepared, they enter the hearing room and are met with a friendly hello and a polite request in much the following manner: "Tell us your problem. This is not an adversary proceeding. There is no need to repeat what you have previously submitted in written form. Give us the essence of your request—what took place and why you need the relief." When the attorney goes into a previous Board case he is generally met with a statement that the Board is well aware of the case; however, all the Board's cases turn on peculiar fact situations so the value to the case at hand is minimal. Attorneys continue to fall into the above trap because of their own training and unfamiliarity with the Board proceedings. They are encouraged to proceed in such a manner by CLE courses in the government contracts law field. For example, course material, of one such course, breaks out the elements of a Pub. L. No. 85-804 request and includes a parenthetical statement to include references to, and discussions of, relevant CAB Decisions. There is also a sample request which is replete with discussions of statutory history and prior CAB decisions to justify granting the relief.

If the ACAB has any questions, as to its authority, or the legal rationale of the particular case, it will ask the contractor's attorney. If the Board feels the contractor deserves the relief, it will find a way to give it and as a last resort it will use its "general powers".

Whether the ACAB proceedings will become more formal or drift towards a more adversary nature are uncertain. There are some factors which possibly impact on the situation. Cases are becoming more complicated by technology and intricate financial operations. The Board dispenses millions of dollars. Even small busi-

nesses receive half million dollar reliefs.

Some hearings are characterized by the contractor and Government personnel being present during the contractor's presentation. When the presentation is finished, the contractor's personnel and attorneys are thanked, and they depart the hearing room. Then the Government personnel give their testimony and also comment on the contractor's submission. The contractor is unaware of what is going on because the Board rarely makes a transcript of the proceedings. Thus, a misstatement of fact by a Government witness could prejudice his relief. These comments do not mean that the members are oblivious or are not penetrating in the inquiry, but they are human and may miss a crucial point. Because so much money is normally involved and financial viability of businesses are at stake, there may be a need to formally change the Board proceedings to permit the contractor to be present during the Government witnesses presentation. The Board presently follows this practice; however, it has not always been the case in the past and it may occur again.

Another perplexing situation is developing for the Boards. The issues are becoming more complicated and require the testimony of experts. The Board normally has available audit reports and Government technical reports. At times they need to be supplemented. In *Diamond Reo Trucks, Inc.*, ACAB No. 1171A, 3 April 1975, *Diamond Reo*, a major defense truck producer, was asking for \$5½ million to stay in business. The ACAB hired a consultant who provided his analysis to the Board. This is one means the Board uses to overcome its inability to cope with complicated questions of financial structures and the causes for a business' inability to perform. (Also see, *Cincinnati Electronics Corp.*, ACAB No. 1185, 31 December 1975).

Whether the Board's informality and non-adversary role is the best forum to consider complex technical questions is another matter and is open to question. At the present time the Armed Services Board of Contract Appeals (ASBCA) is considered by the courts and Con-

gress to be an acknowledged forum to hear contractual disputes. Its proceedings are adversary and its record of performance, to consider complicated factual questions, is outstanding. Recommendation G-5, of the Commission on Government Procurement requires the Department of Defense to consider developing an "all disputes" clause. If this is done, then the ASBCA would generally handle the cases of mistakes and Government actions now being handled by ACAB. These are the types of cases which the ACAB hears which generally involved complex technical questions. These issues are generally resolved easier and more fairly, to all interests, in an adversary proceeding. Even if Recommendation G-5 is not adopted, it is recommended that the ACAB's authority to hear these two types of cases be transferred to the ASBCA.

The major need for a change in these two areas is that by the very nature of the complexities therein a drift toward formalizing the ACAB proceedings will occur. The character of the proceedings would probably become adversary. This poses a danger to the very essence of the Board's value of being a forum with flexible procedures to enable it to cut through the red tape of the bureaucracy. The courts, GAO, and ASBCA have consistently refused to review the decisions of the Contract Adjustment Boards.<sup>17</sup> Whether this will continue in the future is always subject to question because the courts continue to make inroads into reviewing administrative decisions and the due process of the proceedings. The cases of mistakes and Government action are the soft underbelly of the Contract Adjustment Board which may open it to attack on the theory of lack of due process, thus destroying its legal finality.

#### APPEAL FROM AN HPA DECISION

In examining the ACAB procedures there is a sub-issue raised which will only be commented upon briefly in this article. That issue is whether there are any appeal rights to the ACAB from an HPA's decision.<sup>17</sup> Also, even if it is assumed that an HPA can deny finally those cases within his approving authority, what about those cases beyond either the

HPA's dollar limitation, or the nature of cases the HPA may approve - amendments without consideration.

The present position of the ACAB is that there is no right of appeal from an HPA denial. Applicants are advised that the lower Board's decision is final, and if they believe that there are new facts not previously presented, that information was not properly considered, or that other reasons exist which warrant reconsideration, the applicant should file a motion for reconsideration with the lower Board. Professors Nash and Cibinic, George Washington University Law School, noted legal scholars in this field, concur in this position.<sup>19</sup> This position has support from some of the past practices of the Board. The ACAB in its letter of 5 June 1961, re: *George Voron and Company* (DA 36-039-SC-75279), stated that it was limited in its authority, as set forth in ASPR, and accordingly it "does not have authority, on its own motion or upon a contractor's request, to review a decision by the Chief of a Technical Service denying a contractor's request for contractual adjustment".

On the other hand, an article entitled *Extraordinary Contractual Action in Facilitation of the National Defense from a Department of Defense Attorney's Point of View*, poses an alternative position.<sup>20</sup> After discussing the various practices of the Contract Adjustment Boards, this article concluded that in this complicated area the ACAB should only review an HPA's decision when it "is manifestly arbitrary and unreasonable to the point of frustrating the purpose of Pub. L. No. 85-804".

Attorneys for government contractors have cited the United States Supreme Court opinion of *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1965), for the proposition that an administrative body cannot finally deny a claim it did not have authority to grant. Thus, except for those types of cases which an HPA may approve, there should be a right of appeal. This latter argument misses the point because Pub. L. No. 85-804 is discretionary authority, not a claims statute or a means to dispense aid to contractors (see page

3 of The Senate Report on Pub. L. No. 85-804, No. 2281, 85th Congress, 2d Session, 1958.) It is in the "nature of equity", but not equity *per se*. The ultimate question is whether granting relief will facilitate the national defense. This is a discretionary decision which may be exercised within the constraints of the delegation of authority. The legislative history reveals that HPA decisions were treated as final under Title II.<sup>21</sup> Under the rules of statutory construction, because Congress considered the question, reported, and enacted Pub. L. No. 85-804, without changing or reversing the practice under Title II, the intent of Congress was not to change the past practice.<sup>22</sup> This legislative history interpretation also supports the Board's practice permitting no appeal from an HPA's denial.

