



THE ARMY LAWYER

Headquarters, Department of the Army

October 2014

ARTICLES

The Judge Advocate's Guide to Immigration Consequences for Military Adverse Actions

Major Takashi Kagawa

The New FLIPL: A Primer for Practitioners

Major Jason S. Ballard

TJAGLCS FEATURES

Lore of the Corps

"It's a Family Affair": A History of Fathers, Daughters and Sons, Brothers, and Grandfathers and Grandsons in the Corps

BOOK REVIEWS

Saving Normal: An Insider's Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life

Reviewed by Lieutenant Michael E. Jones

Bunker Hill: A City, a Siege, a Revolution

Reviewed by Major Phillip T. Korman

CLE NEWS

CURRENT MATERIALS OF INTEREST

Department of the Army Pamphlet 27-50-497

Editor, Captain Michelle E. Borgnino
Assistant Editor, Major Elizabeth Turner
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$45.00 each (\$63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at TJAGLCS-Tech-Editor@conus.army.mil.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Communications Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army.

The Army Lawyer accepts articles that are useful and informative to Army lawyers. This includes any subset of Army lawyers, from new legal assistance attorneys to staff judge advocates and military judges. *The Army Lawyer* strives to cover topics that come up recurrently and are of interest to the Army JAG Corps. Prospective authors should search recent issues of *The Army Lawyer* to see if their topics have been covered recently.

Authors should revise their own writing before submitting it for publication, to ensure both accuracy and readability. The style guidance in paragraph 1-36 of Army Regulation 25-50, *Preparing and Managing Correspondence*, is extremely helpful. Good writing for *The Army Lawyer* is concise, organized, and right to the point. It favors short sentences over long and active voice over passive. The proper length of an article for *The Army Lawyer* is "long enough to get the information across to the reader, and not one page longer."

Other useful guidance may be found in Strunk and White, *The Elements of Style*, and the Texas Law Review, *Manual on Usage & Style*. Authors should follow *The Bluebook: A Uniform System of Citation* (19th ed. 2010) and the *Military Citation Guide* (TJAGLCS, 18th ed. 2013). No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil/ArmyLawyer> and at the Library of Congress website at http://www.loc.gov/tr/frd/MilitaryLaw/Army_Lawyer.html.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-tech-editor@mail.mil.

Articles may be cited as: [author's name], [article title in italics], ARMY LAW., [date], at [first page of article], [pincite].

Lore of the Corps

“It’s a Family Affair”: A History of Fathers, Daughters and Sons, Brothers, and Grandfathers and Grandsons in the Corps 1

Articles

The Judge Advocate’s Guide to Immigration Consequences for Military Adverse Actions
Major Takashi Kagawa..... 6

The New FLIPL: A Primer for Practitioners
Major Jason S. Ballard..... 45

Book Reviews

Saving Normal: An Insider’s Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life
Reviewed by *Lieutenant Michael E. Jones* 54

Bunker Hill: A City, a Siege, a Revolution
Reviewed by *Major Phillip T. Korman* 58

CLE News 62

Current Materials of Interest 67

Individual Paid Subscriptions to *The Army Lawyer*..... Inside Back Cover

Lore of the Corps

“It’s a Family Affair”¹:

A History of Fathers, Daughters and Sons, Brothers, and Grandfathers and Grandsons in the Corps

Fred L. Borch

Regimental Historian & Archivist

The recent promotion to colonel of Nicholas F. “Nick” Lancaster by his father, Colonel (COL) (Retired) Steve Lancaster, both Army lawyers, raises the question of just how many fathers and daughters and sons, as well as brothers and sisters, and even grandfathers and grandsons, have served as lawyers in our Corps. What follows is a quick look at our version of “It’s a Family Affair.”

Earliest Family Relationships

Truly the most remarkable family connection in our history is that of the first Army lawyer, William Tudor, and his direct descendant, Thomas S. M. Tudor.



William Tudor was The Judge Advocate General (TJAG) from 1775 to 1777; his great-great-great grandson, Tom Tudor, served as an Army lawyer from 1975 to 1978.

Colonel William Tudor was the first Judge Advocate General and served under General George Washington from 1775 to 1777.² Two hundred years later, in 1975, his great-great-great grandson, Captain (CPT) Thomas “Tom” Tudor, joined our Corps. Captain Tudor served one tour of duty with 3d Armored Division in Germany and left active duty in 1978. Tudor subsequently joined the U.S. Air Force

¹ With a tip of the hat to SLY AND THE FAMILY STONE, *Family Affair*, on FAMILY AFFAIR, (Epic Records 1971), available at <http://www.azlyrics.com/lyrics/slythefamilystone/familyaffair.html> (last visited Aug. 27, 2014). *Family Affair* was the number one single on the Billboard Top 100 in late 1971. The author thanks the members of the Retired Association of Judge Advocates (RAJA) for their help in gathering information for this Lore of the Corps, with a special thanks to RAJA members Major General (Retired) William K. Suter and COL (Retired) Barry P. Steinberg.

² For more on the first Judge Advocate General, see JUDGE ADVOCATE GENERAL’S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 7–10 (1975).

Judge Advocate General’s Corps. He served as an Air Force lawyer from 1980 to 2002.³

Another early family connection in our history is Columbia Law School professor Francis Lieber, author of the famous General Orders No. 100 (“Lieber Code”) and his son, Guido Norman Lieber, who served first as the Acting Judge Advocate General (1884 to 1895) and then as the Judge Advocate General (1895 to 1901). Although the Liebers technically do not qualify for this *Lore of the Corps* since Francis Lieber was a civilian law school professor who never wore an American uniform, they are worth mentioning because of their significance in the history of Army law.⁴

Fathers and Daughters



Major General George S. Prugh was already retired (he left active duty in 1975) when his daughter, Virginia “Patt” Prugh, entered the Corps. She retired as a LTC in 2006.

The earliest father and daughter pair is Major General (MG) George S. Prugh and his daughter, Lieutenant Colonel (LTC) (Retired) Virginia “Patt” Prugh. General Prugh’s distinguished career culminated with his service as TJAG

³ The lineage for this remarkable Tudor connection is as follows: William Tudor (1750–1819); Frederic Tudor (1783–1864); Frederic Tudor (1845–1902); Rosamund Tudor (1878–1949); Tasha Tudor (1915–2010); and Thomas Tudor (1945–present). E-mail, Thomas Tudor, to author, subj: Great-great-great grandson (8 Sept. 2014, 9:58 AM) (on file with author).

⁴ For more on Dr. Francis Lieber and his son, see *THE ARMY LAWYER*, *supra* note 2, at 61–62, 84–86 (1975). While Francis Lieber never served in the U.S. Army, he did see combat as a soldier in the Prussian Army during the Napoleonic wars. He was badly wounded during the Waterloo campaign, and was left for dead on the battlefield. See http://www.loc.gov/r/rfd/Military_Law/Lieber_Collection/pdf/francisbio-more.pdf (last visited Sept. 25, 2014).

from 1971 to 1975.⁵ His daughter served in the Corps from 1982 to 2006. After retiring from active duty, she joined the U.S. State Department, where she serves today.



Colonel LeRoy "Lee" Foreman and Colonel Mary "Meg" Foreman

Colonel (Retired) LeRoy F. "Lee" Foreman and COL Mary M. "Meg" Foreman are the first father-daughter pair to reach the rank of COL as judge advocates. Lee Foreman served on active duty from 1963 to 1992, including overseas assignments in Germany, Vietnam, and Korea. His daughter graduated from the U.S. Military Academy (USMA) in 1988, and entered the Corps through the Funded Legal Education Program (FLEP). Colonel Meg Foreman is now assigned to the Department of Defense General Counsel's Office.

Finally, Brigadier General (Retired) M. Scott Magers, who entered the Corps in 1968 and retired from active duty in 1995, and his daughter, Eleanor Magers (later Eleanor Vuono), served on active duty at the same time at the Pentagon. Then-CPT Magers has the unique distinction of being the only judge advocate to begin her career in the Army General Counsel's Honors Program⁶ and then switch to active duty after completing the Judge Advocate Basic Course. Eleanor left active duty from Fort Carson, Colorado, in 2000.

Other father and daughter combinations include Michael B. "Brett" Buckley, who served as a CPT in the Corps in the early 1980s and his daughter, CPT Michele B. Buckley, now on active duty at Fort Bragg, North Carolina. Similarly, Keith W. Sickendick, who served as a CPT at the Defense Appellate Division in the late 1980s, has a daughter, CPT Katherine E. Sickendick. She also is now on active duty at Fort Bragg, North Carolina.

⁵ For more on Major General George S. Prugh, see *THE ARMY LAWYER*, *supra* note 2, at 256-57.

⁶ The Army General Counsel's Honors Program provides young attorneys with a unique opportunity to help advise the Department of the Army's senior civilian and military leadership on a wide variety of legal and policy issues. These attorneys generally apply for the program in their third year of law school. If selected, they are invited to work alongside highly experienced career civilian and military attorneys in one of our four main practice groups. OFFICE OF THE ARMY GENERAL COUNSEL, http://ogc.hqda.pentagon.mil/Carrers/honors_program.aspx (last visited Oct.9, 2014).

Fathers and Sons

There are at least nineteen father-and-son pairs. In alphabetical order, known pairs include: John and John E. "Jeb" Baker; Steven E. and John T. Castlen; Dean Dort Sr. and Dean Dort, Jr.; Charles P. and Douglas A. Dribben; Gregory and Cameron Edlefsen; Thomas and John T. Jones; Ward and Ward D. King; Steven F. and Nicholas F. Lancaster; Thomas and Dustin J. Lujan; John and Kevin Ley; James Edgar, Jr. and James Ennis Macklin; Talbot Nicholas and Talbot Nicholas, Jr.; William S. and William J. Ostan; Joseph and Edward Piasta; Robert S. Poydasheff and Robert S. Poydasheff, Jr.; Paul and Paul Robblee; James "Jim" and Frank Rosenblatt; and Gary and Gary Thorne.



Colonel John Baker (shown here as Coast Artillery Corps captain) is one of only a handful of judge advocate colonels to have a son (Colonel "Jeb" Baker) reach the rank of colonel in the Corps.

John Baker, a 1942 USMA graduate, entered the Corps after graduating from Yale's law school in 1951. His career as an Army lawyer took him to a variety of assignments and locations, including service as Staff Judge Advocate, U.S. Army South, U.S. Canal Zone, from 1966 to 1969. When COL Baker retired in 1970, he returned to the Canal Zone to serve as a U.S. Magistrate judge until 1982.⁷ His son, John E. "Jeb" Baker, also received his commission through USMA (Class of 1972) and started his career as a judge advocate in 1979 with the 193d Infantry Brigade in the U.S. Canal Zone (his father was still serving as a U.S. Magistrate judge). The younger Baker retired as a COL in 2002.⁸

Steve Castlen entered the Corps in the 1980s. He retired as a COL and his last assignment was with the Army Trial Judiciary. His son, CPT John T. Castlen is currently serving in Germany.

Colonel Dean Dort Sr. and his son, Dean Dort, Jr., both served in the Corps. While the elder Dort stayed for a career and retired as a COL, the junior Dort resigned his commission when he was a major (MAJ).

⁷ ASS'N OF GRADUATES, REGISTER OF GRADUATES AND FORMER CADETS 3-77 (2004).

⁸ *Id.* at 3-398.

Charles P. Dribben retired as a COL; his last assignment was with the U.S. Army Judiciary. His son, Douglas A. “Doug” Dribben, entered the Corps in 1990 through the FLEP; the younger Dribben had graduated from USMA in 1983. Major Doug Dribben retired in 2003.⁹

Lieutenant Colonel Gregory Lee Edlefsen served in the Corps from 1971 until he retired in 1993. His last assignment was Staff Judge Advocate, 7th Signal Command, Fort Ritchie, Maryland. His son, MAJ Cameron R. “Cam” Edlefsen, is on active duty and currently serves as a trial attorney, Contract & Fiscal Law Division, U.S. Army Legal Services Agency. The younger Edlefsen graduated from the USMA in 2000 and entered the Corps in 2007 through the Funded Legal Education Program.

Colonel Charles Grimm and his son, Paul Grimm, both served in the Corps. The senior Grimm served his entire career as an active duty Army lawyer. The younger Grimm served some active duty and retired as Reserve LTC. He is now a U.S. District Court judge in Maryland.

Colonel John Thomas Jones graduated from USMA in 1946 and entered our Corps after completing law school at Columbia University. He was a judge on the Army Court of Military Review before retiring in 1982.¹⁰ His son, John Thomas Jones, Jr., served in the Corps in the 1980s and 90s and retired as a LTC; the younger Jones’ area of expertise was contract law, and he headed the Contract Law Division at The Judge Advocate General’s School, U.S. Army (TJAGSA) prior to his retirement.

Colonel Ward King and his son, Ward D. King, both served in the Corps. The younger King graduated from the USMA in 1971 and, after service as a Field Artillery officer, completed law school at the University of Texas and entered the Corps in 1977. Lieutenant Colonel King retired in 1996.¹¹

John P. Ley, Jr. entered the Corps in 1977. He served in a variety of locations, including overseas duty in Germany, Italy, and Korea. When COL Ley retired in 2008, he was serving as the Acting Commander, The Judge Advocate General’s Legal Center and School (TJAGLCS). His son, MAJ Kevin M. Ley, serves in the Corps today.

Colonel (Retired) Thomas R. Lujan served more than twenty-five years before retiring in 1998. His son, CPT Dustin Lujan, was commissioned as an Infantry officer and later entered the Corps through the FLEP. He is now stationed at Fort Hood, Texas.

James Edgar Macklin, Jr., a USMA graduate who entered the Corps in 1955 after graduating from Columbia Law School, retired as a COL. His son, James E. Macklin, was commissioned after graduating from USMA in 1980 and entered the Corps through the FLEP. He retired as a LTC.¹²

Colonel Talbot Nicholas and his son, Talbot Nicholas, Jr., both served in the Corps. The younger Nicholas left active duty as a CPT.

The senior William Ostan served at Fort Dix, New Jersey from 1976 to 1979; his son, CPT “Bill” Ostan, entered the Corps in 2007 and is on active duty today.

Colonel Joseph Piasta and his son, Edward Piasta, both served in the Corps.

Colonel (Retired) Robert S. “Bob” Poydasheff served in a variety of assignments in the Corps from 1961 to 1979. When he retired from active duty, Poydasheff was the Staff Judge Advocate at Fort Benning, Georgia. His son, Robert S. Poydasheff, Jr., served in the Corps from 1986 to 1991, when he left active duty.

Colonel Paul A. Robblee and his son, Colonel Paul Robblee, both served full careers as Army lawyers and retired as colonels. The senior Robblee received his law degree from the Minnesota College of Law in 1935 and, after serving as an Infantry officer in World War II, entered our Corps in 1947. He retired in the 1960s.¹³ The junior Robblee first served as an Infantry officer in Vietnam (with the 101st Airborne Division) before going to law school at Washington and Lee University. He entered the Corps in 1972 and then served in a variety of assignments including Deputy Staff Judge Advocate, 82d Airborne Division and Staff Judge Advocate, U.S. Army Japan and Third U.S. Army. The younger Robblee retired in 1992. The Robblees were the first father-son pair in our Corps’ history to both attain the rank of COL.



Then-Captain Paul A. Robblee, Jr. (left) and Colonel Paul A. Robblee, Sr. (right), ca. 1970.

⁹ ASS’N OF GRADUATES, *supra* note 5, at 3-562.

¹⁰ *Id.* at 3-126.

¹¹ *Id.* at 3-385.

¹² ASS’N OF GRADUATES, REGISTER OF GRADUATES AND FORMER CADETS 403, 786 (1992),

¹³ Department of the Army, Army Register (1961).

Colonel James “Jim” (but also called “Rosey” by those who knew him well) Rosenblatt retired after a distinguished career and was the Dean, Mississippi College of Law for many years. His son, MAJ Franklin Rosenblatt, entered the Corps through the FLEP and is on active duty in Hawaii today.

Colonel Gary Thorne served as a judge advocate in the 1950s; his son, also named Gary, served as a captain in our Corps in the 1970s. The younger Thorne “is one of the most recognizable voices in sports broadcasting, having covered Major League Baseball, the National Hockey League, the Olympics, NCAA basketball, football and hockey” during a more than a thirty-five-year broadcasting career.¹⁴

A final father-son pair, albeit like the Liebers, not exactly in the category of father-son judge advocates, is William S. Fulton, Jr. and Sherwin Fulton. Colonel Fulton served as a judge advocate for many years (after seeing combat as an Infantryman in World War II and Korea), and finished his service to our Corps as an Army civilian employee and Clerk of the Army Court of Criminal Review (the forerunner of today’s Army Court of Criminal Appeals). His son, Sherwin, was a paralegal in our Corps and retired in 1995 as a sergeant first class.

Brothers

There have been at least ten sets of brothers in the Corps: the Camerons, Comedecas, Cooleys, Goetzkes, Hudsons, Lederers, Mackeys, Russells, Warners and Woodruffs.

Dennis S. Cameron served in the 1970s and his brother, Michael K. Cameron was on active duty in the Corps in the 1980s and 1990s.

The Comedeca brothers, Peter J. (senior) and Michael P. (junior), were on active duty at the same time in the late 1980s. Pete Comodeca graduated from USMA in 1977 and entered the Corps through the FLEP after completing law school at Harvard. He resigned his commission in 1990. His brother, Mike, likewise graduated from USMA (class of 1979) and entered the Corps through the FLEP. Lieutenant Colonel Mike Comodeca retired in 2000.¹⁵

Robert and Howard Cooley were brothers who served in the Corps in the 1970s and 1980s. Robert “Bob” Cooley left active duty after several tours of duty and began a career as a state court judge in Virginia. His younger brother, Howard, remained in the Corps for a career and retired as a COL.

¹⁴ Baseball Assistance Team, MLB.ORG, http://www.mlbcommunity.org/programs/baseball_assistance_team.jsp?content=new_board_2014 (last visited Aug. 27, 2014).

¹⁵ ASS’N OF GRADUATES, *supra* note 5, at 3-471, 3-501.

The Cooleys are apparently the only African-American brothers to have served as judge advocates in our Corps.

Karl M. and Kenneth H. Goetzke, Jr., both served in the Corps at the same time. Karl retired as a COL; Ken left active duty as a MAJ.

William A. “Bill” Hudson, Jr. and Walter M. “Walt” Hudson, both served in the Corps at the same time. Bill Hudson entered the Corps in 1984 and retired as a COL. His younger brother, Walt, is on active duty in the Corps today.

Colonel (U.S. Army Reserve Retired) Fredric I. “Fred” Lederer and his younger brother, COL (Retired) Calvin M. “Cal” Lederer likewise were on active duty at the same time in the 1970s. The older Lederer finished his active duty at TJAGSA (teaching in the Criminal Law Division) before beginning an academic career as a law school professor at the College of William and Mary. His younger brother, Cal Lederer, served a full career as an Army lawyer and retired from active duty in 2002. He then assumed duties as the Deputy Chief Counsel for the U.S. Coast Guard. When the Coast Guard became a part of the Department of Homeland Security in 2003, the Secretary of that department designated Cal Lederer as Deputy Judge Advocate General for the U.S. Coast Guard.¹⁶

Patrick J. and Richard J. Mackey were identical twins who entered the Corps in 1974 and served full careers; both retired as COLs. They are likely the only identical twins to have served in our Regiment.

George and Richard “Rich” Russell both served in the Corps at the same time; both retired as COLs. George was the older sibling and is deceased.

Colonel (Retired) Karl K. “Kasey” and LTC (Retired) Andrew M. “Mac” Warner entered the Corps in the 1980s. Both were USMA graduates who pinned the crossed sword and quill insignia on their collars after completing the FLEP. Kasey Warner retired in 2001; Mac Warner retired in 2000.¹⁷

Finally, William A. “Woody” Woodruff and his younger brother, Joseph A. Woodruff, both served on active duty in the Corps. The older Woodruff joined the Corps in 1974 and retired as a COL. He is now on the law faculty at Campbell University’s law school in Raleigh, North Carolina. The younger Woodruff entered the Corps after graduating from the University of Alabama’s law school. He left active duty as a MAJ and now practices law in Tennessee. A final note: Cedric Woodruff, their father,

¹⁶ Calvin Lederer, *U.S. Coast Guard, Dep’t of Homeland Security*, <http://www.uscg.mil/flag/biography/CalvinLederer.pdf> (last visited Aug. 27, 2014).

¹⁷ ASS’N OF GRADUATES, *supra* note 5, at 3-434, 3-472.

served as a warrant officer in the Corps from 1962 to 1972 and retired as a Chief Warrant Officer Three.

Grandfathers and Grandsons

To date, there have been two situations where a grandfather and his grandson were Army lawyers. Major General Ernest M. “Mike” Brannon served as TJAG from 1950 to 1954.¹⁸ Almost thirty years later, his grandson, Patrick D. “Pat” O’Hare, entered the Corps on active duty. The younger O’Hare retired as a COL in 2005 and now serves as the Deputy Director of the Legal Center at TJAGLCS.

Colonel Edward W. Haughney was a judge advocate from 1949 until his retirement in 1972. He subsequently joined the faculty at the Dickenson School of Law and taught for more than thirty years. His grandson, LTC Chris Jenks, recently retired from the Corps after twenty years on active duty.

Just as this Lore of the Corps gave a ‘tip of the hat’ to the Liebers, who do not quite fit the mold, it is only appropriate and fair to mention a father and daughter-in-law: Brigadier General (Retired) Richard “Dick” Bednar and his daughter-in-law, MAJ Yolanda A. Schillinger.

Brigadier General Bednar entered the Corps in 1954 and retired from active duty in 1983; Major Schillinger recently completed the 62d Graduate Course and remains on active duty. The only thing missing from this ‘family affair’ story is mothers, sons, and daughters, and sisters. With the ever increasing number of female judge advocates in the Corps, however, the day will soon come when sons and daughters join their mothers in wearing JAG brass on their collars, along with sisters.

A final note: pieces of this family affair are almost certain to be missing. Your Regimental Historian and Archivist invites readers to send him information that should be included in this part of our history.

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

<https://www.jagcnet.army.mil/8525736A005BE1BE>

¹⁸ For more on Major General Brannon, see THE ARMY LAWYER, *supra* note 2, at 200–02.

The Judge Advocate's Guide to Immigration Consequences for Military Adverse Actions

Major Takashi Kagawa*

*It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” . . . To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.*¹

I. Introduction

A criminal conviction carries many consequences, and immigration consequences can be some of the most extreme. Despite acknowledging the complexity of immigration law, the U.S. Supreme Court in *Padilla v. Kentucky* ruled that the Sixth Amendment requires defense counsel to advise noncitizen clients of the immigration consequences when pleading guilty.² In response, the Army Trial Judiciary has undertaken steps to ensure that the noncitizen accused is aware of potential immigration consequences of a plea of guilty.³ Unfortunately, this change overlooks another class of servicemembers who may suffer immigration consequences by pleading guilty—U.S. citizens naturalized through the military.⁴ In addition, other military adverse actions may impact noncitizen and military-naturalized⁵

servicemembers' immigration statuses. This is often overlooked by judge advocates.⁶

This primer introduces judge advocates to the fundamentals of immigration law as it relates to servicemembers, specifically immigration consequences of military adverse actions. Whether acting as a defense counsel representing Soldiers or a trial counsel prosecuting them, it is important to be familiar with how military adverse actions can affect noncitizen and naturalized servicemembers' abilities to remain in the country they serve. Part II discusses immigration law fundamentals, covering the legal framework of how one immigrates to and is naturalized in the United States and how one may suffer immigration consequences for misconduct or undesirable acts. Part III explains potential immigration consequences that a noncitizen or naturalized servicemember may face based on military adverse actions. Lastly, Part IV guides judge advocates in how to handle military adverse actions with regard to immigration consequences.

II. Immigration Law Fundamentals

To appreciate the significance of servicemembers' immigration issues, one must understand how the United States regulates the entry and stay of noncitizens: what laws and regulations govern the immigration processes; what agencies implement and enforce them; and how one enters, immigrates, naturalizes, or is deported.

A. Historical Background and Legal Framework

Known as “a nation of immigrants,”⁷ the United States began its nationhood with an open border; however, it

* Judge Advocate, U. S. Army. Presently assigned as Assistant Executive Officer, Military Law and Operations, Office of The Judge Advocate General, U. S. Army, Washington, D.C. LL.M., 2014, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1998, New York Law School at New York; B.A., 1995, The Citadel, The Military College of South Carolina, at Charleston. Member of the bars of the Supreme Court of the United States, the Court of Appeals for the Armed Forces, and New York. This article was submitted in partial completion of the Master of Laws requirements of the 62d Judge Advocate Officer Graduate Course. The author wishes to thank the following people who assisted in the drafting of this article to include: Major M. Eric Bahm, Lieutenant Colonel Jonathan E. Cheney, Major Keirsten H. Kennedy, Ms. Margaret D. Stock, Esq., and Ms. Glenda M. Regnart, Esq.

¹ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (citation omitted) (holding that defense counsel violated a noncitizen's Sixth Amendment right to counsel by not advising the immigration consequences for pleading guilty).

² *Id.* at 365–66, 369. “We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.” *Id.*

³ See U.S. Army Trial Judiciary, Approved Change #10-03 (Effect of Guilty Plea on Immigration Status) to U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010). This interim change requires military judges to inquire into noncitizen accused's understanding of potential immigration consequences and to verify the existence of defense counsel's written advisement regarding such consequence. *Id.*

⁴ See MARGARET D. STOCK, IMMIGRATION LAW & THE MILITARY 31 (2012); see *infra* Part III.A.3.

⁵ This article addresses U.S. citizens who were naturalized based on military service as “military-naturalized” citizens, distinguishing them from other U.S. citizens who were naturalized under the regular process. See Immigration and Nationality Act (INA) §§ 328–329, 8 U.S.C. §§ 1439–1440 (2012). These military naturalizations “waive . . . age, continuous

residence, physical presence, and state residence requirements of the civilian naturalization” STOCK, *supra* note 4, 33–34.

⁶ Currently, Army judge advocates only receive familiarization of immigration law for legal assistance purposes at The Judge Advocate General's Legal Center and School and typically rely on civilian attorneys and paralegals in the field to handle most immigration matters. This assertion is based on the author's recent professional experience teaching immigration law for the 190th Officer Basic Course, The Judge Advocate General's School in April 2013.

⁷ See JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964).

gradually restricted the immigration of certain people considered undesirable, reflecting the “xenophobia” of the time as well as concern for the potential drain on the U.S. economy.⁸ In 1952, Congress overhauled the immigration system by passing the Immigration and Nationality Act (INA) of 1952, codified in Title 8 of the U.S. Code.⁹ Since its passage, the INA has been amended numerous times but still provides the basic legal framework for the immigration process.¹⁰

Like other statutes, the INA is implemented and enforced through executive agencies that issue corresponding regulations. The main regulation implementing federal immigration law is Title 8 of the Code of Federal Regulations (CFR).¹¹ It promulgates the day-to-day functions and responsibilities of the various federal immigration agencies and provides regulatory guidance in interpreting the INA.¹²

These laws and regulations mandate civil procedural due process for immigration beneficiaries, but also possess quasi-criminal legal characteristics with regard to detaining and deporting immigration violators.¹³ This mixed administrative and quasi-criminal nature is further complicated by the involvement of multiple federal departments and agencies.

B. Agencies

Historically, federal immigration authority, with the

⁸ RICHARD D. STEEL, *STEEL ON IMMIGRATION* § 1.1 (2013).

⁹ *Id.* § 1.2. Despite being codified under the U.S. Code, federal immigration agencies and immigration practitioners still cite to the sections in the INA, rather than the U.S. Code. *See Laws: Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 13, 2013). To be consistent with prevailing immigration practice, this article provides citations to both. For example, section 329 of the INA is cited as “INA § 329, 8 U.S.C. § 1439 (2012).”

