MILITARY AFFAIRS

J.A.G.S. TEXT NO. 3

The Judge Advocate General's School

ANN ARBOR, MICHIGAN

U. S. judge advocate general's school, Ann Arbor, Mich.

MILITARY AFFAIRS

J.A.G.S. TEXT NO. 3

LIST OF CURRENT TEXTS

of

THE JUDGE ADVOCATE GENERAL'S SCHOOL

Prepared for instructional purposes only.

JAGS TEXT No. 1 MILITARY JUSTICE
Procedural guide for staff judge advocates.

JAGS TEXT No. 2 MILITARY JUSTICE
Comments on common errors and irregularities in court-martial procedure.

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Selected materials in the bibliography, procedure and substantive law of military affairs.

JAGS TEXT No. 4 WAR POWERS AND MILITARY JURISDICTION
Introduction to military jurisdiction and an orientation in the field of military law.

JAGS TEXT No. 5 GOVERNMENT CONTRACTS
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JAGS TEXT No. 9 SELECTED OPINIONS - MILITARY AFFAIRS
Companion volume to JAGS TEXT No. 3, containing current selected opinions of the Military Affairs Division, Office of The Judge Advocate General.

JAGS TEXT No. 10 Publication discontinued.

JAGS TEXT No. 11 LAW OF BELLIGERENT OCCUPATION
Commentary on the Hague Regulations.

FOREWORD

This text was prepared by the Military Affairs Department of The Judge Advocate General's School as one of a series for use in the School.

The purpose of these materials is twofold:

(1) To be used as an aid to instruction and orientation in Military Affairs in the curriculum of this School; and

(2) To serve as a convenient reference work or manual for students of the School who may be assigned as judge advocates in the field and handicapped by the lack of an adequate library.

Some matters have been treated chiefly by bibliographical reference, others by reprints from official sources. In addition to these materials, reference should be made to current War Department publications. Finally, certain subjects have lent themselves to more extended exposition and editorial comment. With regard to these subjects it is believed that the method of textual synthesis best serves the dual purpose of the materials.

EDWARD H. YOUNG,
Colonel, J.A.G.D.,
Commandant.

The Judge Advocate General's School,
United States Army,
Ann Arbor, Michigan,
1 October 1943.

(Reproduced with ADDENDA, 15 May 1944)

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PART I

ORGANIZATION OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The following outline of the organization of the Office of The Judge Advocate General is an entirely unofficial adaptation of section 207.02, Army Service Forces Organization Manual, M 301, 15 July 1943. It is based, however, upon a tentative revision of that section approved 27 August 1943; Office Memorandum No. 33, 15 September 1943, relating to the reorganization of the Military Personnel Division; Office Orders No. 200, 1 October 1943, making several organizational changes; and the organization chart approved by The Judge Advocate General on 5 October 1943.

* * * * *

OFFICE OF THE JUDGE ADVOCATE GENERAL

a. Mission.--To serve as the chief law officer of the War Department and the chief legal adviser of the Secretary of War, the War Department, and the Military Establishment. To supervise the system of military justice throughout the Army, and the rendition of legal advice and services throughout the War Department and the Military Establishment. To operate the system of appellate review of records of general courts-martial provided by Article of War 50 1/2 and to furnish legal advice and service to all agencies of the War Department.

b. Major functions.--The Judge Advocate General, under the direction of the Director of Administration, performs the following functions:

(1) Supervises the system of military justice throughout the Army.

(2) Supervises the work of all judge advocates of the Army.

(3) Supervises the rendition of legal advice and serv-

ices throughout the War Department and the Military Establishment.

(4) Operates the system of appellate review of records of general courts-martial provided by Article of War 50 1/2 and, for this purpose, establishes branches of his office wherever the Army is serving.

(5) Furnishes legal advice and service to all agencies of the War Department on matters including those relating to claims by and against the Government; contracts with the Government; bonds of Government officials, contractors, and subcontractors; patents; copyrights; War Department land purchases, sales, leases, and grants; state and Federal taxation; litigation involving the War Department; the organization of the War Department and the Army; and the rights and obligations of military and civilian personnel of the War Department.

(6) Controls and coordinates all patent activities of the War Department.

(7) Represents the War Department in all litigation involving the department, except litigation arising out of rivers and harbors, flood control, and Washington aqueduct activities, and maintains liaison with the Department of Justice in connection with such litigation.

(8) Recommends the appointment, assignment, and reassignment of all judge advocates of the Army.

(9) Recommends to the Military Training Division, Army Service Forces, training doctrine for use at The Judge Advocate General's School.

(10) Maintains the office of record of all records of general courts-martial, military commissions and courts of inquiry; all documents relating to the title to lands outside the District of Columbia under the control of the War Department; War Department patent assignments and licenses; and the records of the Army Section, Army and Navy Patent Advisory Board.

(11) Prepares for publication the following War Department publications, supplements thereto, and changes therein: Military Laws of the United States; Military Reservations; Digest of Opinions of The Judge Advocate General of the Army; Bulletin of The Judge Advocate General of the Army; Current Legal Bulletin.

(12) Maintains the Military Law Library.

(13) Exercises general administrative supervision with respect to the legal elements involved in claims against and in favor of the Government arising out of executed contracts, maritime accidents, and other claims authorized for administrative settlement under the various claims statutes.

c. Organization.--(1) The Office of The Judge Advocate General consists of The Judge Advocate General, four Assistants Judge Advocate General, the Tax Division, the Contracts Co-Ordinator, the Contracts Division, the Military Reservations Division, the Military Affairs Division, the Claims Division, the Litigation Division, the Patents Division, the Legal Assistance Branch, the Control Branch, the Office of Technical Information, the Executive Division, the War Plans Division, the Military Justice Division, the statutory Boards of Review, the Military Personnel Division, Special Assignments and Field Installations.

(2) One Assistant Judge Advocate General supervises the Tax Division, the Contracts Co-Ordinator, the Contracts Division, the Military Reservations Division, the Military Affairs Division, the Claims Division, the Litigation Division, the Patents Division and the Legal Assistance Branch, acts as chief adviser to The Judge Advocate General with respect to matters within the provinces of those agencies and performs such other duties as are assigned to him by The Judge Advocate General.

(3) Another Assistant Judge Advocate General supervises the Control Branch, the Office of Technical Information, the Executive Division and the War Plans Division, acts as chief adviser to The Judge Advocate

General with respect to matters within the provinces of those agencies, and performs such other duties as are assigned to him by The Judge Advocate General.

(4) Another Assistant Judge Advocate General supervises the Military Justice Division and the Boards of Review, acts as chief adviser to The Judge Advocate General with respect to the matters within the provinces of those agencies, and performs such other duties as are assigned to him by The Judge Advocate General.

(5) The other Assistant Judge Advocate General supervises the Military Personnel Division, has general administrative supervision of Special Assignments and Field Installations, acts as chief adviser to The Judge Advocate General with respect to the matters within the provinces of those agencies, and performs such other duties as are assigned to him by The Judge Advocate General.

(6) The Tax Division handles all cases in which the principal question presented is one of Federal, state or local taxation; cooperates with other divisions in the preparation of opinions in cases in which tax questions are presented incidentally, conducts correspondence and conferences with Federal, state and local authorities for the adjustment of controversies concerning the applicability of Federal, state and local taxes to War Department and Army agencies, personnel, activities, and contractors; takes or prepares all action required of The Judge Advocate General by Army Regulations 410-5, 8 February 1943, with relation to tax litigation affecting the War Department; arranges with the Department of Justice for proper representation of the interests of the Government in such litigation; and cooperates with the Department of Justice in the conduct of such litigation from its inception to its conclusion.

(7) The Contracts Co-Ordinator supervises the Contracts, Tax, and Patents Divisions and coordinates the legal work connected with Government contracts done by the Contracts, Patents, Tax, and Litigation Divisions and by legal agencies of the War Department outside the Office of The Judge Advocate General.

(8) The Contracts Division consists of the Contracts Law Branch, the Bonds Branch, and the Contracts Appeals Branch.

(a) The Contracts Law Branch prepares opinions on questions of law as to the nature and extent of authority to contract; the availability of appropriations to contract; advertising; opening and awarding of bids; the negotiation, form, legal sufficiency, and effect of original and supplemental contracts and change orders; advance payments; rights and obligations arising upon modification, extension of time, renewal, performance, delay, and breach of contracts; debarment of bidders; the assessment of liquidated damages, emergency purchases; acceptance of donations; the sale, lease, exchange, and other disposition of personal property; the construction and operation of contract provisions for unemployment, workmen's compensation, liability, and other forms of insurance.

(b) The Bonds Branch examines as to legal sufficiency, form and execution, fidelity and surety bonds (bid bonds excepted), and consents of surety to modification of contracts; and maintains, for the War Department, files of powers of attorney indicating authority of representatives of authorized surety companies.

(c) The Contract Appeals Branch represents the interests of the United States before the War Department Board of Contract Appeals.

(9) The Military Reservations Division consists of the Titles Branch, the Publications Branch, the Records Branch, and the Miscellaneous Branch.

(a) The Titles Branch prepares opinions on questions of law pertaining to the acquisition, title, possession, and disposition of real property under the control of the Secretary of War, including questions relating to condemnation, purchase, title, encumbrances, limitation, boundaries, possession, transfers, deeds, easements, and leases; and drafts documents incident thereto.

(b) The Publications Branch prepares the War Department publication "Military Reservations".

(c) The Records Branch classifies, indexes, files, and preserves title records pertaining to military reservations and other land under the control of the Secretary of War, including deeds, easements, leases, licenses, and permits.

(d) The Miscellaneous Branch prepares opinions on questions of law relating to state and Federal jurisdiction over military reservations and other lands under the control of the Secretary of War; the administration of such property, including custody, control, buildings, roads, materials, licenses, and permits; flood control; and to the regulation, improvement, and use of navigable waters of the United States.

(10) The Military Affairs Division consists of the Officers Branch, the Enlisted Branch, and the Miscellaneous Branch. The division prepares opinions on questions of law pertaining to procurement, appointment, enlistment, pay and allowances, status, promotion, discharge, retirement, discipline, and administration of military and civilian personnel, and the organization of the War Department and the Army; prepares and revises drafts of legislation, reports, executive orders, and regulations relating to the foregoing matters; and prepares opinions on questions of law involving interpretation of laws and regulations not specifically allocated to other divisions of the office.

(11) The Claims Division consists of the Administrative Branch, the Examination Branch, the Legal Review Branch, the Special Assignments Branch, the Admiralty Branch, the Foreign Claims Branch, the Personnel Claims Branch and the Field Training and Supervision Branch. The Division exercises general administrative supervision with respect to the legal elements involved in claims against or in favor of the Government arising out of executed contracts, maritime accidents, and other claims authorized for administrative settlement under the various claims statutes; prepares opinions on law and procedure

incident to claims and related matters, including reports to Congress on pending legislation, particularly private bills for relief; prepares drafts of revisions of Army regulations relating to the foregoing matters, and maintains liaison with other agencies and departments relative thereto.

(12) The Litigation Division consists of the Administrative Branch, General Litigation Branch, Commerce Branch, and Contractor's Defense Branch. The Division takes or prepares all action required of The Judge Advocate General by Army Regulations 410-5, 8 February 1943, with relation to litigation affecting the War Department, excepting litigation primarily involving tax questions and matters expressly assigned by The Judge Advocate General to other divisions and officers; arranges for and cooperates with the Department of Justice in the representation of the interests of the Government in all such litigation; furnishes counsel to represent the War Department before Federal and state administrative tribunals in proceedings affecting the interests of the War Department; takes appropriate action in response to subpoenas duces tecum served upon military personnel and requests for War Department personnel as witnesses; prepares and presents War Department claims in bankruptcy and reorganization cases; takes necessary action in protecting the interests of the Government in pending or threatened litigation involving loans guaranteed by the War Department or the security given therefor.

(13) The Patents Division consists of the Administrative Branch, the Classified Inventions Branch, the Claims Branch, the Prosecution Branch, and the International Branch. The Division supervises collection and preparation of evidence for use by the Department of Justice in defense of patent infringement suits filed against the United States; maintains files of patent assignments and licenses; prepares, files, and prosecutes applications for patents, interferences, and appeals; makes patent validity and infringement searches; renders opinion on questions of patents and copyright law; and maintains the records of the Army Section, Army and Navy Patent Advisory Board.

(14) The Legal Assistance Branch supervises the work of legal aid officers throughout the Army, maintains liaison with the American Bar Association and other civilian agencies which give legal aid to military personnel, furnishes all legal service required by the Soldiers' Home, and performs the legal aid work of the Office of The Judge Advocate General, including the rendition of legal advice to military personnel respecting their personal affairs, the drafting of wills, powers of attorney and similar legal documents, and the legal representation of inmates of the Soldiers' Home.

(15) The Control Branch obtains information regarding the efficiency of the operations of all elements of the Office of The Judge Advocate General and the progress of the work of the office; studies the organization of the office, its research facilities, administrative procedures, procurement of supplies, and reports of work done; recommends changes in existing policies, organization, personnel, procedures and methods to overcome situations requiring corrective action, and prepares directives to carry out such changes.

(16) The Office of Technical Information reviews public opinion affecting the Office of The Judge Advocate General and the Judge Advocate General's Department; conducts, or causes to be conducted, surveys of public opinion or public relations situations requiring corrective or preventive action and makes recommendations in regard thereto; where appropriate, prepares, or causes to be prepared, technical or general information for appropriate dissemination; acts as liaison between the Office of The Judge Advocate General and the Technical Information Division, Army Service Forces.

(17) The Executive Division consists of the Supply Branch, the Civilian Personnel Branch, the Libraries Branch, the Message Center Branch, and the Court Martial Records Branch. The Executive, under the supervision of The Judge Advocate General, has general administrative supervision of the Office of The Judge Advocate General.

(a) The Supply Branch performs office service functions.

(b) The Civilian Personnel Branch, under the supervision of the Chief Clerk, handles all matters pertaining to the appointment, pay, promotion, and transfer of civilian personnel of the Office of The Judge Advocate General.

(c) The Libraries Branch consists of the Military Law Library, the Legislation Section, the Index and Publications Section, and the Records Section.

1. The Military Law Library operates the central library of the Office of The Judge Advocate General; supervises the libraries of the divisions of the office and supervises the libraries of the judge advocates in the field.

2. The Legislation Section consists of the Legislative Reference Subsection which maintains the legislative reference service and the Military Law subsection which compiles new editions and supplements to the Military Laws of the United States.

3. The Index and Publications Section comprises the Index subsection which indexes all opinions of The Judge Advocate General of the Army and the Boards of Review rendered since 1842, and the Publications subsection which edits and prepares for publication the Bulletin of The Judge Advocate General of the Army, the Current Legal Bulletin, and new editions of and supplements to the Digest of Opinions of The Judge Advocate General of the Army.

(d) The Message Center Branch receives, distributes, collects, and dispatches mail, telegrams, cables and teletype messages, safeguards classified documents, provides messenger service and maintains the general records of the office.

(e) The Court Martial Records Branch files and indexes all records of general courts-martial, military commissions, and courts of inquiry appointed under authority of the United States since 1811.

(18) The War Plans Division prepares opinions and War Department publications on international law, including the laws of war, the rules of land warfare, prisoners of war, internment of enemy aliens, relations with our allies, military government, and like subjects; and on martial law and military aid to the civil power; maintains liaison with the Department of State with respect to such of the above matters as are within its jurisdiction.

(19) The Military Justice Division consists of the Clemency Branch, the Examination Branch, and the Miscellaneous Branch. The Division examines as to legal sufficiency, records of trial by general courts-martial and military commissions, not examined by the Boards of Review, initiating corrective action when necessary; checks all general courts-martial orders; makes recommendations, answers correspondence and renders opinions in regard to clemency, habeas corpus proceedings, granting of general courts-martial jurisdiction, maintenance of uniformity of sentences, keeping number of trials to a minimum, elimination of unnecessary delays in trials, disposition of prisoners, and questions pertaining to the Articles of War, the Manual for Courts-Martial and War Department publications, which involve the administration of military justice; trains judge advocates; and initiates legislation and changes in War Department publications pertaining to the above-named subjects.

(20) The Boards of Review under Article of War 50 1/2 conduct automatic appellate review of all records of trial by general courts-martial involving sentences to death, dismissal not suspended, dishonorable discharge not suspended or confinement in a penitentiary and of other records of trials found by the Military Justice Division to be legally insufficient to support the finding and sentences (unless adequate corrective action can be taken administratively); prepares opinions, holdings, reviews and correspondence relating to records on which it functions.

(21) The Military Personnel Division consists of the Assignment Branch, the Classification Branch, the

Administrative Branch, the Planning and Training Branch, and the Miscellaneous Branch. It conducts the military personnel administration of the Judge Advocate General's Department including all functions of The Judge Advocate General relative to procurement, assignment, transfer, reclassification, relief from active duty, discharge, retirement, promotion, decoration, and discipline of judge advocates of the Army.

ADDENDA

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PART II

MILITARY AFFAIRS:

INTRODUCTION and ORIENTATION

The use of the term "Military Affairs" as the designation of a course in The Judge Advocate General's School, or as explanatory of one of the phases of work performed by a judge advocate, either in the field or in the Office of The Judge Advocate General is, at best, misleading. The term in and of itself has no definite meaning in military law as, for example, do "Claims", "Contracts" and "Military Justice". It is used to refer to a general field of work or to a group of unrelated legal subjects not otherwise denominated. The term "Miscellaneous Affairs" would perhaps be more descriptive.

At the present time in The Judge Advocate General's Department the term "Military Affairs" is used to refer to any one of three separate groupings of work or subjects:

(1) The work of the Military Affairs Division of the Office of The Judge Advocate General.

(2) The entire field of work performed by a staff judge advocate of an administrative or tactical command, other than those matters which are specifically assigned to other sections.

(3) The subjects taught by the Military Affairs Department of The Judge Advocate General's School.

In order that the scope and purpose of this course may be clarified at the outset, it is essential that the organization of

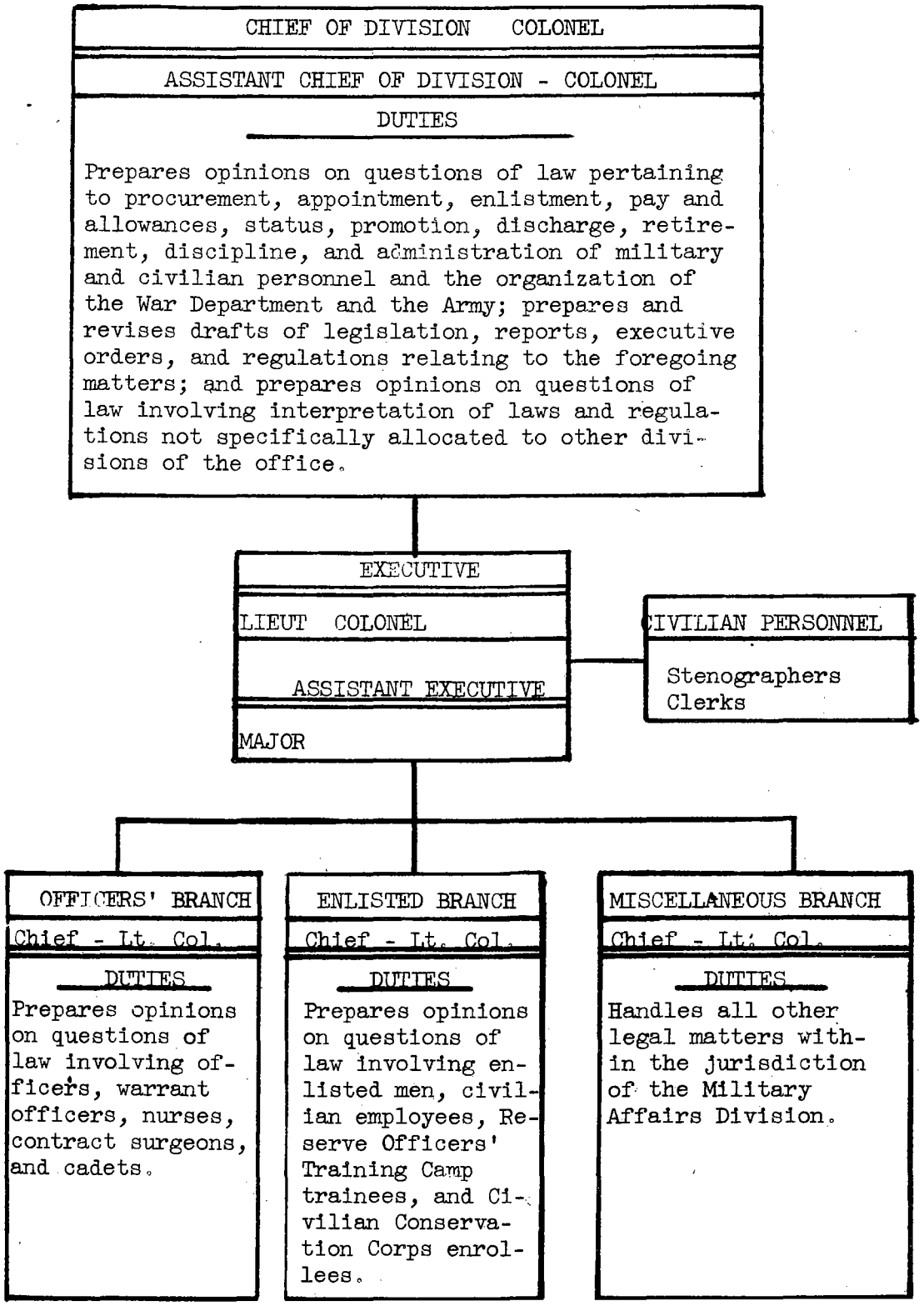
the Division in Washington and the scope of the judge advocate's duties in the field be understood.

CHAPTER 1 - THE MILITARY AFFAIRS DIVISION OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Military Affairs Division in the Office of The Judge Advocate General consists of the Chief of Division, who holds the rank of colonel, the Assistant Chief of Division, the Executive and Assistant Executive, and three Branches: Officers, Enlisted and Miscellaneous. Each branch is supervised and directed by a lieutenant colonel whose duties include the preparation, supervision and consideration of opinions assigned to his branch.

The annexed organization chart indicates the general structure and functions of the Division and of each of its three branches.

ORGANIZATION CHART
MILITARY AFFAIRS DIVISION
OFFICE OF THE JUDGE ADVOCATE GENERAL



The Military Affairs Division is under the supervision of one of the Assistants Judge Advocate General, with the rank of brigadier general, who also supervises the Claims, Contracts, Patents, Military Reservations, War Plans, Tax and Litigation Divisions, the Contracts Co-ordinator and the Legal Assistance Branch. The other divisions of the office are supervised by other Assistants Judge Advocate General.

CHAPTER 2 - MILITARY AFFAIRS IN THE OFFICE OF THE STAFF JUDGE ADVOCATE

The work of the office of the staff judge advocate of the typical infantry division is frequently divided for purposes of convenience into two categories: Military Justice and Military Affairs. All matters which do not come within the scope of Military Justice fall automatically into the category of Military Affairs. The term would include, therefore, not only those matters handled by the Military Affairs Division in the Office of The Judge Advocate General but also all matters pertaining to Claims, Contracts, Taxation, Military Reservations and other subjects which are assigned to separate divisions in that Office.

It is to be noted that the personnel of the divisional judge advocate's office consists of one officer, one warrant

officer and two enlisted men.[1] In service command headquarters and other installations to which several judge advocate officers are detailed, further separations are often made and individual officers are assigned to work exclusively in such special fields as Claims, Contracts and Litigation. "Military Affairs" is there used loosely as an omnibus term to denote all legal subjects affecting military personnel and organization not otherwise designated and assigned to other specific sections. It will generally be found that when the volume of work requires the formation of separate sections, the scope of the term "Military Affairs" becomes narrower and approximates the type of work assigned to the Military Affairs Division in the Office of The Judge Advocate General.

CHAPTER 3 - THE MILITARY AFFAIRS DEPARTMENT OF THE JUDGE ADVOCATE GENERAL'S SCHOOL

It would be manifestly impossible in the school curriculum to cover, even superficially, all the subjects which are subsumed under the title "Military Affairs" either in the judge advocate's office in the field or in the Military Affairs Division in Washington.

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1. A proposed change in the Table of Organization calling for an assistant staff judge advocate, with the rank of captain, has been approved by G-1 of the War Department General Staff and will probably become effective in the near future.

The program of instruction in this subject has two broad objectives: first, to instruct and train the student in the use of the special books, materials and procedures essential to the functioning of any judge advocate's office; and second, to familiarize the student with some of the substantive and procedural laws and regulations relating to those subjects which are common to the activities of the judge advocate in the field and to the Military Affairs Division of The Judge Advocate General's Office. Such special subjects as Claims, Contracts, Taxation, Rules of Land Warfare, Litigation and Military Reservations are taught by the Civil Affairs Department of the School.

The course in Military Affairs and this volume, intended for use in conjunction with it, are concerned first with the organization of the Office of The Judge Advocate General, and particularly of the Military Affairs Division (Parts I and II). There follows some basic material relating to the books, digests and reference works which are the professional tools of all judge advocates (Part III). The student is then introduced to the method and technique of writing formal opinions in the Washington office (Part IV). The remainder of the course deals with a selection of the substantive and procedural law of Military Affairs consisting chiefly of legal material on military personnel and the organization of officers and enlisted men in the great wartime Army. The

choice of particular subjects from the vast body of military law has been made solely on a practical, utilitarian basis. It has been the aim of the Military Affairs Department to devote attention chiefly to those matters which are likely to be presented for frequent consideration by judge advocates in the field or by officers on duty in the Office of The Judge Advocate General.

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PART III

BIBLIOGRAPHY

CHAPTER 1 - MILITARY LAWS OF THE UNITED STATES (ANNOTATED), 1939; NATIONAL DEFENSE ACT

Military Laws, 1939, contains most of the permanent and general laws of the United States in effect on 1 January 1939, including the legislation of the Seventy-fifth Congress. It also contains certain temporary legislation. usually appropriation acts, which has been enacted from year to year. Certain statutes have been included solely for reasons of historical interest. Provisions, the legal existence and effect of which are the subject of doubt, have been included or excluded from the publication pursuant to opinions of The Judge Advocate General. Explanatory notes have been added where the compilers of the United States Code and The Judge Advocate General are not in accord concerning legal existence of the legislation.

The present edition is the eighth and was prepared in the Office of The Judge Advocate General. The seventh edition, published in 1929, contains the pertinent legislation in effect at the time of adjournment of the Seventieth Congress on 4 March 1929, annotated by opinions of the courts and the Attorney General published between 1789 and 1929. The annotations in the 1939 edition cover the period 1929-1939. The section numbers assigned to the various statutes in the 1929 edition and Supplement thereto have been retained generally, the exceptions being noted in Table VIII. Repealed, superseded, expired or obsolete provisions have been

eliminated, with an explanatory note under the same section number as used in the 1929 edition.

The 1939 edition may be considered as having two parts. Part I consists of the Articles of and Amendments to the Constitution of the United States and the pertinent laws, the latter being codified into 38 alphabetically arranged chapters, the first entitled "Army of the United States: Regular Army" and the last, "War". Part II consists of a Table of Acts Cited by Popular Name, which sets out the date of the act and its Statutes at Large citation, and eight other Tables. Of these Tables I, II, III, IV, V, and VII show the section number in Military Laws, 1939, in which may be found the material which may have been elsewhere cited to the reader from the Constitution, Revised Statutes, Statutes at Large, United States Code, National Defense Act, or Executive Orders. Table VI contains the Recurring Provisions of annual Army appropriation acts arranged under the 38 chapter headings in Military Laws, 1939, and refers the reader to the section number under which the act may be found. In that section will be found a citation to the first act in which the terms of the annual statute first appeared, modifications being indicated by italicizing words omitted and by bracketing new language. Table VIII has been referred to above. An index completes the volume.

Supplement II to the Military Laws of the United States.

This supplement contains the pertinent legislation of the Seventy-sixth and Seventy-seventh Congresses, annotated by opinions of the courts and the Attorney General rendered between 1 January 1939 and 31 December 1942, in addition to certain materials omitted from the 1939 volume. Thus, when the researcher has reason to believe that certain material was published prior to the date of publication of Military Laws, 1939, but does not find it in that volume, Supplement II should be looked at.

The format, arrangement, and topical content of Supplement II are the same as that of Military Laws, 1939. Supplement II includes the material contained in Supplement I, which embraced the legislation of the Seventy-sixth Congress and covered the period between 1 January 1939 and 31 December 1940.

National Defense Act.

The United States Constitution vests in Congress the authority for the establishment, organization, maintenance, and operation of the Army. This authority has been exercised from time to time by the enactments relating to the national defense, the basic acts being those of 3 June 1916,[1] 4 June 1920,[2] and

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Chapt. 1

1. 30 Stat. 166; 10 U.S.C. 2; M.L. 1939, sec. 2.

2. 41 Stat. 759; 10 U.S.C. 2; M.L. 1939, sec. 2.

15 June 1933.[3] Collectively, the legislation is known as the National Defense Act, which briefly may be defined as the basic law governing the permanent organization and operation of the Army of the United States.[4]

The act, together with certain cognate legislation, has been published in pamphlet form under the title of The National Defense Act, Approved June 3, 1916, as Amended to January 1, 1942, Inclusive, with Related Acts and Notes. An index sets out the section number of the act in which the material sought may be found, together with its pamphlet page number.

Military Laws of the United States, 1939, and Supplement II contain most of the National Defense Act in codified form under

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3. 48 Stat. 153; 10 U.S.C. 2; M.L. 1939, sec. 2.

4. On 28 February 1942, the President ordered a reorganization of the War Department and the Army, effective 9 March 1942, (E.O. 9082, 28 Feb. 1942. See Cir. 59, WD, 1942, as amended, inter alia, by Cir. 81, WD, 1942. See also Cirs. 181, 406, WD, 1942). The reorganization was effected pursuant to the provisions of Title I of the First War Powers Act, 1941 (act 18 Dec. 1941, 55 Stat. 838; 50 U.S.C. Sup. I, 601), by which, "for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy", he was authorized to make redistribution of functions among the executive agencies and offices and officers thereof. Since upon termination of Title I - duration of the war and six months thereafter or such earlier time as the Congress by concurrent resolution or the President may designate - the functions of the agencies, offices and officers thereof will be as theretofore or thereafter provided by law, the present organization of the Army is temporary. See Part V, infra.

appropriate headings. The National Defense Act pamphlet contains the entire act in its 128 successive sections. Public Resolution No. 96[5] and the Selective Training and Service Act of 1940,[6] as amended to 1 January 1942, have also been included.

CHAPTER 2 - ARMY REGULATIONS

Generically, a regulation is a rule by which effective management, government or administration is sought to be accomplished. Army Regulations are rules which have as their object the maintenance of order, uniformity, and discipline in the Military Establishment.

1. Source.

Authority to make rules and regulations for the Military Establishment lies with Congress,[1] the President as Chief

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5. 54 Stat. 858, 50 U.S.C. 401.

6. 54 Stat. 885, 50 U.S.C. 301.

Chapt. 2

1. Const., art. I, sec. 8:
"The Congress shall have Power * * *
"To * * * make Rules concerning Captures on Land and Water." (cl. 11)
"To make Rules for the Government and Regulation of the land and naval Forces." (cl. 14).
"to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (cl. 18)

Executive[2] and as Commander in Chief,[3] and the Secretary of War.[4] Congressional action normally takes the form of an Act or a Resolution; Executive Orders and Presidential Proclamations are issued by the President as such and Military Orders are issued by him as Commander in Chief; and the Secretary of War may act for the President or for himself with relation to the War Department and for the Commander in Chief with relation to the Army. Although certain Army Regulations may be comprised almost solely of statutory materials and Executive Orders, the major portion of them comes into existence specifically in the execution by the Secretary of War of the duties placed upon him as head of the War Department and as the second element in the chain of command at the top of which is the Commander in Chief. Where, formerly, Army Regulations derived almost solely from the Commander in Chief, it would appear

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2. Const., art. II, sec. 3: "* * * he shall take Care that the Laws be faithfully executed * * *"; act 1 March 1875 (18 Stat. 337; 10 U.S.C. 16; M.L. 1939, sec. 309; see note 8, infra.