While counsel to ACAB (1972-1974), it was my judgment that the following offered the best guideline for the ACAB to follow, to carry out the intent of its charter. (See page 2, *supra*.) As the central authority, ACAB inherently has the power and obligation to see that the basic purpose of Pub. L. No. 85-804 is not frustrated. This position is also bolstered by the fact that ACAB is not limited to an HPA submitting cases to it. Under its charter, other officials, *e.g.*, Secretary of the Army or Assistant Secretary of the Army, may submit cases to it, and if done so, the Board must consider them. (See *A.R.F. Products Inc.*, ACAB No. 1147, 9 October 1973.) The practical application of this rule would be a two-fold hearing by the Board. First, the Board would determine if the HPA was arbitrary, unreasonable, or the decision was made based on erroneous or insufficient facts. This test is applicable whether it is a full denial or partial approval of a request. If the answer to the first question is yes, and if it can be rectified at the HPA level, *e.g.*, erroneous facts, then the case may be returned to the HPA for further consideration.<sup>23</sup> Second, if the HPA's decision appears to be arbitrary or the facts are more easily obtained at the ACAB level, then a hearing would be held on the merits of the request by the ACAB.

The above concept and application prevents the Board from developing rationales for hear-

ing a case. An example, of hearing a case but not classifying it as an appeal, may be seen in the recent small business case of *G.C. Industries, Inc.*, ACAB No. 1175, 21 March 1975. In the ACAB's Memorandum of Decision it stated:

A previous application for relief, dated 24 September 1974, but proceeding under the theory of mistake (section 17-204.3, (Defense Acquisition Regulation), was denied by the Troop Support Command Contract Adjustment Board by written opinion of 6 December 1974, upon the finding that the facts did not warrant relief under that theory. The 20 January application for relief while framed by the contractor in terms of an appeal from the 6 December decision of the Command Board, was treated by the Command and by the Army Materiel Command, and will be treated by this Board, as an application *de novo*.

The legally supported rationale of reviewing HPA's denials which are arbitrary or unreasonable or based upon insufficient or erroneous facts to the point of frustrating the purpose of Pub. L. No. 85-804, provides the ACAB with a logical means of carrying out its functions.<sup>24</sup>

There is a good argument to treat the HPA's decisions as final based upon the philosophy of deciding a case, once and for all, at the lowest possible level. The HPA's are closer to the situation to judge whether relief is needed to facilitate the national defense.

If appeals are to be considered by the ACAB, there is also a good argument that the procedures and standards should be regularized by specifically setting them forth in DAR. Because of the natural desire to have one's case decided by the highest authority, this will probably result in more cases coming to the ACAB despite the reasonableness and depth of consideration given to the case by the HPA.

The foregoing discussion only highlights the problem. It is suggested that this sub-issue deserves more discussion to determine if any changes should be made in this area of decision making.

## CONCLUSION

Notwithstanding the termination of the national emergencies, the need for the authority in Pub. L. No. 85-804, to permit extraordinary contractual relief to facilitate the national defense, still continues. There may be no time to mobilize, to accelerate production, or to complete vital projects if a war should occur. The United States must maintain a high state of preparedness. Vital military projects must "proceed without the interruption generated by misunderstandings, ambiguities, and temporary financial difficulties"<sup>25</sup> The Government must continue to have the flexibility "to deal with the variety of situations which will inevitably arise in a multi-billion-dollar defense program and for which other statute authority is inadequate".<sup>26</sup>

Likewise, the Army Contract Adjustment Board established pursuant to Pub. L. No. 85-804 should be continued; however, some changes should be made in its procedures. Also, in order to continue the ACAB's flexibility and viability, its authority over requests for relief based upon mistakes or Government actions should be transferred to the ASBCA. The time is propitious for a change.

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*This article is adapted and updated from a paper presented to the Armed Forces Staff College, Norfolk, Virginia while the author was a member of Class 60. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Armed Forces Staff College or any other governmental agency.*

## Footnotes

<sup>1</sup>National Emergencies Act, Public L. No. 94-412, 90 Stat. 1255 (1976).

<sup>2</sup>To Authorize the Making, Amendment and Modification of Contracts to Facilitate the National Defense, Pub. L. No. 85-804, 72 Stat. 972, as amended by Pub. L. No. 93-155 §807(a), 87 Stat. 615 (1973); 50 U.S.C.A. 1431-1435 (1978 Supp.)

<sup>3</sup>National Emergencies Act, *supra* note 1, at §§ 502 (a) (6) and 502(b).

<sup>4</sup>Executive Order 10789 of November 14, 1958 (23 Fed. Reg. 8897), as amended by Executive Order 11051 of September 17, 1962, Executive Order 11610 of July 22, 1971.

<sup>5</sup>The Armed Services Procurement Regulation (ASPR) is being replaced by the Defense Acquisition Regulation. (DAR) See Monroe, *Analysis of ASPR Section XV*, 80 Mil. L.R. 147, at 148, n.1.

<sup>6</sup>DAR Section 17-204.2 (a).

<sup>7</sup>DAR Section 17-204.2(b).

<sup>8</sup>DAR Section 17-204.3

<sup>9</sup>DAR Section 17-204.4.

<sup>10</sup>*Star Publishing Co.*, ACAB No. 1145A, 16 October 1973, provides an excellent discussion of informal commitments.

<sup>11</sup>DAR Section 17-203 and Section 17-205.

<sup>12</sup>U.S., Congress, House, Committee on the Judiciary, *Authorizing the Making, Amendment, and Modification of Contracts to Facilitate the National Defense*, 85 Cong., 2d sess., 1958, H. Report No. 2232, P. 2.

<sup>13</sup>U.S. Congress, House, Committee on the Judiciary, *Authority for Certain Actions Relating to Defense Contracts. Hearings Before Subcommittee No. 4*, 85th Cong., 2d sess., 1958, p. 42.

<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*, p. 43

<sup>17</sup>*Bolinders Co. v. United States*, 139 Ct. Cl. 677 (1957), *cert. denied*, 355, U.S. 953 (1958); 37 Comp. Gen. 622 (1958); *Grenell Mfg. Inc.*, ASBCA No. 12862, 60-1 BCA para. 9538.

<sup>18</sup>DAR Section 17-205.2 and Section 17-208.

<sup>19</sup>Ralph C. Nash, Jr., and John Cibinic, Jr., *Federal Procurement Law*, (Second Edition, Washington, D.C.: The George Washington University 1969), p. 982, n.4.

<sup>20</sup>47 Mil. L. Rev. 23, 36 n.60 (1970).