¹⁰ STEEL, *supra* note 8, §§ 1:2–1:3. *See generally* INA, tits. I–V, 8 U.S.C. subchs. I–V (2012).

¹¹ *See generally* 8 C.F.R. ch. I (Department of Homeland Security), ch. V (Executive Office of Immigration Review, Department of Justice) (2013).

¹² *E.g., compare* INA § 329, 8 U.S.C. § 1440 (providing the statutory requirements for wartime military naturalization), *with* 8 C.F.R. pt. 329 (providing the regulatory requirements for wartime military naturalization). In addition, the State Department’s regulation governs the issuance of U.S. passports and visas abroad. 22 C.F.R. pts. 22, 40–42, 45–46, 50–53, 62, 97, 99, 104 (2013).

¹³ *See* STEEL, *supra* note 8, § 1:8; STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 2–3 (5th ed. 2009); Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 261 (2008) (pointing out that immigration law has not developed the procedural due process to match the increasingly quasi-criminal process of immigration enforcement).

exception of visa and passport issuance authority, belonged to the Department of Justice’s Immigration and Naturalization Service (INS): it provided immigration benefits, conducted border inspections, detained noncitizens for status violations, and deported them when appropriate.¹⁴ In 2002, to strengthen the nation’s security against terrorism, Congress abolished the INS and distributed the federal immigration authority across three different departments: the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State (DOS).¹⁵

The DHS inherited most of the INS’s functions—now separated between immigration benefit services and immigration enforcement.¹⁶ The U.S. Citizenship and Immigration Services (USCIS), a DHS bureau, performs the service function, processing all immigration benefits such as permanent residency and naturalization.¹⁷ The enforcement function is divided between two DHS agencies: the U.S. Customs and Border Protection (CBP), which inherited the INS Border Patrol’s role of enforcing immigration law at the border; and the U.S. Immigration and Customs Enforcement (ICE), which investigates and enforces immigration and customs laws within U.S. borders.¹⁸

Though stripped of most immigration functions, the DOJ retained some. Its Executive Office for Immigration Review (EOIR) “interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings” through its immigration judges and the Board of Immigration Appeals.¹⁹ The DOJ also retained the enforcement function to initiate action to revoke U.S. citizenship in federal courts.²⁰

The DOS, through its consulates abroad and the Office of Visa Services in D.C., holds the immigration function of issuing visas to noncitizens and passports to U.S. citizens;

¹⁴ LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 2.

¹⁵ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) §§ 428 (visa issuance), 441–46 (immigration enforcement functions), 451–62 (citizenship and immigration functions), 471–78 (general immigration provisions).

¹⁶ LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 3.

¹⁷ *See About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/aboutus> (last updated Sept. 12, 2009).

¹⁸ *Timeline*, U.S. CUSTOMS & BORDER PROTECTION, http://nemo.cbp.gov/opa/timeLine_04212011.swf (last visited Nov. 26, 2013); *About ICE: Overview*, ICE, <http://www.ice.gov/about/overview/> (last visited Nov. 26, 2013).

¹⁹ Exec. Office of Immigration Review, *About the Office*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/orginfo.htm> (last updated Oct. 2013); LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 3–4, 504.

²⁰ *See infra* Part II.D.6.

however, as a consequence of the 2001 Terrorist Attacks on September 11th, the DHS now oversees the DOS's consular visa processing at consulates.²¹

Working together, the three departments collaborate to enforce immigration law by administering immigration statuses. The following explains how these agencies classify people.

C. Classes of Immigration Status in the United States

To comprehend immigration law, one must also know the different immigration statuses.²² The three²³ main categories are (1) U.S. citizens or nationals,²⁴ (2) immigrants, commonly referred to as lawful permanent residents (LPRs),²⁵ and (3) nonimmigrants.²⁶ Citizens of the United States are either born or naturalized.²⁷ Immigrants

are noncitizens who are admitted to the United States with a privilege to permanently reside and work, and nonimmigrants are noncitizens temporarily admitted to the United States “for a specific purpose.”²⁸ It is possible to change from one status to another.²⁹

Outside of these categories are “illegal immigrants” or “illegal aliens,” who do not have formal statuses—they are simply “unlawfully present,” either by overstaying on an expired status or entering the United States without inspection and becomes an “immigration violator.”³⁰ Immigration violators are either “inadmissible aliens,” who are not qualified to enter the United States, or “deportable aliens,” who are removable from the United States.³¹ The United States denies entry to inadmissible aliens and removes deportable aliens, as it considers them to have potential “adverse impact on the nation’s health and welfare.”³²

D. Immigration and Naturalization Process³³

With this understanding of the immigration classifications, a judge advocate may now turn to how the United States enforces immigration law. To illustrate, this article follows a typical scenario of a foreigner seeking to enter the United States as a nonimmigrant.³⁴

²¹ LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 4.

²² One must be aware that “status” and “visa” are two separate authorizations. “Visa” is a U.S. consular endorsement on a passport permitting the holder to apply for admission into the United States in a particular immigration category and duration; whereas, “status” is a U.S. Customs and Border Protection (CBP) issued authorization to enter and remain in the United States in a particular classification and for an applicable period of time. See *Visa*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/tools/glossary/visa> (last visited Jan. 22, 2014); BLACK’S LAW DICTIONARY 1706 (9th ed. 2009) (“visa”).

²³ There are several other statuses such as “refugee,” “asylee,” and “temporary protective status:” however, they will not be discussed as they are in-between nonimmigrant and immigrant status.

²⁴ The INA differentiates U.S. nationals from U.S. citizens, defining “U.S. national” as being either “U.S. citizen” or “a [noncitizen] who . . . owes permanent allegiance to the United States.” INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (2012). Thus, some U.S. nationals are “born in outlying possessions” but are not citizens. INA § 308, 8 U.S.C. § 1408. U.S. nationals must naturalize to gain citizenship. See STOCK, *supra* note 4, at 10 n.6 (listing examples of U.S. noncitizen nationals born in American Samoa and Swain’s Island). People from Micronesia, the Marshall Islands, and Palau are not U.S. nationals but are permitted to join the U.S. military. E-mail from Ms. Margaret D. Stock, Esq., to author, subj: Footnotes Requested (Oct. 22, 2014, 12:40PM EST), cmt. MDS2 [hereinafter Stock e-mail].

²⁵ *Lawful Permanent Resident (LPR)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr> (last visited Jan. 22, 2014). There are also conditional permanent residents (CPRs) who receive permanent residency on a two-year conditional basis—by marriage or for entrepreneurship. *Conditional Permanent Residence*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence> (last visited Feb. 27, 2014). Many of these CPRs do serve in the military. Stock e-mail, *supra* note 24, cmt. MDS3.

²⁶ INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (listing categories of nonimmigrant statuses for foreigners who are temporarily present in the United States).

²⁷ INA § 301, 8 U.S.C. § 1401. There are also “derivative” citizens who obtain their citizenship as a child due to parents’ naturalization or a foreign-born child adopted by U.S. citizens. *Derivative Citizenship*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/tools/glossary/derivative-citizenship> (last visited, Oct. 22, 2014).

²⁸ INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (definition of “lawfully admitted for permanent residence”); INA § 101(a)(15)(A)–(V), 8 U.S.C. § 1101(a)(15)(A)–(V) (providing various nonimmigrant status for specific purpose and period of time); RUTH E. WASEM, CONG. RESEARCH SERV., RS20916, IMMIGRATION AND NATURALIZATION FUNDAMENTALS 1 (2003).

²⁹ A nonimmigrant can become a lawful permanent resident (LPR) based on her U.S. employment or familial relationship, and a LPR can seek to be naturalized once she meets the citizenship requirements. INA §§ 245 (status change from nonimmigrant to LPR), 310 (U.S. authority to naturalize foreigners), 8 U.S.C. §§ 1255, 1421. Though rare, U.S. citizens can also renounce citizenship by naturalizing in another country, joining a foreign military, accepting a foreign government position, or committing treason. INA § 349, 8 U.S.C. § 1481.

³⁰ INA § 212(a), 8 U.S.C. § 1182(a), *cited in* ROBERT C. DIVINE, IMMIGRATION PRACTICE: 2010–2011 EDITION § 10-6(f), at 10-79 (2010); LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 1140 (referring to aliens who enter without inspection as “undocumented immigrants”).

³¹ See *infra* Appendices B (Inadmissibility Grounds) & C (Deportability Grounds).

³² LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 420, 431. See generally, INA §§ 212 (“inadmissible alien”), 237 (“deportable alien”), 8 U.S.C. §§ 1182, 1227. Though “substantially similar,” inadmissibility grounds and deportable grounds are slightly different so one must be careful to review the actual statute and corresponding regulation. DIVINE, *supra* note 30, § 10-6, at 10-8.

³³ See Appendix A (Immigration and Naturalization Process) (providing graphic illustration).

³⁴ A foreigner may also immediately qualify for LPR status based on employment or family sponsorship. See *infra* Part II.D.3 discussion.

1. Issuance of U.S. Visa

Before a foreign national can be issued a visa, the U.S. consulate abroad must vet her visa eligibility and admissibility. Visa eligibility depends on the type of visa sought: some visas require USCIS's pre-approval, while others may be issued at the consulate's discretion.³⁵ To determine the admissibility of an applicant, the consulate checks the applicant's information against the Consular Lookout and Support System to see if she has committed acts that constitute inadmissible grounds under the INA.³⁶ If the individual is both eligible and admissible, the consulate will issue the nonimmigrant visa.

2. Admission to the United States

When a foreigner travels to the United States using a properly issued visa, the CBP inspection officer at the border determines whether the foreigner is "clearly and beyond a doubt entitled to be admitted."³⁷ At this stage, the officer ensures the traveler has the right documents and determines admissibility by checking the names against the Interagency Border Inspection System (IBIS)³⁸ "lookout" list.³⁹ If the officer finds the foreigner inadmissible, she may be asked to voluntarily return or be detained for removal proceeding.⁴⁰ If no issue exists, the individual is admitted to the United States as a nonimmigrant.⁴¹

³⁵ See INA §§ 214(c) (certain employment-related visas requiring U.S. Citizenship and Immigration Services (USCIS) pre-approval before applying for visa), 221 (consular officer's responsibility to issue visa), 8 U.S.C. §§ 1184(c), 1201.

³⁶ DIVINE, *supra* note 30, § 10-2(a), at 10-3 to 10-4. The system includes checks against the FBI's National Crime Information Center criminal history information and against other U.S. law enforcement and intelligence agencies' databases. *Id.*

³⁷ INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A).

³⁸ *IBIS-General Information*, U.S. CUSTOMS & BORDER PROTECTION (July 31, 2013, 3:46 PM), https://help.cbp.gov/app/answers/detail/a_id/151/~/ibis--general-information. It provides DHS inspectors access to interagency law enforcement database, including FBI National Crime Information Center and the National Law Enforcement Telecommunications Systems, which connects with all fifty states' law enforcement agencies. *Id.*

³⁹ U.S. CUSTOMS & BORDER PROTECTION, CUSTOMS AND BORDER PROTECTION (CBP) INSPECTOR'S FIELD MANUAL (FM) ch. 15.2 (Feb. 10, 2006) [hereinafter, CBP INSPECTOR'S FM] (redacted for Public Release); see also LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 503.

⁴⁰ INA §§ 239–240, 8 U.S.C. §§ 1229–1229a; see LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 504. For details on removal proceedings, see *infra* Part II.D.5 discussion.

⁴¹ In 2011, 1.9 million nonimmigrants lived in the United States. Bryan Baker, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2011*, POPULATION ESTIMATE 1 (Sept. 2012).

3. Becoming a Lawful Permanent Resident

A nonimmigrant who wants to remain in the United States indefinitely will need to become a LPR.⁴² However, she cannot simply receive a permanent residency solely by her intent to immigrate; an employer or family member must first sponsor the nonimmigrant for LPR status.⁴³ The USCIS adjudicates the U.S. sponsor's petition. Once approved, the nonimmigrant can ask the U.S. consulate to issue an immigrant visa abroad⁴⁴ (if they are not currently located within the United States) or the USCIS to adjust her status from nonimmigrant to LPR while still in the United States.⁴⁵ Then, either upon her re-entry to the United States with an immigrant visa or when the USCIS approves the adjustment, the nonimmigrant officially becomes a LPR.⁴⁶

4. Becoming a Naturalized U.S. Citizen

A LPR can live and work in the United States permanently; however, she remains subject to removal and cannot vote, sit on jury, or take a federal job (with very few exceptions).⁴⁷ To fully enjoy all the benefits of living in the

⁴² Nonimmigrants find their statuses too tenuous because most cannot be extended indefinitely and any change in circumstances (e.g., graduation or loss of job) requires a new nonimmigrant petition. See, e.g., 8 C.F.R. § 214.2(h) (2013).

⁴³ INA §§ 203(a) (family sponsored immigration), 203(b) (employment-based immigration), 8 U.S.C. §§ 1153(a), 1153(b). Though most obtain LPR status through family- or employment-based immigration, there are several other ways to obtain LPR such as diversity visa, special immigrant juvenile status, battered spouse/child, and etc. *Other Ways to Get a Green Card*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/other-ways-get-green-card> (last updated Jan. 8, 2014).

⁴⁴ This process subjects the foreigner to examination by U.S. consulate abroad and then by the CBP at the border. See *supra* Part II.D.1–2.

⁴⁵ The USCIS examines her adjustment application for inadmissibility and deportability because the bureau deems her "adjustment" as a new "admission" and reviews for deportability. See DIVINE, *supra* note 30, § 10-4, at 10-7. If denied for other than inadmissibility or deportable grounds, the applicant must seek reopening or reconsideration of the case or seek an immigrant visa from the consulate. See 8 C.F.R. § 103.5 (2013). If the denial is based on inadmissibility or deportable grounds, the USCIS can initiate removal proceeding. INA §§ 239–240, 8 U.S.C. §§ 1229–1229a. See *infra* Part II.D.5 discussion.

⁴⁶ In 2012, there were 13.3 million LPRs residing in the United States. Nancy Rytina, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Estimates of the Lawful Permanent Resident Population in 2012*, POPULATION ESTIMATE 1 (July 2013).

⁴⁷ *Compare Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited May 13, 2014) (listing a LPR's rights to live and work in the United States permanently and be protected by the laws of the United States and responsibility to pay taxes and register for selective service), and *Maintaining Permanent Residence*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence> (last visited May 13, 2014) (listing conditions in which a LPR can lose the LPR status), *with*

United States, a LPR must become a U.S. citizen.

Generally, to naturalize, a LPR must (1) be a LPR for at least five years; (2) have been physically present in the United States at least half of that time as a LPR; (3) be a person of “good moral character”⁴⁸ for five years prior to applying for naturalization; (4) have requisite knowledge of the English language and U.S. civics; and (5) be attached to the U.S. constitutional principles.⁴⁹ Noncitizens⁵⁰ with qualifying military service are eligible for military naturalization without meeting the time or residence requirements.⁵¹ The USCIS adjudicates naturalization by conducting a background investigation, interviewing the applicant under oath, and testing the applicant’s English and civics knowledge.⁵² For military naturalization, the USCIS requires a service’s certification that the noncitizen is

Citizenship Rights and Responsibilities, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> (last visited May 13, 2014) (listing U.S. citizen’s rights to vote, serve on a jury, and gain federal employment).

⁴⁸ The review of good moral character is critical as it triggers potential referral to removal proceedings based on inadmissibility or deportable grounds. See DIVINE, *supra* note 30, § 12-3(C)(1)(iv), at 12-16. The INA defines “good moral character” in the negative, enumerating what acts would render one a person not of good moral character. INA §101(f), 8 U.S.C. §1101(f). See Appendix F (Definition of “Good Moral Character”) (providing the full text). Furthermore, there are other statutory bars against naturalization, such as being a member of or affiliated with anarchist, communist, or totalitarian principles, advocating overthrow of the U.S. government, avoiding the draft, deserting the armed forces during wartime, and being discharged from the armed forces based on alienage. INA §§ 313–315, 8 U.S.C. §§ 1424–1426.

⁴⁹ INA §§ 312 (English and civics requirement), 316 (requirements for residence, good moral character, and attachment to U.S. Constitution), 8 U.S.C. §§ 1423, 1427. The spouse of a U.S. citizen has a shorter time in residence and physical presence requirements. INA § 319 (U.S. citizen spouse exceptions), 8 U.S.C. § 1430.

⁵⁰ Under a pilot military exception, a qualified nonimmigrant may also be naturalized through the Military Accessions Vital to the National Interest (MAVNI) program, now available until May 2015. See Fact Sheet, U.S. Dep’t of Def., Military Accessions Vital to the National Interest (MANVI) Recruitment Pilot (May 2012), available at <http://www.defense.gov/news/mavni-fact-sheet.pdf>; *MAVNI Program: Direct U.S. Citizenship Without Green Card*, Int’l STUDENT VOICE MAG. (May 5, 2014), <http://www.isvmag.com/05/05/mavni-program-direct-u-s-citizenship-without-green-card/5366>. On 25 September 2014, The Department of Defense further announced that it would also allow qualified undocumented aliens to enlist under this program. See Julia Preston, *Military Path Opened for Young Immigrants*, N.Y. TIMES, Sept. 25, 2014, http://www.nytimes.com/2014/09/26/us/military-path-opened-for-young-immigrants.html?_r=0.

⁵¹ INA §§ 328–329, 8 U.S.C. §§ 1439–1440; see also *supra* note 5.

⁵² Investigation includes (1) the FBI criminal background check, (2) a name check against the FBI’s Universal Index, and (3) “other inter-agency criminal background and security checks.” U.S. CITIZENSHIP & IMMIGRATION SERVS., 12 USCIS POLICY MANUAL pt. B, ch. 2, at 110 (Sept. 30, 2013) [hereinafter, USCIS POLICY MANUAL VOL. 12], available at <http://www.uscis.gov/policymanual/PDF/PolicyManual.pdf>. Though not named in the policy manual, the author suspects that IBIS is also queried in this investigation. See *supra* note 38.

serving or has served “under honorable conditions.”⁵³ If the USCIS determines that the applicant is fit for naturalization, she takes an oath of allegiance⁵⁴ similar to an enlistment oath and is naturalized.

5. Removal (Deportation) of a Noncitizen

When the USCIS, ICE, or CBP⁵⁵ determines a noncitizen inadmissible or deportable during any of the processes outlined above, they can initiate a proceeding to remove⁵⁶ the noncitizen from the United States.⁵⁷ The proceeding is “quasi-judicial [and] adversarial”⁵⁸ where both the DHS and the alien may be represented by counsel, and an immigration judge presides over the hearing.⁵⁹ Much like a criminal trial, a DHS agency serves a notice to the noncitizen alleging her inadmissible or deportable act(s), notifying the specific grounds for removal, and advising of the right to representation.⁶⁰ Unlike a criminal trial,

⁵³ INA §§ 238(e), 239(a), 8 U.S.C. §§ 1439(e), 1440(a). See *infra* Part III.B.3.

⁵⁴ 8 C.F.R. § 337.1 (2013) (the naturalization oath).

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Id.

⁵⁵ For arriving noncitizens who lack proper documents or misrepresent information to a border inspection officer, the CBP can remove such noncitizens without a removal proceeding. See INA § 235(b), 8 U.S.C. § 1225(b).

⁵⁶ In 1996, the term “remove” replaced the terms “exclude,” which only applied to aliens denied admission, and “deport,” which only applied to aliens already admitted but found deportable. LEGOMSKY & RODRÍGUEZ, *supra* note 13, at 421. Due to familiarity, however, the term “deport” is still interchangeably used with “remove.” *Id.*

⁵⁷ INA § 239, 8 U.S.C. § 1229.

⁵⁸ DIVINE, *supra* note 30, § 11-1, at 11-2.

⁵⁹ *Id.* Though aliens may be represented by counsel, Ms. Stocks notes that most do not. Stock e-mail, *supra* note 24, cmt. MDS6.

⁶⁰ CHARLES A. WIEGAND III, EXEC. OFFICE OF IMMIGRATION REV., U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF IMMIGRATION LAW 69 (Oct. 2011); INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4).

however, the burden of proof depends on the noncitizen's immigration status. If the noncitizen has not been admitted (i.e., the noncitizen evades CBP inspection and enters the United States or CBP did not grant admission upon inspection), the noncitizen must prove that she is "clearly and beyond a doubt entitled to be admitted . . ." ⁶¹ If the noncitizen has been admitted, the DHS must prove the noncitizen is removable by "clear and convincing evidence." ⁶²

During the proceeding, the immigration judge decides whether the noncitizen is removable, considers any relief from removal, and orders removal, if appropriate. ⁶³ Either party can appeal the judge's decision to the Board of Immigration Appeals (BIA). ⁶⁴ The BIA addresses both findings of fact and questions of law, providing authoritative interpretation of immigration law unless overruled by federal courts. ⁶⁵ Judicial review of BIA decisions is possible, but very limited. ⁶⁶

For noncitizen criminals, the government expedites their removal in two ways—administrative removal of aggravated felons by DHS and judicial removal by federal courts. The administrative removal applies to non-LPRs and conditional permanent residents convicted of an aggravated felony; ⁶⁷ the DHS can summarily deport these noncitizens without a removal proceeding upon their release from incarceration. ⁶⁸ Federal judges, however, can order removal of all noncitizen criminal defendants, including LPRs, as a part of an adjudged sentence. ⁶⁹ To invoke this procedure, the

prosecuting U.S. Attorney must provide notice of the intent to seek judicial removal, and both the U.S. Attorney and the DHS must jointly file the grounds of deportation prior to sentencing. ⁷⁰

6. Denaturalization: Revocation of U.S. Citizenship

Though a naturalized citizen enjoys the unfettered rights of citizenship and is no longer subject to removal, she is not completely immune from immigration consequences. ⁷¹ The U.S. government can revoke naturalization, known as "denaturalization," through civil or criminal judicial revocation processes. ⁷² For both civil and criminal processes, the U.S. Attorney must file a revocation action with the federal district court. ⁷³ The difference between the civil and criminal denaturalization is the required burden of proof—the U.S. Attorney must provide "clear, convincing, and unequivocal evidence" ⁷⁴ for a civil revocation and evidence beyond a reasonable doubt for a criminal revocation. ⁷⁵ Before the local U.S. Attorney initiates a revocation, she must consult the DOJ Civil Division's Office of Immigration Litigation. ⁷⁶ Once initiated, DOJ Criminal Division's Office of Special Investigations prepares, initiates, and prosecutes the case. ⁷⁷

⁶¹ INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2) (burden on arriving aliens and aliens present in the United States without being inspected or paroled); DIVINE, *supra* note 30, §11-1, at 11-3.

⁶² INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8 (2014) ("Burdens of Proof in removal proceedings").

⁶³ INA § 240(c), 8 U.S.C. § 1229a(c). The immigration judge may terminate the proceeding, adjust the noncitizen's status to LPR if eligible, cancel the removal of certain LPRs and nonimmigrants, or waive certain deportability grounds. DIVINE, *supra* note 30, § 11-5(c), (d), (f), (g).

⁶⁴ 8 C.F.R. § 1003.1.

⁶⁵ *Id.* § 1003.3(b); *see* DIVINE, *supra* note 30, § 11-6(a), at 11-100.

⁶⁶ DIVINE, *supra* note 30, § 11-6(b), at 11-101. Due to the complexity of federal courts' jurisdiction over immigration matters, this article does not address federal appeal processes. *See id.* § 2-2(a)(1)(I), at 2-24 to 2-32.

⁶⁷ INA § 238(c), 8 U.S.C. § 1228(c); *see infra* Appendix E (Definition of "Aggravated Felony" in the INA). Conditional permanent residents are those immigrants who receive permanent residency on a two-year conditional basis—by marriage or for entrepreneurship. *See supra* note 25. By written policy, however, the DHS does not utilize expedited removal of CPRs. Stock e-mail, *supra* note 24, cmt. GR10.

⁶⁸ INA § 238(b), 8 U.S.C. § 1228(b); DIVINE, *supra* note 30, § 11-4(h), at 11-56.

⁶⁹ INA § 238(c), 8 U.S.C. § 1228(c). This subsection was erroneously renumbered; it is supposed to be subsection (d). DIVINE, *supra* note 30, at 11-58, n.267.

⁷⁰ INA § 238(c), 8 U.S.C. § 1228(c). DIVINE, *supra* note 30, § 11-4(i), at 11-57. Often, the noncitizen defendants will agree to judicial removal as a part of the plea bargain. *Id.*

⁷¹ DIVINE, *supra* note 30, § 12-5, at 12-46.

⁷² The three civil grounds for denaturalization are (1) "illegal procurement of naturalization," (2) "concealment of a material fact or willful misrepresentation," and (3) for military-naturalized citizen, being "discharged [from service] under other than honorable conditions before serving honorably for five years." USCIS POLICY MANUAL VOL. 12, *supra* note 52, pt. L, ch. 1, at 291. Under the criminal process, one's conviction of the federal offense of procuring naturalization unlawfully results in revocation. *Id.*; 18 U.S.C. § 1425 (Procurement of citizenship or naturalization unlawfully). The USCIS has an administrative authority to reopen the naturalization "to correct, reopen, alter, modify, or vacate" a naturalization order. INA § 340(h), 8 U.S.C. § 1451(h). However, this article focuses only on the revocation.

⁷³ USCIS POLICY MANUAL VOL. 12, *supra* note 52, pt. L, ch. 1, at 291.

⁷⁴ *Kungys v. United States*, 485 U.S. 759, 767 (1988), *cited in* USCIS POLICY MANUAL VOL. 12, *supra* note 52, pt. L, ch. 1, at 291.

⁷⁵ USCIS POLICY MANUAL VOL. 12, *supra* note 52, pt. L, ch. 1, at 291.

⁷⁶ OFFICE OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, 9 UNITED STATES ATTORNEYS MANUAL § 9-73.801 (May 2010) [hereinafter 9 U.S. ATTORNEYS MANUAL], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/73mcrm.htm#9-73. In practice, Office of Immigration Litigation (OIL) initiates and prosecutes civil denaturalization cases. Stock e-mail, *supra* note 24, cmt. MDS13.

⁷⁷ 9 U.S. ATTORNEYS MANUAL, *supra* note 76. Beginning in 2010, the DHS reviews all proposed civil denaturalization actions prior to being presented to OIL and U.S. attorney's office. Stock e-mail, *supra* note 24, cmt. GR14.

Though cursory, these six agency actions provide the basics of U.S. immigration framework. With this foundation, the next part discusses how LPR and military-naturalized⁷⁸ servicemembers can suffer consequences from military adverse actions.

III. Immigration Law and Servicemembers

Except in very rare situations,⁷⁹ all servicemembers must be either U.S. citizens or LPRs due to the military's enlistment or commissioning requirements.⁸⁰ Among U.S. citizens, there are three categories: (1) citizens at birth and child citizens, (2) regular-naturalized, and (3) military-naturalized.⁸¹ Military adverse actions bear no immigration consequences to the first two citizen types.⁸² As such, this section of the article focuses on the potential immigration consequences to LPR and military-naturalized servicemembers military adverse actions.

A. Servicemembers' Immigration Consequences

Though special immigration benefits for military service exist, there is very little special protection for servicemembers from immigration consequences.⁸³ Military-naturalized and LPR servicemembers face the same immigration consequences as civilians: a LPR

⁷⁸ See *supra* note 5 (explanation of "military-naturalized").