3. Const., art. II, sec. 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States * * *"; Ex parte Quirin et al. (317 U.S. 1).

4. As Cabinet member and pursuant to R.S. 161 (5 U.S.C. 22; M.L. 1939, sec. 888) which authorizes the head of each executive department to "* * * prescribe regulations, not inconsistent with law, for the government of his department * * *".

that, after 1875,[5] and especially with the advent of legislative techniques which have given an important place to administrative law, the role of the President as Chief Executive has become increasingly important in military matters.

2. History.

On 29 March 1779, the Continental Congress adopted certain "Regulations for the order and discipline of the troops of the United States". In the main, they constituted a system of tactics and drill regulations for troops, together with "Instructions" for officers and men. From that time until 17 February 1881, numerous revised editions of Army Regulations were submitted to Congress for its approval. Some were published officially, others not; some were approved or adopted by Congress,[6] others were not. In 1870[7] the Secretary of War was directed by Congress to prepare and submit to it a code of regulations for the government of the Army. Upon consideration of the code submitted, the Military Affairs Committee

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5. See note 8, infra.

6. The Army Regulations in effect at the time of presentation to Congress or promulgated pursuant to Congressional direction, may be said to have been adopted by Congress in the following legislation: Act 3 March 1813 (2 Stat. 819); act 24 April 1816 (3 Stat. 298); act 2 March 1921 (3 Stat. 616), later amended by act 7 May 1822 (3 Stat. 686); and act 28 July 1866 (14 Stat. 337).

7. Act 15 July 1870 (16 Stat. 319; 10 U.S.C. 16; M.L. 1939, sec. 309).

of the House of Representatives in the Forty-third Congress recommended that the President be authorized to make and publish regulations for the government of the Army in accordance with existing laws. This recommendation was adopted and enacted in 1875[8] and on 17 February 1881 a set of Army Regulations was first promulgated under the authority conferred. In 1920 the pamphlet system of Army Regulations now in use was initiated.[9]

3. Content.

Dependent upon the matter sought to be regulated, Army Regulations will be found to include, verbatim or paraphrased, clauses of the Constitution, statutes, Executive Orders, opinions of the courts, the Attorney General, Comptroller General, and The Judge Advocate General, administrative rules in the true sense and, infrequently, opinions of text writers. Whatever may be the source of the material included, be it of higher or lower authority than the Army Regulations as such, its inclusion in the former case at least serves to remove any question of applicability in administration of the Army, and, in the latter, its adoption gives it official status. Army Regulations, in the main, relate to the duties and functions of the several arms and services and of their components

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8. Act 1 March 1875 (18 Stat. 337; 10 U.S.C. 16; M.L. 1939, sec. 309).

9. For a detailed history of Army Regulations, see M.L. 1939, sec. 309 (note) and Lieber, Remarks on The Army Regulations and Executive Regulations in General, 1898.

and deal specifically with matters of personnel, property, and procedure.

4. Force and Effect

In view of the fact that the authority to make regulations for the government and administration of the Military Establishment resides in several places, it is at times difficult to know the exact source of authority for given Army Regulations. This is particularly true in times of national emergency when administration and control of the national effort probably is best effected by centering much quasi-legislative authority in the Executive Branch for coordination with the functions of the President as Commander in Chief.

Army Regulations in most instances are promulgated by the Secretary of War in implementation of a statute[10] or in obedience to the Commander in Chief.[11] The authority of the President

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10. In the same manner that a statute may be said to implement the provisions of the Constitution. For instance: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * *" (Art. I, sec. 4, cl. 1); "The Congress shall have Power to * * * make Rules concerning Captures on Land and Water * * *" (Art. I, sec. 8, cl. 11); "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *" (Art. IV, sec. 3, cl. 2).

11. United States v. Eliason (16 Pet. 291); Davis v. Woodring (111 F. 2d 523).

to act in a particular matter may arise (1) from his Constitutional office as Commander in Chief, (2) by explicit statutory direction of Congress that he issue rules and regulations, or (3) by implication inherent in a specific statute that rules and regulations are necessary for the proper execution of the law.[12] Considered as

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12. Brigadier General G. Norman Lieber, the ninth Judge Advocate General, in his "Remarks on Army Regulations and Executive Regulations in General" (note 9, supra) divides Army Regulations into the following classes:

a. Those which have received the sanction of Congress and therefore cannot be altered or exceptions to them be made by the executive unless the regulations themselves so provide. /This classification is largely academic today since Congress no longer acts upon Army Regulations (note 8, supra). An insubstantial type of sanction may possibly be found in the fact that Congress continues to make annual appropriations for specific Army activities which are administered by existing Army Regulations. See Maddux v. United States, 20 Ct. Cl. 193/

b. Those made pursuant to or in execution of a statute. These, if not prohibited by the statute, may be modified by the executive authority but, until modified, are binding on the authority making them.

c. Those depending on the Constitutional authority of the President as Commander in Chief and as Executive and not made in supplement to particular statutes. These may be modified at will by the President but exemptions are given only in exceptional cases.

d. Departmental regulations made by virtue of the authority conferred by Revised Statutes 161 (see note 4, supra).

e. A long continued practice has been held equivalent to a specific regulation. /Witness, for example, AW 19; see United States v. Webster, F. Cas. No. 16658./

regulations proper, Army Regulations are somewhat loosely said to have the "force of law".[13] Whether resting upon a Congressional statute or upon the Constitutional power of the President, they are rules and directions which, being acts of executive or administrative nature, must be consonant with the power of the actor.[14] Briefly stated, Army Regulations have the general force and effect of law to the extent that they do not contravene the Constitution or statutes.[15] To the extent that the course of conduct enjoined is within the Constitutional power of the Commander in Chief they have the specific force and effect of law and are binding and conclusive upon the Army.

The effective date of Army Regulations, in the absence of

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13. Gratiot v. United States (4 Howard 117); Symonds v. United States (21 Ct. Cl. 151).

14. In the same manner, Congress, in making rules for the "Government and Regulation of the land and naval Forces" (Const., art. I, sec. 8, cl. 14), cannot impair the command functions of the Commander in Chief nor can the President in exercising command, in the form of Army Regulations or military orders evade Congressional rules by which he and the Army must be governed. Swaim v. United States (28 Ct. Cl. 173); McBlair v. United States (19 Ct. Cl. 528).

15. United States v. Symonds (120 U.S. 46), (see note 13, supra, in lower court); United States v. Eliason (16 Pet. 291); Smith v. Whitney (116 U.S. 167); 4 Op. Atty. Gen. 62; Winthrop, Military Law and Precedents, Reprint, 1920, p. 20. "Regulations thus promulgated have the force of law * * * but they are not the law itself". Laurey v. United States (32 Ct. Cl. 259, 265); United States v. Eaton (144 U.S. 677).

a statement of effective date, is the date they bear, which date is presumptively the date of promulgation. The date of promulgation is the date of actual release and distribution by deposit in the mails by the War Department.[16]

5. Interpretation.

With a few possible exceptions, Army Regulations are subject to the same rules of construction and interpretation as are applicable to statutes and executive regulations generally. In the usual case, it is indicated that the following three steps in the process of interpretation be taken:

(a) Ascertain class to which the regulation belongs. Made by the President, ordered by the Commander in Chief, or sanctioned by Congress?

(b) Use extrinsic aids. Is the legislative history, General Staff or branch study available?

(c) Apply rules of construction.

A probable exception to the standard rules of statutory construction relates to the matter of the revocation of a revocatory regulation. Ordinarily, where an act is repealed and the repealing act is repealed by another which manifests no intention that the first shall continue repealed. the common law rule is that the repeal of the second act revives the first and revives it ab initio. It is probable, however, that the revocation or rescis-

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16. Par. 14g, AR 1-15, 12 Dec. 1927.

sion of Army Regulations which revoked an earlier regulation does not result in a revival of the first, except possibly in the case where the first was evidence of custom or usage.[17]

Army Regulations are not to be given retroactive effect unless the language clearly implies such intention. A probable exception is that of a regulation which is intended to cure matters of form or explain other regulations.[18]

6. Form and Use.

All administrative regulations for the Military Establishment, general or special in character, which are of more or less permanent application and issued under authority of the Secretary of War are published in a series of numbered pamphlets, known individually and collectively as Army Regulations.[19] They are published by the War Department at Washington, D.C., and bear the date of publication. They are printed at the Government Printing Office, in octavo size, with two slots in the left hand margin for insertion in looseleaf binders.

Army Regulations are drafted in the offices of the chiefs of the arms or services charged with the administration and super-

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17. Lieber, op. cit. supra note 9, at 88.

18. United States v. Davis (132 U.S. 334).

19. Par. 1b, AR 1-15, 12 Dec. 1927.

vision of the activity which is the subject of the individual regulation. Effort is made to have each Army Regulations pamphlet confine itself primarily to a single subject or division or subdivision of the subject, to be effected by the use of one or more sections, paragraphs, or subparagraphs.[20] Citations and cross references are used as research aids.

As shown by the sample page of Army Regulations 605-10, 30 December 1942, set out at the end of this chapter, the title of each pamphlet consists of two parts:[21]

(a) The general title indicating the general subject matter of the regulation, e.g., COMMISSIONED OFFICERS.

(b) The subtitle indicating the specific subject of the regulation, e.g., OFFICERS APPOINTED IN THE ARMY OF THE UNITED STATES.

The number of each pamphlet consists of two parts, separated by a dash:

(a) The base number is the number of the general title and appears before the dash, e.g., "AR 605-__" signifies that this number is the number of the general title COMMISSIONED OFFICERS.[22]

(b) The subnumber is the number of the subtitle and appears after the dash, e.g., "AR___-10"

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20. See Par. 29d, C 5, AR 340-15, 21 Aug. 1942.

21. See p. III - 20, infra.

22. See pp. III - 20, III - 22, infra.

signifies that this number is the number of the subtitle OFFICERS APPOINTED IN THE ARMY OF THE UNITED STATES

The pamphlet numbers in most instances are multiples of 5. If an asterisk appears before the number of the regulation on the first page, the reader is referred to the bottom of the page for information concerning the effect of the regulation upon matter previously published on the subject by the War Department.

Immediately under the Army Regulations number at the top right hand corner of the first page and at the top outside corners of succeeding pages appear the numbers of the paragraphs which are found on the page.

Each pamphlet and each section of a pamphlet contains a table of contents immediately under its title. On the last page of the pamphlet appear the authority (Secretary of War), signature (Chief of Staff), authentication (The Adjutant General), and class of distribution [23] of the pamphlet.[24]

Changes to Army Regulations ordinarily are published as such, unless the amount of material in the existing pamphlet is such as to render advisable a revision and reprinting of the latter. Usually a one-page or two-page pamphlet will be changed by a re-

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23. See AR 310-200, 1 May 1943

24. See page III - 21, infra.

vision and complete printing of the pamphlet. The pertinent Army Regulations[25] provide that pamphlets will not be changed for a period of one year after the date of publication or the date of the last change except--

(a) In cases in which changes must be made to conform to--

(1) Acts of Congress.
(2) Executive Orders or proclamations.
(3) Decisions of the Comptroller General of the United States.
(4) Approved opinions of The Judge Advocate General.

(b) In cases in which the changes, if authorized--

(1) Effect important economies to the military service.
(2) Involve pay and allowances of members of the service.
(3) Involve such a change of policy or practice as to require immediate publication.

Changes are published in slotted pamphlets similar to those of Army Regulations,[26] do not contain all current changes in the base pamphlet, and do not supersede preceding changes unless otherwise indicated. Regulations and their changes are filed in binders in the inverse order of dates of publication.

The first pamphlet in the series is the Index to Army Regulations (AR 1-5, 1 Jan. 1943) which covers all regulations and

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25. Par. 14b, C 2, AR 1-15, 12 Dec. 1927.

26. See p. III - 22, infra.

changes promulgated prior to 1 January 1943. It is not designed for binding with other Army Regulations pamphlets. AR 1-5 supersedes, inter alia, AR 1-6,[27] an alphabetical arrangement of titles of Army Regulations, but the latter is useful when AR 1-5 is unavailable. AR 1-10[28] is a list of current pamphlets and changes showing as to each pamphlet:

(a) Its number, title, and date.
(b) The number of the latest change.
(c) Its distribution.

Officially, an individual pamphlet or a change is given the plural number, e.g., "Army Regulations 140-5" or "Changes No. 2".

The practice of publishing changes to Army Regulations in War Department Circulars pending revision of the regulations, was discontinued by Circular 166, War Department, 1942. Subsequently, the practice was reestablished by Circular 320, War Department, 1943, authorizing the use of War Department Circulars for publication of partial and complete suspensions, rescissions and minor changes to Army Regulations and other War Department publications.

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27. 1 Jan. 1941.

28. 1 Jan. 1943.

FIRST PAGE OF AR 605-10

See Below

Base number

Subnumber

Paragraphs on Page

* AR 605-10

1-2

ARMY REGULATIONS)
No. 605-10)

WAR DEPARTMENT
Washington, December 30, 1942

General Title

COMMISSIONED OFFICERS

Subtitle

OFFICERS APPOINTED IN THE ARMY OF THE UNITED STATES

Pamphlet Table of Contents

SECTION I

GENERAL

Section Table of Contents

1. General.--a. These regulations govern, etc.

* * * *

2. Statutory authority.--That during the, etc.

* * * *

Indicates pamphlets, changes or Circulars superseded by this pamphlet

* This pamphlet supersedes AR 605-10, December 10, 1941, including C 1, August 11, 1942, and C 2, November 18, 1942.

LAST PAGE OF AR 605-10

Paragraphs on Page — AR 605-10, 28-29

COMMISSIONED OFFICERS

* * * *

29. Waiver of physical defects.--Deviations, etc.

* * * *

The Adjutant General's File Number — /A.G. 210.1 (12-1-42)./

Authority — BY ORDER OF THE SECRETARY OF WAR:

Signature — G. C. MARSHALL,
Chief of Staff.

Authentication — OFFICIAL:

J. A. ULIO,
Major General,
The Adjutant General.

Class of Distribution — DISTRIBUTION:
B.

FIRST PAGE OF C 7, AR 605-10

Base number
AR 605-10 — Subnumber
* C 7 — Changes No.
See Below
COMMISSIONED OFFICERS — General Tit
OFFICERS APPOINTED IN THE ARMY OF THE UNITED STATES — Subtitle

CHANGES)
NO. 7)

WAR DEPARTMENT,
Washington 25, D.C. 16 June 1943

AR 605-10, 30 December 1942, is changed as follows:

13. Assignment.

* * * *

b. An officer appointed in, etc.

* * * *

23. Methods.--Appointments, etc.

* * * *

24. Deaths.--Deaths will be reported, etc.

* * * *

* These changes supersede C 1, 8 January 1943.

ARMY REGULATIONS*

Base Numbers and General Titles

Base Number		General Title
1	-	Army Regulations
6	-	Assistant Secretary of War for Air
10	-	General Staff
15	-	Adjutant General's Department
20	-	Inspector General's Department
25	-	Judge Advocate General's Department
30	-	Quartermaster Corps
35	-	Finance Department
40	-	Medical Department
45	-	Ordnance Department
50	-	Chemical Warfare Service
55	-	Transportation Corps
60	-	Chaplains
75	-	Infantry
80	-	Cavalry
85	-	Field Artillery
90	-	Coast Artillery Corps
95	-	Army Air Forces
100	-	Corps of Engineers
105	-	Signal Corps
130	-	National Guard
140	-	Officers' Reserve Corps
145	-	Reserve Officers' Training Corps
150	-	Enlisted Reserve Corps
170	-	Service Commands and Departments
190	-	Military Police Board
210	-	Posts, Camps, and Stations
220	-	Organizations
235	-	Regiments
240	-	Battalions
245	-	Companies
250	-	Bands
260	-	Flags
265	-	Tactical and Training Inspections
300	-	Mapping and Charting
310	-	Military Publications

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* As listed in AR 1-10, 1 July 1943.

Army Regulations (cont.)

Base Number		General Title
330	-	Machine Records Codes
340	-	Correspondence
345	-	Army Personnel System
350	-	Military Education
380	-	Safeguarding Military Information
410	-	Litigation
420	-	Boards of Officers for Conducting Investigations
490	-	Petty Offenses Committed by Civilians on Federal Reservations
500	-	Employment of Troops
600	-	Personnel
605	-	Commissioned Officers
610	-	Warrant Officers
615	-	Enlisted Men
620	-	Civilian Employees
625	-	Officer Candidates
700	-	Supplies
750	-	Range Regulations for Firing Ammunition for Training and Target Practice
760	-	Targets and Target Equipment
775	-	Qualification in Arms and Ammunition Training Allowances; Technical Requirements for Marine Divers
850	-	Miscellaneous (Authorized Abbreviations, Lease of Personal Property Belonging to the United States under the Control of the Secretary of War, Regulations for State Guards, etc.)

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CHAPTER 3 - WAR DEPARTMENT CIRCULARS, BULLETINS AND GENERAL ORDERS

1. War Department Circulars.

Paragraph 8 of Army Regulations 310-50, 8 August 1942, provides:

> "Circulars will usually contain matter that is directive in nature, general in application, but temporary in duration. Circulars are used as a medium for the expeditious publication of matter that is important and matter that may later be incorporated in established forms of regulations."

The format of War Department Circulars, like that of most official publications, may be conveniently divided into four parts: heading, designation, body and authentication. The heading, which appears in the upper right hand corner, consists of the name of the issuing headquarters, the date and the place of issue. The circular is designated by number in the upper left hand corner of the first page. The body of the circular is set forth in sections numbered consecutively with Roman numerals; each section may in turn be divided into paragraphs numbered consecutively with arabic numerals. At the end of the circular appear the authority, signature and authentication, as follows:

"BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:
J. A. ULIO,
Major General,
The Adjutant General."

Circulars are numbered consecutively each calendar year; the first circular of each year is assigned the number 1. These numbers appear in the designation on the first page and in the upper outside corner of each page of the circular. At the top of the first page of Circular No. 1 of each year there is published a note indicating that the circular upon which it appears is the first of the year and stating the number of the last circular of the preceding year.

The matters dealt with in War Department Circulars are extremely varied and do not lend themselves to any ready classification. In the vast field of administrative detail they serve the valuable function of bringing quickly to the attention of the Military Establishment information and directives of importance.

The practice of publishing changes to Army Regulations in War Department Circulars pending revision of the regulations, was discontinued by Circular 166, War Department, 1942. Subsequently, the practice was reestablished by Circular 320, War Department, 1943, authorizing the use of War Department Circulars for publication of partial and complete suspensions, rescissions and minor changes to Army Regulations and other War Department publications.

2. War Department Bulletins

Paragraph 7 of AR 310-50, 8 August 1942, provides:

"Bulletins will usually contain matter that

is informative or advisory in nature and of permanent duration."

Bulletins issued by the War Department are used primarily to republish material of interest to the Military Establishment. They contain reprints of Congressional acts and resolutions, Executive Orders, proclamations and Military Orders of the President in convenient form for use by military personnel. The bulletins will be the first printed copies of statutes and presidential orders received by most judge advocates and frequently in the field they represent the only available source of this material.

There are occasionally printed in War Department Bulletins compilations and convenient lists or guides designed to synthesize the statutory material relating to a particular field or subject. An example may be found in the lists of statutes affecting the War Department which were suspended or put in operation by a state of war, published in sections I and II, Bulletin 38, War Department, 1941.

The format of the bulletins resembles closely that of the circulars: it includes a similar heading and designation; the body is divided into sections and paragraphs in the same manner; and the authority, signature and authentication are similarly set out. Bulletins are also numbered consecutively starting with number 1 at the beginning of each calendar year.

3. General Orders.

In the language of paragraph 2 of AR 310-50, 8 August 1942:

> "General orders will usually include matter of importance, directive in nature, general in application, and of permanent duration not readily susceptible of immediate incorporation in established forms of regulations."

War Department General Orders usually relate to one or more of the following types of matters:

(a) Grants of authority to appoint general courts-martial.

(b) Designation of military reservations and general hospitals.

(c) Awards and citations for distinguished service, gallantry, etc.

(d) Transfers of activities and functions among the various arms and services.

(e) Establishment of military districts.

(f) Designation of duties and missions of certain commands.

(g) Changes of name of certain activities, units, arms services, commands, etc.

The format of general orders, like that of circulars and bulletins, conforms to the usual pattern of official publications, consisting of heading, designation, body and authentication. General orders are published from time to time as required and are numbered consecutively starting with number 1 at the beginning of each calendar year.

Unlike special orders, general orders take effect upon promulgation, i.e., on the date of their actual release and distribution by deposit in the mails by the War Department. General orders should be carefully distinguished from general court-martial orders issued by the War Department or other headquarters with general court-martial jurisdiction.

4. Compilations and Indices

All War Department General Orders, Bulletins and Circulars still in force and of general application on 1 January 1943, have been published in a single volume bearing the title Compilation of War Department General Orders, Bulletins and Circulars, published as of that date. The greater portion of the volume is devoted to material published during the year 1942. The volume contains a full subject matter index but, because the compilation is arranged chronologically, no table of contents is included.

This volume brings up to date the earlier compilation of 1 October 1941, and Supplement I to the earlier volume which was published under the date of 1 June 1942. In certain cases, reference to these sources may be required for material which is no longer of current application or of general interest, and therefore omitted from the more recent compilation.

Under date of 1 January 1943, there was published an Index to General Orders, Bulletins and Numbered Circulars. This

consists of a subject index of all general orders, bulletins and numbered circulars for the years 1920 to 1941, both inclusive, which were regarded as of general application and still in force on 1 January 1943, together with a complete index of all such publications issued in the year 1942. An earlier volume, dated 1 January 1942, carries the index only to the end of 1941 but contains a chronological list of War Department publications through the year 1940.

Beginning on 1 May 1942, and monthly thereafter, there has been published a Digest of War Department Directives and Index to General Orders, Bulletins and Numbered Circulars. In addition to the digest of War Department directives of general application issued by The Adjutant General and the index to general orders, bulletins and circulars, each of these pamphlets contains in convenient form the following lists:

(a) Additions, revisions, supersessions, suspensions, rescissions and changes to Army Regulations published during the preceding month.

(b) Blank forms, AGO, issued during the preceding month.

(c) Additions and changes to and revisions of Tables of Basic Allowances and Allowances issued during the preceding month.

(d) Additions and changes to and rescissions and revisions of Tables of Organization and Equipment issued during the preceding month.

(e) Training publications and changes thereto published during the preceding month.

The pamphlet published on 1 May 1942, differs from the other monthly pamphlets in that it contains an index of general orders, bulletins and circulars from 1 January to 30 April 1942, and carries the lists of Army Regulations back to 2 January 1942, of AGO forms to 1 July 1941, of Tables of Basic Allowances and Tables of Allowances to 1 February 1942, of Tables of Organization to 1 October 1941, and of training publications to 1 February 1942.

In the middle of August 1942, general War Department directives issued by The Adjutant General (known in the Army as AG letters) were replaced by W-Memorandums. Beginning with the pamphlets of January 1943, published 1 February 1943, the title of the digest-index became Monthly Digest of War Department Directives and Index to General Orders, Bulletins, Numbered Circulars and W-Memorandums.

The function of the AG letter or W-Memorandum, as such directives are now designated, is the expeditious publication of matters of more or less general application to the military service. They cover a wide variety of subjects which are not, however, deemed to be of sufficient importance or scope to justify publication in War Department Circulars.

It will be noted that each W-Memorandum is assigned a number which consists of three parts: a base number according to

the system of base numbers used in the pamphlet series of Army Regulations, a serial number, and the year. Thus, for example, "Memo W 55-2-43, 16 Jan." represents the second W-Memorandum of the year 1943 dealing with the Transportation Corps.

CHAPTER 4 - DIGESTS OF OPINIONS OF THE JUDGE ADVOCATE GENERAL

There have been published at least 10 substantial editions of the Digest of Opinions of The Judge Advocate General, in addition to many annual and sub-annual editions. Under the authorship of Colonel William Winthrop editions were published in 1865, 1866 or 1867, 1868, 1880 and 1895. A revised edition of Colonel Winthrop's last edition was prepared by Major Charles McClure in 1901. The 1912 edition of the Digest of Opinions was prepared by Captain Charles R. Howland and in 1917 was reprinted. The 1912 edition covers the period from 3 September 1862 to 31 January 1912, which latter date may be said to mark the end of the early period in the modern history of the office of The Judge Advocate General of the Army, at least insofar as the editions of the Digest of Opinions may be said to write its history. The period 1 July 1912 to 31 December 1917 is covered by the Digest of Opinions 1912-1917. In 1917, 1918, and 1919 volumes of selected opinions in full were published. Later the 1912-30 edition was compiled and on 1 January 1941, the present volume, Digest of Opinions

of The Judge Advocate General of the Army, 1912-40, was published.

The later digests consist of synopses of selected opinions rendered by The Judge Advocate General, topically arranged under such chapter titles as Army Personnel, Claims, Contracts, National Guard, Pay and Allowances, Public Money and Finance, Supplies and Services, Uniform, and War. The several editions vary greatly in arrangement, digest or abridgement technique, and section numbering. Some are without indexes and other lack tables of contents. Complementary use of the 1912 and 1940 editions will afford the best normally available coverage between 1862 and 1940. Since, however, other editions containing digests of opinions not included in the 1912 and 1940 volumes were published during the periods covered by these volumes, reference to them, when easily available, is desirable. A Consolidated Index to Published Volumes of Opinions and Digests of Opinions of The Judge Advocate General of the Army, covering the period 1912 to 1924 and published in 1926 will be found to be useful.

The Digest may be said to be divided into three parts, Part I containing digested opinions based on the Constitution and Federal statutes, Part II consisting of opinions based on Army Regulations, and Part III comprising the following seven tables of reference and cross-citation: Constitution, Revised Statutes, Statutes at Large, United States Code, National Defense Act, Recur-

ring Provisions, and Manual for Courts-Martial, 1928. An index completes the volume.

With the exception of the 1912-40 volume no prior digest is keyed to other publications of The Judge Advocate General. In that edition the chapter titles and section numbers in Part I are keyed directly to the titles and numbers in Military Laws of the United States, 1939. Thus, for example, the legislation giving the right of trial to certain discharged officers is found in section 227, Military Laws, 1939, and digests of opinions interpreting that legislation are found in section 227, Digest of Opinions of The Judge Advocate General, 1912-40.

By reason of the fact that many of the opinions digested were written under laws and regulations which have since been amended, repealed, or superseded, care should be exercised in the application of the digested opinions to the facts and laws pertinent to present questions raised.

Supplement I to the Digest of Opinions of The Judge Advocate General of the Army, 1912-40.

This paper bound supplement contains digests of opinions rendered during the calendar year 1941 and also contains certain opinions rendered before that time but omitted from the basic volume. Thus, as with Military Laws of the United States, 1939, and its supplement, the supplement should be used to find opinions

properly includable in the 1912-40 volume. A further and effective use is that of citator, thereby to learn whether opinions digested in the basic volume have been modified or overruled.

A companion volume to the Digest, it may also be divided into three parts. The opinions in Part I relate to the Constitution and Federal statutes, in Part II to Army Regulations, and Part III is comprised of the same seven tables of reference. An index is included.

The publication of annual supplements has been suspended for the duration of the war and its place has been taken by the Bulletin of The Judge Advocate General of the Army.

Bulletin of The Judge Advocate General of the Army.

The Bulletin is a monthly publication prepared in the Office of The Judge Advocate General. It contains:

(a) Selected opinions and digests of opinions of The Judge Advocate General, the Attorney General, the Comptroller General, and the courts.

(b) Notes on Military Justice.

(c) Other legal materials of use to judge advocates in the field.

The arrangement of the Bulletin follows that of the Digest of Opinions, 1912-40, several new features and improvements making it a valuable research tool. Parts I and II relate to the Constitution and Federal statutes, and Army Regulations respectively. What may be considered as Part III consists of reference tables.

Volume I consists of eight numbers, the first covering the period January - June, 1942, with an index; the next six numbers cover the succeeding months of that year, and the eighth is a cumulative index with tables, to Volume I, 1942, and to Supplement I to the Digest of Opinions of The Judge Advocate General, 1912-40. A table of Executive Orders and a table of Location of Bulletin Sections, by which is shown the Bulletin number or numbers in which material under various section numbers of Digest of Opinions, 1912-40 (and also therefore, Military Laws, 1939) may be found, have been added to the usual seven tables found in the Digest of Opinions and its Supplement I. Volume II, Number 1, covers the month of January, 1943, and Number 2, February, 1943, etc. Each number of the Bulletin is published in slotted form suitable for inclosure in binders used for Army Regulations, has a table of contents, and the pagination is successive within the calendar year. Volume I contains 472 pages.

Judge advocates and other interested members of the service are invited to advise The Judge Advocate General of judicial decisions, administrative rulings or other materials coming to their attention which they may think appropriate for inclusion in the Bulletin. Materials submitted may refer to matters arising in the continental United States, its territories and possessions, and foreign countries.

ADDENDA

Page III - 14, last paragraph:

Revised Statutes 12 (1 U.S.C. 28) changes the common law rule with respect to construction of federal statutes, by providing: "Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided."

ADDENDA

PART IV

FORMAL OPINIONS IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

CHAPTER 1 - PROCESSING OF REQUESTS FOR OPINIONS

Requests for legal opinions, for drafts of legislation, for information upon which to base a reply to a basic communication, for comment or concurrence in connection with a staff study, and for review of various board proceedings and other matters, are transmitted to the Office of The Judge Advocate General by a variety of means. Pursuant to the reorganization of the War Department and of the Army (Cir. 59, WD, 1 March 1942) the Secretary of War issued a directive (Memorandum, 13 March 1942, File G-1/16470, reprinted infra, p. IV - 18) authorizing The Judge Advocate General to render opinions to staff divisions and other War Department agencies on simple questions of law by telephone but requiring written requests for all complex matters. As to direct inquiries from judge advocates in the field, see the annexed letter of Colonel Schindler, Assistant Chief of Military Affairs Division (p. IV - 5).

When a written request is received it is analyzed in the General Records Section of the Executive Division and routed to the proper division for action. These requests, when received in the Military Affairs Division, are assigned by the Chief of Division or his Executive to an officer in the appropriate branch for the preparation of a formal written opinion.

The officer to whom the request is assigned is charged with the expeditious preparation of an opinion, which is typed in

rough draft and goes to the Branch Chief for his examination, concurrence or modification. After approval by the Branch Chief, it is delivered to the Chief or Assistant Chief of Division for his action. If the opinion is one which presents no complex question of law, after approval by the Chief or Assistant Chief of Division it is typed in final form and dispatched over the signature of the Chief or Assistant Chief of Division without the prior approval of the Assistant The Judge Advocate General. All opinions involving complex legal questions are sent to the Assistant The Judge Advocate General supervising the Military Affairs Division for his approval. After its return to the Division with all corrections, additions or modifications, it is then typed in final form for the signature of the appropriate officer, usually the Chief or Assistant Chief of Division.

May 22, 1943

Lieutenant Colonel Reginald C. Miller, J.A.G.D.,
Chief, Military Affairs Department,
The Judge Advocate General's School,
Ann Arbor, Michigan.

Dear Colonel Miller:

Reference is made to the request contained in your letter dated May 8, 1943, for a statement of the views of this division with respect to the types of military affairs matters which might properly form the basis of direct inquiries to this office from judge advocates in the field.