<sup>21</sup>The Comptroller General's report to the House contains the following statement: "The boards receive request for relief only after they have been reviewed and acted upon by the contracting officer and succeeding levels within the procuring activity concerned. However, procuring

activities have authority for final denial of any request and may approve requests . . . . (Emphasis Added)." *Supra* n. 12, at p. 67.

<sup>22</sup>"Because the military departments have used title II powers more extensively than other agencies, *particular attention was given to the regulations and the administrative procedures which they employed under title II and which would control the operation of this act in those departments. The committee found no reason to object to the manner in which title II has been generally administered by the military departments and believes that the proposed legislation will be effectively and properly administered.* (Emphasis Added)" *Supra* n. 11, at p. 7.

<sup>23</sup>The ACAB has in the past advised an HPA to reconsider

its decision (Letter to CG U.S. Army Weapons Command, subject: Request for Relief Under Public Law 85-804 by the Otis Andrew Company on Purchase Order 33-008-003-01625, dated 30 April 1965).

<sup>24</sup>This suggested standard of review is similar to that given by Congress to the courts over the ASBCA by the *Wunderlich Act*, 60 Stat. 81 (1954), 41 U.S.C. sections 321-322 (1970) wherein it states: "Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent, or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence."

<sup>25</sup>*Supra*, note 12, at 4.

<sup>26</sup>*Ibid*.

## PROMOTIONS IN THE JAGC, USAR

*Captain Joseph A. Rehyansky, JAGC \**

Reserve Component Judge Advocate captains not serving on extended active duty in the AUS Component are reminded of the educational qualifications for promotion to major, JAGC, set out in Table 2-2, Army Regulation 135-155, dated 10 October 1977. Completion of or credit for the Judge Advocate Officer Graduate Course (resident or nonresident) is an *absolute prerequisite* for promotion to major, JAGC, USAR, for those officers not serving on extended active duty in the AUS Component. The course must have been completed by the date the selection board convenes. Reserve captains are usually promoted to major on the seventh anniversary of their promotion to captain, USAR, and are *considered* for promotion to major in the calendar year *preceding* the year in which they are due to be promoted. A captain considered for the first time but not selected by the board will be considered again the following year. An officer considered for the second time but not selected will usually be discharged from the Reserve. The importance of maintaining military educational qualifications cannot be overemphasized. Lack of actual notice of non-selection for educational deficiency will ordinarily not entitle the officer to be considered by an additional board. A discharge issued by proper authority will ordinarily not be set aside because of lack of actual notice of nonselection for deficiency. It is the

individual responsibility of the officer concerned to be aware of educational prerequisites for promotion, and to satisfy them.

Reserve officers serving on extended active duty in the AUS Component are not, however, in the same position, due to a recent change to Army Regulation 135-155. Paragraph 2-6a(3), AR 135-155, dated 10 October 1977, previously read:

An officer who is serving on active duty (excluding ADT) *may* [emphasis added] be considered to have met the educational requirements for promotion *to the next higher grade in which serving* [emphasis added] . . .

That provision has been nullified by Interim Change #6-2 to paragraph 2-6b(3), Army Regulation 135-155, dated 111030Z Aug 78, which reads:

Educational substitution. The following may be substituted [sic] for military education requirements for promotion to the grades indicated: . . . (3) An officer who is serving on active duty as a commissioned officer (excluding ADT) *will* [emphasis added] be considered educationally qualified for promotion *to the next higher grade than the grade in which serving* [emphasis added] provided the officer was not consid-

ered for temporary promotion to a grade higher than his active duty grade which resulted in a recommendation by the board that the officer not be promoted.

There have been reports of active duty judge advocates who have been passed over for the grade of major, JAGC, USAR, based on non-completion of the Judge Advocate Officer Graduate Course (resident or nonresident). Such action should be reported to PP&TO in the Office of The Judge Advocate General, the Director of the Reserve Affairs Department at

the JAG School, and the Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-OES-J, 9700 Page Boulevard, St. Louis, Missouri 63132, through the JAGC representative at the RCPAC, who can be reached toll free at 800-325-1862.

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## ADMINISTRATIVE AND CIVIL LAW SECTION

*Administrative and Civil Law Division, TJAGSA*

### The Judge Advocate General's Opinions

(Commissioned Officers - Rank and Precedence) **A Reserve Officer Serving On Active Duty Who, After Selection For Temporary Promotion (AUS), Is Placed On The Temporary Disability Retired List (TDRL) Before That Promotion Is Accomplished Is Not Entitled To Be Promoted**, DAJA-AL 1978/3425, 8 Sep 1978. A reserve officer serving on active duty as a Captain (AUS) was selected for promotion to Major (AUS), and his anticipated promotion date was in December 1978. However, he was placed on the TDRL in August 1978 with 100% disability for multiple sclerosis. The Judge Advocate General's opinion was requested as to how this officer could receive an accelerated promotion to the grade of Major (AUS).

The Judge Advocate General reviewed applicable statutory and regulatory authority and concluded that current law and regulations would not permit this promotion. Reserve officers must be serving on active duty to qualify for AUS promotion, and they must possess the ability and efficiency required for the new grade. In the case under consideration, the officer would be transferred from the TDRL to permanent disability retirement with no intermediate return to active duty. Authority to order a member on the TDRL to active duty in

retired status is not implemented in regulations. Under current Army regulations (chapter 7, AR 635-40), return to active duty can only be accomplished if the member is found physically fit, removed from the TDRL, and reappointed in an active status. Even if regulations were changed to permit the officer's return to active duty in retired status, an accelerated promotion from the current list could only be accomplished, under current regulations, if he was found to be "critically ill" (paragraph 2-12, AR 624-100). However, the medical diagnosis does not support such a finding in this case. Moreover, in view of the ability and efficiency requirement, TJAG doubted the legality of promoting a member physically unfit to perform the duties of his office.

Finally, even if the officer were promoted to Major (AUS), no increased retirement benefits would accrue. The Comptroller General requires a bonafide intent that an officer serve in a higher grade and has denied increased benefits where promotion was accomplished solely to increase benefits.

In conclusion, The Judge Advocate General pointed out that even if otherwise permissible, changes to applicable Army regulations or an exercise of Presidential authority would be necessary to accomplish the desired promotion

and that the officer would receive only the title and not the benefits of the higher grade.

**(Separation From the Service - Grounds) The Voidance of An Enlisted Member's Fraudulent Enlistment, In Accordance With Then Applicable Regulations, Properly Took Precedence Over A Pending Medical Discharge.** DAJA-AL 1978/3374, 8 Sept 1978. A member had concealed a civilian conviction for assault and battery, and enlisted fraudulently. Army regulations in effect at the time permitted the general court-martial convening authority to void the enlistment. While serving on active duty, the servicemember was involved in an automobile accident which led to a determination that he could be discharged with a 22 percent disability. However, rather than completing the medical discharge, the general court-martial convening authority directed the voidance of the enlistment. The soldier applied to the Army Board for Correction of Military Records to have his discharge characterized as being for medical reasons and to have an honorable discharge certificate issued.