⁷⁹ Prior to 2004, there were a few cases of illegal aliens joining the service with fraudulent documents. Mary D. Stock, *Essential to the Fight: Immigrants in the Military Eight Years After 9/11*, IMMIGRATION POL'Y CTR. SPECIAL REP. 9 n.13 (Nov. 2009), available at http://www.immigrationpolicy.org/sites/default/files/docs/Immigrants_in_the_Military_-_Stock_110909_0.pdf (citing Douglas Gillison, *The Few, the Proud, the Guilty: Marines Recruiter Convicted of Providing Fake Documents to Enlist Illegal Aliens*, VILLAGE VOICE, Oct. 11, 2005, <http://www.village-voice.com/2005-10-11/news/the-few-the-proud-the-guilty/>). Since 2004, the armed services verify a noncitizen recruit's status via the USCIS database. STOCK, *supra* note 4, at 15 n.33.

⁸⁰ 10 U.S.C. §§ 504 (requiring U.S. citizenship, LPR, or U.S. nationality for enlistment in the armed forces), 532 (requiring U.S. citizenship for receiving regular commission in the armed forces unless Secretary of Defense waives for LPRs and U.S. nationals) (2012).

⁸¹ See *supra* Part II.D.4 and notes 5 & 24.

⁸² Again, U.S. citizens, regardless of whether by birth or by regular naturalization, can lose their citizenship by certain acts such as formal renunciation or foreign naturalization. See *supra* note 72. For regular-naturalized citizens, it may be possible that a military adverse action may reveal one's illegal procurement or willful misrepresentation to procure naturalization; however, the underlying conduct is not military-specific. Therefore, these topics are beyond the scope of this article.

⁸³ STOCK, *supra* note 4, at 81; Stock e-mail, *supra* note 24, cmt. MDS9 ("There are some limited protections such as military naturalization and the [Servicemembers'] Civil Relief Act."). There is, however, a limited protection for noncitizen servicemembers from removal when traveling in and out of the United States while on official military orders. 8 C.F.R. § 235.1(c) (2013).

servicemember may be removed based on deportable grounds or be denied naturalization for lack of good moral character or other statutory bar, and a military-naturalized servicemember may be denaturalized for receiving an other than honorable (OTH) discharge.⁸⁴

One should note that military adverse actions do not automatically result in these immigration consequences.⁸⁵ Removal, naturalization denial, and denaturalization require federal immigration authorities to affirmatively pursue these actions.

A military adverse action may trigger these consequences when it evidences the grounds for them. Therefore, to identify the military adverse actions with immigration consequences, a judge advocate must first examine the criteria for the three consequences.

1. Removal of LPR Servicemembers

As pointed out by the Supreme Court, removal is the gravest immigration consequence a LPR servicemember can suffer.⁸⁶ A LPR servicemember becomes removable when she commits an act that constitutes a ground for removal under one of six categories.⁸⁷ Among these grounds, two grounds warrant discussion because they are the most common deportable category is used to remove foreigners⁸⁸ and military adverse actions are likely to trigger them: (a) conviction-based removal grounds; and (b) conduct-based removal grounds.⁸⁹

a. Conviction-Based Removal Grounds

A LPR servicemember becomes removable when her qualifying criminal conviction matches an enumerated criminal offense in the INA. There are twelve enumerated offense types: crimes involving moral turpitude (CIMT); multiple CIMTs; multiple convictions resulting in more than

⁸⁴ See *supra* note 72 and Part II.D.4.-6.

⁸⁵ STOCK, *supra* note 4, at 87.

⁸⁶ See *supra* note 1 and accompanying text.

⁸⁷ INA § 237(a), 8 U.S.C. § 1227(a) (2012); see *infra* Appendix C (Deportability Grounds). The six categories are (1) immigration law violation; (2) deportable criminal offenses; (3) security related grounds; (4) failure to comply with immigration registration requirements or falsely claiming citizenship; (5) public charge; and (6) unlawful voter. *Id.*

⁸⁸ In 2012, 47.6 percent of total removal were based on criminal grounds. John F. Simanski & Lesley M. Sapp, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Action: 2012*, ANNUAL REPORT tbl.7, at 6 (Dec. 2013).

⁸⁹ OFFICE OF IMMIGRATION LITIG., U.S. DEP'T OF JUSTICE, IMMIGRATION CONSEQUENCES FOR CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY 7-18 (2010) [hereinafter USDOJ-OIL MONOGRAPH].

five years sentence; aggravated felonies; drug offenses; firearm-related offenses; espionage, treason, or related security offenses; domestic violence offenses (including stalking and child abuse); sex offender registration failures; protective order violations; high speed flights from border checkpoint; and alien registration violations.⁹⁰

Determining whether a conviction triggers removal is a complex task due to ambiguous statutory definitions, resulting in a wide breadth of case law with diverse circuit rulings.⁹¹ Research of case law is necessary to determine whether the military adverse action is a conviction for immigration purposes.⁹² If it is a conviction for immigration purposes, then one must decide whether the conviction (1) contains an element of moral turpitude, (2) matches elements of generic crimes listed as an aggravated felony, or (3) matches the other enumerated crimes in the INA.⁹³ If the adverse action does not qualify as a conviction, then it may still trigger conduct-based removal grounds.

b. Conduct-Based Removal Grounds

This ground for removal is triggered solely by the LPR's conduct—it is triggered when the LPR servicemember admits to conduct constituting an enumerated crime or when DHS reasonably finds that the LPR servicemember committed such a crime. Under this category, there are fourteen types of prohibited conduct: CIMT; drug abuse and trafficking; prostitution; fraud or misrepresentation; falsely claiming U.S. citizenship; alien smuggling; marriage fraud; human trafficking; money laundering; espionage, sabotage or treason; terrorism; unlawful voting; polygamy; and international child abduction. Similar to conviction-based removal, analysis of the elements of the prohibited conduct is required to determine whether the adverse action evidences the LPR

servicemember having committed them.⁹⁴

2. Naturalization Denial of LPR Servicemembers

Unlike removal, a naturalization denial does not seem as dire a consequence given that the LPR servicemember is not being removed (unless the basis of denial also triggers the removal grounds); however, due to the U.S. citizenship requirement in order to obtain a security clearance⁹⁵ and other benefits as a U.S. citizen,⁹⁶ such a consequence is detrimental. The DHS has broad authority to deny naturalization for lack of “good moral character,” which is evidenced either by enumerated conduct or by the agency's discretion.⁹⁷ There are also statutory bars to naturalization: desertion from the military permanently bars one's naturalization; an OTH or punitive discharge bars one from receiving military naturalization; discharge from service due to being an alien permanently bars one from naturalizing later, and a conscientious objector discharge, even an honorable one, bars one from receiving wartime military naturalization.⁹⁸

3. Denaturalization of Military-Naturalized Servicemembers

Like civilians or servicemembers who naturalized under regular processes, military-naturalized servicemembers can be denaturalized for illegally procuring or willfully misrepresenting facts to obtain naturalization.⁹⁹ Interestingly, there is an additional ground to denaturalize a military-naturalized servicemember—being separated from the service “under other than honorable conditions before the person has served honorably for a period or periods aggregating five years.”¹⁰⁰ The DHS does not make an independent determination of one's service but relies on the armed force's characterization of service from the DD Form 214 to determine whether one served honorably for naturalization purposes.¹⁰¹ Hence, a military-naturalized servicemember who receives a punitive discharge at a court-

⁹⁰ *Id.* at 7–11. Technically, these crimes are divided between deportable and inadmissible criminal convictions; however, for the purpose of determining removability, they are applied equally. Hence, this article does not distinguish them. For the definition of a crime of moral turpitude, see Appendix D of this article.

⁹¹ Major Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Service Members Who Are Not United States Citizens*, 51 NAVAL L. REV. 53, 57 (2005); USDOJ-OIL MONOGRAPH, *supra* note 89, at 6–25, app. D.

⁹² Belliss, *supra* note 91, at 56–57.

⁹³ *Id.* at 57–63 (explaining how to determine whether a crime is a crime involving moral turpitude, aggravated felony, and other deportable offenses); USDOJ-OIL MONOGRAPH, *supra* note 89, app. D (providing excellent summary of the two-step process called “categorical” and “modified categorical” approaches used by federal courts and Board of Immigration Appeals (BIA) to determine whether a particular federal or state conviction matches the generic definition of criminal grounds for removal as well as a “circumstance-specific” approach for non-generic criminal grounds for removal). See *infra* note 151 (explaining these approaches).

⁹⁴ USDOJ-OIL MONOGRAPH, *supra* note 89, at 7, 11–18.

⁹⁵ U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 3-22a (14 Jan. 2014).

⁹⁶ See *supra* note 47 and accompanying text.

⁹⁷ INA §§ 212(f), 316, 8 U.S.C. §§ 1101(f), 1427 (2012); see *supra* note 48 and *infra* Appendix F.

⁹⁸ INA §§ 314–315, 328–329, 8 U.S.C. §§ 1425–1426, 1439–1440 (2012). See also *supra* note 5 and accompanying text.

⁹⁹ See *supra* Part II.D.6.

¹⁰⁰ INA §§ 328–329, 8 U.S.C. §§ 1439–1440; see also STOCK, *supra* note 4, at 57.

¹⁰¹ See 8 C.F.R. §§ 328.1, 329.1 (2013).

martial or is separated with an OTH discharge may face denaturalization; however, such instance is extremely rare as there have only been two reported cases with only one resulting in denaturalization.¹⁰²

B. Military Adverse Actions with Immigration Consequences

Given the above criteria, the following military adverse actions may have immigration consequences: (1) conviction at a general or special court-martial; (2) non-judicial punishment; and (3) administrative separation.¹⁰³

1. Court-Martial Convictions

Just like civilian convictions, court-martial convictions may result in removal, naturalization denial, or denaturalization. Whether a court-martial conviction triggers such consequence depends on (a) the level of court-martial, (b) the substance of the crime, and (c) the possible and adjudged punishment for the crime.¹⁰⁴

a. The Level of Court-Martial

For immigration purposes, a “conviction” is defined as a “formal judgment of guilt . . . entered by a court”¹⁰⁵ and must be a result of “a trial . . . whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal.”¹⁰⁶ It is accepted that general and special court-martial convictions qualify as a “conviction” for immigration purposes.¹⁰⁷

¹⁰² There are only two denaturalization cases based on other than honorable discharge from the armed forces, and only one resulted in denaturalization. See *United States v. Sommerfeld*, 211 F. Supp. 493, 495 (E.D. Pa. 1962) (denaturalizing an Air Force veteran who received dishonorable discharge); see also *United States v. Tarantino*, 122 F. Supp. 929, 932 (E.D.N.Y. 1954) (denying denaturalization of an Army veteran who received dishonorable discharge).

¹⁰³ STOCK, *supra* note 4, at 59–60, 80. There are other adverse actions such as administrative reprimand or counseling that may create an official document that evidences servicemember’s misconduct; however, they are unlikely to trigger immigration consequences unless they become a matter of public record. *Id.* at 59–60.

¹⁰⁴ See *id.* at 60–65.

¹⁰⁵ INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); see STOCK, *supra* note 4, at 57.

¹⁰⁶ *In re Eslamizar*, 23 I. & N. Dec. 684, 687 (BIA 2004) (holding that conviction at an Oregon violation proceedings without counsel is not a conviction for immigration purposes).

¹⁰⁷ See *In re Rivera-Valencia*, 241 I. & N. Dec. 484 (BIA 2008) (holding that the alien’s general court-martial conviction for carnal knowledge is conviction for immigration purposes); see also Gregory E. Fehlings, *Deportation as a Consequence of a Court-Martial Conviction*, 7 GEO.

The Supreme Court has ruled that a summary court martial (SCM) is not a criminal proceeding; therefore, SCM convictions do not qualify as convictions for immigration purposes.¹⁰⁸ Nevertheless, SCM convictions resulting from military law enforcement investigations may raise a conduct-based removal issue or impact a naturalization because such conviction is reportable to the FBI as a criminal record.¹⁰⁹ The DHS may seek removal for the underlying conduct or deny naturalization for lack of good moral character based on a LPR servicemember’s criminal record entry stating “[s]ubject found guilty by [SCM].”¹¹⁰

b. Substance of the Crime

As stated in Part III.A.1.a., to trigger immigration consequences, a court-martial conviction must be for certain crimes, as enumerated in the INA.¹¹¹ The elements of crimes under Uniform Code of Military Justice (UCMJ) must be evaluated to determine whether they match those of enumerated crimes.¹¹² As a starting point, a judge advocate can refer to Appendix G of this article (UCMJ Offenses and Potential Immigration Consequences) for UCMJ offenses with potential immigration consequences.

c. The Possible or Adjudged Punishment

Lastly, a court-martial conviction can trigger immigration consequences based on the maximum allowable

IMMIGR. L.J. 295 (June 1993) (explaining that the additional constitutional safeguards for the military accused have made general and special court-martial convictions qualifying under the INA).

¹⁰⁸ INA § 101(a)(48), 8 U.S.C. § 1101(a)(48); see Fehlings, *supra* note 107, at 300 (citing *Middendorf v. Henry*, 425 U.S. 25, 34 (1976)).

¹⁰⁹ U.S. DEP’T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 4-10 (30 Mar. 2007) [hereinafter AR 190-45]; U.S. DEP’T OF DEF., INSTR. 5505.11, FINGERPRINTING CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS enclosures 2, 3 ¶ 2.b.(1) (9 July 2010) (C1, 3 May 2011) [hereinafter DODI 5505.11] (requiring reporting of summary court-martial convictions when resulting from a Department of Defense (DOD) law enforcement investigation); see STOCK, *supra* note 4, at 63.

¹¹⁰ DODI 5505.11, *supra* note 109, enclosure 4, para. 2.d.(1)–(2). *E.g.*, a summary court-martial conviction for wrongful use of controlled substance may trigger the deportable ground of being a “drug abuser or addict” without having a criminal conviction. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

¹¹¹ See *infra* Appendices B, C, F. For denaturalization, the substance of the crime is irrelevant so long as one receives a punitive discharge—a discharge worse than under other than honorable conditions. See *supra* Part III.A.3.

¹¹² See Belliss, *supra* note 91, at 57–63 (explaining how to determine whether a crime is a crime involving moral turpitude, aggravated felony, and other deportable offenses); USDOJ-OIL MONOGRAPH, *supra* note 89, app. D (providing a two-step process used to determine immigration consequences of a conviction).

sentence or the actual sentence adjudged.¹¹³ Researching the specific grounds for removal is essential to determine whether the ground is triggered by the possible sentence or the sentence actually adjudged.¹¹⁴ Furthermore, a punitive discharge may result in a servicemember's denaturalization (though improbable).¹¹⁵

Court-martial convictions are reported to the ICE under its Criminal Alien Program.¹¹⁶ The ICE routinely seeks out noncitizens with deportable crimes while they are incarcerated in federal, state, and local prisons, and arranges to remove them upon release from incarceration.¹¹⁷ Noncitizen servicemembers in military correctional facilities fall under this program—military correctional facilities cooperate with ICE by forwarding information on noncitizen prisoners who may be deportable.¹¹⁸

2. Non-Judicial Punishment

Unlike court-martial convictions, non-judicial punishment (NJP)¹¹⁹ is not a “conviction” for immigration purposes and is not deemed a criminal conviction.¹²⁰ Like the SCM conviction, however, all field-grade NJPs resulting from military law enforcement investigations are reportable to the FBI.¹²¹ The DHS may find a conduct-based removal basis or make a negative good moral character determination based on such criminal record.¹²²

¹¹³ Compare INA § 212(a)(2)(B) (stating that an alien is inadmissible when he is “convicted of two or more offenses . . . for which the aggregate sentences to confinement were 5 years or more”), with *id.* § 237(a)(2)(A)(i)(II) (stating that an alien is deportable when he is “convicted of a crime for which a sentence of one year or longer may be imposed”).

¹¹⁴ For a good research starting point, the readers should review USDOJ-OIL MONOGRAPH, *supra* note 89.

¹¹⁵ See *supra* Part III.A.3 & note 101.

¹¹⁶ U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITIES enclosures 2, ¶ 2.d. (11 Mar. 2013) [hereinafter DODI 1325.07].

¹¹⁷ *Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program/> (last visited Jan. 30, 2014).

¹¹⁸ DODI 1325.07, *supra* note 116, enclosures 2, ¶ 2.d.

¹¹⁹ UCMJ art. 15 (2012).

¹²⁰ See *supra* note 105 and accompanying text; see also STOCK, *supra* note 4, 58–59.

¹²¹ AR 190-45, *supra* note 109, para. 4-10; DODI 5505.11, *supra* note 109, enclosures 2, 3 ¶ 2.b.(1).

¹²² STOCK, *supra* note 4, at 59 n.5. “[Nonjudicial punishment] can affect a good moral character determination not because they are convictions, but because U.S. Citizenship and Immigration Services (USCIS) is permitted to use its discretion when deciding whether someone has good moral character.” *Id.*

3. Administrative Separation

An administrative separation may result in immigration consequence depending on the characterization of service upon discharge, the underlying conduct, or a statutory requirement that bars certain immigration benefits for certain types of military discharges: An OTH discharge is a basis for denaturalization of military naturalized servicemembers;¹²³ a noncitizen servicemember's underlying conduct may evidence a conduct-based removal ground or a lack of good moral character;¹²⁴ and a conscientious objector discharge bars wartime military naturalization.¹²⁵

IV. Guidance to Judge Advocates

When handling military adverse actions, judge advocates must identify these immigration consequences and competently advise their respective clients. The following provides counsel with guidelines for determining a servicemember's immigration status and more specific guidance for defense and trial counsel.

A. General Guidance

For every military adverse action, judge advocates must first ascertain the servicemember's immigration status to determine whether there are potential immigration consequences. A noncitizen servicemember is easily identified due her personnel records listing her country of citizenship (though, with any military records, subject to error).¹²⁶ To ensure accuracy, one should review the enlistment contract, which also contains citizenship information.¹²⁷ The harder task is identifying whether a person is a born or naturalized U.S. citizen, and if she is naturalized, whether naturalized under regular naturalization process or military naturalization process.

¹²³ INA §§ 328(f), 329(c), 8 U.S.C. §§ 1439(f), 1440(c) (2012) (denaturalization for OTH discharge). One should note that there is no reported case of denaturalization solely based on an OTH characterization of service; however, it remains a potential consequence to a military naturalized servicemember.

¹²⁴ STOCK, *supra* note 4, at 67; see *supra* Parts III.A.1.b and III.A.2.

¹²⁵ INA § 329(a), 8 U.S.C. § 1440(a) (conscientious objector bar to wartime naturalization); see *supra* Part III.A.2.

¹²⁶ For example in the Army, section IV of the Enlisted or Officer Record Brief provides the country of citizenship. Ms. Stock points out that these records often have errors, listing derivative citizens as non-U.S. citizens and listing noncitizens as U.S. citizens. Stock e-mail, *supra* note 24, cmt. MDS13.

¹²⁷ U.S. Dep't of Def., DD Form 1966/1, Record of Military Processing—Armed Forces of the United States sec. I, box 5 (Aug. 2011), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd1966.pdf>.

Short of asking the individual, one can distinguish U.S. citizens by using the following methods. First, the service records may contain a U.S. birth certificate (indicating U.S.-born citizenship) or naturalization certificate (indicating naturalization). Second, service records may contain certification for honorable service, indicating military naturalization.¹²⁸ Lastly, if the servicemember joined under the Military Accessions Vital to the National Interest program, the individual is a military-naturalized citizen.¹²⁹

As immigration practice is complex, one should find an immigration law expert for consultation. In some cases, it is helpful to establish a relationship with the DHS agencies (USCIS, CBP, or ICE) and, the local U.S. Attorney's office.¹³⁰ The American Immigration Lawyers Association also has a military assistance program that assists judge advocates and servicemembers dealing with complex immigration matters.¹³¹ Within each service's legal assistance division, there are subject matter experts as well.¹³²

B. Defense Counsel

After *Padilla*, defense counsel are aware of the need to counsel a noncitizen accused of potential immigration consequences.¹³³ The fix created by the trial judiciary, however, is under-inclusive as it only applies to courts-martial and noncitizen servicemembers. Defense counsel must also advise military-naturalized servicemembers with less than five years of honorable service of the potential for denaturalization when pleading guilty to offenses with a punitive discharge potential or when being administratively separated with an OTH.¹³⁴

For LPR servicemembers, defense counsel should not only be concerned with the conviction but also the resulting documentation of misconduct through SCM, NJP, or

administrative separations that may trigger conduct-based removal.¹³⁵ By using the appendices and the statutes cited therein, counsel can identify potential immigration consequences. Also, defense counsel should tailor pretrial agreements to avoid immigration consequences.¹³⁶

C. Government Counsel

For the government, the immigration consequences provide "significant advantage" in negotiating pretrial agreements with affected accused.¹³⁷ The accused is more likely to be cooperative to avoid possible removal.¹³⁸ When facing a LPR accused, trial counsel should review whether any of the UCMJ offenses may constitute removable grounds. For a military-naturalized accused, trial counsel should ensure that the accused is provident of potential denaturalization when pleading guilty to offenses that carry the possibility of a punitive discharge. Lastly, counsel must advise commanders to notify the ICE and DOJ Civil Division's Office of Immigration Litigation when a military-naturalized servicemember is discharged under other than honorable conditions and seek denaturalization through the local U.S. Attorney's office when warranted.¹³⁹ For the Army, regulation requires commanders to report qualifying instances to the federal immigration authorities.¹⁴⁰

V. Conclusion

¹³⁵ See STOCK, *supra* note 4, at 58–59, 63, 67.

¹³⁶ Belliss, *supra* note 91, at 84. Though one may seek post-trial relief under Article 60, UCMJ to alleviate the conviction sentence, the DHS may still pursue removal based on the conviction, regardless of suspension of a sentence. USDOJ-OIL MONOGRAPH, *supra* note 89, app. C; UCMJ art. 60 (2012).

¹³⁷ Vivian Chang, *Where Do We Go from Here: Plea Colloquy Warnings and Immigration Consequences Post-Padilla*, 45 U. MICH. J.L. REFORM 189, 194 (2011) ("Prosecutors in particular have utilized this relationship between criminal and immigration law, often to their significant advantage. If a prosecutor is aware of a defendant's noncitizen status, he or she is able to start off plea negotiations in a particularly powerful position, because noncitizen defendants may be interested in serving longer sentences in order to avoid adverse immigration consequences, or vice versa.")

¹³⁸ *Id.* at 194.

¹³⁹ U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 1-39 (6 June 2005) (RAR 6 June 2011) [hereinafter AR 635-200]. One should note that the regulation still refers to the obsolete Immigration & Naturalization Service, which were dismantled when the DHS immigration agencies were created. See *supra* Part II.B. Hence, until the regulation is updated with a new point of contact, the author recommends sending the notice to the ICE, DOJ's Office of Immigration Litigation, and the local U.S. Attorney's office for action.

¹⁴⁰ AR 635-200, *supra* note 139, para. 1-39.

¹²⁸ U.S. Citizenship & Immigration Services, Form N-426, Request for Certification of Military or Naval Service (Apr. 30, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/n-426.pdf>.

¹²⁹ See *supra* note 50.

¹³⁰ STOCK, *supra* note 4, at 72; Belliss, *supra* note 91, at 88–89. Ms. Stocks does warn that the DHS agencies are not necessarily well-versed in military immigration benefits. Stock e-mail, *supra* note 24, cmt. MDS15.

¹³¹ AILA Military Assistance Program, AM. IMMIGR. LAW. ASS'N (Dec. 19, 2007), <http://www.aila.org/content/default.aspx?docid=24108>. For more information on AILA Military Assistance Program contact, Ms. Michelle Singleton, at msingleton@aila.org. *Id.*

¹³² E.g., Mr. Terry Spearman, XVIII Airborne Corps Legal Assistance Office, is such an expert within the Army legal community.

¹³³ See *supra* note 3 and accompanying text.

¹³⁴ INA §§ 328–329, 8 U.S.C. §§ 1439–1440 (2012); see also STOCK, *supra* note 4, at 57.

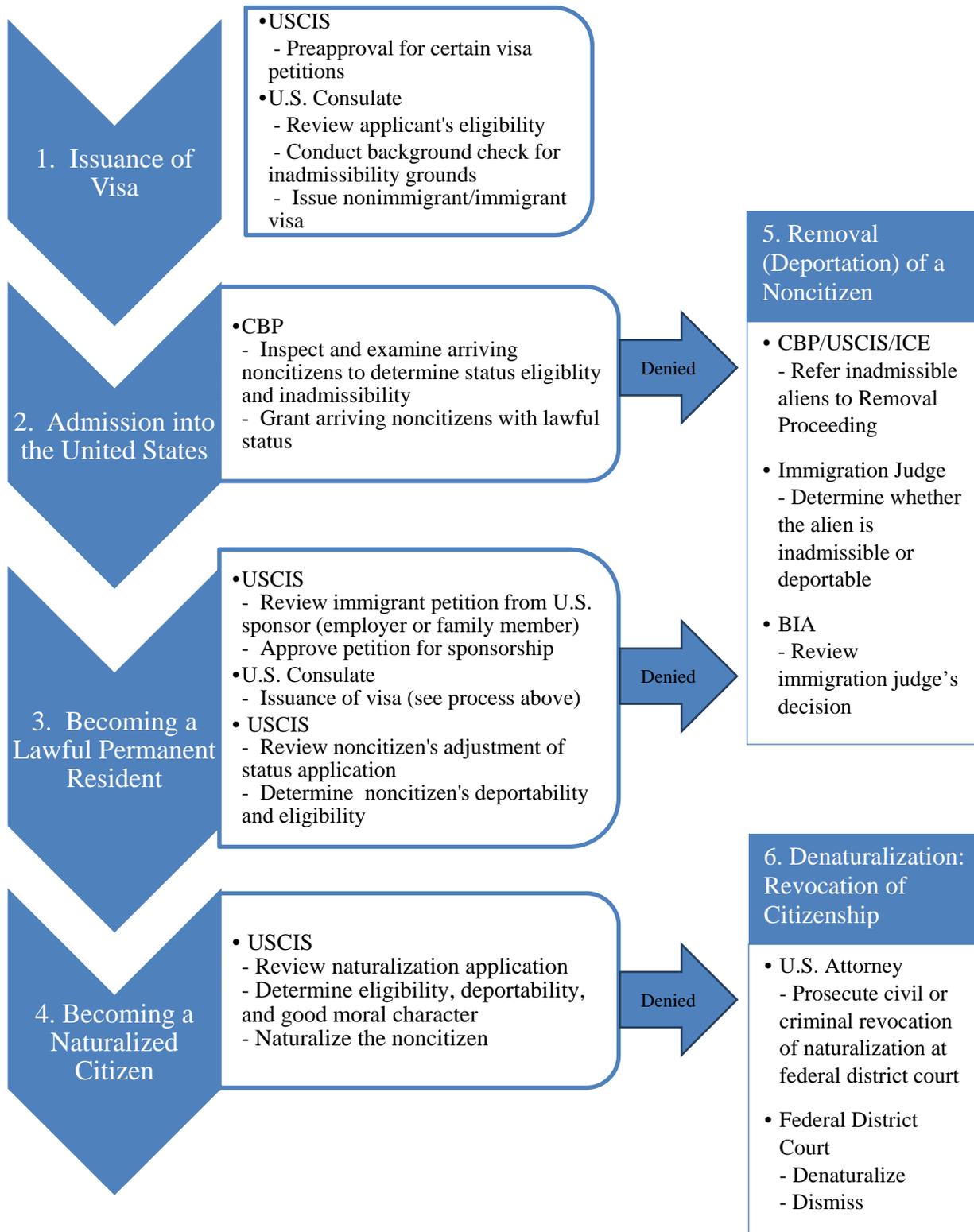
Likened to a Greek mythological maze, immigration law is extremely complex.¹⁴¹ But in light of *Padilla* and the potentially devastating consequences of failing to understand the nuances in immigration law, judge advocates must be aware of the potential immigration consequences of military adverse actions. Defense counsel can no longer fail to advise LPR and military-naturalized clients of the impact an adverse action may have on their immigration status. Trial counsel must also take care to know the accused's status and

the potential immigration consequences. Justice requires servicemembers be given fair notice of the consequences of their actions, but also demands such consequences be carried out when they commit acts deserving removal or denaturalization.