Paragraph 5, Army Regulations 340-15, August 21, 1942, specifies the persons who may request direct and receive official opinions of The Judge Advocate General. This paragraph is not regarded as a prohibition against requests from judge advocates in the field of the nature indicated below. However, the facilities of The Judge Advocate General's Office are limited and the number of such requests should be kept to a necessary minimum. It is perhaps superfluous to point out that the judge advocate, before submitting or advising his commanding general to submit any question for opinion by this office, should first carefully examine the digests and bulletins of this office, as well as pertinent Army regulations, to assure himself that these do not provide the desired informat on. Another test as to the propriety of direct application to this office is the question whether the immediate or any intermediate commander in the prescribed channel of communication will be interested in the matter.

Generally speaking, requests from the field for opinions of the Ofice of The Judge Advocate General which would normally be drafted in the Military Affairs Division should, for various reasons, be processed through channels. The subject matter will usually be of general interest to the service and intervening commanders may be able to supply the answer by reason of already having obtained an opinion on a similar question. They will also thus be given an opportunity to express their views and to supply additional facts for the benefit of this office. Furthermore, the use of regular channels tends towards closer coordination throughout the chain of command. Certain matters, particularly in the field of domestic relations, may more often than not be settled on the basis of the facts rather than the law and should be handled locally wherever

possible, reserving for reference to this office only those cases presenting complex legal problems.

The practice of seeking an opinion of this office for the sole purpose of fortifying one side of a local dispute is not looked upon with favor.

Where an error in a regulation or other official document is discovered it is well to wait a reasonable time before making it the subject of correspondence. Many such errors are corrected at or near the source within a comparatively short time.

On the other hand, there are a number of ways in which this division is glad to assist judge advocates in the field informally. For example, if it is desired to know the basis for a streamlined opinion the division will attempt to furnish additional information or a copy of the supporting memorandum, or both, upon request. Information as to whether a certain case in the digest or elsewhere has been overruled or modified, what division or officer is handling a particular matter, whether any action is being taken along certain lines, and other similar matters will likewise be furnished wherever possible. The policy of the division is to be as helpful as possible but to request that judge advocates in the field observe generally the foregoing principles in making requests for assistance.

Colonel West has read this letter and concurs therein.

Sincerely yours,

Irvin Schindler,
Colonel, J.A.G.D.,
Assistant Chief of Military Affairs Division.

CHAPTER 2 - CLASSES OF OPINIONS

There are, generally, three classes of written opinions prepared by the Division:

(1) Opinions which present no complex question of law. These may be dispatched over the signature of the Chief or Assistant Chief of Division without the prior approval of the Assistant The Judge Advocate General;

(2) Opinions involving complex questions of law which require the interpretation of Federal statutes, Executive Orders, Army Regulations, etc. These opinions are dispatched over the signature of the Chief or Assistant Chief of Division after approval by the Assistant The Judge Advocate General;

(3) Opinions containing a recommendation which is at variance with that of another general officer; involving a new question of law not theretofore passed upon by The Judge Advocate General's Office; involving a matter of such importance that it should be signed by The Judge Advocate General; or involving matters which in the opinion of the Assistant The Judge Advocate General require the personal attention of The Judge Advocate General. These opinions are ordinarily signed by The Judge Advocate General, or, at his direction, by the Assistant The Judge Advocate General.

CHAPTER 3 - RESEARCH

The Office Memorandum, a reprint of which follows, contains many helpful suggestions as to research methods to be followed by officers assigned to duty at the Office of The Judge Advocate General. Judge advocates assigned to lower echelons will naturally have more limited libraries and source materials at their disposal. Within these limitations, however, this memorandum will serve as a useful guide.

There is also reprinted in this chapter a portion of AR 310-10, 27 February 1943, setting out the approved forms of citation of the more commonly used source references.

SPJGE-Control June 4, 1942

OFFICE MEMORANDUM NO. 36.

Subject: Research Methods, Office of The Judge Advocate General.

1. Thorough, painstaking, scrupulously accurate research is a primary requisite for the production of sound opinions of The Judge Advocate General. The responsibility for complete, scholarly research rests, as it must, upon the judge advocate who writes an opinion. Superior officers can check authorities which are cited; they cannot be certain that all pertinent authorities have been searched and all relevant legislation and precedents discovered. The following suggestions as to research methods have been prepared to assist judge advocates to use the research facilities of the office with maximum efficiency.

2. In the typical case the first step in research is an exhaustive search for precedents among past opinions of The Judge Advocates General. Such precedents provide citations to other pertinent authorities. It is most important that every relevant precedent be discovered, lest a prior opinion of The Judge Advocate General be over-ruled through ignorance of its existence.

The General Records Section of this office has complete files of the opinions of The Judge Advocates General, other than those relating to particular court-martial records, rendered since September 3, 1862. The general opinions rendered from 1862 to 1882 are indexed in four bound volumes in the General Records Section and those rendered from 1882 to 1894 are indexed in four additional volumes. The General Records Section has separate card indices to the opinions rendered from 1894 to 1911 and from 1911 to September, 1917. There is no card index covering the period from September, 1917 to 1921. The general opinions rendered since September, 1917, have been filed and cross referenced according to subject classifications in the General Records Section and since 1921 they have also been indexed as to legal principles involved in the Digest Section. The classifications used in the General Records Section vary widely from those used in the Digest Section. Usually both systems should be utilized in the search for precedents.

Opinions relating to particular court-martial records rendered prior to 1918 are filed and indexed in the General Records Section with general opinions of The Judge Advocates General. Opinions of

The Judge Advocates General and the Boards of Review relating to particular court-martial records rendered since 1918 are filed with the records to which they relate and may be secured in the Courts-Martial Records Section. Such opinions are cited by serial number preceded by the letters "CM". Additional copies of those rendered since 1929 are on file with the Boards of Review. Those rendered since 1921 are indexed in the Digest Section. The Boards of Review maintain a card index of Board of Review opinions rendered since 1929. A duplicate of this index is kept in the Military Justice Division.

Most of the important opinions rendered prior to 1912 are digested in the Digest of Opinions of the Judge Advocates General, 1912, copies of which are available in all divisions of the office. An index to this digest was published in 1920. The Digest of Opinions of The Judge Advocate General, 1912-1917, which contains an index, is useful in finding some of the opinions rendered during the period covered. Digests of opinions covering various periods were issued at varying intervals from 1912 to 1924 and most of the opinions rendered during 1917, 1918 and 1919 were published at length in annual bound volumes with indices. The 1912 Digest and all of the digests and opinions published from 1912 to 1924 are indexed in the Consolidated Index of Published Volumes of Opinions and Digests of Opinions of The Judge Advocate General of the Army, 1912-1924. Except in cases involving the interpretation of old statutes it is usually sufficient to consult the Consoldiated Index, 1912-1924, to find opinions rendered prior to 1921. The Digest of Opinions of The Judge Advocate General, 1912-1930, and the Digest of Opinions of The Judge Advocate General, 1912-1940, are useful.

The normal search for precedents in opinions of The Judge Advocates General should include study of the Consolidated Index, 1912-1924, and the 1912-1940 Digest, use of the index maintained by the Digest Section and examination of all opinions filed under appropriate subject classifications in the General Records Room.

3. The second step in research on a problem of Federal Law is usually a search of the United States Statutes. The Military Laws of the United States, 1929, contains most of the statutes affecting the War Department which were in effect in 1929, with annotations covering the period, 1789-1929. The Military Laws of the United States, 1939, contains statutes affecting the War Department with annotation covering the period 1929-1939. The United States Code Annotated is the best annotated source of Federal statutes of a general nature currently in force but it should be borne in mind that the United States Code is only prima facie evidence of

the existence and wording of statutes. In opinions of this office statutes are normally quoted from the United States Statutes at Large rather than from the United States Code. Repealed and amended statutes are indexed in Scott and Beaman, Index Analysis of the Federal Statutes, 1789-1873, and McClenon and Gilbert, Index to the Federal Statutes, 1874-1931. All of the foregoing publications are shelved in the library.

The Digest Section maintains a citator index of opinions of The Judge Advocate General which construe existing legislation and the Legislative Section maintains a similar index of opinions which construe proposed and pending legislation.

No search for Federal statutes is complete without examination of the Congressional Index Service, which is in the library, and a check with the Legislative Section for recent, pending and proposed legislation. Much recent general legislation is contained in current appropriation acts. Since there is no adequate index to these acts, they must be examined carefully to avoid overlooking pertinent recent legislation. Hearings, committee reports and Congressional debates, material relating to which is kept in the Legislative Section, are often important aids in the interpretation of legislation.

4. The third step in research on a problem of Federal law is usually a search for decisions of the Federal courts and opinions of the Attorney General and the accounting officers of the Government. The decisions of the Federal courts, including the United States Supreme Court, the United States Circuit Court of Appeals, the United States District Courts and the Court of Claims, are indexed and digested in the Federal Digest, which was published in 1940 and is kept up to date with pocket parts. Citations to judicial decisions and opinions of the legal and accounting officers of the Government which relate to statutes as may be secured from the annotations in the United States Code Annotated and the Military Laws of the United States, 1929 and 1939. Opinions of the Attorney General rendered prior to 1921 are digested and indexed in three bound volumes shelved in the library. Opinions of the Attorney General relating to the War Department rendered since 1921 are indexed in the Digest Section. The published opinions of the Comptroller of the Treasury and the Comptroller General of the United States rendered between 1894 and 1940 are indexed and digested in two bound volumes shelved in the library. The Digest Section maintains an index of both manuscript and published opinions of the Comptroller General relating to the War Department rendered since 1921 and keeps files of the manuscript opinions.

5. Most problems relating to military administration require search of some part of the complicated system of War Department publications, which includes Army Regulations, Changes in Army Regulations, War Department General Orders, Bulletins and Circulars, Procurement Regulations and Circulars, Field Service Regulations, Field Manuals, Training Circulars, Mobilization Regulations, Mobilization Training Programs, Technical Manuals, Technical Regulations, Firing Tables, Instruction Charts, National Guard Regulations, Tables of Organization, Tables of Basic Allowances and Manual for Courts-Martial, 1928. Copies of all of these are shelved in the library. The existing indices to current Army Regulations and War Department General Orders, Bulletins and Circulars are not wholly satisfactory. These publications must be searched by use of Army Regulations 1-5, January 1, 1935, and Changes No. 1 thereto, which constitute an obsolete index to Army Regulations; Army Regulations 1-6, January 1, 1941, Alphabetical Arrangement of Titles of Army Regulations; Army Regulations 1-10, January 2, 1942, List of Current Pamphlets and Changes; the Compilation of War Department General Orders, Bulletins and Circulars, October 1, 1941; the Index to General Orders, Bulletins and Numbered Circulars, January 1, 1942, and the Digest of War Department Directives and Index to General Orders, Bulletins and Numbered Circulars, published monthly by The Adjutant General. The library has a compilation of Army Regulations relating to procurement, Procurement Regulations and Procurement Circulars which is kept up to date by the insertion of new sheets. Field Manuals and Training Circulars are listed and indexed in Field Manual 1-6, which is revised periodically, procurable in the library. The Digest Section maintains a citator index of opinions of The Judge Advocate General which construe Army Regulations and the Manual for Courts-Martial, 1928.

It must be borne in mind that Army Regulations and all other War Department instructions are frequently modified or amplified by War Department circular letters, issued by The Adjutant General. These are filed and indexed in the General Records Section. Those of an important nature issued since January 1, 1942, are also indexed in the Digest of War Department Directives and Index to General Orders, Bulletins and Circulars, published monthly by The Adjutant General.

Occasionally a problem involving a search of old Army Regulations arises. The library maintains an historical set of Army Regulations issued since the inauguration in 1921 of the present pamphlet system of publication. The library has copies of the Army Regulations, 1913, with changes, and of all previous bound volume editions of Army Regulations. For the World War period it

is necessary to consult also the Compilation of General Orders, Circulars and Bulletins of the War Department, 1881-1915, and all changes thereto and the series of Special Regulations. The library has copies of superseded Technical Regulations, Training Regulations, and Tables of Organization. It has complete files of all War Department General Orders, which in the past were media for the publication of many instructions of types which would now be published in Army Regulations or War Department Circulars.

6. Presidential proclamations and executive orders currently in force and regulations of other departments of the Federal Government are published and indexed in the Code of Federal Regulations and the Federal Register, which are shelved in the library. Most of the presidential proclamations and executive orders issued during the World War are filed and indexed in the library. Those issued since 1921 are filed and indexed in the Legislative Section.

7. In the preceding paragraphs of this memorandum the emphasis has been on legal materials with which the lawyer whose practice has been confined largely to the state courts is likely to be unfamiliar. It does not follow that the research tools familiar to the scholarly lawyer in private practice should be neglected in the work of this office. State statutes may be found by use of the State Law Index, codes, private compilations and session laws, available in the library. State judicial decisions are indexed and digested in the American Digest System, comprising the American Digest, which covers decisions rendered from 1658 to 1896, the four Decennial Digests, which cover the period 1897 through 1936, and the annual volumes of the General Digest from 1936 to date. Legal encyclopedias, such as Corpus Juris, Ruling Case Law and American Jurisprudence, frequently save time in legal research. Series of annotated reports are often valuable. The library has American Decisions (1764-1870) and American Reports (1871-1887), which are indexed together, Lawyers' Reports Annotated (1888-1918) and American Law Reports (A.L.R.) (1918-date). A.L.R. notes are usually complete briefs of their subjects.

Treatises are very important in such fields as international law, admiralty, the laws of war, and military law. In some other fields there are monumental treatises amounting to encyclopedias of their subjects, such as Wigmore on Evidence, Williston on Contracts and Fletcher on Corporations. The American Law Institute Restatement of the Law is a concise, carefully-phrased statement of the law of the fields it covers, which represents the concensus of expert opinion in those fields. Legal periodicals are often helpful on timely subjects. The library contains several of the

best university law reviews, the Index to Legal Periodicals and the Legal Periodical Digest. Citations to articles in periodicals to which the library does not subscribe may be secured from the Index and Digest and the periodicals obtained from the Library of Congress by inter-library loan. Loose-leaf services are of value in fields where there are numerous and changing administrative regulations. The Prentice-Hall State and Local Tax Service is in the Litigation Division. The War Law Service and other similar publications are in the library.

8. Each judge advocate upon reporting for duty in this office will be furnished with a copy of this memorandum by the Administrative Section, Military Personnel Division.

By order of The Judge Advocate General:

/s/ J. L. Harbaugh, Jr.

J. L. HARBAUGH, JR.,
Colonel, J.A.G.D.,
Executive.

Distribution B and D
Administrative Section, Personnel Div. 50.

FORM OF CITATIONS

(Extract, AR 310-10, 27 February 1943)

6. Form of citations.--The following forms of citations involving the use of the source references will be used where applicable in publications:

The Constitution of the United States: Const., art. I, sec. 10, cl. 3.
United States Revised Statutes: R.S. 3224.
Act of Congress:
Not in bound volumes: act 14 December 1942 (Public Law 800, 77th Cong.).
In bound volumes: act 6 August 1937 (50 Stat. 563).
United States Code: 44 U.S.C. 306.
Supplement to United States Code: 7 U.S.C., Sup., 502.
United States Code and Supplement: 7 U.S.C. 502 and Sup.
(The United States Code, being principally a compilation of Federal statutes, both the statute and the code should be cited in referring to a specific act: act 6 August 1937 (50 Stat. 563; 34 U.S.C. 821).)
Executive order: E.O. 1173, 3 March 1910.
Federal court cases:
United States Supreme Court—
Prior to 1875, identified by the name of the reporter as Wheaton, etc.: Leventhal v. Pack, 8 Wheat. 241.
Subsequently, cited as United States Reports: New Hampshire v. Louisiana, 108 U.S. 76.
United States District and Circuit courts:
Prior to 1880, identified as Federal Cases citing either individual number of case or volume and page: United States v. Porter, F. Cas. No. 16074; United States v. Porter, 27 F. Cas. 598.
Subsequently, cited as Federal Reporter: Brown v. Jones, 274 F. 493; Federal Reporter, second series--Harris v. McCarthy, 18 F. 2d 274; Federal Supplement--Cronin v. Mack, 14 F. Supp. 290.
(The three last-named systems include cases decided in the United States District Courts, the United States Circuit Court of Appeals, and the Court of Appeals of the District of Columbia. The court deciding the case may be indicated in parentheses after the name of the case, for example, Brown v. Jones (D.C. Mass.), 274 F. 493; Harris v. McCarthy (C.C.A.), 18 F. 2d 274; Cronin v. Mack (App. D.C.), 14 F. Supp. 290).

Court of Claims: Smith v. Jones, 18 Ct. Cl. 476.
State court cases: Atlantic Reporter and Atlantic Reporter, second series, for example:
Nevin v. Disharoon, 66 A. 362, and State v. Shannon, 3 A. 2d 899, respectively. Similarly: Northeastern Reporter, N.E.; Northeastern Reporter, second series, N.E. 2d; Northwestern Reporter, N.W.; Pacific Reporter P.; Pacific Reporter, second series, P. 2d; Southeastern Reporter, S.E.; Southeastern Reporter, second series, S.E. 2d; Southern Reporter, So.; Southwestern Reporter, S.W.; Southwestern Reporter, second series, S.W. 2d; New York Supplement, N.Y.S.; New York Supplement, second series, N.Y.S. 2d.
Opinions of the Attorney General: 9 Op. Atty. Gen. 371.
Decisions of the Comptroller of the Treasury: 10 Comp. Dec. 368.
Decisions of the Comptroller General of the United States:
Published decisions: 7 Comp. Gen. 341.
Unpublished decisions: MS. Comp. Gen., A 8841, 28 August 1937.
Articles of War: AW 65.
Manual for Courts-Martial: MCM, 1928, par. 90a.
Army Regulations: par. 4, AR 190-10, 7 Oct. 1942.
War Department Bulletins: Bull. 58, WD, 28 Nov. 1942.
War Department Circulars: Cir. 397, WD, 7 Dec. 1942.
Opinions of The Judge Advocate General of the Army: JAG 342.00, 27 December 1938; SPJG 1942/6088, 23 December 1942.
Digest of Opinions, JAG 1912: Dig. Op. JAG, 1912, p. 910; Dig. Op. JAG, 1912-30, sec. 207; Dig. Op. JAG, 1912-30, Sup., sec. 1582; Dig. Op. JAG, 1912-40, sec. 416; Dig. Op. JAG, 1912-40, Sup. I, sec. 1598.
Bulletin of The Judge Advocate General of the Army: Bull. JAG, October 1942, p. 264.
Military Laws of the United States: M.L. 1939, sec. 29.
Supplement to Military Laws of United States: M.L. 1939, Sup. I, sec. 1013.
Congressional Reports:
House of Representatives: H. Rep. 2119, 60th Cong.; H. Doc. 899, 60th Cong.
Senate: S. Rept. 3922, 60th Cong.; S. Doc. 537, 60th Cong.
Congressional Record:
Not in bound volumes: Daily Cong. Rec. (Date)(Page).
In bound volumes: 41 Cong. Rec. 1251.
Hearings, Congressional: Hearings before the House Committee on Military Affairs on H.R. 6069 and H.R. 6632, 76th Cong., 1st Sess.
Federal Register: 1 F.R. 692.
Code of Federal Regulations: 7 CFR 108.16.

The following additional accepted forms should be noted:

Changes to Army Regulations: par. 4, C 1, 3 Apr. 1943, AR 850-80, 26 Aug. 1942.
Digest of Opinions (AR sections): Dig. Op. JAG, 1912-40, AR 35-1360, par. 1.
Digest of Opinions (Constitution sections): Dig. Op. JAG, 1912-40, Const., art. VI, sec. 2, cl. 9.
Military Laws of the United States (Constitution Sections): M.L. 1939, Const., art. VI, sec. 2, cl. 9.

CHAPTER 4 - FORM OF OPINIONS

A quotation from the memorandum of the Secretary of War (file G-1/16470, 13 March 1942) which radically altered the opinion procedure in the Office of The Judge Advocate General is contained in the Office Memorandum which follows. It outlines the formal requirements to be met in carrying out the provisions of that directive.

March 27, 1942.

OFFICE MEMORANDUM:

Subject: Opinions of The Judge Advocate General.

1. In the memorandum dated March 13, 1942, file G-1/16470, the Secretary of War has directed:

"1. That on simple questions of law, Staff divisions and other War Department agencies are authorized to make request for legal opinions by telephone to the office of The Judge Advocate General. Request for, and subsequent opinion rendered, may be confirmed in writing.

"2. That when the matter is complex, request for opinion will be made in writing. In such cases The Judge Advocate General will render his opinion in one short paragraph, substantially as contained in the concluding paragraph of present form of opinion. All argument and legal discussion will be retained as a memorandum for record in the office of The Judge Advocate General available to the interested agency on call and will be written after the opinion is rendered.

"3. That when staff studies are sent to The Judge Advocate General for concurrence, such studies in which The Judge Advocate General concurs will be initialed in the space provided in Section III of the study. No further comment is necessary. In cases of nonconcurrence, the study will be returned with a brief memorandum which outlines only the conflicting legal points. Memorandum for record as to laws, previous opinions, etc., will be retained in the files of The Judge Advocate General, available to the interested agency on call.

"4. That any written opinion of The Judge Advocate General furnished Staff Divisions or other War Department Agencies will be considered as approved by the Secretary of War unless The Judge Advocate General is notified to the contrary.

"5. That The Judge Advocate General and all concerned be informed of this directive."

2. In carrying out the provisions of the foregoing directive the following tentative instructions will be followed until further notice:

a. Written opinions. - Rough drafts substantially the same as required in the past but in the form of an office memorandum addressed to The Judge Advocate General and signed by the Chief of Division will be made of all cases in which a written opinion is required. In such cases the last paragraph of the office memorandum will recommend the disposition to be made of the papers (transmitted to, returned to,-etc.) by what method (memo., indorsement,-etc.), by whom the opinion is to be signed (Chief of Div., The Judge Advocate General,-etc.), and the exact text of the body of the proposed streamlined opinion.

If the case is one in which, under the instructions in force, the opinion may be finalled and dispatched by authority of the Chief of Division without reference to higher authority, the streamlined opinion will be finalled as soon as the rough draft office memorandum is approved by the Chief of Division, and will then be signed and sent with the file to the General Records Section.

If the case is one in which, under the instructions in force, the Division Chief has authority to submit the opinion in final but not to direct its dispatch without reference to higher authority, the streamlined opinion will be finalled immediately on approval of the rough draft office memorandum by the Division Chief; as soon as the opinion is signed or the green initialed by the Division Chief, the entire file, including all copies of the finalled opinion together with the rough draft office memorandum will be sent to the Assistant The Judge Advocate General or the Assistant to The Judge Advocate General [an office which no longer exists], according to which has immediate supervision of the Division concerned; approval by the Assistant of both the streamlined opinion and the office memorandum will be evidenced by his initials on the green (record) copy of the opinion; upon such approval the file will be sent (thru The Judge Advocate General if his signature or approval is necessary) to the General Records Clerk.

In all other cases the rough draft office memorandum will be initialed by the Division Chief, and sent with the file to the proper Assistant, and upon return thereof to the Division bearing the requisite approval of higher authority, further procedure shall be as prescribed in the last previous subparagraph for cases in which the Division Chief is authorized to submit the opinion in

final and has approved the rough draft office memorandum.

Upon arrival in the General Records Section the opinion will be dated, the original and necessary copies dispatched to the agency requesting the opinion and the green and extra white copies placed in temporary files pending the receipt of the final of the rough draft. The rough draft will be immediately returned to the Division in which prepared where it will be typed in final (original, green and 5 white copies) as a memorandum for The Judge Advocate General and signed by the Division Chief. Thereafter all copies of the office memorandum will be sent directly to the General Records Section where all copies will be given the identical date placed on the opinion already dispatched. The greens of the opinion and office memorandum will be stapled together and placed in the files in the General Records Section for use as office precedents. The original of the office memorandum, extra white copies and the extra white copies of the opinion will be placed on file for distribution in the event a call for them is made to any interested agency of the War Department.

b. Staff Studies.

(1) In case of concurrence a rough draft need not be made, if no complex legal question is presented and if a copy of the study containing the facts in the case is made or can be withdrawn from the papers in reference for the files of this office. After the concurrence has been initialed by The Judge Advocate General or other appropriate officer the staff study will be sent to the General Records Section for dispatch. In such cases care will be exercised in General Records Section to insure the withdrawal for the files of this office of a copy of the study containing a statement of the facts involved.

(2) In case of nonconcurrence or in cases involving complex legal questions, the procedure prescribed in paragraph 2a above will be followed.

c. Cases other than staff studies referred to this office for comment or concurrence.

(1) In case of concurrence no office memorandum need be made if no complex question of law is involved and a complete statement of facts is included in the papers submitted, a copy of which may be withdrawn or made for the files of this office. The concurring opinion will be stated briefly in final form and sent to the Assistant having direct supervision over the Division

in which the case is handled. Thereafter the opinion will be sent directly to the General Records Section for dating and dispatch. In such cases care will be exercised in the General Records Section to see that a copy of the fact is filed with the opinion of this office.

(2) In case of nonconcurrence or in cases involving complex legal questions, the procedure prescribed in paragraph 2a above will be followed.

d. Oral opinion. - If the question propounded and the opinion rendered are regarded by the Chief of the Division involved as of sufficient importance he will cause to be prepared an office memorandum addressed to The Judge Advocate General (original, green and 2 white copies) which will be signed by the officer of the Division who rendered the opinion and countersigned by the Chief of the Division indicating his concurrence, or in the event he does not concur, the steps he has taken or proposes to take to correct it. In such cases the office memorandum will contain a statement of the question, when, by whom and how presented, a brief reference to the laws involved and the answer given, and when, by whom and how the answer was transmitted. Processing of such memoranda (submission of rough drafts, finalling, filing, etc.) will be the same as in like cases of written opinions. (See paragraph 2a above.) No officer less than a Division Chief will render an oral opinion which is understood to be official by the party requesting same without first consulting his Division Chief. Division Chiefs likewise will refrain from binding this office on matters which in their opinion should receive the attention of higher authority.

3. As a general rule, Assistants to The Judge Advocate General will transmit to The Judge Advocate General through the Executive the rough drafts of all cases,

a. In which a recommendation is made at variance with that of another general officer,

b. Which involves a new question of law not heretofore passed upon by this office,

c. Which because of its importance should be signed by The Judge Advocate General,

d. Which in the opinion of the Assistant to The Judge Advocate General are of such importance as to require the personal attention of The Judge Advocate General.

4. The rules now in effect regarding the distribution within this office of copies of opinions will apply to the distribution

of copies of office memoranda.

5. Division Chiefs will be held responsible for the correctness of all citations and quotations in opinions written in their respective divisions. The heretofore existing practice of checking these matters in the Executive Division is abolished.

6. All personnel in this office (military and civilian) are invited and urged to submit (preferably in writing) to the Executive any ideas that they may have which will tend to simplify or expedite the handling of business.

For The Judge Advocate General:

/s/ J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr.,
Lieutenant Colonel, J.A.G.D.,
Executive.

Prior to the mentioned memorandum of the Secretary of War (OSW 13 March 1942, G-1/16470), quoted in the foregoing Office Memorandum, it was the practice of the office to transmit a complete legal opinion to the interested War Department agency. The traditional form of opinion consisted generally of five paragraphs arranged with respect to content as follows:

(1) Origin and substance of the request;

(2) Concise and complete statement of facts;

(3) Applicable provisions of law (statutes, Executive Orders, Army Regulations, War Department directives, etc.);

(4) Rationale (application of law to facts with reference to applicable prior JAG opinions);

(5) Conclusion (based upon (3) and (4)).

These opinions, containing as they did all the necessary supporting information and authority, were often lengthy. The agencies which received them were rarely interested in anything but the conclusion. The first four paragraphs served chiefly as guides in the preparation of subsequent opinions in similar or allied cases by officers in the Office of The Judge Advocate General.

Under the new procedure, therefore, the "opinion" (i.e., that which is transmitted to the interested agency) is merely the conclusion which would have been contained formerly in the concluding paragraph of the formal opinion. There is now prepared a

"Memorandum for The Judge Advocate General", signed by the Chief or Assistant Chief of Division which contains the same five paragraph structure and roughly corresponds in form to the older formal opinion. The concluding paragraph of the memorandum is so drawn that it contains verbatim the so-called "streamlined" opinion which will, if approved, be dispatched by the Office of The Judge Advocate General to the interested agency.

The officer charged with the preparation of a reply to a request for opinion prepares only the Memorandum for The Judge Advocate General, and after this memorandum receives the approval of the Chief or Assistant Chief of Division or of higher authority, the stenographer merely copies the "streamlined" opinion for the signature of the appropriate officer. The Memorandum for The Judge Advocate General is then prepared in final form and filed in the General Records Section. The officer who prepares the memorandum is relieved of the purely mechanical task of copying the "streamlined" opinion in proper form to be dispatched. He is charged, however, with the responsibility of checking in final form both the "streamlined" opinion and the memorandum to insure their agreement with the approved rough draft.

All memoranda for The Judge Advocate General do not necessarily contain five numbered paragraphs. It will sometimes be found desirable in the interest of conciseness and clarity to combine in the first paragraph the matter that would usually be

covered in paragraphs 1 and 2; and the material of the third and fourth paragraph may be consolidated in one paragraph for the same reasons. In other cases, because of the number of legal questions involved or the character and scope of the applicable reference materials, it may be desirable to employ more than five paragraphs. In such cases the number of paragraphs appropriate for development of the opinion will be considered satisfactory, but the conventional content and order of material is always uniform, viz., origin and nature of request, facts, applicable law and regulations, rationale, conclusion.

March 10, 1943

MEMORANDUM for Chiefs of Branches, Military Affairs Division.

Subject: Errors of Form Noted in Rough Drafts of Opinions.

Supplementing prior memorandum on the above subject dated October 19, 1942, the following errors of form have been noted recently:

1. The words "suggested" and "proposed" may be omitted before "draft of reply" as their meaning is inherent in the word "draft".

2. The words "as to" should be omitted before "whether" in such expressions as "inquiry is made in the basic letter as to whether".

3. The following expressions, although entirely acceptable in many other places, are not regarded with favor in opinions of this office and their use should be avoided whenever practicable:

a. The "instant case". Use "case under consideration" or similar expression.

b. The "said" officer. Use "mentioned" officer.

c. The "subject statute". Use "cited", "quoted", or "mentioned" statute.

d. The word "attached" is not to be used in the sense of "inclosed". Use "attached" only when papers are more or less permanently affixed, such as bound exhibits to a record of proceedings.

4. For sake of uniformity the spelling "inclosed" is preferred to "enclosed". Although the Navy and many other respectable sources use the "e" form, Army regulations governing inclosures suggest the advisability of the "i" form in military correspondence.

5. When reference is made to certain chiefs of branches note that the definite article is capitalized, i.e., The Adjutant General, The Judge Advocate General. However, this is not true in cases like the Adjutant General's Department and the Judge Advocate General's Department Reserve. The word "Office" is capitalized whether used as The Adjutant General's Office or the Office of The

Judge Advocate General, the latter form being preferred.

6. Sentences which are too long and involved must be split up. One was noted several days ago which covered two-thirds of a legal cap sheet.

7. An erroneous use of the word "however" is illustrated by the following sentence: It is stated in the basic inquiry that these articles are a distinctive part of the uniform, however, paragraph 20b, Army Regulations * * * does not mention such articles. The word "but" would be preferable to "however" in the sentence set forth. If it is desired to use "however", it may be used in another sentence in the following manner: Paragraph 20b, Army Regulations, * * * does not, however, mention such articles.

8. Split infinitives are never to be used, i.e., "to more clearly see" should read "more clearly to see" or "to see more clearly".