In response to a request from the ABCMR for a legal review, The Judge Advocate General first determined that a fraudulent entry was, in fact, established, and therefore voidance of the enlistment was proper under then existing provisions of AR 635-200. The issue then became whether the voidance was proper when a medical discharge was pending. Looking to the provisions of para. 1-2e, AR 635-140 dealing with physical disability separations, The Judge Advocate General determined that, where grounds exist for both misconduct and disability discharges, the misconduct action will take precedence unless the general court-martial convening authority personally decides to pursue the medical disability route. Therefore, voidance of the enlistment was a proper course of action in this case.

**(Separation From The Service - Grounds) Where A Fraudulent Enlistment Was Aided By Recruiter Misconduct, Separation Was Mandatory Under The Provisions of AR 635-200.** DAJA-AL 1978/2709, 2 June 1978. Five

months after he enlisted, a check of a soldier's police records disclosed a civil conviction which he had concealed at the time of enlistment. Recruiter connivance was indicated. The soldier's battery and battalion commanders recommended retention, but AR 635-200 mandated voidance of the enlistment. Because of the recommendations for retention, the soldier was permitted to enlist immediately, but received no credit for the previous five months of service for promotion and longevity purposes. He therefore petitioned the Army Board for Correction of Military Records seeking credit for the voided period of service.

In responding to a request from the ABCMR for a legal opinion, The Judge Advocate General pointed out that the command in this case had properly verified the enlistment disqualification and that the soldier himself had claimed recruiter involvement in the fraud. Additionally, the wording of the questions in the enlistment document was such that the enlistee could not, in good faith, have relied upon the recruiter's directions to falsify the document. Therefore, the enlistment was deemed fraudulent with recruiter connivance, voidance was mandatory under the then current regulation, and no credit could be given for prior service.

This provision requiring mandatory discharge where recruiter misconduct was involved has been changed by DA Message (DTG 141800Z July 78) Subject: Interim Change to AR 635-200, Personnel Separations, Enlisted Personnel. A soldier who enlists fraudulently with the unlawful assistance of a recruiter may be retained at the discretion of the general court-martial convening authority, if the soldier requests retention. In this case, the soldier will receive credit for actual service under the fraudulent enlistment.

**(Absence Without Leave; Pay, Basic and Special Pay) Disbursing Officer Not Bound By Convening Authority's Excusal of Unauthorized Absence; Absence Must Be Unavoidable On The Part of Both The Member And The Government.** DAJA-AL 1978/3272, 21 Aug 1978. Relying upon misinformation supplied by

the military police that a soldier was AWOL, a civilian judge set bail at an amount the soldier was unable to post. The soldier consequently remained under custody of civil authorities twenty days beyond expiration of leave. To provide relief, the special court-martial convening authority subsequently excused the absence as unavoidable. However, the disbursing officer questioned the authority of the commander to excuse an absence when the initial confinement was due to the member's misconduct.

Two questions were presented to The Judge Advocate General for opinion. First, was the administrative determination of the special court-martial convening authority binding on the disbursing officer? Secondly, could the absence be excused as unavoidable if the soldier's absence was the fault of the military police and not due to the initial arrest?

The Judge Advocate General concluded that the disbursing officer was not bound by the determination of the special court-martial convening authority. Disbursing officers have special statutory authority to solicit an opinion of the Comptroller General before disbursing Government funds and the disbursing officer acted under this provision (31 U.S.C. § 74).

In addressing the second question, The Judge Advocate General concluded that there was substantial evidence in support of the administrative finding that the proximate cause of the soldier's civil detention over leave was the supervening independent fault of the military police in failing to exercise due diligence in checking the soldier's status and in misadvising the civilian judge. The Judge Advocate General noted that, under decisions of the Comptroller General, not only did the absence have to be unavoidable from the soldier's standpoint, it had to be unavoidable from the Government's as well (para. 1-14a, AR 630-10), a rule implementing the decision of the Comptroller General in 40 Comp. Gen. 336 (1960). Because the absence was at least partly the fault of Government agents, it was not unavoidable insofar as the Government was concerned, and thus would not be excusable. However, The Judge Advocate General was of the view that this was an absurd and unfair result and that the rationale and possible limitations of the Comptroller General's rule are not apparent. Because the matter was not free of doubt, The Judge Advocate General declined to express an opinion and recommended that the matter be referred to the Comptroller General for determination.

### Legal Assistance Items

*Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, Major Joseph C. Fowler, Jr. and Major Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA*

#### Administration—Preventive Law Program.

**Buyers of hearing aids would have 30 days to return the hearing aids and get most of their money back under a "buyer's right to cancel" provision if the FTC adopts a trade regulation rule recommended by the FTC staff.**

The recommended rule is contained in the "Hearing Aid Industry Staff Report" prepared by the staff of the Bureau of Consumer Protection.

According to the FTC staff report, there are "numerous experiences reported of unusable

hearing aids, purchased at great financial sacrifice." The "buyer's right to cancel" provision is intended to eliminate the problem of consumers spending money on such hearing aids. The staff report notes that, while many reputable hearing aid sellers already offer their customers a 30-day trial period, many others do not.

Under terms of the recommended rule, the buyer may invoke the right to cancel if the hearing aid is unsatisfactory in any way. If the buyer exercises that right, he would be entitled to most of his money back. The recommended rule would permit the seller to retain specified

cancellation charges amounting to about \$50 for each hearing aid returned.

Evidence indicates that hearing aids cost an average of \$350 apiece, says the staff. The record also indicates that many people buy one hearing aid for each ear, and that about 650,000 are purchased annually.

Other parts of the recommended rule address selling tactics which the record shows to be deceptive, according to the FTC staff. There is evidence "of a multitude of abusive sales transactions and sales tactics" within the hearing aid industry, says the report.

For example, the staff report says some retailers sell used hearing aids as new. In addition, some sellers represent that hearing aids will function in a manner similar to the way a normal ear functions or claim that hearing aids will retard or arrest the progression of hearing loss when such is not possible.

The recommended rule would also restrict the manner in which prospective hearing aid customers could be obtained. In addition, it would provide consumers with protection against unsolicited and unannounced sales visits at their homes or places of employment. People selling hearing aids would be required to identify themselves as sales persons under terms of the proposed rule. According to the staff, the record indicates that many people selling hearing aids represent themselves as "experts" to prospective customers. Under terms of the recommended rule, misleading advertising and misrepresentations by sellers would be prohibited and high pressure sales tactics would be discouraged.