¹⁴¹ *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (“This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”).

Appendix A

Immigration and Naturalization Process¹⁴²



¹⁴² See *supra* Part II (explaining the immigration process).

Appendix B

Inadmissibility Grounds

Health-related grounds (INA § 212(a)(1), 8 U.S.C. § 1182(a)(1))

- Possessing communicable disease of public health significance
- Failing to present documentation of having received vaccination against vaccine-preventable diseases
- Having or had a physical or mental disorder and behavior associated with the disorder that may pose, or has posed
- Being a drug abuser or addict

Criminal and related grounds (INA § 212(a)(2), 8 U.S.C. § 1182(a)(2))

- Being convicted of or admits having committed/committing acts constituting the essential elements of “a crime involving moral turpitude” or drug offense
- Being convicted of two or more offenses resulting in the aggregate sentence of five years or more
- Being or having been a drug trafficker
- Having engaged in or procured prostitution (within ten years)
- Coming to engage in unlawful commercialized vice
- Having previously asserted immunity for a serious criminal offense in the United States
- Having violated religious freedom as a foreign government official
- Committing human trafficking offenses inside or outside the United States
- Engaging in money laundering

Security and related grounds (INA § 212(a)(3), 8 U.S.C. § 1182(a)(3))

- Being a national security threat such as espionage, sabotage, export control violation, and overthrow of U.S. Government
- Engaging in or having engaged in “terrorist activity” including representing organizations promoting terrorism
- Potentially causing serious adverse consequences to U.S. foreign policy
- Having a present or past voluntary membership in Communist or totalitarian party
- Participating in Nazi persecution, genocide, torture, or extrajudicial killing
- Recruiting child soldiers

Public charge (INA § 212(a)(4), 8 U.S.C. § 1182(a)(4))

- Being likely to “become primarily dependent on government for subsistence”¹⁴³

Labor certification and qualifications for certain immigrants (INA § 212(a)(5), 8 U.S.C. § 1182(a)(5))

- Lacking Department of Labor certification that there are no qualifying U.S. residents to perform the labor that the alien seeks to fill (for employment based immigrants)

Illegal entrants and immigration violators (INA § 212(a)(6), 8 U.S.C. § 1182(a)(6))

- Being present in the United States without being admitted or paroled
- Failing to attend removal proceeding
- Procuring immigration benefits through willful misrepresentation or fraud
- Falsely claiming U.S. citizenship
- Being a stowaway
- Smuggling other aliens into the United States illegally
- Abusing student visa status

Documentation requirements (INA § 212(a)(7), 8 U.S.C. § 1182(a)(7))

- For immigrants, not possessing valid documents for admission (e.g., unexpired immigrant visa, reentry permit, border

¹⁴³ See *Public Charge*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 3, 2009), <http://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>.

crossing ID card, or other documents)

- For nonimmigrants, not possessing passport valid for at least six months or the proposed duration of the stay in the United States or not possessing an unexpired nonimmigrant visa

Ineligible for citizenship (INA § 212(a)(8), 8 U.S.C. § 1182(a)(8))

- Having evaded training or service in the armed forces during wartime

Aliens previously removed (INA § 212(a)(9), 8 U.S.C. § 1182(a)(9))

- Having been ordered removed under removal proceedings within five (for first time removal) or twenty years (for subsequent removal) of entry
- Having been unlawfully present in the United States within three (if unlawfully present more than 180 days but less than one year) or ten years (if unlawfully present one year or more)

Miscellaneous (INA § 212(a)(10), 8 U.S.C. § 1182(a)(10))

- Practicing polygamy
- Being a guardian to an inadmissible alien who is certified as helpless
- Abducting or supporting an abduction of a child whose custody belongs to a U.S. citizen
- Unlawfully voting in a U.S. federal, state, or local election, initiative, recall, or referendum
- Having renounced U.S. citizenship to avoid taxation

Appendix C

Deportability Grounds

Violation of Immigration Law (INA § 237(a)(1), 8 U.S.C. §1227(a)(1))

- Being inadmissible at the time of entry or adjustment of status
- Being present in the United States unlawfully
- Violating or failing to maintain one's nonimmigrant status or condition of entry
- Being terminated of conditional permanent residence
- Smuggling aliens
- Procuring one's visa through marriage fraud

Criminal offenses (INA § 237(a)(2), 8 U.S.C. §1227(a)(2))

(A) General crimes.

- Being convicted of a "crime of moral turpitude" with a possible sentence of one year confinement or more within five years of admission
- Being convicted of "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial"
- Being convicted of an "aggravated felony at any time after admission"
- Being convicted of a federal offense "relating to high speed flight from an immigration checkpoint"
- Being convicted of a federal offense for failing to register as a sex offender

(B) Controlled substances.

- Being convicted of a drug offense (federal, state, or foreign), except single possession of marijuana (less than 30 grams), any time after admission
- Being a drug abuser or addict any time after admission

(C) Certain firearm offenses.

- Being convicted of a firearms or explosives offense at any time after admission

(D) Miscellaneous crimes.

- Being convicted of any federal criminal offense relating to espionage (18 U.S.C. ch. 37), sabotage (18 U.S.C. ch. 105), treason or sedition(18 U.S.C. ch. 115) with a maximum penalty of five years or more confinement
- Being convicted of threatening the President (or his successor)(18 U.S.C. § 871) or invading a friendly nation (18 U.S.C. § 960)
- Being convicted of violating the Military Selective Service Act¹⁴⁴ or the Trading with the Enemy Act¹⁴⁵
- Being convicted of violating travel document fraud (INA §215) or importing "aliens for [an] immoral purpose" (INA § 278)

(E) Domestic violence crimes.

- Being convicted of "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment"
- Violating a court-ordered protection order

(F) Human traffickers.

- Committing a human trafficking offense whether inside or outside the United States

¹⁴⁴ 50 U.S.C. app. §§ 451–473 (2012).

¹⁴⁵ *Id.* app. §§ 1–44.

Failure to register and falsification of documents (INA § 237(a)(3), 8 U.S.C. §1227(a)(3))

- Failing to file change of address with USCIS
- Being convicted of falsifying registration information, violating the Alien Registration Act of 1940, the Foreign Agents Registration Act of 1938, or any federal offense relating to fraud and misuse of visas, permits, or other entry documents (18 U.S.C. § 1546)
- Being ordered deportable for document fraud
- Falsely claiming U.S. citizenship for any purpose or benefit

Security and related grounds (INA § 237(a)(4), 8 U.S.C. § 1227(a)(4))

- Having engaged or engaging in unlawful acts involving espionage, sabotage, export control violation, endangering public safety/national security, or overthrowing the U.S. government
- Having engaged or engaging in “terrorist activity,” including representing organizations promoting terrorism
- Potentially causing serious adverse consequences to U.S. foreign policy
- Participating in Nazi persecution, genocide, torture, or extrajudicial killing
- Having violated religious freedom as a foreign government official
- Recruiting child soldiers

Public charge (INA § 237(a)(5), 8 U.S.C. § 1227(a)(5))

- Being likely to “become primarily dependent on government for subsistence”¹⁴⁶

Unlawful voters (INA § 237(a)(6), 8 U.S.C. § 1227(a)(6))

- Unlawfully voting in a U.S. federal, state, or local election, initiatives, recall, or referendum

¹⁴⁶ *Public Charge*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 3, 2009), <http://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>.

Appendix D

Definition of “Crime Involving Moral Turpitude” (CIMT)

The Immigration and Nationality Act (Title 8, U.S. Code) does not define CIMT; hence, following are excerpts from relevant agencies defining CIMT for their adjudication purposes.

U.S. Department of Justice, Immigration Judge Benchbook

“[] Crimes Involving Moral Turpitude

An alien convicted of, or who admits having committed, or who admits committing acts which constitutes the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A)(i)(I) of the [INA].

Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or society in general. *See In re Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994). Moral turpitude also has been defined as an act which is *per se* morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. *See In re Torres-Varela*, 23 I. & N. Dec. 78, 85 (BIA 2001); *see also In re Franklin*, 20 I. & N. Dec. at 868; *In re Fualaau*, 21 I. & N. Dec. 475 (BIA 1996). The seriousness of a criminal offense, the severity of the sentence imposed, or the particular circumstances of the crime's commission do not determine whether the crime involves moral turpitude. *In re Serna*, 20 I. & N. Dec. 579, 581 (BIA 1992); *In re Short*, 20 I. & N. Dec. 136, 137 (BIA 1989).

To determine whether a specific crime constitutes a crime involving moral turpitude, the immigration judge may look to the language of the statute defining the crime, the specific elements of the offense, and the record of conviction. *See In re Torres-Varela*, 23 I. & N. Dec. at 84; *In re L-V-C-*, 22 I. & N. Dec. 594 (BIA 1999); *In re Y-*, 1 I. & N. Dec. 137 (BIA 1941). This approach is analogous to the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990).

When a statute is divisible, that is, some of the prohibited conduct involves moral turpitude and some does not, then the judgment of conviction may be consulted to determine the nature of the underlying offense (*In re Vargas*, 23 I. & N. Dec. 651 (BIA 2004)) and if necessary, to authoritative court decisions in the convicting jurisdiction that elucidate the meaning of equivocal statutory language. *See In re Olquin*, 23 I. & N. Dec. 896, 897 n.1 (BIA 2006). A probation report cannot be considered in making the determination. *See In re Y-*, 1 I. & N. Dec. 137 (BIA 1941).”¹⁴⁷

¹⁴⁷ Exec. Office of Immigration Rev., *Immigration Judge Benchbook*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/vll/benchbook/templates/benchbook%20law%20on%20inadmissibility%20and%20removability.htm> (last visited Jan. 29, 2014).

“9 FAM 40.21(a) N2.1 Evaluating Moral Turpitude Based Upon Statutory Definition of Offense and U.S. Standards

To render an alien inadmissible under INA 212(a)(2)(A)(i)(I) (8 U.S.C. 1182(a)(2)(A)(i)(I)), the conviction must be for a statutory offense which involves moral turpitude. The presence of moral turpitude is determined by the nature of the statutory offense for which the alien was convicted, and not by the acts underlying the conviction. Therefore, evidence relating to the underlying act, including the testimony of the applicant, is not relevant to a determination of whether the conviction involved moral turpitude except when the statute is divisible (see 9 FAM 40.21(a) N6.2) or a political offense (see 9 FAM 40.21(a) N10). The presence of moral turpitude in a statutory offense is determined according to United States law.

9 FAM 40.21(a) N2.2 Defining ‘Moral Turpitude’

Statutory definitions of crimes in the United States consist of various elements, which must be met before a conviction can be supported. Some of these elements have been determined in judicial or administrative decisions to involve moral turpitude. A conviction for a statutory offense will involve moral turpitude if one or more of the elements of that offense have been determined to involve moral turpitude. The most common elements involving moral turpitude are:

- (1) Fraud;
- (2) Larceny; and
- (3) Intent to harm persons or things.

9 FAM 40.21(a) N2.3 Common Crimes Involving Moral Turpitude

Categorized below are some of the more common crimes, which are considered to involve moral turpitude. Each category is followed by a separate list of related crimes, which are held not to involve moral turpitude. . . .”¹⁴⁸

¹⁴⁸ U.S. DEP’T OF STATE, 9 FOREIGN AFF. MANUAL sec. 40.21(a) n.2 (Oct. 06, 2011), *available at* <http://www.state.gov/documents/organization/86942.pdf>.

Appendix E

Definition of “Aggravated Felony” in the INA

“The term ‘aggravated felony’ means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this

chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.”¹⁴⁹

¹⁴⁹ INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012).

Appendix F

Definition of “Good Moral Character”

“(f) For the purposes of this chapter—

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

(1) a habitual drunkard;

(2) Repealed.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) [**prostitution (procured or engaged in) and commercialized vice**], (6)(E) [**smuggler of unlawful immigrants**], and (10)(A) [**practicing polygamists**] of section 1182(a) of this title; or subparagraphs (A) [**convicted of or admits to committing crime involving moral turpitude or controlled substance offense**] and (B) [**multiple criminal convictions: convicted of two or more offenses, resulting in a sentence of five years or more confinement**] of section 1182(a)(2) of this title and subparagraph (C) [**controlled substance traffickers**] thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marijuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from **illegal gambling activities**;

(5) one who has been **convicted of two or more gambling offenses** committed during such period;

(6) one who has given **false testimony** for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of **one hundred and eighty days or more**, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an **aggravated felony** (as defined in subsection (a)(43) of this section);¹⁵⁰ or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in **Nazi** persecution, participation in **genocide**, or commission of acts of **torture** or **extrajudicial killings**) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.”¹⁵¹

¹⁵⁰ See Appendix E (Definition of “Aggravated Felony” in the INA).

¹⁵¹ INA § 101(f), 8 U.S.C. § 1101(f) (2012) (emphasis added).

Appendix G

UCMJ Offenses and Potential Immigration Consequences

Due to lack of case laws in determining the immigration consequences of UCMJ offenses,¹⁵² the following chart provides the potential immigration consequences based on the statutory elements of UCMJ offenses compared to the INA's inadmissible and deportable grounds.¹⁵³ The potential immigration consequences are (1) removal, (2) naturalization denial,¹⁵⁴ or (3) both.¹⁵⁵ It should be noted that any UCMJ offense will result in naturalization denial due to lack of good moral character when the accused serves an aggregate of 180 days or more confinement within five years of naturalization application.¹⁵⁶ Italicized consequences are the author's opinion based on the author's application of "categorical" and "modified categorical approaches" in determining whether an offense matches the INA removal grounds.¹⁵⁷ Readers should consider this as a starting point to conduct full analysis before rendering legal advice on immigration consequences.

Art.	UCMJ Offense	Potential Immigration Consequences	Authority Citations
78	Accessory after the fact	Depends on underlying offense	<i>In re Rivens</i> , 25 I. & N. Dec. 623 (BIA Oct. 19, 2011) (holding that offense of accessory after the fact is a crime involving moral turpitude (CIMT) only if the underlying offense is CIMT).
80	Attempts	Depends on underlying offense	8 U.S.C. §§ 1101(a)(43)(U), 1182(a)(2)(A)(i)(I) (2012) (covering attempt of Aggravated Felony and other enumerated crimes).
81	Conspiracy	Depends on underlying offense	8 U.S.C. §§ 1101(a)(43)(U), 1182(a)(2)(A)(i)(I) (covering conspiracy of Aggravated Felony and enumerated crimes); <i>In re Richardson</i> , 25 I. & N. Dec. 226 (BIA Apr. 22, 2010) (holding that conspiracy does not require overt act). <i>Contra United States v. Gracia-Santana</i> , No. 12-10471, 2014 WL 667083 (9th Cir. Feb. 20, 2014) (holding that generic conspiracy requires overt act).

¹⁵² *Aguilar-Turcious v. Holder*, 740 F.3d 1294, 1300 n.8 (9th Cir. 2014) ("We have found no other case from our circuit or our sister circuits discussing the application of the categorical and modified categorical approaches to convictions under the UCMJ, although clearly the federal government does rely on UCMJ convictions to remove citizens.").

¹⁵³ This chart is inspired by and relies on the works by Margret D. Stock and Richard D. Belliss as a basis. STOCK, *supra* note 4, at 75–76; Belliss, *supra* note 91, at 57–63.

¹⁵⁴ Because of the DHS's broad discretionary authority to determine whether one lacks good moral character, this chart will only mention naturalization denial when it is specifically enumerated as evidencing lack of good moral character. See *supra* Appendix F.

¹⁵⁵ Because the denaturalization ground for military-naturalized servicemember depends solely on the characterization of service, it will not be discussed in this chart.

¹⁵⁶ 8 U.S.C. § 1101(f)(8) (2012).

¹⁵⁷ See USDOJ-OIL MONOGRAPH, *supra* note 89, app. D, at 6–25. Federal courts and BIA use the two-step method, "categorical" and then "modified categorical," to determine whether a federal/state criminal conviction constitutes a criminal ground for removal under the INA. *Id.* app. D. In the first step, "categorical" approach (or analysis), the court determines whether the elements of the criminal conviction matches the elements of the "generic definition" of the criminal removal ground. *Id.* at D-1 to D-2. If the elements matches or is narrower than the generic definition of the INA's removal ground, the court will find the conviction alone is sufficient to find the removal ground triggered without looking at the underlying conduct resulting in the conviction; however, if the elements is broader than the generic definition, it will go to the second step of "modified categorical" approach. *Id.* at D-2 to D-3. Under the "modified categorical" approach, the court will look to the underlying conduct of the criminal conviction and determine whether the generic definition of the INA's criminal grounds are triggered by the actual conduct, not the elements of the conviction. *Id.* at D-3 to D-4. If the INA criminal ground of removal is a specific act or circumstances and does not have a generic definition, the courts apply the "circumstance-specific" approach, which is to look at the underlying conduct without regard to the elements of the conviction. *Id.* at D-5 to D7. Readers are recommended to review the DOJ's monograph, which provides excellent explanation. See *id.*

82	Solicitation of desertion (art. 85), mutiny (art. 94), misbehavior before enemy (art. 99), sedition (art. 94)	Depends on underlying offense—see underlying offenses below	<i>Cf. Barrage-Lopez v. Mukasey</i> , 507 F.3d 899, 903 (9th Cir. 2007) (holding that CIMT determination for inchoate crimes depends on the underlying offense); <i>cf. Rohit v. Holder</i> , 670 F.3d. 1085, 1089–90 (9th Cir. 2012) (holding that California’s conviction of solicitation for prostitution is CIMT because prostitution is CIMT).
83	Fraudulent enlistment, appointment, separation	Removal (CIMT; not Aggravated Felony); Naturalization Denial (lack of good moral character)	<i>Belliss</i> , <i>supra</i> note 91, at 58 (“crimes involving a level of fraud”); <i>cf. Kariuki v. Tarango</i> , 709 F.3d. 495 (5th Cir. 2013) (fraudulent enlistment as prior bad acts for lack of good moral character); no corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
84	Effecting unlawful enlistment, appointment, separation	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss</i> , <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
85	Desertion	Not CIMT; Not Aggravated Felony; Naturalization Denial (statutory bar to naturalization)	<i>In re S----- B-----</i> , 4 I. & N. Dec. 682, 683 (BIA July 21, 1952) (holding desertion under Articles of War is not CIMT); 8 U.S.C. § 1425 (barring naturalization of deserters from armed forces); <i>Polanski v. INS</i> , No. 96 Civ. 9007, 2000 WL 869487 (S.D.N.Y. June 29, 2000) (permanently barring a Marine deserter from naturalization).
86	Absence without leave	Not CIMT; Not Aggravated Felony	<i>In re Garza-Garcia</i> , No. A77-697-333, 2007 WL 3301468 (BIA Oct. 2, 2007) (“The elements of Article 86 of the [UCMJ], which include failing to appear for duty, leaving a place of duty, or absenting oneself from one’s unit, similarly do not evince a manifestation of baseness and depravity.”); no corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
87	Missing movement	<i>Not CIMT; Not Aggravated Felony</i>	Akin to UCMJ art. 86, the offense lacks the moral turpitude element for CIMT. <i>See Belliss</i> , <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
88	Contempt toward officials	<i>Not CIMT; Not Aggravated Felony</i>	<i>Cf. Fernandez-Ruiz v. Gonzales</i> , 468 F.3d 1159 (9th Cir. 2006) (holding the act of insulting or provoking as “undesirable or unacceptable but . . . [does] not constitute ‘baseness or depravity contrary to accepted moral standard’”). The offense lacks the moral turpitude element for CIMT. <i>See Belliss</i> , <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).

89	Disrespect toward superior commissioned officer	<i>Not CIMT; Not Aggravated Felony</i>	<i>Cf. Fernandez-Ruiz v. Gonzales</i> , 468 F.3d 1159 (9th Cir. 2006) (holding the act of insulting or provoking as “undesirable or unacceptable but . . . [does] not constitute ‘baseness or depravity contrary to accepted moral standard’”). The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
90	Assaulting or striking a superior commissioned officer	<i>Removal (Possible CIMT and Aggravated Felony)</i>	<i>Belliss, supra</i> note 91, at 59 (crimes against the person as CIMT). <i>Contra Uppal v. Holder</i> , 605 F.3d 712 (9th Cir. 2010) (holding Canadian’s aggravated assault not CIMT); <i>Partyka v. U.S. Attorney Gen.</i> , 417 F.3d 408 (3d Cir. 2005) (holding NJ’s offense of aggravated assault against police officer not CIMT). 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (“a crime of violence” with possible confinement more than one year as Aggravated Felony).
	Disobeying superior commissioned officer	<i>Depends on the underlying lawful order</i>	<i>Cf. Aguilar-Turcios v. Holder</i> , 740 F.3d 1294 (9th Cir. 2014) (holding order violation depends on the underlying order.).
91	Strike or assault a warrant, noncommissioned, petty officer	<i>Removal (Possible CIMT and Aggravated Felony)</i>	<i>Belliss, supra</i> note 91, at 59 (crimes against the person as CIMT). <i>Contra Uppal v. Holder</i> , 605 F.3d 712 (9th Cir. 2010) (holding Canadian’s aggravated assault not CIMT); <i>Partyka v. U.S. Attorney Gen.</i> , 417 F.3d 408 (3d Cir. 2005) (holding NJ’s offense of aggravated assault against police officer not CIMT). 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (“a crime of violence” with possible confinement more than one year as Aggravated Felony).
	Willfully disobey the lawful order of a warrant, noncommissioned, petty officer	<i>Depends on the underlying lawful order</i>	<i>Belliss, supra</i> note 91, at 59 (crimes against the person as CIMT). <i>Contra Uppal v. Holder</i> , 605 F.3d 712 (9th Cir. 2010) (holding Canadian offense of aggravated assault not CIMT); <i>Partyka v. U.S. Attorney Gen.</i> , 417 F.3d 408 (3d Cir. 2005) (holding NJ’s aggravated assault against police officer not CIMT). 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (“a crime of violence” with possible confinement more than one year as Aggravated Felony).
	Contempt or disrespect in language or deportment toward a warrant, noncommissioned, petty officer	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year. <i>Cf. Fernandez-Ruiz v. Gonzales</i> , 468 F.3d 1159 (9th Cir. 2006) (holding the act of insulting or provoking as “undesirable or unacceptable but . . . [does] not constitute ‘baseness or depravity contrary to accepted moral standard’”).
92	Failure to obey order, regulation	Depends on the underlying lawful general order	<i>Aguilar-Turcios v. Holder</i> , 740 F.3d 1294 (9th Cir. 2014) (holding access to child porn on government computer in violation of UCMJ art. 92 is not aggravated felony because the general order prohibited pornography in general).
93	Cruelty and maltreatment of subordinates	<i>Removal (Possible CIMT, Not Aggravated Felony)</i>	<i>Belliss, supra</i> note 91, at 59 (crimes against the person as CIMT); no corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43) (not “crime of violence” as no element of violence in the art. 93, UCMJ).

94	Mutiny by creating violence or disturbance	<i>Removal (Aggravated Felony, Miscellaneous Crime, Security related grounds)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (“a crime of violence” with possible confinement more than one year as Aggravated Felony); § 1227(a)(2)(D)(i) (violating 18 U.S.C. §§ 2383 (Rebellion and Insurrection), 2384 (Seditious Conspiracy), 2387 (activities affecting armed forces generally), 2388 (activities affecting armed forces during war)); § 1227(a)(4)(A)(ii) (“any other criminal activity which endangers public safety or national security”); § 1227(a)(4)(A)(iii) (“any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.).
	Mutiny by refusing to obey orders or perform duty	<i>Removal (Security related grounds)</i>	8 U.S.C. § 1227(a)(4)(A)(ii) (“any other criminal activity which endangers public safety or national security”); § 1227(a)(4)(A)(iii) (“any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.).
	Sedition	<i>Removal (Aggravated Felony, Miscellaneous Crime, Security related grounds)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (“a crime of violence” with possible confinement more than one year as Aggravated Felony); § 1227(a)(2)(D)(i) (violating 18 U.S.C. §§ 2383 (Rebellion and Insurrection), 2384 (Seditious Conspiracy), 2387 (activities affecting armed forces generally), 2388 (activities affecting armed forces during war)); § 1227(a)(4)(A)(ii) (“any other criminal activity which endangers public safety or national security”); § 1227(a)(4)(A)(iii) (“any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.).
	Failure to prevent and suppress a mutiny or sedition	<i>Not CIMT; Not Security Related ground; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT or a security related offense. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
	Failure to report a mutiny or sedition	<i>Not CIMT; Not Security Related ground; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT or a security related offense. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
	Attempted mutiny	<i>Removal (Miscellaneous Crime)</i>	8 U.S.C. § 1227(a)(2)(D)(i) (attempting to violate 18 U.S.C. §§ 2383 (Rebellion and Insurrection), 2384 (Seditious Conspiracy), 2387 (activities affecting armed forces generally), 2388 (activities affecting armed forces during war)).

95	Resisting apprehension	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43). <i>Cf. United States v. Aparicio-Soria</i> , 740 F.3d 152 (4th Cir. 2013) (resisting arrest not a “crime of violence” for U.S. sentence guidelines).
	Flight from apprehension	<i>Not CIMT; Not High Speed Flight; Not Aggravated Felony</i>	Elements lack the moral turpitude element for CIMT and UCMJ art. 95 elements are too broad for High Speed Flight; not aggravated felony because not “crime of violence.” <i>Cf. United States v. Aparicio-Soria</i> , 740 F.3d 152 (4th Cir. 2013) (resisting arrest not a “crime of violence” for U.S. sentence guidelines).
	Breaking arrest	<i>Not CIMT; Not Aggravated Felony</i>	Elements lack the moral turpitude element for CIMT and UCMJ art. 95 elements are too broad for High Speed Flight; not aggravated felony because less than one year confinement.
	Escape from custody or confinement	<i>Removal (Possible Aggravated Felony for obstruction but not for crime of violence)</i>	8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (obstructing justice as Aggravated Felony); <i>United States v. Draper</i> , 996 F.2d 982 (9th Cir. 1993) (holding escape from custody as obstruction of justice for U.S. sentence guidelines). <i>Contra In re Duran-Morales</i> , No. A41-777-177, 2008 WL 1924674 (BIA Apr. 10, 2008) (holding escape not obstruction of justice under Aggravated Felony); <i>Addo v. U.S. Attorney Gen.</i> , 355 F.App’x. 672 (3d Cir. 2009) (holding escape conviction was not “crime of violence” and not Aggravated Felony).
96	Releasing a prisoner without authority	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
97	Unlawful detention	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
98	Noncompliance with procedural rules, etc.	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
99	Misbehavior before enemy	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
100	Subordinate compelling surrender	<i>Not CIMT; Not security related ground; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT or a security related offense. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).

