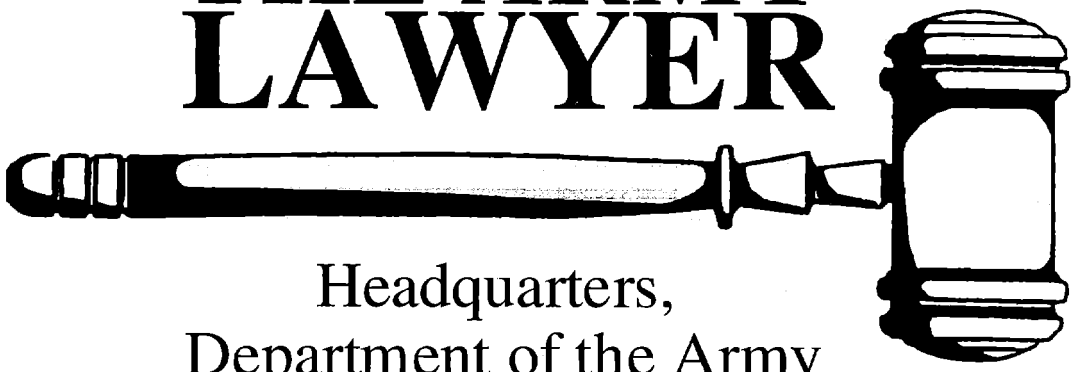
THE ARMY LAWYER



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The Military Personnel Review Act: Department of Defense's Statutory Fix for *Darby v. Cisneros*

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Introduction

On 21 June 1993, the United States Supreme Court decided *Darby v. Cisneros*.[1] The Court held that federal courts do not have authority to require plaintiffs to exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA)[2] where neither relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. *Darby v. Cisneros* will have a dramatic impact on military personnel litigation because none of the statutes nor regulations governing the various military administrative boards require exhaustion as a prerequisite to judicial review.

The Department of Defense (DOD) is considering three statutory proposals to amend Title 10 of the United States Code that would require service members to seek administrative relief from service Boards for Correction of Military Records prior to seeking judicial review.[3] In the Department of Defense Authorization Act for Fiscal Year 1996, the Senate Armed Services Committee directed the Secretary of Defense and the Attorney General to "jointly establish an advisory panel on centralized review of Department of Defense administrative personnel actions" no later than 15 December 1996.[4] The panel is to provide findings and recommendations on the following matters:

> (1) Whether the existing practices with regard to judicial review of administrative personnel actions of the DOD are appropriate and adequate.
>
> (2) Whether a centralized judicial review of administrative personnel actions should be established.
>
> (3) Whether the United States Court of Appeals for the Armed Forces should conduct such reviews.[5]

The panel is to submit a report to the Secretary of Defense and the Attorney General[6] who, in turn, must review the findings and recommendations of the panel and submit a report to the Committee by 1 January 1997.[7]

This article analyzes the American Bar Association, the Department of Justice, and the Air Force proposals and provides an opinion as to the most appropriate statutory solution.

History of Exhaustion of Administrative Remedies in the Military

The doctrine of exhaustion of administrative remedies has its roots in the practical requirement that a lower court's decision must be final before a reviewing court can take jurisdiction.[8]

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[1] 113 S. Ct. 2539 (1993).

[2] Act of June 11, 1946, ch. 324, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 6362, 7562 (1970).

[3] The three proposals are from the American Bar Association, the Department of Justice, and the Air Force, and will be discussed later in this article.

[4] S. 1124, 104th Cong., 1st Sess. § 559 (1995).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Edward F. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 496 (1987), *citing* Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327-34 (1963).

Additionally, under the common law, jurisdiction would not lie in a court of equity until legal remedies were exhausted.[9] The doctrine developed in administrative law as a "discretionary doctrine applied by courts to ensure that review is not premature."[10] The military, an entity unlike any other federal administrative agency, and the courts have often wrestled with the application of the doctrine of exhaustion of administrative remedies.

The Special Nature of Military Society and the Deference Traditionally Granted by the Courts to Internal Personnel Decisions

> Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[11]

The Founding Fathers vested "plenary control" in the President[12] and Congress[13] to promulgate rules relating to the composition and regulation of the Armed Forces. The Supreme Court has recognized that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[14] Because the military is, "by necessity, a specialized society separate from civilian society,"[15] the Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed . . . ."[16] "[P]erhaps in no other area has the Court accorded Congress greater deference" than in the military context.[17]

Further, "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked."[18] Thus, in *Gilligan v. Morgan*,[19] the Court declared that it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military forces are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches.[20]

Consequently, it is the constitutional province of Congress to balance competing individual and military interests. "Congress [is] certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'"[21] "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life" to "foster instinctive obedience, unity, commitment, and *esprit de corps*."[22] The restrictions required to achieve "the subordination of personal preference and identities

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[9] *See id.* at 496 (citing 2 J. MOORE, FEDERAL PRACTICE ¶ 2.03 (2d ed. 1967)).

[10] *See id.* at 497.

[11] Colonel Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

[12] U.S. CONST. art. II, § 2, cl. 1.

[13] U.S. CONST. art. I, § 8, cls. 12-14.

[14] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[15] Parker v. Levy, 417 U.S. 733, 743 (1974).

[16] *Id.* at 756.

[17] Rostker v. United States, 453 U.S. 57, 64-65 (1981). *See also* Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989) (deference to military judgment "significantly reduces the ordinary scope of review").

[18] *Rostker*, 453 U.S. at 65.

[19] 413 U.S. 1 (1973).

[20] *Id.* at 10; *accord* Chappell v. Wallace, 462 U.S. 296, 305 (1983)("'[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'" (quoting Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[21] *Rostker*, 453 U.S. at 80.

[22] Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)). *See also* 10 U.S.C.A. § 654(a)(8) (West Supp. 1995).

in favor of the overall group mission" are matters entrusted to the military's "considered professional judgment,"[23] and the "courts have traditionally shown the utmost deference" to the "[p]redictive judgment" of the Executive Branch on such issues.[24] In 1994, the Supreme Court in *Weiss v. United States*[25] relied on this principle in holding that, when the constitutional rights of service members are implicated, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[26]

As early as 1840, the Supreme Court, in *Decatur v. Paulding*,[27] espoused a doctrine of nonreviewability regarding military determinations: "The interference of the courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."[28] The Court in *Decatur* held that it did not have jurisdiction to review the Secretary of the Navy's interpretation of the statute at issue because the Secretary is vested with judgment and discretion.[29] Military administrative determinations were considered the sole province of the executive branch and therefore immune from judicial review.[30] This view was followed throughout the nineteenth century. As one author notes, "with the development of modern concepts of administrative law in the twentieth century,"[31] the military and other executive offices began to lose their immunity.

The doctrine of nonreviewability of executive department decisions was seriously diminished in 1902.[32] In *American School of Magnetic Healing v. McAnnulty*,[33] the Supreme Court held that if the executive department exceeds its statutory authority the courts had the power to hear the case and grant relief.[34]

In *Reaves v. Ainsworth*,[35] the Supreme Court for the first time specifically addressed the unique considerations of the military in the context of reviewability of executive branch administrative decisions. One author characterizes *Reaves* as "the seminal case with regard to the nonreviewability of military administrative actions."[36] Lieutenant Reaves was discharged for failing an examination required for promotion.[37] Reaves in turn claimed a disability which under the statute would have allowed him to retire in the next higher grade rather than be discharged.[38] A physical disability evaluation board, however, had determined Reaves was fit for duty even though there was some evidence to

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[23] *Goldman*, 475 U.S. at 508.

[24] Dep't of Navy v. Egan, 484 U.S. 518, 529-30 (1988).

[25] 114 S. Ct. 752 (1994).

[26] *Id.* at 761 (quoting Solario v. United States, 483 U.S. 435, 447-48 (1987)).

[27] 39 U.S. (14 Pet.) 497 (1840).

[28] Peck, *supra* note 11, at 5 (quoting *Decatur*, 39 U.S. (14 Pet.) at 516).

[29] *Id.* at 5, 6.

[30] Sherman, *supra* note 8, at 490.

[31] *Id.*

[32] *Id.* (The Supreme Court abolished the "executive" immunity of military administrative determinations in the *McAnnulty* case). Peck, *supra* note 11, at 7, agrees, stating: "*McAnnulty* marked the beginning of a presumption of at least some degree of reviewability of administrative actions of the executive departments and hence the end of the early doctrine of nonreviewability which had foreclosed judicial examination even of questions of statutory interpretation."

[33] 187 U.S. 94 (1902).

[34] Peck, *supra* note 11, at 7.

[35] 219 U.S. 296 (1911).

[36] Peck, *supra* note 11, at 10.

[37] *Id.*

[38] *Id.*

support Lieutenant Reaves' disability claim.[39] Because the evidence was taken in secret and Lieutenant Reaves was denied the right to present and cross-exam witnesses, the case presented classic due process issues. One author states that "[d]ischarge cases are a paradigm for the doctrine of nonreviewability"[40] because discharge cases involve:

> a particularly vital concern of the military—its ability to meet manpower requirements—which is frequently cited as a justification for giving the military a free hand over its personnel. Since the military must rely on recruitment and the draft for its manpower, it is of some importance that it possess the power to require, grant, or withhold discharges and to condition them as honorable or less than honorable.[41]

The Court in *Reaves* provided three grounds for declining to review the Army's physical disability determination. The Court analogized a physical disability evaluation board to a court-martial and relied on the case law governing review of the latter.[42] While courts-martial cases prevented review completely, the Court in *Reaves* proceeded to review the disability statutes to ensure that the Army followed them.[43] Next, the Court imposed a presumption against reviewability in the absence of specific statutory authorization as follows:

> If it had been the intention of Congress to give an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion, and carry them over the head of the President to the courts . . . such intention would have been explicitly declared.[44]

Finally, the Court, uneasy about inserting itself into the day to day operation of the Army, stated:

> This [review within the executive branch] is the only relief from the errors or injustices that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of Government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer . . . but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army.[45]

Given the Court's strong language, one wonders what the Court would have said had the Army Board for Correction of Military Records (ABCMR) been available to the plaintiff. The ABCMR could have provided the review for "errors or injustices" mentioned by the Court. The Court in *Reaves* acknowledged that the military is different from the rest of the executive branch and should have its own standard of reviewability.[46]

Forty-two years after *Reaves*, the Supreme Court revisited the reviewability of military activities other than courts-martial in *Orloff v. Willoughby*.[47] Orloff was a doctor educated at government expense who, at the time of entry on active duty, refused to answer questions regarding his affiliation with the Commu-

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[39] *Id.*

[40] "The imperatives concerning military discipline require the strict application of the exhaustion doctrine in discharge cases." Guitard v. Secretary of the Navy, 967 F.2d 737, 740 (2d Cir. 1992).

[41] Sherman, *supra* note 8, at 490-91 (footnotes omitted).

[42] *Id.* at 10.

[43] *Id.* at 11.

[44] *Id.* at 11 (quoting *Reaves*, 219 U.S. at 306).

[45] *Id.*

[46] Peck summarizes the doctrine of nonreviewability of military administrative activities as consisting of two propositions:

> [O]ne limiting review of the factual basis for the action; the other, precluding review of procedural due process. Only the latter restriction reflected a greater degree of judicial restraint than existed with regard to most other executive actions. But the doctrine by no means foreclosed judicial review altogether. It was also clear that *civil courts could review military actions for compliance with statutory authority. Peck, supra* note 11, at 16 (emphasis in original).

[47] 345 U.S. 83 (1953).

nist Party. The Army refused to commission Orloff but declined to discharge him. Orloff brought a *habeas corpus* action, demanding that the Army either commission or discharge him.

In widely quoted language, the Supreme Court declined to interfere with the President's power to appoint and assign officers:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[48]

While this language seems to reaffirm the nonreviewability of military decisions, the Supreme Court did discuss the merits of Orloff's claim[49] and appeared to make a distinction between procedural review and substantive review of the merits. While the Court reserved the right to review whether Orloff was lawfully inducted into the Army and thereby subject to the Army's jurisdiction, it declined to interfere with Presidential discretion in granting commissions, holding that it was not in the province of the Court to revise a soldier's duty orders.[50]

If *Orloff* appeared to strengthen the doctrine of nonreviewability of military discretionary decisions, *Harmon v. Brucker*[51] cast doubt as to its viability in 1958. Based on activities that occurred prior to his entry into the Army, Harmon was declared a security risk and released with a less than honorable discharge. After exhausting his administrative remedies, Harmon sued the Army for an honorable discharge.[52] Relying on *Orloff* and *Reaves*, the lower courts held for the Army and dismissed the complaint.[53]

The Supreme Court reversed, concluding that the statute used by the Army to discharge Harmon required that the characterization be based solely on his service record, not pre-enlistment activities.[54] In a short *per curiam* opinion, the Court placed no significance on the military nature of the controversy. Arguably, the Court in *Harmon* did not abandon the doctrine of nonreviewability of military decisions, but relied on the *McAnnulty* caveat that the courts retain the power to review military decisions to ensure the Service Secretaries do not exceed their statutory authority.[55]

Creation and Development of the Boards for Correction of Military Records[56]

In response to burdensome private relief legislation, Congress passed Section 207 of the Legislation Reorganization Act of 1946 which authorized the various services to establish administrative boards for correction of military records.[57] Congress gave the various service Boards for Correction of Military Records broad authority to "correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice."[58] Shortly after its creation, the Army Board for Correction of Military Records (ABCMR) was asked to review a court-martial; the question arose whether the ABCMR

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[48] *Id.* at 93-94.

[49] Peck, *supra* note 11, at 30.

[50] *Orloff*, 345 U.S. at 94.

[51] 355 U.S. 579 (1958).

[52] Peck, *supra* note 11, at 32.

[53] *Id.*

[54] *Id.*

[55] American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902). While the Supreme Court was tinkering with the reviewability of military decisions, the lower courts were still requiring plaintiffs to exhaust their administrative remedies prior to filing suit. *See generally,* Reed v. Franke, 297 F.2d 17 (4th Cir. 1961).

[56] Hereinafter the service boards will be referred to as either "BCMR" or the "Board."

[57] Major Lawrence H. Williams, *The Army Board for Correction of Military Records,* 6 MIL. L. REV. 41 (1959).

[58] Legislative Reorganization Act of 1946, § 207, 60 Stat. 837 (codified at 10 U.S.C.A. § 1552 (West Supp. 1996).

had such authority.[59] The Attorney General of the United States determined that the ABCMR's authority was broad enough to include review of courts-martial convictions, with the following caveat: "the language of section 207 cannot be construed as permitting the reopening of the proceedings, findings, and judgments of courts martial so as to disturb the conclusiveness of such judgments, which has long been recognized by the courts."[60]

The Attorney General uniformly held that in matters other than courts-martial the boards had the same authority as Congress in the area of private legislation.[61] Prior to the 1951 amendments to Section 207, the Comptroller General ruled that Section 207 did not authorize the payment of money as a result of a board's correction of records.[62] In the fifty years since the creation of the boards, courts have consistently held that the boards have broad powers to correct any error or injustice and make the applicants whole.[63]

These broad powers, however, might be curtailed as a result of criticism of the boards that has reached Congress. Section 555 of the Senate Report on the National Defense Authorization Act for Fiscal Year 1996 states:

> The committee recommends a provision that would require the Secretaries of the military departments to review the composition of the Boards for the Correction of Military Records and the procedures used by those boards.
>
> . . . .
>
> The committee is concerned about the perception among service members that the boards have become lethargic and unresponsive, and have abdicated their independence to the uniformed service staffs.
>
> . . . .
>
> These boards are to be the honest broker, the forum for adjudication of claims from service members who allege errors in military records. If these boards become extensions of the military staffs, they will have lost their sole reason for existence.[64]

The Senate Report required a report from the services through the DOD to the Senate and House.

Policies behind the doctrine of exhaustion of administrative remedies

> *The basic function of the exhaustion doctrine in the military context is not only to balance military and civilian judicial power, but also to utilize fully administrative expertise and to insure finality.*[65]

The exhaustion of administrative remedies doctrine benefits the agency, the courts, and the individual claimant.[66] The doctrine does not affect the ultimate availability of judicial review. It merely regulates the timing of judicial review by "preserving the balance of authority between competing systems of decisionmaking."[67] As the Supreme Court recently noted in *McCarthy v. Madigan,*[68] "[e]xhaustion serves the twin purposes of protecting

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[59] Williams, *supra* note 57, at 42.

[60] *Id.* at 43.

[61] *Id.* at 46, 47.

[62] *Id.* at 50 (citing Act of 25 October 1951, 65 Stat. 655).

[63] *See generally* Ortiz v. Secretary of Defense, 41 F.3d 738, 741 (D.C. Cir. 1994); Dodson v. United States, 988 F.2d 1199, 1204 (Fed. Cir. 1993); Geyen v. Marsh, 775 F.2d 1303, 1308 (5th Cir. 1985).

[64] S. REP. No. 104-112, at 246 (1995).

[65] Sherman, *supra* note 8, at 525.

[66] *See* Committee of Blind Vendors v. District of Columbia, 28 F.3d 130, 133 (D.C. Cir. 1994).

[67] Sherman, *supra* note 8, at 520. "The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

[68] 503 U.S. 140 (1992).

administrative agency authority and promoting judicial efficiency."[69] If Congress, through the statutory scheme governing an agency, specifically requires exhaustion, then the courts must also require exhaustion.[70] However, where Congress is silent, as in the statutory scheme governing the military, then "sound judicial discretion governs."[71]

The exhaustion doctrine benefits the agency by protecting its administrative autonomy:[72]

> [T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.[73]

The agency should have a chance to correct its own errors before the matter reaches federal court.[74] Exhaustion further protects agency autonomy because "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."[75]

The exhaustion doctrine also benefits the courts by promoting judicial efficiency:

> When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted or at least piecemeal appeals may be avoided. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.[76]

Furthermore, the exhaustion requirement benefits the complainant by avoiding costly litigation. A service member can apply to the boards without hiring an attorney. A board, rather than the expensive discovery process, will compile all relevant documents and service records. If the service member is successful before a board and recovers back pay, all of the pay goes to the service member, not to an attorney. If the service member is unsuccessful before a board, resort to the courts is still available. At this point however, the vast majority of the regulatory and statutory analysis is complete, thereby reducing litigation costs for the service member once an attorney is hired to file suit.

Whether exhaustion is required by statute or by exercise of the courts' discretion, the Supreme Court has recognized "at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion."[77] All three of these exceptions to the exhaustion requirement could have significant implications on the military.

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[69] *Id.* One author notes three objectives of the exhaustion requirement in the military context:

> First, to prevent premature court review which could upset the balance of power between the military (as a separate, functioning judicial and administrative system) and the civilian judiciary; second, to prevent interference with the efficient operation of the military judicial and administrative systems which could deny the military the opportunity to exercise its expertise before resort to the courts; and third, to prevent inefficient use of judicial resources by requiring 'finality' within the military judicial and administrative systems so that needless review can be avoided.

Sherman, *supra* note 8, at 520-21.

[70] *McCarthy*, 503 U.S. at 144.

[71] *Id.*

[72] McKart v. United States, 395 U.S. 185, 194 (1969).

[73] *McCarthy*, 503 U.S. at 145.

[74] *Id.*

[75] *McKart*, 395 U.S. at 195.

[76] *McCarthy*, 503 U.S. at 145 (citations omitted). *See also* Noyd v. Bond, 395 U.S. 683, 696 (1969); Guitard v. Secretary of the Navy, 967 F.2d 737, 740 (2d Cir. 1992) (quoting Schlesinger v. Councilman, 420 U.S. 738 (1974)).

[77] *McCarthy*, 503 U.S. at 146.

The first exception states that "exhaustion will not be required if the administrative remedy may occasion undue prejudice to subsequent assertion of a court action."[78] As an example, the Supreme Court cites "an unreasonable or indefinite time frame for administrative action."[79] None of the statutes governing the three major military boards specify a length of time in which a board must issue a decision.[80] Even if these statutes did specify a reasonable time in which to issue a decision, "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim."[81]

The second exception recognized by the Supreme Court states that "an administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'"[82] For example, the agency may lack the "institutional competence"[83] to determine the constitutionality of a statute. Several courts have examined the ability of the service boards to review constitutional issues; some required exhaustion,[84] others did not.[85] Additionally, an agency cannot review the adequacy of its own procedures.[86] Finally, even if the agency possesses authority to decide the issue presented, it may lack the authority to grant the requested relief.[87] For example, while the service boards can award back pay, they cannot award money damages.

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[78] *Id.* at 146-47.

[79] *Id.* at 147, *citing* Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"); Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 587 (1989) ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); Walker v. Southern R. Co., 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591-92 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief").

[80] *See* 10 U.S.C.A. §§ 1552, 1553, 1554 (West Supp. 1996). However, one author notes that "courts have generally held that time limits in agency enabling statutes are directory, not mandatory." BERNARD SHAW, ADMINISTRATIVE LAW § 10.19 (3d ed. 1991).

[81] *McCarthy*, 503 U.S. at 147 (citing Bowen v. City of New York, 476 U.S. 467, 483 (1986)) (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

[82] *McCarthy*, 503 U.S. at 147, *quoting* Gibson v. Berryhill, 411 U.S. 564, 575 (1973).

[83] *Id.* at 148.

[84] *See* Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) (Plaintiff raised procedural due process claim); Duffy v. United States, 966 F.2d 307, 311 (7th Cir. 1992) ("The mere presence of constitutional claims, however, does not obviate the need to pursue administrative remedies [before the AFBCMR]"); Jorden v. Sajer, 1988 WL 113365, *3 (E.D. Pa. 1988) ("To avoid interference with the decision-making process of the military, many courts require military personnel to first exhaust all military administrative remedies before filing their claims, including constitutional claims under section 1983."); Krugler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984) (Even though plaintiff raised constitutional challenges to the Army's homosexual policy, the Court held that exhaustion to the ABCMR was still required).