The recommended rule would require all hearing aid sellers to give each buyer certain simply-worded documents which clearly spell out the buyer's right to return the hearing aid within 30 days of delivery. In addition, the seller is required to state orally that the hearing aid may be returned. If these documents are not given to the buyer, or if there are oral misrepresentations by the seller, the FTC can impose civil penalties on the seller.

Of the estimated 650,000 hearing aids pur-

chased annually in the United States, most are bought without the involvement of a medical specialist. About half of all such sales are consummated in the consumer's home. It is in such cases that many abuses take place, according to the FTC staff.

The recommended rule would apply to the approximately 40 hearing aid manufacturers and the more than ten thousand sellers of hearing aids sold at the retail level. The rule would also apply to those physician ear specialists and audiologists (nonmedical professionals with graduate degrees) who sell hearing aids.

The staff report has not been reviewed or adopted by the Commission. The Commission's final determination in this matter will be based upon the record taken as a whole, including the staff report, the presiding officer's report, and the comments received during the 60-day comment period. [Rev: Ch. 2, DA Pam 27-12.]

**Administration—Preventive Law Program.**  
**In a suit filed in the U.S. District Court for Colorado, the Federal Trade Commission has charged a multi-state freezer meat company with engaging in "bait and switch" practices.**

The Department of Justice filed the FTC's complaint against Jim Clark's Beef, Inc. and Frank I. Clark, the dominant shareholder. The suit asks the court to award civil penalties and enjoin the company's "bait and switch" and other challenged practices. The investigation that led to the complaint was handled by the FTC's Denver Regional Office.

The complaint alleges that the firm advertised attractively low prices for bulk beef as "bait" to lure customers into its stores where they were "switched" to higher priced meat. According to the complaint, the defendants knew that such "bait and switch" practices have been found to be illegal under previous Commission decisions.

The suit is based on Section 5(m) of the Federal Trade Commission Act which allows the FTC to seek civil penalties from individuals or businesses not subject to an FTC order if they

knowingly violate previous Commission decisions issued against others. Defendants in such suits are liable for civil penalties of up to \$10,000 per violation.

The complaint also alleges that some of the defendants' advertisements for freezer meat violated prior FTC decisions and are unfair or deceptive because they:

Failed to disclose that the advertised meat was untrimmed and would weigh substantially less after trimming.

Stated or implied that all advertised meat was "prime" or "choice" even though some of the meat was either ungraded or graded less than "prime" or "choice."

Failed to disclose all of the credit terms required by the Truth in Lending Act.

The Commission believes that Jim Clark's Beef, Inc. and Frank I. Clark have operated freezer meat stores in a number of states including Colorado, Nevada, New Mexico, Kansas, Arkansas and Texas.

For further information contact: Karen S. Blumenberg, Public Information Officer, Denver Regional Office (303) 837-2271. [Ref: Ch. 2, DA Pam 27-12.]

**Family Law—Domestic Relations—Child Support. In A Case With Important Implications For Military Members, The North Carolina Court Of Appeals Held That A Divorced Father Who Had Changed His Domicile From North Carolina To Texas Remained Subject To Continuing Jurisdiction Of The North Carolina Courts For Matters Involving The Original Custody And Support Order.** *Griffith v. Griffith*, 4 Fam. L. Rep. 2736 (N.C. Ct. App., 1978).

The parties divorced in 1962 when both husband and wife were domiciled in North Carolina. In 1976, the wife brought an action in North Carolina to collect arrearages in child support, even though neither party was then domiciled or living in North Carolina. The husband challenged the court's jurisdiction, but the Appellate Court held that, under North

Carolina law, this action remained subject to the continuing jurisdiction of North Carolina, regardless of the domicile or residence of the parties. Further, the court held, the attorney of record for each party remains available for service of process in the later action. Therefore, at least in North Carolina, divorced parties departing the state must keep their attorneys aware of any future address changes so that they may properly defend subsequent actions.

**Family Law—Domestic Relations—Divorce The Puerto Rico Supreme Court, Tired of Waiting For Legislation, Has Created Immediate No-Fault Divorce, Based On The Mutual Consent Of The Parties, For The Commonwealth.** *Ferrer v. Commonwealth*, 4 Fam. L. Rep. 2744, (P.R. Sup. Ct., 1978). The court based its decision on previous cases which have held that the right to privacy under the Puerto Rican Constitution is broader than under the United States Constitution and includes freedom from attacks on one's honor and reputation in private life and the inviolability of human dignity. Finding that the present system forces couples who no longer wish to remain married but who also have no traditional fault grounds to either wait an excessive separation period or "create" such grounds, the court decides to recognize mutual consent as a valid divorce basis. The court, it should be noted, specifically commented that this case did not raise the issue of how the involvement of children would affect the holding, but the implication is that children would not affect the decision in any way.

**Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Preservation of Consumer Claims and Defenses (Holder-In-Due-Course Rule). "Holder in Due Course" Rule Amendments proposed by staff of Federal Trade Commission.**

The staff of the Federal Trade Commission has proposed improvements to what is known as the "holder-in-due-course" rule to cover creditors. A second staff recommendation pro-

poses to simplify the notice that must be included in contracts covered by the rule.

The present rule requires sellers to be sure specific language is included in all sales finance and many loan contracts used to finance purchases by consumers. That language preserves the consumers' rights to recourse against subsequent "holders" of the contracts. The formal name of the rule is "Preservation of Consumers' Claims and Defenses."

The proposed amendment to the rule would extend this requirement for the inclusion of protective language to lenders who make loans covered by the rule. In addition, creditors would be prohibited from purchasing sales finance contracts from sellers unless the contracts complied with the rules.

The report also recommends changes in the specific language of the provision required to be included in contracts. The changes are not intended to affect the legal meaning of the provision, but only to make it more easily understandable. The report also recommends that the provision be written in Spanish in contracts that are otherwise legally required to be in Spanish.

The staff report has not been reviewed or adopted by the Commission. Therefore, its publication should not be interpreted as reflecting the present views of the agency. [Ref: Ch. 10, DA Pam 27-12.]

### Recently Enacted Legislation

#### Decedent's Estates and Survivor's Benefits—The Survivor Benefit Plan.

Public Law 95-397, approved on 30 September 1978, amends the Military Survivor Benefit Plan, 10 U.S.C. § 1447 *et seq.*, by offering to reserve component members and retired reserve component members, not yet 60 years old, the opportunity to participate in the Survivor Benefit Plan before becoming eligible for retired pay. Servicemembers who retire as a member of the reserve component are not eligible to receive retired pay until they reach age 60. Prior to Public Law 95-397 a member who retired from the reserves was not eligible to

participate in the Survivor Benefit Plan until becoming eligible for retired pay (age 60). The retired reserve component member who died before reaching age 60 not only lost retirement pay, but also the chance to provide for surviving beneficiaries, by not qualifying to participate in the Survivor Benefit Plan.