101	Improper use of countersign	<i>Not CIMT; Not security related ground; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT or a security related offense. <i>See</i> Belliss, <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
102	Forcing safeguard	<i>Removal (Security related ground)</i>	8 U.S.C. § 1227(a)(4)(A)(ii) (“any other criminal activity which endangers public safety or national security”).
103	Failing to secure public property taken from the enemy	<i>Not CIMT; Not Aggravated Felony if less than \$500.</i>	The offense lacks the moral turpitude element for CIMT. <i>See</i> Belliss, <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
	Failing to report and turn over captured or abandoned property	<i>Not CIMT; Not Aggravated Felony if less than \$500.</i>	The offense lacks the moral turpitude element for CIMT. <i>See</i> Belliss, <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
	Dealing in captured or abandoned property	<i>Removal (CIMT, Aggravated Felony)</i>	Belliss, <i>supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as aggravated felony); 8 U.S.C. § 1101(a)(43)(G) (a theft offense with imprisonment of one year or more as Aggravated Felony).
	Looting and Pillaging	<i>Removal (CIMT, Aggravated Felony)</i>	Belliss, <i>supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as aggravated felony); 8 U.S.C. § 1101(a)(43)(G) (a theft offense with imprisonment of one year or more as Aggravated Felony).
104	Aiding the enemy	<i>Removal (Miscellaneous crime ground; Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating treason, 18 U.S.C. § 2382, as Aggravated Felony); § 1227(a)(3)(D)(i) (violating treason under chapter 115 of Title 18).
	Attempting to aid the enemy	<i>Removal (Miscellaneous crime ground; Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(U), 1227(a)(2)(A)(iii) (covering attempts of Aggravated Felony).
	Harboring or protecting the enemy	<i>Removal (Miscellaneous crime ground)</i>	8 U.S.C. § 1227(a)(3)(D)(i) (violating Harboring or concealing person, 18 U.S.C. § 792, under chapter 37 of Title 18).
	Giving intelligence to the enemy	<i>Removal (Miscellaneous crime ground; Aggravated Felony; Security related ground)</i>	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 793 (gathering, transmitting or losing defense information) as Aggravated Felony); § 1227(a)(3)(D)(i) (violating § 793 under chapter 37 of Title 18); § 1227(a)(4)(A)(i) (“any activity to violate any law of the United States relating to espionage”).
	Communicating with the enemy	<i>Removal (Security related ground)</i>	8 U.S.C. § 1227(a)(4)(A)(i) (“any activity to violate any law of the United States relating to espionage”).
105	Misconduct as prisoner	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See</i> Belliss, <i>supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).

106	Spying	<i>Removal (Miscellaneous crime ground; Aggravated Felony; Security related ground)</i>	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 793 (gathering, transmitting or losing defense information) as Aggravated Felony); § 1227(a)(3)(D)(i) (violating § 793 under chapter 37 of Title 18); § 1227(a)(4)(A)(i) (“any activity to violate any law of the United States relating to espionage”).
106a	Espionage	<i>Removal (Miscellaneous crime ground; Aggravated Felony; Security related ground)</i>	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 793 (gathering, transmitting or losing defense information) as Aggravated Felony); § 1227(a)(3)(D)(i) (violating § 793 and § 794 under chapter 37 of Title 18); § 1227(a)(4)(A)(i) (“any activity to violate any law of the United States relating to espionage”).
107	False Official Statement	Removal (CIMT)	<i>Cf. In re Chavez-Alvarez</i> , 26 I. & N. Dec. 274 (BIA Mar. 14, 2014) (noting in dicta that immigration judge found general court-martial conviction of UCMJ art. 107 as CIMT); <i>Itani v. Ashcroft</i> , 298 F.3d 1213 (11th Cir. 2002) (quoting <i>United States v. Gloria</i> , 494 F.2d 477, 481 (5th Cir. 1974) (“Generally, a crime involving dishonesty or false statement is considered to be one involving moral turpitude.”); <i>Belliss, supra</i> note 91, at 58 (crimes involving a level of fraud as CIMT).
108	Selling or otherwise disposing of military property	Removal (CIMT; Aggravated Felony; Certain firearms offenses)	<i>Belliss, supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as aggravated felony); 8 U.S.C. § 1227(a)(2)(C) (selling firearm or destructive device as deportable crime).
	Damaging, destroying, or losing military property	Removal (CIMT, Aggravated Felony for damaging and destroying if willful)	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 2153 (destruction of war materials, war premises, or war utilities) as Aggravated Felony); <i>cf. In re M-----</i> , 2 I. & N. 629 (BIA June 18, 1946) (holding that respondent damaging war supply ship in violation of 50 U.S.C. § 102 (impairing war material) (repealed 1948) as CIMT); <i>cf. In re Escobedo-Gutierrez</i> , No. A78-103-729, 2008 WL 3919068 (BIA July 24, 2008) (holding that GA’s offense of interference with government property as Aggravated Felony because of the use of physical force); <i>Belliss, supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as Aggravated Felony).
	Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of	Removal (CIMT, Aggravated Felony for damaging and destroying if willful)	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 2153 (destruction of war materials, war premises, or war utilities) as Aggravated Felony); <i>cf. In re M-----</i> , 2 I. & N. 629 (BIA June 18, 1946) (holding that respondent damaging war supply ship in violation of 50 U.S.C. § 102 (impairing war material) as CIMT); <i>Belliss, supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as aggravated felony).
109	Property other than U.S. military property: waste, spoilage, or destruction	Removal (CIMT, Aggravated Felony for damaging and destroying if willful)	<i>Belliss, supra</i> note 91, at 58 (“crimes against property” as CIMT and “theft crimes” as Aggravated Felony).
110	Improper hazarding of vessel	<i>Removal (CIMT, if willful)</i>	8 U.S.C. §§ 1101(a)(43)(L)(i), 1227(a)(2)(A)(iii) (violating 18 U.S.C. § 2153 (destruction of war materials, war premises, or war utilities) as Aggravated Felony); <i>cf. In re M-----</i> , 2 I. & N. 629 (BIA June 18, 1946) (holding that respondent damaging war supply ship in violation of 50 U.S.C. § 102 (impairing war material) as CIMT).

111	Wanton or reckless operation of vehicle, aircraft, or vessel	<i>Removal (CIMT if physical injury occurred)</i>	<i>Cf. Keunge v. U.S. Attorney Gen.</i> , 561 F.3d. 1281, 1285–86 (11th Cir. 2009) (quoting <i>Knapik v. Ashcroft</i> , 384 F.3d 84, 90 n.5 (3d Cir. 2004)) (“With regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death.”).
	Drunk or impaired operation of vehicle, aircraft, or vessel	<i>Not CIMT if no injury; however, possible CIMT if physical injury occurred.</i>	<i>Cf. In re Lopez-Meza</i> , 22 I. & N. Dec. 1188, 1194 (BIA 1999) (“Simple [driving under influence] is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge [A] simple DUI offense does not inherently involve moral turpitude.”); <i>cf. Padilla v. Kentucky</i> , 559 U.S. 356, 379 (2010) (Alito, J., concurring) (citing R. MCWHIRTER, AM. BAR ASSOC., THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW 136 (2d ed. 2006) (“[DUI] may be a CIMT if the DUI results in injury”).
	Operation of vehicle, aircraft, or vessel with blood alcohol concentration of 0.1	<i>Not CIMT if no injury; however, possible CIMT if physical injury occurred.</i>	<i>Cf. In re Lopez-Meza</i> , 22 I. & N. Dec. 1188, 1194 (BIA 1999) (“Simple [driving under influence] is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge [A] simple DUI offense does not inherently involve moral turpitude.”); <i>cf. Padilla v. Kentucky</i> , 559 U.S. 356, 379 (Alito, J., concurring) (citing R. MCWHIRTER, AM. BAR ASSOC., THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW 136 (2d ed. 2006) (“[DUI] may be a CIMT if the DUI results in injury”).
112	Drunk on duty	<i>Not CIMT; Not Aggravated Felony; however, potential naturalization (lack of good moral character)</i>	The offense lacks the moral turpitude element for CIMT; no corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43); lack of good moral character due to “habitual drunkard.” <i>Id.</i> § 1101(f)(1).
112a	Wrongful use, possession, manufacturing, or introduction of controlled substance	Removal (Controlled Substance Offense)	8 U.S.C. § 1227(a)(2)(B) (violating any law or regulation relating to controlled substance, other than single marijuana use (less than thirty grams), is deportable crime).
113	Misbehavior of sentinel or lookout	<i>Not CIMT; Not Aggravated Felony; however, possible removal (security related ground)</i>	The offense lacks the moral turpitude element for CIMT; no corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43); § 1227(a)(4)(A)(ii) (“any other criminal activity which endangers public safety or national security”).
114	Dueling	<i>Removal (Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony). 18 U.S.C. § 16 states, “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
115	Malingering	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT or security related offense. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).

116	Riot	<i>Removal (Aggravated Felony)</i>	<i>Cf. United States v. Hernandez-Rodriguez, 388 F.3d 779 (10th Cir. 2004) (holding Utah riot conviction as Aggravated Felony).</i>
	Breach of Peace	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
117	Provoking speech, gestures	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year. <i>Cf. Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006) (holding the act of insulting or provoking as “undesirable or unacceptable but . . . [does] not constitute ‘baseness or depravity contrary to accepted moral standard’”).</i>
118	Murder	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “murder” as Aggravated Felony).
119	Voluntary Manslaughter	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony).
	Involuntary Manslaughter	<i>Removal (Possible CIMT)</i>	<i>Cf. Franklin v. INS, 72 F.3d 571 (8th Cir. 1995) (holding involuntary manslaughter as CIMT). But see In re Ghunaim, 15 I. & N. Dec. 269, 270 (BIA 1975) (quoting In re Lopez, 13 I. & N. Dec. 725 (BIA 1971) (“Murder and voluntary manslaughter are [CIMT]; involuntary manslaughter is not.”).</i>
119a	Death or injury of an Unborn Child	<i>Depends on the underlying offense causing the death or injury of unborn child</i>	UCMJ art. 119a requires the proof of commission of certain UCMJ offenses causing the death or injury of the unborn child, or attempt thereof. 18 U.S.C. § 1841 recognizes unborn child as a human being.
120	Rape	Removal (CIMT, Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “rape” as Aggravated Felony); <i>Nunez v. Holder, 594 F.3d 1124 (9th Cir. 2010) (“[R]ape is categorically a crime of moral turpitude.”).</i>
	Sexual Assault	<i>Removal (CIMT; Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Aggravated Sexual Contact	<i>Removal (CIMT, Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Abusive Sexual Contact	<i>Removal (CIMT; Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
120a	Stalking	Removal (Crime of Stalking)	8 U.S.C. § 1227(2)(E)(i) (designating stalking deportable crime).
120b	Rape of a Child	Removal (CIMT, Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “rape” as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Sexual Assault of a Child	Removal (CIMT, Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “sexual abuse of a minor” as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Aggravated Sexual Contact of a Child	Removal (CIMT, Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “sexual abuse of a minor” as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Abusive Sexual Contact of a Child	Removal (CIMT, Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (designating “sexual abuse of a minor” as Aggravated Felony); <i>Belliss, supra</i> note 91, at 58 (“crimes against person” as CIMT).

120c	Indecent Viewing, Visual Recording, or Broadcasting	Removal (CIMT)	Belliss, <i>supra</i> note 91, at 58 (“crimes against person” as CIMT).
	Forcible Pandering	Removal (CIMT; Aggravated Felony)	<i>Cf. Rohit v. Holder</i> , 670 F.3d 1085, 1089–90 (9th Cir. 2012) (holding solicitation of prostitution as CIMT because no less vile than engaging in prostitution which is CIMT); 8 U.S.C. §§ 1101(a)(43)(K(i)), 1227(a)(2)(A)(iii) (designating “offense that . . . relates to the owning, controlling, managing, or supervising of a prostitution business” as Aggravated Felony).
	Indecent Exposure	Not CIMT	<i>Cf. Nunez v. Holder</i> , 594 F.3d 1124 (9th Cir. 2010) (holding that California’s indecent exposure conviction is not “inherently base, vile, and depraved”).
121	Larceny	Removal (CIMT; Aggravated Felony) unless for non-military property worth \$500 or less	<i>Cf. Lecky v. Holder</i> , 723 F.3d 1 (1st Cir. 2013) (holding that Connecticut’s larceny conviction is Aggravated Felony under 8 U.S.C. § 1101(a)(43)(G) (“theft offense”).
	Wrongful Appropriation	Removal (Not CIMT; however, Aggravated Felony for appropriating motor vehicle, aircraft, and vessel; certain firearm offenses if appropriating firearm or explosive)	<i>Cf. Wala v. Mukasey</i> , 511 F.3d 102 (2d Cir. 2007) (remanding BIA’s ruling that larceny was CIMT because failed to determine whether the taking was permanent or temporary); <i>cf. In re Grazley</i> , 14 I. & N. Dec. 330, 333 (BIA 1973) (“[A] conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”); <i>cf. In re R-----</i> , 2 I. & N. Dec. 819, 828 (BIA 1947) (“It is settled law that the offense of taking property temporarily does not involve moral turpitude.”); <i>cf. Artega v. Mukasey</i> , 511 F.3d 940, 947 (9th Cir. 2007) (holding unlawfully taking a vehicle with the intent to either permanently or temporarily deprive the owner of possession is a theft offense and an Aggravated Felony); 8 U.S.C. § 1227(2)(C) (Certain firearm offense) (“Any alien who . . . is convicted under any law of . . . possessing . . . any weapon . . . which is a firearm . . . is deportable.”).
122	Robbery	Removal (CIMT; Aggravated Felony)	<i>Cf. Medonza v. Holder</i> , 623 F.3d 1299 (9th Cir. 2010) (holding that California’s robbery conviction is CIMT); 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony).
123	Forgery	Removal (CIMT)	<i>Cf. Cetik v. Gonzales</i> , 181 F.App’x 117 (2d Cir. 2006) (holding that New York forgery conviction is CIMT).
123a	Making, drawing, or uttering check, draft, or order without sufficient funds	Removal (CIMT) when over \$500	<i>Cf. In re Haller</i> , 12 I. & N. Dec. 319 (BIA 1967) (holding issuing fraudulent check as CIMT).
124	Maiming	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); <i>cf. Singh v. Holder</i> , 568 F.3d 525 (5th Cir. 2009) (holding Virginia’s unlawful wounding conviction as “crime of violence” triggering Aggravated Felony).

125	Sodomy	Removal (CIMT)	<i>Cf. Velez-Lozano v. INS</i> , 463 F.2d 1305, 1307 (D.C. Cir. 1972) (holding that “sodomy is a crime of moral turpitude”); <i>cf. In re Morsy</i> , No. A77-043-593, 2007 WL 416704 (BIA Jan. 26, 2007) (holding that sodomy is CIMT).
126	Arson	Removal (CIMT; Aggravated Felony)	<i>Cf. Pretelet v. U.S. Attorney Gen.</i> , 370 F.App’x 338 (3d Cir. 2010) (holding New Jersey’s arson conviction as CIMT); <i>Cf. Santana v. Holder</i> , 714 F.3d 140 (holding New York’s attempted arson conviction as “crime of violence,” triggering Aggravated Felony).
127	Extortion	Removal (Aggravated Felony)	<i>Cf. In re Zeng</i> , No. A040-009-879, 2010 WL 2601513 (BIA June 8, 2010) (holding New York’s extortion conviction as “crime of violence,” triggering Aggravated Felony).
128	Simple Assault (without firearm); Assault consummated by battery; Assault upon noncommissioned or petty officer not in execution of office	<i>Not CIMT, Not Aggravated Felony</i>	Maximum allowable confinement is less than a year. <i>Cf. Popal v. Gonzales</i> , 416 F.3d 249 (3d Cir. 2005) (holding that misdemeanor simple assault is not Aggravated Felony).
	Other Assaults	Removal (Aggravated Felony; certain firearms offense if firearm used)	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); 8 U.S.C. § 1227(2)(C) (Certain firearm offenses) (“Any alien who . . . is convicted under any law of . . . using . . . any weapon . . . which is a firearm . . . is deportable.”).
129	Burglary	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii) (designating “burglary” as Aggravated Felony).
130	Housebreaking	<i>Removal (CIMT)- Depends on underlying offense</i>	<i>Cf. In re E-----</i> , 2 I. & N. Dec. 134 (BIA 1944) (holding Ohio housebreaking with larceny intent conviction as CIMT).
131	Perjury	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (designating “perjury” as Aggravated Felony).
132	Frauds against the United States	Removal (CIMT; Aggravated Felony if over \$10,000)	<i>In re Antigua</i> , No. A75-401-302, 2003 WL 23269935 (BIA Oct. 22, 2003) (quoting <i>Jordan v. De George</i> , 341 U.S. 223, 229 (1951) (“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”); 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(iii) (designating fraud with \$10,000 loss as Aggravated Felony).
133	Conduct unbecoming officer	<i>Depends on the underlying misconduct—potential CIMT</i>	MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 59.c.(3) (2012) (listing examples of crimes, including “committing or attempting to commit a crime involving moral turpitude.”); 8 U.S.C. § 1227(2)(A)(i) (CIMT).

134	Disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1)	<i>Depends on the underlying conduct</i>	MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60.c.(2).
	Conduct of a nature to bring discredit upon the armed forces (clause 2)	<i>Depends on the underlying conduct</i>	MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60.c.(3).
	Crimes and offenses not capital (clause 3)	<i>Depends on the underlying noncapital crimes and offenses prohibited by U.S. Code or state criminal laws</i>	MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60.c.(4).
	Abusing public animal	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
	Adultery	<i>Possible CIMT; Not lack of good moral character</i>	<i>Cf. In re B-----</i> , 7 I. & N. Dec. 166 (BIA 1956) (holding adultery as CIMT). <i>Schmidt v. United States</i> , 177 F.2d 450 (2d Cir. 1949) (holding that adultery not evidence of lack of good moral character for naturalization).
	Assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking	<i>Removal (CIMT; Aggravated Felony)—based on underlying conduct</i>	Akin to attempt or conspiracy as the elements require the intent to commit the underlying offense. <i>Cf. Ceron v. Holder</i> , 712 F.3d 426 (9th Cir. 2013) (holding California’s assault with deadly weapon as CIMT).
	Bigamy	<i>Removal (CIMT)</i>	<i>Cf. Injeti v. USCIS</i> , 737 F.3d 311, 318 (4th Cir. 2013) (stating in dicta bigamy is CIMT). <i>But see Forbes v. Brownwell</i> , 149 F.Supp. 848 (D.D.C. 1957) (holding that Canadian bigamy not CIMT because it lacks mens rea).
	Bribery and Graft	<i>Removal (Potential Aggravated Felony)</i>	8 U.S.C. §§ 1101(a)(43)(J), 1227(a)(2)(A)(iii) (2012) (designating racketeering activity, which includes bribery and graft under 18 U.S.C. § 201, as Aggravated Felony).
	Burning with intent to defraud	<i>Removal (CIMT)</i>	<i>Cf. In re Antigua</i> , No. A75-401-302, 2003 WL 23269935 (BIA Oct. 22, 2003) (quoting <i>Jordan v. De George</i> , 341 U.S. 223, 229 (1951) (“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”)).
	Check worthless, making and uttering	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
	Child endangerment	<i>Removal (CIMT; Crimes against children)</i>	<i>Cf. Hernandez-Perez v. Holder</i> , 569 F.3d 345 (8th Cir 2009) (holding Iowa’s child endangerment conviction as CIMT); 8 U.S.C. § 1227(a)(2)(i) (designating “child abuse, child neglect, and child abandonment” as deportable crimes).
	Child pornography	Removal (Aggravated Felony; Crimes against children)	8 U.S.C. §§ 1101(a)(43)(I), 1227(a)(2)(A)(iii) (2012) (designating child pornography related offenses under 18 U.S.C. §§ 2251, 2251A, 2252 as Aggravated Felony); 8 U.S.C. § 1227(a)(2)(i) (designating “child abuse, child neglect, and child abandonment” as deportable crimes).
	Cohabitation, wrongful	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
	Correctional custody, escape from	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year. <i>Cf. Salazar-Luviano v. Mukasey</i> , 551 F.3d 857 (9th Cir 2008) (holding escape from custody is not obstruction of justice under Aggravated Felony).

Correctional custody, breach of	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Debt, dishonorably failing to pay	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Disloyal statements	<i>Removal (Miscellaneous crimes—related to treason and sedition)</i>	8 U.S.C. § 1227(a)(2)(D)(i) (incorporating 18 U.S.C. § 2387 (activities affecting armed forces generally) as deportable crime).
Disorderly conduct	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Drunkenness aboard ship	<i>Not CIMT; Not Aggravated Felony; however, possible lack of good moral character</i>	Maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(1) (“habitual drunkard”).
Drunk and disorderly	<i>Not CIMT; Not Aggravated Felony; however, possible lack of good moral character</i>	Maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(1) (“habitual drunkard”).
Drinking liquor with prisoner	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Drunk prisoner	<i>Not CIMT; Not Aggravated Felony; however, possible lack of good moral character</i>	Maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(1) (“habitual drunkard”).
Drunkenness-incapacitating oneself for performance of duties	<i>Not CIMT; Not Aggravated Felony; however, possible lack of good moral character</i>	Maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(1) (“habitual drunkard”).
Possessing or using with intent to defraud or deceive, or making altering, counterfeiting, tampering with, or selling military or official pass, permit, discharge certificate and identification card	<i>Removal (CIMT; Aggravated Felony if over \$10,000)</i>	<i>Cf. In re Antigua</i> , No. A75-401-302, 2003 WL 23269935 (BIA Oct. 22, 2003) (quoting <i>Jordan v. De George</i> , 341 U.S. 223, 229 (1951) (“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”); 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(iii) (designating fraud with \$10,000 loss as Aggravated Felony).
All other cases	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
False pretenses, obtaining services over \$500	<i>Removal (CIMT; Aggravated Felony if over \$10,000)</i>	<i>Cf. In re Antigua</i> , No. A75-401-302, 2003 WL 23269935 (BIA Oct. 22, 2003) (quoting <i>Jordan v. De George</i> , 341 U.S. 223, 229 (1951) (“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”); 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(iii) (designating fraud with \$10,000 loss as Aggravated Felony).
False pretenses, obtaining services \$500 and under	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.

False swearing	<i>Removal (CIMT)</i>	<i>Cf. Grajales v. Mukasey</i> , 303 F.App'x 942 (2d Cir. 2008) (holding that offense making a false statement on passport application is CIMT even if the offense did not require the moral turpitude element as an element); <i>cf. Calvo-Ahumada v. Rinaldi</i> , 435 F.2d 544 (3d Cir. 1970) (holding federal conviction of false statement under oath for permanent residence application as CIMT).
Firearm, discharging through negligence	<i>Removal (Certain firearm offense); Not CIMT; Not Aggravated Felony</i>	8 U.S.C. § 1227(2)(C) (Certain firearm offense) (“Any alien who . . . is convicted under any law of . . . using . . . any weapon . . . which is a firearm . . . is deportable”). Not CIMT or Aggravated Felony because the maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(1).
Firearm, discharging willfully, under such circumstances as to endanger human life	<i>Removal (Certain firearm offense; CIMT; Aggravated Felony)</i>	8 U.S.C. § 1227(2)(C) (Certain firearm offense) (“Any alien who . . . is convicted under any law of . . . using . . . any weapon . . . which is a firearm . . . is deportable.”); <i>cf. Keunge v. U.S. Attorney Gen.</i> , 561 F.3d 1281, 1285–86 (11th Cir. 2009) (quoting <i>Knapik v. Ashcroft</i> , 384 F.3d 84, 90 n.5(3d Cir. 2004)) (“With regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death.”); 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony). 18 U.S.C. § 16 states, “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” <i>Id.</i>
Fleeing scene of accident	<i>Removal (possible CIMT)</i>	<i>Cf. Garcia-Maldonado v. Gonzales</i> , 491 F.3d 284 (5th Cir. 2007) (holding Texas’s conviction of driver failing to stop and render aid in an accident resulting in death or injury as CIMT); <i>cf. Latu v. Mukasey</i> , 547 F.3d 1070 (9th Cir. 2008) (holding that Hawaii’s conviction of driver fleeing the accident resulting in injury as not CIMT).
Fraternization	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crimes in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
Gambling with subordinate	<i>Not CIMT; Not Aggravated Felony; however, Naturalization Denial (Lack of good moral character if more than two gambling offenses)</i>	Maximum allowable confinement is less than a year. 8 U.S.C. § 1101(f)(5) (lack of good moral character when convicted of two or more gambling offenses).
Homicide, negligent	<i>Not CIMT; Not Aggravated Felony</i>	Elements lack the moral turpitude element for CIMT. <i>Cf. States v. Dominguez-Ochoa</i> , 386 F.3d 639 (5th Cir. 2004) (holding that Texas’s conviction for criminal negligent homicide is not “crime of violence” for U.S. sentence guidelines); <i>cf. Leocal v. Ashcroft</i> , 543 U.S. 1, 1–2 (2004) (holding that state DUI offenses without a mens rea and only requiring negligence in operating a vehicle is not “crime of violence” under Aggravated Felony).

Impersonation with Intent to Defraud	<i>Removal (CIMT; Aggravated Felony if over \$10,000)</i>	<i>Cf. In re Antigua</i> , No. A75-401-302, 2003 WL 23269935 (BIA Oct. 22, 2003) (quoting <i>Jordan v. De George</i> , 341 U.S. 223, 229 (1951) (“Fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.”); 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(iii) (designating fraud with \$10,000 loss as Aggravated Felony).
Impersonation	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Indecent language, communicated to child under the age of sixteen	<i>Removal (Crimes against children)</i>	8 U.S.C. § 1227(a)(2)(E)(i) (listing “child abuse” as deportable). The elements, however, may be too broad to trigger removal.
Indecent language	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Jumping from vessel into the water	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Kidnapping	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (incorporating “crime of violence” under 18 U.S.C. § 16 as Aggravated Felony); <i>cf. Delgado-Hernandez v. Holder</i> , 697 F.3d 1125 (9th Cir. 2012) (holding California’s ordinary kidnapping as Aggravated Felony).
Mail: taking, opening, secreting, destroying, or stealing	<i>Removal (Aggravated Felony if stealing)</i>	<i>Cf. Randhawa v. Ashcroft</i> , 298 F.3d 1148 (9th Cir. 2002) (holding possession of stolen mail as theft offense under Aggravated Felony).
Mails: depositing or causing to be deposited obscene matters in	<i>Not CIMT</i>	<i>Cf. In re D-----</i> , 1 I. & N. Dec. 190 (BIA 1942) (holding federal conviction for mailing obscene letter is not CIMT).
Misprision of serious offense	<i>Removal (Possible CIMT)</i>	<i>Cf. Itani v. Ashcroft</i> , 298 F.3d 1213 (11th Cir. 2002) (holding misprision of felony as CIMT). <i>But see Robles-Urrea v. Holder</i> , 678 F.3d 702 (9th Cir. 2012) (holding misprision of felony is not categorically a CIMT but may be under modified categorical match).
Obstructing justice	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (designating obstruction of justice as Aggravated Felony).
Wrongful interference with an adverse administrative proceeding	<i>Depends on the underlying conduct resulting in the interference; potential Aggravated Felony.</i>	MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 96.c (2012). Potential Aggravated Felony for obstruction of justice for obstructing proceedings before agencies. 8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (designating obstruction of justice as Aggravated Felony); 18 U.S.C. § 1505 (2012) (criminalizing “imped[ing] or endeavor[ing] to influence, obstruct, or imped[ing] the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States”).
Pandering	<i>Removal (CIMT; Aggravated Felony)</i>	<i>Cf. Rohit v. Holder</i> , 670 F.3d 1085, 1089–90 (9th Cir. 2012) (holding solicitation of prostitution as CIMT because no less vile than engaging in prostitution which is CIMT); 8 U.S.C. §§ 1101(a)(43)(K(i)), 1227(a)(2)(A)(iii) (designating an “offense that . . . relates to the owning, controlling, managing, or supervising of a prostitution business” as Aggravated Felony).
Prostitution and patronizing a prostitute	<i>Removal (CIMT)</i>	8 U.S.C. § 1182(2)(D) (prostitution and procurement of prostitution).
Parole, violation of	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Perjury, subornation of	Removal (Aggravated Felony)	8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (designating “subornation of perjury” as Aggravated Felony).