[85] *See* Walmer v. United States Dep't of Defense, 835 F. Supp. 1307, 1310-11 (D. Kan. 1993), *aff'd*, 52 F.3d 851 (10th Cir. 1995) ("ABCMR does not have authority, except on an as-applied basis, to hold a military policy [re: homosexuals] unconstitutional, and that in fact, it is impermissible for the ABCMR to strike down a military policy on its face . . . Constitutional issues are issues singularly suited to a judicial forum and clearly inappropriate for an administrative board."); Vance v. United States, 434 F. Supp. 826, 832 (N.D. Tex.), *aff'd*, 565 F.2d 1214 (5th Cir. 1977) ("[T]he court concludes that Vance's equal protection attack on Air Force weight regulations presents a 'purely legal' claim over which the AFRCMR possesses no particular expertise."). *See also* Sherman, *supra* note 8, at 524 n.197: "[I]t has been suggested that. . .boards for correction of records are incompetent to determine questions concerning the constitutionality of an act of Congress."

[86] *McCarthy*, 503 U.S. at 148, *quoting* Barry v. Barchi, 443 U.S. 55, 63 n.10 (1979), "'the question of the adequacy of the administrative remedy . . .[is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'"

[87] *Id.* (citing McNeese v. Board of Education, 373 U.S. 668, 675 (1963)) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); Montana Bank v. Yellowstone County, 276 U.S. 499, 505 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief" in the face of prior controlling court decision).

The third exception states that "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it."[88] This exception appears to be inferred from the following language of Section 555 of the Senate Report on the National Defense Authorization Act for Fiscal Year 1996 cited above: "[T]he committee is concerned about the perception among service members that the boards have become lethargic and unresponsive, and have abdicated their independence to the uniformed service staffs."[89] The boards routinely seek legal opinions from the agency's administrative law office and rely on these opinions for granting or denying relief.[90]

The exhaustion requirement clearly benefits the agencies and the courts and generally benefits the complainant. In sum, but for the inconvenience of the delay required to first seek relief from the service boards, a complainant should save a tremendous amount of money if successful at a board.

Comparison of the Exhaustion Doctrine with the Doctrine of Primary Jurisdiction

The courts often confuse the overlapping doctrines of primary jurisdiction and exhaustion of administrative remedies. Professor Bernard Schwartz of the University of Tulsa College of Law explains the difference between the two doctrines:

> They determine whether an action may be brought in a court or whether an agency proceeding is necessary. More specifically, "(e)xhaustion applies where an (administrative) agency alone has jurisdiction over a case; primary jurisdiction where both a court and an agency have the legal capacity to deal with the matter."
>
> Stated otherwise, the exhaustion doctrine prevents premature judicial interference with the administrative process; primary jurisdiction arises in cases where the original jurisdiction of a court is invoked. In the primary jurisdiction case, court jurisdiction is invoked to decide the merits of the case. If not for primary jurisdiction, the court would possess original jurisdiction over the case and be able to grant the relief requested.[91]

Professor Schwartz also notes the different policy reasons behind the two doctrines: "Exhaustion is based on administrative autonomy and judicial efficiency. Primary jurisdiction promotes judicial economy by exploiting administrative expertise and helps to assure uniform application of regulatory laws."[92]

Darby v. Cisneros[93]

Background

The petitioner in *Darby v. Cisneros*, R. Gordon Darby, was a self-employed real estate developer.[94] In the early 1980's, he along with Lonnie Garvin, a mortgage banker, developed a plan for multifamily developers to obtain single-family mortgage insurance from the Department of Housing and Urban Develop-

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[88] *McCarthy*, 503 U.S. at 148 (citing Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973); Houghton v. Shafer, 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act").

[89] S. REP. No. 104-112, at 246 (1995). *But see* Schaefer v. Cheney, 725 F. Supp. 40, 51 (D.D.C. 1989) ("[S]imply because the ABCMR would not likely diverge from the position that the Defendants propose does not suggest that the ABCMR is not functioning in an independent capacity. A convergence of opinion should not suggest on its own that the ABCMR's role is merely illusory").

[90] *See* Memorandum, Chief, Military Personnel Branch, Litigation Division, DAJA-LTM, to Deputy General Counsel, Personnel & Health Policy, Office of the General Counsel, Department of Defense, subject: Department of Justice Legislative Proposal to Modify Judicial Review of Military Personnel Actions, para. 4.d.1. (8 June 1993) [hereinafter Jewell Memo].

[91] Bernard Schwartz, *Timing of Judicial Review-A Survey of Recent Cases*, 8 ADMIN. L.J. AM. U. 261, 265 (1994) (footnotes omitted).

[92] *Id.* at 265.

[93] 113 S. Ct. 2539 (1993).

[94] *Id.*

ment (HUD).[95] After financing several units under this plan, a depressed rental market forced Darby into default in 1988. This left HUD responsible for $6.6 million in insurance claims.[96]

The HUD investigated Darby and Garvin in 1986 and concluded that they had done nothing wrong.[97] In 1989, however, the HUD issued a "limited denial of participation (LDP) that prohibited petitioners for one year from participating in any program in South Carolina administered by" the HUD.[98] A short time later, the petitioners were notified that the Assistant Secretary was going to bar them from participation in all HUD transactions with any federal agencies.[99] The petitioners appealed.

An administrative law judge (ALJ) concluded that the financing plan was a sham but that the HUD was aware of the plan early on and that the petitioners had no criminal intent.[100] The ALJ found that the indefinite debarment was punitive and recommended reduction to an eighteen month debarment.[101]

The HUD regulations stated that the ALJ's decision was final unless either party requested review in writing within fifteen days of receipt of the hearing officer's determination.[102] Neither the petitioners nor the HUD exercised this permissive right.[103] One month after the decision, the petitioners filed suit in district court alleging that the HUD violated its debarment regulations.[104]

The government moved to dismiss for petitioners' failing to exhaust administrative remedies.[105] The district court denied the government's motion, finding that exhaustion would have been futile, and granted the petitioners' motion for summary judgment.[106] The Court of Appeals for the Fourth Circuit reversed.[107] While acknowledging that exhaustion was not mandated by regulation, the Fourth Circuit found that the district court had erred in denying the government's motion to dismiss because there was no evidence that exhaustion would have been futile.[108]

The Administrative Procedure Act[109]

The Administrative Procedure Act (APA) was enacted in 1946. Ironically, the APA was enacted one year before Congress authorized the service boards. In *Darby*, the Supreme Court uses the APA to potentially render the service boards irrelevant.

During the 1930s and 1940s, the role of federal agencies expanded tremendously. One author notes that "[t]his led to a growing concern about controlling the discretion of these agencies and insuring the uniformity, impartiality, and fairness of their procedures."[110]

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 2542.

[101] *Id.*

[102] *Id.*, *citing* 24 C.F.R. § 24.314c (1992).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 2542, *citing* Darby v. Kemp, 957 F.2d 145 (1992).

[108] *Id.*

[109] Act of June 11, 1946, ch. 324, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 6362, 7562 (1970).

[110] Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 135-36 (1985).

The *Darby* decision hinges on 5 U.S.C. §§ 10c and 704, which state:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[111]

Section 10a of the APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[112] The *Darby* Court explained the relationship between the two provisions: "[A]lthough § 10a provides the general right to judicial review of agency actions under the APA, § 10c establishes when such review is available."[113]

The Court stated that resort to legislative history was unnecessary but discussed the legislative history nonetheless.[114] Section 10c was intended to implement section 8a, codified as 5 U.S.C. § 557(b).[115] Section 8a "provides, unless the agency requires otherwise, that an initial decision made by a hearing officer 'becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule.'"[116] As the Court explained, "The purpose of § 10c was to permit agencies to require an appeal to 'superior agency authority' before an examiner's initial decision became final. This was necessary because, under section 8a, initial decisions could become final agency decisions in the absence of an agency appeal."[117]

In other words, if an agency wanted to avoid the finality of the initial decision, it could draft a rule requiring an agency appeal before judicial review was available, so long as it suspended the effect of the decision until the appeal was completed.[118] In the military, this caveat is unacceptable. No commander is going to allow a soldier who has been recommended for administrative discharge by an elimination board to stay in the unit while his application makes its way through the ABCMR. For this reason, a statutory rather than a regulatory exhaustion requirement must be enacted.[119]

One author questions whether the APA applies to discretionary military personnel decisions:

> Section 2(a) specifically excluded from the operation of the Act "courts martial and military commissions" and "military or naval authority exercised in the field in time of war or in occupied territory." The legislative history, however, indicates that this was to be the full extent of the military exemption: "Thus, certain war and defense functions are exempted, but not the War and Navy Departments in the performance of other functions."
>
> Although the Supreme Court has not addressed the issue directly, it has become widely accepted that the Act does apply to the military.

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[111] *Darby*, 113 S. Ct. at 2540 n.1.

[112] *Id.* at 2544, *quoting* the APA (emphasis in original).

[113] *Id.* at 2544.

[114] *Id.* at 2545.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Darby* states that suspension of the adverse action is only required when the exhaustion requirement is regulatory, as opposed to statutory. *Id.* at 2548.

> Even so, the introductory clause of section 10 prevents the Act from being of much assistance in resolving the question of reviewability of military actions. It provides that, to the extent that "agency action is by law committed to agency discretion," section 10 does not apply. Because the law which determines what is committed to agency discretion includes the common law as well as statutes, the Act does not prescribe any new and uniform path for the courts to follow.[120]

Virtually every military personnel action is an "agency action . . . committed to agency discretion." The reality is, however, that, "In the vast majority of military cases, there is little doubt of the *power* of the federal court to review military discretion. The major question in each case concerns the appropriate scope of review."[121]

The Petitioners' Arguments

The petitioners in *Darby* primarily relied on the plain language of the last sentence of section 10c of the APA:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[122]

The petitioners argued that this language excuses the exhaustion of administrative remedies in the absence of a regulatory or statutory requirement.[123] Further, since the provision explicitly addresses exhaustion, "[f]ederal courts are not free to require further exhaustion as a matter of judicial discretion."[124]

The Government's Arguments

The government in *Darby* argued that section 10c is concerned solely with the timing of when an agency decision becomes final. It also argued that "Congress had no intention to interfere with the courts' ability to impose conditions on the timing of their exercise of jurisdiction to review final agency actions."[125] The government conceded that the HUD's decision was final because there was no requirement to seek further review.[126] Nevertheless, the government argued that even though the APA does not preclude judicial review, the Court is free under the APA to impose exhaustion requirements.[127]

Holding

Justice Blackmun delivered the opinion in *Darby* for a unanimous Court as to Parts I, II, and IV, and the opinion of the Court as to Part III in which Justices White, Stevens, O'Connor, Kennedy, and Souter, joined.[128] The Chief Justice and Justices

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[120] Peck, *supra* note 11, at 24-25, *quoting* 5 U.S.C. § 701(a)(2) (1970). Earlier in this article, I outlined the expansive history of cases and the statutory scheme which grants to the Congress, the President, and by delegation to the service secretaries, plenary control over the military. *See supra* notes 11-17 and accompanying text.

[121] Captain John B. McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions,* 108 MIL. L. REV. 89, 133 (1985) (emphasis in original).

[122] *Darby,* 113 S. Ct. at 2543, *citing* 5 U.S.C. § 704.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 2540.

Scalia and Thomas joined in all but part III of the opinion.[129] The Court framed the issue in the following manner:

> [W]hether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. At issue is the relationship between the judicially created doctrine of exhaustion of administrative remedies and the statutory requirements of § 10c of the APA.[130]

The Court answered the granted issue in the negative, reversing the Fourth Circuit court of appeals.

The Court relied on *Bowen v. Massachusetts*[131] for the proposition that congressional intent in drafting section 10c was to "codify the exhaustion requirement."[132] This codification of the common-law exhaustion requirement meant that the courts were now precluded "from invoking the common-law doctrine as a prerequisite to judicial review under the Administrative Procedure Act."[133] The Court therefore concluded that:

> [W]here the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under § 10c.[134]

The Court also noted that "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA."[135]

Post Darby Treatment of the Exhaustion Requirement in Military Personnel Cases in Federal Court

Saad v. Dalton

In *Saad v. Dalton*,[136] the plaintiff, Lieutenant Commander (LCDR) Saad, was a Navy nurse discharged for violating the Navy's weight control program.[137] LCDR Saad raised two constitutional challenges to her separation: (1) "the body fat percentage limitation has no rational relationship to job performance" and (2) "the test used by the Navy to determine appropriate body fat percentage appears to have a substantial adverse and discriminatory impact upon women."[138] LCDR Saad did not seek relief from the Navy Board for Correction of Military Records prior to filing suit.[139]

In a very brief opinion, the district court granted the government's motion to dismiss for failure to exhaust administrative remedies.[140] Citing *Chappell v. Wallace*,[141] the court stated that, "Due to the special relationship between the military and its personnel, a plaintiff is ordinarily required to pursue rem-

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[129] *Id.*

[130] *Id.* (citations omitted).

[131] 487 U.S. 879 (1988).

[132] Ann H. Zgrodnik, Note, *Darby v. Cisneros: A Codification of the Common-Law Doctrine of Exhaustion Under Section 10(C) of the Administrative Procedure Act*, 20 OHIO N.U. L. REV. 367, 368 (1993).

[133] *Id.* at 368.

[134] *Darby*, 113 S. Ct. at 2548.

[135] *Id.*

[136] 846 F. Supp. 889 (S.D. Cal. 1994).

[137] *Id.* at 890.

[138] *Id.* at 891.

[139] *Id.*

[140] *Id.*

[141] 462 U.S. 296, 303 (1983).

edies provided for by Congress before resorting to judicial review. This exhaustion requirement results from Congress' near sole authority over the military."[142]

In *Saad*, the district court rejected plaintiff's reliance on *Darby* for the proposition that exhaustion of administrative remedies was not required. In conclusory fashion, the court stated, "Review of military personnel actions, however, is a unique context with specialized rules limiting judicial review."[143]

The government's motion to dismiss discusses the numerous cases that support the exhaustion requirement without mentioning *Darby* until the very end of the argument.[144] In footnote seven, the government states:

> The Supreme Court's recent decision in *Darby v. Cisneros*, 61 U.S.L.W. 4679 (June 21, 1993) does not absolve plaintiff of the requirement to exhaust intramilitary remedies. Absent legislative evidence mandating a contrary result, exhaustion should continue to be the rule for service members who bring claims for grievances related to military service. Pursuant to its "plenary constitutional authority over the military, [Congress] established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." In 1946, about the same time the Administrative Procedures Act was being enacted, Congress authorized each Secretary to create a Board for the Correction of Military Records to relieve itself of the burden of private relief legislation. Congress did not intend that service members circumvent their intramilitary remedies by rushing into court with an APA claim.[145]

The government seems to be arguing that the statute creating the Board for Correction of Military Records (BCMR) or "boards" should be read to infer that exhaustion is required; otherwise, Congress would not have authorized creation of the boards. While there is some logic to this assertion, the unambiguous language of *Darby* states that, in the absence of an express statutory requirement that a plaintiff exhaust administrative remedies, the courts will not impose one.[146] The government in *Saad* asked the court to reverse this presumption for a military defendant.

In response to the government's argument, LCDR Saad argued that exhaustion is not required when a constitutional challenge is involved or a constitutional right is denied.[147] She next asserted that recourse to the Navy BCMR is futile because "[i]t is not an autonomous body and merely makes recommendations to the Secretary of the Navy which he may choose to follow or ignore."[148] She cited *Darby*, without discussion, and stated that requiring exhaustion in this case would be inconsistent with the holding of *Darby*. Finally, LCDR Saad contended that resort to the Board for Correction of Military Records is an inadequate remedy; the board "lacks authority to provide formal discovery, subpoena powers or award damages . . . "[149]

Perhaps sensing the weakness of its position, the government in its Reply Brief elaborated on its original Motion and greatly strengthened its argument. The government turned to the legislative history of the APA, noting that it "arose from government regulation of commerce, railroads, and utilities—not military personnel administration."[150] The government compared this

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[142] *Id.* at 891.

[143] *Id.*

[144] Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment at 14-16, Saad v. Dalton, 846 F.Supp. 889 (S.D. Cal. 1994) (No. 93-1472-H(POR)).

[145] *Id.* at 16 n.7.

[146] Darby v. Cisneros, 113 S. Ct. 2539, 2544 (1993).

[147] Plaintiff's Opposition to Defendants Motion to Dismiss or in the Alternative Motion for Summary Judgment and Motion Pursuant to FRCP 56(f) at 16, Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994) (No. 93-1472-H(POR)).

[148] *Id.* at 17.

[149] *Id.*

[150] Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment at 4, Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994) (No. 93-1472-H(POR)).

background to the origins of 10 U.S.C. § 1552.[151] Congress created the boards specifically to address the problem of private bills: "In establishing the correction boards, Congress, with great clarity, designated the boards, and the boards alone, as the source of recourse for those seeking to correct perceived errors or injustice. There is no provision for judicial intervention before correction board action is made final by the service Secretary concerned."[152]

The government argued that the APA only applies in the military context "after a correction board recommendation has been made final through decisional action by a service Secretary."[153] In support of this proposition, the government cited two circuit court cases. The first, *Seepe v. Department of the Navy*,[154] states that "[w]here Congress has provided by statute for an administrative remedy capable of granting relief appropriate to the complaint concerned, a complainant is required to exhaust that remedy before turning to the courts."[155] The Government assertion ignores substantial contrary authority, including the second case cited by the government, *Ogden v. Zuckert*.[156]

In *Ogden v. Zuckert*, the Court of Appeals for the District of Columbia Circuit stated that failure to seek board consideration does not deprive the court of jurisdiction.[157] Noting the purpose behind Congress' creation of the boards, the court stated, "There is no indication of congressional consciousness or intention that judicial jurisdiction would be affected."[158] In other words, the court in *Ogden* correctly concluded that resort to a permissive administrative remedy, above and beyond the administrative process that results in the Secretary's initial action, does not preclude judicial review of a final agency decision:[159]

> This plan was not designed to bring the Boards into the original administrative process of making the records, a process which is participated in by the various other boards, referred to earlier in this opinion, which considered and reviewed plaintiff's case before the Secretary acted. There are important additional factors. An application to the Board may be delayed up to three years after the discovery of the error or injustice, and the aid of the Board may be invoked by the claimant's heirs or legal representatives as well as by the claimant himself. *All this obviously removes Board consideration from the administrative process which precedes finality. The Board furnishes a means by which to seek correction of error or injustice, but neither statute nor regulation requires this means to be pursued as a condition to finality or the Secretary's action.*[160]

The precedential value of *Saad* is questionable. First, the court fails to provide any analysis to support its conclusion. Additionally, the court fails to discuss whether exhaustion would be futile. LCDR Saad levied a purely constitutional challenge to her discharge. She did not allege that the Navy failed to follow its own regulations nor that the Navy exceeded its statutory authority in discharging her. These are the traditional means by which a plaintiff gets past the nonreviewability of military administrative decisions. The courts have consistently held that the boards are not equipped to address purely legal or constitutional challenges.[161] Further, the court in *Saad* never discussed the absence of a statutory or regulatory exhaustion requirement—the cornerstone of the *Darby* decision. The plain language of

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[151] *Id.* at 4-5.

[152] *Id.* at 5.

[153] *Id.*

[154] 518 F.2d 760, 762-64 (6th Cir. 1975).

[155] *Id.* at 762, *citing* McKart v. United States, 395 U.S. 185, 193 (1969).

[156] 298 F.2d 312 (D.C. Cir. 1961).

[157] *Id.* at 314.

[158] *Id.* at 315.

[159] *Id.*

[160] *Id.* (emphasis added).

[161] *See* Seepe v. Dep't of the Navy, 518 F.2d 760, 762 (6th Cir. 1975) ("Some courts have also held that where the complaint involved a matter of law only and did not require or involve application of military experience, the federal courts could exercise jurisdiction"); Von Hoffburg v. Alexander, 615 F.2d 633, 638 (5th Cir. 1980); Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973).

Darby states that, in the absence of such a requirement, courts cannot impose an exhaustion requirement.[162]

While the opinion in *Saad* reflects the military's desired judicial response to *Darby*, it fails to provide an analytical basis for distinguishing between a Navy and a HUD administrative decision.

Dowds v. Clinton

On 9 March 1994, eight days after the *Saad* decision, the United States Court of Appeals for the District of Columbia Circuit in a one page *per curiam* opinion in *Dowds v. Clinton*[163] reversed the district court's dismissal of Colonel Dowd's claim, stating:

> Resort to the military boards of correction is not required by statute, *Ogden v. Zuckert*, 298 F.2d 312, 315 (D.C. Cir. 1961), and the Government has not claimed that any regulation mandates exhaustion. In light of *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), therefore, there is no basis for the District Court to require appellant to exhaust his administrative remedies before seeking judicial review, and appellant's claim must be reinstated.[164]

Prior to *Darby*, the D.C. Circuit required exhaustion of administrative remedies through the boards.[165]

Perez v. United States

Approximately a month later, on 14 April 1994, in the case of *Perez v. United States*,[166] a district court in Illinois issued the first district court opinion which addressed, in depth, the exhaustion requirement in the military context after *Darby*. The plaintiff in *Perez* was a Petty Officer, Second Class,[167] discharged for commission of a serious offense and issued an other than honorable discharge.[168] Petty Officer Perez was initially investigated for sexually abusing his son, but on the basis of the Article 32[169] investigation, the charges were dismissed and administrative action was instead taken against him. Petty Officer Perez challenged his discharge in district court on the grounds that he was denied procedural due process.[170] He conceded that the Navy's regulations were facially valid.[171]

The court in *Perez* accurately summarized the benefits of exhausting administrative remedies prior to seeking judicial relief yet noted that 10 U.S.C. § 1552 did not require exhaustion.[172] The court also rejected the government's attempt to distinguish *Darby*[173] on the grounds that the Supreme Court "was not con-

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[162] Darby v. Cisneros, 113 S. Ct. 2539, 2548 (1993).