Based on the amendments made by Public Law 95-397 reservists who were eligible for retirement as of 1 October 1978 and those becoming eligible for retirement between 1 October 1978 and 1 July 1978 have until 1 October 1979 to elect to participate in the Survivor Benefit Plan prior to receiving retired pay. Members of the reserve component becoming eligible for retirement after 1 July 1979 will have 90 days from the date they are notified as being eligible (Notification is required by 10 U.S.C. § 1331 (d) stating that the years of service required for eligibility for retired pay under chapter 67, title 10, U.S.C. have been completed.) for retirement to elect to participate in the Survivor Benefit Plan prior to receiving retired pay.

A reservist who meets the above requirements has three options available:

1. The reservist may elect not to participate in the plan at the time he qualifies for retirement. Unless participation in the plan is declined prior to receipt of retired pay the reservist is automatically a participant, if married or has a dependent child when he becomes entitled to retired pay (age 60).
2. The reservist may elect to participate in the plan when qualified for retirement and designate, in the event of death before becoming 60 years of age, that the survivor benefit annuity become effective on the 60th anniversary of his birth date. If he lives past 60 years of age, it would become effective the day after death. There is no cost to the reservists until he begins receiving retired pay. The cost, if he lives past age 60, is yet to be determined by the Secretary of Defense. By statute, the annuity will be a percentage, less than 55% of the base. This percentage has not yet

been determined by the Secretary of Defense.

3. The reservist may elect to participate in the plan when he qualifies for retirement and designate, in the event he dies before becoming 60 years of age, that the survivor benefit annuity become effective on the day after he dies. If he lives past 60 years of age, it would become effective the day after he dies. There is no cost to the reservist until he begins receiving retired pay. The cost, if he lives past age 60, is yet to be determined by the Secretary of the Defense. By statute, the annuity will be a percentage, less than 55%, of the base. This percentage has not yet been determined by the Secretary of Defense.

As of this date there is not an official form available to use to make the above described elections. Reservist who qualify have been counseled to prepare a statement of intent selecting one of the above choices to use as evidence of intent to substantiate a claim for the survivor benefit annuity if they should die before receiving the forms needed to make an official election.

Public Law 95-397 also provides for dental and medical care in facilities of the uniformed services for dependents of reservists who elected to participate in the Survivor Benefit Plan when becoming eligible for retirement and who died prior to reaching age 60. This care is not available until the 60th anniversary of the reservist's birthday and is subject to the availability of space and facilities and the capabilities of the medical and dental staff. Dependents of reservists who die after becoming entitled to retired pay are entitled to the same care.

Section 204 of Public Law 95-397 reduced the amount of the social security offset to the survivor benefit annuity to the extent such benefit is reduced by deductions based on income earned by the surviving spouse. [Ref: Ch 16, DA Pam 27-12.]

### **Decedent's Estates And Survivor's Benefits—Survivor Benefits—Dependency And Indemnity Compensation.**

Public Law 95-479, "Veterans' Disability Compensation and Survivors' Benefits Act of 1978," which became effective 18 October 1978, amends Title 38 of the United States Code by increasing the rates of disability compensation for disabled veterans and the rates of dependency and indemnity compensation. The following is a table taken from the Act which sets out the new dependency and indemnity compensation rates for surviving spouse:

<i>Pay Grade</i>	<i>Monthly Rate</i>	<i>Pay Grade</i>	<i>Monthly Rate</i>
E-1	297	W-4	426
E-2	307	0-1	376
E-3	314	0-2	388
E-4	334	0-3	416
E-5	343	0-4	439
E-6	351	0-5	484
E-7	368	0-6	544
E-8	388	0-7	590
E-9	406	0-8	646
W-1	376	0-9	694
W-2	391	0-10	760
W-3	402		

[Ref: Ch 16, DA Pam 27-12.]

### **Taxation—Revenue Act of 1978 and Energy Tax Act of 1978.**

The Revenue Act of 1978 and the Energy Tax Act of 1978 have been signed into law by the President. The following is a short summary of significant parts of the Acts:

1. Starting in 1979 the personal exemption will be \$1,000.00.
2. Beginning in 1979 the tax rates are lower and the brackets wider.
3. 60% of the gain from the sales of capital assets after 1 November 1978, which have been held for more than one year, may be excluded from income.
4. Taxpayers 55 years old or older may exclude all gain up to \$100,000, on the sale of a personal residence sold after 26 July

1978. This is a once in a lifetime exclusion and the taxpayer must have owned and occupied the property as a principal residence for an aggregate of three years out of the five year period immediately prior to the sale.

5. For tax year 1978 and until tax year 1986, homeowners and renters may claim a tax credit of 15% on expenditures up to \$2,000 (maximum credit of \$300) for the installation of insulation or other energy-saving devices for their homes. Furnace replacement burners, devices modifying flue openings, automatic setback thermostats, caulking, weatherstripping, and display

meters all qualify as energy-saving devices. Taxpayers may use credits for amounts spent after 19 April 1977, along with credits for 1978, to reduce tax liability on their 1978 return. Credits may not exceed income tax liability but they may be carried over to the next year. Credit must exceed \$10.00 to be used.

6. The stepped-up basis rules for carryover basis property, which were created by the 1976 Tax Reform Act, have been postponed until 1980. The rules will apply to property acquired from decedents dying after 31 December 1979.

[Ref: Ch 41, DA Pam 27-12.]

## CLE NEWS

### 1. Civilian Sponsored CLE Courses.

#### FEBRUARY

1-2: ALSI, Federal Practice Update and Analysis, Wilshire Hyatt House, Los Angeles, CA. Contract: Advanced Legal Studies Institute, McGraw-Hill, 1221 Avenue of the Americas, New York, NY 10020. Phone: (212) 997-2118. Cost: \$195.

1-2: PLI, Consumer Credit 1979, Fairmont Hotel, New Orleans, LA. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost \$185.

2-3: ALI-ABA, Trial Evidence in Federal Courts: A Clinical Study of Some Recent Developments, Los Angeles, CA. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

2-3: PLI, The Abused and Neglected Child, Ambassador West Hotel, New York, NY. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$100.

2-3: PLI, Medical Malpractice Litigation, Los Angeles Bonaventure Hotel, Los Angeles, CA. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone (212) 765-5700. Cost \$175.

3-9: PLI Patent Bar Review Course. Barbizon Plaza Hotel, New York. Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$325.