Public record: altering, concealing, removing, mutilating, obliterating, or destroying	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
Quarantine, breaking	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Reckless endangerment	<i>Not CIMT</i>	<i>Cf. Knapik v. Ashcroft</i> , 384 F.3d 84 (3d Cir. 2004) (holding New York’s conviction of attempted reckless endangerment as not CIMT); <i>But see Keunge v. U.S. Attorney Gen.</i> , 561 F.3d 1281, 1285–86 (11th Cir. 2009) (quoting <i>Knapik v. Ashcroft</i> , 384 F.3d 84, 90 n.5) (“With regard to reckless acts, moral turpitude inheres in the conscious disregard of a substantial and unjustifiable risk of severe harm or death.”).
Restriction, breaking	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Seizure: destruction, removal, or disposal of property to prevent	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused”). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
Self-injury without intent to avoid service	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
Sentinel or lookout, disrespect to	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Sentinel or lookout: Loitering or wrongfully sitting on post while receiving special pay	<i>Not CIMT; Not Aggravated Felony</i>	The offense lacks the moral turpitude element for CIMT. <i>See Belliss, supra</i> note 91, at 59 (“The key is to identify the existence of any knowledge or evil intent (<i>malum in se</i>) on the part of the accused). No corresponding crime in the definition of Aggravated Felony in 8 U.S.C. § 1101(a)(43).
Sentinel or lookout: Loitering or wrongfully sitting on post	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Soliciting another to commit an offense	Depends on the underlying offense	<i>Cf. Barrage-Lopez v. Mukasey</i> , 507 F.3d 899, 903 (9th Cir. 2007) (holding CIMT determination for inchoate crimes depends on the underlying offense); <i>see also Rohit v. Holder</i> , 670 F.3d 1085, 1089–90 (9th Cir. 2012).
Straggling	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
Testify, wrongfully refusing to	<i>Removal (Aggravated Felony)</i>	<i>Cf. Alwan v. Ashcroft</i> , 388 F.3d 507 (5th Cir. 2004) (holding federal contempt of court conviction of failing to testify at federal grand jury as Aggravated Felony for obstructing justice). 8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii) (designating obstruction of justice as Aggravated Felony).
Threat, bomb or hoax	<i>Removal (Possible CIMT)</i>	<i>Cf. Latter-Singh v. Holder</i> , 663 F.3d 1156 (9th Cir. 2012) (holding that California’s conviction for making threats to terrorize is CIMT). <i>But see Abpikar v. Holder</i> , 544 F.App’x 719 (9th Cir. 2013) (holding that Ohio’s conviction of telephoning bomb threat is not CIMT).

	Unlawful entry	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.
	Weapon, concealed, carrying	Removal (Certain firearm offense)	8 U.S.C. § 1227(2)(C) (Certain firearm offense) (“Any alien who . . . is convicted under any law of . . . carrying . . . any weapon . . . which is a firearm . . . is deportable.”).
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	<i>Not CIMT; Not Aggravated Felony</i>	Maximum allowable confinement is less than a year.

The New FLIPL: A Primer for Practitioners

Major Jason S. Ballard*

I. Introduction

You are a hard-charging judge advocate at Fort Hooah who was recently moved from the legal assistance office into a brigade trial counsel slot because the Staff Judge Advocate wants to develop you into a broadly skilled judge advocate. Your experience with Financial Liability Investigations of Property Loss (FLIPL) is minimal—you saw one client with a FLIPL issue during your six months in legal assistance and your best advice to her was to “just pay for it so they will leave you alone.” Today after physical training (PT) with your new brigade, Major (MAJ) Smith slaps you on the back and says, “Nice run, Judge.” As you are walking back to your office feeling good about yourself, MAJ Smith calls out to you, “Hey, by the way, Judge, I need to swing by your office today to talk legal business. The battalion commander just appointed me as a FLIPL investigating officer and I need to get spun up fast. I know your boss, MAJ Jones (the brigade judge advocate (BJA)), is TDY all week so I’ll just talk to you. See you soon!” The pride you momentarily had for smoking everyone on the run slowly dissipates because you know absolutely nothing about FLIPLs and you do not want to disappoint MAJ Smith or your BJA. You think to yourself, “Man, I wouldn’t be in this jam right now if I only had paid more attention during the Judge Advocate Officer Basic Course.”

New judge advocates must understand the legal issues surrounding a FLIPL and how those issues effect Soldiers found financially liable for lost, damaged, destroyed, or stolen property. Although property accountability and the FLIPL process is not a legal function per se, the ramifications and consequences for improperly conducted FLIPLs have far reaching impacts on both commanders and Soldiers entrusted with Government property.¹ Army Regulation (AR) 735-5 requires heavy judge advocate involvement to ensure FLIPLs are conducted efficiently, effectively, and in compliance with the applicable legal standards.² A thorough understanding of the process will make judge advocates an important part of the investigative and review team, which improves the overall value of the

* Judge Advocate, U.S. Army. Presently assigned as Regiment Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), Fort Campbell, Kentucky. This article was submitted in partial completion of the Master of Laws requirements of the 62d Judge Advocate Officer Graduate Course.

¹ Gordon Block, *Fort Drum Aviation Unit Released from Seven-day Lockdown Amid Outcry from Families*, WATERTOWN DAILY TIMES, Nov. 26, 2013, at A1 (Soldiers of the 277th Aviation Support Battalion were confined in a seven-day lockdown in a cold hangar during search for missing inventory.). *Id.*

² U.S. DEP’T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES (10 May 2013) (RAR 22 Aug. 2013) [hereinafter AR 735-5].

property-accountability process.

This primer briefly discusses the changes to the property accountability process over the last ten years. It also provides a detailed guide for judge advocates advising FLIPL Financial Liability Officers (FLOs) as well as examines the key legal issues both the judge advocate and FLO must understand before beginning the investigation. Moreover, this primer details the investigation procedures and the post-investigation process for lost property.

II. Background, Applicability, and Recent Changes

Army Regulation 735-5 contains the Army’s policies and procedures for Government property accountability. It applies to the Active Army, Army National Guard, and the Army Reserve.³ This regulation, coupled with AR 710-2, provides comprehensive guidance for accounting for Government property.⁴ Within this overall framework for property accountability, “a FLIPL is used to document the circumstances concerning the loss, damage, or destruction (LDD) of Government property and serves as, or supports a voucher for adjusting the property from accountable records.”⁵ Judge advocates must realize that the FLIPL is only a small part of AR 735-5, while understanding the interplay between the FLIPL and the property accountability system as a whole.

The most recent version of AR 735-5 was published as a Rapid Action Revision (RAR) on 22 August 2013. Prior to this change, Army guidance on how to conduct FLIPLs had not been updated since 28 February 2005.⁶ “Old School” Soldiers may even use the term “Report of Survey” to describe the property accountability system.⁷ Regardless, the key for practicing judge advocates to understand before advising a FLO is that they must utilize the recent regulatory guidance and realize that there were important changes incorporated in the 2013 version.⁸

³ *Id.*

⁴ U.S. DEP’T OF ARMY, REG. 710-2, SUPPLY POLICY BELOW THE NATIONAL LEVEL (28 Mar. 2008) [hereinafter AR 710-2].

⁵ THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK (June 2013) [hereinafter COMMANDER’S LEGAL HANDBOOK].

⁶ AR 735-5, *supra* note 2.

⁷ *Id.* para. 13-1 (“The financial liability investigation of property loss proscribed by DOD 7000.14-R replaces the report of survey system.”).

⁸ *Id.* para. 13-17.

III. The Investigation

When government property is deemed lost, damaged, destroyed, or stolen, commanders must ensure that administrative action is taken to determine what happened to the property, who is responsible for the loss, the amount of loss to the Government, and that accountable records are adjusted accordingly.⁹ The two most common forms used in the determination of Soldier accountability are the Department of Defense (DD) Form 362 Statement of Charges¹⁰ and the DD Form 200, Financial Liability Investigation of Property Loss.¹¹ Most often, judge advocates are not involved in completing the DD Form 200 and the FLO likely will have this document in hand prior to the initial legal briefing from the judge advocate.¹²

A. Pre-Investigation Procedures

Going back to our hypothetical, it is 0900 and MAJ Smith storms in your office as expected. He has two pieces of paper with him: the first is the DD Form 200,¹³ the second

⁹ *Id.* para. 12-1c. Judge advocates must be aware that “[a]ll Army property, except real property, is classified for property accounting purposes as expendable, durable, or nonexpendable.” *Id.* para. 7-1. “Army property that becomes lost, damaged, destroyed, or stolen through causes of other than fair wear and tear will be accounted for per paragraph 12-1 of this regulation.” *Id.* If property is suspected as lost, damaged, destroyed, or stolen, units will typically account for the property using the DD Form 200. *Id.* para. 12-1c(1)(c). The DD Form 200 is populated and processed according to chapter 13. *Id.* para. 13-2.

¹⁰ *Id.* para. 12-3. The DD Form 362 is used when the individual admits to liability and offers to pay for the Government property. “If a military member, the charge does not exceed monthly basic pay, or if a civilian, does not exceed 1/12th an annual salary.” *Id.*

¹¹ *Id.* para. 13-2. The DD Form 200 is the document used to begin the FLIPL process.

A DD Form 200 documents the circumstances concerning the loss or damage of Government property and serves as, or supports a voucher for adjusting the property from accountable records. It also documents a charge of financial liability assessed against an individual or entity, or provides for the relief from financial liability.

Id.

¹² Telephone Interview with Lieutenant Colonel Robert Barnsby, Chief, Admin. Law, XVIII Airborne Corps, Fort Bragg, N.C. (Nov. 11, 2013) [hereinafter Barnsby Telephone Interview].

¹³ AR 735-5, *supra* note 2, para. 13-9b.

When it becomes known that there will be a requirement to prepare a DD Form 200 to investigate the loss of Government property, a DA Form 7531 (Checklist and Tracking Document for Financial Liability Investigations of Property Loss) will be prepared with elements in part A completed as events occur. When the DD Form 200 is prepared, it will be attached to DA Form 7531, which will be used as a checklist and for tracking events as they occur.

is a copy of his appointment orders.¹⁴ You think to yourself, “Where did these come from?”

Normally, the initiator of the DD Form 200 is the property hand receipt holder, unit commander, accountable officer, or the individual with the most knowledge of the loss, damage, destruction, or theft.¹⁵ Most often judge advocates are not involved in completing the DD Form 200. However, a good practice is to have a system where the unit S-4 works with the judge advocate to ensure the DD Form 200 is completed with accuracy. It is critical that the initiator complete the form in sufficient detail as to allow the appointing authority the option of relieving an individual from financial liability, assessing financial liability against an individual, or appointing a FLO.¹⁶ For the Active Army,

Id.

¹⁴ *See id.* fig.13-12 (sample memorandum for appointment of a FLO). In practice, judge advocates and unit S-4s typically follow this sample memorandum. However, they may wish to tailor the memorandum for their specific unit and insert more guidance as necessary.

¹⁵ *Id.* para. 13-7.

The three types of accountable officers are – (1) a transportation officer, who is accountable for property entrusted to them for shipment. (2) a stock record officer, who is accountable for supplies being held for issue from time of receipt until issued, shipped, or dropped from accountability. (3) a PBO, who is accountable for property at the using unit level on receipt and until subsequently turned in, used (consumed) for authorized purposes, or dropped from accountability. (Hand receipt holders are not accountable officers.).

Id. para. 2-10. Typically, the initiator of the DD Form 200 is the company commander or unit S-4. *See* Barnsby Telephone Interview, *supra* note 12.

¹⁶ AR 735-5, *supra* note 2, para. 13-10. For example, assume that a squad leader conducts an equipment inspection of her Soldiers prior to a mission. The squad leader determines that Private (PV2) Moore does not have his Universal Sleeping Bag and questions PV2 Moore about the gear. Private Moore explains that he took the Universal Sleeping Bag on a recent camping trip with his buddies and that someone probably stole it while he was fishing. Upon receiving this information, the squad leader reports the missing equipment to the unit S-4. The S-4 initiates a DD Form 200 and completes blocks 1 thru 11. Block 9 should recite the complete circumstances of the suspected loss of Government property.

Block 9 will contain a description of the events leading to the loss or damage of Government property, with an explanation of how it happened, when it happened, and who was involved, omitting personal opinions and conjectures. The description will provide enough detail to determine the proximate cause of the loss or damage if possible. . . . The initiator of a DD Form 200 must prepare a thorough document in recognition that an investigation by a financial liability officer represents a significant expenditure of time and effort. It may be necessary for the initiator to obtain statements from individuals who were witnesses or who have knowledge of the incident resulting in the loss.

Id. para. 13-10b(5).

the DD Form 200 must be initiated and presented to the appointing authority no later than fifteen calendar days after discovery of the loss, damage, destruction, or theft.¹⁷ When reviewing the DD Form 200, adherence to the timeline and compliance with regulatory guidance by the appointing authority are issues to be on the lookout for.¹⁸

Judge advocates must also check the DD Form 200 to ensure that both the appointing authority and the FLO are proper.¹⁹ By regulation, the appointing authority is an officer designated by the approving authority with responsibility for appointing FLOs.²⁰ The appointing authority must be at least a lieutenant colonel (LTC) or major filling a LTC billet.²¹ On the other hand, the FLO need only be an Army officer or noncommissioned officer in the rank of Sergeant First Class (SFC) or above and must be senior to the individual being investigated.²² The key takeaway is that the FLO must outrank the individual subject to potential financial liability.²³ In most instances, the

¹⁷ *Id.* para. 13-8. Notably, there is no punitive provision contained in the regulation for exceeding the fifteen calendar day timeline. In practice, units will often fail to initiate the DD Form 200 within fifteen calendar days. The practical effect is that an individual recommended for financial liability will have equitable grounds in his rebuttal statement to argue for relief of financial liability should the unit greatly exceed the 15 calendar day threshold. See Barnsby Telephone Interview, *supra* note 12.

¹⁸ The judge advocate should review the DD Form 200 to ensure blocks 1 thru 13 are filled out correctly. In the example provided in note 15, a likely scenario would be that the responsible officer (typically the unit commander or S-4), would check “yes” in block 12a; in block 12b he would request an investigation to determine whether PV2 Moore was negligent in losing his Universal Sleeping Bag. He would also explain his rationale for determining why an investigation is warranted. In block 13, the appointing authority “initially makes a decision based upon available evidence whether to appoint a financial liability investigating officer by choosing the correct block in 13c. If an investigating officer is required by the circumstances, the appointing authority completes a memorandum appointing the officer to investigate the circumstances surrounding the loss of government property.” AR 735-5, *supra* note 2, para. 13-10d(13). Again, as noted in footnote 16, there is no punitive provision for incorrectly completing the DD Form 200 or failing to follow regulatory guidance. However, “[a] legal advisor will provide a written opinion as to the legal sufficiency of the [FLIPL.]” *Id.* para. 13-39b. Importantly, “[t]he approving authority will ensure corrective actions are taken before taking final action to assess financial liability.” *Id.* In practice, these deficiencies could significantly delay processing the investigation or may result in an individual being relieved of financial liability.

¹⁹ See U.S. Dep’t of Def., Form 200, Financial Liability Investigation of Property Loss block 13 (July 2009) [hereinafter DD Form 200].

²⁰ AR 735-5, *supra* note 2, para. 13-17d. Typically, the appointing authority will be the battalion or squadron commander. See Barnsby Telephone Interview, *supra* note 12.

²¹ AR 735-5, *supra* note 2, para. 13-17d(1).

²² *Id.* para. 13-27. For example, in the hypothetical outlined in note 15, the FLO may be a SFC (E-7) since the subject of potential financial liability is a PV2 (E-2). However, if the facts were changed and our subject of potential financial liability was a sergeant major (SGM), then the FLO must be an officer or a SGM (E-9) who is senior-in-grade.

²³ *Id.* para. 13-27b. Importantly,

appointing authority will designate the FLO using a memorandum and notify her that the investigation is her primary duty until complete.²⁴

Again, flashing back to our hypothetical, you take a look at MAJ Smith’s papers to determine if the DD Form 200 was completed properly and whether he may serve as a FLO. Both documents check out satisfactorily and you now search your legal repertoire for something intelligent to say. You vaguely recall something about the doctrines of responsibility, culpability, and proximate cause from your basic course instruction in Charlottesville.

1. Types of Responsibility

There are five types of responsibility that must be understood before beginning the investigation: (1) command responsibility, (2) supervisory responsibility, (3) direct responsibility, (4) custodial responsibility, and (5) personal responsibility.²⁵ In general, command responsibility is the obligation of a commander to ensure that Government property within their command is properly used and cared for.²⁶ Command responsibility cannot be delegated to

A financial liability officer generally will be senior to any individual subject to the potential assessment of financial liability. The financial liability officer will report to the approving authority, any instances in the course of an investigation that would require the examination of the conduct or performance of duty of senior personnel. The approving authority will exercise the options of replacing the junior financial liability officer with an individual of a senior grade, or directing the junior financial liability officer to continue the investigation. If the financial liability officer is directed to continue the investigation, the approving authority will document the military exigency (urgency) that prevented the appointment of another financial liability officer. This documentation should be attached to the financial liability investigation of property loss as an exhibit.

U.S. DEP’T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER’S GUIDE para. 1-7 (9 Apr. 2007) [hereinafter DA PAM. 735-5].

²⁴ AR 735-5, *supra* note 2, para. 13-24a. As a practical matter, judge advocates must explain to the FLO that the FLIPL is their primary duty and takes priority over all normal work duties. This is often difficult for the FLO because, in practice, the FLIPL is usually a secondary duty to an already full schedule. Nevertheless, judge advocates and FLOs must remain vigilant in adhering to the required timelines contained in the regulation. See Barnsby Telephone Interview, *supra* note 12.

²⁵ AR 735-5, *supra* note 2, para. 13-29.

²⁶ *Id.* para. 13-29a(2). For example, a commander has a duty to ensure that all property within her command is properly issued to Soldiers in that unit. This is often accomplished by hand receipting the unit property to the supply sergeant who in turn hand receipts it to Soldiers during equipment issue. If, however, the commander does not have a policy that all equipment issued to Soldiers will be properly hand receipted, then the commander could be held financially liable under the theory of command responsibility. See Barnsby Telephone Interview, *supra* note 12.

others.²⁷ Supervisory responsibility is the obligation of a supervisor to ensure that Government property issued to, or used by, her subordinates is properly used and cared for.²⁸ Direct responsibility, on the other hand, simply results from assignment as an accountable officer whose obligation it is to ensure the proper use and care of property which has been received.²⁹ Similarly, custodial responsibility typically results from assignment as a supply sergeant or supply clerk and is that individual's obligation to properly care for property in storage awaiting turn-in or issue.³⁰ Finally, personal responsibility is the obligation of an individual to exercise care for property in her physical possession.³¹ Undoubtedly, it is critical that the judge advocate and FLO understand each type of responsibility before beginning the investigation. While, in practice, the FLO should identify every person that has some form of responsibility for the lost, damaged, destroyed, or stolen property, most FLIPLs will involve the concept of personal responsibility for property issued to an individual by utilizing a hand-receipt or for property merely in an individual's physical possession regardless of a hand-receipt.³²

2. Culpability

Before financial liability may be assessed against an individual, the investigation must determine that the individual breached a particular duty involving the property.³³ Culpability is easily described as "blameworthiness" and involves the breach of some affirmative duty.³⁴ Normally, culpability is shown through either negligence or some willful misconduct by the

individual entrusted with Government property.³⁵ In terms of negligence, there are two types of negligence involving the loss, damage, destruction, or theft of Government property: simple negligence and gross negligence.³⁶ Simple negligence is the absence of due care with regard to the loss, damage, destruction, or theft of Government property.³⁷ In contrast, gross negligence is an extreme departure from due care that results from a reckless or deliberate disregard for the proper care or use of Government property.³⁸

A few illustrations may help demonstrate these concepts of negligence. For example, if Private (PVT) Jones became hungry and decided to boil grease to deep fry a chicken, but he forgot about the boiling grease and the kitchen subsequently caught on fire, PVT Jones would have committed an act of simple negligence for his failure to use common sense while boiling grease because most reasonable people understand that you cannot leave boiling grease unattended.³⁹ In contrast, if PVT Jones became hungry, built a fire pit in the middle of his living room, filled it with firewood, and doused it with gasoline, thereby burning down his barracks room, then PVT Jones would have committed an act of gross negligence for his reckless disregard for the foreseeable consequences of his actions.⁴⁰

3. Proximate Cause

The final, but most widely misunderstood,⁴¹ key legal

²⁷ AR 735-5, *supra* note 2, para. 13-29a(2).

²⁸ *Id.* para. 13-29a(3). For example, a platoon sergeant has a duty to ensure that the property issued to Soldiers within her platoon is properly safeguarded and cared for. Similarly, a squad leader has a responsibility to ensure the proper use of equipment issued to members of his squad. *See* Barnsby Telephone Interview, *supra* note 12.

²⁹ AR 735-5, *supra* note 2, para. 13-29a(4).

³⁰ *Id.* para. 13-29a(5).

³¹ *Id.* para. 13-29a(6).

³² *See* Barnsby Telephone Interview, *supra* note 12. For example, in our hypothetical in footnote 15, PV2 Moore has personal responsibility for his Universal Sleeping Bag because it was sub-hand receipted to him and it is in his physical possession. In addition, PV2 Moore's squad leader has supervisory responsibility for PV2 Moore's Universal Sleeping Bag because the squad leader has the obligation to ensure that her subordinates are safeguarding and properly caring for Government property. Moreover, PV2 Moore's company commander has command responsibility for the Universal Sleeping Bag by virtue of her assignment to a command position. Finally, PV2 Moore's supply sergeant has direct responsibility for the Universal Sleeping Bag because of his duties upon acceptance of the unit's property by hand receipt. *See supra* note 15.

³³ AR 735-5, *supra* note 2, para. 13-29b.

³⁴ BLACK'S LAW DICTIONARY 385 (9th ed. 2009).

³⁵ AR 735-5, *supra* note 2, para. 13-29b.

³⁶ *Id.*

³⁷ *Id.* para. 13-29b(2). For example, simple negligence is easily explained to the FLO as carelessness. In our hypothetical in footnote 15, PV2 Moore exhibited simple negligence if he merely forgot his Universal Sleeping Bag and left it on his camping trip. Importantly, though, negligence can be a "[f]ailure to comply with existing laws, regulations, and/or procedures[.]" DA PAM. 735-5, *supra* note 23, para. 7-1. Therefore, PV2 Moore could be negligent if there were policies that prohibited him from using his Government-issued Universal Sleeping Bag on a personal recreational camping trip.

³⁸ AR 735-5, *supra* note 2, para. 13-29b(3). "Gross negligence is the extreme departure from the course of action expected of a reasonably prudent person, accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act." DA PAM. 735-5, *supra* note 23, para. 2-1f. For example, in our footnote 15 hypothetical, PV2 Moore would have displayed gross negligence if he used his Universal Sleeping Bag as a means to contain the flames of the open campfire and it caught on fire and was destroyed. Clearly, PV2 Moore recklessly disregarded the foreseeable consequence that the sleeping bag would catch on fire.

³⁹ 5TH SPECIAL FORCES GROUP (AIRBORNE), GUIDE FOR THE FLIPL INVESTIGATING OFFICER (Nov. 2009) [hereinafter 5TH SPECIAL FORCES GROUP FLIPL GUIDE].

⁴⁰ *Id.*

⁴¹ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 711 (2d ed. 1995) (noting that one commentator rather uncharitably terms proximate

issue for the judge advocate and FLO to grasp is proximate cause.⁴² Proximate cause is critical in the FLIPL process because the FLO must determine that an individual's negligence was the proximate cause of the loss, damage, destruction, or theft of the Government property before that individual may be held financially liable.⁴³ "Proximate cause is the cause, which, in a natural and continuous sequence, unbroken by a new cause, produces loss, damage, destruction, or theft, and without which, the loss, damage or destruction would not have occurred. Stated more simply, proximate cause is the immediate or direct cause of the loss."⁴⁴

Again, a hypothetical may help illustrate this concept of proximate cause. Sergeant (SGT) Snuffy leaves his equipment in his unlocked vehicle in downtown Charlottesville and the equipment is stolen. Sergeant Snuffy's negligence caused the loss of the equipment because he placed the gear in an unlocked vehicle and in a location where it was reasonably foreseeable that it would be stolen. In other words, SGT Snuffy's negligence proximately caused the loss of his equipment.⁴⁵ In contrast, SGT Snuffy leaves his equipment in his unlocked vehicle in downtown Charlottesville and it is stolen. The thief then abandons the gear while being chased by police and SFC Samaritan, a fellow Soldier and innocent bystander, recovers the stolen equipment. Subsequently, SFC Samaritan loses the gear before he has a chance to return it to SGT Snuffy or his unit. In this situation, although SGT Snuffy was negligent in leaving his gear in an unlocked vehicle in a questionable location, he was not the proximate cause of the loss because SFC Samaritan's subsequent actions directly contributed to the loss after the property was returned to the control of the Government (i.e. SFC Samaritan). Sergeant Snuffy should not be held financially liable for losing the equipment because he was not the proximate cause of the

cause "concise gibberish") (citing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 401 (1963)).

⁴² See Captain Daniel D. Maurer, *Working with Proximate Cause: An 'Elements' Approach*, ARMY LAW., Dec. 2011, at 16 (providing a detailed discussion on working with proximate cause).

⁴³ AR 735-5, *supra* note 2, para. 13-29c. It is not enough to hold an individual financially liable simply because that individual displayed negligence or gross negligence. The Government may only impose financial liability for the loss, damage, destruction, or theft of property if that negligent conduct was also the proximate cause of the loss, damage, or destruction, or theft. *Id.*

⁴⁴ DA PAM 735-5, *supra* note 23.

⁴⁵ TASK FORCE IRON, FINANCIAL LIABILITY INVESTIGATIONS OF PROPERTY LOSS, GUIDE FOR INVESTIGATING OFFICERS 12 (n.d.) [hereinafter TASK FORCE IRON FLIPL GUIDE]. In this situation, the approving authority could hold SGT Snuffy financially liable for losing his equipment since his actions were the proximate cause of the lost Government property. In addition, "[t]he methodology used for computation of the charges against a single individual is shown at table 12-3." AR 735-5, *supra* note 2, para. 13-32d(6)(c).

loss.⁴⁶

Back to our initial hypothetical, MAJ Smith looks at you and confidently says,

OK, I'm tracking all of these legal issues. Before I can recommend that someone be held financially liable, I need to explain in my report how that particular individual had responsibility for the government property and how that person's negligent conduct was the proximate cause of the loss, damage, or destruction of the property. Sounds easy enough, Judge.

B. Investigation Procedures

Now that you and the FLO understand the basic concepts of responsibility, culpability, and proximate cause, MAJ Smith says to you, "Now where do I begin my investigation?"

For any fact-finding mission, a thorough investigation is the key to determining what actually happened to the property.⁴⁷ Moreover, the FLO must approach the investigation free of any preconceived notions of how the property was lost, damaged, destroyed, or stolen.⁴⁸ The FLO must seek out all the facts by examining the property, interviewing witnesses, and obtaining copies of all relevant documents pertaining to the property in question.⁴⁹ As a practical matter, the FLO should focus on the six basic questions of any investigation: "who," "what," "where," "when," "why," and "how." For example, who was responsible for the loss, damage, or destruction of the property?⁵⁰ What was lost, damaged, destroyed, or stolen?