[163] 18 F.3d 953 (D.C.Cir. 1994)

[164] *Id.* at 953.

[165] *See generally* Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); and Bois v. Marsh, 801 F.2d 462, 467 (D.C. Cir. 1986).

[166] 850 F. Supp. 1354 (N.D. Ill. 1994).

[167] *Id.* at 1357.

[168] *Id.* at 1359.

[169] 10 U.S.C. § 832 (1983).

[170] *Perez*, 850 F. Supp. at 1361.

[171] *Id.*

[172] *Id.* at 1360.

[173] I also obtained the pleadings in the *Perez* case. The Government's argument in its motion to dismiss was virtually identical to that made in the *Saad* case. The plaintiff's opposition brief did not address the unique nature of military service, making only brief mention of the holding in *Darby*, and instead focused on his due process arguments. The Government's reply brief in *Perez* was not nearly as persuasive as the argument in *Saad*, which may explain why the Government lost in *Perez*.

fronted with prior precedent recognizing the military's special status as an agency apart with its own 'comprehensive internal system of justice to regulate military life.'"[174]

The court in *Perez* reasoned that the government is reading *Darby* too narrowly:[175] "Nothing in the Court's decision leads this court to believe that *Darby* is limited to H.U.D. specifically, or to non-military agencies generally. Throughout *Darby*, the court, through Justice Blackmun, speaks in general terms of all agencies without distinguishing between those involved in military matters and those which are not."[176] The *Perez* court then cited a list of cases from several circuits which had applied *Darby* to a variety of federal agencies and given no indication that its coverage is limited in any way.[177] The court further stated:

> While cognizant of the special nature of the armed services and the potential dangers of unwarranted judicial interference with military activity, this court declines the government's invitation to carve out a special military exception to the Supreme Court's decision in *Darby*. In this regard, it is important to remember that *Darby* does not preclude agencies or Congress from making administrative exhaustion a prerequisite to federal jurisdiction. Rather, it simply demands that such prerequisites be made explicit by Congress (through statutes) or agencies (through rules), rather than by judges. Until such action is taken, military personnel like Perez will be entitled to seek direct judicial review of final military decisions, such as the discharge at issue here, without first exhausting all available administrative remedies.[178]

The DOD has taken this invitation to heart and is pursuing the appropriate remedy by considering the three statutory proposals discussed in this article.

Ostrow v. Secretary of the Air Force

Approximately a year after *Dowds v. Clinton*,[179] a different panel of the D.C. Circuit was faced with another military exhaustion case. In *Ostrow v. Secretary of the Air Force*,[180] three officers challenged the Air Force's Reduction-in-Force (RIF) procedures under the APA.[181] The D.C. Circuit affirmed the district court's dismissal, citing the nonjusticiable nature of the Secretary's decision rather than failure to exhaust administrative remedies. The court again rejected the government's exhaustion argument, stating that "[t]he Secretary identifies no express statutory requirement of exhaustion . . . [and] this court cannot impose one."[182]

Post Darby Treatment of the Exhaustion Requirement Applied to Other Federal Agencies

Federal courts across the country are grappling with the *Darby* decision in a variety of circumstances. In some of the following cases, federal agencies had regulatory exhaustion requirements. Others, like the military, had no exhaustion requirement. In some cases, the courts ruled that the APA did not apply and, therefore, *Darby* was irrelevant.

Agencies Which Had a Regulatory Exhaustion Requirement

In *CIBA-Geigy Corporation v. Sidamon-Eristoff*,[183] the owner of a paint pigment production facility challenged the Environ-

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[174] *Perez*, 850 F. Supp. at 1360-61.

[175] *Id.*

[176] *Id.*

[177] The following cases were cited by the court and will be discussed later in this article: Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40 (2d Cir. 1993) (Environmental Protection Agency); McDonnell v. United States, 4 F3d 1227 (3rd Cir. 1993) (Federal Bureau of Information); Western Shoshone Business Council v. Bobbitt, 1 F.3d 1052 (10th Cir. 1993) (Department of Interior); Career Educ. v. Dep't of Educ., 6 F. 3d 817 (D.C. Cir. 1993) (Department of Education).

[178] *Perez*, 850 F. Supp. 15 1360-61.

[179] 18 F. 3d 953 (D.C. Cir. 1994).

[180] No. 93-5280, 1995 WL 66752 (D.C. Cir. Feb. 16, 1995).

[181] *Id.* at *1.

[182] *Id.* at *2.

[183] 3 F.3d 40 (2d Cir. 1993).

mental Protection Agency's (EPA) decision to issue a federal permit and its refusal to terminate the federal permit once the New York Department of Environmental Conservation (DEC) received authorization to administer Hazardous and Solid Waste Amendment (HSWA) regulations. The petitioner also challenged the memorandum of agreement between the EPA and the DEC.[184] In *CIBA-Geigy*, the United States Court of Appeals for the Second Circuit held that, while the petitioner had exhausted administrative remedies as to the decision to issue a federal permit, it had failed to administratively challenge the EPA's refusal to terminate the federal permit.[185] The EPA had an explicit exhaustion requirement: "For issuance of a permit, appeal to the EAB is a 'prerequisite to the seeking of judicial review of the final agency action.'"[186] In a footnote, the Second Circuit explains the difference between its case and *Darby*:

> The mandatory exhaustion language contained in this regulation distinguishes this case from *Darby v. Cisneros*, in which a Housing and Urban Development Department regulation provided that parties "may request" administrative review of the decision of a hearing officer, and contained no language identifying this review as a prerequisite to judicial review. In such a case, the Supreme Court held that section 10(c) of the Administrative Procedure Act, prohibits courts from engrafting additional exhaustion requirements. Here, in contrast, agency rule, and not judge-made doctrine, is the source of the exhaustion requirement.[187]

After oral argument, Ciba-Geigy argued that the EPA, by failing to mention exhaustion in its brief, waived any defense based upon exhaustion.[188] The court agreed that, "under limited circumstances, an agency can waive an exhaustion defense"[189] but distinguished the present action.[190] The court dismissed Ciba-Geigy's petition for failure to exhaust administrative remedies.[191]

A few months after *Ciba-Geigy*, the D.C. Circuit decided *Career Education, Inc. v. Department of Education*.[192] In *Career Education,* a professional welding school filed a writ of mandamus to force the Department of Education to act on its re-eligibility application for the federal student loan program. After the Department of Education denied the application, Career Education, Inc. sought an injunction to prevent the termination of eligibility. The D.C. Circuit reluctantly held for the government and dismissed the complaint for failure to exhaust administrative remedies. In the process, the D.C. Circuit stated, "This case is an administrative law mess. We certainly do not blame appellant for having brought its action in federal district court in light of the Department's rather obvious delaying tactics."[193]

The D.C. Circuit described the statutory and regulatory scheme involved as follows:

> Pursuant to statutory mandate, see 20 U.S.C. § 1094(c)(1), the Department has promulgated extensive administrative procedures for hearing and appeal after notice of termination and for a show cause hearing after notice of an emergency action, see 34 C.F.R. §§ 600.41, 668.81-668.97. Although the statute does not explicitly require exhaustion of these administrative remedies, it does provide that the Secretary can make a termination decision only

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[184] *Id.* at 40

[185] *Id.* at 45. The Court of Appeals raised the exhaustion issue *sua sponte*, "since it directly related to the suitability of these matters for judicial review."

[186] *Id.* at 45, *citing* 40 C.F.R. § 124.19(e).

[187] *Id.* at 46 (citations omitted).

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.* at 49.

[192] 6 F.3d 817 (D.C. Cir. 1993).

[193] *Id.* at 819.

> 'after reasonable notice and opportunity for a hearing on the record.' 20 U.S.C. § 1094(c)(1)(F).[194]

The D.C. Circuit interpreted the statute and its regulatory implementation to require exhaustion. When Ciba-Geigy received notice of the termination, it filed suit even though this was merely the beginning of the termination proceedings.[195] As the United States Court of Appeals for the Ninth Circuit stated in *Clouser v. Espy*,[196] the termination would not become final until:

> [A]fter the requested hearing and an opportunity to appeal to the Secretary. It is now well-settled that in such a circumstance a plaintiff must exhaust administrative remedies—in order to give the Department's top level of appeal an opportunity to place an official imprimatur on the Department's interpretation of its regulations before it is reviewed by a federal court. *Darby v. Cisneros*, is not to the contrary. There the Supreme Court held only that an exhaustion requirement—in that case permitting appeal to an agency head—may not be imposed by a federal court if the administrative adjudication is otherwise final and the available appeal is only a discretionary one.[197]

The Ninth Circuit held that the regulatory requirement to appeal to the ALJ distinguished *Clouser* from *Darby*.

In *Clouser*, the Ninth Circuit reached the same result as the Second Circuit in *Ciba-Geigy*. Several miners sued for declaratory and injunctive relief allowing motorized access to mining claims located in national forests.[198] The district court held that the miners had failed to exhaust their administrative remedies before seeking judicial review and the court of appeals affirmed.[199]

The regulatory scheme in *Clouser* required the following: (1) notice of intent to operate before "proposing to conduct operations which might cause disturbance of surface resources, and"[200] (2) if the District Ranger determines that "significant disturbance" will occur, the operator must file a proposed plan of operations.[201] This requirement to file a plan is not appealable as a final order:

> [T]o challenge a decision requiring that a plan be filed, a person must first comply and file a plan. Decisions relating to approval of a plan may then be appealed. The regulations specifically provide that it is the position of the Forest Service that, for decisions appealable under the regulations, exhaustion should be required before an aggrieved party may seek federal court review.[202]

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[194] *Id.* at 818.

[195] *Id.* at 820.

[196] 42 F.3d 1522 (9th Cir. 1994).

[197] *Id.*

[198] *Id.*

[199] The court provides an excellent explanation regarding the scope and applicability of the APA when a plaintiff is challenging the action of a federal agency:

> Generally, except where a party challenges an agency action as violating a federal law—be it a statute, regulation, or constitutional provision—that has been interpreted as conferring a private right of action, or where a particular regulatory scheme contains a specialized provision for obtaining judicial review of agency actions under the scheme, review under a framework statute such as the APA is the sole means for testing the legality of federal agency action . . . Thus, the instant claim challenging the Forest Service rulings as issued without statutory authority should be construed as a claim challenging agency action 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' under 5 U.S.C. § 706(2)c.

Id. at 1528 n.5.

[200] *Id.* at 1532.

[201] *Id.*

[202] 36 C.F.R. § 251.101.

The petitioners in *Clouser* filed suit before submitting the plan, "[t]hus under *Darby*, there is an exhaustion requirement that plaintiffs have not satisfied."[203]

Agencies Without an Exhaustion Requirement

In *Lockett v. Federal Emergency Management Agency*,[204] a Florida district court provides a fascinating analysis which could have a tremendous impact in the judicial review of military personnel actions. Several victims of Hurricane Andrew sued for declaratory and injunctive relief from the Federal Emergency Management Agency's (FEMA) administrative temporary housing eligibility decisions under the Stafford Disaster Relief Act. The court rejected the government's argument that exhaustion was required to obtain a final agency determination:

> The language [in the appeal procedures adopted by FEMA at 44 C.F.R. § 206.101 (m)(1)] does not mandate appeal before availability of judicial review nor does it state that the initial decision becomes inoperative pending appeal. Similarly, statutory language in 42 U.S.C. § 5189a does not require appeal from decisions regarding eligibility; it is couched in permissive terms.[205]

The Government argued two additional grounds for dismissal:

> Defendants maintain that 5 U.S.C. § 701(a) (1977) precludes judicial review of plaintiffs' claims in two additional ways. Defendants first contend that the Disaster Relief Act specifically provides that the administrative action taken by FEMA is exempt from judicial review. In the alternative, defendants suggest that the aforementioned "agency action is committed to agency discretion by law."[206]

Relying on *Citizens to Preserve Overton Park, Inc. v. Volpe*,[207] the government argued that "'Congress sought to prohibit judicial review and . . . there is most certainly' clear and convincing evidence showing legislative intent to restrict access to judicial review."[208] The court agreed with the government and stated:

> Furthermore, this Circuit previously determined that "use of the phrase 'liable for any claim' [in 42 U.S.C. § 5148] indicates not only Congress' concern that the government not have to pay damages, but also that it not be answerable in any way to claims arising out of discretionary actions." Therefore, the Court must examine whether any of the actions set forth in the complaint are discretionary and dismiss those falling under this category.[209]

The Florida district court proceeded to discuss the plaintiffs' complaints one at a time. The court held that all of the constitutional claims were reviewable, including the due process claims, and declined to dismiss them. However, any claim based on a discretionary decision was dismissed. For example, one of the challenged regulations stated that "[t]emporary housing assistance *may* be provided only when both of the following conditions are met . . . ."[210] Relying on the use of the word "may," the court stated, "This clearly shows that assistance is discretionary, not mandatory . . . . [T]herefore, claim one is discretionary and this Court does not have jurisdiction to review it."[211]

Herein lies an opportunity for the military to argue that the vast majority of adverse administrative decisions rendered by the Secretary, acting on behalf of the President, are discretionary

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[203] *Id.*

[204] 836 F. Supp. 847 (S.D. Fla. 1993).

[205] *Id.* at 853.

[206] 5 U.S.C.A. § 701(a) (West 1996).

[207] 401 U.S. 402 (1971).

[208] *Id.* at 410.

[209] *Lockett*, 836 F. Supp. at 853-54 (citations and footnotes omitted).

[210] *Id.* at 854, *citing* 44 C.F.R. § 206.101(f) (emphasis in original).

[211] *Id.*

in nature, against which the courts have no standards to judge. The entire line of justiciability cases decided in the federal circuits discussed above are based on this proposition. The Florida district court in *Lockett* found that several other claims were discretionary and dismissed them also.[212]

In *United States v. Menendez*,[213] National Oceanic and Atmospheric Administration (NOAA) regulations permitted parties to seek wholly discretionary review within the agency, but did not require it as a prerequisite to judicial review.[214] The government brought actions to collect civil penalties assessed by the NOAA against three shrimpers for knowing and unlawful failure to use qualified turtle excluder devices while shrimping in violation of the Endangered Species Act and applicable regulations.[215] The court noted one factual distinction between the case and *Darby*:

> In *Darby*, the individual affected by the agency action filed suit under the APA in district court to set aside the agency action. Here, the government filed suit in district court against Menendez and Plaisance under section 1540 to collect civil penalties assessed by the agency. This distinction affords no apparent basis to deviate from the holding of *Darby* and its interpretation of the plain language of section 10c, as (subject to exceptions not applicable here) the same APA judicial review is equally available in both instances.[216]

The court ruled that the petitioners had exhausted all administrative remedies required by statute or agency rule.[217]

The government had also argued that the district court properly ruled that the petitioners had "waived their right to appeal all procedural issues related to the conduct of the administrative proceedings by not pursuing the two avenues of discretionary appeal provided by the NOAA regulations."[218] The court rejected this argument, stating:

> [T]he district court misapplied the waiver doctrine. The district court based its waiver holding on Menendez's and Plaisance's failure to pursue their due process arguments within NOAA through the available avenues of discretionary appeal. It is, however, clear that Menendez and Plaisance raised their due process arguments before the ALJ by twice requesting hearings.
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> . . . .
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> By focusing on the parties' failure to reassert their requests for a hearing through the discretionary appeals systems established by the NOAA regulations, the district court confused the waiver and exhaustion doctrine and created an end run around Darby. Although the Court in Darby held that parties are not required to exhaust discretionary appeals within an agency, the district court below essentially required Menendez and Plaisance to do so by making a failure to exhaust discretionary appeals a waiver.[219]

The court of appeals reversed the district court and remanded for further proceedings consistent with its ruling.[220]

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[212] *Id.* at 855-56. *See also* Captain John B. McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89, 133 (1985) ("In cases where the challenge is that the military has abused its otherwise legitimate discretion, the general presumption of reviewability of administrative decisions is opposed by a presumption of nonreviewability of military decisions.").

[213] 48 F.3d 1401 (5th Cir. 1995).

[214] *Id.* at 1411.

[215] *Id.* at 1401.

[216] *Id.* at 1411.

[217] *Id.*

[218] *Id.* at 1412.

[219] *Id.* at 1413.

[220] *Id.* at 1414.

Non APA Cases[221]

In *Southern Ohio Coal Co. v. Department of Interior,*[222] a coal mining company sought an injunction against the Office of Surface Mining, Reclamation, and Enforcement, and the Environmental Protection Agency to prevent them from interfering with an emergency plan for the removal of water from its mine as approved by state agencies.[223] The district court granted the injunction and the court of appeals reversed, holding that the district court lacked jurisdiction in the absence of exhaustion of available administrative remedies.[224]

The petitioner in *Southern Ohio* raised numerous arguments that it felt excused further exhaustion, the last of which was based on *Darby*. The court rejected the latter argument, stating:

> *Darby* is inapposite to this case because the SMCRA [Surface Mining Control and Reclamation Act of 1977] unambiguously requires resort to the prescribed administrative review process before seeking judicial review. The Court noted that in cases such as this that are not governed by the APA, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.[225]

The statute relied upon by the court states:

> A mine operator aggrieved by an immediate cessation order issued under § 521(a)(2) or by a cessation order issued after a notice of violation and expiration of an abatement period under § 521(a)(3) *may* immediately request temporary relief from the Secretary, and the Secretary must respond to the request within 5 days of its receipt. Section 526c of the Act, authorizes judicial review of a decision by the Secretary denying temporary relief.[226]

The use of the word "may" is less than an unambiguous requirement to exhaust administrative remedies as asserted by the court of appeals. Further, the court provides no analysis as to why the case is "not governed by the APA." The court cites *Shawnee Coal Co. v. Andrus,*[227] a 1981 case decided well before *Darby*, as controlling authority.[228] The court seems to be arguing that because *Shawnee Coal Co. v. Andrus* interpreted the same permissive statute which required exhaustion in 1981, then it must still require exhaustion after *Darby*, even though it does not explicitly require resort to further agency appeals. The holding of *Southern Ohio* is incorrect and of questionable precedential value.

In *Committee of Blind Vendors v. District of Columbia,*[229] the petitioners sued the District of Columbia Rehabilitation Service Administration (DCRSA) for mismanagement of the blind vendor program established under the Randolph-Sheppard Act.[230]

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[221] While not meriting discussion below, I note *Little Company of Mary Hospital v. Shalala,* 24 F.3d 984, 993 (7th Cir. 1994) (*Darby* does not apply in the situation where an agency's statute requires the exhaustion of particular administrative remedies as a condition to the availability of other administrative remedies, rather than the availability of judicial review).

[222] 20 F.3d 1418 (6th Cir.), *cert. denied,* 115 S. Ct. 316 (1994). While I have placed this case under "Non APA cases," this is based solely on the ruling of the court. I contend this *is* an APA case and that there was no regulatory nor statutory requirement for further administrative exhaustion.

[223] *Id.* at 1418.

[224] *Id.* at 1428.

[225] *Id.* at 1425.

[226] *Id.* at 1423 (citations omitted) (emphasis added).

[227] 661 F.2d 1083 (6th Cir. 1981).

[228] *Southern Ohio,* 20 F.3d at 1422.

[229] 28 F.3d 130 (D.C. Cir. 1994).

[230] *Id.* at 132.

The Act contains its own grievance procedure in which the complainant can request a full evidentiary hearing before his state licensing agency (SLA).[231] If dissatisfied with the results of the hearing, the petitioner files a complaint with the Secretary who convenes an arbitration panel.[232] Under the Act, the arbitration panel's decision is binding and "subject to review as final agency action under the APA."[233] The petitioners filed suit while their grievance was pending.

The court made it clear that this was not an APA case:

> The APA *would have* governed the case if the plaintiff class had challenged the decision of either DCRSA or the Secretary's arbitration panel. Instead, the plaintiff class seeks relief based on DCRSA's alleged mis-administration of the Randolph-Sheppard program. But the APA does not apply to common-law causes of action against an agency . . . . Here the APA is inapplicable because no agency proceeding took place for the court to review.[234]

Blind Vendors is another case where the court confuses the doctrines of finality and exhaustion. The Supreme Court in *Darby* emphasized the difference between the two "conceptually distinct" doctrines:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[235]

The court in *Blind Vendors* was correct in finding the APA inapplicable; however, it was incorrect in treating the case as an exhaustion case. The court correctly noted that "no agency proceeding took place for the court to review;"[236] there was no "adverse decision," and therefore, there was nothing to exhaust. The court should have dismissed the case because it was not ripe for adjudication.[237]

The court in *Howell v. Immigration and Naturalization Service*,[238] facing the same dilemma as the court in *Blind Vendors*, reached the correct result but confused the doctrines of finality and exhaustion. A district director of the Immigration and Naturalization Service (INS) denied Howell's application for adjustment status. The INS sent notice to Howell to come in for an interview. Howell did not respond and a few days later the INS served Howell with an Order to Show Cause why she should not be deported.[239] Howell never appeared for the hearing and commenced an action in district court. The INS argued that Howell had failed to exhaust her administrative remedies by failing to raise her objections at the Show Cause hearing. Therefore, the exhaustion doctrine precluded the district court from reviewing the district director's original decision.[240]

The court's majority opinion held that Howell's exhaustion requirement "arises as a result of the administrative remedies available to Howell pursuant to the statutory and regulatory schemes involving adjustment of status."[241] The majority ac-

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[231] *Id.* at 131.