4-5: ALI-ABA, ABA Section of Taxation Annual Advanced Study Session, Los Angeles, CA. Contact: Donald

M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

4-9: National College of District Attorneys, Organized Crime, Part I, Los Angeles, CA. Contact: NCDA, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

5-7: AAJE, Evidence I: Hearsay and Judicial Notice (for judges). Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$200.

5-8: Pepperdine University School of Law, The Contracting Officer, Sheraton National Hotel, Arlington, VA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$575 to \$600.

5-6: University of Denver School of Law, Freedom of Information, Sheraton National Hotel, Arlington, VA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$450 to \$475.

7-14: ABA, Midyear Meeting, Atlanta, GA. Contact: American Bar Association, 77 S. Wacker Dr., Chicago, IL 60606.

8-10: AAJE, Criminal Law I: Search and Seizure (for judges), Kissimmee, FL. Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$200.

9-10: ALI-ABA "Commercial Speech" and the First Amendment, Washington, DC. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA

Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

9-10: PLI, Prisoner's Rights, Barbizon Plaza Hotel, New York. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone (212) 765-5700. Cost \$125.

11-16: ALI-ABA, Basic Estate and Gift Taxation, Phoenix, AZ. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

11-16: ATLA, National College of Advocacy and Advanced Advocacy College, Carillon Hotel, Miami, FL. Contact: Association of Trial Lawyers of America, P.O. Box 3717, Washington, DC 20007. Cost: (Government/Military Officers) \$325.

12-13: PLI, Taxation of Real Estate Transfers and Sales, New York Sheraton, New York. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$285.

12-16: University of San Francisco School of Law, Government Contracts Course, Conference Center, Williamsburg, VA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$625 to \$650.

15-16: PLI, Medicine for Lawyers, Statler Hilton Hotel, New York. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$185.

15-16: PLI, Preparation of the U.S. Fiduciary Income Tax Returns, Royal Sonesta Hotel, New Orleans, LA. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$235.

16: NPI, Kaplan on Evidence, Los Angeles, CA. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

17: NPI, Kaplan on Evidence, Los Angeles, CA. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

19-21: AAJE, Criminal Law III: Right to Counsel, Competency of Counsel, Speedy Trial (for judges). Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$200.

22-24: AAJE, Evidence III: Opinions, Relevancy, Authentication, and Best Evidence (for judges). Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$200.

22-24: ALI-ABA, Environmental Law, Washington,

D.C. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

22-23: George Washington Univ., Labor Standards, G.W.U. Library, Washington, D.C. Contact: Government Contracts Program, G.W.U., 2000 "H" St. NW, Washington, DC 20052. Phone: (202) 676-6815. Cost: \$290.

23-24: NPI, Estate Planning/Casner & Stein, Scottsdale, AZ. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-444 (in MN call (612) 338-1977).

23-24: PLI, Defending Crimes of Violence, The Cosmopolitan Hotel, Denver, CO. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$200.

24: NPI, Kaplan on Evidence. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

26-2 March: AAJE, Judge Trial Workshop, Arizona State Univ., Tempe, AZ. Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$300.

26-27: PLI, Estate Planning For the Closely Held Corporation, Beverly Wilshire Hotel, Los Angeles, CA. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$185.

## MARCH

1-3: FBA, Southwestern Regional Conference, Two Seminars: Labor, and Federal Trial Practice, Fairmont Hotel, Dallas, TX. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

1-2: PLI, Foreign Patent Practice Under EPC and PCT, Waldorf Astoria Hotel, New York. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$225.

2-3: PLI, Prisoner's Rights, Sir Francis Drake Hotel, San Francisco, CA. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10010. Phone: (212) 765-5700. Cost: \$125.

3: NPI, UCC Update, Chicago, IL. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

4-7: NCDA, Prosecuting Drug Cases, Tampa, FL. Contact: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone (713) 749-1571.

4-9: NJC, Search and Seizure (for judges), University of Nevada, Reno, NV. Contact: National Judicial Col-

lege, Reno, NV 89557. Phone: (702) 784-6747. Cost: \$300.

9-10: NPI, Estate Planning/Casner & Stein, Seattle, WA. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

10: NPI, Kaplan on Evidence, San Francisco, CA. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

10: NPI, UCC Update, St. Louis, MO. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

11-16: NJC, Evidence (for judges). University of Nevada, Reno, NV. Contact: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747. Cost: \$300.

12-16: AAJE, Trial and Appellate Judges Writing Programs, Kissimmee, FL. Contact: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$475.

12-13: FBA-BNA, Annual Briefing Conference on Government Contracts, Barclay Hotel, Philadelphia, PA. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street, NW, Washington, DC 20006. Phone: (202) 638-0252.

15-16: ALI-ABA, Estate Planning, St. Louis, MO. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

16-17: ALI-ABA, Professional Malpractice, Denver, CO. Contact: American Law Institute—American Bar Association Committee on Continuing Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

18-20: National College of District Attorneys, Prosecuting Crimes Against Property, New Orleans, LA. Contact: NCDA, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

19-20: PLI, Taxation of Real Estate Transfers and Sales, New York Sheraton, New York. Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: \$285.

21-23: ALI-ABA, Legal Problems of Museum Administration, FT Worth TX. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

23-24: PLI, Defending Crimes of Violence, New York Sheraton Hotel, New York, Contact: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost \$200.

24: NPI, UCC Update, Houston, TX. Contact: Na-

tional Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

26-30: AAJE, Law and Psychiatry, University of Miami Law School, Coral Gables, FL. Contact: American Academy of Judicial Education, Suite 539, 1426 H Street, NW, Washington, DC 20005. Phone: (202) 783-5151. Cost: \$350.

29-31: ALI-ABA, The New Federal Bankruptcy Code, Dallas, TX. Contact: American Law Institute—American Bar Association Committee on Continuing Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

30: FBA, Conference on Copyright Law, Crystal City Marriott, Arlington, VA. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

30-31: NPI, Estate Planning/Casner & Stein, Baltimore, MD. Contact: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (in MN call (612) 338-1977).

## 2. TJAGSA CLE Courses

February 5-8: 8th Environmental Law (5F-F27).

February 12-16: 5th Criminal Trial Advocacy (5F-F32).

February 21-March 2: Military Lawyer's Assistant (512-71D20/50).

March 5-16: 79th Contract Attorneys' (5F-F10).

March 19-23: 11th Law of War Workshop (5F-F42).

March 26-28: 3d Government Information Practices (5F-F28).

April 2-6: 46th Senior Officer Legal Orientation (5F-F1).

April 9-12: 9th Fiscal Law (5F-F12).

April 9-12: 2d Litigation (5F-F29).

April 17-19: 3d Claims (5F-F-26).

April 23-27: 9th Staff Judge Advocate Orientation (5F-F52).

April 23-May 4: 80th Contract Attorneys' (5F-F10).

May 7-10: 6th Legal Assistance (5F-F23).