9. Army regulations are almost invariably used in the plural form. Don't refer to Army Regulations 605-120 or even a paragraph thereof as "this regulation". Use "these regulations". If the context is such that the use of the singular is necessary, say "paragraph 54 of the mentioned regulations".

10. The expression "There is no * * * nor" etc., is poor grammar because it involves a double negative. Use "or" instead of "nor".

11. In cases of routine inquiries or petty complaints by dependents, creditors, etc. of enlisted men, don't be too quick to suggest to TAG that "the file be referred to the officer exercising general court-martial jurisdiction". It is better just to send the file to TAG without any specific suggestion as that officer handles thousands of such cases and doubtless has a fixed procedure which in many instances permits handling more directly through the post commander. Do not under any circumstances incorporate in a draft of reply to such an inquiry a remark to the effect that the soldier is to be tried by court-martial if he fails to pay the alleged debt as such action is contrary to the policy of TAGO. The foregoing rules are not to be strictly applied in the case of officers, and in appropriate cases it is quite proper to suggest that the matter be referred to the officer exercising GCM jurisdiction "for investigation, appropriate action, and reply direct to the writer" unless the matter is obviously of such importance that the War Department would probably want to take final action.

12. The word "Headquarters" when used in connection with the title of a commander and the place or unit commander is surplusage, i.e., say "Commanding General, Seventh Service Command", not "Commanding Officer, Headquarters Fort Bragg, North Carolina".

13. Most drafts of replies to letters are not well rounded out. Although it is not necessary to appologize for not furnishing advice to people who are not entitled to it, a brief allusion to "the reason why" will often prevent the necessity of further correspondence.

14. Question marks and similar pencil notations on roughs should be erased as soon as the matter has been clarified. Otherwise those through whom the rough passes get the impression the matter is still in doubt.

15. When there is a supporting memorandum the standard 5-paragraph outline --

a. Manner of reference and statement of question presented,

b. Material facts,

c. Pertinent provisions of law or regulations,

d. Discussion,

e. Conclusion or action recommended,

is hard to improve upon and may similarly be adapted to cases where there is no supporting memorandum.

16. Above all, remember that the ultimate purpose of the advice furnished by this division is practical assistance. Although most of our directives come up on questions of law, in many cases at least it is entirely proper to work in a suggestion as to what to do and how. Therefore, care is to be taken to avoid so-called lengthy "scholarly essays", raising and discussing every legal question which may possibly arise even though the chances are quite remote. Most of the time should be spent on the fundamentals and the writing of a concise "streamline" opinion, which will provide promptly the maximum assistance to the agency to which addressed.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

CHAPTER 5 - SYMBOLS

From the time of the last war until April, 1942, all opinions of The Judge Advocate General were designated by the letters "JAG" followed by the file number and date. The file number was determined from the subject matter by reference to the Dewey Decimal System as set forth in War Department Correspondence File, 1918.

Thus "JAG 537.5, Jan. 1, 1942" would be the proper form of citing at least one opinion published on that date. The 500 series, according to the Dewey system, refers to "transportation"; the 30 series to "transportation by land"; the 7 narrows the subject down to "transportation by auto or truck" and the 5 designates "accidents, damages or collisions". Such an opinion would probably be written by the Claims Division but no part of the symbol or designation would so indicate.

In April and May of 1942 the letters "SPJG" were substituted as the symbol for The Judge Advocate General's Office in place of "JAG". Thus an opinion on the same subject would be designated: "SPJG 537.5, May 5, 1942".

On 2 June 1942, Headquarters, Army Service Forces (then Services of Supply), published a list of symbols representing various units, departments and commands and some of their respective subdivisions and lower echelons and its use was prescribed

for the Staff Divisions, Headquarters, ASF, the administrative and supply services and service command headquarters. "SP" represents Army Service Forces and "JG" The Judge Advocate General's Department, as they did formerly. A fifth letter symbol was added for each of the various divisions of The Judge Advocate General's Office as well as for The Judge Advocate General and for each of the Assistants The Judge Advocate General as follows:

SPJGA: Military Affairs Division
SPJGB: Assistant The Judge Advocate General.
SPJGC: Contracts Division.
SPJGD: Claims Division.
SPJGE: Executive Division
SPJGF: Assistant The Judge Advocate General.
SPJGG: The Judge Advocate General.
SPJGH: Board of Review No. 1.
SPJGJ: Military Justice Division.
SPJGK: Board of Review No. 2.
SPJGL: Litigation Division.
SPJGN: Board of Review No. 3.
SPJGO: Military Personnel Division.
SPJGP: Patents Division.
SPJGR: Military Reservations Division.
SPJGT: Tax Division.
SPJGW: War Plans Division.

Thus an opinion similar to the one used above as an illustration would then bear the symbol: "SPJGD 537.5, June 30, 1942."

The most recent change occurred on 12 September 1942, as announced in The Judge Advocate General's Bulletin for that month. It was found that several opinions were often written by the same division on the same general subject on the same day and in such instances no single opinion could be accurately identified.

The Dewey Decimal System was therefore dispensed with and all opinions of the office emanating from all divisions (except opinions relating to specific court-martial cases) are now assigned consecutive serial numbers in the General Records Section of the Executive Division.

Thus "SPJGD 1942/3494, Oct. 14, 1942" would mean that the opinion was written in the Claims Division on 14 October 1942, and was the 3494th opinion written in The Judge Advocate General's Office in 1942. Each opinion has, under this method, its own identifying designation in place of the former descriptive designation.

Correspondence and other matters not within the category of opinions are filed, as before, according to the Dewey Decimal System.

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WAR DEPARTMENT
Services of Supply
Office of The Judge Advocate General
Washington, D. C.

SPJGE September 12, 1942

OFFICE MEMORANDUM NO. 61

Subject: Opinions of The Judge Advocate General.

1. The use of the decimal system described in the War Department Correspondence File, 1918, for the classification, filing and citation of opinions of The Judge Advocate General is hereby discontinued. Hereafter each opinion of The Judge Advocate General which does not relate to a specific court-martial record and each independent legal memorandum for the files prepared in this office will be assigned a serial number by the General Records Section upon

first reaching that section. Thereafter it will be filed and cited by the number so assigned. A new series of serial numbers will be begun on the first day of each calendar year. The form of citation will be as follows: SPJGA 1942/6725, Sept. 10, 1942. The symbol of the division which prepares an opinion or memorandum will be typed in the upper left hand corner before the document leaves the division. Memoranda for the files prepared in support of streamlined opinions will have the serial number of the streamlined opinions typed on them by the division in which they are prepared.

2. The last subparagraph of paragraph 2a, Memorandum, this office, subject as above, dated March 27,1942, as amended by paragraph 10, Memorandum, this office same subject, dated April 1,1942, and paragraph 1, Office Memorandum No. 19, this office, same subject, dated April 27,1942, is further amended to read as follows:

> Upon arrival in the General Records Section the streamlined opinion will be dated, assigned a serial number and stamped with it, the original and necessary copies dispatched and the green, all extra white copies and the rough draft of the office memorandum will be sent to the stylist (Miss Brown) for revision as to matters of style under the supervision of the Assistant concerned. After revision by the stylist all papers will be returned to the division which originally handled the case, where the rough draft will be typed in final (original, green, 3 white copies plus such additional white copies as the division may require) as a memorandum for The Judge Advocate General, which will be given the same date and serial number as the streamlined opinion and will be signed by the division chief. Thereafter all copies of the streamlined opinion and the copies of the office memorandum will be sent to the General Records Section. After arrival there a copy of the streamlined opinion will be stapled to each copy of the office memorandum. The green copies will be placed in the file in the General Records Section for use as office precedents; the white copies, other than those sent to the Digest Section or distributed as marked thereon, will be placed on file for distribution to any interested agency of the War Department which may call for a copy.

3. The present practice of classifying, filing and citing miscellaneous correspondence according to the decimal system

described in the War Department Correspondence File, 1918, will be continued.

By order of The Judge Advocate General:

JOHN M. WEIR,
Colonel, J.A.G.D.,
Executive.

Distribution B and E.

CHAPTER 6 - FORCE AND EFFECT OF OPINIONS OF THE JUDGE ADVOCATE GENERAL

All opinions of The Judge Advocate General are considered approved by the Secretary of War unless information is received to the contrary. The Judge Advocate General is the chief legal adviser to the Secretary of War and the heads of the various components and branches of the Army and the War Department. If, therefore, his opinions relate to Army Regulations, the customs of the service or matters generally pertaining to the military establishment not specifically covered by statute. they are conclusive upon publication, approval by the Secretary of War being presumed.

The Judge Advocate General is also authorized to advise on matters involving the interpretation and application of statutes, court decisions or the opinions of other legal advisers of the

Federal Government such as the Attorney General or the Comptroller General. In these instances, however, his opinion has advisory force only and is subject always to definitive decision of the courts or of the other departments of the Government, as the case may be.

ADDENDA

PART V

ARMY OF THE UNITED STATES

CHAPTER 1 - GENERAL

The composition of the Army of the United States is designated by statute. Its establishment, organization, and maintenance have been effected pursuant to the authority vested by the Constitution of the United States in the Congress to provide for the national defense.[1] The basic legislative enactments are

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1. Const., art. I, sec. 8:
"The Congress shall have Power
"To * * * provide for the common Defence and general Welfare of the United States * * * " (cl. 1)
"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." (cl. 11)
"To raise and support Armies * * * " (cl. 12)
"To make Rules for the Government and Regulation of the land and naval Forces." (cl. 14)
"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." (cl. 15)
"To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." (cl. 16)
"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (cl. 18)

Const., art. I, sec. 10:
"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (cl. 3)

contained in the National Defense Act,[2] which sets forth the permanent organization and manner of operation of the Army of the United States.

The major portion of the personnel of the Army of the United States is drawn from those who are liable for military service.[3] It is made up of professionals, reservists, volunteers,

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1. (cont.)
Const., art. IV, sec. 4:
"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Const., amend. 5:
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * * "

2. See Part III, Chapter 1, and note 4 thereto. Unless otherwise noted, section numbers appearing in Part V are those of the National Defense Act, as amended.

3. (a) National Forces. "* * * all able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States * * * between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with * * * exceptions * * * shall be liable to perform military duty in the service of the United States." Sec. 1, act 22 April 1898 (30 Stat. 361; 10 U.S.C. 1; M.L. 1939, sec. 1).
(b) Unorganized Militia. "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the

and selectees. By a statute[4] it consists of the following:

(a) Regular Army
(b) National Guard while in the service of the United States
(c) National Guard of the United States
(d) Organized Reserves
(e) Officers' Reserve Corps
(f) Enlisted Reserve Corps
(g) Selectees or Inductees

By other statutes the following are also included within the Army of the United States:

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3. (cont.)
United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia." Sec. 57 (39 Stat. 212; 32 U.S.C. 2; M.L. 1939, sec. 1259).

(c) Selectees. "Except as otherwise provided in this Act, every male citizen of the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land and naval forces of the United States." Sec. 3(a), Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C. 301; M.L. 1939, Sup. II, sec. 2225-1) as amended by act 13 November 1942 (56 Stat. 1019; 50 U.S.C. 303; M.L. 1939, Sup. II, sec. 2225-3(a)). By the same section it is provided that citizens or subjects of neutral countries may be relieved from training and service upon proper application but that such applications will bar them from United States citizenship. It is also provided that no enemy alien will be inducted for training and service "unless he is acceptable to the land or naval forces". It is a well established rule of international law that an enemy alien may not be compelled to fight against his own country. Hall, International Law (7th ed.), sec. 61; Moore, International Law Digest, sec. 458; see also Dig. Op. JAG, 1912-40, sec. 1.

4. Sec. 1 (M.L. 1939, Sup. II, sec. 2).

(h) Officers appointed in the Army of the United States[5]
(i) Men enlisted in the Army of the United States[6]
(j) Women's Army Corps[7].

The organized peacetime establishment includes the divisions and other units which form the basis for a complete and immediate mobilization for national defense in the event of a national emergency declared by Congress. It is also provided by statute that the Army be divided, as far as practicable, into brigades, divisions, corps, and armies and that, for purposes of administration, training, and tactical control, the continental area be divided on a basis of military population into corps areas (service commands).[8]

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5. Officers temporarily appointed and commissioned in the Army of the United States under authority of the act 22 September 1941 (55 Stat. 728; 10 U.S.C. Sup. 484, note; M.L. 1939, Sup. II, sec. 2160a), are not included among the components of the Army of the United States, as statutorily defined, despite the fact that the section of the National Defense Act setting out the components was last amended on 13 December 1941.

6. In time of war or other emergency declared by Congress, all enlistments in the active military service of the United States are in the Army of the United States. Sec. 127a [15] (act 14 May 1940; 54 Stat. 213; 10 U.S.C. 234; M.L. 1939, Sup. II, sec. 2163a). By sec. 10, act 18 Aug. 1941 (55 Stat. 628; 50 U.S.C. 360; M.L. 1939, Sup. II, sec. 2227-10), known as the Service Extension Act, enlistments in the Army of the United States, without regard to component, were authorized in the manner provided by the National Defense Act. M.L. 1939, Sup. II, sec. 2163a.

7. Act 1 July 1943 (Public Law 110, 78th Cong.; Bull. 12, WD, 7 July 1943).

8. Sec. 3 (M.L. 1939, sec. 3).

CHAPTER 2 - REGULAR ARMY

1. General

The Regular Army is the permanent military establishment which is maintained in times of peace and war according to law.[1] By statute it is comprised of the following, the first seven components being designated the combatant arms:[2]

(a) Infantry
(b) Cavalry
(c) Field Artillery
(d) Coast Artillery Corps
(e) Air Corps
(f) Corps of Engineers
(g) Signal Corps
(h) General Staff Corps
(i) Adjutant General's Department
(j) Inspector General's Department
(k) Judge Advocate General's Department
(l) Quartermaster Corps
(m) Finance Department
(n) Medical Department
(o) Ordnance Department
(p) Chemical Warfare Service
(q) Officers and enlisted men of the National Guard Bureau
(r) Chaplains
(s) Professors and cadets of the United States Military Academy
(t) Detached officers

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1. Act 22 April 1898 (30 Stat. 361; 10 U.S.C. 3; M.L. 1939, sec. 5).

2. Sec. 2 (M.L. 1939, sec. 6). Section numbers cited in this chapter, unless otherwise noted, refer to the National Defense Act, as amended. The expression "the line of the Army" is one of military custom and usage and is practically synonymous with "the combatant arms". Bull. JAG, Feb. 1943; SPJGA 1943/2844, 20 Feb. 1943.

(u) Detached enlisted men
(v) Unassigned recruits
(w) Indian Scouts
(x) Officers and enlisted men of the retired list
(y) Officers and enlisted men otherwise provided for.

The authorized[3] commissioned officer strength of the Regular Army during peacetime, to be attained by ten approximately equal annual increments beginning 1 July 1939, is sixteen thousand seven hundred and nineteen, including seventy-one general officers of the line.[4] The basic statute governing officer strength[5] states the number of officers, other than general officers, to be assigned to the various branches,[6] the several sections of the National Defense Act setting out the authorized grades within branches.

The act 21 August 1941,[7] authorizes the appointment of chief warrant officers and warrant officers (junior grade) in number not to exceed 1 per centum of the authorized enlisted

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3. Sec. 8, act 3 April 1939 (53 Stat. 558; 10 U.S.C. 481b; M.L. 1939, Sup. II, sec. 7).

4. Sec. 4, as amended by act 28 May 1940 (54 Stat. 227; 10 U.S.C. 482c).

5. See note 3, supra.

6. One hundred and twenty-one officers are assigned to the Judge Advocate General's Department. The same act authorizes the President to increase or diminish the number of officers assigned to any branch by not more than a total of 30 per centum.

7. 55 Stat. 652; 10 U.S.C. 591; M.L. 1939, Sup. II, sec. 131a.

strength of the Regular Army.

The National Defense Act[8] provides that, except in time of war or similar emergency when the public safety demands it, the maximum number of enlisted men in the Regular Army will not exceed two hundred and eighty thousand. Commonly, the enlisted strength has been governed from year to year by the provisions of the current Army or War Department appropriation act.[9] By act 5 June 1942,[10] all provisions of existing law limiting the officer and enlisted strength of any branch of the Army were suspended.

2. Components

By reason of the fact that the command functions relative to the Army of the United States reside in the Commander in Chief, the amount of Congressional legislation relating to the duties and functions of the various arms and services is necessarily

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8. Sec. 2 (M.L. 1939, sec. 15).

9. By act 26 June 1940 (54 Stat. 601; M.L. 1939, Sup. II, sec. 15a) the maximum number of enlisted men fixed by the National Defense Act was increased to 375,000 for the fiscal year 1941. The branch strength limitations were also removed for that year. Act 2 July 1940 (54 Stat. 713; M.L. 1939, Sup. II, sec. 134). The Military Appropriation Act, 1944 (Public Law 108, 78th Cong.; Bull. 13, WD, 9 July 1943) does not advert to the matter of strength limitations.

10. 56 Stat. 314; 50 U.S.C. Sup. 762.

limited.[11] The following paragraphs set out the general permanent statutory framework of the Regular Army.

a, b, c, d. With respect to the Infantry,[12] Cavalry,[13] Field Artillery[14] and Coast Artillery Corps,[15] the statute merely provides that each arm shall be headed by a Chief, with the rank of major general, and shall consist of officers and men, organized into units as the President may direct.

e. The Air Corps consists of one Chief of the Air Corps with the rank of major general, three assistants with the rank of brigadier general, officers and enlisted men, including flying cadets, organized into such units as the President may prescribe.[16]

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11. See Part III, Chapter 2. The statutory provisions have been implemented by regulations setting out in detail the duties and functions of the respective arms and services.

12. Sec. 17.

13. Sec. 18.

14. Sec. 19.

15. Sec. 20. It is also provided that the Coast Artillery Corps shall include the officers of the Army Mine Planter Service.

16. Sec. 13a. By act 3 June 1941 (55 Stat. 239; 10 U.S.C. 297a; M.L. 1939, Sup. II, sec. 35a-1) the special and separate enlisted grade of aviation cadet was substituted for the grade of flying cadet. By act 8 July 1942 (56 Stat. 649; 10 U.S.C. 299a; M.L. 1939, Sup. II, sec. 35 b-1) the title of flight officer was created, with the rank, pay, and allowances provided for a warrant officer (junior grade).

f. The Corps of Engineers consists of one Chief of Engineers with the rank of major general, two assistants with the rank of brigadier general, officers and men, organized into such units as the President may prescribe.[17] The Chief of Engineers is charged with the submission of annual reports to Congress relating to river and harbor improvements;[18] the supervision of river and harbor improvements, flood control, and other nonmilita public works;[19] the direction of all work pertaining to the construction, maintenance, and repair of buildings, structures, and utilities for the Army; the acquisition of all real estate and the issuance of licenses in connection with Government reservations; and with the operation of water, gas, electric and sewer utilities, except those pertaining exclusively to any branch of the Army.[20]

g. The Signal Corps consists of one Chief Signal Officer with the rank of major general, officers and men, organized into such units as the President may prescribe.[21] The operations

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17. Sec. 11.

18. Act 3 March 1899 (30 Stat. 1150; 33 U.S.C. 549; M.L. 1939, sec. 44).

19. Act 30 August 1935 (49 Stat. 1028; 33 U.S.C. 540; M.L. 1939, sec. 1821).

20. Act 1 Dec. 1941 (55 Stat. 787; 10 U.S.C. 181b; M.L. 1939, Sup. II, sec. 45).

21. Sec. 13.

of the corps are confined to the performance of all military signal duties, including the construction, repair and operation of military telegraph lines, the collection and transmission of information for the Army by wire, and general charge of signal apparatus.[22]

h. The General Staff Corps was established by act 14 February 1903,[23] composed of officers detailed from the Army at large, under rules prescribed by the President. It consists of the Chief of Staff, the War Department General Staff, and the General Staff with troops. In time of peace the detail of an officer as a member of the General Staff Corps is for a period of four years, unless sooner relieved.[24]

The Chief of Staff, under the direction of the President or of the Secretary of War for the President, has supervision of all troops of the arms and services and of the reserve components.[25] He renders professional assistance to the Secretary of War and performs such other duties as may be prescribed by the President.

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22. Act 1 Oct. 1890 (26 Stat. 653; 10 U.S.C. 212; M.L. 1939, sec. 48).

23. 32 Stat. 830; 10 U.S.C. 21; M.L. 1939, sec. 49.

24. Sec. 5.

25. Ibid; act 14 Feb. 1903 (32 Stat. 830; 10 U.S.C. 21; M.L. 1939, sec. 54.

from time to time. He also presides over the War Department General Staff and causes it to make the necessary plans for recruiting, organizing, supplying, equipping, mobilizing, training, and demobilizing the Army of the United States.[26]

The War Department General Staff consists of the Chief of Staff, the Deputy Chief of Staff and five assistants to the Chief of Staff selected by the President from the general officers of the line, in addition to other officers not below the grade of captain. It is also provided that not less than five additional officers must be members of the National Guard of the United States and a like number must be members of the Officers' Reserve Corps. This staff prepares plans for national defense and the use of the military forces for that purpose, reports on all questions affecting the efficiency of the Army of the United States, and renders professional aid and assistance to the Secretary of War and the Chief of Staff. This staff is also charged with the preparation of studies, including comments and recommendations, of plans involving Congressional legislation affecting the War Department. These studies, when not incompatible with the public interest, accompany the plans for legislation when submitted to Congress by the Secretary of War.[27]

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26. Sec. 5.

27. Ibid.

The General Staff with troops consists of the number of officers not below the grade of captain as may be necessary to perform the General Staff duties of the headquarters of the large field units and installations.[28]

i. The Adjutant General's Department consists of The Adjutant General with the rank of major general, one assistant with the rank of brigadier general, and other officers. With certain limitations, the Personnel Bureau within the Department is charged with the operating functions of procurement, assignment, promotion, transfer, retirement, and discharge of all officers and enlisted men of the Army.[29]

j. The Inspector General's Department consists of one Inspector General with the rank of major general, and other officers.[30]

k. The Judge Advocate General's Department consists of The Judge Advocate General with the rank of major general, and other officers.[31] The Judge Advocate General, by statute, is charged with receiving, revising, and recording the proceedings of all courts-martial, courts of inquiry, and military commissions

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28. Ibid.
29. Sec. 6.
30. Sec. 7.
31. Sec. 8.

and performing such other duties as customarily have been performed by him.[32]

l. The Quartermaster Corps consists of the Quartermaster General with the rank of major general, three assistants with the rank of brigadier general, officers and men. The Quartermaster General is charged with the purchase and procurement for the Army of all supplies of standard manufacture and of those common to two or more branches but not of special or technical articles issued or used exclusively by other supply departments. He is also charged, by statute, with the transportation of the Army by land and water.[33]

m. The Finance Department consists of the Chief of Finance with the rank of major general, officers and men. The Chief of Finance is charged with the disbursement of all funds of the War Department, including pay of the Army and with such other fiscal and accounting duties as may be required by law or assigned to him by the Secretary of War.[34] He also acts as the

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32. Act 23 June 1874 (18 Stat. 244; 10 U.S.C. 62; M.L. 1939, sec. 63); also, R.S. 1199 (10 U.S.C. 62; M.L. 1939, sec. 63); see Part I.

33. Sec. 9. See AR 55-5, 5 October 1942, for functions of the Chief of Transportation during the present war as directed by G.O. 38, WD, 31 July 1942.

34. Sec. 9a.

fiscal, disbursing, and accounting agent of the Director of Selective Service.[35]

n. The Medical Department consists of a Surgeon General with the rank of major general, four assistants with the rank of brigadier general, officers, contract surgeons, enlisted personnel, and the Medical Corps, Dental Corps, Veterinary Corps, Medical Administrative Corps, Army Nurse Corps,[36] and the Pharmacy Corps.[37]

o. The Ordnance Department consists of the Chief of Ordnance, with the rank of major general, two assistants with the rank of brigadier general, officers and men.[38] The Chief of Ordnance is charged with procuring, inspecting, and proving the necessary supplies of ordnance and ordnance stores for the use the Army.[39]

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35. Act 16 Sept. 1940 (54 Stat. 894; 50 U.S.C. 310; M.L. 1939, Sup. II, sec. 2225-10(d)).

36. Sec. 10; act 4 June 1920 (41 Stat. 766; 10 U.S.C. 81; M.L. 1939, sec. 71).

37. The Pharmacy Corps was established in the Medical Department by act 12 July 1943 (Public Law 130, 78th Cong.; Bull. 16, WD, 21 July 1943). It also provided that officers of the Regular Army holding commissions in the Medical Administrative Corps should be transferred to the Pharmacy Corps and commissioned in grade in that Corps, in addition to the number of officers authorized for the Corps.

38. Sec. 12.

39. R.S. 1164 (10 U.S.C. 192; M.L. 1939, sec. 82).

p. The Chemical Warfare Service consists of the Chief of the Chemical Warfare Service with the rank of major general, officers and men. The Chief of the Chemical Warfare Service has the duty of investigating, developing, manufacturing or procuring, and supplying to the Army all smoke and incendiary materials, toxic gases and gas-defense appliances, and is charged with the instruction, training and equipment of special gas troops.[40]

q. The National Guard Bureau is charged with the administration of War Department plans, policies, and procedures relating to the organization, equipment, and training of the National Guard not in Federal Service and of the several State guards. It maintains and has custody of all War Department records of the National Guard not in the service of the United States, the State and Territorial Guards of the several States and territories, and of the militia.[41] The Chief of the Bureau is appointed by the President, with the advice and consent of the Senate, from lists of officers of the National Guard of the United States having certain grade and service qualifications, submitted by the governors of the states. The Chief of the Bureau holds office for four years and has the rank of major general while serving. The Presi-

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40. Sec. 12a.

41. ASF Organization Manual, 15 Feb. 1943, sec. 303.03.

dent may assign officers and men of the Regular Army to duty with the Bureau.[42]

r. One chaplain, not below the grade of major, is appointed by the President, with the advice and consent of the Senate, as Chief of Chaplains, holding the rank of colonel for the four year term. During the present emergency and six months thereafter, the Chief of Chaplains holds the rank, pay, and allowances of brigadier general. His duties include investigation into the qualifications of chaplaincy candidates, and general coordination and supervision of the work of chaplains.[43]

Others. By section 5 of the National Defense Act[44] the existing laws pertaining to the following were continued in effect: Military personnel on duty at the United States Military Academy, detached personnel,[45] the officers and men on the retired list,[46] and the Indian Scouts.[47]

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42. Sec. 81.

43. Sec. 15

44. Act 3 June 1916 (39 Stat. 181; M.L. 1939, sec. 1920).

45. See M.L. 1939, sec. 95-100.

46. Retired officers are carried on the Army Register and, with retired enlisted men, remain subject to the Articles of War. R.S. 1256; 10 U.S.C. 1023; M.L. 1939, sec. 102; AW 2.

47. These are men enlisted to act as scouts in the Indian Country. M.L. 1939, sec. 101.

3. Philippine Scouts

By act 2 February 1901,[48] the President is authorized to enlist natives of the Philippine Islands for "service in the Army" when conditions in the Islands justify such action. The unit in which they are enlisted is the Philippine Scouts.[49] The President is also authorized to organize the Scouts in a manner similar to that of the Regular Army and to it may be assigned officers of the Army of the United States in addition to officers of the Philippine Scouts.[50] He is further authorized to disband the Scouts or reduce its personnel.[51]

4. Regular Army Reserve

Although not mentioned in the statute designating the components of the Regular Army,[52] the Regular Army Reserve is

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48. 31 Stat. 757; 10 U.S.C. 321, 333; M.L. 1939, sec. 103.

49. The Philippine Scouts are to be distinguished from the Philippine Army. The latter was called and ordered "into the service of the armed forces of the United States" by Military Order of the Commander in Chief, dated 26 July 1941 (Bull. 26, WD, 1941), pursuant to authority of the Philippine Independence Act (act 17 January 1933, as amended; 47 Stat. 761; 48 U.S.C. 1232) and an Ordinance appended to the Philippine Constitution. Congress makes appropriations for the Philippine Army separate from those for the Army of the United States (SPJGA 004.61, 4 June 1942); see Military Appropriation Act, 1944 (Public Law 108, 78th Cong.; Bull. 13, WD, 9 July 1943).

50. Sec. 22a.

51. Act 30 June 1932 (47 Stat. 770; 10 U.S.C. 321a; M.L. 1939, sec. 103).

52. See note 2, supra.

organized and maintained as part of the Regular Army and in addition to its authorized strength.[53] Any person, less than 36 years of age, who has served in the Regular Army and has been honorably discharged therefrom may reenlist in the Regular Army Reserve. During the period of reenlistment an enlistment allowance of $24 per year is payable but no other emoluments accrue during inactive service, except that upon being accepted for active duty the soldier may be paid a sum of money computed at the rate of $3 per month for each month during which he has served in the Reserve, not to exceed $150. The members of the Reserve may be ordered to active duty only in case of emergency declared by the President for the period of the emergency and six months. They are subject to military law only from the date they are required to obey an order to report for active duty.[54]

CHAPTER 3 - NATIONAL GUARD

1. General

The militia of the United States,[1] subject as it is to

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53. Army Regulations relating to the Regular Army Reserve, AR 155-5, 16 Feb. 1939, have been suspended for the duration of the present war. Cir. 6, WD, 2 Jan. 1943.

54. Sec. 30.

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1. See Chapter 1, note 3, supra.

Federal and state use and control, has had a legislative history reflective of that condition of dual authority.[2] From the time of its original service during the Revolutionary War until 1933, efficient use of the organized militia, as such, was limited during periods of warfare due, in the main, to short term enlistments, prohibitions against extra-continental service, inadequate appropriations, and the absence of centralized supervision. Under present legislation, that portion of the militia which is represented by the National Guard of each State, Territory, and the District of Columbia (commonly termed the National Guard), and by the National Guard of the United States, affords to the Federal Government a valuable military arm.[3]

The National Guard is a component of the Army of the

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2. The principal Congressional enactments have been the following: The Militia Act of 1792 (act 8 May 1792; 1 Stat. 271), act 28 February 1795 (1 Stat. 424), act 21 January 1903 (32 Stat. 775), act 27 May 1908 (35 Stat. 400), act 3 June 1916 (39 Stat. 166), act 4 June 1920 (41 Stat. 759), and act 15 June 1933 (48 Stat. 153).

3. The National Guard of each State, Territory, and the District of Columbia was established as a component of the Army of the United States under the "militia power" of Congress (Const., art. I, sec. 8, cl. 15, 16). The "army power" (Const., art. I, sec. 8, cl. 12) was used to establish the National Guard of the United States as a component of the Army of the United States. For a discussion of the Army and militia powers, see Selective Draft Cases, 254 U.S. 366. See also art. IV, sec. 4, guaranteeing a republican form of government to the states and their protection against invasion.

United States only when it is in the service of the United States under a "call".[4] In the present war and emergency the President has not called the National Guard, as such, into the Federal service but almost all its units and personnel have been ordered into the service of the United States as units and personnel of the National Guard of the United States, at all times a component of the Army of the United States.[5] The functional relationship between the National Guard of the several states and the National Guard of the United States requires a consideration of the statutory character and composition of the National Guard itself.

Congress has authorized the President to "call" all or part of the National Guard into the service of the United States whenever the country is invaded or is in danger of invasion, or there is insurrection or danger of insurrection against the authority of the Government, or when he is unable, with the regular forces at his command, to execute the laws of the Union.[6]

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4. Sec. 1. Units and members retain their state status, temporarily suspended, as Federally recognized units and members of the National Guard. Par. 129, AR 130-10, 27 March 1940.