[232] *Id.*

[233] *Id.*, *citing* 20 U.S.C. § 107d-2(a).

[234] *Id.* at 134 (citations omitted).

[235] Darby v. Cisneros, 113 S. Ct. 2539, 2543 (1993) (citations omitted).

[236] *Blind Vendors*, 28 F.3d at 134.

[237] *See* Howell v. Immigration and Naturalization Service, 72 F.3d 288, 294 (2d Cir. 1995), *citing* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); Occidental Chem. Corp. v. FERC, 869 F.2d 127, 129 (2d Cir. 1989).

[238] 72 F.3d 288 (2d Cir. 1995).

[239] *Id.* at 290.

[240] *Id.* at 291-92.

[241] *Id.* at 293.

knowledged *Darby,* but swept it away with a conclusory statement, "[W]e also think that *Darby* does not limit the requirement of exhaustion of administrative remedies in the present case."[242]

Circuit Judge Walker, in his concurrence, astutely recognized the flaw in the majority opinion. Judge Walker concurred in the result "based upon [his] conclusion that the case [was] not ripe for judicial review, not on the majority's reasoning that exhaustion of remedies applies."[243] Judge Walker correctly noted that the INS regulation relied upon by the majority merely "spells out the appeal procedures . . . . I do not think that it satisfies the stringent requirements that *Darby* placed upon agencies that seek to condition judicial review upon exhaustion of remedies."[244]

Judge Walker succinctly explained the procedural misunderstanding of the majority: "[O]nce deportation proceedings have begun there will be no direct and immediate impact until after the final decision in the deportation proceedings, judicial review would interfere with the INS's adjudication process, the factual record has not been fully developed, and there is no final agency action."[245] The majority failed to grasp the difference between the doctrines of finality or ripeness and exhaustion.

The foregoing cases outline the problems that lie ahead for the military if some form of Military Personnel Review Act is not adopted. Explicit exhaustion requirements must be identified in the statute in clear, unambiguous terms.

Potential Impact of Darby

One author notes that it is surprising that *Darby* did not occur sooner because it merely recognizes the plain language of the APA, language written in 1946.[246] Another warns, "[D]arby represents a backward step that may upset the balance between courts and agencies served by the exhaustion doctrine."[247] For the military practitioner, *Darby* could drastically change the way personnel cases are defended in federal court.

Professor Bernard Schwartz of the University of Tulsa College of Law, an administrative law expert, is especially critical of the *Darby* decision. He wrote that the *Darby* decision "illustrates the present Court's inadequacy in the field of administrative law."[248] Professor Schwartz argues that the facts of *Darby* presented a routine administrative law situation:

> *Darby* appears to present the classic *Sing Tuck*[249] type of case calling for simple application of the exhaustion rule. There has been a decision in the agency that is subject to an appeal within the administrative hierarchy. It has been hornbook law that, so long as there is a legal right to appeal, access to the courts is not available until after the appellate remedy has been exhausted. The courts should not permit premature interruption of the administrative process by intervening before there is a final decision at the highest agency level . . . . This is elementary exhaustion doctrine. In *Darby*, however, the Court held that the doctrine does not apply to review actions brought under the APA.[250]

Professor Schwartz's harsh criticism may not be warranted. He is absolutely correct, however, when he states that *Darby* "removes a major part of judicial review from any exhaustion requirement," and that "[t]he practical effect . . . will be a proliferation of appeals from ALJ decisions by agencies themselves in cases where there are no statutory review provisions."[251] In other

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[242] *Id.*

[243] *Id.* at 294.

[244] *Id.*

[245] *Id.*

[246] Major William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros,* ARMY LAW., Sep. 1994 at 8.

[247] Schwartz, *supra* note 91, at 289.

[248] *Id.* at 285.

[249] United States v. Sing Tuck, 194 U.S. 161 (1904).

[250] Schwartz, *supra* note 247, at 286 (citations omitted).

[251] *Id.* at 287.

words, if a party loses before an ALJ, he or she can now go directly to court. In effect, this could make the ALJ, rather than an agency head the final spokesman for the agency. As Professor Schwartz notes, this makes "it difficult for the agency heads to ensure conformity with their policies in the agency decision process."[252]

At least one author finds some positive impact of *Darby*. Ms. Ann H. Zgrodnik wrote in the *Ohio Northern University Law Review* that the decision will "promote efficiency within the administrative and judicial systems because it provides a concise and accurate interpretation of section 10c."[253] Ms. Zgrodnik also noted that *Darby* clarifies the "fine-line distinction" between the doctrines of exhaustion and finality and determines that section 10c applies to both doctrines.[254]

The *Darby* decision will not affect cases brought by service members under the Tucker Act or the Federal Tort Claims Act.[255] These statutes provide their own waiver of sovereign immunity, separate and apart from the APA. Many times, however, especially with *pro se* plaintiffs, the jurisdictional basis of the complaint is unclear. The complaint usually contains a mix of legal and equitable relief. While a mandamus action for correction of military records may be reviewable under the APA by the federal district court, the resulting award of back pay may be beyond the jurisdiction of the district court if the amount of back pay exceeds $10,000.[256]

In most cases, the federal district court will strive to find a jurisdictional basis for the plaintiff.[257] Therefore, even though the service member plaintiff may actually have a Tucker Act case within the exclusive jurisdiction of the Court of Federal Claims, the district court may fight to keep the action as an APA review case that affords purely equitable relief. Under this scenario, does *Darby* apply? It will if the district court wants to keep the case. The only way for a district court to keep the case is to rely on the APA. If the case is successfully transferred to the Court of Federal Claims (the only court authorized to award non-tort money damages in excess of $10,000 against the United States) however, then *Darby* does not apply. In this scenario, however, the government still loses its exhaustion argument. While the government has avoided *Darby*, the Federal Circuit does not require exhaustion at the service board level.[258]

Most of the problems discussed above can be avoided by statutorily requiring military plaintiffs to exhaust their administrative remedies with the service boards. The three proposals currently under consideration (by the American Bar Association (ABA), Department of Justice (DOJ) and the Air Force) are discussed below.

The American Bar Association Proposal

The American Bar Association (ABA) approved its proposal in February 1993, approximately four months before the Supreme Court issued the *Darby* decision. One of the proposal's basic assumptions is that exhaustion is already mandatory in military cases:

> At one time there was some diversity of opinion as to whether a service member must have his

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[252] *Id.*

[253] Ann H. Zgrodnik, Note, *Darby v. Cisneros: A Codification of the Common-Law Doctrine of Exhaustion Under Section 10(C) of the Administrative Procedure Act*, 20 OHIO N.U. L. REV. 367, 370 (1993).

[254] *Id.* at 371.

[255] Barto, *supra* note 246, at 8.

[256] The Court of Federal Claims has exclusive jurisdiction over non-tort claims against the government for more than $10,000, pursuant to the provisions of the Tucker Act, 28 U.S.C.A. § 1491 (West 1994):

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any of Congress or any regulation of an executive department, or upon any express of implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[257] *See* Caldwell v. Miller, 790 F.2d 589, 595 (7th Cir. 1986) ("It is well settled that *pro se* litigants are not held to the stringent standards applied to formally trained members of the legal profession, and that, accordingly, we construe *pro se* complaints liberally") (citing Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (*per curiam*)).

[258] *See* Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983) (exhaustion of military administrative remedies is only permissive, not mandatory).

> case considered by a correction board before seeking any judicial relief. However, now it seems clear that the Circuit Courts will require a service member to exhaust his remedy in the Correction Board, absent truly exceptional circumstances.[259]

This assumption was questionable before *Darby*.[260] After *Darby* it is, of course, completely false. This bedrock problem immediately undercuts the viability of the ABA proposal.

The focus of the ABA proposal is not to correct the problem created by *Darby*, that is, exhaustion being no longer required, but to "establish a readily accessible, centralized system of judicial review for military administrative discharges and other military administrative actions significantly affecting the rights of service members . . . "[261] The ABA proposal is primarily concerned with eliminating possible abuse of the administrative elimination process by unscrupulous commanders who want to get rid of a soldier without a court-martial.[262]

The DOJ and Air Force proposals, on the other hand, are primarily concerned with statutorily requiring service members to first seek relief from the service boards because exhaustion benefits the DOD and the courts. In other words, the ABA proposal is concerned with the rights of service members while the Air Force and DOJ proposals are more government oriented—designed to correct systemic deficiencies.

The ABA proposal does not require exhaustion of administrative remedies prior to seeking judicial review. Nowhere in the proposed statute, 10 U.S.C. § 867a, must a service member apply to the boards prior to seeking judicial review.[263] This glaring oversight is not the only problem with the ABA proposed legislation.

Subparagraph one of the proposed statute states that the United States Court of Military Appeals, now called the Court of Appeals for the Armed Forces (hereinafter CAAF),[264] shall have "exclusive jurisdiction" over all administrative claims.[265]

Subparagraph two states that review shall be based upon the record developed at a board, but does not state that resort to such boards is a prerequisite to judicial review. This paragraph also states that, if "relevant and material evidence was unavailable or otherwise unable to be presented during the administrative process," the court may authorize additional discovery "including subpoenas, depositions, and the like."[266] The court also may supplement the administrative record or remand the case for reconsideration.[267]

This provision raises many interesting questions. What subpoena power, if any, does the CAAF have? Does it have jurisdiction over civilian witnesses? What rules will govern the discovery process? Neither the Manual for Courts-Martial nor the CAAF court rules address this process. If discovery is not forthcoming, what enforcement power does the CAAF have? Can

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[259] Peter Strauss, *Report to the House of Delegates: Recommendation*, 1993 A.B.A. SEC. ADMIN. L. & REG. PRAC. 3 [hereinafter ABA Proposal].

[260] As mentioned above, exhaustion of military remedies is permissive, not mandatory, in the Federal Circuit. Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983). Additionally, many courts have developed numerous exceptions to the exhaustion doctrine in a military context: administrative remedies are inadequate; recourse to administrative remedies would be futile or cause irreparable injury; and the challenge is a purely legal one beyond the capacity of the administrative body to decide. *See generally*, Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) (inadequacy); Bradley v. Laird, 449 F.2d 898 (10th Cir. 1971) (futility); Hickey v. Commandant, 461 F. Supp. 1085 (E.D. Pa. 1978) (irreparable injury); Downen v. Warner, 481 F.2d 642 (9th Cir. 1973) (purely legal issues).

[261] ABA Proposal, *supra* note 259, at 1.

[262] *Id.* 1-2.

[263] *Id.* at appendix.

[264] On 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time particular case is decided will be used in referring to that decision. *See* United States v. Sanders, 41 M.J. 485, 485 n.1 (1995).

[265] ABA Proposal, *supra* note 259, at appendix.

[266] *Id.*

[267] *Id.*

it hold a civilian attorney in contempt? Where would the attorney be incarcerated? If depositions are held and a dispute arises, how will the dispute be settled? None of these problems arise under either the DOJ or the Air Force proposals.

Subparagraph three of the ABA Proposal places on the boards a time limit of eighteen months to complete a review. It also provides a mechanism for the applicant to ask the CAAF to compel a board to expedite the review.[268] This provision may pose a problem; for example, the ABCMR's current average processing time is one to three years.[269] The processing time could drastically increase especially if exhaustion is made mandatory. It is estimated that an additional 4000 applications will be submitted annually under the mandatory exhaustion requirements of the Military Personnel Review Act.[270]

Subparagraph four requires an applicant to file a notice of appeal to the CAAF within six months of the date of decision from a board or the discharge review board.[271]

Subparagraph five adopts the same standard of review that currently exists in federal district courts and the Court of Federal Claims. A board's decision will not be disturbed unless it was "arbitrary, capricious, contrary to the law, or unsupported by substantial evidence on the record as a whole."[272]

Subparagraph six attempts to explicitly grant the CAAF the same powers and jurisdiction of a federal district court and implicitly grant it the powers and jurisdiction of the Court of Federal Claims. The provision states that:

> In order to provide an entire remedy and complete relief in cases within its jurisdiction, the United States Court of Military Appeals may award monetary judgments for military pay and allowances improperly denied or withheld; issue orders to any appropriate official of the United States directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records; and grant such other injunctive and declaratory relief, final or interlocutory, as would be available from any United States District Court.[273]

If the CAAF seeks to award back pay, the United States waiver of sovereign immunity must be expressed unequivocally and cannot be implied.[274]

The ABA proposal should be rejected. The CAAF is not equipped to review the board decisions. The only advantage to CAAF review is its knowledge of military matters—the Federal Circuit already has some knowledge and can be educated further. The Federal Circuit has the case law, the structure, and the statutory authority to resolve all types of claims against the United States by former service members.

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[268] *Id.*

[269] Memorandum, Deputy Assistant Secretary, DA Review Boards and Equal Employment Opportunity Compliance and Complaints Review, SAMR-RB, to Chief of Legislative Liaison, ATTN: Investigations and Legislative Division (Ms. Rose Knickerbocker), subject: Misc 2562, 103rd Congress "The Military Personnel Review Act of 1993" (7 Jan 1994) [hereinafter Matthews' Second Memo].

[270] *See id.* In 1992, the ABCMR received 9415 applications, but only 5165 applications were processed during this same period. *See also* Jewell Memo, *supra* note 90, at para. 4.c.

[271] ABA Proposal, *supra* note 259, at appendix.

[272] *Id. See also* Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983); Kendall v. ABCMR, 996 F.2d 362, 367 (D.C. Cir. 1993).

[273] ABA Proposal, *supra* note 259, at appendix. The CAAF has been sensitive to its Article I status since *United States v. Matthews*, 16 M.J. 354, 364 (C.M.A. 1983), where the Government argued that the Court of Military Appeals, being an Article I court, may not decide the constitutionality of congressional enactments. In *United States Navy-Marine Corps Court of Military Review v. Cheney*, 29 M.J. 98, 102 (C.M.A. 1989), the Government argued that the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994) only authorizes or empowers Article III courts to award attorneys fees and urged the court to dismiss the application on the basis of lack of subject matter jurisdiction. *See* Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983); McQuiston v. C.I.R., 78 T.C. 807, 810-11 (1982), *aff'd*, 711 F.2d 1064 (9th Cir. 1983). As Judge Everett himself noted, "We recognize that Congress has not chosen to confer upon this Court the 'judicial power' provided by Article III. Moreover, Congress is not permitted to confer certain powers upon an Article I court. For example, Congress cannot authorize bankruptcy judges to decide common law causes of action which always had been subject to trial by jury." United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 329 (C.M.A. 1988)(citations omitted). As early as June 1993, the Army viewed the ABA proposal as "poorly conceived and unworkable."

[274] United States v. Testan, 424 U.S. 392, 399 (1976); United States v. King, 395 U.S. 1, 4 (1969). The United States Court of Federal Claims has exclusive jurisdiction over non-tort claims against the government for more than $10,000 pursuant to the provisions of the Tucker Act, 28 U.S.C.A. § 1491 (West 1994).

The Department of Justice Proposal

The Department of Justice (DOJ) proposal was initiated in 1990 by Mr. James Kinsella, a reviewer[275] in that agency's Commercial Litigation Branch. The DOJ proposal includes a lengthy discussion of the purpose, background, and summary of the Military Personnel Review Act.[276]

Mr. Kinsella is a former Air Force judge advocate and alumnus of the Air Force Litigation Division. He is the Commercial Litigation Branch subject matter expert on military personnel law and has had a hand in virtually every major case in the Federal Circuit regarding military personnel issues. He, along with a colleague in Commercial Litigation, Mr. John S. Groat, a former Navy judge advocate and Captain in the Navy Reserve, are primarily responsible for framing the recent line of cases in the Federal Circuit dealing with the justiciability of military personnel decisions.[277]

The stated purpose of the DOJ proposal is "to establish uniform procedures for the judicial review of the decisions of the review boards established with the military departments under [title 10]."[278] The DOJ proposal seeks to replace the "patchwork system of judicial review" that currently exists with centralized judicial review in the Federal Circuit.[279] The DOJ proposal has been promoted as benefiting both the government and the service member:

> [C]entralizing judicial review in [the Federal Circuit] would foster the development of a uniform body of case law for the benefit of service members and the guidance of the armed forces. In short, the legislative proposal would, if enacted, establish an effective, efficient, and inexpensive avenue of relief for a service member to obtain review and, when appropriate, complete relief upon a service member's appeal from a board's decision.[280]

Upon close examination, the government, not the service member, benefits more from the DOJ proposal.

The DOJ discussion of the reason for the Act provides a succinct and persuasive argument as to why exhaustion of administrative remedies and centralized review should be required.[281] The DOJ proposal notes that, while the Civil Service Reform Act of 1978, the Foreign Service Act of 1980, and the Veterans' Judicial Review Act of 1988 all provide a statutory basis for review and centralized forums, no legislation has statutorily defined judicial review of military personnel actions.[282] One could argue that the military, more than any other entity, requires explicit congressional guidance to clearly define the separation between the judicial branch and the executive branch of government.

The key provisions of the DOJ's proposal can be divided into the following categories: (1) service Secretaries' new settlement option, (2) statute of limitations, (3) new Board requirements, (4) finality, (5) judicial review, and (6) standard of review.

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[275] A "reviewer" is the rough equivalent to a branch chief in the Army's Litigation Division. However, unlike at the Litigation Division, a reviewer does not have a set group of attorneys who work for him or her. The reviewer is assigned cases based on area of expertise. At any given time a reviewer will be supervising a shifting pool of attorneys.

[276] Memorandum, Deputy Director, Legislative Reference Service, Dep't of Defense, Office of General Counsel, to all Service Secretaries, subject: Misc. 2562, a legislative proposal entitled "The Military Personnel Review Act of 1993" (16 Dec. 1993) [hereinafter DOJ Proposal].

[277] "A controversy is justiciable only if it is one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence." Voge v. United States, 844 F.2d 776, 780 (Fed. Cir.) (citations omitted), *cert. denied*, 488 U.S. 941 (1988); Sargisson v. United States, 913 F.2d 918, 922 (Fed. Cir. 1990) (judicial review of military decisions are appropriate only where there are tests and standards against which a Court can judge a Secretary's determination); Murphy v. United States, 993 F.2d 871, 872 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 1402 (1994).

[278] Draft Letter, Dep't of Justice, to Speaker of the House of Representatives, subject: Military Personnel Review Act of 1993, at 1 (undated). *See* DOJ Proposal, *supra* note 276, at 2. [hereinafter Letter to Speaker]. A comparison of the DOJ's purpose statement with the ABA's reveals that, while both proposals speak of "judicial review," the ABA proposal clearly places more emphasis on the rights of servicemembers, while the DOJ proposal is more concerned with uniformity, *i.e.*, streamlining the review process.

[279] *See* DOJ Proposal, *supra* note 276, at 2.

[280] *Id.*

[281] *Id.* at 1-6.

[282] *Id.* at 2.

Secretaries' New Settlement Option

The DOJ proposes to amend 10 U.S.C. § 1552 by adding a subparagraph (h):

> Prior to issuing a final decision upon an application under this section, the Secretary concerned may, following a recommendation by the General Counsel of the agency concerned, compromise and settle any matter presented in the application to the same extent as the Secretary would be authorized if the Secretary, acting through the board, had granted the relief requested.[283]

The DOJ argues that this provision "provides an extra measure of flexibility in the correction board process."[284] The DOJ correctly notes that no statutory mechanism exists for expediting the application process.[285] However, expedited treatment of a particular case has always been available upon request.[286] Mr. John W. Matthews, the Deputy Assistant Secretary of the Army responsible for all actions before the ABCMR, sees a potential for abuse: "Somebody could interpret the provisions in the proposed bill as a 'special' way of providing quick and quiet relief without benefit of the checks and balances of the independent board system."[287]

In an appropriate case, an application will receive expedited treatment and a Secretary may reject a board's recommendation to deny or grant relief. The provision is superfluous and could create an avenue for higher ranking applicants, or applicants with influential connections, to obtain special treatment.

Statute of Limitations

There are three different boards affected by the DOJ proposal: (1) boards for correction of military records, (2) discharge review boards, and (3) disability review boards. Title 10 U.S.C. § 1552 governing boards for correction of military records requires that an application be filed within three years of discovery of the error or injustice. Under the current system, the boards for correction of military records may waive the three year limitation period if the board finds that it is in the interest of justice to do so.[288] Title 10 U.S.C. § 1553 governing discharge review boards requires filing within fifteen years "after the date of the discharge or dismissal." Title 10 U.S.C. § 1554 governing disability review boards requires filing within fifteen years "after the date of the retirement or separation."

The DOJ proposal makes no pretense that this amendment is designed to benefit the service member. It spends very little time discussing why this amendment is necessary except to state:

> [G]iven the extraordinary authorized length of time for filing requests for relief pursuant to sections 1553 or 1554, the service is often in the position of resolving questions regarding a former member's discharge or disability long after the events in question have occurred, or having to make such decisions solely upon the basis of clemency.[289]

The DOJ proposal "precludes all judicial review of any decision rendered pursuant to" 1552, 1553, or 1554, unless the request for relief or application is received by the agency concerned within three years of the pertinent date of the challenged decision . . . ."[290] In other words, no judicial review is available even

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[283] *Id.* at 46.

[284] *Id.* at 13.

[285] *Id.*

[286] "In extraordinary circumstances, the ABCMR has processed a case from start to finish within one hour and routinely processes other deserving cases within one day." Memorandum, Deputy Assistant Secretary, DA Review Boards and Equal Employment Opportunity Compliance and Complaints Review, SAMR-RB, to The Judge Advocate General, subject: DOJ Proposal to Modify Judicial Review of Military Personnel Actions, at 3 (23 Sep. 1993) [hereinafter Matthews' First Memo].