May 14-16: 3d Negotiations (5F-F14).

May 21-June 8: 18th Military Judge (5F-F33).  
 May 30-June 1: Legal Aspects of Terrorism.  
 June 11-15: 47th Senior Officer Legal Orientation (5F-F1).  
 June 18-29: JAGSO (CM Trial).  
 June 21-23: Military Law Institute Seminar.  
 July 9-13 (Contract Law) and July 16-20 (Int. Law): JAOGC/CGSC (Phase VI Contract Law) Int. Law.  
 July 9-20: 2d Military Administrative Law (5F-F20).  
 July 16-August 3: 19th Military Judge (5F-F33).

July 23-August 3: 81st Contract Attorneys' Course (5F-F10).  
 August 6-October 5: 90th Judge Advocate Officer Basic (5-27-C20).  
 August 13-17: 48th Senior Officer Legal Orientation (5F-F1).  
 August 20-May 24, 1980: 28th Judge Advocate Officer Graduate (5-27-C22).  
 August 27-31: 9th Law Office Management (7A-713A).  
 September 17-21: 12th Law of War Workshop (5F-F42).  
 September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

**JUDICIARY NOTES**

*U.S. Army Judiciary*

**ADMINISTRATIVE NOTES**

*1. Designating Places of Confinement*

Paragraph 4-2c AR 190-47, effective 1 October 1978, again mandates the use of the following statements:

(a) When sentence to confinement is approved and ordered executed: "The accused will be confined in (name of facility) and the confinement will be served therein or elsewhere as competent authority may direct."

(b) When sentence to confinement is approved but not ordered executed pending completion of appellate review: "Pending completion of appellate review, accused will be confined in (name of facility) or elsewhere as competent authority may direct."

*2. Records of Trial*

In examining general court-martial records of trial under the provisions of Article 69, UCMJ, it has been noted that in some instances *original* documents were missing (*e.g.*, accused's request for enlisted members; accused's request for trial by military judge; the pretrial advice; the charge sheet). Staff judge advocates

should establish procedures to insure that original documents that are required to be with the record of trial and its allied papers are safeguarded by the persons responsible for the assembly of the record.

**QUARTERLY COURT-MARTIAL RATES PER 100 AVERAGE STRENGTH  
 JULY - SEPTEMBER 1978**

	General CM	Special BCD	CM NON-BCD	Summary CM
ARMY-WIDE	.29	.28	1.22	.67
CONUS Army commands	.23	.24	1.19	.76
OVERSEAS Army commands	.39	.36	1.27	.51
USAREUR and Seventh Army commands	.45	.29	1.27	.32
Eighth US Army	.03	1.03	1.37	.28
US Army Japan	—	—	—	—
Units in Hawaii	.62	.26	1.15	1.35
Units in Thailand	—	—	—	—
Units in Alaska	.20	.20	.90	.60
Units in Panama/ Canal Zone	.28	—	2.35	5.53

NOTE: Above figures represent geographical areas under the jurisdiction the commands and are based on average number of personnel on duty within those areas.

**RESERVE AFFAIRS ITEM***Reserve Affairs Department, TJAGSA*

The resident phases of the Judge Advocate Branch Officer Advanced Course, Phase VI, and the Judge Advocate General's Reserve Component General Staff Course will be presented at The JAG School from 9-20 July 1979.

All prospective students are advised that their request to attend either course (DA Form 1058 or appropriate CONUS Army or NGB Form) must be in channels no later than 15 April 1979.

**JAGC Personnel Section***PP&TO, OTJAG***1. RA Promotions****COLONEL**

McKay, William P. 6 Dec 78

**LIEUTENANT COLONEL**

Dancheck, Leonard H. 11 Dec 78

**MAJOR**

Bonney, Charles E. 9 Oct 78

**CAPTAIN**

Jackson, Robert F., Jr. 16 Jul 77  
Popescu, John 6 Dec 78

**3. Reassignments.****NAME****FROM****TO****LIEUTENANT COLONELS**

Armstrong, Henry  
Foreman, Leroy  
Price, James

Korea  
OTJAG  
USALSA

USALSA  
2d Inf Div, APO SF  
OTJAG

**MAJORS**

Carmichael, Harry

OTJAG

Stu Det AFSC,  
Norfolk, VA

**CAPTAINS**

Anderson, Larry  
Fligg, Warren  
Lederer, Calvin  
Neurauter, Jose  
Porter, Steven

USALSA  
Ft Dix, NJ  
USAREUR  
Redstone Arsenal, AL  
USAREUR

OTJAG  
USALSA  
OTJAG  
Ft Ord, CA  
Ft. Detrick, MD

**2. AUS PROMOTIONS****COLONEL**

Brown, Terry W. 12 Nov 78  
La Plant, Earl M. 8 Nov 78  
McKay, William P. 6 Dec. 78

**LIEUTENANT COLONEL**

Armstrong, H. Jere 2 Nov 78  
Cundick, Ronald P. 2 Nov. 78

**CAPTAIN**

Feeney, Thomas J. 18 Oct 78  
Stokes, William G. 26 Dec 78

**CW3**

Velez, Manuel 10 Nov 78

## Current Materials of Interest

### Articles

J. B. Lieder and J. H. Tracy, Forums and Remedies for Disappointed Bidders of Federal Government Contracts, 10 Pub. Cont. L.J. 92 (Aug. 1978).

Gregory P. Wilson, Antarctica, The Southern Ocean and the Law of the Sea, 30 JAG J. 47 (Summer 1978).

Public Access to National Resources at Naval Installations, 75 Off the Record 179 (November 1978).

The Freedom of Information Act and Federal Acquisitions: The Proper Balancing of Com-

peting Interests, 12 Nat'l Cont. Management Q.J. 1 (Sept. 1978).

United States v. Verdi, An Increased Prosecutorial Burden? 75 Off The Record 14 (November 1978).

### Notes and Comments

Lieutenant Christopher James Sterritt, JAGC, USNR, Military Law: In Personam Jurisdiction: Recruiter Misconduct Sufficient to Preclude A Constructive Enlistment, United States v. Harrison, 30 JAG J. 105 (Summer 1978).

### Errata

The article, "Recent Developments in the Wake of *United States v. Booker*," by Captain John S. Cooke, in the November issue of *The Army Lawyer* contains a significant omission. At page 6 the last sentence in the last full paragraph reads: "Thus, none of *Booker's* exclusionary rules apply to cases tried after 11 October 1978." This sentence should read: "Thus,

none of *Booker's* exclusionary rules apply to cases tried before *Booker* was originally decided.<sup>23</sup> By negative implication, however, *Booker's* exclusionary rules do apply to cases tried after 11 October 1977." The editor regrets any confusion which may have resulted from this oversight.