5. See Chapter 4, infra.

6. Act 21 January 1903 (32 Stat. 776), as amended by act 27 May 1908 (35 Stat. 400; 32 U.S.C. 81a; M.L. 1939, sec. 1295). The power to "call" the National Guard is to be distinguished from the power to "order" the National Guard of the United States into Federal service. U.S. v. Sugar, 243 F. 423.
In case of insurrection against the government of a

6. (cont.)
state, the President may call out the militia for its supression, upon application of the legislature of the state or of the governor when the legislature cannot be convened (R.S. 5298; 50 U.S.C. 202; M.L. 1939, sec. 502). In cases of rebellion against the authority of the Government of the United States, when the President deems it impracticable to enforce the laws of the United States within the states by judicial proceedings, he may call out the militia to suppress such forcible opposition (R.S. 5299; 50 U.S.C. 202; M.L. 1939, sec. 503). Whenever the execution of the laws of the states or the Union is so forcibly obstructed or hindered as to deprive persons of their Constitutional privileges and immunities and the state authorities are unable, fail, or refuse to render protection, such facts are deemed to be a denial by such state of "equal protection" and the President, thereupon is authorized to employ the militia for the suppression of such violence (R.S. 5299; 50 U.S.C. 203; M.L. 1939, sec. 504). When the President has deemed it necessary to use the military forces under the above statutes, he must, by proclamation, command "the insurgents to disperse and retire peaceably to their respective abodes, within a limited time". (R.S. 5300; 50 U.S.C. 204; M.L. 1939, sec. 505).

In the usual situation calling for the use of troops for state purposes the following events take place: The Governor by wire requests the President to furnish troops; the President, after investigation showing need for troops, advises the Secretary of War, who orders the movement of troops through The Adjutant General, who transmits the order to the commanding general of the service command having jurisdiction of the area in question, who orders out the Federal troops. If National Guard units are to be utilized, the Secretary of War transmits the communications "calling" them into the service of the United States to the governors of the affected states and territories and to the commanding general of the District of Columbia National Guard. Par. 133, AR 130-10, 27 March 1940. When troops already in the Federal service are ordered out for Federal purposes, e.g., in aid of Federal court process, or to relieve obstruction in use of the mails or free flow of interstate commerce, the channel of communication will omit state authorities. See generally, AR 500-50, 5 April 1937.

The National Guard while in the service of the United States under a Presidential "call" may be used within any territory in which the laws of the United States have effect to suppress insurrection, repel invasion, or execute the laws of the Union. Probably it can also be used in foreign territory for such limited purposes as to forestall action in cases of evident intent to invade or to defeat a hostile force which has made, attempted, or threatened invasion.[7]

2. Composition

The National Guard of each State, Territory, and the District of Columbia consists of the active and inactive units and volunteer personnel thereof, Federally recognized and organized, armed, and equipped, in whole or in part, at Federal expense, as provided in the National Defense Act.[8]

a. Units. The general organization and composition of the National Guard units are the same as prescribed for the Regular Army and the President is authorized to prescribe the arm or service of each unit but no change in allotment, branch, or arm of units wholly within a state may be made without the approval of the governor.[9] The President may assign the units to higher

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7. 29 Op. Atty. Gen. 322; see par. 129, AR 130-10, 27 March 1940

8. Secs. 58, 71.

9. Sec. 60.

tactical units of the Army and detach a Regular Army officer to perform the duties of chief of staff of each fully organized division.[10] The adjutants general of the National Guard units,[11] and the National Guard Bureau[12] are the administrators of the National Guard program. Annual appropriations, apportioned among the states in ratio to the number of enlisted men in active service in the several states, are made by Congress to cover at least part of the expense of providing equipment, pay and allowances, and training of the Federally recognized units and personnel.[13] As part of its training, each company, troop, battery and detachment, subject to regulations of the Secretary of War, is required to assemble at least 48 times a year for instruction and attend encampments for 15 days each year.[14] Provision is also made for attendance at maneuvers,[15] special schools and small arms compe-

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10. Secs. 64, 65.

11. Sec. 66.

12. Sec. 81; see Chapter 2, supra.

13. Sec. 67.

14. Sec. 92. Outside the area occupied by Federal legislation and regulations and within Constitutional limits, the state is the sole judge of the means to be employed and the amount of training to be exacted. Hamilton v. Regents, 293 U.S. 245.

15. Sec. 94.

tition,[16] and regular service schools.[17] A courts-martial system, similar to that governing the Army of the United States, except as to punishments, is provided for the National Guard organizations when they are not in the service of the United States.[18] In peacetime annual inspections are made by inspectors general or other officers of the Regular Army to determine the amount and condition of property, the sufficiency of arms, equipment, training, and instruction of the units and personnel, and the possession by the officers and enlisted men of the prescribed physical and other qualifications. The reports of inspection serve as bases for determining issue of property and whether the organizations and individuals shall continue to be Federally recognized, i.e., constitute elements of the National Guard.[19]

The National Guard includes an active and inactive force.[20]

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16. Sec. 97.

17. Sec. 99.

18. Secs. 102-108.

19. Sec. 93. The War Department summarily may withdraw Federal recognition from National Guard units and officers thereof found on inspections to be lacking in required qualifications. The action may be taken without a trial and is not subject to judicial review. Hurley v. U.S. ex rel. Gladman, 47 F. (2d) 431. Thus, mandamus will not lie to restore Federal recognition of an officer. U.S. ex rel. Gillett v. Dern, 74 F. (2d) 166.

20. Secs. 71, 78.

The inactive National Guard is not defined by statute but includes (1) the headquarters and units allotted to the states for the development of the National Guard but not authorized for organization and equipment and the Federally recognized personnel assigned to such units up to their war strength, and (2) inactive personnel assigned to active and recognized units in sufficient number to bring them up to war strength.[21]

b. Personnel. Officers and warrant officers of the National Guard are appointed by the governors of the states[22] pursuant to the power retained by the states in the Constitution[23] and in accordance with provisions of the National Guard Regulations. To be eligible for a commission in the National Guard the applicant must be a citizen of the United States between the ages of 21 and 64[24] and must have been selected from one of the following classes[25]: (1) officers and enlisted men of the National Guard;

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21. 37 Op. Atty. Gen. 424. Formerly, there existed a National Guard Reserve but it was, in effect, abolished by the act 15 June 1933 (48 Stat. 153; 10 U.S.C. 38; M.L. 1939, sec. 1257a); JAG 210.1, 15 October 1934.

22. Appointments in the National Guard of the District of Columbia are made by the President. See par. 137a, AR 130-10, 27 March 1940.

23. Const., art. I, sec. 8, cl. 16.

24. Sec. 58.

25. Sec. 74.

(2) officers, reserve, retired, and former officers of the Army, Navy, or Marine Corps; (3) enlisted men and former enlisted men of the Army, Navy, and Marine Corps who have received honorable discharges; (4) graduates of the United States Military and Naval Academies; (5) graduates of schools and camps who have been certified by the Regular Army supervisor as fit for appointment; and (6) other civilians specially qualified for technical duties. An appointment board of three officers selected by the Secretary of War from Regular Army or National Guard of the United States officers must approve the physical, moral, and professional qualifications of the applicant. If the eligibility of the applicant is certified by the Chief of the National Guard Bureau and the dual oath - to support the Constitutions of the United States and the state, and obey the President and the governor - prescribed by section 73 is taken, full National Guard officer status is attained.[26] The capacity or fitness of any such officer for continued Federal recognition may be investigated by an efficiency board of senior officers of the Regular Army or National Guard of the United States. If the findings are unfavorable and are approved by the President, Federal recognition may be withdrawn.[27]

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26. Sec. 75. Federal recognition is a condition precedent to eligibility for Federal pay.

27. Sec. 76.

If the appointment is terminated or vacated by state action, or the officer reaches the age of 64, Federal recognition is withdrawn. Although the National Defense Act provides that an officer ceases to be a member of the National Guard when Federal recognition is withdrawn, and that he is to be discharged by the official authorized to appoint,[28] as a formal matter, the state appointment may only be terminated or vacated in the manner provided by state law.

Enlisted men of the National Guard, the number of whom is proportioned according to Congressional representation,[29] must on original enlistment be between the ages of 18 and 45, or not over 64 on reenlistments or if formerly members of the Regular Army, Navy or Marine Corps.[30] Original enlistments are for three year terms and reenlistments may be for one or three years. The dual form of oath prescribed by section 70 must be taken.[31]

By section 14 of the Pay Readjustment Act of 1942, as

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28. Sec. 77.

29. Sec. 62.

30. Sec. 58. The act of enlisting the National Guard is of a contractual nature resulting in the employment of the enlistee by the state. Andrews v. State, 90 P. (2d) 995.

31. Sec. 69. Federal recognition is usually granted or withdrawn at the time of annual unit inspections. See sec. 93.

amended,[32] it is provided that under such regulations as may be prescribed by the Secretary of War, officers other than general officers, warrant officers and enlisted men of the National Guard are to be paid at the rate of one-thirtieth of the monthly pay authorized for them when they are in Federal service for each period of regular drill or appropriate duty engaged in, such pay being in addition to compensation for attendance at field or coast-defense instruction or maneuvers.[33] General officers receive $500 a year in addition to pay for duty under sections 94, 97, and 99 "for satisfactory performance of their duties", and commanding officers of units less than brigades having administrative functions connected therewith receive a maximum of $240 a year "for the faithful performance of such administrative functions". When performing the duties provided in sections 94, 97, and 99 or when in the Federal service, the personnel of the National Guard receive the same pay and allowances as are authorized for persons of corresponding grade and length of service in the Regular Army.

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32. Act 16 June 1942 (56 Stat. 359; 37 U.S.C. 101; M.L. 1939, Sup. II, sec. 1371c-1).

33. The National Defense Act, secs. 109 and 110, sets the minimum hours of each period at one and one-half hours. The field or coast-defense instruction and maneuvers are provided for in sections 94, 97, and 99.

3. Federal Service Under a "Call"

From the time at which it is required to respond to a call into the service of the United States, the National Guard becomes subject to the laws and regulations governing the Regular Army, to the extent that such are applicable to officers and men whose permanent retention in the military service is not contemplated by existing law.[34] Officers continue to be appointed as when not in Federal service and no officer or enlisted man may be held to service beyond the term of his commission or enlistment. Promotion of officers and warrant officers while in Federal service is effected pursuant to National Guard Regulations and separation and relief from the service of officers and enlisted men pursuant to Army Regulations.[35] Since the military authorities of the United States have no power to separate personnel inducted under a call from the military service of a state, territory, or the District of Columbia, complete separation of such personnel from military service requires both Federal and state action or operation of law.[36] Liaison is maintained between the Federal and state authorities by the transmission to the latter.

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34. Sec. 101. Disability benefits are also payable. Sec. 112.

35. Principally, AR 130-10, 27 March 1940.

36. Par. 139b, id.

i.e., their adjutants general, of all orders, reports, and returns required by applicable regulations.[37]

4. State Guard

By section 61 of the National Defense Act,[38] Congress has given qualified consent to the maintenance by the states and territories of troops other than the National Guard.[39] Under regulations prescribed by the Secretary of War, military forces may be organized under state laws and maintained and trained in conformity with the provisions of the National Defense Act while any part of the National Guard of the state, territory, Puerto Rico or the Canal Zone is in active Federal service. Since the types and employment of state guard organizations vary with local conditions, War Department regulations for them are limited to a general indication of the general type of course and training to be pursued.[40] The National Guard Bureau is the agent of the War Department in state guard matters and the channel of administration is through the commanding general of the service command to

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37. Par. 135c, id.

38. Act 3 June 1916 (39 Stat. 198; 32 U.S.C. 194; M.L. 1939, sec. 1323).

39. Art. I, sec. 10, cl. 3 of the Constitution provides that "No State shall, without the Consent of Congress, * * * keep Troops or ships of war in time of Peace * * * ".

40. AR 850-250, 21 April 1941.

the appropriate state authority. The Secretary of War is authorized to issue such arms and equipment "as may be in possession of and can be spared by the War Department".[41]

Essentially, the state guard may be considered as a secondary reserve echelon in the military forces of a state, the first being the inactive National Guard. It is not subject, as such, to call, order, or draft into the active Federal service but its members are not exempted from military service under Federal law.[42] Being soldiers in the military service of the state, they are recognized as lawful belligerents under the rules of war.[43] The authority of the state to maintain its guard ceases on the relief from active Federal service of all elements of its National Guard.[44]

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41. Amended provisions of section 101, terminating on the expiration of the present war and six months thereafter or such earlier time as Congress may concurrently resolve upon or the President may proclaim, add the Virgin Islands of the United States to the political divisions which may maintain state guards and authorize the Secretary of War to issue "such arms, ammunition, clothing and equipment as he deems necessary". Act 1 October 1942 (56 Stat. 762; 32 U.S.C. 194; M.L. 1939, Sup. II, sec. 1323).

42. Men dually enlisted in the National Guard and the National Guard of the United States but not in active Federal service may enlist in a state guard. I Bull. JAG 49, sec. 1323.

43. Annex to Hague Convention No. IV, art. 1, sec. 1, chapt. 1 (par. 9a, FM 27-10); JAG 324.5, 9 March 1942.

44. Par. 4b, AR 850-250, 21 April 1941.

CHAPTER 4 - NATIONAL GUARD OF THE UNITED STATES

1. General

In 1933[1] the National Defense Act was amended by the creation of the National Guard of the United States as a component of the Army of the United States.[2] Membership in this component is available only to personnel of the National Guard of each State, Territory, and the District of Columbia,[3] who, upon being commissioned or enlisted in the National Guard of the United States acquire a military status which is superimposed upon their militia or National Guard status. Although the National Guard may be "called" into the active military service of the United States under certain circumstances, nevertheless, military history has shown that the Constitutional and other limitations on its use narrow its availability for Federal military purposes.[4]

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1. Act 15 June 1933 (48 Stat. 155); sec. 58, National Defense Act. The section numbers herein, unless otherwise noted, are those of the National Defense Act.

2. See Chapter 3, especially note 3, supra.

3. Herein, and commonly, referred to as the National Guard.

4. For example, in the World War, the National Guard could not be called for domestic duty because the theater of operations was deemed to be too distantly removed from the continental United States to permit a call "to repel invasion". As a result, its members volunteered or were drafted as individuals. In the present war by Proclamation 2225, 7 December 1941, the President proclaimed the invasion of United States territory

With the establishment of the National Guard of the United States as a reserve component, the national government was enabled to appoint or enlist personnel who may be "ordered" to duty under emergency or nonemergency conditions and who are eligible for certain peacetime service in the War Department.[5]

2. Composition

The National Guard of the United States consists of the Federally recognized National Guard units, the officers and warrant officers of the National Guard who have been appointed by the President in the National Guard of the United States, and the enlisted men of the National Guard, who have been enlisted in the National Guard of the United States.[6] The principal units of the National Guard of the United States are divisions, e.g., the 27th Infantry Division, Army of the United States, is composed of National Guard units. As far as practicable the units are to be kept intact when ordered to active service.

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4. (cont.)
by the Empire of Japan, and by Proclamations 2226 and 2227, 8 December 1941, the threatened invasion of United States territory by Germany and Italy.

5. With their consent certain officers of the National Guard of the United States may be ordered to active duty with the General Staff Corps and the National Guard Bureau. Secs. 5 and 81; see Chapter 2.

6. Secs. 58, 70, 71, and 111.

3. Personnel

All persons appointed as officers in the National Guard of the United States are commissioned in the Army of the United States.[7] The President is authorized to appoint in the same grade and branch in the National Guard of the United States any person[8] who is an officer or warrant officer in the National Guard, Federally recognized in that grade and branch.[9] The period of appointment is coextensive with that of the National Guard appointment except that an appointment in force at the outbreak of war continues in force until six months after its termination.[10] The dual form of oath prescribed by section 73 must be taken. Upon the ordering to duty of the National Guard of the United States, the officers and warrant officers of the National Guard who do not hold appointments in the National Guard of the United States may be appointed and commissioned therein in their National Guard grades and branches.[11]

It is provided in section 111 that, "In the initial

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7. Sec. 38.

8. Ibid. Appointments of general officers must be by and with the advice and consent of the Senate. Sec. 38.

9. Sec. 73.

10. Sec. 38.

11. Sec. 111.

mobilization of the National Guard of the United States, war-strength officer personnel shall be taken from the National Guard as far as practicable". For this purpose, in peacetime, warrant officers and enlisted men of the National Guard may be appointed as officers in the National Guard of the United States for a term of five years. They must be members of the active National Guard and under the age of 30. Under current regulations they are not, in time of nonemergency, ordered to active duty under their commissions in the National Guard of the United States. If they are later commissioned in the National Guard, the appointment in the National Guard of the United States will be adjusted to the National Guard grade and arm or service.[12]

Eligibility for enlistment in the National Guard of the United States is provided by a Federally recognized enlistment in the National Guard. Original enlistments are for the term of 3 years and subsequent enlistments for periods of 1 or 3 years, all National Guard of the United States enlistments being coterminous with National Guard enlistments, except that in the event of an

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12. Pars. 19-23, AR 130-15, 3 November 1942. Officers who also hold commissions in the National Guard are not promoted in the National Guard of the United States in peacetime, but, upon receiving Federally recognized promotions in the National Guard, they may be tendered new appointments in the National Guard of the United States in the increased National Guard grade. Id., par. 16.

emergency declared by Congress the period of enlistment may be extended for a period of six months after the termination of the emergency.[13]

Commissions, warrants, and enlistments in the National Guard of the United States generally are retained even during periods of service in the inactive National Guard.[14] Except when ordered into the active service of the United States, members of the National Guard of the United States are administered, armed, equipped, and trained in their status as the National Guard of the several states, territories, and the District of Columbia.[15]

4. Service

The President may order the National Guard of the United States, in whole or part, into the active military service of the United States for the period of the War or emergency and six

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13. Sec. 69; pars. 24-26, AR 130-15, 3 November 1942. The periods of enlistment, appointment, or commission of all members of the Army of the United States were extended for the period of any war and six months thereafter by act 13 December 1941 (55 Stat. 800; 50 U.S.C. 732; M.L. 1939, Sup. II, sec. 2228-2).

14. AR 130-15, 3 November 1942. However, acceptance of an appointment in the Officers' Reserve Corps vacates a commission in the National Guard of the United States. II Bull. JAG 111, sec. 1266a.

15. Par. 6, AR 130-15, 3 November 1942. While not on active duty, officers of the National Guard of the United States are not, by reason of their appointments, pay, or status as such, deemed to be officers or employees of the United States. Sec. 38.

months thereafter, whenever Congress declares a national emergency and authorizes the use of armed land forces for any purpose requiring the use of troops in excess of those of the Regular Army.[16]

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16. Sec. 111; act 13 December 1941, supra, note 13.

(a) By Public Resolution No. 96 (54 Stat. 858, approved 27 August 1940) the President was authorized, during the period ending 30 June 1942, to order into the active military service for a period of 12 months, any member or unit of any or all reserve components of the Army of the United States, and retired personnel of the Regular Army, with or without his consent, but it was provided that none so ordered should be employed outside the Western Hemisphere, except in United States territories and possessions. Under the authority of the Resolution and the National Defense Act and as Commander in Chief, the President, by Executive Orders 8530, 31 August 1940 (5 F.R. 3501); 8551, 25 September 1940 (5 F.R. 3820); 8594, 16 November 1940 (5 F.R. 4557); 8605, 30 November 1940 (5 F.R. 4795); 8618, 23 December 1940 (5 F.R. 5255); 8627, 4 January 1941 (6 F.R. 117); 8633, 14 January 1941 (6 F.R. 415 and, as corrected, 729) as amended by 8756, 17 May 1941 (6 F.R. 2474) ordered a number of active and inactive units of the National Guard of the United States into active Federal service.

(b) In the Selective Training and Service Act of 1940 (act 16 September 1940; 54 Stat. 885; 50 U.S.C. 301; M.L. 1939, Sup. II, sec. 2225-1) Congress declared its intent that, when the necessity for such security existed, the National Guard of the United States and those in training and service for a 12 month period under the act should be ordered into or retained in Federal service as long as the necessity should exist.

(c) The Service Extension Act of 1941 (act 18 August 1941; 55 Stat. 626; 50 U.S.C. 351; M.L. 1939, Sup. II, sec. 2227-1) authorized the President to extend to 18 months the period of service of members of the reserve components of the Army of the United States and those subject to training and service under the Selective Training and Service Act.

(d) By act 13 December 1941 (supra, note 13), the restrictions on the territorial use of reserve components and members of the Army of the United States were suspended for the duration of any war and 6 months thereafter, and the period of service, appointment, and enlistment were extended for a like period.

Except in time of Congressionally declared emergency, the officers of the National Guard of the United States may not be employed on active duty for more than 15 days in a calendar year without their consent.[17]

Personnel so ordered to active duty are temporarily relieved, as of the date of such order, from duty in the National Guard of each State, Territory, and the District of Columbia and during the period of service are subject to such laws and regulations of the Army of the United States as are applicable to members of the Army whose permanent retention in active military service is not contemplated by law.[18] Personnel, except general officers, in active military service receive the pay and allowances, and disability benefits provided for members of the reserve forces and, upon being relieved from duty, they and their units revert to their National Guard status.[19]

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17. Sec. 38

18. Ibid. The date of induction, however, is the date on which response to orders to active duty is required. Par. 148, AR 130-10, 27 March 1940. The Presidential proclamations ordering units and members of the National Guard of the United States into the active military service of the United States are transmitted by the Secretary of War to the governors of the affected states and territories whose National Guard units and personnel form the units of the National Guard of the United States and to service command and theatre commanders concerned (Id., par. 147).

19. Secs. 111, 112.

CHAPTER 5 - ORGANIZED RESERVES

There is little statutory material or pertinent interpretation on the subject of the Organized Reserves. The National Defense Act does not define this component of the Army of the United States but does include it as a part of the organized peacetime establishment.[1]

The Organized Reserves have as their purpose the organization of Reserve officers and men in peacetime into skeleton units entirely comprised within the limits of particular states or territories. They provide partially trained tactical units which may be quickly expanded to war strength and completely trained in time of emergency.[2]

In the present emergency, however, the members of the Officers' Reserve Corps and the Enlisted Reserve Corps, although assigned to the various units of the Organized Reserves, were not ordered into active military service as members of such units but were ordered as individual members of the two Corps. Chapters 6 and 7, infra, deal with the component Corps.[3]

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1. Sec. 3 (M.L. 1939, sec. 3). Section 3a of the National Defense Act was added by act 4 June 1920 (41 Stat. 760; 10 U.S.C. 341; M.L. 1939, sec. 1339b).

2. See generally, AR 140-5, 17 June 1941.

3. See Dig. Op. JAG, 1912-40, sec. 2.

CHAPTER 6 - OFFICERS' RESERVE CORPS

The Officers' Reserve Corps is organized for the purpose of providing a reserve of officers available for Federal military service when needed. Its personnel consists of general officers and other officers assigned to sections generally corresponding to those of the Regular Army.[1] Its supervision and development, and the policies and regulations affecting its members are the responsibility of the Chief of Staff.[2]

While in active status, the units of the Organized Reserves receive the training prescribed in current War Department letters of instruction and while in inactive status, the members are offered courses of instruction at troop, group, and special service schools and the Command and General Staff School, and may enroll in Army Extension Courses and other military educational activities. Regular Army officers are assigned to various units and groups for instructional and administrative purposes.[3]

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1. Sec. 37, National Defense Act. The section numbers herein, unless otherwise noted, are those of the National Defense Act.
2. Par. 5, AR 140-5, 17 June 1941. The Executive for Reserve and R.O.T.C. Affairs is the officer ultimately charged with the administrative matters concerning the Corps. Ibid; see ASF Organization Manual, 15 July 1943, sec. 207.06. For purposes of administrative control, Reserve officers are under the jurisdiction of the commanders of the service commands in which their permanent residences are located. Par. 5d, AR 140-5, 17 June 1941.
3. Id., pars. 62-65.

All personnel in the Officers' Reserve Corps are Reserve officers and are appointed in the Army of the United States. Appointments in grades below that of brigadier general are made by the President alone and general officers by and with the advice and consent of the Senate. All appointments are for the period of 5 years but those in force at the outbreak of war are continued in force until 6 months after its termination.[4]

At the time of his appointment in peacetime, an officer must be a citizen of the United States or of the Philippine Islands between the ages of 21[5] and 60 years.[6] As provided in the National Defense Act[7] and Army Regulations,[8] the following are generally eligible for appointment:

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4. Sec. 37. A state of war, once declared, does not ordinarily end with the cessation of hostilities, but continues until the conclusion of a treaty of peace or until some date set by law. SPJGA 1943/4798, 10 April 1943; II Bull. JAG 156, sec. 1348.

5. Par. 13b, C 2, AR 140-5, 17 June 1941, sets the wartime minimum age at 18 years.

6. Par. 13, id, sets out the minimum and maximum ages for appointments in the several branches. The minimum age for appointment in the Judge Advocate General's Department Reserve in the grade of captain (base grade in the section) is 28 and the maximum is 37.

7. Sec. 5.

8. Basically, AR 140-5, 17 June 1941. Under current War Department policy most appointments during the period of the war are in the Army of the United States without component.

(a) Former Regular Army officers.

(b) Former officers of the Army at any time between 6 April 1917 and 30 June 1919.

(c) Former officers of the National Guard of the United States.

(d) Graduates of the Reserve Officers' Training Corps.[9]

(e) Warrant officers and enlisted men of the Regular Army and National Guard of the United States and enlisted men of the Enlisted Reserve Corps.

(f) Persons who served in the Army at any time between 6 April 1917 and 11 November 1918.

(g) Others specially trained or qualified.

In the usual case, applications for appointment must first be approved by the commander of the service command who then refers them to an examining board, which will require the presence of the applicants and inquire into physical, moral, professional and general qualifications.[10] Recommendations for peacetime promotion must show that the Reserve officer (1) holds a Certificate of

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9. Secs. 40 to 47d relate to the establishment and maintenance of the Reserve Officers' Training Corps units in civil educational institutions. Regular Army officers are assigned to the units to supervise military instruction. Graduation from the courses and attendance at camp are conditions precedent to appointment.

10. Pars. 20-23, AR 140-5, 17 June 1941.

Capacity for the next higher grade;[11] (2) is recommended for an existing vacancy;[12] (3) has served a prescribed minimum time in grade; (4) has, during service in grade, completed at least 14 days of active duty training with an Efficiency Report of at least "satisfactory";[13] (5) has appropriate qualifications and experience required by his section; and (6) has, within 1 year prior to date of recommendation, passed a prescribed physical examination.[14]

Except in time of national emergency declared by Congress no Reserve officer may be ordered to active duty for more than 15 days in any calendar year without his consent.[15] When

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11. An instrument in writing which certifies that the officer named therein has met the professional qualifications prescribed for the grade and section specified in the certificate. Par. 33, id.

12. No vacancy is necessary for promotion from the grade of second lieutenant to first lieutenant. Par. 31b, id.

13. This requirement may be waived. Ibid.

14. Ibid.

15. See series of legislative acts in present emergency as set out in Chapter 4, note 16. By E.O. 9049, 6 February 1942 (Bull. 7, WD, 1942), the President ordered into the active military service of the United States for the duration of the war and six months thereafter all personnel of the Organized Reserves not already in such service. By act 3 April 1939 (53 Stat. 557), act 25 July 1939 (53 Stat. 1079) and act 10 December 1941 (55 Stat. 796; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117) all officers, warrant officers, and enlisted men of the Army of the United States, other than

not on active duty, members of the Corps are not, by reason of their appointments and commissions, deemed to be officers or employees of the United States, nor are they entitled to pay and allowances.[16]

An officer of the Officers' Reserve Corps may be discharged at any time in the discretion of the President,[17] but appointments are usually terminated by one of the usual six means of separation from the service, namely, (1) death, (2) resignation, (3) vacation of appointment, (4) discharge,[18] (5) expiration of term of appointment, and (6) dismissal or dropping from rolls.[19]

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15. (cont.)
officers and enlisted men of the Regular Army, if called or ordered into active military service by the Federal government for extended service in excess of 30 days are generally entitled to the same pensions, compensation, retirement pay and hospital benefits provided for personnel of the Regular Army of corresponding grades and length of service. A statute (act 26 September 1941; 55 Stat. 733; 10 U.S.C. 456a; M.L. 1939, Sup. II, sec. 1117) confers similar disability benefits on Reserve officers ordered to more than 30 days active duty on or after 28 February 1925.

16. Secs. 37, 37a.

17. The President has discretionary power to discharge a member of the Officers' Reserve Corps for any reason or no reason and the power of discharge may be delegated to the Secretary of War. Seltzer v. U.S., Ct. Cl. 45709, 1 March 1943; II Bull. JAG 112, sec. 1358a.

18. In peacetime a board of officers to investigate and report on matters of individual misconduct, inefficiency, or other unfitness, is appointed in proper cases. It is commonly termed a "74c" board. Par. 74c, AR 140-5, 17 June 1941.

19. Id., pars. 70-76.

CHAPTER 7 - ENLISTED RESERVE CORPS

The Enlisted Reserve Corps consists of the men voluntarily enlisted therein[1] or transferred thereto.[2] With certain minor exceptions, enlistments are limited to persons eligible for enlistment in the Regular Army[3] who have had such military or technical training as may be prescribed by the Secretary of War.

Enlistments are generally for 3 year periods and those in force at the outbreak of war or entered into during its existence continue in force until six months after its termination.[4]

The Corps is organized into sections generally similar

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1. Sec. 55, National Defense Act.

2. Sec. 3c of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 50 U.S.C. 301; M.L. 1939, Sup. II, sec. 2225-1), provides for the transfer to "a reserve component of the land or naval forces of the United States" after completion of the period of training and service of persons inducted under the act. The Enlisted Reserve Corps has been selected as the component for the transfer of personnel discharged for economic reasons, etc. Under certain circumstances, transfers for a short period of time of inductees may be effected immediately after induction to permit arrangement of personal affairs.

3. Enlistments in the Regular Army have been suspended for the duration of the present war. Par. 5, AR 600-750, 30 September 1942. The age limits, by statute, for original enlistment in the Regular Army are 18 and 35. Act 2 March 1899 (30 Stat. 978; 10 U.S.C. 621; M.L. 1939, sec. 246).

4. Sec. 55, National Defense Act. See Chapter 4, note 16, for other legislation during the present emergency.

to those of the Regular Army, composed, as far as practicable, of men residing in the same locality, and to it may be assigned Regular Army and Reserve officers for training purposes.[5] The units form part of the Organized Reserves.[6]

Members of the Enlisted Reserve Corps may be placed on active duty, as individuals or organizations, in the discretion of the President, but except in time of a national emergency declared by Congress,[7] no reservists may be ordered to active duty in excess of the number permitted under appropriations made for the purpose, nor for a longer period than 15 days in any calendar year without their consent. When on active duty they receive the same pay and allowances as other enlisted men of like grades and length of service.[8] Army Regulations 150-5[9] contain the general regulations, including the methods of separation from the service, relating to the Corps.

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5. Sec. 55a, National Defense Act.

6. See Chapter 5, supra.

7. For present emergency legislation see Chapter 4, note 16.

8. Sec. 55b, National Defense Act.

9. 30 December 1931.

CHAPTER 8 - SELECTEES OR INDUCTEES

Declaring it to be imperative that the personnel of the armed forces of the United States be increased and trained, Congress enacted the Selective Training and Service Act of 1940.[1] The act, as amended, in general provides for the registration[2] for military training and service in the land and naval forces of the United States of all male citizens and residents of the United States between the ages of 18 and 65 and for the training and service, with certain exceptions[3] of those between 18 and 45.

Section 3a of the act provides that, except in time of war, the maximum number in training and service should be 900,000 but the limitation was later suspended before the entry of the United States into the present war.[4] Except when Congress declares that the national interest is imperiled, a minimum period

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1. Act 16 September 1940 (54 Stat. 885; 50 U.S.C. 301; M.L. 1939, Sup. II, sec. 2225-1).