⁴⁶ TASK FORCE IRON FLIPL GUIDE, *supra* note 45. In this scenario, it is possible that SGT Snuffy and SFC Samaritan are held collectively liable for the lost Government property since, arguably, their actions both contributed to the lost property. "When more than one person's negligent act or willful misconduct is the proximate cause for the loss, those persons should be recommended for assessment of collective financial liability. The term 'collective financial liability' is used when more than one individual is found financially liable for a loss." DA PAM 735-5, *supra* note 23, para. 4-6b(3). In addition, "When two or more entities are held collectively and individually liable for a single loss, their individual financial charge is computed per table 12-4." AR 735-5, *supra* note 2, para. 13-41c.

⁴⁷ AR 735-5, *supra* note 2, para. 13-31.

⁴⁸ *Id.* ("An investigation should not be started with predetermined ideas as to what caused, or who is to blame for the [loss, damage, or destruction of Government property.]").

⁴⁹ *Id.*

⁵⁰ *Id.* (recognizing the regulation contemplates that an investigation may determine that no one is responsible for the loss, damage, destruction, or theft of Government property). The regulation states, "A thorough

Where was the Government property lost, damaged, destroyed, or stolen? When was it lost? Why was the property lost, damaged, destroyed, or stolen? And finally, how was the property lost, damaged, destroyed, or stolen?

1. Gathering Evidence and Facts

In order to answer the six basic questions of any investigation, the FLO must collect evidence by interviewing witnesses and obtaining statements from all individuals who are logically connected to the property in question.⁵¹ The FLO will record the witness interviews on a Department of the Army (DA) Form 2823.⁵² However, it is important to understand that the statements and evidence collected may be conflicting or even self-serving.⁵³ It is the FLO's job to sort through all available evidence and resolve conflicts to determine what actually occurred to the lost, damaged, destroyed, or stolen Government property.⁵⁴ This evidence will include copies of the hand receipt from the unit S-4 or the Soldier(s) in question.⁵⁵ This task is relatively simple when dealing with lost property.⁵⁶ Further, the FLO must determine when and where the property was lost, damaged, destroyed, or stolen.⁵⁷ This can be

investigation may establish no fault, or it may establish that financial liability should be recommended." *Id.*

⁵¹ *Id.* para. 3-31. For example, in our footnote 15 hypothetical, the FLO should interview PV2 Moore and anyone that accompanied him on the camping trip. In addition, the FLO should also interview the company commander, the first sergeant, platoon sergeant, and squad leader to determine any additional facts logically related to the lost gear. *See supra* note 15.

⁵² AR 735-5, *supra* note 2, para. 3-31.

⁵³ *Id.* (noting that evidence will often contradict other evidence or even support more than one logical conclusion). It is the FLO's duty to resolve these conflicts by using his best judgment and common sense to arrive at a conclusion that best represents what actually occurred. It is important that the FLO explain in his findings how he resolved any contradictions and why he arrived at a particular conclusion. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* As a practical matter, the FLO should always attempt to first locate lost property by examining the type of property in question and where it was potentially lost by visiting the site and interviewing individuals who were near the area at the time of the loss. The FLO should submit as an exhibit to the FLIPL his attempts to locate the concerned property. The FLO should follow the steps outlined in AR 735-5, para. 14-14, to reestablish accountability if the missing property is located during his search. *See* Barnsby Telephone Interview, *supra* note 12.

⁵⁶ *See* Barnsby Telephone Interview, *supra* note 12 (stating that the FLO's job becomes more onerous when dealing with damaged or destroyed property); *see also* AR 735-5, *supra* note 2, para. 13-31 (explaining that the FLO will need to physically inspect the damaged or destroyed property, obtain police reports, obtain estimated costs of repair, seek expert opinion in determining the cause of damage, and release the property for repair or turn-in).

⁵⁷ AR 735-5, *supra* note 2, para. 13-31; *see also* Barnsby Telephone Interview, *supra* note 12 (stating that if the FLO cannot determine when the loss, damage, destruction, or theft occurred, the FLO should determine

accomplished by looking at the DD Form 200 or talking to witnesses who have knowledge of the incident or lost property.⁵⁸ By gathering evidence and answering the questions of "what," "when," and "where," the FLO is generally able to establish the "who" by simply drawing a reasonable conclusion based on the available evidence.

The final task for the FLO during the investigative phase is determining how and why the Government property was lost, damaged, or destroyed. Normally, these questions will be answered in the process determining the facts surrounding the "who," "what," "where," and "when" issues and then by making logical and reasonable conclusions based on the evidence.⁵⁹ If, however, the loss, damage, destruction, or theft is more difficult to determine, the FLO must examine what facts are indisputable and compare them with those in conflict, and then make logical determinations based on all the existing evidence.⁶⁰

2. Finalizing the Investigation: FLO's Conclusions and Recommendations

Once the FLO finishes the investigative phase, he will enter his findings and recommendations on the DD Form 200, block 15a.⁶¹ The FLO's findings are the conclusions reached during the course of the investigation. They must be based on the facts and circumstances surrounding the lost, damaged, destroyed, or stolen property.⁶² The FLO must state the facts and conclusions in his own words rather than reciting the contents of the witness statements.⁶³ After the FLO records his findings on the DD Form 200, he must then submit logical recommendations based on those findings and conclusions.⁶⁴ There are two kinds of recommendations: (1) relieve all individuals of financial liability or (2) recommend financial liability against an individual or individuals. If financial liability against any individual is recommended, the FLO will ensure that the individual completes the

when the property was last accounted for and by whom. This may assist the FLO in determining additional witnesses to interview).

⁵⁸ AR 735-5, *supra* note 2, para. 13-31; *see also* Barnsby Telephone Interview, *supra* note 12 (stating that if, however, the DD Form 200 is not clear on where the property was lost, damaged, or destroyed, the cause could be an accountability problem during the issuance of the property). For example, a Soldier may have signed for the property in question and thereafter issued it to another Soldier, but failed to issue a sub-hand receipt during the latter transaction.

⁵⁹ AR 735-5, *supra* note 2, para. 3-31.

⁶⁰ *Id.*

⁶¹ *Id.* para. 13-32.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

relevant portion of the DD Form 200.⁶⁵ The FLO must give that individual a chance to examine the DD Form 200 after the FLO's findings and recommendations have been recorded and an opportunity to submit a rebuttal statement concerning the recommendation of financial liability.⁶⁶ The FLO shall explain to that individual the consequences of the recommendation of financial liability and the significance of the rebuttal statement.⁶⁷ For example, a subsequent finding of financial liability could expose the individual to forfeiture of one month's basic pay, or worse, the full amount of the Government's loss.⁶⁸ On the other hand, a well-crafted rebuttal may convince the approving authority that financial liability is not warranted by the facts and circumstances.

Back to our hypothetical: MAJ Smith turns to you with a quizzical look and asks,

Let me get this straight, Judge; before I submit my findings and recommendations to LTC Fair (battalion commander/appointing authority), I have to explain all

⁶⁵ *Id.* (requiring that the individual charged must complete block 16 of the DD Form 200).

⁶⁶ *Id.* para. 13-34; *see also id.* para. 13-35 (stating that "[i]ndividuals have the right to submit a rebuttal statement, or other added evidence, and to have that statement or evidence considered and attached to the financial liability investigation of property loss for consideration by higher authority. Individuals against whom a charge of financial liability is recommended may obtain legal advice from the servicing legal office.").

⁶⁷ *Id.* para. 13-34.

⁶⁸ *Id.* para. 13-41. "The basic premise on which financial charges are computed is that the charge will represent the actual loss to the Government. The actual loss to the Government is the difference between the value of the property immediately before its loss or damage and its value immediately after." *Id.* app. B, para. B-5. Specifically,

The value of lost, destroyed, or irreparably damaged property will be the actual value of the property at the time of the loss, minus any salvage or scrap value. Actual value at the time of the loss or damage may be computed in one of three ways. The preferred method of determining the value of property at the time of loss or damage is by a qualified technician's two-step appraisal of its fair market value. . . . When determination of fair market value is not possible or equitable, the value at the time of the loss or destruction may be computed by subtracting depreciation from the current FEDLOG or other standard price of a new item. Depreciation is not deducted on loss or damage to new property. . . . When determination of fair market or depreciated value is not possible or equitable, the value of the loss or damage may be computed by subtracting the standard rebuild cost plus any salvage value from the current FEDLOG price for the item.

Id. app. B, para. B-2. Judge advocates must be aware that a common mistake by FLOs is that they often use the purchase cost of an item without factoring in depreciation or the actual loss to the Government. *See* Barnsby Telephone Interview, *supra* note 12

of this legal stuff to anyone that I recommend for financial liability? And you are telling me that someone might actually submit a rebuttal statement to me and that I must consider that statement before I make my final recommendation to LTC Fair? Am I tracking, Judge?

As you swell with pride, you confirm MAJ Smith's understanding of the process but continue to explain to him that there is still work to be done before the FLIPL is complete. You explain to MAJ Smith that the post-investigation process is as important as the actual investigation itself.

C. Post-Investigation Procedures

After the FLO completes the DD Form 200 and receives and considers the respondent's rebuttal statement, the FLO must submit his final report to the appointing authority.⁶⁹ The appointing authority must personally review the investigation to ensure that all pertinent instructions have been followed and that the investigation represents a complete and unbiased determination of the facts and circumstances surrounding the loss, damage, destruction, or theft of the property.⁷⁰ The appointing authority then has three options: first, the appointing authority can return the investigation to the FLO for additional follow-up or fact-gathering; second, the appointing authority can concur with the FLO's findings and recommendations; or third, the appointing authority can nonconcur with the findings and recommendations of the FLO and substitute his own findings.⁷¹ Upon completion of his review, the appointing authority will forward the DD Form 200 and all exhibits to the approving authority for further review and action.⁷²

⁶⁹ AR 735-5, *supra* note 2, para. 13-33; *see also id.* para. 13-10d(13)(b) ("The appointing authority determines, upon receipt or following completion of an investigation, if financial liability should be assessed. When there is no evidence of negligence or willful misconduct, the appointing authority can recommend that all persons be relieved of financial liability.").

⁷⁰ *Id.* para. 13-36.

⁷¹ *Id.* para. 13-37.

⁷² *Id.*; *see also id.* para. 13-17 (explaining that "[t]he approving authority is defined as an Army officer or DA civilian employee authorized to appoint a financial liability officer and to approve financial liability investigations of property loss. In most cases for Army garrisons, garrison commanders will be the approving authority for financial liability investigations of property loss arising within their commander or under their supervision. . . . For financial liability investigations assessing a final loss of \$100,000 or greater, or loss of a controlled item, the approving authority will be the first general officer or SES employee in the rating chain. . . . Army officers in command positions in the grade of colonel or above . . . are approving authorities for financial liability investigations of property loss arising within their command or under their supervision"). The 10 May 2013 AR 735-5 RAR also authorized approving authorities in the rank of colonel to delegate, in writing, approving authority to lieutenant colonels for FLIPLs worth \$5000.00 or less that does include equipment classified as

The approving authority will also personally review all FLIPLs and make an administrative check to determine that the investigation is thorough and complete.⁷³ Specifically, the approving authority will ensure that contradictory statements and evidence have been resolved and that the FLO has presented logical findings and recommendations.⁷⁴ In addition, the approving authority will ensure that individuals against whom financial liability has been recommended received developmental counseling, rights advisement, and an opportunity to submit a rebuttal statement on their behalf.⁷⁵ If the approving authority believes that the recommendation of financial liability is correct, he will submit the investigation to the servicing legal office for a written legal opinion.⁷⁶ The servicing legal office will provide a written legal opinion discussing the legal sufficiency of the FLIPL and whether the investigation is thorough and complete.⁷⁷ If the investigation is found to be legally insufficient, the approving authority will ensure the investigative shortcomings are remedied before assessing financial liability against any individual for the loss, damage, destruction, or theft of Government property.⁷⁸ Once the approving authority determines that the FLIPL is complete, he can either adopt the FLO's findings and recommendations or substitute his own findings, which could result in relieving the individual of financial liability or assessing financial liability against a different individual.⁷⁹

communications security, sensitive items, and/or equipment that contains personal identification information.

⁷³ *Id.* para. 13-38.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* para 13-39.

⁷⁷ *Id.*; *see also id.* para. 13-39c (directing that “[a] lawyer other than the one who advised the respondent in the preparation of the respondent’s rebuttal statement must perform the legal review required by the approving authority”).

⁷⁸ *Id.* para. 13-39.

A legal advisor will provide a written opinion as to the legal sufficiency of the financial liability investigation of property loss. If, in the legal advisor’s opinion, the financial liability investigation of property loss is not legally sufficient, the opinion will state the reasons why and make appropriate recommendations. The opinion will be attached to the financial liability investigation prior to the approving authority’s review and decision. The approving authority will ensure corrective actions are taken before taking final action to assess financial liability.

Id.

⁷⁹ *Id.* para. 13-40; *see also id.* para. 13-10d(14)(c)2 (explaining that “when the approving authority determines the financial liability investigation is complete, the approving authority will adopt the recommendations of the financial liability investigating officer or appointing authority by checking

Flashing back to our initial hypothetical, as you are about to put the finishing touches on your legal brief to MAJ Smith, he stops you mid-sentence and asks, “Judge, do we really have to run this investigation through the battalion commander for the brigade commander’s final decision? That seems a bit excessive to me. There has to be an easier way.” You explain to MAJ Smith that the post-investigative procedures are just as important as the investigation itself. You emphasize that the opportunity for the Soldier to review the FLO’s findings and recommendations before submitting the report to the battalion commander promotes fairness and ensures due process in the system. You continue to explain that the battalion commander serves as an administrative check in the system, which allows him to review the FLO’s work and return the investigation for any necessary follow-up. In addition, after the battalion commander reviews the FLIPL, the brigade commander, as the approving authority, acts as an additional administrative check in the system by also reviewing the investigation to determine if other questions must be answered or more evidence is needed.

Major Smith confirms,

“OK, Judge. That makes sense. The appointing and approving authorities are there to make sure I didn’t miss anything during my investigation. They also have the ability to concur with my findings and adopt my recommendations or they can make their own decisions based on the evidence. That seems fair. What else do I need to know?”

Relieved that MAJ Smith understands your legal brief, you take another deep breath and explain to MAJ Smith that the final piece to the FLIPL is notifying the Soldier if there is a decision to hold him financially liable.

D. Notifying the Respondent

There are two instances during the FLIPL process where the Government must notify an individual of an assessment of financial liability. First, the FLO will notify an individual against whom there is a recommendation of financial liability and give him an opportunity to submit a rebuttal statement before the FLIPL is forwarded to the appointing authority.⁸⁰ Second, the approving authority will notify a

the approve box in block 14a and complete blocks 14b through 14h; or make a decision contrary to the financial liability investigating officer or appointing authority’s findings by checking the disapprove box in 14a and either relieving all concerned from financial liability or assessing financial liability against a new individual”).

⁸⁰ *Id.* para. 13-34; *see also id.* para. 13-34a(1)–(3) (explaining that the financial liability officer will “(1) Explain to the individual recommended for a charge of financial liability, the consequences of the recommendation, if approved. (2) Explain to the individual the significance of any rebuttal statement submitted by them regarding the possible assessment of financial

respondent if a determination of financial liability was made by the approving authority because there are several rights the respondent may choose to exercise.⁸¹ Those rights include: the right to inspect and copy Army records concerning the assessment of financial liability, as well as to obtain free legal advice from the servicing legal assistance office;⁸² the right to request reconsideration of the assessment of financial liability due to some form of legal error;⁸³ the right to request remission or cancellation of the debt;⁸⁴ the right to request an extension of the collection period concerning the debt;⁸⁵ and the right to submit an application for correction of military record using a DD Form 149, Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552.⁸⁶

liability. (3) Consider and attach as an exhibit to the DD Form 200 any statement the individual desires to submit"); *see also id.* para. 13-34b(1)-(3) (explaining that "[t]he financial liability officer will notify the individual by memorandum that they have the right—(1) To inspect and copy Army records relating to the debt. (2) To legal advice as authorized by AR 27-3. Free legal advice from the servicing legal office is normally provided only to military and DOD civilian employees. (3) To submit a statement and other evidence in rebuttal of the financial liability officer's recommendation").

⁸¹ *Id.* para. 13-42.

⁸² *Id.* para. 13-42a(1)-(2).

⁸³ *Id.* para. 13-42a(3); *see also id.* para. 13-43a (stating that "an individual will [s]ubmit requests for reconsideration by memorandum through their immediate commander to the approving authority. Submit requests for reconsideration only on the basis of legal error. When the approving authority does not reverse their original decision to approve financial liability, the request for reconsideration becomes an appeal, which will be forwarded to the appeal authority by the approving authority. The request for reconsideration will set forth, in detail, any new evidence offered, and provide rationale why financial liability is not appropriate. A request for reconsideration stops all collection action pending a decision by the approving authority and/or the appeal authority").

⁸⁴ *Id.* para. 13-42a(5). This provision applies only to enlisted personnel under the provision of AR 600-4. In addition, paragraph 13-46 states,

When financial liability assessed through a financial liability investigation causes financial hardship on an enlisted Soldier, they may submit an application for remission or cancellation of the debt, DA Form 3508 (Application for Remission or Cancellation of Indebtedness) through their commander, per AR 600-4. A copy of the approved DD Form 200 assessing financial liability will be submitted with the application.

Id. para. 13-46.

⁸⁵ *Id.* para. 13-42a(6); *see also id.* para. 13-47 (explaining that "requests for extension of the collection period will be forwarded through the approving authority to the servicing FAO or USPFPO for action. . . . The approving authority will make a recommendation regarding extending the collection period using the following factors as the basis for the recommendation: monthly income, additional income or assets (including spouses), and expenses caused by living standards that are too high or by mishandling of personal funds are not a basis for a hardship determination").

⁸⁶ *Id.* para. 13-42a(7). An individual may "[s]ubmit an application in accordance with AR 15-185, DD Form 149 (Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section

Notably, it is important for judge advocates to understand that submission of a request for reconsideration or a request for remission/cancellation of indebtedness stops all collection action on the indebtedness until a decision is made by the appropriate appellate authority.⁸⁷ The critical aspect for the judge advocate to remember is that the FLIPL does not end when the approving authority makes his final decision. Individuals have a myriad of legal avenues to challenge any decision to approve financial liability. Proactive judge advocates will remain involved in the process until all challenges and appeals are exhausted and the FLIPL is properly closed out at the unit level.

Several weeks after your initial meeting, MAJ Smith stops by your office. "Hey, Judge. The investigation is done and the boss has let the Soldier know he may have to pay. Thanks for all your help!" As he leaves, you pat yourself on the back for a job well done.

IV. Conclusion

The FLIPL process can be an untamed beast unless judge advocates and FLOs clearly understand the nuances and legal principles contained in the regulation. Before the investigation can even begin, judge advocates must ensure the DD Form 200 is accurate and that the FLO has been properly appointed. Getting the FLO to understand difficult legal principles such as responsibility, culpability, and proximate cause can be a tedious task, but spending the time to properly explain these concepts during the legal brief will reap rewards in the end. Judge advocates must guide the FLO during his quest to gather facts and evidence once the investigation is underway. Adhering to the six investigative questions of "who," "what," "where," "when," "why," and "how" will provide the FLO with ample evidence so that he may offer logical conclusions and recommendations to the appointing authority. Judge advocates must ensure that the FLO finalizes the process by providing notice and a rebuttal opportunity for anyone against whom there is a recommendation of financial liability. Finally, the prudent judge advocate will anticipate and plan for all post-investigation issues such as the required legal review and any appellate issues that may be raised by the respondent. The mission is not complete until all loose ends are tied up, the appellate issues are properly resolved, and the FLIPL is closed out at the unit level.

1552.)" *Id.* In addition, "Individuals assessed financial liability through a financial liability investigation may submit an application, DD Form 149 to the ABCMR if they believe the findings of negligence on their part are unjust. Applications are submitted on DD Form 149, with a complete copy of the DD Form 200 to include all exhibits, attached. Instructions for submitting an application are contained in AR 15-185." *Id.* para. 13-48.

⁸⁷ *Id.* para. 13-42b.

Saving Normal: An Insider's Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life

Reviewed by Lieutenant Michael E. Jones*

*Resiliency is built into every aspect of our biological, psychological, and social being. We are hardwired to work remarkably well, but are far too complicated always to work perfectly and we can lose purchase on normality by mislabeling as mental disorder each and every one of our glitches.*¹

I. Introduction

Judge advocates are frequently involved in decision making processes that can result in the administrative discharge of personnel with mental or physical conditions not amounting to disabilities. In *Saving Normal*, Allen Frances, M.D., convincingly argues that experiencing unpleasant feelings or engaging in activities that have the potential to adversely impact our welfare puts "well" patients at risk for being diagnosed with a myriad of mental disorders as defined in the newly published *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition: DSM-5*² (DSM-5). An outspoken critic of the means and methods used by the DSM-5 task force and the unwholesome silent partnership between the American Psychiatric Association (APA) and pharmaceutical companies, Dr. Frances's concern for the explosive growth of medications being prescribed by physicians and psychiatrists alike is well-grounded and portends rampant diagnostic inflation for many unfounded diagnoses. Dr. Frances expertly and concisely outlines the history and development of psychiatry from Greek times to present day and then critically attacks the alarming trend over the past 60 years of moving away from the use of psychotherapy toward the prolific use of prescription drugs, many of which have the efficacy of a placebo.³ When choosing between administrative separation and retention in the armed forces, commanders generally lean on their judge advocates to aid them in making a determination about the propriety of separation given the complexity and sensitive nature of mental health issues. Judge advocates must, therefore, be familiar with not only the laws and regulations of the service branches, but also the emerging trend of diagnostic inflation that Dr. Frances highlights in his work.

II. Background

Dr. Allen Frances is currently a professor emeritus at Duke University and has been in the practice of psychiatry since he graduated from medical school in 1967.⁴ He served as the chair of the task force that was responsible for the production of the *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition: DSM-IV* (DSM-IV) in 1994.⁵ Since its first publication in 1952, the DSM has gained increasing importance in the field of psychiatry and, since the 1980s, has been considered the bible of mental health disorder diagnostics. Since 2009, Dr. Frances has been a vocal harbinger about the detrimental effects that DSM-5 is likely to have on the practice of psychiatry.⁶ Dr. Frances believes that direct marketing campaigns by pharmaceutical companies to the general public and the significant number of primary care physicians who diagnose patients with serious mental disorders and prescribe medications after office visits lasting only a few minutes will exacerbate diagnoses under DSM-5.⁷

III. Role of the Judge Advocate in Administrative Separations

Judge advocates are increasingly involved in the analysis that takes place when a commander decides whether to administratively separate a member due to personality disorders and physical or mental conditions not amounting to a disability. Service branches are largely consistent in their administrative policies surrounding the requirements and procedures for separating a member due to a mental health disorder. Army Regulation (AR) 635-200⁸ and the Naval Military Personnel Manual⁹ (MILPERSMAN) both

* Judge Advocate, U.S. Navy. Presently assigned as Personnel Law Attorney, Office of the Judge Advocate General, Code 13, Personnel Law Branch, Washington, D.C.

¹ ALLEN FRANCES, *SAVING NORMAL: AN INSIDER'S REVOLT AGAINST OUT-OF-CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE* (2013).

² AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

³ FRANCES, *supra* note 1, at 97-101.

⁴ NORTH CAROLINA MED. BOARD, *NCMB Licensee Results*, <http://www.wapps.ncmedboard.org/Clients/NCBOM/Public/LicenseeInformation/Details.aspx?EntityID=31787&PublicFile=1> (last visited Sept. 12, 2013).

⁵ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, at ix (4th ed. 1994).

⁶ FRANCES, *supra* note 1, at 101-03.

⁷ *Id.*

⁸ U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 5-17 (RAR 6 Sept. 2011).

⁹ U.S. DEP'T OF NAVY, NAVAL MILITARY PERS. MANUAL, ENLISTED ADMINISTRATIVE SEPARATIONS sec. 1910 (13 Apr. 2005).

provide bases for separation under these circumstances.

Important interests are at stake when the government decides whether to exercise these bases for administrative separation. Members are provided costly training from the time they enter military service, and the government must be vigilant about safeguarding that investment. For members, there is grave risk of losing at least one significant benefit—the GI Bill—if his or her service is characterized as General (Under Honorable Conditions).¹⁰ Upon a complete review of a member’s service record, commanders have the power, under both the AR and MILPERSMAN, to characterize a member’s discharge as General which may act as a bar in many cases should the member wish to use his education benefits. Even more concerning is when the member has already availed himself of those educational benefits and is discharged for a mental health condition: he may be responsible for repayment of a portion or all of those benefits, depending on numerous factors.¹¹ The DSM-5 plays an increasingly critical role as military mental health professionals assess members and make diagnoses of mental health disorders. The size of the mental health disorder aperture as listed in DSM-5 criteria has a direct correlation to whether members stay on active duty or face administrative separation and possibly lose their educational benefits.

IV. Widening the Net on Characterization of Mental Disorders

The DSM is a diagnostic tool that facilitates the identification and diagnosis of mental health disorders by licensed practitioners. That practice, however, encompasses not only psychiatrists, but also clinical psychologists, primary care physicians, nurse practitioners, and other professionals who are authorized to both diagnose and treat mental health disorders through psychopharmacology. Dr. Frances highlights three disorders that are redefined in DSM-5 in a way that widens the aperture and risks over inclusion of well patients in diagnoses of Attention Deficit Disorder (ADD), autism, and bipolar disorder.¹²

A. Attention Deficit Disorder

One in ten American school-aged children takes medication for ADD and diagnosis is rising for adults.¹³

¹⁰ UNITED STATES DEP’T OF VETERANS AFF., *What Type of Discharge Is Required to Qualify for the Post-9/11 GI Bill?*, https://gibill.custhelp.com/app/answers/detail/a_id/942/kw/characterization%20of%20service (last visited Sept. 12, 2013).

¹¹ *Id.*

¹² FRANCES, *supra* note 1, at 139.

¹³ L. PRATT ET AL., NAT’L CTR. FOR HEALTH STATISTICS, *ANTIDEPRESSANT USE IN PERSONS AGED 12 AND OVER: UNITED STATES, 2005–2008* (2011).

Relying on decades of professional experience, Dr. Frances asserts that the reasons for the high rates of diagnosis for ADD among children and adults includes definition and criteria changes within the DSM-5, aggressive marketing by pharmaceutical companies to patients and physicians, media coverage, desires of parents and educators to control unruly behavior in classrooms, assignment of additional benefits in schools, and prescription drug abuse.¹⁴ Illustrative of the reduced threshold for diagnosis of ADD is the fact that DSM-5 lowered the requisite number of criteria for diagnosis in adults as compared to DSM-IV. It also removed the requirement that actual impairment before the age of seven resulted from the behavior to merely requiring the presence of symptoms prior to the age of 12.¹⁵ Additionally, the DSM-5 allows a co-diagnosis of ADD with autism spectrum disorder.¹⁶

Common sense dictates that we consider whether the rapid increase in the diagnosis of ADD is due, among many reasons, to groundbreaking and overwhelming scientific evidence that did not exist at the time that DSM-IV was published or, alternatively, our physiological constitution has degraded to the point where we are suddenly so susceptible to this disorder. There is a dearth of scientific evidence in general within the practice of psychiatry.¹⁷ So little is known about the human brain and no significant discoveries have been made in the last twenty years that would aid in the diagnosis of ADD.¹⁸ Direct marketing to patients, coupled with the ease of obtaining a diagnosis under increasingly inclusive criteria, is a logical explanation for the increase in the prevalence of ADD. Dr. Frances rightly argues that we haven’t become sicker since 1994; we’ve simply allowed direct marketing tactics by pharmaceutical companies to influence us.¹⁹

B. Childhood Bipolar Disorder

In order to satisfy the DSM-IV diagnostic requirements of Childhood Bipolar Disorder (CBD), simultaneous classic mood swings between mania and depression were required.²⁰ DSM-5 has changed those requirements so that the mere presence of some symptoms of mania and depression will

¹⁴ FRANCES, *supra* note 1, at 141.