[287] *Id.* at 3.

[288] 10 U.S.C.A. § 1552(b) (West Supp. 1996).

[289] DOJ Proposal, *supra* note 276, at 24.

[290] *Id.* at 24-25.

though the board for correction of military records may decide to waive the three year limitation period and consider the case. The applicant is stuck with the BCMR's decision. Furthermore, the new provision essentially cuts the fifteen year filing deadline under sections 1553 and 1554 to three years. An applicant could still file an application under these two sections within the fifteen year time limit. Beyond three years, he must accept the board's decision—no judicial review is available.

In *Cornetta v. United States*,[291] the court held that the Soldiers' and Sailors' Civil Relief Act (SSCRA) tolls the statute of limitations for a soldier's Tucker Act claim so long as the soldier remains on active duty. More recently, in *Detweiler v. Pena*,[292] the court held that the tolling provision in the SSCRA suspends the BCMR's three-year statute of limitations during the service member's period of active duty. The DOJ proposal seeks to overrule the effect of these two cases: "[R]egardless of any other period of limitations or tolling provision, to obtain judicial review, a member or former member must file a request or application for relief with a board, pursuant to section 1552, 1553, or 1554, within three years of the challenged action."[293] While overruling the above two cases may be the intent of the proposed statute, its language should be more explicit.

Section two of the proposal which contains the amendments to section 1552 does not mention the SSCRA or tolling. Sections three and four of the proposal contain the amendments to sections 1553 and 1554, governing respectively the discharge and disability review boards, and they likewise fail to specifically mention tolling of the statute of limitations or the SSCRA. The latter two sections simply state:

> A motion or request for review under this section must be made within 15 years after the date of the discharge or dismissal; however, *not withstanding any other provision of law*, no final decision made pursuant to this section shall be the subject of judicial review, pursuant to section 1555, unless the motion or request for review has been made within 3 years after the date of the challenged discharge or dismissal.[294]

Section 8(g) of the implementing provisions contains the only mention of the SSCRA:

> Notwithstanding any other provision of law, specifically including sections 2401[295] and 2501[296] of title 28, United States Code, and *section 525 of the appendix to title 50, United States Code,* on and after the date of enactment, no court of the United States, or the United States Court of Federal Claims, shall have jurisdiction to entertain a suit by a military claimant, as otherwise authorized by subsections (f)(i) and (ii), if the subject matter of the suit concerns the underlying facts or circumstances of events which occurred more than six years prior to the date of filing suit.[297]

To prevent courts from using the SSCRA to toll the three year statute of limitations contained in sections 1552, 1553, and 1554, the proposed statute should contain a paragraph which explicitly overrules the effect of the *Cornetta* and *Detweiler* decisions. Presently, the DOJ proposal appears to overrule these cases only as to the six-year statute of limitations for seeking judicial review. If a service member is now required under the Act to exhaust administrative avenues via the boards, then the only deadline he or she should be concerned with is the sixty-day window from the date of the board's decision until review by the Federal Circuit.[298]

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[291] 851 F.2d 1372 (Fed. Cir. 1988).

[292] 38 F.3d 591 (D.C. Cir. 1994).

[293] DOJ Proposal, *supra* note 276, at 25.

[294] *Id.* at 47 (emphasis added).

[295] 28 U.S.C.A. § 2401 (West 1994) contains the six-year statute of limitations for district courts.

[296] 28 U.S.C.A. § 2501 (West 1994) contains the six-year statute of limitations for the Court of Federal Claims.

[297] DOJ Proposal, *supra* note 276, at 53 (emphasis added).

[298] *See id.* at section 6.

New Board Requirements

The DOJ proposal requires that the final decision from all three boards[299] contain "(1) findings of fact, including a discussion of what evidence was considered in making the findings; (2) the interpretation of any applicable statutes, regulations, or policies; and (3) conclusions of law."[300] In my opinion, these new requirements represent a major change in the way the boards do business and will place tremendous new personnel and administrative burdens on the boards.

Neither the current statutes nor the regulations governing the boards detail the specific contents of a board decision.[301] As for the ABCMR, its opinions already contain a statement of facts but they do not include a detailed discussion of what evidence was considered in making its decision. Normally, a standard phrase is included which states that all personnel records and the service member's application and attachments were considered. The need for comprehensive documentation, useful for trial, is the driving force behind the DOJ's new requirement.

Occasionally, the DOJ must defend lawsuits against the services where a board's final decision is thin on detail and analysis. For example, in *Dodson v. United States*[302] the court stated the following:

> The ABCMR, making its own personnel decision as to Dodson's "overall performance and potential" and relying on two conclusory advisory opinions, one from the very body alleged to have erred, found that Dodson had probably not suffered any material error. We cannot agree. Dodson's "military career was . . . ruined through no fault of his own, but because of . . . bureaucratic bungling. This was a clear error . . . to [Dodson] but the Correction Board refused to exercise its authority and mandate, under statute and regulation, to correct it."[303]

Consider also the court's language in *Maier v. Orr*[304]:

> [T]hat in the light of the unrefuted opinions of Dr. Roth and Lieutenant Colonel McDonnel, except as to the self-serving conclusory unsubstantiated statement in the board's finding filed in court today, that there is no further issue as to facts and, therefore, the findings of the Air Force board for the correction of Military Records are [sic] unsupported by substantial weight of evidence available before it.[305]

In yet another case, a court wrote:

> [W]hile the Board and Surgeon General had before them the records of the VA relative to applicant's medical problems, it could not be determined what weight was given to that evidence because the Board's and Surgeon General's reports were conclusory in nature and did not discuss the details or specify precisely what items of evidence were considered.[306]

The cases cited above illustrate the DOJ's frustration with some of the board's less than exemplary opinions and explain its desire to correct these problems. While laudable goals, the burden imposed upon the boards by the proposed DOJ amendment is beyond the current capabilities of the boards and is an unrealistic requirement. In today's current budget situation, it is unlikely Congress will sufficiently enlarge the capabilities of the boards to handle the expanded role envisioned by the DOJ proposal.

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[299] The BCMR under section 1552; the Discharge Review Board under section 1553; and the Disability Review Board under section 1554.

[300] DOJ Proposal, *supra* note 276, at 46-48.

[301] *See* 10 U.S.C.A. §§ 1552, 1553, 1554 (West Supp. 1996).

[302] 988 F.2d 1199 (Fed. Cir. 1993).

[303] *Id.* at 1207-08 (citations omitted).

[304] 754 F.2d 973 (Fed. Cir. 1985).

[305] *Id.* at 979.

[306] Jordan v. United States, No. 287-68, 1974 WL 21686, at *32 (Ct. Cl. July 19, 1974).

Finality

This portion of the DOJ proposal directly addresses the problem created by *Darby*. Prior to *Darby*, the military's adverse personnel action was final when approved by a Secretary or his designee.[307] If the claimant chose to appeal to one of the boards, then a service Secretary would consider the board's recommendation and review the final action.[308] Execution of the adverse personnel action, however, occurred at the time of initial Secretary approval.[309] Under the DOJ proposal, the initial action would still be final for purposes of executing the adverse personnel action, but the initial action would not become final for purposes of judicial review until after the service member seeks relief from a board.

The DOJ proposal amends all three board statutes by adding new finality language. The proposal deletes the last sentence to subparagraph (a) of Section 1552 of Chapter 79 of title 10: "Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." The DOJ proposal adds a new subparagraph (i), "Except when procured by fraud, a decision under this section shall be final, conclusive, and binding upon the applicant, and all officers and courts of the United States, including the United States Court of Federal Claims, except to the extent provided by section 1555 of this title."[310] The proposal adds a new subparagraph (f) to sections 1553 and 1554, which is identical to proposed subparagraph (i) but for the last clause that states "except to the extent provided by subsections (d) and (e) of this section."[311]

The heart of the DOJ proposal's finality provision is contained in the new section 1555 which states as follows:

> This section establishes the Military Personnel Review Act as the exclusive avenue of relief for any military claimant, thereby eliminating all trial court level review of military claims by the federal district courts or the United States Court of Federal Claims. Pursuant to the Act, all military claimants, as defined in the implementing provisions of the Act, will be required to first apply for relief through the military boards, acting pursuant to sections 1552, 1553, or 1554 of title 10, United States Code.[312]

The DOJ proposed exhaustion provision therefore appears to meet the *Darby* requirement that a statute must specifically mandate exhaustion before the courts can require it.

Limitations on Judicial Review

The DOJ proposal attempts to specifically exclude from judicial review certain military determinations. Section 1555(d)(2) states the following:

> (d) Notwithstanding the provisions of subsections (a), (b), and (c) of this section, the court of appeals shall not have jurisdiction to entertain: (2) Any matter contained in a petition for review seeking to challenge the underlying facts or circumstances, or the application of law, or the findings, interpretations, or conclusions set forth in a final decision, with respect to:
>
> (i) The denial of an appointment, commission, promotion, enlistment, or reenlistment, or any award or decoration;
>
> (ii) The substance of any rating or evaluation of a service member's duty performance, or fitness for a promotion or for an assignment or billet, or relief from any assignment or billet;
>
> (iii) The imposition of any authorized discipline or punishment, or the denial of clemency;

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[307] *See* 298 F.2d 312, 315 (D.C. Cir. 1961).

[308] *Id.*

[309] *Id.*

[310] DOJ Proposal, *supra* note 276, at 46.

[311] *Id.* at 47. Subsections (d) and (e) contain the statute of limitations and the required contents of the boards' final decision, respectively. Subsection (e) also requires the Secretary to notify an applicant of the procedure and time for obtaining judicial review.

[312] *Id.* at 30.

(iv) The determination of a service member's suitability, mental or physical fitness, or qualifications for service, or continued service;

(v) The determination as to which of the authorized characterizations of discharge, or reenlistment designators or codes will be assigned; and

(vi) Any matter related to access to secure or classified documents, information, equipment, or locations.[313]

Citing *Orloff v. Willoughby*[314] and *Gilligan v. Morgan,*[315] the DOJ proposal argues that most courts have concluded that this laundry list of military determinations is either nonreviewable or nonjusticiable.[316] The DOJ, however, cites cases where courts have exceeded their authority and addressed some of these issues.[317] The DOJ proposal seeks to prevent future judicial intrusions into military affairs: "[D]ecisions such as these are properly confined within the exclusive province of the Executive Branch, with congressional oversight; they should not be subject to review by the courts."[318]

Anticipating criticism of this provision, the DOJ proposal attempts to defend this limitation.[319] It is appropriate because the President gives trust, responsibility, and discretion to commanders to maintain morale and exercise discipline.[320] By precluding judicial review of discretionary determinations, the Act will not:

> [R]esult in commanders and supervisors serving as the sole arbiter of their own actions. The check on the commander or supervisor's unfettered use of that discretion rests upon the simple fact that every commander who takes such adverse actions is required to justify those actions to senior officers and civilians, up to and including the Secretary. No less than the discretion to determine who should be disciplined, certain day-to-day military personnel decisions are also properly not within the sphere of judicial supervision of the armed forces.[321]

The DOJ provides the following example to illustrate its point: "[I]t would have been inappropriate for a court to entertain a challenge by General MacArthur to President Truman's decision to relieve him during the Korean conflict."[322]

The DOJ eloquently and persuasively explains why the sanctity of the military superior-subordinate relationship should not be disturbed by the courts:

> The military personnel management system depends, at bottom, upon the best efforts of commanders and supervisors to resolve complex questions regarding not only how an individual performs assigned peacetime tasks, but also the quintessentially military judgment regarding how the same individual might perform in a wartime billet. Courts not only lack the institutional competence to judge the propriety of such decisions, they are not accountable if the service's rating, retention, and promotion system does not meet the nation's need to have the best armed forces possible.[323]

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[313] DOJ Proposal, *supra* note 276, at 50-51.

[314] 345 U.S. 83 (1953).

[315] 413 U.S. 1 (1973).

[316] DOJ Proposal, *supra* note 276, at 5.

[317] The DOJ proposal cites two cases: Hoffman v. United States, 16 Cl. Ct. 406 (1989), *aff'd*, 894 F.2d 380 (Fed. Cir. 1990) (whether it was proper to relieve an Air Force Captain from his duties as chief of a contracting office after the contracting office received low ratings by an Inspector General team); and Bowes v. United States, 645 F.2d 961 (Ct. Cl. 1981) (whether it was appropriate to reprimand an Army officer for misconduct while serving in Vietnam).

[318] DOJ Proposal, *supra* note 276, at 5.

[319] *Id.* at 19-24.

[320] *Id.* at 20-21.

[321] *Id.* at 21.

[322] *Id.*

[323] *Id.* at 23.

A recent Federal Circuit case raises substantial questions about the DOJ's position on the justiciability of military discretionary decisions.

In *Adkins v. United States*,[324] the Federal Circuit reversed the Court of Federal Claims' dismissal of the complaint on the grounds of nonjusticiability. The plaintiff, retired Army Lieutenant Colonel Adkins, was selected to be promoted to Colonel and the list was approved by Congress. Upon discovering certain adverse information, however, the Secretary of the Army removed Lieutenant Colonel Adkins from the promotion list. He then sought relief from the ABCMR, which recommended that the challenged material be removed from his Official Military Personnel File (OMPF) and that all obstacles to his restoration to the 1988 Colonel Army Promotion List be removed.[325] The Secretary of the Army declined to follow the ABCMR's recommendation and refused to promote Lieutenant Colonel Adkins.

Lieutenant Colonel Adkins' argument proceeded as follows:

> [P]laintiff intends to prove that the Secretary made [the decision not to accept the recommendations of the ABCMR] without reviewing the entire record below, and in fact considered evidence outside this administrative record. The Secretary did not review compelling evidence seen by the ABCMR such as a videotape prepared by the late General Richard G. Stillwell. In fact, plaintiff will establish that the Secretary did not even review a complete record of the proceedings due to an error in transcription. In addition, plaintiff will show that the Secretary continued to rely on the adverse OERs which were supposed to have been removed from plaintiff's personnel file.[326]

The Court of Federal Claims rejected this argument, noting the following:

> [Plaintiff] allege[s] a violation of the regulations governing promotion, but does so in the most general terms . . . . The court notes, however, that Congress has placed no limitations on the President's power to remove officers from a promotion list . . . . This unconditional authority has in turn been delegated and subdelegated in its entirety to the Secretary of the Army . . . . Thus, nothing in the statute or regulations limits the material that the Secretary may consider when deciding to remove an officer's name from the promotion list. Without suggesting agreement with plaintiff's contention that it was error for the PRB to consider the investigative reports, the court finds that nothing restrained the Secretary from doing so.[327]

After acknowledging the long line of well established case law regarding justiciability,[328] the Federal Circuit held, contrary to its own controlling precedent,[329] the following:

> The merits of a service secretary's decision regarding military affairs are unquestionably beyond the competence of the judiciary to review . . . . Not every claim arising from a military decision presents a nonjusticiable controversy, however. This court has consistently recognized that, although the merits of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular procedure followed in rendering a military decision may present a justiciable controversy.[330]

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[324] 68 F.3d 1317 (Fed. Cir. 1995).

[325] *Id.* at 1318.

[326] *Id.* at 1324.

[327] *Id.* at 1324 (quoting the Court of Federal Claims in *Adkins v. United States*, 30 Fed. Cl. 158, 163-64 (1993)) (citations and footnote omitted).

[328] *Id.* at 1321-22.

[329] *See* Law v. United States, 11 F.3d 1061 (Fed. Cir. 1993). In *Law*, the plaintiff challenged his removal from the list of officers to be promoted to Lieutenant Commander in the United States Coast Guard. One of the statutes at issue provided that "[t]he President may remove the name of any officer from a list of selectees established under section 271 of this title." 14 U.S.C. § 272(a) (1994). Law argued that when the Secretary of Transportation, acting for the President, removed Law's name from the promotion list, the removal was defective because he failed to afford Law various procedural safeguards. In rejecting Law's claim, the Federal Circuit quoted section 272(a), and then stated that "Congress has not imposed the procedural limitations on the President's exercise of the authority which appellant asserts. It would be outside our province to create them." *Law*, 11 F.3d at 1068.

[330] *Adkins*, 68 F.3d at 1322 (citations omitted).

The Federal Circuit then made the following distinction: "[A]dkins's claim, however, is not based on the Secretary's decision to remove Adkins's name from the promotion list. Rather, his contention is that the Secretary improperly considered material outside the record in deciding whether to accept the recommendations of the ABCMR relating to the correction of his OMPF."[331]

The abnormality of the majority's decision in *Adkins* is best described by the dissenting judge who stated:

> The majority's holding that the President's decision not to reinstate Adkins to the 1988 promotion list is reviewable for procedural error by his alter ego, the Secretary, is astounding. Under binding precedent, heretofore followed by this court, no court may for either substantive or procedural reasons review the exercise of Presidential power over a purely discretionary military decision.[332]

The DOJ's proposal to specifically exclude certain discretionary military decisions from judicial review is a good one--especially in light of *Adkins*.

Standard of Review

Although the DOJ's proposal to exclude specific matters from judicial review is sound, its creation of a new standard of judicial review is not. Under the DOJ proposal, the new subsection to section 1555c states:

> The court shall review the record and hold unlawful and set aside any findings or conclusions found to be (1) obtained without procedures required by law or regulation having been followed, but only if the petitioner establishes that the failure to follow such procedures substantially prejudiced the petitioner's right to relief; or (2) unsupported by substantial evidence.[333]

Under well established case law, a board's decision will not be disturbed unless it was "arbitrary, capricious, contrary to the law, or unsupported by substantial evidence on the record as a whole."[334] The DOJ proposal eliminates two of the four grounds for overturning a board decision: arbitrary and capricious. Nowhere in its lengthy memorandum does the DOJ explain its proposed new standard of review.

As the cases cited in the previous section reveal, a plaintiff has a better chance of showing that a board violated regulations or procedures than showing that a board acted arbitrarily or capriciously. Arbitrary is defined as, "[F]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . . Despotic; absolute in power; bound by no law; tyrannical . . . ."[335] Capricious is defined as, "Of things, changeable; irregular; changing apparently without regard to any laws . . . ."[336] It is unclear why DOJ would want to abandon a higher standard for what appears to be a lower standard for a plaintiff to meet.

Summary of DOJ Proposal

The DOJ proposal states, "Nothing in this bill is intended to change the current system of internal reviews and correction board appeals."[337] The analysis in this article undermines this statement. The DOJ proposal limits a service member's access to the boards by tightening the application times and eliminating the possibility of tolling. The proposal severely limits a service member's options by allowing only one forum for judicial review and no chance of a "trial" on the merits. The DOJ proposal places extensive new administrative burdens upon the review boards.

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[331] *Id.* at 1325-26.

[332] *Id.* at 1327.

[333] DOJ Proposal, *supra* note 276, at 50.

[334] *See* Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983); Kendall v. ABCMR, 996 F.2d 362, 367 (D.C. Cir. 1993).

[335] WEBSTER'S NEW INTERNATIONAL DICTIONARY 138 (2d ed. 1946).

[336] *Id. at* 399.

[337] DOJ Proposal, *supra* note 276, at 10.

On the other hand, the DOJ proposal also benefits the complaining service member by simplifying the process. The DOJ contemplates an aggrieved service member handling his or her own case all the way to the Federal Circuit. There will be no need for an attorney to figure out which court has jurisdiction over which claims. The cost savings will be substantial for both the service member and the government. Furthermore, a uniform body of law will develop, clarifying many ambiguous and conflicting decisions among the circuits. This will level the playing field for all parties.

Mandatory exhaustion to the boards makes sense for both the service member and the government. Even if one believes that the boards are tools of the services, designed to support the government's position at the expense of the aggrieved service member, it still benefits the service member to have the board examine the complaint prior to going to court. Even if the service member loses, he or she has forced the service to state its position on all pertinent procedures, regulations, and complaints. The *only* negative aspect for the service member of mandatory exhaustion is delay. It may take longer for a final resolution of the complaint.

The DOJ makes the valid point that mandatory exhaustion to the boards will "foster respect for the role of civilian oversight over each military service."[338] Contrary to the belief of service members who are unsuccessful, the boards are not "rubber stamps." In the wake of *Darby*, *no* service member will be required to go to the boards before going to court. Following *Darby*, a vital, well-meaning, and fair-minded administrative check on the system may wither on the vine and die. Congress can reinforce its support for the administrative system it put in place fifty years ago by mandating that a service member's road to court first take him or her through the boards.

The Air Force Proposal

Drafted in 1994 by Mr. Barry Kean, Office of the General Counsel of the Air Force, the Air Force proposal is a scaled down version of the DOJ proposal:

> This draft is a "slimmed down" revision of a proposal circulated for comment last year as the "Military Personnel Review Act of 1993." The present draft incorporates the core purpose of the earlier proposal—to reform and simplify judicial review of military personnel decisions—while eliminating a number of collateral provisions of the earlier proposal which proved controversial. Both this draft and the earlier proposal focus on three main objectives: (1) Mandatory exhaustion of administrative remedies by application to the Board for Correction of Military Records (BCMR) prior to judicial review; (2) Judicial review on the administrative record developed by the BCMR; no *de novo* review; (3) Concentration of judicial review in a single forum—the Court of Appeals for the Federal Circuit.[339]

The same points made above in the discussion of the DOJ proposal apply to the Air Force proposal. I will discuss only the modifications to the DOJ proposal made by the Air Force proposal.

Secretaries' New Settlement Option

The Air Force proposal does not include a new settlement option provision like the DOJ proposal.

Statute of Limitations

The Air Force proposal drops the DOJ restrictions on the BCMR's three-year statute of limitations and the Discharge and Disability Review Board's fifteen year statute of limitations. The Air Force proposal allows judicial review of *any* final BCMR decision so long as the notice of appeal is timely filed.