2. With certain exceptions, e.g., members of land and naval forces and reserve components, diplomatic representatives, etc.

3. See, for example, Chapter 2, note 3(c), supra. Deferred classifications are provided for the Vice President of the United States, the Governors of the states, members of state and Federal legislative and judicial bodies, ministers of religion, and others.

4. Act 18 August 1941 (55 Stat. 628; 50 U.S.C. 359; M.L. 1939, Sup. II, sec. 2227-9).

of 12 consecutive months of training and service is prescribed, with subsequent transfer to a reserve component carrying with it the liability for further service.[5]

Those inducted for training and service under the act receive the same pay, allowances, pensions, disability, death compensation and other benefits as are provided for other enlisted men of like grade and length of service of the component to which assigned.

The President is authorized to establish a Selective Service System and to prescribe rules and regulations for the selection of men for induction and training under state quotas and for the deferment of essential workers, persons with dependents, and certain students.

Under certain conditions, selectees who leave designated permanent positions of employment may be reinstated in them or

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5. Relief from liability for further service in a reserve component is provided under certain circumstances. Sec. 3c, Selective Training and Service Act of 1940.

6. Sec. 5g of the act provides that those who, by reason of religious training and belief, are conscientiously opposed to combatant training and service, may, upon upholding of their claim for exemption from such service, be inducted and assigned to noncombatant service. Those found to be conscientiously opposed to participation in noncombatant service, may, in lieu of induction for training and service, be assigned to work of national importance under civilian direction.

in ones of like seniority, status and pay upon conclusion of their military service. The benefits of the Soldiers' and Sailors' Civil Relief Act of 1940,[7] as amended, are available to those in service after 17 October 1940.[8]

CHAPTER 9 - OFFICERS APPOINTED IN THE ARMY OF THE UNITED STATES

The act 22 September 1941,[1] authorized the President, during the present emergency, to appoint qualified persons as temporary officers in the Army of the United States without appointing them in any particular component. The officers are commissioned in the Army of the United States, and they may be ordered into the active military service for periods of time prescribed by the President.[2]

Appointments in grades below that of brigadier general

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7. Act 17 October 1940 (54 Stat. 1179; 50 U.S.C. 510; M.L. 1939, Sup. II, sec. 2230). See Part XIV.

8. For service prior to that date, section 13 of the act made available certain benefits of the Soldiers' and Sailors' Civil Relief Act, approved 8 March 1918 (40 Stat. 440).

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1. 55 Stat. 728; 10 U.S.C. 484, note; M.L. 1939, Sup. II, sec. 2160a; see Chapter 1, note 5, supra.

2. Regulations governing appointment are found at 6 F.R. 5660 and 5823; also see AR 605-10, 30 December 1942.

are made by the President alone, those in that grade and above, by and with the advice and consent of the Senate. The appointments may be vacated by the President at any time and, if not sooner vacated, continue for the duration of the present emergency and 6 months thereafter. The officers commissioned under the provisions of this act receive the same pay and allowances and are entitled to receive the same rights, privileges, and benefits as members of the Officers' Reserve Corps[3] of the same grade and length of service.[4]

CHAPTER 10 - MEN ENLISTED IN THE ARMY OF THE UNITED STATES

The act 14 May 1940[1] provides that in time of war or other emergency declared by Congress all enlistments in the active military service of the United States are to be in the Army of the United States, without specification of component. The en-

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3. See Chapter 6, supra.

4. By act 7 July 1943 (Public Law 114, 78th Cong.; Bull. 14, WD, 16 July 1943), the act 22 September 1941, was amended to provide that no warrant officer temporarily appointed as a commissioned officer under the act is to have his pay and allowances reduced below the amounts payable to him at the time of his appointment.

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1. Adding par. 15 to sec. 127a of the National Defense Act (54 Stat. 213; 10 U.S.C. 634; M.L. 1939, Sup. II, sec. 2163a).

listments are for the duration of the war or emergency and six months thereafter, unless sooner terminated by the President.

Eligibility for such enlistments is limited to persons not less than 18 years of age and otherwise qualified under regulations prescribed by the Secretary of War. The act also provides that, as long as personnel enlisted in the Army of the United States, or in any of its components, continue in military service, they may be assigned to duty with any unit of the Army of the United States and may be transferred from one unit to another without regard to the component status of the units involved.[2]

CHAPTER 11 - WOMEN'S ARMY CORPS

By the provisions of act 1 July 1943,[1] there was established "in" the Army of the United States, as a "component" thereof,[2] the Women's Army Corps. The period of existence of the

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2. See Chapter 1, note 6, supra.

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1. Public Law 110, 78th Cong.; Bull. 12, WD, 7 July 1943. Section 5 of the act provides for the repeal of the act which created the Women's Army Auxiliary Corps (act 14 May 1942, 56 Stat. 278; 10 U.S.C. 1707; M.L. 1939, Sup. II, sec. 2285-1), except section 11 thereof (disability benefits based on former status), effective "on the last day of the second calendar month following the date of approval" of the act.

2. The predecessor Corps was organized for noncombatant service "with" (sec. 1 of the earlier act) and was not a "part" of the Army (sec. 12, id.). SPJGA 354.01, 2 June 1942; SPJGA 354.01, 14 July 1942.

Corps is the duration of the present war and six months thereafter or such shorter period as Congress or the President may prescribe.

The commissioned officers are women appointed as officers in the Army of the United States under the provisions of the act 22 September 1941,[3] and ordered into the active military service. The enlisted personnel are enlisted in the Army of the United States under the act 14 May 1940,[4] and, on the date of enlistment, must be citizens of the United States between the ages of 20 and 50 years. The commissioned and noncommissioned officers exercise command only over women of the Corps and other members of the Army of the United States specifically placed under their command.

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3. See Chapter 1, note 5, supra; also Chapter 9, supra; and Part VI, Chapter 1, infra.

4. See Chapter 1, note 6, supra; also Chapter 10, supra; and Part VI, Chapter 2, infra.

ADDENDA

Page V - 34, note 4.

Draft of the National Guard prior to 1933. At the time of the Spanish-American War, regiments of organized militia were permitted to volunteer and be inducted as units into the Volunteer Army of the United States. When the members of a regiment enlisted as a body, the governors of the several states and territories were authorized to appoint the officers as officers of the same unit in the Volunteer Army. Sec. 6, act 22 Apr. 1898 (30 Stat. 361). The National Defense Act of 1916 empowered the President to draft the National Guard into the military service of the United States and to commission the officers in the Army of the United States, to serve for the duration of the war, whenever Congress should authorize the use of troops in excess of those of the Regular Army. Sec. 111, act 3 June 1916 (39 Stat. 211). Specific Congressional authorization was contained in the Selective Draft Law of 1917. Sec. 1(2), act 18 May 1917 (40 Stat. 76). Pursuant to the authority so conferred, the President called the National Guard into Federal service and drafted it into the Army of the United States. Proclamation of 3 July 1917 (40 Stat. 1681). For the history of militia legislation generally, see Wiener, "The Militia Clause of the Constitution," 54 Harv. L. R. 181 (1940).

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Enlisted Reserve Corps. Current procedures governing enlistment in, transfer to, call to active duty from, discharge from, and reports of status of the Enlisted Reserve Corps, are set out in Cir. 117, WD, 22 Mar. 1944.

PART VI

ARMY PERSONNEL

CHAPTER 1 - COMMISSIONED OFFICERS

1. Original Appointment.

During the period of the war practically all original appointments are being made in the Army of the United States, without appointment in any particular component, under the provisions of the act of 22 September 1941.[1] Appointments under this statute are temporary and are effective for the duration of the war and 6 months thereafter, unless sooner terminated.[2]

Although the National Defense Act, as amended, provides that in "time of war * * * persons appointed as officers, shall be appointed and commissioned in the Army of the United States",[3] The Judge Advocate General has ruled that this provision does not set out the exclusive manner for the appointment of commissioned officers in time of war.[4]

Regular Army. Original appointments in the Regular Army are limited in number to the filling of vacancies within the total

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1. 55 Stat. 728; 10 U.S.C., Sup. I, 484; M.L. 1939, Sup. II, sec. 2160a.

2. Par. 3, AR 605-10, 30 Dec. 1942.

3. Par. 7, sec. 127a, National Defense Act, as amended; 10 U.S.C. 513; M.L. 1939, sec. 289.

4. JAG 210.1, 5 Sept. 1941; JAG 351.1, 30 Dec. 1941.

commissioned strength authorized by Congress, and must be made from the groups specified in section 24e of the National Defense Act, as amended. There are general regulations[5] which govern the original appointment of officers in all the arms and services of the Regular Army except the Medical Department, Chaplains, and the Judge Advocate General's Department. Under current War Department policy, the appointment of officers in the Regular Army, with certain exceptions, has been suspended for the duration of the war.[6]

Officers' Reserve Corps. The Officers' Reserve Corps was set up to provide a reserve of officers available for military service when needed, and consists of officers commissioned in sections corresponding generally to the various arms and services of the Regular Army. Appointments are for a period of 5 years, but an appointment in force at the outbreak of war or made in wartime, will continue in force until 6 months after the termination of the war, should the 5-year period terminate prior to that time. The general regulations governing the Officers' Reserve Corps, including original appointments, are found in AR 140-5. The special requirements pertaining to each section of the Officers' Reserve Corps are set forth in the appropriate Army Regulations (AR 140-22

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5. AR 605-5, 8 Dec. 1934.

6. Sec. I, Cir. 121, WD, 17 May 1943.

to 140-39, inclusive).

National Guard of the United States. Appointments in the National Guard of the United States are dual status appointments. All Federally recognized officers of the National Guard of a State, Territory, or the District of Columbia, are eligible for appointment in the National Guard of the United States in grades corresponding to those in which they are Federally recognized in the National Guard.[7] Conversely, appointments to commissioned grade in the National Guard of the United States are restricted to Federally recognized National Guard personnel.

The term of every appointment in the National Guard of the United States is coextensive with the officer's Federally recognized status in the National Guard,[8] and upon withdrawal of Federal recognition he is to be discharged from the National Guard of the United States.[9] An appointment in force at the outbreak of war continues in force until 6 months after the termination of the war.[10] The general regulations governing appointments in the

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7. Sec. 73, National Defense Act, as amended (32 U.S.C. 113a; M.L. 1939, sec. 1266d).

8. Sec. 38, National Defense Act, as amended (32 U.S.C. 19; M.L. 1939, sec. 1266b); par. 10, AR 130-15, 3 Nov. 1942.

9. Sec. 77, National Defense Act, as amended (32 U.S.C. 114; M.L. 1939, sec. 1287).

10. Sec. 38, National Defense Act, as amended; see footnote 8, supra.

National Guard of the United States are found in AR 130-15.

Army of the United States. Inasmuch as most original appointments made during the period of the war are temporary appointments in the Army of the United States, attention should be directed to certain general aspects of appointment under the act of 22 September 1941.[11]

The act of 22 September 1941, provides generally that temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons to any particular component of the Army of the United States. The regulations which have been prescribed are those set out in AR 605-10.[12] The act further provides that such appointments in grades below that of brigadier general shall be made by the President alone; general officers[13] are appointed by the President with the advice and consent of the Senate. In the absence of the mentioned statutory provision, all appointments now being made under the act, including appointments of graduates

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11. 55 Stat. 728; 10 U.S.C., Sup. I, 484; M.L. 1939, Sup. II, sec. 2160a.

12. 30 Dec. 1942.

13. The term "general officer" denotes an officer of the rank of brigadier general or above; "field officer" refers to an officer of the rank of colonel, lieutenant colonel or major; and "company officers" are captains and lieutenants. See SPJGA 1943/2687, 12 Feb. 1943.

of officer candidate schools, would require the approval of the Senate under the United States Constitution.[14] The act provides that any appointment made under its provisions may be vacated at any time by the President, and if not sooner vacated will continue during the present emergency and 6 months thereafter. The act further provides that officers appointed under its provisions shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service.

An appointee must be a citizen of the United States or of the Philippine Islands, or a citizen of a co-belligerent or friendly country who otherwise possesses the same qualifications as a citizen of the United States, between the ages of 18 and 60 years.[15]

Under the National Defense Act, as amended, an officer holding a permanent commission in the Regular Army may be appointed to a higher temporary grade in the Army of the United States in time of war or national emergency determined by the President,

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14. Const., art. II, sec. 2. Under this provision Congress may vest the appointment of such inferior officers as it thinks proper in the President alone; otherwise the appointment of officers of the United States must be with the advice and consent of the Senate.

15. Par. 6, AR 605-10, 30 Dec. 1942.

without vacating his permanent appointment in the Regular Army.[16] Similarly, under the act of 22 September 1941,[17] a Reserve officer or a National Guard officer may be appointed to a higher or lower temporary grade in the Army of the United States, without thereby affecting his regular appointment in the Officers' Reserve Corps or the National Guard of the United States, as the case may be.

2. Acceptance of Appointment; Oath

An appointment as a commissioned officer is not effective unless the tender of appointment is accepted.[1]

The Revised Statutes prescribe a form of oath to be taken by any person who "is elected or appointed to any office of honor or trust under the Government of the United States" before entering upon the duties of his office.[2] The execution and forwarding of the oath is the usual manner of indicating acceptance of a tendered appointment. An appointment can, however, be accepted even though the oath is not executed. Any act evidencing the intent to accept

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16. Par. 7, sec. 127a, National Defense Act, as amended (10 U.S.C. 513; M.L. 1939, sec. 289).

17. 55 Stat. 728; 10 U.S.C., Sup. I, 484; M.L. 1939, Sup. II, sec. 2160a.

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1. JAG 241.19, 5 Feb. 1919; Dig. Op. JAG, 1912-40, sec. 121 (1).

2. R.S. 1757 (5 U.S.C. 16; M.L. 1939, sec. 118).

the appointment is sufficient to constitute a valid acceptance.[3] Entering upon and performing the duties of the office are deemed to effect a valid acceptance by conduct.[4]

The fact that an appointment can be effected without the statutory oath, does not mean, however, that the oath can be ignored. The execution of the oath remains a condition precedent to the officer's right to receive the pay and allowances of the office.[5]

When an appointment has been accepted informally by entry upon duty, the oath, when subsequently taken, relates back to the date of entry on duty and entitles the appointee to full pay and allowances for the intervening period.[6]

3. De Facto Officers

An individual may undertake to perform the duties of a commissioned grade under apparently proper orders, and it may later develop that the orders were improper because the individual did not have a valid appointment to the grade in question. What status can be accorded an individual for the period during which in good faith he performed the duties of the commissioned grade without in

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3. JAG 210.1, 21 Apr. 1923; Dig. Op. JAG, 1912-40, sec. 121 (1).

4. SPJGA 013.1, 14 July 1942.

5. SPJGA 013.1, 14 July 1942; 21 Comp. Gen. 817.

6. 21 Comp. Gen. 817; MS. Comp. Gen. B-23168, 16 Feb. 1942; I Bull. JAG 50, sec. 1342.

fact holding a valid appointment thereto? Particularly, what are his rights to the pay and allowances of the grade?

A retroactive appointment cannot properly be made. An order which purports to make an appointment effective on a date prior to the issuance of the order is void.[1] In the absence of express statutory authority, neither administrative nor executive action can give retroactive effect to the appointment of an officer so as to entitle him to the pay and allowances of the office as of a date prior to the actual appointment.[2]

Such an individual may, however, be regarded as a de facto officer in the grade in question. The requirements are that he occupy the office and discharge its duties in good faith, and with every appearance of acting with authority; he must not be a mere intruder or usurper.[3]

A de facto officer may retain such compensation as has been paid him for services actually rendered in the office, provided it does not exceed the rate of pay prescribed for the de jure grade occupied.[4] It is settled, however, that a de facto

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1. Dig. Op. JAG, 1912, p. 277.

2. MS. Comp. Gen. B-29430, 2 Feb. 1943; II Bull. JAG 74, sec. 1342.

3. United States v. Royer, 268 U.S. 394.

4. United States v. Royer, 268 U.S. 394; SPJGA 1942/2083, 21 May 1942; I Bull. JAG 71, sec. 2220-1 (6).

officer who has not been paid cannot recover compensation for his services.[5]

4. Posthumous Appointments

The power to make posthumous appointments exists only as it is authorized by statute.

By act of 28 July 1942,[1] Congress made provision in certain situations for the posthumous appointment of deceased military personnel to commissioned or noncommissioned grades. Four distinct situations are covered by the separate sections of the act:

Section 1 authorizes issuance of an appropriate commission in the name of any enlisted man who, while in the military service after 8 September 1939, was duly appointed to a commissioned grade, but was unable to accept the appointment by reason of his death in line of duty.

Section 2 authorizes issuance of an appropriate appointment and commission in the name of any enlisted man who, while in the military service after 8 September 1939, successfully completed the course at a training school for officers and was recommended

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5. Mechem, Public Offices and Officers, sec. 331; JAG 154, 14 Nov. 1941; JAG 210.451, 30 Oct. 1941.

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1. 56 Stat. 722; M.L. 1939, Sup. II, sec. 150.

for appointment to a commissioned grade by the officer commanding the school, but was unable to receive or accept such appointment by reason of his death in line of duty.

Section 3 authorizes issuance of an appropriate commission in the name of anyone who, while in the service after 8 September 1939, was officially recommended for appointment or promotion to a commissioned grade, which recommendation was duly approved by the Secretary of War, but was unable to receive or accept such appointment or promotion by reason of his death in line of duty.

Section 4 authorizes issuance of an appropriate warrant in the name of any enlisted man who, while in the service after 8 September 1939, was officially recommended for appointment or promotion to a noncommissioned grade, but was unable to receive or accept such appointment by promotion by reason of his death in line of duty.

In addition to special requisites peculiar to each of the four sections of the statute, there are certain general requisites common to all four sections:

(a) The appointee must have been in the military service of the United States.

(b) The requisite steps preliminary to appointment (differing with each of the four sections) and the appointee's death must have taken place after 8 September 1939. This is the date on which the President proclaimed the existence of a "limited emergency".

(c) The appointee's death (intervening to prevent his

acceptance of the appointment) must have occurred in line of duty.

5. Relative Rank

Relative rank as between two or more commissioned officers may have significance in determining seniority, for purposes of command, promotion or social amenities.

The rules as to relative rank have been clarified in some degree by a recent statute[1] enacted by the 77th Congress, amending section 127a of the National Defense Act.[2] As now amended, the eighth paragraph of this section reads:

> " * * * Unless special assignment is made by the President under the provisions of the one hundred and nineteenth article of war, all officers in the active service of the United States in any grade shall take rank according to date, which, in the case of an officer of the Regular Army, is that stated in his commission or letter of appointment, and, in the case of a reserve officer or an officer of the National Guard called into the service of the United States, shall precede that on which he is placed on active duty by a period equal to the total length of active Federal service and service under the provisions of sections 94, 97, and 99 of this Act, which he may have performed in the grade in which called or any higher grade. When dates of rank are the same, precedence shall be determined by length of active commissioned service in the Army, which shall include all time served on active duty as a commissioned officer in the Federal ser-

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1. Act 14 Dec. 1942 (56 Stat. 1051; M.L. 1939, Sup. II, sec. 293).

2. Par. 8, sec. 127a, National Defense Act, as amended (10 U.S.C. 511; M.L. 1939, sec. 293).

> vice, and commissioned service under provisions of sections 94, 97, and 99 of this Act. When length of such service is the same, officers of the Regular Army shall take rank among themselves according to their places on the promotion list, preceding reserve and National Guard officers of the same date of rank and length of service, who shall take rank among themselves according to age."

Three general rules are thus used successively in determining relative rank of officers of the same grade in active service, in the absence of special assignment of command made by the President under Article of War 119.[3] The rule applied first is "date of rank". No difficulty is presented in the case of a Regular Army officer on the active list; the statute clearly fixes his "date of rank" as that stated in his commission or letter of appointment. The "date of rank" of a Reserve officer or National Guard officer is determined by fixing a date preceding the date he is placed on active duty by a period equal to the total length of his active Federal service and service under the provisions of sections 94, 97, and 99 of the National Defense Act, performed in the same or a higher grade.[4]

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3. The powers conferred on the President by Article of War 119 have been delegated by the Secretary of War, acting for the President, to certain commanders. Sec. III, Cir. 120, WD, 12 May 1943.

4. For example, Captain X (Inf.-Res.) is ordered to active duty on 1 Oct. 1943, in the grade of captain. He had previously served a total of 30 days in active Federal service in the same grade. His "date of rank" is 1 Sept. 1943.

The statute provides no means of computing the "date of rank" of a retired Regular Army officer who has been recalled to active duty. Manifestly it was not intended that such a retired officer should have the same "date of rank" as if he had been serving on the active list without interruption. The Judge Advocate General has expressed the opinion that the "date of rank" of retired officers should be fixed according to the length of prior active commissioned service performed in the grade in which called to active duty, including service under temporary appointment to any higher grade.[5]

If the "date of rank" of two officers is the same, the second test is applied--length of active commissioned service in the Army. Regular Army officers may count total commissioned service, in any grade. Reserve officers and National Guard officers may count only the period of time they have served on active Federal duty as a commissioned officer, in any grade, plus, in the case of a National Guard officer (by virtue of the act of 14 December 1942), commissioned service under the provisions of sections 94, 97, and 99 of the National Defense Act, as amended.

If "date of rank" and length of active commissioned service of two officers are both the same, the third general rule governs: Regular Army officers outrank Reserve and National Guard

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5. JAG 210.725, 27 May 1941.

officers and take rank among themselves according to their places on the promotion list; Reserve and National Guard officers take rank among themselves according to age. Retired Regular Army officers who have been recalled to active duty will take rank among themselves by order of original entrance into the Army, when their dates of rank and length of active commissioned service are the same.[6]

Temporary officers, Army of the United States, who are commissioned under the act of 22 September 1941,[7] take rank in the same manner as Reserve officers.[8]

The rapid expansion of the air forces in recent years, and a special temporary promotion policy in the Air Corps made necessary thereby, gave rise to several troublesome problems of relative rank. The act of 16 February 1942,[9] is the most recent Congressional attempt to allow for relatively rapid promotion in the Air Corps without undue discrimination against the officers of other branches of the Army. Under this statute, an officer may be appointed to "higher temporary grade" while assigned to duty with

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6. Par. 4c, AR 600-15, 10 Dec. 1941.

7. 55 Stat. 728; 10 U.S.C., Sup. I, 484; M.L. 1939, Sup. II, sec. 2160a.

8. Par. 20, AR 605-10, 30 Dec. 1942.

9. 56 Stat. 94; M.L. 1939, Sup. II, sec. 2160c.

the Air Corps "without vacating his existing commission" in the Regular Army, Officers' Reserve Corps, National Guard of the United States or Army of the United States. Officers so appointed to higher temporary grades take rank within the Air Corps from the date stated in their letters of appointment to such grade; but throughout the Army at large, they take rank in such higher temporary grade after officers holding such grade pursuant to appointment under a statute applicable to the Army at large.[10]

6. Promotion

Promotion in permanent grade in the Regular Army operates only in accordance with a system of promotion by seniority as prescribed by statute. Vacancies in grades below that of brigadier general must be filled by the promotion of officers in the order in which they stand on the promotion list, without regard to the branches in which they are commissioned.[1] With a few

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10. SPJGA 1943/4160, 6 April 1943; II Bull. JAG 165, sec. 2160c. For example, assume that officers A and B, both captains on duty with the Air Corps, have that rank in the AUS; that Captain A was promoted to Major AUS-AC on 1 March 1942, and to Major AUS on 1 July 1942; that Captain B was promoted to Major AUS on 1 June 1942. Major B is senior to Major A in the Army generally except within the Air Corps where Major A is senior to Major B.

1. Sec. 24c, National Defense Act, as amended (10 U.S.C. 552; M.L. 1939, sec. 274).

exceptions, all Regular Army officers on the active list in the grades of second lieutenant to colonel, inclusive, are promotion list officers.[2] The statutory system of promotion in permanent grade of promotion list officers prescribes, for example, 3 years' continuous service for promotion to permanent grade of first lieutenant; 10 years' continuous service for promotion to permanent grade of captain.[3] No examination other than a physical examination is required,[4] and if the officer fails in his physical examination and is found incapacitated for service by reason of physical disability contracted in line of duty, he is retired with the rank to which his seniority entitles him to be promoted.[5]

A rigid system of promotion which is based on seniority becomes inadequate in time of emergency to meet the needs of a greatly expanding army. During the present emergency there is in effect a special system of temporary promotions, announced by the War Department, which is applicable to all officers of the Army of

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2. Sec. 1, Army Promotion Act of 31 July 1935 (49 Stat. 505; 10 U.S.C. 553a; M.L. 1939, sec. 283). These exceptions are officers of the Medical Department, Chaplains and professors of the United States Military Academy.

3. 10 U.S.C. 552a; M.L. 1939 and Sup. II, sec. 274.

4. Sec. 24c, National Defense Act, as amended (10 U.S.C. 556; M.L. 1939, sec. 276).

5. Sec. 3, act 1 Oct. 1890 (26 Stat. 502; 10 U.S.C. 556; M.L. 1939, sec. 224a).

the United States.[6] The criteria specified for such temporary promotions are fitness and capacity for the duties and responsibilities of the next higher grade for which a position vacancy exists.[7] Certain general requirements have been announced governing the minimum periods of time in grade required and the submission of recommendations for promotion.[8]

A promotion to a higher grade constitutes a new appointment to another office. This is true of temporary as well as permanent promotions.[9] There is, accordingly, the same requirement of acceptance as in the case of an initial appointment.[10] Since a new office is involved, the necessity for taking the oath of office prescribed by section 1757 of the Revised Statutes,[11] must be considered.

The Comptroller General has construed section 1757 as requiring a new oath of office of an officer promoted to a higher

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6. Cir. 161, WD, 26 May 1942, as modified by sec. III, Cir. 417, WD, 23 Dec. 1942; Cir. 157, WD, 9 July 1943; Cir. 169, WD, 24 July 1943; Cir. 185, WD, 17 Aug. 1943.

7. Sec. III, Cir. 417, WD, 23 Dec. 1942.

8. See footnote 6, supra.

9. Par. 1a, AR 35-1660, 10 May 1939, as changed by sec. II, Cir. 142, WD, 1942.

10. SPJGA 210.2, 12 June 1942.

11. 5 U.S.C. 16; M.L. 1939, sec. 118.

grade as a condition precedent to his being paid the emoluments of the higher grade.[12] The harshness with which the dual requirements of acceptance and taking of a new oath operated in practical effect in overseas theatres, was brought into sharp focus recently when question arose as to how the promotion of certain Signal Corps officers interned in Japan might be accomplished.[13]

The situation led to the passage by Congress of the act of 14 October 1942,[14] which provides that every officer promoted to a higher grade at any time after 7 December 1941,

> "* * * shall be deemed for all purposes to have accepted his promotion to higher grade upon the date of the order announcing it unless he shall expressly decline such promotion, and shall receive the pay and allowances of the higher grade from such date * * *."

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12. 4 Comp. Gen. 845; 24 Comp. Dec. 547.

13. SPJGA 210.2, 12 June 1942. In this opinion, The Judge Advocate General concluded that the promotions might be made, but that in order for them to become effective, the officers concerned would have to be notified of their promotions and transmit their acceptances through officials of some neutral power. Expressing disagreement with the construction placed by the Comptroller General on section 1757 as requiring a new oath before the promoted officer could receive the pay of the higher grade, The Judge Advocate General was nevertheless bound to accept this ruling. Since officials of neutral powers could not administer the required oath, there was no way for the interned officers to qualify for the pay of the higher grade.

14. 56 Stat. 787; 10 U.S.C., Sup. II, 558; M.L. 1939, Sup. II, sec. 276a.

The same act further provides:

> "* * * No such officer who shall have subscribed to the oath of office required by section 1757, Revised Statutes, shall be required to renew such oath upon his promotion to a higher grade, if his service after the taking of such an oath shall have been continuous."

Within the provisions of the quoted statute, a promotion takes effect immediately upon its announcement, acceptance being presumed, without the delay previously incident to notification and acceptance. The officer becomes immediately entitled to the pay and allowances of the higher grade to which he has been promoted. His right to receive the emoluments of the higher grade is not conditioned upon his execution of a new oath of office. In the relatively rare instances where the officer's service may not have been continuous since his last execution of an oath, a new oath will still be required sometime during the term of office; but even in such instances, it does not appear that the taking of the new oath can be deemed a condition precedent to receiving the pay and allowances of the higher grade.

7. Retirement

The status of retirement is held only by Regular Army officers. It is not a manner of separation from the service. An officer on the retired list remains an officer of the United

States.[1] He is always subject to recall to active duty.[2]

There are a variety of methods by which a Regular Army officer on the active list may be placed on the retired list. Some are a matter of statutory right on the officer's part;[3] some are compulsory and mandatory by statute;[4] others rest within the discretion of the President.[5]

When a Regular Army officer appears to be incapable of performing the duties of his office by reason of physical or mental disability, the matter is the proper subject of inquiry by an Army retiring board.[6] If a retiring board finds that the officer is incapacitated for active service as the result of an incident

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1. Par. 21, AR 605-245, 17 June 1941.

2. Secs. 40b, 55c, 127a, National Defense Act, as amended. The act of 18 August 1941 (55 Stat. 627; 50 U.S.C., Sup. I, 356; M.L. 1939, Sup. II, sec. 2227-6), removed previously existing restrictions on peacetime recall of retired officers to active duty.

3. See pars. 1-3, AR 605-245, 17 June 1941. For example, a Regular Army officer with 40 years' service has a statutory right to be placed on the retired list and receive retirement pay on the basis of 75% of active duty pay. The statute is not self-executory, and retirement is only granted upon application therefor.

4. See pars. 9-12, AR 605-245, 17 June 1941. For example, retirement is by statute mandatory at 64 years of age.

5. See pars. 4-8, AR 605-245, 17 June 1941.

6. Par. 12, AR 605-250, 1 June 1943.

of service, and such decision is approved by the President, the officer is retired from active service and placed on the list of retired officers.[7] If the board's finding is that the incapacity is not the result of an incident of service, and its decision is approved by the President, the officer is retired from active service and placed on the retired list, or "wholly retired", as the President shall determine.[8] An officer "wholly retired" from the service becomes a civilian.[9]

During the present emergency, Regular Army officers are not being retired for physical disability if they can qualify for "limited service", except in those situations where retirement is made mandatory by law. With experience demonstrating the practicality of using limited service officers in active military service, the provisions of AR 605-245, so far as they pertain to the retirement of officers of the Regular Army, have been suspended during the emergency, except for those officers: (1) who are incapacitated and unfit for limited service duty; or (2) whose

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7. R.S. 1251; 10 U.S.C. 933; M.L. 1939, sec. 324.

8. R.S. 1252; 10 U.S.C. 934; M.L. 1939, sec. 324.

9. Par. 21, AR 605-245, 17 June 1941; Miller v. United States, 19 Ct. Cl. 338; 19 Op. Atty. Gen. 202. So, while it is generally true that "retirement" in the Army does not mean separation from the service, an exception exists in the case of an officer "wholly retired" on the basis of retiring board findings.

retirement is mandatory by law under the provisions of AR 605-245 or the act of 29 July 1941.[10]

Regular Army officers may also be placed on the retired list through a statutory procedure designed to vitalize the active list by the removal of inefficient or incompetent officers. A rather cumbersome procedure to accomplish this purpose is provided in section 24b of the National Defense Act, as amended, involving the annual classification of Regular Army officers into Class A (for retention in active service) and Class B (for retirement or discharge).[11] Under that procedure, however, no officer could finally be classified in Class B until he had been given an opportunity to appear before a court of inquiry.[12] The exigencies of wartime required the more expeditious procedure provided by the act of 29 July 1941.[13] This act suspends the operation of section 24b for the duration of the emergency and makes every

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10. Cir. 82, WD, 24 March 1943.