¹⁵ AM. PSYCHIATRIC ASS’N, *HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5* (2013) [hereinafter APA HIGHLIGHTS].

¹⁶ *Id.* at 2.

¹⁷ Drake, Robert, et al., *Implementing Evidence-Based Practices in Routine Medical Health Service Settings*, PSYCHIATRIC SERVS., February 2001, vol. 52, no. 2, <http://ps.psychiatryonline.org/data/Journals/PSS/3561/179.pdf?resultClick=1/>.

¹⁸ FRANCES, *supra* note 1, at 104.

¹⁹ *Id.*

²⁰ APA HIGHLIGHTS, *supra* note 15, at 1–2.

permit diagnosis.²¹ Furthermore, there is no minimum age requirement. Dr. Frances's concern for the application of diagnoses to young patients is well-founded. In one case, a psychiatrist in Boston prescribed Clonidine, Seroquel, and Depakote to a twenty-eight month old girl until she died two years later from overdosing on the pharmaceutical cocktail of blood pressure, antipsychotic, and anti-seizure medications.²² Neither Clonidine nor Depakote is approved by the Food and Drug Administration for use by children.²³ Although this is an extreme case that is likely due to medical malpractice vice typical courses of treatment for toddlers, the fact that DSM-5 did not take this as a lesson-learned and provide guidance for diagnosticians when examining children highlights its failure to employ best practices for diagnosing disorders to patients who can even qualify for a diagnosis.

C. Autism Spectrum Disorder

The DSM-5 rolled four separate disorders related to autism into a single disorder—Autism Spectrum Disorder (ASD)—with a sliding scale of severity.²⁴ As described by the APA, ASD is characterized now by “deficits in social communication and social interaction.”²⁵ Once again, children become the most susceptible to diagnosis because they may be diagnosed with ASD for exhibiting no more than social awkwardness. As is true in the case of ADD diagnoses, children diagnosed with autism and its milder sister diagnosis, Asperger's Syndrome, are eligible to receive more specialized educational and mental health services.²⁶ Dr. Frances concedes that the expansive definition in DSM-IV that sparked widespread diagnosis of autism and Asperger's was partly due to the DSM-IV task force's inability to predict the rate of increase in diagnosis.²⁷ However, the proliferation of services being offered within school systems is directly tied to the requirement that the child be formally diagnosed with autism.²⁸ Dr. Frances points to positive media influences that destigmatize both disorders as being another reason for the increased frequency of diagnosis.²⁹ He relies on studies to support his

position that only half of the children diagnosed with autism truly satisfy the criteria, while half of those who are diagnosed will not qualify for the diagnosis as they age and mature.³⁰

V. Pharmaceutical Companies' Revenues Surge While Their Sphere of Influence Grows

Shortly after DSM-IV was published, pharmaceutical companies were allowed to advertise prescription psychiatric medication to patients via direct marketing.³¹ Prior to that, pharmaceutical companies were generating some \$50 million in revenue annually from ADD medications.³² Once these companies were permitted to market to unwitting patients through television, clever advertising campaigns were highly effective at helping individuals to self-diagnose their own mental health disorders and ask a doctor for a prescription to the miracle cure. Evidence of just how effective these advertising campaigns have become is found in the volume of psychiatric medication prescriptions that are written by primary care physicians – up to 90%, depending on the type of medication.³³ In 2010, physicians wrote more than 51 million prescriptions for ADD medications, and pharmaceutical companies made a staggering \$7.42 billion in revenue—an 83% increase over 2006 revenue levels.³⁴

Other drugs are also extremely lucrative. Recent studies from 2012 show that Abilify, an anti-psychotic used to treat depression and bipolar disorder, was the second highest revenue generator for pharmaceutical companies—raking in \$5.6 billion.³⁵ Cymbalta, used to treat depression, was ranked the fifth highest revenue generator and brought in \$4.7 billion.³⁶ These rankings and revenue levels reflect our belief as a society that we are not only mentally ill, but that we can get our mental health care from primary care physicians instead of psychiatrists. The APA is complicit in this epidemic by failing to change the criteria required for diagnoses of mental health disorders within DSM-5. They shoulder significant responsibility for the proliferation of

²¹ *Id.* at 4.

²² Shelley Murphy, *Doctor Is Sued in Death of Girl*, 4, BOSTON GLOBE, Apr. 4, 2008, http://www.boston.com/news/local/articles/2008/04/04/doctor_is_sued_in_death_of_girl_4/.

²³ *Id.*

²⁴ APA HIGHLIGHTS, *supra* note 15, at 1–2.

²⁵ *Id.*

²⁶ FRANCES, *supra* note 1, at 147–49.

²⁷ *Id.* at 148.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Rosenthal et al., *Promotion of Prescription Drugs to Consumers*, N. ENG. J. MED., Feb. 14, 2002, vol. 346, no. 7.

³² *Id.* at 142.

³³ *Id.* at 101.

³⁴ Gardiner Harris, *F.D.A. Finds Short Supply of Attention Deficit Drugs*, N.Y. TIMES, Dec. 31, 2011, available at http://www.nytimes.com/2012/01/01/health/policy/fda-is-finding-attention-drugs-in-short-supply.html?supply.html?pagewanted=all&_r=1&.

³⁵ *Top 10 Money-Making Drugs of 2012*, DRUGS.COM, <http://www.drugs.com/slideshow/top-10-money-making-drugs-of-2012-1034#slide-2> (last visited Sept. 12, 2013).

³⁶ *Id.* slide 5.

psychopharmacology because they refuse to take back their profession. By allowing unqualified and inexperienced primary care physicians to prescribe these medications, they have abdicated their prerogative to be the primary care providers in the specialty field.

VI. Self-esteem and Personal Accountability

Dr. Frances does an admirable job covering the breadth of issues surrounding the rampant increase in use of prescription drugs. He also adeptly addresses one of the most important intangible issues—that of self-esteem. Recounting several stories of specific individuals who were harmed by the failure of mental health professionals, Dr. Frances exposes the significance of self-esteem and the potential that fake diagnoses will discourage patients from seeking healthy self-help treatments because of the stigma that can be associated with labels. His credibility is bolstered by his recollection of a patient named Mindy who was treated on an inpatient basis for more than two years for schizophrenia at the age of 15 after she exhibited rebellious and eccentric behaviors.³⁷ She was forced to treat her disorder with medications until another psychiatrist realized that Mindy was merely a teenager who had a hard time dealing with her mother. She went on to lead a productive life and eventually forgave the care provider who forced treatment on her for two years of her life—Dr. Allen Frances.³⁸ The story strengthens Dr. Frances' plea to his profession to start controlling the treatment of mental health disorders.

Unfortunately, Dr. Frances did not go the extra step of discussing the concept of how personal accountability is degraded through the excessive use of prescription medications to ensure that we don't feel unpleasant things and think unpleasant thoughts. If a patient fractures his arm, he lowers his expectation of being able to use that arm until the injury is healed. He knows that it takes time to heal, and he feels no compulsion to take external corrective action since the cast will do the work. Similarly, when a patient is diagnosed with a mental health disorder and begins taking medications without engaging in psychotherapy, that patient divorces himself from his personal conduct as it relates to symptoms of his disorder. The patient has a natural tendency to ignore his own character flaws or shortcomings as symptomatic of a mental health disorder. Long-term use of medication only reinforces the diagnosis in his mind and gives him the freedom to let the drugs do the work when he would be better served by seeking psychotherapy from a licensed professional. We are resilient enough as a species to weather significant psychological trauma without sustaining permanent injury.³⁹ When we self-medicate, we

do ourselves a serious disservice and risk teaching future generations that feeling anything other than happiness is not natural.

VII. Impact of the Proliferation of Diagnosis and Prescription Medications on Administrative Separations

Based on increasing trends of diagnoses for mental health conditions that are rooted in the comparatively liberal DSM-5 criteria, judge advocates can be assured that they will encounter greater numbers of personnel with documented mental health conditions in the future. Given the complexity of mental health disorders and the ease with which many health care providers diagnose and prescribe medication, judge advocates are called upon to assist their commanders with distinguishing between those personnel who can safely and effectively continue their duties from those who cannot carry on without endangering those around them.

Far from being a bright-line determination, mental health issues require a sound understanding not only of the law and service regulations, but also of the nuances of mental health diagnoses given the proliferation of diagnosis and medication. Because administrative separation of personnel can cause significant financial harm to the servicemember, it is crucial for judge advocates to ensure that commanders and servicemembers alike understand what is at stake in terms of benefits and entitlements.

VIII. Conclusion

Saving Normal is a warning to patients and the psychiatric community that urges well-reasoned mental health disorder diagnoses, prudent use of prescription medications with reasonable efficacy rates for articulable disorders, and prohibition of marketing to patients by pharmaceutical companies. Dr. Frances acknowledges his own role in contributing to the current conditions as the former DSM-IV task force chair, increasing his credibility. We are in dire need of reform in the area of psychopharmacology. Dangerous drugs are prescribed by the wrong professionals to the wrong people who are told by manufacturers to take a pill to cure their blues. Somebody had to raise a red flag. Thankfully, Dr. Frances had the moral courage to do so.

³⁷ FRANCES, *supra* note 1, at 244–47.

³⁸ *Id.*

³⁹ *Id.* at 30.

Bunker Hill: A City, a Siege, a Revolution¹

Reviewed by Major Phillip T. Korman*

*I see the clouds which now rise thick and fast upon our horizon. The thunders roll, and the lightnings play, and to that God who rides on the whirlwind and directs the storm I commit my country.*²

I. Introduction

So spoke lawyer Josiah Quincy, Jr., on 16 December 1773, to the crowd of more than five thousand people crammed inside Boston's Old South Meeting House to consider the way ahead regarding the East India tea currently stored on three ships tied up along Griffin's Wharf.³ Tensions were high, as Great Britain had demanded that the tea be unloaded, sold exclusively by loyalist agents at a significant discount, and taxed.⁴ Although Quincy had implored his fellow citizens to thoughtfully consider the consequences before taking action against Great Britain, later that evening more than a hundred Bostonians, disguised as Indians, liberated the East India Company's tea into Boston Harbor.⁵

In *Bunker Hill* author Nathaniel Philbrick endeavors to "provide an intimate account of how, over the course of eighteen months a revolution transformed a city and the towns that surrounded it, and how that transformation influenced what eventually became the United States of America."⁶ He also asserts that "the Battle of Bunker Hill is the critical turning point in the story of how a rebellion born in the streets of Boston became a countrywide war for independence."⁷ This review examines the author's background, explores how the Boston patriots ultimately triggered the war for independence, critiques the book, and makes a recommendation as to its usefulness.

II. Background

Nathaniel Philbrick, a skilled writer who labored three years on this book, is well-suited to craft this narrative.⁸ A Boston native, Philbrick holds a Bachelors of Art degree in

English from Brown University and a Masters of Art degree in American Literature from Duke University.⁹ Philbrick's most notable works include *In the Heart of the Sea*, a winner of the National Book Award; *Mayflower*, a finalist for the Pulitzer Prize; *Sea of Glory*, winner of the Theodore and Franklin D. Roosevelt Naval History Prize; *The Last Stand*; *Why Read Moby Dick?*; and *Away Off Shore*.¹⁰

III. Philbrick Demonstrates How Boston Patriots Triggered the War for Independence

Revealing how Boston patriots championed liberty, Philbrick organizes *Bunker Hill* chronologically into three parts: *Liberty*, covering the Boston Tea Party to April 1775;¹¹ *Rebellion*, which includes the battles at Lexington and Concord through Bunker Hill on June 17, 1775;¹² and *The Siege*, which covers the siege of Boston to the first Boston public reading of the Declaration of Independence in July 1776.¹³ Although *Bunker Hill* introduces a cast of historical figures, from leading patriots Samuel Adams and John Hancock to British generals Thomas Gage and William Howe, Philbrick focuses on the almost forgotten patriot Dr. Joseph Warren, a respected Boston physician, and shifts to General George Washington after the battle of Bunker Hill.¹⁴

Warren entered the political scene as a writer and later joined his mentor Samuel Adams on the Boston Committee of Correspondence, a colony-wide network of communication intended to promote the patriot cause throughout the colony and beyond.¹⁵ When Parliament enacted the Port Act¹⁶ to close Boston Harbor due to the Tea Party, Warren served on the committee that drafted a circular letter broadcasting the port's closure and calling for a complete boycott of British goods.¹⁷ After Parliament targeted Massachusetts with the Massachusetts Government

* Judge Advocate, U.S. Air Force. Presently assigned as an acquisition attorney with the 78th Air Base Wing, Robins Air Force Base, Georgia.

¹ NATHANIEL PHILBRICK, *BUNKER HILL: A CITY, A SIEGE, A REVOLUTION* (2013).

² *Id.* at 4. Quincy, an eloquent lawyer who was dying from tuberculosis, had teamed with John Adams to successfully represent the British soldiers tried for the Boston Massacre a few years earlier. *Id.* at 3-4.

³ *Id.* at 3.

⁴ *Id.* at 8-9.

⁵ *Id.* at 4, 8-9.

⁶ *Id.* at xvi.

⁷ *Id.* at xiv.

⁸ *Id.* at xv.

⁹ Nathaniel Philbrick, <http://nathanielphilbrick.com/about> (last visited Aug. 21, 2014).

¹⁰ *Id.*

¹¹ PHILBRICK, *supra* note 1, at 1, 3, 9, 104.

¹² *Id.* at 107, 127, 143-59, 221-30.

¹³ *Id.* at 231, 249, 285, 290.

¹⁴ *Id.* at 26-27, 33-34, 46, 121, 216-17, 237-39.

¹⁵ *Id.* at 34-35, 68-69.

¹⁶ Boston Port Bill (March 31, 1774), <http://www.ushistory.org/declaration/related/bpb.htm>.

¹⁷ *Id.* at 36-37.

Act¹⁸ and enacted various legislation collectively known as the “Coercive Acts”¹⁹ against the colonies, Warren authored the “Suffolk Resolves,” advocating disobedience of the Coercive Acts, encouraging towns to elect military officers to muster militia, boycotting of British goods, establishing a provincial congress, and creating a system of couriers to alert towns in the countryside of the need for assistance should the enemy move quickly.²⁰ In the preamble to the Suffolk Resolves, Warren eloquently stated that Massachusetts had observed “the power but not the justice, the vengeance but not the wisdom of Great Britain,” convincing the members of the First Continental Congress to vote unanimously to endorse his resolves and to consent to an intercolonial boycott of British goods, an important step for unity among the colonies.²¹

Philbrick pays special attention to Warren’s decision to alert the countryside the night of 18 April 1775, which set the stage for confrontation with the British.²² As one of the last patriot leaders still in occupied Boston that evening, Warren received a tip about an upcoming secret British raid on the military supplies stored in Concord and information about a possible effort to capture leading patriots Samuel Adams and John Hancock.²³ Rather than convene a meeting of the Committee of Safety and vote on whether to send the alarm out to the towns as directed by the extra-legal Provisional Congress, Warren decided on his own to have William Dawes and Paul Revere sound the alarm to towns throughout Massachusetts.²⁴ The next day British troops would meet the gathered militia in the celebrated battles of Lexington and Concord.²⁵ Philbrick indicates that at this stage, the patriots were still seeking simply to restore their liberties and flew the British flag out of loyalty to the king.²⁶

¹⁸ The Massachusetts Government Act effectively prohibited regular town meetings, the heart of the patriot movement, and transferred to the King, rather than the Massachusetts House of Representatives, the power to determine the upper chamber of the General Court, the colony’s legislative body. <http://www.ushistory.org/declaration/related/mga.htm>.

¹⁹ Along with the Massachusetts Government Act and the Boston Port Bill, the Administrative of Justice Act and the Quartering Act form what were called the Coercive or Intolerable Acts by the colonies. See MASSACHUSETTS HISTORICAL SOC’Y, <http://www.masshist.org/revolution/coercive.php>.

²⁰ *Id.* at 74–75.

²¹ The Suffolk Resolves (September 6, 1774), <http://constitution.org/primarysources/suffolk.html>.

²² *Id.* at 116–17.

²³ *Id.* at 116–19; see also DAVID H. FISHER, PAUL REVERE’S RIDE 95 (1994) (stating that an informer notified Warren that the British plan called for seizing Samuel Adams and John Hancock in Lexington and burning the military supplies at Concord).

²⁴ Even if five members of the Committee of Safety had met, it is not certain they would have unanimously approved sending out the alarm since the seven hundred British troops readying for the operation lacked baggage or artillery, a requirement of the Provincial Congress for sending out the alarm. PHILBRICK, *supra* note 1, at 118.

²⁵ *Id.* at 127–28, 141–59.

²⁶ *Id.* at 55, 180–81.

The energetic Warren served as President of the Provincial Congress, led the Committee of Safety, and was chosen to be a major general.²⁷ Following Concord, he drafted a circular seeking recruits colony-wide, and the Provincial Congress aimed to raise a New England-wide army.²⁸ When the Battle of Bunker Hill broke out nearly two months later, the de facto patriot leader in Massachusetts joined the provincial army forces because he could not remain in safety “while my fellow citizens are shedding their blood for me.”²⁹ Volunteering to serve where the action would be the hottest rather than to command, Warren was killed in combat.³⁰

With the death of Warren, Philbrick switches his focus to General George Washington, the Continental Congress’s choice to lead the Provincial Army, and his effort to transform them into a disciplined, intercolonial force.³¹ In this new, intercolonial army, the seeds of independence were sown.³² On 1 January 1776, the first day of the new Continental Army, General Washington replaced the previous flag with the Union flag.³³ When Boston loyalists printed a copy of the King’s Speech as a final ultimatum for the rebel soldiers to either return as British subjects or admit their participation in a war for independence, the soldiers publicly burned it.³⁴ With the Continental Army besieging Boston, the British would evacuate, and in July 1776, a copy of the *Declaration of Independence* would be publicly read in Boston, confirming the transformation of the liberty movement into a national struggle for independence.³⁵

IV. Critique of *Bunker Hill*

In retelling the momentous events that shook Boston from 1773 to 1775, *Bunker Hill* reflects the dynamic, and at times, seemingly uncontrollable events in that short but tumultuous era. This well-documented work contains over fifty pages of notes and a bibliography stretching over twenty small print pages.³⁶ While nearly a dozen maps and thirty-two pages of illustrations are helpful, the sheer volume of information and rapid movement in this work may overwhelm the first time reader.

²⁷ *Id.* at 175, 191, 194.

²⁸ *Id.* at 163, 165.

²⁹ *Id.* at 215.

³⁰ *Id.* at 219, 229–30.

³¹ *Id.* at 236, 242–44, 246.

³² *Id.* at 262.

³³ *Id.* at 265.

³⁴ *Id.* at 264–65.

³⁵ *Id.* at 290–91.

³⁶ *Id.* at 301–56, 357–78.

By injecting commentary and presenting unflattering images of Boston citizens, the militia, and even patriot icons General Washington and Warren, Philbrick provides an unvarnished, contemporary view of the liberty movement and the leading patriots. For example, he devotes nearly six pages to describing how citizens of Boston cruelly administered their “tar-and-feather” brand of street justice to a loyalist customs officer for knocking a patriot unconscious with his cane.³⁷ Philbrick juxtaposes the respect Lieutenant General Gage paid to the civil liberties of the patriots with the intimidation certain Boston citizens heaped upon loyalists.³⁸ In a similar manner, he chips the veneer off the patriot militia’s exalted image by observing that their narrow concept of freedom apparently did not extend to slaves.³⁹ He does not shrink from speculating on the shortcomings of the venerated General Washington.⁴⁰

Philbrick overachieves in portraying the human failings of Warren by speculating on whether Warren impregnated an unwed young woman named Sally Edwards while he courted the notable Mercy Scollay.⁴¹ Philbrick leaps to his conclusion based in part on an entry in Dr. Nathaniel Ames’ diary mentioning a visit to his friend Dr. Warren along with a near contemporaneous entry in his tavern account book identifying Joseph Warren’s “fair *incognita* pregnans” as a boarder.⁴² He also notes that a letter by Warren’s fiancée Mercy Scollay refers to a “Sally Edwards” as a “little hussy” and “vixen” and assumes the “fair *incognita* pregnans” was none other than Sally Edwards.⁴³ Philbrick admits the possibility that another man impregnated Sally Edwards and that Warren was merely providing her a safe haven, but on multiple occasions he returns to his theory that Warren impregnated Sally Edwards.⁴⁴ Later Philbrick posits that

Warren may have surreptitiously visited the pregnant Edwards the morning of the battle of Bunker Hill.⁴⁵

The available evidence is inconclusive as to whether Warren fathered an illegitimate child and arranged care for the mother, or, alternately, served merely as discreet caretaker for a young patient in a difficult circumstance. In view of the limited evidence and the reputational harm associated with wrongly identifying Warren as the father of Sally Edwards’ child, Philbrick’s persistence in raising such speculative claims distracts and risks the author’s credibility.

V. *Bunker Hill’s* Usefulness to Judge Advocates

This book’s focus and workmanship make it appropriate fare for history fans. Philbrick does a service by introducing the modern reader to the often overlooked Dr. Joseph Warren and his significant contributions to the patriot cause. While this historical narrative does not present itself as an activist handbook, political activists, nevertheless, can also glean helpful tips from its pages, such as waging an effective communication campaign. Likewise, in an era of Middle Eastern uprisings and social media, would-be revolutionaries can absorb important lessons on strategic planning from the Massachusetts patriots, including preparing an armed force, securing military resources, creating clandestine communication and spy networks, framing public opinion at home and aboard, and establishing a shadow government.

Servicemembers and commanders would benefit from reading this book in order to better appreciate the formation of the Continental Army under General Washington and learn leadership lessons for maintaining a disciplined military. The Provincial Army’s lack of unity of command and discipline at the Battle of Bunker Hill could have been the beginning of the end for the Continental Army. The lack of cohesion among the state militia’s was evident: elements built a fort on the wrong location, and patriot leaders Colonel John Stark, Colonel William Prescott, and General Israel Putnam fought separately rather than combining forces.⁴⁶ When a Captain John Chester reached Bunker Hill, he even observed numerous provincial soldiers trying to avoid fighting.⁴⁷

General George Washington’s steps to transform the Provincial Army into the Continental Army are instructive to any commander faced with overhauling an undisciplined force. First, he directed courts-martial proceedings to correct derelictions and issued numerous orders to restore

³⁷ *Id.* at 16–22.

³⁸ *Id.* at 121.

³⁹ *Id.* at 120–21.

⁴⁰ Philbrick recounts how early in his military career, Washington lost control of a situation near Fort Duquesne, leading to the slaughter of likely surrendering French troops and ultimately the start of the French and Indian War. *Id.* at 238–39. See also JOSEPH J. ELLIS, *HIS EXCELLENCY* 14–16 (2004) (recalling that Washington’s first combat experience likely involved a massacre later considered the hostile act responsible for the French and Indian War).

⁴¹ PHILBRICK, *supra* note 1, at 101–02.

⁴² *Id.* at 101. Warren biographer Dr. Samuel Forman, in a comment on an internet post discussing Philbrick’s claims, notes that he had stated in his earlier work that “secrecy, Warren’s close identification with the proceedings, and posthumous continuation of charges to his account suggest, but do not prove, Joseph’s paternity.” DR. JOSEPH WARREN ON THE WEB, <http://www.drjosephwarren.com/2013/06scandalous-implication-with-no-solid-documentation/> (last visited Sept. 11, 2013). See generally SAM FORMAN, *DR. JOSEPH WARREN: THE BOSTON TEA PARTY, BUNKER HILL, AND THE BIRTH OF AMERICAN LIBERTY* (2011).

⁴³ PHILBRICK, *supra* note 1, at 101.

⁴⁴ *Id.* at 101–02, 112, 177, 215–16.

⁴⁵ *Id.* at 215–16. In her Amazon.com review of this book, reprinted as a guest blog entry to the Dr. Joseph Warren website, Warren biographer Janet Uhlar takes issue with Philbrick’s portrayal of Dr. Warren’s purported relationship with the young, unwed Sally Edwards and reaches a different conclusion. See FORMAN, *supra* note 41.

⁴⁶ PHILBRICK, *supra* note 1, at 204, 214.

⁴⁷ *Id.* at 222.

camp order.⁴⁸ In choosing officers, he placed a premium on merit rather than family connections.⁴⁹ To bolster cohesion among the intercolonial troops, in a ceremony he replaced the flag at the heights of Prospect Hill with the “Union flag,” a symbol of colonial unity.⁵⁰ The Continental Army’s completion of two towering forts atop the hills of Dorchester in just one night, a feat that stunned British Major General Howe, attests to General Washington’s inspirational leadership.⁵¹

Washington’s timeless leadership principles still resonate with the Army he helped found. Imposing good order and discipline among the troops remains as important as ever, and, to this end, judge advocates serve as a commander’s primary weapon. Promoting officers based on merit rather than nepotism ensures that the most capable officers are placed in leadership positions, maximizing the force’s opportunities for continued success. Army battle uniforms now bear the updated American flag, uniting soldiers from various geographic backgrounds just as the Union flag first did more than two centuries ago atop Prospect Hill.

VI. Conclusion

As the prescient Josiah Quincy foresaw, storms—complete with the thunder and lightning of discharging cannon—did indeed fall upon his land. Boston would be divided, besieged, evacuated by the British, and then reclaimed. Philbrick has delivered on his promise to show how a restless patriot presence in Boston effectively galvanized Massachusetts citizens to defend their liberties at Lexington, on the Concord bridge, and at bloody Bunker Hill, which transformed the conflict into a national war for independence under General Washington and the newly forged Continental Army.

⁴⁸ *Id.* at 243–44.

⁴⁹ *Id.* at 244–46.

⁵⁰ *Id.* at 265.

⁵¹ *Id.* at 275, 277–78, 280.

CLE News

1. Resident Course Quotas

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

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

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

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900
- FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC: National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for all Reserve Component company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 November all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2014, will not be allowed to attend the December 2014 Phase II resident JAOAC. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3359, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations, and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised that to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer,” the “Military Law Review,” and the “Law Library.”

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click “Submit.” The JAGCNet Service Desk Team will process your request within 2 business days.

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt cnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil.

Individual Paid Subscriptions to *The Army Lawyer*

Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.

ARLAWSMITH212J ISSUE0003 R 1
 JOHN SMITH
 212 MAIN STREET
 SAN DIEGO, CA 92101

The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
 Superintendent of Documents
 ATTN: Chief, Mail List Branch
 Mail Stop: SSOM
 Washington, D.C. 20402



Order Processing
 Code: 5937

Army Lawyer and Military Review SUBSCRIPTION ORDER FORM

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 856 612-1800
 Phone: 202 512-1800
 Fax: 202 512-2104

Mail: Superintendent of Documents
 PO Box 371854
 Pittsburgh, PA 15250-7954

YES, enter my subscription(s) as follows:

_____ subscription(s) of the *Army Lawyer* (ARLAW) for \$50 each (\$70 foreign) per year.

_____ subscription(s) of the *Military Law Review* (MILR) for \$20 each (\$28 foreign) per year. The total cost of my order is \$_____.

Prices include first class shipping and handling and is subject to change.



Check method of payment:

- Check payable to Superintendent of Documents
 SOD Deposit Account
 VISA MasterCard Discover/NOVUS American Express

_____ (expiration date)

Thank you for your order!

Personal name _____ (Please type or print)

Company name _____

Street address _____ City, State, Zip code _____

Daytime phone including area code _____

Purchase Order Number _____

Authorizing signature _____

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:



GERALD B. O'KEEFE
Administrative Assistant
to the Secretary of the Army
1429402