The Air Force proposal gives an applicant 180 days, rather than sixty days, in which to appeal an adverse board decision to the Federal Circuit. Further, the Air Force allows an applicant to request an extension for good cause. The DOJ proposal does not permit an extension of the 60 day filing time.

New Board Requirements

The Air Force proposal does not place additional burdens on the BCMRs by requiring a more thorough final decision. Instead, the Air Force language merely states that "the claimant shall be provided a concise written statement of the factual and legal basis for the decision."[340]

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[338] *Id.* at 19.

[339] Barry Kean, Office of General Counsel of the Air Force, Military Personnel Review Act of 1995, at 1 [hereinafter Air Force Proposal].

[340] *Id.* at 4.

Finality

The Air Force proposal does not include the finality language proposed in the DOJ amendments. Rather, it states that, "No appeal may be made under this section unless the petitioner shall first have requested a correction under section 1552, and the Secretary concerned shall have rendered a final decision denying that correction in whole or in part."[341]

Limitations on Judicial Review

The Air Force proposal abandons the DOJ laundry list of excluded issues and instead includes a paragraph in the statute which states:

> Nothing in this Act shall be construed to grant any federal court the authority to review any matter relating [to] the granting or denying of a security clearance or access to classified information, documents, equipment or locations, or any other matter committed to the discretion of the Secretary concerned as a matter of law.[342]

Standard of Review

The Air Force proposal does not specify a standard of review, apparently leaving in place the established standard—that the BCMR's decision will not be disturbed unless it is "arbitrary, capricious, contrary to the law, or unsupported by substantial evidence on the record as a whole."[343]

Conclusion

The Air Force proposal, with some recommended additions discussed below, is the best proposal. It corrects the problems created by *Darby* without creating other issues.

The Department of the Army's Concerns With the Three Proposals

Some of the concerns already have been noted earlier in this article and will not be discussed here. Mr. Matthews, the Deputy Assistant Secretary of the Army, does not oppose the consolidation and centralization of appeals in the Federal Circuit[344] but he is concerned that the boards will not be able to handle the additional workload if exhaustion to the boards becomes mandatory. He feels that the DOJ proposal too severely restricts the reviewability of service members' complaints. The response to that concern is that, in light of *Darby,* few will go to the boards, choosing instead to go directly into court, and the boards will soon become irrelevant.

Mr. Matthews reasons that "somehow the interest of the bureaucracy overrides the individual's rights, even though it should be just the opposite."[345] Mr. Matthews believes checks on the system keep it "honest," and remarked that:

> [T]he threat of judicial review forces us to continually reevaluate and assess how we do business. When we are forced to review and respond to the decision which is under judicial review, often times we discover an error and correct it; making the litigation moot. Without the reality of judicial review, this important oversight look would not happen."[346]

A modified Air Force proposal meets Mr. Matthews' concerns while at the same time preserving the autonomy of the Army and greatly reducing costs to both the service member and the Army (and other services).

Under the Air Force proposal, judicial review will still occur but it will occur *only* after a board has had the opportunity to consider the complaint. Under the current system, a board may never have the opportunity to consider a service member's com-

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[341] *Id.* at 5.

[342] *Id.* at 7.

[343] *See* Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983); Kendall v. ABCMR, 996 F.2d 362, 367 (D.C. Cir. 1993).

[344] Matthews' First Memo, *supra* note 286, at 1-2. I suspect that some of Mr. Matthews' opposition to the DOJ proposal stems from DOJ's failure to consult with the boards during the development of its proposal. *See* Matthews' Second Memo, *supra* note 269, at 1.

[345] Matthews' First Memo, *supra* note 286, at 2. Mr. Matthews makes an interesting point that during the Carter administration, the Army was "seriously limited" by DOJ in raising of nonreviewability and nonjusticiability arguments. His point is that they "did not want to do anything which might be interpreted as impeding anybody's access to the courts to seek review of government actions." *Id.* at 4. Most of the justiciability line of cases in the Federal Circuit were decided during the Reagan and Bush presidencies.

[346] *Id.* at 3.

plaint if he or she bypasses the boards and goes straight to court. As far as limiting the matters a court may consider, these matters are discretionary decisions which virtually every court has held to be within the exclusive province of military leaders. With mandatory exhaustion, the board will have more, not less, opportunity to find and correct errors before judicial intervention is necessary.

One could argue that Mr. Matthews' adamant opposition to legislative reform undermines his own confidence in the board system he so vigorously defends. If he believes that the boards competently ferret out injustices and correct them, then more layers of judicial review and additional checks on the system are unnecessary. If the boards were simply rubber stamps for the military leadership, then additional checks and more judicial review would be warranted. If service members are dissatisfied with a board's decision, they can then go to the Federal Circuit with a complete administrative record expertly prepared by experienced professionals working for Mr. Matthews.

Many of the concerns expressed by Mr. Matthews and the Litigation Division relate to increased workloads, either at the Federal Circuit, the boards, or the Administrative Law Division. I contend that these increased costs, if they actually occur, are more than outweighed by the reduced litigation expenses. Mandatory exhaustion and the limitation of reviewable matters will greatly reduce the number of man-hours required to defend against frivolous cases.

Conclusion: My Proposal

The Air Force proposal, with slight modifications, is the best proposal. The amendments should be simple and the language unambiguous. Any change must fix a "clear and reasonable" time limit for the BCMR's to complete their reviews.[347] The DOJ's list of nonreviewable matters should be included, but it should be limited to those items that are expressly delegated to the President's discretion by Congress; for example, appointment, commissioning, promotion.[348]

The Military Personnel Review Act, or some variation thereof, is absolutely required. If the DOD cannot support the Air Force proposal with the modifications I have suggested, then, in light of *Darby,* it is imperative that 10 U.S.C. § 1552 be amended to require exhaustion. Further, this simple amendment would not raise any of the concerns expressed by the Department of the Army. As word of the full impact of *Darby* spreads, and plaintiffs' counsel become aware of *Perez,*[349] more and more service members may forego the boards. The cost of defending these new suits could become astronomical. On the other hand, if all service members are required to seek relief from the boards prior to seeking judicial relief, many cases may never reach the courts.

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[347] *See* Schwartz, *supra* note 91, at 279, *citing* Coit Independent Joint Venture v. FSLIC, 484 U.S. 561, 587 (1989).

[348] *See* Lockett v. Federal Emergency Management Agency, 836 F. Supp. 847, 853 (S.D. Fla. 1993), *citing* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) ("Upon examination of the pertinent statutory language, this provision indicates 'that Congress sought to prohibit judicial review and . . . is most certainly' clear and convincing evidence showing legislative intent to restrict access to judicial review").

[349] 850 F. Supp. 1354 (N.D. Ill. 1994).

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Subterfuge!

Command Intent and Judicial Deference Under Military Rule of Evidence 313(b)

Introduction

In two recent cases, the Court of Appeals for the Armed Forces (CAAF) and the Air Force and Navy-Marine Courts of Criminal Appeals demonstrated a surprising reluctance to suppress evidence based on the inspection subterfuge rule of Military Rule of Evidence (MRE) 313(b).[1]

In *United States v. Shover*,[2] the CAAF recently affirmed the Air Force Court of Criminal Appeals (AFCCA) decision[3] which found the subterfuge rule was triggered but that the primary purpose of the inspection was administrative rather than disciplinary. In *United States v. Moore*,[4] the Navy-Marine Court of Criminal Appeals (NMCCA) granted a government appeal and reversed a military judge by finding that the subterfuge rule was not triggered. The NMCCA reminded judge advocates that, unless triggered, the standard for admissibility of such inspections is a preponderance of the evidence. Both cases demonstrate that the military appellate courts take an expansive view of "lawful primary purpose" under MRE 313(b) and are willing to defer to the judgment of the commander in matters affecting a unit's ability to perform its mission.[5]

Military Rule of Evidence 313(b) permits a commander to require military members to submit to drug testing as a valid inspection without a showing of probable cause.[6] The inspection, however, must be administrative in nature; that is, it must be conducted to ensure security, military fitness, or good order and discipline. For evidence obtained during such an inspection to be admissible at a court-martial, the government must show by a preponderance of the evidence that it was the product of a legitimate inspection.[7] The subterfuge rule of MRE 313(b), however, provides that, where the purpose of the examination is to find contraband *and* it was (1) directed immediately following a report of an offense and was not previously scheduled or (2) specific individuals were targeted or (3) individuals were subjected to substantially different intrusions, the government must demonstrate by clear and convincing evidence that the examination was "an inspection within the meaning of [the] rule" and not a substitute for a criminal search.[8]

United States v. Shover

In *Shover*, a divided CAAF affirmed a trial court's finding that the government demonstrated by clear and convincing evidence that the primary purpose for the urinalysis inspection was proper. *Shover* involved an anonymous tip to Air Force criminal investigators that Captain A was dealing marijuana on base. A few days after the anonymous tip, Captain A reported to investigators that she found marijuana in her briefcase. After a government polygraph indicating no deception by Captain A, the investigation shifted to three potential suspects who had motives to plant the drugs. The deputy staff judge advocate suggested a unit wide urinalysis sweep *to investigators* to identify the perpetrator.[9] After consulting with the investigators and his legal advisor, the acting commander of Captain A ordered a urinalysis of all personnel in Captain A's building.[10] He directed this pursuant to a suggestion from the Judge Advocate's office. The ac-

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[1] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 313(b) (1995) [hereinafter MCM].

[2] No. 95-0890/AF, slip. op. (C.A.A.F. Sep. 24, 1996).

[3] 42 M.J. 753 (A.F. Ct. Crim. App. 1995).

[4] 41 M.J. 812 (N.M.Ct.Crim.App. 1995).

[5] These cases appear to be part of a trend that supports the commander's obligation to examine the overall fitness of his unit to accomplish the mission. In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the Court of Military Appeals (COMA) upheld an inspection and the commander's primary purpose by focusing solely on the facts known to the commander when the inspection was ordered. The COMA refused to impute to the commander the tainted knowledge of subordinates advising the commander on the inspection.

[6] *Shover*, 42 M.J. at 755, *citing* United States v. Bickel, 30 M.J. 277, 285 (C.M.A. 1990).

[7] MCM, *supra* note 1, Mil. R. Evid. 313(b).

[8] *Id.*

[9] Notwithstanding the CAAF's affirmance, the propriety of this advice amidst an ongoing investigation is questionable.

[10] Significantly, there were twenty "no shows" who were never tested. *Shover*, 42 M.J. at 758. This fact figures prominently in the dissent of Chief Judge Dixon in the lower court.

cused, Shover, was the sole participant to test positive, although for methamphetamine, not marijuana.[11]

Shover was charged with wrongful use of methamphetamine in violation of Article 112a, Uniform Code of Military Justice (UCMJ),[12] and the case was referred to a general court-martial. Shover moved to suppress the results of the test, arguing that the inspection was a subterfuge search following the report of a crime (the planting of the marijuana).[13]

At the suppression hearing, the acting commander testified that he was not aware of any targeted personnel. All personnel present that day were tested. Further, the accused was not assigned to Captain A's section nor was he one of the three identified by investigators as having a motive to plant evidence on Captain A. Finally, the acting commander testified that, although he had an interest in finding who planted the drugs, his purpose was to end the "finger pointing, hard feelings," and "tension" that the incident caused in the unit and to "get people either cleared or not cleared."[14] He "felt that it was probably in the best interest of those individuals, for the good order and discipline of that particular organization."[15] Based on this testimony, the trial court denied Shover's suppression motion, holding that, although the subterfuge rule was triggered, the government demonstrated by clear and convincing evidence that the commander's primary purpose was to inspect, not to search for evidence of crime. Following conviction and sentence, Shover appealed the military judge's ruling admitting the test results.[16] The AFCCA affirmed the findings and the sentence.[17]

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[11] *Shover*, 42 M.J. at 755.

[12] UCMJ art. 112a (1988).

[13] Shover v. United States, No. 95-0890/AF, slip. op. at 7 (C.A.A.F. Sep. 24, 1996).

[14] *Id.* at 11.

[15] *Shover*, 42 M.J. at 754.

[16] Shover was sentenced to a bad-conduct discharge, four months confinement, and reduction to E-1. Shover also alleged that the military judge erred by excluding defense evidence that the trial court found irrelevant. The CAAF similarly denied this contention and affirmed.

[17] The Air Force Court of Criminal Appeals (AFCCA) found that the subterfuge rule of MRE 313(b) was triggered. Indeed, the avowed purpose of the inspection was to detect drug use, and the inspection in this case immediately followed the report of a specific offense. The AFCCA concluded, however, that the military judge did not err in finding that the primary purpose of the inspection was administrative. *Shover*, 42 M.J. at 755. The court stated that the military judge's ruling could not be viewed as clearly erroneous when the commander's testimony was considered. The commander reasonably could have believed that the planting was an "inside job" and the urinalysis was "clearly motivated by a need to end the speculation and recrimination" caused by the evidence planting. *Id.* The AFCCA postulated that the commander would have been derelict in his duties if he had not ordered the testing because unit cohesion is an important element of good order and discipline. Thus, the AFCCA ruled that the drug test ordered by the commander in this case was not a subterfuge to conduct a search for evidence of a crime without probable cause.

In a thoughtful dissent, Chief Judge Dixon states that the government "falls far short" of its clear and convincing burden. *Id.* at 758 (Dixon, J., dissenting). The primary purpose of the urinalysis was to obtain evidence to link individuals to the planted marijuana—that is, for prosecution. Therefore, Chief Judge Dixon argues, the evidence should be suppressed and the charges dismissed.

Judge Dixon questions the military judge's findings of fact regarding primary purpose. He implies that both the trial court and majority consider MRE 313(b) "a license for a commander to use urinalysis testing whenever he may like in support of a criminal investigation." *Id.* Chief Judge Dixon was troubled by certain salient facts. The people chosen for the drug test all worked in the same building as the captain; the stated purpose was "to clear the record" regarding "the finger pointing," and most significant to Judge Dixon, "no shows" were never tested. These facts, he argues, are only "consistent with a desire to obtain evidence on or clear a group of possible suspects." *Id.* For these reasons he would reverse and dismiss. Judge Dixon compares *Shover* with *United States v. Parker*, 27 M.J. 522 (A.F.C.M.R. 1988), and calls the parallels "startling." *Id.*

In *Parker*, members of a carpentry shop were tested following discovery of a marijuana butt in a parking lot used by the shop. The commander was concerned about rumors and jokes of chronic drug use in the shop. Only twelve of the twenty assigned members were present for testing. "Although Parker, who tested positive, was never a suspect, [the] court held there was no valid inspection because the commander excused some members of the selected unit from having to provide urine samples." *Shover*, 42 M.J. at 758. Specifically, although Parker was never a suspect nor viewed by the command as a target, "a commander need not go so far as to single out specifically identified suspects for testing to raise an inference that an examination for evidence rather than an inspection has been directed." *Id.* at 759.

Presumably, Chief Judge Dixon's argument is selection by omission, thereby triggering the second prong of MRE 313(b) and the higher burden of proof. Unfortunately, Chief Judge Dixon's view of the *Parker* holding is not shared by the other members of the AFCCA. In *Parker*, the court found that the excusal of a single staff sergeant from testing (not multiple members) created a substantially different intrusion for the accused. A substantially different intrusion under the third prong of MRE 313(b) is what triggered the higher standard of review. Chief Judge Dixon's statement that "our court held there was no valid inspection because the commander excused some members of the selected unit from having to provide urine samples" arguably oversimplifies the court's holding. Further, the *Parker* court went on to assess the primary purpose and found that the commander was focused primarily on disciplinary ramifications and for *this* reason suppressed the evidence. Thus, Chief Judge Dixon's point may mislead practitioners that *Parker* involved the "selection trigger" and that this alone caused the reversal. Both propositions are inaccurate.

The CAAF found that the subterfuge rule of MRE 313(b) was triggered, based on the prior report of the planting of evidence in Major A's briefcase. The court then found the military judge's findings of fact, regarding the inspection's primary legitimate purpose, were not clearly erroneous. The CAAF turned next to the question of law: whether the urinalysis was an inspection or a search. In this *de novo* review, the court found the military judge did not abuse his discretion. In an opinion remarkably thin on analysis, the CAAF first reminded practitioners that when deciding between a valid inspection or a subterfuge search, the focus is on the commander who ordered the urinalysis, citing *United States v. Taylor*.[18] Referring to the acting commander's unequivocal testimony that his purpose was to end the "finger pointing, hard feelings," and "tension" in the unit, and to "get people either cleared or not cleared," the CAAF abruptly affirmed.[19]

Perhaps most remarkable about the majority opinion is its failure to address the commander's arguably euphemistic language. This failure looms over the entire opinion and becomes particularly disturbing in light of the dissenting opinions. Worse yet, the court does not acknowledge the dissents of Senior Judge Everett and Judge Sullivan who find, echoing the dissent of Chief Judge Dixon in the court below, that the facts shout "loud and clear" that this was a subterfuge search. As Everett notes, the urinalysis was "ordered to assist an investigation [by OSI], not out of some general concern for the well being of the unit . . . . A dragnet search, focused on finding criminal evidence and/or criminals themselves, even without a particular suspect in mind, nonetheless remains a search."[20] Judge Sullivan, quoting extensively from the record, argues that "[a]ny other construction of [the commander's] words ignores their plain meaning and renders Mil. R. Evid. 313(b) meaningless."[21]

The CAAF's decision in *Shover* also serves to remind practitioners that a commander's probable secondary purpose to seek evidence of a crime does not render the results of an otherwise valid inspection inadmissible.

United States v. Moore

A month before the events giving rise to his court-martial, Private Moore received nonjudicial punishment for use of methamphetamine and was declared nondeployable. After his unit deployed, Moore was transferred to a company-sized organization of mostly nondeployable Marines. This company was subdivided into platoons according to status or needs, including a "medical platoon," an "end-of-service platoon," a "witness platoon," and a "legal platoon."[22] Moore was assigned to the legal platoon awaiting administrative discharge. The legal platoon was composed of Marines with criminal and non-criminal related problems.

The regimental commander identified a high incidence of positive drug test results in Headquarters Company. He ordered more frequent testing for those platoons showing high drug usage.[23] As a result, the legal platoon, the communications platoon, and the motor transport platoon were inspected on a weekly basis. Moore tested positive for both marijuana and methamphetamine on two such inspections.

Moore was charged with wrongful use of marijuana and methamphetamine in violation of Article 112(a), UCMJ.[24] At trial, Moore moved to suppress the two test results alleging that the commander's primary purpose was to obtain evidence for use in a court-martial. He argued that specific individuals, himself included, were targeted for examination, which would trigger the subterfuge rule of MRE 313(b). After reviewing the facts, the military judge agreed with Moore and suppressed both test results. The military judge found that the legal platoon was specifically selected for testing due to its previous "high incidence" of drug use and that the primary purpose of the urinalysis tests was to obtain evidence for disciplinary action. The government

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[18] *See supra* note 5 for a discussion of *Taylor*. In all likelihood, the CAAF began its analysis with this proposition because of the conflicting testimony of the actual commander who was on temporary duty when the urinalysis was ordered by the acting commander. Testifying that he was involved in discussions early on in the investigation, the commander testified that "the thing that we thought is that there may be a high degree of probability that the person who planted the marijuana could have also been using it—or an illicit drug of some sort . . . . There were morale problems in the unit" but "[t]he morale problems were not the reason for the urinalysis." Shover v. United States, No. 95-0890/AF, slip. op. at 6 (C.A.A.F. Sep. 24, 1996). The dissent also quotes the commander stating "[t]here were morale problems in the unit. That had nothing to do with the urinalysis." And later, "[t]he morale problems were not the reason for the urinalysis." *Id.* at 3 (separately paginated dissent) (Sullivan, J., dissenting). This testimony effectively eviscerated the acting commander's stated primary purpose which stressed solving the morale problem in the unit with the inspection. This background helps to explain the court's focus on the acting commander and its harkening to *Taylor*.

[19] *Id.* at 11.

[20] *Id.* at 1 (separately paginated dissent) (Everett, J., dissenting).

[21] *Id.* at 2 (separately paginated dissent) (Sullivan, J., dissenting).

[22] Other platoons included the communications and motor platoons.

[23] Significantly, what constituted "high" usage was never defined at trial or elsewhere.

[24] UCMJ art. 112a (1988).

failed to show by clear and convincing evidence that the more frequent urinalyses were inspections and not quests for evidence of a crime.

The government appealed pursuant to Article 62, UCMJ.[25] The Navy-Marine Court of Criminal Appeals (NMCCA) reversed the military judge's ruling and held that the subterfuge rule was not triggered because specific individuals were not targeted or selected. The standard of review, therefore, was a preponderance of evidence. The NMCCA found that the government had met its burden of showing by a preponderance of evidence that the drug testing was an inspection within the meaning of MRE 313(b) and that the test results were admissible. Further, the NMCCA found that even if the standard were clear and convincing evidence, the government had satisfied this burden because the military judge's findings of fact were clearly erroneous.

Writing for a unanimous court, Judge McLaughlin reminded practitioners that under MRE 313(b) the government need only prove that an inspection is valid by a preponderance of evidence. Only when one or more of the three triggering events of MRE 313(b) occurs must the government prove the validity of the inspection by clear and convincing evidence. The court specifically found that none of the three subterfuge triggers was present. Having rejected the findings of the military judge as clearly erroneous, the NMCCA held that, under either a preponderance or a clear and convincing standard, the legal platoon was not singled out because of its perceived lack of discipline. In a supporting footnote, the court cited the drafter's analysis that "'specific individuals' means persons named or identified on the basis of individual characteristics, rather than by duty assignment or membership in a subdivision of the unit . . . such as a platoon or squad, or on a random basis."[26]

The NMCCA noted that during oral argument Moore claimed he was specifically targeted to get evidence to court-martial him. The court found this to be unsupported by the record and refuted by the commander's actions which increased urinalysis testing of *three* platoons and "initiat[ed] the increased testing, not with the [accused's] legal platoon, but with the communication platoon."[27] Furthermore, no contrary evidence was introduced nor other evidence offered that Moore was specifically targeted. Without evidence to support Moore's contention that he and others were selected for examination following the report of a crime, the court declined to impose on the government the burden of establishing the validity of the inspection by clear and convincing evidence.