11. Sec. 24b, National Defense Act, as amended (10 U.S.C. 571; M.L. 1939, secs. 141, 225).

12. The regulations which govern classification under section 24b of the National Defense Act, are set out in AR 605-200, 6 Feb. 1935. Courts of inquiry are statutory boards officers; their composition, powers and procedure are prescribed in Articles of War 97 to 103, inclusive, and AR 600-300, 23 May 1927.

13. 55 Stat. 606; M.L. 1939, Sup. II, sec. 2162a

Regular Army officer subject to removal from the active list upon the recommendation of a board of general officers appointed by the Secretary of War. Officers removed from the active list in accordance with the new procedure, who have completed seven or more years of commissioned service, are placed on the retired list; those with less than seven years of commissioned service are honorably discharged.

Officers of the Army of the United States, other than the Regular Army, are not eligible for retirement or retired status. Recent legislation, however, accords to officers other than those of the Regular Army, who suffer disability or death in line of duty while in active Federal service, the same pensions, retirement pay and hospital benefits as are provided by law for Regular Army officers of corresponding grades and length of service.[14] The distinction between retirement and entitlement to retirement pay has been clearly recognized.[15]

Officers who have submitted resignations for the good of the service or who are to be discharged under conditions other

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14. Sec. 5, act 3 April 1939, as amended (10 U.S.C. Sup. I, 456; M.L. 1939, Sup. II, sec. 1117); and sec. 1, act 26 Sept. 1941 (10 U.S.C. Sup. I, 456a; M.L. 1939, Sup. II, sec. 1117).

15. "There is no statutory provision authorizing the retirement, as distinguished from entitlement to retirement pay, of officers of the reserve components." JAG 210.455, 15 June 1942.

than honorable, forfeit their right to retirement pay under the act of 3 April 1939.[16]

Until recently, officers of the Regular Army,[17] National Guard of the United States, and Officer's Reserve Corps,[18] who became physically disabled in line of duty while serving in temporary higher grades, were entitled to retirement pay only upon the basis of their permanent grades. Temporary officers of the Army of the United States, on the other hand, when eligible for retirement pay, were entitled to receive the retirement pay of the grade in which they were serving because they held no other commission.[19] This anomalous situation was corrected by the act of 29 June 1943,[20] which provides for the payment of retirement pay to officers of the Regular Army, National Guard of the United States and Officers' Reserve Corps upon the basis of their higher temporary grades. Regular Army officers receive the higher grade on the retired list as well as the increased retirement pay.

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16. JAG 210.01, 18 Dec. 1941; SPJGA 1942/6181, 29 Dec. 1942.

17. Dig. Op. JAG, 1912-40, sec. 322b; JAG 210.85, 27 Feb. 1920. The words "the actual rank held by them at the date of retirement" (R.S. 1254; 10 U.S.C. 1025; M.L. 1939, sec. 322b) were interpreted to mean permanent grade in the Regular Army.

18. SPJG 210.851, 19 Mar. 1942.

19. Ibid.

20. Public Law 701, 78th Cong.; sec. I, Bull. 12, WD, 7 July 1943.

8. Separation from the Service

The general methods by which an officer's appointment may be terminated include death, resignation, discharge, dismissal or dropping from the rolls. In addition to these methods, certain appointments are limited as to time. Thus, unless sooner terminated, temporary appointments in the Army of the United States continue only for the duration of the present emergency and 6 months thereafter.[1] Except during the existence of a state of war, a Reserve officer's appointment terminates upon the expiration of the 5-year term for which he was appointed, unless otherwise terminated prior thereto.[2]

a. Resignation. The right of an officer to resign his commission at pleasure is subject to restrictions growing out of his military status.[3] The War Department may properly refuse to accept the resignation of an officer's commission in time of war

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1. Par. 3, AR 605-10, 30 Dec. 1942; act 22 Sept. 1941 (55 Stat. 728; M.L. 1939, Sup. II, sec. 2160a); sec. 2, act 13 Dec. 1941 (55 Stat. 800; 50 U.S.C., Sup. I, 132; M.L. 1939, Sup. II, sec. 2228-2).

2. Par. 75, AR 140-5, 17 June 1941. "* * * an appointment in force at the outbreak of war shall continue in force until six months after its termination * * *." Sec. 37, National Defense Act,as amended; 10 U.S.C. 358; M.L. 1939, sec. 2161; sec. 2, act 13 Dec. 1941 (55 Stat. 800; 50 U.S.C., Sup. I, 132; M.L. 1939, Sup. II, sec. 2228-2).

3. Par. 1a, AR 605-275, 25 Sept. 1928.

or when war is imminent.[4] As a matter of current general policy, the Department is not favorably disposed toward accepting resignations during the period of the war. Refusal to accept an officer's resignation is also indicated when he is under investigation, under charges, awaiting result of trial, absent without leave, absent in the hands of civil authorities, or in default with respect to public property or public funds.[5]

When a resignation is tendered, it will be forwarded through channels to the War Department for final action. Until notified of the acceptance of his resignation, the officer remains in the service.[6] Usually acceptance of a resignation will be effective only upon actual notice to the officer resigning.[7] Where, however, the accepting authority determines that the circumstances and the interests of the Government require, the acceptance can be effective upon constructive notice, if so recited in the acceptance itself.[8]

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4. Par. 1b, id.

5. Ibid.

6. Par. 2, id.

7. Par. 1f, id.

8. Par. 1f, id. The character of the notice required will in each case be recited in the acceptance. Constructive notice is all that is prescribed where the acceptance is stated to be "effective on the date of receipt hereof at said officer's post or station."

Generally, a mere offer to resign or to tender resignation is revocable at any time before acceptance.[9] After a person has received notice of the acceptance of his resignation, however, a revocation of the acceptance will not restore him to office.[10]

Resignations tendered by temporary officers of the Army of the United States are required to be submitted in accordance with the regulations applicable to members of the Officers' Reserve Corps,[11] which prescribe that the resignation be tendered in letter form, that it be unconditional, and that it contain a statement of the reasons for which submitted.[12]

Resignation "for the good of the service". In general the separation of officers from the service by resignation should be considered as under "honorable conditions" except when the resignation is accepted for the good of the service.[13] An officer may be given the opportunity to tender his resignation as an alternative to being tried by court-martial upon charges which,

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9. Par. 1c, AR 605-275, 25 Sept. 1928.

10. Mimmack v. United States, 97 U.S. 426; Dig.Op. JAG, 1912, p. 817; par. 1g, AR 605-275, 25 Sept. 1928.

11. Par. 25, C 7, AR 605-10, 30 Dec. 1942.

12. Par. 72, AR 140-5, 17 June 1941.

13. Dig. Op. JAG, 1912-40, AR 605-275 (B-1), p. 989; JAG 210.83, 20 Feb. 1919.

if substantiated, would warrant his dismissal from the service. An officer who has been recommended for reclassification may submit his resignation as an officer of the Army.[14] When misconduct or undesirable habits or traits of character are involved, a resignation will be accepted by the War Department only when it expressly contains the qualifying phrase "for the good of the service".[15] A resignation for the good of the service is similar to the dismissal of an officer in that stigma is attached thereto, but dissimilar in the sense that it does not carry the penal consequences which may be attached to a dismissal.[16] Resignations submitted for the good of the service may not, if accepted, be recorded as under honorable conditions.[17]

b. Discharge. Dismissal through court-martial proceedings is not the only means by which involuntary separation from the service of officers can be accomplished. Officers of all components of the Army may be involuntarily separated from the service by discharge, although the procedures by which the discharge is accomplished may differ according to the component of which the officer is a member.

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14. Par. 14a, AR 605-230, 9 June 1943.

15. Ibid.

16. SPJGA 1942/6194, 29 Dec. 1942.

17. Par. 25, C 7, AR 605-10, 30 Dec. 1942.

Regular Army. The administrative discharge of Regular Army officers is subject to statutory limitations. While it is questionable on constitutional grounds whether Congress can validly impose any restrictions on the President's power to remove military officers,[18] the War Department follows the practice of

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18. The case of Myers v. United States, 272 U.S. 52, is authority for the proposition that the President has inherent constitutional power as the Chief Executive to remove executive officers of the Government, without regard to statutory limitations with which Congress may have sought to limit the power of removal. The rule of the cited case has been held applicable to Presidential removal of a member of the board of directors of the Tennessee Valley Authority, on the ground the latter was predominantly an administrative arm of the executive department (Morgan v. Tennessee Valley Authority (C.C.A.) 115 F. 2d 990); but the rule does not apply in the case of members of agencies such as the Federal Trade Commission which exercise mainly quasi-legislative and quasi-judicial functions (Humphrey's Executor v. United States, 295 U.S. 602). While the rule of the Myers case has never been applied to Army officers, it has been argued that the reasons expressed in that case for recognizing an inherent power in the President to remove civil officers of the executive departments might be applied to military officers, since the Constitution (art. II, sec. 2) makes the President the Commander in Chief of the Army.

If the latter view were adopted, doubt would be cast upon the constitutionality of R.S. 1230 (10 U.S.C. 573; M.L. 1939, sec. 227) which purports to give any officer, dismissed by order of the President, the right to be tried by court-martial on the charges on which he shall have been dismissed, and to provide that the Presidential order of dismissal would be voided if the officer were acquitted by the court-martial. Such an extension of the constitutional argument would also affect the validity of the limitation expressed in Article of War 118 (originating with the act of 13 July 1866) that in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial.

In Wallace v. United States, 257 U.S. 541, it was held that nomination and Senate confirmation of a successor

basing the separation of officers from the service upon the recommendations of boards of officers, in accordance with prescribed statutory procedure.

When it appears that a Regular Army officer has become incapacitated and unfit even for limited service duty by reason of physical disability, the matter is referred to an Army retiring board.[19] Such action will usually be taken upon the recommendation of a general hospital disposition board.

Reclassification board proceedings are initially appropriate where a Regular Army officer appears incapable of performing the duties of his office by reason of such causes as mental indifference, inaptitude or incompetence. When a reclassification board recommends the discharge or retirement of a Regular Army officer for reasons other than physical disability and the convening authority concurs in the recommendation, a board of officers will be convened in accordance with provisions of the act of 29 July 1941.[20]

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18. (cont.)
operated effectively to remove an officer summarily dismissed by the President without court-martial trial but the Supreme Court declined to consider the constitutionality of R.S. 1230.

19. The statutory provisions governing the disposition of such cases are discussed under the heading of "Retirement", p. VI - 23, supra.

20. This action is prescribed by par. 15a, AR 605-230, 9 June 1943.

The act of 29 July 1941, as earlier noted,[21] sets forth a new statutory procedure for the retirement or discharge of inefficient or incompetent Regular Army officers. The new statutory procedure takes the place of the less expeditious procedure provided under section 24b of the National Defense Act,[22] which has been suspended for the duration of the emergency. Under the act of 29 July 1941, any Regular Army officer is subject to removal from the active list (amounting to retirement or discharge depending on the length of his service) upon the recommendation of a board of general officers appointed by the Secretary of War. The officer concerned is entitled to a hearing before the board, but has no right to have the matter heard by a court of inquiry.

National Guard of the United States. There is also a statutory limitation affecting the administrative discharge of officers of the National Guard of the United States. When a reclassification board recommends the discharge of such an officer for reasons other than physical disability and the convening authority concurs in the recommendation, an "efficiency board" must be convened pursuant to section 76 of the National Defense Act, as amended.[23]

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21. Pp. VI - 24, 25, supra.

22. Sec. 24b, National Defense Act, as amended (10 U.S.C. 571; M.L. 1939, secs. 141, 225).

23. Par. 51b, AR 605-230, 9 June 1943.

There is no procedure prescribed by statute governing the discharge for reason of physical disability of officers of components other than the Regular Army. While, as earlier noted,[24] officers other than those of the Regular Army are not eligible for retirement or retired status, the War Department has utilized the machinery of the Army retiring board as a matter of administrative procedure to secure the factual determinations necessary to decide (1) whether or not such an officer should be discharged for physical disability, and (2) whether he should be certified as eligible for retirement pay and benefits under the act of 3 April 1939, as amended.[25] Thus in the case of all officers other than those of the Regular Army, if discharge is indicated for physical disability, the officer may be ordered before an Army retiring board upon recommendation of a hospital disposition board as being incapacitated and unfit for limited service duty.[26]

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24. See p. VI - 25, supra.

25. Sec. 5, act of 3 April 1939, as amended (10 U.S.C., Sup. I, 456a; M.L. 1939, Sup. II, sec. 1117).

26. Cir. 217, WD, 1941. Cir. 82, WD, 1943, limits the use of the retiring board procedure to those officers who are recommended by disposition boards as incapacitated and unfit for limited service duty or who are found to have conditions not incident to the service which, though not disqualifying at the time, are likely to be aggravated by military service and later made the basis for a "line-of-duty" claim.

Officers' Reserve Corps. There are no statutory restrictions on the discharge of a Reserve officer.[27] As a matter of administrative procedure, however, the discharge of Reserve officers for reasons other than physical disability is usually handled upon recommendation of a reclassification board.[28] When a physical disability is indicated as ground for discharge, the usual procedure followed is to order the officer concerned before an Army retiring board.[29]

Army of the United States. There are no statutory restrictions on the discharge of temporary officers, Army of the United States. The statute expressly provides that the appointment of any such temporary officers "may be vacated at any time by the President".[30] As in the case of Reserve officers, however, administrative procedure has been set up governing the discharge of temporary officers. The regulations provide for summary dis-

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27. "Any officer of the Officers' Reserve Corps may be discharged at any time in the discretion of the President." Sec. 37, National Defense Act, as amended (10 U.S.C. 358; M.L. 1939, sec. 1358a).

28. Par. 74c (2), C 1, AR 140-5, 17 June 1941. Reclassification board procedure is covered by AR 605-230, 9 June 1943.

29. This procedure is applicable to all officers of reserve components; see p. VI - 34, supra.

30. Act 22 Sept. 1941 (55 Stat. 728; 10 U.S.C., Sup. I, 484); M.L. 1939, Sup. II, sec. 2160a).

charge of a temporary officer serving on active duty in the following situations:

> (1) If it is found by a general officer that he is not qualified or suited by temperament, character, habits or otherwise to be an officer, and upon recommendation of such general officer made within the first 6 months of his commissioned service after entry on active duty, his commission may be terminated by summary discharge at any time.[31]
>
> (2) At any time when information is revealed which, if known at the time of his appointment, would have made him ineligible for such appointment; any misstatement of fact or any material omission in original application or attendant papers may also be made the basis for discharge at any time.[32]
>
> (3) In all cases wherein facts of a highly confidential or secret nature are involved or in which the best interests of the service or the public safety demand drastic and immediate action; recommendation for summary discharge in such cases is to be forwarded to The Adjutant General with full report of the circumstances.[33]

In the situations covered in (1) and (2) above, the officer is to be informed in writing that he may request trial by court-martial or a hearing by a reclassification board, whichever is appropriate. Such request, if made, may be approved or disapproved by the commander exercising general court-martial jurisdiction; if disapproved, the file is forwarded to the War Depart-

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31. Par. 26a(1), C 7, AR 605-10, 30 Dec. 1942.

32. Par. 26a(2), id.

33. Par. 26a(4), id.

ment for final decision.[34]

The appointment of a temporary officer who has not entered upon active duty under his appointment, may be terminated by discharge at any time when information is revealed which makes his active duty status undesirable or inadvisable; such an officer need not be given a hearing before a court-martial or reclassification board.[35]

When a temporary officer, Army of the United States, is not subject to summary discharge as noted above, but is deemed unfit to be an officer by reason of incompetence, inaptitude, undesirable habits or the like, he will be ordered before a reclassification board or tried by court-martial, whichever is appropriate.[36] Reclassification board proceedings will not be substituted for appropriate disciplinary action.[37]

Except in cases of dismissal by sentence of a general court-martial, the separation from the service of temporary officers for reason other than physical disability will be either by "honorable discharge" or by "discharge". An officer recommended

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34. Par. 26a(3), id.

35. Ibid.

36. Par. 26b, id.

37. Par. 4, AR 605-230, 9 June 1943

for "honorable discharge" will be one whose service has been honest and faithful or who is subject to discharge solely because of lack of military proficiency; he will be entitled to a Certificate of Service.[38] An officer recommended for "discharge" without specification as to character thereof, will be one whose lack of fitness has resulted from his own misconduct, neglect or avoidable habits and whose retention in the service is undesirable but whose honor and integrity have not been compromised; he will not be entitled to a Certificate of Service.[39]

Temporary officers are subject to discharge for physical disability in the same manner as officers of other reserve components.[40]

c. Dismissal. The term "dismissal" has sometimes been loosely employed as covering any means of involuntary separation of an officer from the service. It is customary, however, to reserve the use of the term "dismissal" to a separation accomplished by sentence of a general court-martial, confirmed in accordance with the requirements of Article of War 48.

An officer found guilty of certain offenses under the

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38. Par. 26c(2)(a), C 7, AR 605-10, 30 Dec. 1942.

39. Par. 26c(2)(b), id.

40. Cir. 217, WD, 1941, as modified by Cir. 82, WD, 1943. See p. VI - 34, supra.

Articles of War, must be sentenced to be dismissed the service.[41]

d. Dropping from the Rolls. This form of separating an officer from the service is seldom used. Article of War 118 provides that the President may drop from the rolls of the Army any officer who has been absent from duty 3 months without leave or absent in confinement for 3 months after final conviction by a court of competent jurisdiction. The provision originated in a statute of 1870.[42]

CHAPTER 2 - ENLISTED PERSONNEL

1. Enlistment

Enlistment is a contract. Like marriage, it involves a contractual relationship which creates a new status. By enlistment the citizen becomes a soldier. He acquires a new status, with correlative rights and duties. Once accomplished, the status cannot be avoided at will by the soldier. He may violate the contractual obligations assumed on his part and may even renounce

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41. For example, "Any officer * * * who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service" (AW 95); "Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct * * * " (AW 85).

42. Sec. 17, c. 295, act 15 July 1870. It was later incorporated in Revised Statutes 1220 (Winthrop's Military Law and Precedents, 2nd Ed., p. 745).

the relationship, but his status as a soldier remains unchanged.[1]

All enlistments in the active military service of the United States in time of war or other emergency declared by Congress will be in the Army of the United States without specification of any particular component,[2] and will be for the duration of the war or other emergency and for 6 months thereafter. Enlistments in the Regular Army have been suspended for the duration.[3]

In time of war or other emergency declared by Congress, eligibility for enlistment in the active military service is limited by statute to persons not less than 18 years of age and otherwise qualified by such regulations as the Secretary of War may prescribe.[4]

The current enlistment policy, effective 6 December 1942, prohibits the enlistment of men between the ages of 18 and

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1. In re Grimley, 137 U.S. 147.

2. Par. 15, sec. 127a, National Defense Act, as added by act 14 May 1940 (54 Stat. 213; 10 U.S.C. 634; M.L. 1939, Sup. II, sec. 2163a).

3. Par. 5a, AR 600-750, 30 Sept. 1942.

4. Par. 15, sec. 127a, National Defense Act, as added by act 14 May 1940; see footnote 2, supra. With reference to eligibility for enlistment in the Regular Army at other times, see sec. 27, National Defense Act, as amended (10 U.S.C. 627; M.L. 1939, sec. 248).

38.[5] This policy evidences intention that further increase in the Army be accomplished through the channels of Selective Service.

Oath of Enlistment. A form of oath of enlistment is prescribed by Article of War 109. The taking of this oath is a prerequisite to the accomplishment of a formal enlistment.[6]

Constructive Enlistment. The taking of the oath of enlistment is not, however, essential to a constructive enlistment.[7] In view of the contractual character of an enlistment, a constructive enlistment may be effected when a person otherwise qualified to enlist voluntarily submits to military authority and performs the duties of a soldier and is treated as such, even though no oath of enlistment is taken.[8]

2. Extension of Term of Service

The outbreak of war on 7 December 1941,[1] made operative

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5. Sec. I, Cir. 397, WD, 7 Dec. 1942.

6. SPJGA 342, 28 May 1942; JAG 220.451, 14 May 1941; JAG 342, 31 Dec. 1940.

7. Dig. Op. JAG, 1912-40, sec. 467; SPJG 220.451, 2 April 1942.

8. JAG 342, 2 July 1921.

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1. The exact hour which has been fixed upon for the outbreak of the war with Japan is 1:25 p.m., E.S.T., 7 December 1941. Sec. III, Cir. 118, WD, 23 April 1942.

that part of section 55 of the National Defense Act[2] which provides:

> "* * * All enlistments in force at the outbreak of war or entered into during its continuation, whether in the Regular Army or the Enlisted Reserve Corps, shall continue in force until six months after its termination unless sooner terminated by the President."

Thus, the term of service under any enlistment in the Regular Army or Enlisted Reserve Corps, in force at 1:25 p.m., E.S.T., 7 December 1941, was extended by operation of law for the duration of the war and six months thereafter, unless sooner terminated by the President.

It is important to recognize that the soldier continues to serve under the same enlistment.[3] No new "term of service" is created. The statute simply postpones the expiration of the existing "term of service" to an indefinite future date.

Similarly, the act of 13 December 1941,[4] extends for

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2. Sec. 55, National Defense Act, as amended (10 U.S.C. 425; M.L. 1939, sec. 252).

3. When Army Regulations refer to a soldier's "term of service" in authorizing his discharge on the date "upon which he will have completed his term of service" (par. 1c, AR 615-360, 26 Nov. 1942) the phrase includes the period of the duration of the war and 6 months thereafter if the enlistment was in force on 7 December 1941. See SPJGA 220.8, 2 June 1942; I Bull. JAG 7, sec. 252.

4. Sec. 2, act 13 Dec. 1941 (55 Stat. 800; 50 U.S.C., Sup. I, 732; M.L. 1939, Sup. II, sec. 2228-2).

the duration of any war plus six months the term of service or enlistment of all members of the Army of the United States.

3. Induction of Selectees

Voluntary enlistment is adequate to fill the ranks of the relatively small professional Army which the United States has traditionally maintained in time of peace. When the national security is imperiled and the armed forces must be expanded rapidly, the process of selective compulsory military service is an effective means of mobilizing the nation's manpower. Experience has shown that it provides a well-balanced national Army.

Cumpulsory military service has long been recognized as a duty inherent in citizenship.[1] All able-bodied male citizens between the ages of 18 and 45 are regarded by statute as included in the militia of the United States.[2]

The major portion of the personnel of the Army of the United States has entered the military service through the machin-

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1. Selective Draft Law Cases, 245 U.S. 366, 378-379.

2. Sec. 57, National Defense Act, as amended (32 U.S.C. 1; M.L. 1939, sec. 1259). The "militia" since colonial times has comprised all males physically capable of acting in concert for the common defense "civilians primarily, soldiers on occasion". United States v. Miller, 307 U.S. 174.
   This large and unorganized group of men of military age is declared to constitute "the national forces" and to be liable to perform military duty. 30 Stat. 361; 10 U.S.C. 1; M.L. 1939, sec. 1.

ery set up in the Selective Training and Service Act of 1940, as amended.[3] The processes of registration and classification under this act have been assigned to the civilian agencies of the Selective Service System, rather than to the Military Establishment; the legal problems arising in connection therewith are therefore beyond the scope of this volume.

It is important, however, to ascertain the precise point at which the civilian selected for military service first becomes a part of the Army and subject to military jurisdiction. Section 3(d) of the Selective Training and Service Act[4] provides:

> "With respect to the men inducted for training and service under this Act there shall be paid, allowed, and extended the same pay, allowances, pensions, disability and death compensation, and other benefits as are provided by law in the case of other enlisted men of like grades and length of service * * *." (Underscoring supplied)

Section 11 of the act[5] provides:

> "No person shall be tried by any military or

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3. Act 16 Sept. 1940 (54 Stat. 885), as amended by act 29 May 1941 (55 Stat. 211), act 16 Aug. 1941 (55 Stat. 621), act 18 Aug. 1941 (55 Stat. 627), act 20 Dec. 1941 (55 Stat. 844), act 16 June 1942 (56 Stat. 369), act 23 June 1942 (56 Stat. 386), act 28 July 1942 (56 Stat. 723), act 13 Nov. 1942 (56 Stat. 1018); 50 U.S.C. and Sups. I and II, 301 ff; M.L. 1939, Sup. II, sec. 2225-1 ff.

4. Sec. 3(d), act 16 Sept. 1940 (54 Stat. 886; 50 U.S.C. 303(d); M.L. 1939, Sup. II, sec. 2225-3(d)).

5. Sec. 11, id. (54 Stat. 894; 50 U.S.C. 311; M.L. 1939, Sup. II, sec. 2225-11).

> naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." (Underscoring supplied)

"Induction" is thus plainly indicated as the act or event marking the change of status from civilian to soldier. The authorities have confirmed this view.[6]

The procedure for induction is not set out in the Selective Training and Service Act of 1940, but authority to prescribe rules and regulations necessary to carry out the provisions of the act is delegated to the President.[7] Current Selective Service regulations provide that "at the induction center, the selected men found acceptable will be inducted into the land or naval forces".[8]

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6 SPJGA 1942/5148, 4 Nov. 1942; 20 Comp. Gen. 772. Although Article of War 2 (10 U.S.C. 1473) subjects to military law, among others, "persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same", this statute has been said to be inapplicable to persons ordered to report for induction but not yet inducted under the Selective Training and Service Act of 1940. United States v. Rappeport (D.C. N.Y., 1941) 36 F. Supp. 915, aff'd (C.C.A. 2d, 1941) 120 F. (2d) 236; cf. United States v. Smith (D.C. Mass, 1942) 47 F. Supp. 607.

7. Sec. 10 (a), act 16 Sept. 1940 (54 Stat. 893; 50 U.S.C. 310; M.L. 1939, Sup. II, sec. 2225-10(a)).

8. Selective Service Regulations (2d ed., 1941), par. 633.9.

The taking of an oath is not essential to accomplish induction. When the selectee is found acceptable by the Army at the induction center, it is the duty of the military authorities to induct him immediately, and he cannot avoid induction by refusing to take the oath.[9] Army Regulations provide that induction will be performed by an officer in a short ceremony in which the oath contained in Article of War 109 is administered; in the event that a selectee refuses to take the oath, it will be read to him and he will be informed that his refusal in no respect alters his obligations to the United States.[10]

Upon induction, a selectee becomes an "enlisted man" in the Army of the United States.[11] In accordance with current

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9. Billings v. Truesdell (C.C.A., 10th, 1943) 135 F. (2d) 505, affirming Ex parte Billings (D.C. Kan., 1942) 46 F. Supp. 663.

10. Par. 13e, AR 615-500, 1 Sept. 1942. It is interesting to compare the induction procedure which was followed under the Selective Draft Act of 1917 (40 Stat. 76; 50 U.S.C. 201). The earlier act provided that all persons "drafted into the service of the United States * * * shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army". It was determined in cases arising under this earlier act that military jurisdiction did not attach before a man was lawfully "inducted" (Ver Mehren v. Sirmyer (C.C.A., 8th) 36 F. (2d) 876; Ex parte Goldstein (D.C., Mass) 268 F. 430); but "induction" was accomplished by the local draft board's mailing of a notice ordering the selected draftee to report for service at a specified date and notifying him that from such specified date "he was in the military service of the United States".

11. Sec. 1 of the National Defense Act, defining the composition of the Army of the United States, was amended by the act of

policy, those who desire are given the opportunity, immediately after induction, to return to their homes to arrange personal, financial and business affairs. This is accomplished by release from active service, transfer to the Enlisted Reserve Corps, and call to active duty on a specified future date, with orders to proceed on that date to a designated reception center for duty.[12]

The Selective Training and Service Act of 1940 originally prescribed a 12 month period of training and service for selectees which the President was authorized to extend when Congress declared the national interest to be imperiled.[13] The period of training and service was later extended for 18 months by the President upon the authorization of the Service Extension Act of 1941;[14] and, following the outbreak of war, was extended for the duration of any war and six months thereafter by the act of 13 December 1941.[15]

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11 (cont.) 13 Dec. 1941 (55 Stat. 800; 10 U.S.C., Sup. I, 2), to include persons inducted into the land forces of the United States under the Selective Training and Service Act of 1940, as amended.

12. Par. 16, AR 615-500, 1 Sept. 1942.

13. Par. 3(b), act 16 Sept. 1940 (54 Stat. 886; 50 U.S.C. 303(b); M.L. 1939, Sup. II, sec. 2225-3(b)).

14. Sec. 2, act 18 Aug. 1941 (55 Stat. 626; 50 U.S.C., Sup. I, 352; M.L. 1939, Sup. II, sec. 2227-2).

15. Sec. 2, act 13 Dec. 1941 (55 Stat. 800; 50 U.S.C., Sup. I, 732; M.L. 1939, Sup. II, sec. 2228-2).

4. Appointment and Reduction of Noncommissioned Officers

Appointment. During the present emergency, appointments of noncommissioned officers are temporary and do not confer any rights of permanent tenure after the termination of the emergency.[1] The issuance of warrants to noncommissioned officers has been suspended for the duration of the war and 6 months thereafter. In lieu thereof, a copy of the order announcing the appointment is furnished to them.[2]

Generally, the authority to appoint temporary noncommissioned officers is vested in the commander of a regiment or comparable unit.[3] The company commander or commanding officer of a unit of comparable size is in most cases the appointing authority for privates, first class.[4]

The effective date of an appointment is the date of the order or other instrument of appointment.[5] A noncommissioned

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1. Par. 3a, AR 615-5, 30 June 1943.
2. Par. 12a, id.
3. Par. 6, id. The commanders of separate or detached battalions or companies have similar authority within their respective commands. Chiefs of services and commanders of posts and units higher than regiments are authorized to make such appointments for their offices and headquarters. Technicians of the third, fourth and fifth grades are noncommissioned officers and are governed by the same rules and regulation. Par. 8, id.
4. Par. 6, id.
5. Par. 2a, id.

grade is not an office in the sense that acceptance is required. Neither failure to notify a soldier of his promotion to a noncommissioned grade nor his failure to accept it will prevent the promotion from becoming effective.[6]

Reduction. The appointment of a noncommissioned officer or a private, first class, may be terminated:

(a) By a court-martial in accordance with the Articles of War and within the prescribed maximum limits of punishment.[7]

(b) By the Secretary of War at will.[8]

(c) By the authority competent to make the appointment: in all grades, at the request of the soldier; in the grade of private, first class, when deemed in the best interests of the service; in other grades for misconduct or inefficiency after careful investigation of the facts; and in the grade of first sergeant, upon the recommendation of the company commander, for any reason other than misconduct or inefficiency which he deems sufficient.[9] Sickness in line of duty

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6. Dig. Op. JAG, 1912-40, sec. 255(1); JAG 220.24, 26 May 1919. With reference to the accomplishment of posthumous appointments, see par. 11, AR 615-5, 30 June 1943; p. VI - 11, supra.

7. Par. 13a, AR 615-5, 30 June 1943. Under the provisions of par. 103d, Manual for Courts-Martial, 1928, any sentence in the case of a noncommissioned officer or private first class, which, as ordered executed or as suspended, includes dishonorable discharge or hard labor (with or without confinement) reduces the accused automatically to the grade of private.