The NMCCA next examined whether the government showed a proper primary purpose for the urinalysis. Again, the court rejected the trial judge's findings of fact on primary purpose as clearly erroneous. The regimental commander's stated purpose was to strictly adhere to Marine Corps policy. At trial, when pressed to choose one purpose, he said, "I'd reiterate it was the Marine Corps' [sic] policy that we would not have people using drugs."[28] Without further explanation, the NMCCA found this a "a legitimate purpose, as is deterrence."[29]

Finally, the NMCCA found the rationale for more frequent testing, "the special interest of the military in ferreting out illegal drugs and protecting the health and fitness of its members,"[30] to be facially neutral. The NMCCA held that the government demonstrated a legitimate primary purpose for the drug testing under either a preponderance of the evidence or clear and convincing evidence standard.

Impact

Both *Shover* and *Moore* demonstrate a striking reluctance to suppress urinalysis evidence based on the subterfuge rule of MRE 313(b). These two cases provide valuable lessons to practitioners at both the trial and the appellate levels. On the tactical level, these cases provide valuable clues to success both at trial and on appeal. Considering the facts in *Shover*, where a urinalysis was conducted in the midst of an investigation for drugs, trial counsel should aggressively defend the validity of inspections even under the most questionable circumstances. Arguably, the purpose in *Shover* to "end recrimination and finger pointing" was simply a euphemism for "identify the perpetrator." Given the court's acceptance of this "thin" distinction, trial counsel should fight even the toughest cases with optimism.

The cases also serve to remind trial counsel of the importance of the two step methodology under MRE 313(b). First, trial counsel must argue vigorously, as in *Moore*, that MRE 313(b) has not

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[25] *Id.* art. 62.

[26] Moore v. United States, 41 M.J. 812, 816 n.2 (N.M.Ct.Crim.App. 1995).

[27] *Id.* at 816.

[28] *Id.*

[29] *Id.* Other witnesses testified that the primary purpose was to maintain good order and discipline, fitness and deterrence.

[30] *Id.* at 817, *citing* United States v. Johnston, 24 M.J. 271, 274 (C.M.A. 1987), Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

[31] For example, understanding the background relating to the "specifically selected" trigger will aid counsel. For an example of individuals "hand-picked" through the subterfuge of testing a unit, *see United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994).

been triggered. To argue effectively, trial counsel should maximize their familiarity with the drafters' analysis and the background to MRE 313(b).[31] Trial counsel must then argue that if the rule was triggered the commander possessed a legitimate purpose for ordering the inspection. *Shover* and *Moore* suggest that the courts are willing to show great deference to the commander, that is, anything short of expressed disciplinary intent, in determining when an inspection is necessary.[32]

Shover also points out the danger of conducting a sweep during an ongoing investigation. Conventional wisdom suggests that one wait until probable cause develops. More aggressive counsel who advise commanders to conduct a sweep in such a case risk, as in *Shover*, a view of the sweep as an investigative tool, thereby compromising the results. Threading the subterfuge needle can be difficult for trial counsel.

Shover and *Moore* represent unwelcome news for defense counsel who typically use such questionable inspections to either "kill" a case or as leverage for more favorable pretrial agreements. These cases may lessen such leverage in the future. Undaunted, defense counsel should detect a silver lining in these cases. Both *Shover* and *Moore* reemphasize the importance of aggressive trial practice. The commander's articulation of a legitimate primary purpose is critical to the government's success in upholding the validity of an inspection. Trial counsel are often unable to prepare a commander for the suppression hearing until shortly before the hearing itself. This represents a golden opportunity for aggressive defense counsel to interview commanders first and "lock-in" statements favorable to the defense.

Once defense counsel learn of a sweep, they should immediately interview the commander to divine his primary purpose in conducting the drug testing. At this early stage, the commander is less likely to choose his words carefully. His description of his primary purpose, therefore, may be favorable to the defense. Defense counsel should attempt to commit the commander to use language favorable to the defense. A subtle turn of a phrase may win the day. Defense counsel should consider asking the commander for a sworn statement or, at least, having a witness present during the interview of the commander. Although commanders are unlikely to grant requests for written statements, any statement, verbal or written before full preparation by trial counsel, often will yield favorable results.[33] Conversely, trial counsel must thoroughly advise commanders before or soon after the inspection is conducted to avoid providing the defense with a tactical advantage.

If the commander's primary purpose is couched euphemistically, defense counsel should vigorously attempt to strip away this veneer. If defense counsel can suggest the commander had "mixed" purposes, this also may impede the government's ability to show a legitimate *primary* purpose. Indeed, the courts have long recognized the multiple purposes of urinalysis inspections.[34] In some cases, the inability of the government to focus on a single legitimate primary purpose resulted in the overturning of the conviction.[35]

As the dissent in *Shover* points out, defense counsel should develop the facts surrounding administration of the urinalysis. Defense counsel should also determine who was included and who failed to provide a sample and why. Arguing selection or targeting by omission of other personnel may activate the MRE 313(b) trigger and impose the higher burden on the government.

Conclusion

Shover and *Moore* demonstrate clear reluctance by the CAAF and the service courts to suppress evidence using the subterfuge rule of MRE 313(b). Both cases teach a number of valuable lessons. Early involvement by both trial and defense counsel often will determine success or failure. Trial counsel should be cautious of drug sweeps amidst ongoing investigations but, when faced with one, should litigate even highly questionable inspections. Defense counsel should get to the commander as soon as possible upon learning of the sweep and aggressively attack the primary purpose formulation by cutting away the euphemistic veneer. Defense counsel may also attempt to show mixed "primary" purposes. Major Pede.

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[32] This may be a product of the court's frustration with the anomaly built into MRE 313(b). As Chief Judge Dixon said dissenting in *Shover*, "We interpret Mil. R. Evid. 313(b) as we find it, not as we might like it to be. There is, admittedly, a built in anomaly in the rule. Roughly stated, urinalysis evidence derived from a unit inspection becomes admissible in courts-martial only when the inspection was not directed for the primary purpose of obtaining such evidence." Shover v. United States, 42 M.J. 753, 758 (A.F. Ct. Crim. App. 1995), *citing* Parker v. United States, 27 M.J. 522 (A.F.C.M.R. 1988).

[33] This is not meant to suggest that witness preparation is a matter of gamesmanship or institutionally sanctioned deceit. Actual trial practice, however, does involve assisting the witness in how best to present testimony. So long as the ethical rules animate counsel, effective witness preparation is vital to success on both sides of the bar.

[34] Parker v. United States, 27 M.J. 522, 525 (A.F.C.M.R. 1988).

[35] *Id.* at 527.

Litigation Division Notes

Homosexual Litigation Update

In January 1993, President Clinton directed the Secretary of Defense to review the Department of Defense's (DOD) policy concerning the service of homosexuals in the military. After extensive hearings in both houses, Congress enacted, as part of the 1994 National Defense Authorization Act, the so-called "Don't Ask, Don't Tell" policy.[1]

As expected, numerous legal challenges to the policy have been making their way through the judicial system and appeals have reached four different federal appellate courts. Two federal circuit courts have upheld the policy, one has upheld the policy but remanded the case to the district court for further findings, and a fourth circuit has yet to render a decision in three pending cases. These appellate cases are discussed below.

In *Thomasson v. Perry*,[2] a Naval officer brought equal protection and First Amendment challenges to the statements provision[3] of the new policy. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, upheld the policy. The Fourth Circuit's ruling relied heavily on the fact that the policy was a "carefully crafted national political compromise" and "[t]he courts were not created to award by judicial decree what was not achievable by [the] political" process.[4] Thomasson petitioned the United States Supreme Court for review, which was recently denied.

The Eighth Circuit recently joined the Fourth Circuit in upholding the policy. In *Richenberg v. DOD*,[5] an Air Force officer sought to enjoin his discharge under the statements provision of the new policy. The district court granted summary judgment for the Government. On appeal, the Eighth Circuit held that the policy was consistent with equal protection under rationality review because "Congress and the President may rationally exclude those with a propensity or intent to engage in homosexual acts."[6] The court also held that the policy did not violate free speech, accepting our argument that statements are evidence of propensity to engage in prohibited conduct.

The Second Circuit upheld the policy against a facial challenge to the statements provision when it reversed and vacated the district court's judgment that the new policy violated the First Amendment.[7] The court of appeals held that, assuming the validity of the prohibition against military personnel engaging in acts,[8] the statements provision of the new policy did not violate the First Amendment but rather struck a reasonable balance between competing interests, was important to the military's accomplishment of its objectives and restrained speech no more than reasonably necessary. The court, however, also held that the district court erred in ruling that plaintiffs did not have standing to challenge the acts prohibition and thus remanded the case to the district court for it to consider the constitutionality of the acts prohibition. The case has been briefed at the district court on remand, and was argued on 18 November 1996. A decision is pending.

Finally, the Ninth Circuit has heard argument on three different district court cases that challenge the policy. The primary case, *Philips v. Perry*,[9] involves a Navy enlisted member who was recommended for discharge because (1) he committed homosexual acts, and (2) he stated that he was a homosexual and did not rebut the presumption of homosexual acts. The district court upheld the military's policy in a limited ruling by holding

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[1] 10 U.S.C. § 654(b)(2) (1995).

[2] 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 1996 WL 396112 (U.S. Oct. 21, 1996) (No. 96-1)

[3] The "statements provision" of the statute provides that a servicemember "shall be separated from the armed forces" if there is a finding "[t]hat the member stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2) (1995).

[4] *Thomasson*, 80 F.3d at 921, 923.

[5] 97 F.3d 256 (8th Cir. 1996), *aff'g* 909 F. Supp. 1303 (D. Neb. 1995).

[6] *Id.* at 262.

[7] Able v. United States, 88 F.3d 1280 (2d Cir. 1996), *rev'd and vacated* 880 F. Supp. 968 (E.D.N.Y. 1995).

[8] The "acts provision" of the statute provides that, unless certain findings are made, a member of the armed forces "shall be separated from the armed forces" if that member "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . ." 10 U.S.C. § 654(b)(1) (1995).

[9] 883 F. Supp. 539 (W.D. Wash. 1995), *appeal docketed*, No. 95-35293 (9th Cir.)

that the military could permissibly discharge Philips for committing homosexual acts. The court refused to consider his challenge against the statements provision in order to avoid ruling on an unnecessary constitutional issue. The case was argued on appeal on 4 March 1996, and a decision is pending.

Two other cases that were consolidated on appeal, *Holmes v. California Nat'l Guard*,[10] and *Watson v. Perry*,[11] are also at the Ninth Circuit. In *Holmes*, a former lieutenant in the California National Guard filed suit challenging his discharge based on a statement to his commander that he was gay. On 29 March 1996, the federal district court for the Northern District of California found the DoD's homosexual conduct policy unconstitutional on both equal protection and First Amendment grounds.

In *Watson*, a Navy Lieutenant assigned to the Naval Reserve Officers Training Corps at Oregon State University filed suit challenging his discharge based on a one-page document titled, "Submission of Sexual Orientation Statement" that included the statement, "I have a homosexual orientation. I do not intend to rebut the presumption."[12] He had given this statement to his commanding officer. The district court found the policy constitutional as applied to Lieutenant Watson. The court determined that statements Watson made could be rationally interpreted to presume that he committed homosexual acts.

These consolidated cases were argued in the Ninth Circuit on 8 July 1996, and Court TV filmed the argument for later broadcast. However, on 16 August 1996, the court issued an order vacating submission of these cases. The Court gave no reasons for its decision. Therefore, it appears that the *Philips* case will be the first pronouncement on the constitutionality of the new policy in the Ninth Circuit.

Conclusion

The appellate courts have consistently upheld the policy against various constitutional challenges. If this trend continues, review by the United States Supreme Court might be more remote than current commentators suggest. Major Mickle.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)* which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically which appears in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 4, number 3, dated December 1996, is reproduced below.

Editor's Note

The United States Army Engineer Division, Huntsville, Alabama, will be sponsoring an Ordnance and Explosives workshop in Las Vegas, Nevada, from 27 to 30 January 1997. The workshop discusses removal response actions for conventional unexploded ordnance (UXO). Although the course addresses UXO response actions at Formerly Used Defense Sites (FUDS), the removal response action process used at FUDS is very similar to that currently being used by the Army at other locations. For those of you at installations that are conducting or planning to conduct UXO removals, the course is an opportunity to become familiar with basic procedures and requirements of UXO response actions.

The point of contact for information about the course and registration is Mr. Doug Wilson, Huntsville Division, commercial telephone (205) 895-1533, or facsimile (205) 895-1513. There is no tuition charge for the course however, participants are responsible for their travel and per diem expenses.

NEPA and Hunting Revisited

Early this year, a federal district court judge in New Mexico barred a state-sponsored hunt of state-owned buffalo on Fort

[10] 920 F. Supp. 1510 (N.D. Cal. 1996), *appeal docketed*, Nos. 96-15762, 96-15855 (9th Cir.) (consolidated for oral argument).

[11] 918 F. Supp. 1403 (W.D. Wash. 1996), *appeal docketed*, No. 96-35314 (9th Cir.).

[12] *Id.* at 1408.

Wingate because the Army had not performed any National Environmental Policy Act (NEPA) analysis. The judge ruled that the Army's ability to place safety and security-related conditions on the hunt was sufficient control to make the hunt a "Federal action" pursuant to NEPA.[13]

The Engle Act requires the Army to comply with state hunting, fishing, and trapping regulations. The statute also requires the Army to provide state officials with full access to its installation to carry out these regulations, conditioned only by safety and military security measures.[14]

New Mexico had notified the Army commander at Fort Wingate of the hunt and had requested access. The commander granted access subject to four conditions:

(1) The hunters were to be accompanied by a New Mexico Game and Fish employee.

(2) The United States would be held harmless for any harm suffered by hunters on the hunt.

(3) Army-specified off-limit areas designated to protect federal interests would be observed (open burn pits containing unexploded ordnance, historical ruins, etc.).

(4) Flame producing devices or alcohol would not be brought onto Fort Wingate.

Federal funds were to be used for the sole purpose of providing access to Fort Wingate, not to perform the hunt itself.

Shortly after the federal judge's ruling, the Army asked the judge to reconsider her opinion because the 1966 plan establishing the herd pre-dated the NEPA. In October, 1996, the court rejected this argument, holding that the plan's failure to specify all of the hunt's "parameters" and the Army's ability to control the hunt in accordance with extant law made the current hunt an "ongoing project" subject to the NEPA.

The denial of the motion for reconsideration enables the Army to appeal to the Tenth Circuit Court of Appeals. The Environmental Law Division (ELD) is currently coordinating with the United States Department of Justice to appeal the rulings. An appeal is being sought because hunting and fishing occurs at many Army installations under the auspices and management of state fish and game officials. The Army contends that *Fund for Animals* should be overturned because no NEPA analysis is necessary where the Army lacks discretion to act. This is true particularly where the state promulgates a hunting or fishing regulation that we are required by law to follow. As a practical measure, however, Army installations should include the guidelines for hunting and fishing programs in their installation's Integrated Natural Resources Management Plan (INRMP).[15]

The deadline for filing a notice of appeal is 19 December 1996. Once filed, the court will establish a briefing schedule and determine the need for oral argument. No decision on this appeal is expected for many months. In the interim, installations should continue to assess the impact of state hunting and fishing regulations as part of the installation's implementation of the INRMP. Mr. Kohns.

Did you know? . . . In 1273, King Edward I banned the burning of coal in London in an attempt to reduce air pollution.

Environmental Compliance Assessment System

Army Regulation 200-1 requires each installation to establish and maintain an Environmental Quality Control Committee (EQCC).[16] The EQCC acts on a broad range of installation environmental issues, priorities, policies, and strategies. The EQCC also plays a key role in conducting internal Environmental Compliance Assessment System (ECAS) assessments and preparing for external ECASs. The installation Environmental Law Specialist (ELS) is an integral member of the EQCC, which is also comprised of members representing the command, operations, engineering, resource management, safety, medical, and tenant activities. Overseas, the EQCC is often referred to as the Environmental Protection Committee (EPC) because this is the term used in the Overseas Environmental Baseline Guidance Document (OEBGD).

One of the responsibilities of the EQCC is to establish an internal ECAS that, at a minimum, conducts an internal ECAS assessment each year that an external one is not completed. External assessments are conducted every three years.

[13] 3 ENVTL. LAW DIV. BULLETIN 6, at 1-2 (Mar. 1996), *citing* The Fund for Animals, et al., v. United States, No. 6:96-CV-40 MV/DJS (D.N.M. 1996).

[14] Engle Act, 10 U.S.C. § 2671 (1958).

[15] All INRMPs must undergo the NEPA analysis in accordance with DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1989).

[16] DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 12-13 (23 Apr. 1990) [hereinafter AR 200-1].

External ECASs are coordinated and planned by the Army Environmental Center (USAEC). The external ECAS is normally conducted by a team of 12 to 20 technical experts and typically lasts at least one week. The team conducts an in-brief and out-brief for the installation command and staff. The team leader also conducts a daily brief with the installation Environmental Management Officer (EMO) to discuss the ECAS Team's daily findings and recommendations. We recommend that the installation ELS attend as many of these briefings as possible. The schedule of upcoming external ECASs for this fiscal year is as follows:

FORSCOM

Ft. Campbell, KY	24 February to 14 March 1997
Fort Buchanan, PR	28 April to 16 May 1997
Ft. Indiantown Gap, PA	2 to 20 June 1997
Ft. Bragg, NC	11 to 29 August 1997.

TRADOC

Ft. Gordon, GA	6 to 24 January 1997
Ft. Knox, KY	10 to 28 March 1997
Ft. Lee, VA	12 to 30 May 1997
Ft. Leavenworth, KS	21 July to 8 August 1997

USARPAC

17th ASG, Japan	to be determined

MEDCOM

Ft. Sam Houston, TX	2 to 20 December 1996

MTMC

Bayonne MOT, NJ	7 to 18 April 1997
Oakland Army Base, CA	8 to 19 September 1997.

Mr. Nixon and MAJ Ayres.

U.S. Environmental Protection Agency Focuses upon Endangered Species

Installation leaders should be aware of the interface between the United States Environmental Protection Agency's (USEPA) traditional regulatory role and a new focus upon endangered species and other ecological resources. On 9 September 1996, the USEPA proposed guidelines for Ecological Risk Assessments.[17] Concurrent with this measure, it appears that the USEPA increasingly desires a more detailed ecological risk assessment (ERA) for projects that require health risk assessments as part of a regulatory permitting process. If an installation prepares an ERA, and if federally listed, threatened, and endangered, species are present in the area of potential effects, installations should supplement their Endangered Species Act (ESA), Section 7 consultation, with results of the ERA.[18]

Additionally, according to one publication, the USEPA is planning to elevate its concern and actions in furtherance of the protection of endangered species.[19] The publication notes that the USEPA is already consulting with the Department of Interior to determine if USEPA's water quality standards need to be revised to be more protective of endangered species.[20] The article also notes that USEPA's "pesticide office is debating how to resurrect its endangered species program."[21] The article quotes a USEPA source as stating that "EPA knows it has to strengthen its [ESA] programs . . . We've waited for political endorsement which we recently got."[22] Major Ayres.

Did you know? . . . Evergreens, because of their long life span and their needles' year round exposure to the elements, are the trees that are most vulnerable to air pollution.

Settlement Reached on Phase IV Land Disposal Restriction Rule

On 31 October 1996, the U.S. Environmental Protection Agency (USEPA) and the Environmental Defense Fund (EDF)

[17] The USEPA's Proposed Guidelines for Ecological Risk Assessments, 61 Fed. Reg. 47,552 (1996).

[18] Endangered Species Act, 16 U.S.C. § 1536 (1988).

[19] INSIDE EPA'S ENVTL. POLICY ALERT, Vol. XIII, No. 23, at 40 (Nov. 6, 1996).

[20] *Id.*

[21] *Id.*

[22] *Id.*

reached an agreement concerning promulgation of the Land Disposal Restrictions Phase IV rulemaking. The LDR IV rule was proposed in August 1995 and was scheduled to be finalized in the summer of 1996 pursuant to a consent decree with the EDF. Widespread opposition to the rule caused USEPA to negotiate an extension on the finalization of the rule.

The agreement, filed in United States District Court for the District of Columbia, set 15 April 1997 as the deadline for the final rule establishing treatment standards for wood preserving wastes. The other portions of the Phase IV rule dealing with mineral processing waste recycling and land disposal restrictions for metal wastes will be re-proposed in April 1997 with finalization set for April 1998.

The "mini" Phase IV rule to be finalized April 1997 will be a pared down version of the original rule. Congress' RCRA rifle shot bill, signed by the President in March 1996, allowed the agency to remove many of the proposed treatment standards from both the Phase III and Phase IV rules. The USEPA had been under a court order[23] to promulgate RCRA treatment standards for decharacterized wastes even if they were regulated by other statutes, such as the Clean Water Act and the Safe Drinking Water Act.

The USEPA's reproposed rule shifts from allowing recycling in land units to requiring the use of storage tanks and containers. The USEPA cites "new information" as its reason for the change in the reproposal's basic premise. Although environmentalists will undoubtedly support the reproposal as an improvement, there will be close scrutiny of USEPA's justification for the change. MAJ Anderson-Lloyd.

Did you know? . . . 85 species of birds nest in tree cavities in the forests of North America.

U.S. Environmental Protection Agency Considers Options on Recycling Rulemaking

On 19 November 1996, the United States Environmental Protection Agency (USEPA) convened a public meeting in Washington D.C. to discuss its upcoming proposal to amend the definitions of solid waste at 42 U.S.C. § 6903 (27) and 40 C.F.R. § 261.2. These provisions govern the Resource Conservation and Recovery Act (RCRA) subtitle C jurisdiction over hazardous secondary materials that are under a legitimate recycling process.

Legitimate recycling are those processes where the secondary material (1) significantly contributes to the product or the process; (2) can be sold in commerce as a result of the recycling process; (3) is managed to minimize losses; and, (4) does not significantly increase the levels of toxic constituents. Although the USEPA's proposed amendments are in the drafting stage, the purpose of the public meeting was to place the regulated community on notice of the Agency's probable approach to revamp the RCRA's recycling regulations that have been in effect since 1985. The proposed amendments will advance two options for comment.

The first is the "Transfer-Based" option, which would allow a RCRA exemption for secondary materials that are recycled on site of generation or within the same company. Materials shipped off-site or outside of the company, even for legitimate recycling processes, would be considered a waste subject to full subtitle C regulation. The current scheme for granting case-specific variances for certain materials at 40 C.F.R. § 260.31 would be retained in principle. There would be several conditions in order to qualify for the exemption (i.e., no land disposal, inventory recordkeeping requirements, no speculative accumulation) and certain types of recycling would be regulated even if performed on-site (i.e., burned for energy recovery, use constituting disposal, or designated inherently waste-like). The option would also exclude waste fuels comparable to petroleum fuels.

The second option is the "In-Commerce" option, which treats recycling as an on-going production. Under the In-Commerce option, the major jurisdictional determinant is how the secondary material is being recycled, excluding from subtitle C regulation the recycling of any secondary material that is handled like a commodity and is used to produce a marketable product. This option focuses on the commercial value of the secondary material rather than on where the recycling process takes place. As with the first option, the material would be regulated if burned for energy recovery, disposed of, speculatively accumulated, stored on land, or designated inherently waste-like.

Once the USEPA formally proposes its amended definitions, the Department of the Army will solicit comments from installation and MACOM legal and environmental offices on which option, or combination of options, would be of greatest utility. CPT Anders.

[23] Chemical Waste Management v. EPA, 976 F.2d 2 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1961 (1993).

Claims Report

United States Army Claims Service

Personnel Claims Note

Missing High Value Items

In *OK Transfer and Storage Inc.*,[1] the Army lost an appeal involving a missing fur coat. The first lesson to be learned from this loss is that servicemembers must be more involved in the inventory preparation. The second lesson requires claims office personnel to demand more evidence for expensive items, especially when there is questionable proof of tender and value.

This claim involved a three quarter length mink coat which was noted as missing at delivery. The coat was purchased two years earlier for $1050. The replacement cost was $1500 and the claims office took depreciation and awarded the member $1350. The only proof of tender for the mink coat was the standard missing item statement and a picture of the claimant's wife in a fur coat. Though the fur coat was only two years old, the claim file lacked purchase receipts, checks, credit card statements, or even a statement from the store that sold the coat.

The carrier contended that the picture established that the claimant's wife wore a fur coat at some time but there was nothing to establish that it was tendered as it was not listed on the inventory.

At the General Accounting Office (GAO) Claims Group level, the Army lost the appeal.[2] In essence, the Army lost for lack of proof of tender even though the claims examiner reduced the carrier's liability to $675 due to lack of a receipt. The GAO Claims Group noted that it was the shipper's obligation to inform the carrier that the fur coat was to be shipped, and that the shipper was also required to inquire whether the coat was listed on the inventory. The GAO Settlement Certificate concluded that a mink coat was an item of such intrinsic value that it should have been listed on the inventory.

The Army appealed the GAO Settlement Certificate to the Comptroller General. The Army argued that it was the carrier's obligation to prepare the inventory, citing paragraph 54 of the Carrier's Tender of Service which describes the carrier's obligations when preparing the inventory.[3] The Army noted that nowhere in this paragraph which extends from items "a" through "s" did the Tender of Service require the claimant to inform the carrier that he intended to ship a high value item. The Army cited two Comptroller General decisions that dealt with issues of high value.[4] In these cases, the member failed to notify the carrier that high value items were included and the Comptroller General upheld the government in both cases. The Army also noted that some carriers utilize special high value inventories to protect themselves in such situations. Ordinarily, a carrier inquires if the shipper intends to ship a high value item and then prepares a special high value inventory for the expensive items, *e.g.*, electronic items, jewelry, and furs. At destination, the shipper, even if he or she waives unpacking, opens these cartons to establish delivery. In the present case, OK Transfer failed to avail itself of such an opportunity to protect its interest and prepare a high value inventory.

The Army noted that the carrier, in its correspondence, indicated that any packer would have labeled the item as a mink coat, or fur coat, and that he or she would definitely have packed it in a wardrobe carton, not a 3.1 cubic foot carton. The Army pointed out that the inventory reflected there were thirteen cartons which were all 3.1 cubic foot cartons and all were labeled with the generic term "clothes." There were no other cartons used for any sort of clothing. The Army protested that at a minimum, wardrobe cartons should have been used for closet items and that there should have been a more specific description on the other cartons other than merely "clothes."

The Army also argued that the Comptroller General has consistently upheld offset action on missing items when there is a reasonable relationship between the item claimed and the inventory description. The Comptroller General has long recognized that not every item tendered is listed on the inventory.[5] The Army argued that there is a very reasonable relationship between a carton marked "clothes" and a fur coat. The Army even found the claimant and received a statement indicating that his wife had seen the packers pack the fur coat.

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[1] Comp. Gen. B-261577 (Mar. 20, 1996).

[2] GAO Settlement Certificate, Z-2869191(0) (Mar. 22, 1995).

[3] DEP'T OF DEFENSE, REG. 4500.34-R, PERSONAL PROPERTY TRAFFIC MANAGEMENT, app. A, para. 54 (1 Oct. 1991).

[4] All Ways H&S Forwarders, Inc., Comp. Gen. B-252197 (June 11, 1993); Allied Van Lines, Inc., 53 Comp. Gen. 61 (1973).

[5] Allied Van Lines, Inc., Comp. Gen. B-270007 (June 20, 1996); American Van Services, Inc., Comp. Gen. B-270379 (May 22, 1996); American Van Services, Inc., Comp. Gen. B-260840 (May 13, 1996); American Vanpac Van Lines, Comp. Gen. B-239199.4 (Sept. 29, 1992); Carlyle Brothers Forwarding Co., Comp. Gen. B-247442 (Mar. 16, 1992); Cartwright Van Lines, Comp. Gen. B-241850.2 (Oct. 21, 1991); Valdez Transfer, Inc., Comp. Gen. B-197911.8 (Nov. 16, 1989).

The Army concluded by noting that it was the carrier's obligation to prepare the inventory and that there was no obligation on the shipper's part to inform the carrier of high value items. On the contrary, it was the carrier's obligation to make such an inquiry. The Army contended that OK Transfer's very lax inventory preparation should not enable it to profit from its own negligence.

Despite these arguments, the Comptroller General ruled against the Army. The Comptroller General agreed that it is generally sufficient that a lost item bears a reasonable relationship to an inventory description; however, it was noted that tender of an item is the first element of a *prima facie* case and "where the value of a lost item is in question, the member must furnish some substantive evidence on the issue like a detailed statement by the shipper or others."[6] Further, "the issue in dispute is whether there is sufficient evidence on the record to demonstrate that the member tendered the claimed mink coat to OK Transfer. The more valuable the lost object is, the higher the evidentiary standard."[7]

The Comptroller General noted that the photograph of the servicemember's wife in a fur coat is some evidence that she owned a fur-type coat. He agreed that the servicemember did note a fur coat missing at delivery. However, he found this evidence still insufficient to establish tender. He noted the coat was only two years old and there should have been a receipt because the mink coat was a major purchase. In the absence of such a receipt, there should have been some substantive documentation such as an appraisal, charge receipt, canceled check, or at a minimum, a statement by the seller of the cost of the coat to establish value. The Comptroller General did not, in this case, lend much credence to the wife's statement because it came at such a late date. Finally, he disagreed with the Army's contention that the member bore no responsibility for inventory preparation. The Comptroller General believed that the member had responsibility for the inventory and further noted that the member was required to verify the accuracy of the inventory. In other words, the Comptroller General found that it was the member's responsibility to see that the fur coat was included on the inventory. The Comptroller General concluded that there was insufficient evidence to substantiate tender of a mink coat.

Field claims offices should prepare short articles for the post newspaper reminding soldiers of the importance of maintaining purchase receipts and other evidence of ownership to substantiate ownership and value. Field Claims offices should also ensure that soldiers are properly briefed on the importance of the inventory. The soldier has the responsibility to insist that a fur coat or other expensive items be listed on the inventory when tendered to the carrier. Field claims offices should continue to encourage soldiers to handcarry expensive jewelry and other small valuable items when they move. In nearly every case, missing jewelry is not payable even if the soldier has his or her purchase receipts. If for some reason circumstances prevent handcarrying of expensive items, then the soldier must ensure that each high value item is individually listed on the inventory.

This guidance also applies to other expensive items such as Lladro and Hummel figurines. Some carriers merely list these as figurines which may not be sufficient. The inventory description should adequately describe them as Lladros or Hummels, and also indicate the number of expensive figurines tendered.

It is imperative that servicemembers carefully peruse the inventory prior to signing it. The more careful a servicemember is with the inventory description, the better his or her opportunity to be paid if expensive items are lost, and the greater likelihood that the Army can successfully recoup payment from the carrier. Ms. Schultz.

[6] OK Transfer and Storage Inc., Comp. Gen. B-261577 at 3 (Mar. 20, 1996).

[7] *Id.*

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Reserve Component(On-Site) Continuing Legal Education Program

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan Rivera, Chief, Unit Liaison and Training Of-*

ficer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380. Major Rivera.

1996-1997 Academic Year On-Site CLE Training

On-Site instruction provides an excellent opportunity to obtain CLE credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Legal automation instruction provided by the Legal Automation Army-Wide Systems Office (LAAWS) personnel and enlisted training provided by qualified instructors from Fort Jackson will also be available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Remember that *Army Regulation 27-1*, paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army judge advocates, National Guard judge advocates, and Department of Defense civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program.

If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380. You may also contact me on the Internet at *riveraju@otjag.army.mil.* Major Rivera.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,
Director ..... tromeyto@otjag.army.mil

COL Keith Hamack,
USAR Advisor ..... hamackke@otjag.army.mil

LTC Peter Menk,
ARNG Advisor ..... menkpete@otjag.army.mil

Dr. Mark Foley,
Personnel Actions ..... foleymar@otjag.army.mil

MAJ Juan Rivera,
Unit Liaison Officer ..... riveraju@otjag.army.mil

Mrs. Debra Parker,
Automation Assistant ..... parkerde@otjag.army.mil

Ms. Sandra Foster,
IMA Assistant ..... fostersa@otjag.army.mil

Mrs. Margaret Grogan,
Secretary ..... groganma@otjag.army.mil

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, 1996-1997 ACADEMIC YEAR

1-2 Mar	Charleston, SC 12th LSO Sheraton-Charleston Hotel 170 Lockwood Blvd. Charleston, SC 29403 (800) 968-3569	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG J. Altenburg BG T. Eres MAJ C. Garcia LTC K. Ellcessor COL K. Hamack	COL Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 727-4523
8-9 Mar	Washington, CD 10th LSO Southern Maryland Memorial USAR Center 5500 Dower House Road Upper Marlboro, MD 20722-3603 (301) 394-0558/0562	AC GO RC GO Int'l-Ops Law Criminal Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ M. Newton MAJ C. Pede Dr. M. Foley	CPT Michelle A. Lang 10th MSO 5500 Dower House Road Washington, DC 20135 (301) 394-0558/0562

15-16 Mar	San Francisco, CA 75th LSO	AC GO RC GO Criminal Law Contract Law GRA Rep	MG M. Nardotti BG Eres, COLs O'Meara, & DePue MAJ R. Kohlmann LTC J. Krump COL T. Tromey	LTC Allan D. Hardcastle Babin, Seeger & Hardcastle P.O. Box 11626 Santa Rosa, CA 95406 (707) 526-7370
22-23 Mar	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ P. Conrad MAJ M. Mills LTC P. Menk	MAJ Ronald C. Riley P.O. Box 1395 Homewood, IL 60430-0395 (312) 443-4550
4-6 Apr	Miami, FL 174th MSO/FL ARNG Miami Airport Hilton and Towers 5101 Blue Lagoon Drive Miami, GL 33126 (305) 262-1000	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Altenburg COL R. O'Meara LCDR M. Newcombe MAJ T. Pendolino LTC P. Menk	LTC Henry T. Swann P.O. Box 1008 St. Augustine, FL 32085 (904) 823-0131
26-27 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Tng Ctr 360 Eliott Street Newport, RI 02841	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ M. Mills MAJ K. Sommerkapm LTC P. Menk	MAJ Katherine Bigler HQ, 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Avenue Fort Devens, MA 01433 (508) 796-6332, FAX 2018
3-4 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf St Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	AC GO RC GO Criminal Law Contract Law GRA Rep	BG W. Huffman BG T. Eres LTC D. Wright MAJ W. Meadows Dr. M. Foley	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304
17-18 May	Des Moines, IA 19th TAACOM The Embassy Suites 101 E. Locust Des Moines, IA 50309 (515) 244-1700	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	TBD COL J. Depue MAJ J. Little MAJ J. Krump LTC P. Menk	MAJ Patrick J. Reinert P.O. Box 74950 Cedar Rapids, IA 52407 (319) 363-6333

* Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

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

2. TJAGSA CLE Course Schedule

1997

March 1997

3-14 March:	138th Contract Attorneys Course (5F-F10).
17-21 March:	21st Administrative Law for Military Installations Course (5F-F24).
24-28 March:	1st Advanced Contract Law Course (5F-F103).
31 March-4 April:	141st Senior Officers Legal Orientation Course (5F-F1).

April 1997

7-18 April:	7th Criminal Law Advocacy Course (5F-F34).
14-17 April:	1997 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April:	27th Operational Law Seminar (5F-F47).
28 April-2 May:	8th Law for Legal NCOs Course (512-71D/20/30).
28 April-2 May:	47th Fiscal Law Course (5F-F12).

May 1997

12-16 May:	48th Fiscal Law Course (5F-F12).
12-30 May:	40th Military Judges Course(5F-F33).
19-23 May:	50th Federal Labor Relations Course (5F-F22).

June 1997

2-6 June:	3d Intelligence Law Workshop (5F-F41).
2-6 June:	142d Senior Officers Legal Orientation Course (5F-F1).
2 June-11 July:	4th JA Warrant Officer Basic Course (7A-550A0).
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).
16-27 June:	JAOAC (Phase II) (5F-F55).
16-27 June:	JATT Team Training (5F-F57).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
22 June-12 September:	143d Basic Course (5-27).
30 June-2 July:	28th Methods of Instruction Course (5F-F70).

July 1997

1-3 July:	Professional Recruiting Training Seminar
7-11 July:	8th Legal Administrators Course (7A-550A1).
23-25 July:	Career Services Directors Conference
28 July-8 May 1998:	46th Graduate Course (5-27-C22).
28 July-8 August:	139th Contract Attorneys Course (5F-F10).
29 July-1 August:	3d Military Justice Managers Course (5F-F31).

August 1997

4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
11-15 August:	8th Senior Legal NCO Management Course (512-71D/40/50).
11-15 August:	15th Federal Litigation Course (5F-F29).
18-22 August:	66th Law of War Workshop (5F-F42).
18-22 August:	143d Senior Officers Legal Orientation Course (5F-F1).
25-29 August:	28th Operational Law Seminar (5F-F47).

September 1997

3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
8-10 September:	3d Procurement Fraud Course (5F-F101).
8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
15-26 September:	8th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1997

March

2-7, NJC	Dispute Resolution Skills Las Vegas, NV
8-13, AAJE	Criminal Trial Skills Key West, FL
13-14, ABA	Trial Practice Arlington, Hot Springs, AR
20, ABA	Legal Assistance for Military Personnel (LAMP), Fort Carson, CO

April

26-May 1, AAJE	Advanced Evidence Carmel, CA

May

2-3, ABA	Environmental Law Victoria Inn, Eureka Springs, AR

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

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
ABA:	Arkansas Bar Association 400 West Markham, Suite 600 Little Rock, AR 72201
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 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

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
National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 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 of Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

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

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

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

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

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
(800) 932-4637 (717) 233-5774

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. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	31 July annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	30 June annually
New Mexico	prior to 1 April annually
North Carolina**	28 February of succeeding year
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	All reporting periods and every three years, except new admittees and reinstated members—an initial one-year period
Pennsylvania**	Annual deadlines; Group 1, 30 April; Group 2, 31 August; Group 3, 31 Dec.
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	no "reporting date" per se, but minimum credits must be completed by last day of birthday month each year
Utah	31 December annually
Vermont	15 July annually
Virginia	30 June annually (annual license renewal)
Washington	31 January annually
West Virginia	31 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the November 1996 issue of *The Army Lawyer.*

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100 or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly with cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. These publications are for government use only.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
AD A305239	Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
AD B164534	Notarial Guide, JA-268-92 (136 pgs).
*AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).
AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A297426	Wills Guide, JA-262-95 (517 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A280725	Office Administration Guide, JA 271-94 (248 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
AD A289411	Tax Information Series, JA 269-95 (134 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).
AD A275507	Air Force All States Income Tax Guide, April 1995.

Administrative and Civil Law

AD A310157	Federal Tort Claims Act, JA 241-96 (118 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A311351	Defensive Federal Litigation, JA-200-95 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A311070 Government Information Practices, JA-235-95 (326 pgs).

*AD A318897 AR 15-6 Investigations, JA-281-92 (45 pgs).

Labor Law

AD A308341 The Law of Federal Employment, JA-210-96 (330 pgs).

*AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988).*

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(*3*) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(*1*) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(*2*) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Legal Automation Army-Wide Bulletin Board System (LAAWS BBS).

(*3*) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(*4*) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of *DA Pams* by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (*e.g.*, DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full

duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11
Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AFAll States Income with 1994 Tax Guide for use with 1994 state income tax returns, April 1996.
ALAW.ZIP	June 1990	*The Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memoran dum, ARLAWMEM.WPF.
BULLETIN.ZIP	July 1996	Current list of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school in Word 6.0, June 1996.
CHILDSPT.ASC	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1995.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA2.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200.ZIP	September 1996	Defensive Federal Litigation, August 1995.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.ZIP	May 1996	Law of Federal Labor-Management Relations, May 1996.
JA 221.EXE	September 1996	Law of Miitary Installations (LOMI), September 1996.

FILE NAME	UPLOADED	DESCRIPTION
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, Volumes I and II, September 1995.
JA235.ZIP	January 1996	Government Information Practices Federal Tort Claims Act, August 1995.
JA241.ZIP	January 1996	Federal Tort Claims Act, August 1994.
JA260.ZIP	September 1996	Soldiers' & Sailors' Civil Relief Act Guide, January 1996.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.
JA263.ZIP	August 1996	Family Law Guide, August 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.ZIP	September 1996	Uniform Services World wide Legal Assistance Office Directory, February 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses Protection Act Outline and References, June 1996.
JA275.EXE	December 1993	Model Income Tax Assistance Program, December 1996.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.
JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA 280P1.EXE	September 1996	Administrative and Civil Law Basic Handbook (Part 1 & 5, (LOMI/Ref)), September 1996
JA 280P2.EXE	September 1996	Administrative and Civil Law Basic Handbook (Part 2, Claims), September 1996
JA 280P3.EXE	September 1996	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), September 1996
JA 280P4.EXE	September 1996	Administrative and Civil Law Basic Handbook (Part 4, Legal Assistance), September 1996
JA 285.EXE	December 1996	Senior Officer Legal Orientation, November 1996
JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook Volume 1, March 1996.

FILE NAME	UPLOADED	DESCRIPTION
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
OPLAW95.ZIP	January 1996	Operational Law Deskbook 1995.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996
OPLAW3.ZIP	September 1996	Operational Law Hand book, Part 3, September 1996

FILE NAME	UPLOADED	DESCRIPTION
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic department (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5¼ inch or 3½ inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

5. The Army Lawyer on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP DEC96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

6. Articles

The following information may be useful to judge advocates:

Nicholas R. Weisbkopf, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN'S J. LEGAL COMMENT. 239 (1996).

Bruce J. Winick, *Advance Directive Instruments for Those with Mental Illness*, 51 U. MIAMI L. REV. 57 (1996).

7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978, extension 435. Lieutenant Colonel Godwin.

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Office of the Staff Judge Advocate
ATTN: STEWS-JA, Building S-146
White Sands Missile Range, New Mexico
88002-5075
COM (505) 678-1266
DSN 258-1263
FAX (505) 678-1266

* U.S. Supreme Court Digest (Lawyer's Edition), 20 volumes with 1980 pocket parts

* West's Federal Practice Digest 2d, 92 volumes with 1984 pocket parts

* West's Pacific Digest (covering 1 P2d through the May 1993 Supplement), 4 sets, 194 volumes

* West's Texas Digest 2d, 60 volumes with 1986 pocket parts

* West's Texas Digest, 42 volumes with 1983 pocket parts

* U.S. Court of Claims Reports, 210 volumes (1863-1976)

* The Opinions of the U.S. Attorneys General, volumes 1-41

*U.S. Government Printing Office: 1997 - 404-577/40014