8. Par. 13b, AR 615-5, 30 June 1943.

9. Pars. 13c, 15, id. Unauthorized absence does not automatically effect termination of appointment of noncommissioned officers; definite administrative action is required. Par. 15b, id.

and return from overseas for physical disability or as a battle casualty are not regarded as justifying reduction.[10]

The termination of an appointment becomes effective:

(a) In the case of sentence by court-martial, on the date of publication of the court-martial order approving the reduction;

(b) In all other cases, on the date of receipt of notice by the soldier, or, if absent for his own convenience or through his own fault, upon the date when the notice of reduction is received at his proper station.[11]

Noncommissioned officers, when reduced, revert to the grade of private. Reappointment in a lower noncommissioned grade requires separate action.[12]

5. Retirement

Only enlisted men of the Regular Army are eligible for retired status. When placed on the retired list, they remain part of the Regular Army,[1] and subject to being ordered to active duty by the President.[2]

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10. Par. 14a, id.

11. Par. 16, id.

12. Par. 13e, id.

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1. Sec. 2, National Defense Act, as amended (10 U.S.C. 4; M.L. 1939, sec. 6).

2. Sec. 6, act 18 Aug. 1941 (55 Stat. 627; 50 U.S.C., Sup. I, sec. 356; M.L. 1939, Sup. II, sec. 2227-6).

The act of 2 March 1907[3] accords to enlisted men of the Regular Army who have served thirty years, the right to be placed on the retired list upon application to the President. The statutory right vests and becomes absolute upon the completion of thirty years' service and the making of the application. It is not thereafter subject to the discretion of any superior officer, not even of the President.[4]

In computing the necessary thirty years' time, all service in any of the armed services will be credited. Commissioned service may be credited under the same conditions as enlisted service.[5] Service as a warrant officer or field clerk may be counted.[6] Periods of unauthorized absence, confinement, or inability to perform duty, required to be made good under Article of War 107, will not be counted in the computation of service for retirement.[7]

The act of 30 June 1941[8] provides that enlisted men of the Regular Army who have served twenty years or more in the mil-

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3. 34 Stat. 1217; 10 U.S.C. 947; M.L. 1939, sec. 343.

4. Dene v. United States, 89 Ct. Cl. 505; SPJGA 220.85, 1 Sept. 1942.

5. Par. 3b, AR 615-395, 6 June 1942.

6. Par. 3e, id.

7. Par. 3d, id.

8. 55 Stat. 394; 10 U.S.C., Sup. I, 656, 939; M.L. 1939, Sup. II, secs. 232a, 343a.

itary forces of the United States and have become permanently incapacitated for active service due to physical disability incurred in line of duty, will be placed on the retired list; those who have served less than twenty years will be discharged. The same rules which govern the computation of time for retirement upon completion of thirty years of service, apply in the computation of this twenty-year period. The procedure to be followed in effecting a retirement under the provisions of this latter statute are set out in section II of AR 615-395.

Retirement under the act of 2 March 1907 may be more advantageous than under the act of 30 June 1941, in that retirement pay is computed under the earlier statute on the basis of 75% of the pay being received at the time of retirement, and under the later statute on the basis of 75% of the average pay received for the six months prior to retirement.[9]

If a retired enlisted man would be eligible to receive a pension or compensation under laws administered by the Veterans Administration except for the receipt of retired pay, he may waive the retired pay for the purpose of receiving such pension

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9. Par. 1, AR 35-2640, 1 Aug. 1942.

or compensation.[10]

Retired enlisted men when serving on active duty receive the full pay and allowances of the grade in which they serve on active duty.[11]

As already noted, eligibility for retired status is limited to enlisted men of the Regular Army. Members of the Army of the United States, other than members of the Regular Army, who suffer disability in line of duty are entitled to receive the same retirement pay as Regular Army personnel of like grade and length of service.[12]

6. Discharge

The chart which follows is a graphic representation of some of the significant differences among the various grounds of discharge of enlisted men and the methods of accomplishment. The introductory notes are concerned with certain matters applicable to discharge generally.

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10. Sec. 4, act 30 June 1941 (55 Stat. 395; 38 U.S.C., Sup. I, 26b; M.L. 1939, Sup. II, sec. 1089a). Both retirement pay and pensions are regarded as gratuities given in recognition of services rendered, the recipient of one being deemed ineligibile to receive the other at the same time. Pate v. United States, 78 Ct. Cl. 395.

11. Sec. 15, Pay Readjustment Act of 1942 (56 Stat. 367; 37 U.S.C., Sup. II, 115; M.L. 1939, Sup. II, sec. 1371c-15).

12. Sec. 5, act 3 April 1939, as amended (10 U.S.C., Sup. I, 456; M.L. 1939, Sup. II, sec. 1117).

Neither the chart nor the notes purport to be exhaustive. For further procedural information, the pertinent sections of AR 615-360 should be consulted.

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Notes to Chart on Discharge of Enlisted Men

Note 1:

Article of War 108 provides, in part, that "no enlisted man shall be discharged from said service [the military service] before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial". The commanding generals of service commands (formerly corps areas) have for many years, by regulation and otherwise, been recognized as synonymous with department commanders (JAG 220.8, 16 Mar. 1940; JAG 342.06, 25 Feb. 1942).

Under current regulations, the authority to order discharge prior to expiration of term of service has been delegated, under certain specific conditions, to the following commanders: commanding officers of named general hospitals, reception centers, staging areas, ports of embarkation, general officers commanding administrative units and installations (par. 5b, AR 615-360, 26 Nov. 1942) and commanding officers of all stations with normal housing capacity of 5,000 men or more (sec. III, Cir. 48, WD, 12 Feb. 1943). In the following chart these officers are referred to collectively as "discharge authorities".

A discharge ordered by an officer with plenary authority to discharge under AW 108 (President, Secretary of War, Commanding General of a Department or Service Command) is irrevocable except for fraud, even though granted under a mistake of fact or an erroneous interpretation of law (SPJGA 1943/7724, 28 May 1943; JAG 1942/688, 25 Feb. 1942). On the other hand, a discharge ordered by a subordinate commander to whom the authority has been delegated by administrative regulation is an absolute nullity unless it is strictly within the limits of the delegated authority (ibid.).

Note 2:

Under par. 3b, AR 615-360, 26 Nov. 1942, the company or detachment commander has full discretion as to the character to be given to an enlisted man to be discharged from the Army if the rating is "Good" or better. If the company commander is of the opinion that the man is not entitled to a character at least "Good" then, unless the discharge is specifically required by other provisions of the regulations to be given on WD, AGO Form No. 56, or WD, AGO Form No. 57, he is required to notify the enlisted man and the commanding officer or next higher commander who convenes a board of officers, three if practicable, to determine the character and form of discharge certificate to be given. The company or detachment commander is not eligible for detail on this board. In the following chart, this board is designated as the "character board".

Note 3:

The discharge of an enlisted man takes effect on the date of notice to him of his discharge (Dig. Op. JAG, 1912-40, AR 615-360, sec. I; SPJGA 1943/365, 12 Jan. 1943). The notice may either be actual, by delivery of the discharge certificate, or constructive, when delivery cannot be made by reason of his absence for his own convenience or through his own fault, as for example, when he is in the custody of the civil authorities (par 4a, AR 615-360, 26 Nov. 1942). When the enlisted man is absent in desertion at the time an order for his discharge is received, the discharge is not executed but he is dropped as a deserter (par. 4d, id.).

CHART
DISCHARGE OF ENLISTED MEN

GROUND FOR DISCHARGE	SECTION OF AR 615-360	AUTHORITY TO ORDER DISCHARGE	FORM OF DISCHARGE	REMARKS
EXPIRATION OF TERM OF SERVICE	I	Regimental commander (AW 108).	White (WD, AGO Form No. 55) or blue (WD, AGO Form No. 56) according to character (see note 2). For effective date of all discharges, see note 3.	Term of service extended pursuant to sec. 55, Nat. Def. Act, as amended, as to Reg. Army and E.R.C. by outbreak of war and as to all Army of U.S. by act of 13 Dec. 1941 (55 Stat. 800), for duration of war and 6 months.
DISABILITY	II	Discharge authorities (see note 1).	If in line of duty, white unless otherwise ordered by character board (see note 2). If not in line of duty, blue if result of misconduct unless incurred prior to current enlistment and disability was noted on enlistment papers or board directs white discharge or nature of service merits white discharge.	Only separated when no useful service can be obtained. Certificate of Disability for Discharge (WD, AGO Form No. 40) prepared by immediate commander, forwarded to C.O. of general hospital, station or unit, who convenes board of officers to determine the origin, nature, and service connection of disability; then forwarded to discharge authority for final action.
PURCHASE	III Sec.4, act 16 June 1890 (26 Stat. 158; 10 U.S.C. 651; M.L. 1939, sec. 232)	CG of Service Command; in certain special cases, by Secretary of War.	White unless otherwise directed by character board (see note 2).	Limited to time of peace by sec. 4, act 16 June 1890 (26 Stat. 158; 10 U.S.C. 651; M.L. 1939, sec. 232). Sec. III, AR 615-360, suspended for duration of any war plus 6 months.
MINORITY (Under 18)	IV Act 30 June 1921 (42 Stat.74; 10 U.S.C. 653a; M.L. 1939, sec. 231)	Discharge authorities (see note 1); in all doubtful cases, the Secretary of War.	White or blue, according to form to which service would entitle him notwithstanding misrepresentations as to age.	Also entitled to transportation to place of acceptance for enlistment or to home, whichever is nearer (sec. 126, Nat. Def. Act, as amended). Only parents or guardian (not minor himself) may make application; or discharge authority himself may initiate procedure.
DEPENDENCY	V Sec. 29, act 14 June 1920 (41 Stat. 775; 10 U.S.C. 652; M.L. 1939, sec. 230).	Discharge authorities (see note 1); in all doubtful cases, the Secretary of War.	White or blue according to character rating (see note 2).	Granted only in extreme cases in wartime on written application of EM showing dependency due to death or disability in family since enlistment or induction. For evidence required and WD policies, see par. 42.
FRAUDULENT ENLISTMENT	VI	Discharge authorities (see note 1).	Blue	Given for concealment of desertion from sister services or of certain civil court convictions when discharge authority deems trial by court-martial unwarranted.
DESERTION AND PHYSICAL UNFITNESS	VII	CG of Service Command or other officer with GCM jurisdiction.	Blue	Discharge permitted after deserter is restored to duty and found permanently incapacitated for service on physical or mental grounds when court-martial action is deemed unwarranted.
INAPTNESS OR UNDESIRABLE HABITS OR TRAITS OF CHARACTER	VIII	Discharge authorities (see note 1).	Blue unless Section VIII board finds retention in service would be desirable but for inaptitude or lack of required adaptability; in that event, white.	Granted when EM is: (1) inapt; (2) has not the necessary adaptability; (3) has undesirable habits or traits of character; or (4) is disqualified for service by his own misconduct. Company commander initiates proceedings; C.O. convenes board; proceedings forwarded with action to discharge authority. No discharge unless no useful service can be obtained.
CONVICTION BY CIVIL COURT	IX	Discharge authorities (see note 1).	Blue	Requires final conviction of an offense by a civil court which clearly indicates individual is not a suitable person to associate with EM.
CONVENIENCE OF GOVERNMENT	X	Discharge to accept appointment as officer or warrant officer in armed forces, by discharge authorities (see note 1); in all other cases, by Secretary of War only.	White unless otherwise directed by character board (see note 2).	Includes discharge or release from active duty because of EM's importance to national health, safety or interest, or for erroneous draft classification.
HABEAS CORPUS	XI	U.S. court or a justice or judge thereof.	White unless otherwise directed by character board (see note 2).	Officer on whom writ is served notes appeal, reports to TAG. Upon notification from WD or Dept. of Justice that no appeal will be taken or that the order has been sustained, EM to be discharged.
SENTENCE OF COURT-MARTIAL OR MILITARY COMMISSION	XII	Any officer exercising GCM jurisdiction.	Yellow (WD, AGO Form No. 57)	Dishonorable discharge not to be given in any other case.

ADDENDA

Page VI - 33, last sentence:

The necessity for separate "efficiency board" action following reclassification board recommendation of discharge of an NGUS officer, has been obviated by Changes 1, 5 Nov. 1943, to AR 605-230, 9 June 1943, vesting the statutory "efficiency board" with full reclassification powers. An NGUS officer being considered for reclassification is now ordered directly before a board constituted as required by sec. 76, NDA.

Page VI - 45, footnote 6:

The United States Supreme Court held in Billings v. Truesdell, 64 Sup. Ct. 737 (decided 27 Mar. 1944) that Article of War 2 (10 U.S.C. 1473) was inapplicable to selectees under the Selective Training and Service Act of 1940 prior to their actual induction into the Army.

Page VI - 46, footnote 9:

In Billings v. Truesdell, 64 Sup. Ct. 737, the United States Supreme Court reversed the courts below, and held that acceptance of a selectee by the Army was not the equivalent of his "induction" under the Selective Training and Service Act of 1940; and that a selectee who refused to submit voluntarily to whatever might be prescribed as an induction ceremony was subject to the penalties of the Act but not to military jurisdiction.

Page VI - 47, line 6:

Act of 5 Dec. 1943 (Public Law 197, 78th Cong.; Bull. 24, WD, 24 Dec. 1943) provides for pre-induction physical examination of selectees. Amended Selective Service regulations provide a period of at least 21 days between notification of the selectee that he has been found acceptable to the Army on such examination, and the date fixed for his induction. It is understood that this new procedure supplants the practice of transferring inductees to the Enlisted Reserve Corps to enable them to return to their homes to arrange personal and business affairs.

ADDENDA

Page VI - 4, footnote 6:

Sec. V, Cir. 29, WD, 22 Jan. 1944, provides that no original appointments will be made in the Regular Army until further notice except for (1) future graduates of U. S. Military Academy; and (2) certain appointments to be made in 1944 in the Medical Corps, the Pharmacy Corps and from ROTC honor graduates.

Page VI - 7, new paragraph:

Former commissioned officers of any component of the Army of the United States who were honorably discharged because of physical disqualification after 31 Aug. 1940, and are inducted into the Army, will, if found physically qualified for retention in the military service, be reappointed in the Army of the United States in the grade formerly held and given appropriate assignment in the arm or service to which formerly assigned. Sec. II, Cir. 172, WD, 2 May 1944. The same rule will apply to individuals who have successfully completed the ROTC course and were denied commissions because of physical disqualification and are inducted into the Army within 5 years subsequent to graduation. Applications are submitted through channels to The Adjutant General with report of final type physical examination. This procedure constitutes an exception to the provisions of AR 605-10 pertaining to the reappointment of former officers, which ordinarily require appearance before a board of officers.

Page VI - 10, first sentence, last paragraph, should read:

A de facto officer may retain such compensation as has been paid him for services actually rendered in the office, provided it does not exceed the rate of pay prescribed for the higher grade which he has occupied as a de facto officer.

Page VI - 14, footnote 4:

This statutory rule for determining the "date of rank" of Reserve and National Guard officers applies only with respect to the "date of rank" in the grade in which called to active duty. When an officer is promoted while serving on active duty, his "date of rank" in the new higher grade will, in the absence of other instructions, be the date of the order announcing the promotion.

Page VI - 19, footnote 6:

A new pamphlet has been issued (AR 605-12, 3 Feb. 1944, "Temporary Promotions in the Army of the United States") which supersedes the WD circulars cited in footnote 6.

PART VII

CITIZENSHIP AND NATURALIZATION

CHAPTER 1 - ACQUISITION OF CITIZENSHIP

The terms "citizenship" and "nationality" refer to the status of the individual in his relationship to the state and are often used synonymously. "Nationality", however, has a broader meaning than "citizenship". A "citizen" is a person who is endowed with full political and civil rights in the body politic of the state. The term "national" applies to a citizen and, as well, to a person who, although not a citizen, owes permanent allegiance to the state and is entitled to its protection, as, for example, a native of an outlying possession of the United States.[1] A resident alien is not a national of the United States, regardless of the length of his residence or of the fact that he has taken out his "first papers".[2]

Citizenship in the United States may be acquired by birth or by naturalization. The statutes relating to the acquisition of citizenship and nationality by birth and by naturaliza-

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1. 3 Hackworth, Digest of International Law, sec. 220. This distinction between "citizen" and the more inclusive term "national" is drawn in section 101 of the Nationality Act of 1940 (54 Stat. 1137; 8 U.S.C. 501).

2. Sec. 101, Nationality Act of 1940 (54 Stat. 1137; 8 U.S.C. 501). See also the definition of "alien enemy" in act 16 April 1918 (40 Stat. 531; 50 U.S.C. 21; M.L. 1939, Sup. II, sec. 2180a).

tion have been codified in the Nationality Act of 1940, as amended.[3]

The Fourteenth Amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * * ".[4] The circumstance of birth within the United States makes one a citizen thereof even if his parents were at the time aliens, provided they were not by reason of diplomatic character, or otherwise, exempted from the operation of its laws.[5] The Nationality Act of 1940 also confers nationality and citizenship, or nationality without citizenship, upon persons born abroad, under specified conditions, to parents of whom one or both are citizens, or nationals but not citizens.[6]

The primary method of acquiring citizenship other than by birth is direct naturalization in the individual's own right in accordance with prescribed judicial procedure. A derivative method of naturalization is recognized, under certain conditions,

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3. Act 14 Oct. 1940 (54 Stat. 1137; 8 U.S.C. 501).

4. The Nationality Act of 1940 restates the constitutional rule as to citizenship by birth (54 Stat. 1138; 8 U.S.C. 601) and defines the term "United States" to mean continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands (54 Stat. 1137; 8 U.S.C. 501).

5. United States v. Wong Kim Ark, 169 U.S. 649.

6. 54 Stat. 1138-1139; 8 U.S.C. 601, 602, 603, 605.

to a child born outside the United States of an alien parent who becomes naturalized while the child is under the age of 18 years.[7] The law at one time similarly conferred citizenship by derivative naturalization to an alien woman upon her marriage to a citizen of the United States, provided that she was a person who might herself be lawfully naturalized; and citizenship so acquired might be retained after termination of the marital relation.[8] Under present statutes, however, marriage of an alien to a citizen of the United States does not confer citizenship of the United States.[9]

The naturalization of aliens is a judicial proceeding in the United States.[10] Contrary to the rule in many other countries where naturalization depends in each individual case upon

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7. Secs. 13, 314, Nationality Act of 1940 (54 Stat. 1145; 8 U.S.C. 713, 714; M.L. 1939, Sup. II, sec. 555).

8. R.S. 1994; sec. 4, act 2 March 1907 (34 Stat. 1229).

9. Prior statutes which recognized naturalization by marriage to a citizen were repealed by act of 22 September 1922 (42 Stat. 1022) without their repeal affecting, however, citizenship previously acquired thereunder. Under the Nationality Act of 1940, certain of the usual requirements for naturalization are relaxed for aliens married to United States citizens. (54 Stat. 1144-1145; 8 U.S.C. 710, 711).

10. Exclusive jurisdiction to naturalize persons as citizens has been conferred by statute upon the federal district courts for the various states and territories, and also upon state and territorial courts of record having general jurisdiction. Sec. 301, Nationality Act of 1940 (54 Stat. 1140; 8 U.S.C. 701).

the discretion of the proper governmental agency, an alien who seeks American citizenship has the statutory right to have his petition heard by a judicial tribunal, and, if the requisite facts are established, the right to receive a certificate of naturalization,[11] provided he is not subject to racial or other statutory disqualification.[12]

As a general rule, naturalization may only be accomplished in accordance with the procedure prescribed in the Nationality Act of 1940. The applicant files with a court having naturalization jurisdiction a signed declaration of his intention to become a citizen of the United States, which contains certain specified information, including his correct name, place of residence, age, occupation, place of last foreign residence, and details of his entry into the United States.[13] He thereby secures

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11. Tutun v. United States, 270 U.S. 568.

12. The right to become a naturalized citizen is limited to "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere"(sec. 303, Nationality Act of 1940; 54 Stat. 1140; 8 U.S.C. 703). Conviction by a court-martial of desertion from the armed forces of the United States in time of war, disqualifies a person for citizenship (sec. 306, Nationality Act of 1940; 54 Stat. 1141; 8 U.S.C. 706). Enemy aliens are not absolutely disqualified, but they may become naturalized only under certain conditions and upon 90 days' notice of hearing to the Commissioner of Immigration and Naturalization (sec. 326, Nationality Act of 1940; 54 Stat. 1150; 8 U.S.C. 726).

13. Sec. 331 (54 Stat. 1153; 8 U.S.C. 731).

his so-called "first papers" and is known as a "declarant alien", as distinguished from a "non-declarant alien". At least two years must then elapse before the next step is taken, the filing of a sworn petition for naturalization which contains the required averments.[14] At least five years' continuous residence in the United States is required for naturalization, and six months' residence in the state.[15] The court has jurisdiction to naturalize only persons resident within its territorial jurisdiction.[16] Ability to speak the English language is prescribed as a condition to naturalization.[17]

A preliminary hearing upon the petition is conducted by a member of the Immigration and Naturalization Service of the Department of Justice, who makes findings and recommendations thereon to the naturalization court.[18] The final hearing upon the petition is held in open court no less than 30 days after the filing of the petition.[19] Before being admitted to citizenship,

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14. Sec. 332 (54 Stat. 1154; 8 U.S.C. 732).

15. Sec. 307 (54 Stat. 1142; 8 U.S.C. 707).

16. Sec. 301 (54 Stat. 1140; 8 U.S.C. 701).

17. Sec. 304 (54 Stat. 1140; 8 U.S.C. 704).

18. Sec. 333 (54 Stat. 1156; 8 U.S.C. 733).

19. Sec. 334 (54 Stat. 1156; 8 U.S.C. 734).

the petitioner is required to take an oath in open court, renouncing his former allegiance and swearing to support and defend the Constitution and laws of the United States against all enemies.[20]

A schedule of fees is set out in the statute for the filing and issuing of declarations, petitions and certificates.[21]

Some of the foregoing requirements are relaxed under the Nationality Act of 1940 in favor of certain classes of persons, including the following: an alien married to a United States citizen;[22] a child, born abroad, under 18 years of age, who is a permanent resident and has one parent who is a citizen;[23] a child, under 18 years of age, adopted by United States citizens;[24] a woman who has lost her United States citizenship under prior statutes by marriage to an alien;[25] a person who lost his citizenship by serving in the armed forces of another country;[26] a former

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20. Sec. 335 (54 Stat. 1157; 8 U.S.C. 735).

21. Sec. 342 (54 Stat. 1161; 8 U.S.C. 742).

22. Secs. 301, 311 (54 Stat. 1144-1145; 8 U.S.C. 710, 711).

23. Sec. 315 (54 Stat. 1146, 8 U.S.C. 715).

24. Sec. 316 (54 Stat. 1146; 8 U.S.C. 716).

25. Sec. 317 (54 Stat. 1146; 8 U.S.C. 717). By act of 2 March 1907 (34 Stat. 1228) an American woman lost her citizenship by marriage to an alien. This statute was repealed by act 22 September 1922 (42 Stat. 1022).

26. Sec. 317 (54 Stat. 1146; 8 U.S.C. 717); sec. 323 (54 Stat. 1149) as amended by act 2 April 1942 (56 Stat. 198; 8 U.S.C., Sup. II, 723).

citizen, under 25 years of age, who lost citizenship through the expatriation of his parents;[27] and a person who has served honorably at any time in the United States Army, Navy, Marine Corps or Coast Guard for a period or periods aggregating three years.[28]

CHAPTER 2 - EXPEDITIOUS NATURALIZATION OF PERSONS SERVING IN THE ARMED FORCES UNDER THE SECOND WAR POWERS ACT

A more liberal and expeditious naturalization procedure for persons serving honorably in the armed forces during the present war, was provided in Title X of the Second War Powers Act,[1] by way of amendment to the Nationality Act of 1940.[2]

In making naturalization easier for aliens serving in the armed forces, Congress may have taken into account that the Selective Training and Service Act of 1940 was amended on 20 Decem-

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27. Sec. 318 (54 Stat. 1147; 8 U.S.C. 718).

28. Sec. 324 (54 Stat. 1149; 8 U.S.C. 724). Neither declaration of intention nor residence within court's jurisdiction are required. The five-years' continuous residence requirement is eliminated if petitioner is still in the service or was within 6 months preceding filing of petition.

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1. Act 27 March 1942 (56 Stat. 182-183).

2. Sec. 701-705, added to act 14 Oct. 1940 (8 U.S.C., Sup. II, 1001-1005; M.L. 1939, Sup. II, sec. 2269).

ber 1941[3] to make liable for military service "every male citizen of the United States and every other male person residing in the United States" between the ages of 18 and 65. Under the act, as amended, a neutral alien may apply prior to induction to be relieved from liability to serve, but in doing so, will forfeit his right to become a citizen.[4] Enemy aliens are also subject to military service under the act, as amended, when "acceptable to the land or naval forces".[5]

Under the liberalized procedure authorized by Title X of the Second War Powers Act,[6] aliens serving in the armed forces

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3. 55 Stat. 845; 50 U.S.C., Sup. II, 303; M.L. 1939, Sup. II, sec. 2225-3(a). As originally enacted (54 Stat. 885) the Selective Training and Service Act had applied only to citizens and resident declarant aliens; it had followed the Selective Draft Law of 1917 in this regard (40 Stat. 77; 50 U.S.C. 202).

4. 55 Stat. 845; 50 U.S.C., Sup. II, 303; M.L. 1939, Sup. II, sec. 2225-3(a).

5. Ibid. Enemy aliens may not be conscripted "to take part in the operations of war directed against their own country" by international law convention to which the United States is a party. Art. 23(h), Annex to Hague Convention No. IV, 18 Oct. 1907. The exemption granted to the enemy alien may be waived by him. JAG 220.8, 9 May 1918; Dig. Op. JAG, 1912-40, sec. 1. If the enemy alien should be captured by the state of which he is a national, he is not entitled to be treated as a prisoner of war under rules of international law and may be put to death. SPJGA 014.33, 14 Aug. 1942; I Bull. JAG 192, sec. 2269.

6. Act 27 March 1942 (56 Stat. 182; 8 U.S.C., Sup. II, 1001; M.L. 1939, Sup. II, sec. 2269).

are relieved in the following respects of the requirements upon which their applications for citizenship would otherwise be conditioned:[7]

(1) The racial disqualifications are inapplicable.

(2) No declaration of intention is necessary.

(3) No period of residence within the United States or within any state is required.

(4) The petitioner is not required to be able to speak the English language or sign his name to the petition.

(5) The petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner.

(6) The petitioner may be naturalized immediately if prior to the filing of the petition he and the required witnesses have been examined by a representative of the Immigration and Naturalization Service.

(7) If the petitioner is not within the jurisdiction of any naturalization court, he may be naturalized by an authorized representative of the Immigration and Naturalization Service without appearance in court.

(8) No fee may be charged in connection with the proceedings.

(9) Enemy aliens are relieved from the restrictions which would otherwise govern their naturalization; the 90 day notice requirement may be waived by the Commissioner of Immigration and Naturalization, in his discretion.

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7. See pp. VII - 6 — VII - 8, supra.

The requirements under the Second War Powers Act are simply that the petitioner be lawfully admitted to the United States, a resident thereof at the time of his enlistment or induction, and have served honorably in the armed forces during the present war.[8] With the petition, there must be filed affidavits of at least two credible citizens attesting the petitioner "to be a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States", and proof of his military service as shown either by a copy of his record of service duly authenticated by the War Department or by affidavits of at least two members of the military forces of noncommissioned grade or higher, who are citizens.

A petition for naturalization under Title X of the Second War Powers Act must be filed not later than one year after the termination of the effective period of other titles of the act.[9]

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8. The requirement of "service" contemplates active military service. Alien selectees who, immediately upon induction, are transferred to the Enlisted Reserve Corps and relieved from active duty, and aliens commissioned temporary officers (AUS) but not called to active duty, are ineligible for expeditious naturalization under the Second War Powers Act. SPJGA 1942/5000, 24 Oct. 1942; I Bull. JAG 279, sec. 561.

9. Act 27 March 1942 (56 Stat. 182; 8 U.S.C., Sup. II, 1001; M. L. 1939, Sup. II, sec. 2269). The time limit prescribed for other titles of the Second War Powers Act is 31 December 1944 or such earlier time as Congress by concurrent resolution, or

The basic administrative procedure which the War Department has adopted to effectuate the naturalization of aliens in the service under the provisions of Title X of the Second War Powers Act, is set forth in Circular No. 193, 27 August 1943.[10]

All noncitizens enlisted, inducted or appointed in the Army of the United States are to be advised of their right to apply for citizenship upon their arrival at reception centers.[11] From there they are sent to replacement training centers,[12] where they are again advised of their right to apply for citizenship. Whether or not the noncitizen desires to apply is there noted on his service record.[13] It will be made clear to him that neither his failure to apply nor the rejection of his application will in any way affect determinations concerning his assignment to an overseas theatre.[14]

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9. (cont.)
the President, may designate. Sec. 1501, act 27 March 1942 (56 Stat. 187; 50 U.S.C., Sup. II, 645; M.L. 1939, Sup. II, sec. 2273).

10. This circular supersedes Cir. 120, WD, 24 Apr. 1942, as amended.

11. Par. 4c, Cir. 193, WD, 27 Aug. 1943.

12. Noncitizens will not be sent directly to units from reception centers except upon specific direction of the War Department. Ibid.

13. Ibid.

14. Ibid.

Commanding officers of posts, camps and stations are directed to establish liaison with the nearest office of the United States Immigration and Naturalization Service, and to secure from it a supply of blank preliminary application forms for distribution among eligible and worthy noncitizens within the command.[15] Commanding officers are to designate a properly instructed individual to inform noncitizens of their right to apply for citizenship, to assist persons who desire to make application, and to expedite by all practicable means completed action on the application prior to the applicant's transfer to another post, camp or station.[16]

The preliminary application form, immediately upon its execution, is forwarded by the post, camp, or station commander to the nearest office of the Immigration and Naturalization Service. Thereafter the immediate commanding officer of the applicant takes such steps as are necessary to ascertain whether the applicant is worthy of citizenship.[17] When advice is received from the office of the Immigration and Naturalization Service that it is ready to proceed with the examination of the applicant and his witnesses and the

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15. Pars. 4a, 4b, id.

16. Par. 4a, id.

17. Par. 4d, id.

preparation of a formal petition, the applicant's immediate commanding officer prepares a certificate for attachment to the preliminary application form, attesting to the applicant's military status, honorable service of at least 30 days, good moral character, and approval of the application.[18] The Immigration and Naturalization Service will not favorably consider the application without a certificate of approval of the immediate commanding officer.[19]

Arrangements are to be made with nearest office of the Immigration and Naturalization Service for the examination of applicants and witnesses, the preparation and filing of formal petitions, and hearings thereon.[20] The certificate of naturalization issued to the soldier is filed with his Army records until he is honorably separated from the service.[21]

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18. Applications will not be approved until the applicant has been in the active service at least 30 days and unless, in the opinion of the immediate commanding officer, the noncitizen will make a loyal and useful citizen of the United States. If the applicant's character and service do not warrant approval, disapproval will be indicated on the form. Par. 4d, id.

19. Ibid.

20. Pars. 4e, 4f, 5a, id. Wherever possible, arrangements will be made to have these matters conducted at the same time and places to minimize loss of time from military duties of the personnel involved.

21. Par. 6b, id.

Overseas commanders having eligible and worthy noncitizens in their commands who desire citizenship are to communicate with the nearest authorized official[22] to make arrangements for the consideration of applications from such noncitizens. Generally at overseas stations the examination, filing of formal petition, hearing and granting of naturalization are conducted at one time by the Immigration and Naturalization Service official.[23] Because of the extreme difficulty of accomplishing naturalization at overseas stations, commanding officers are directed to make every reasonable effort to have completed action taken on each application prior to the applicant's transfer.[24]

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22. The list of consular officers of the Department of State in various parts of the world who have been designated to act as representatives of the Immigration and Naturalization Service under sec. 702 of the Nationality Act of 1940, as amended, is set out in par. 9, Cir. 193, WD, 27 Aug. 1943.

23 Par. 8, Cir. 193, WD, 27 Aug. 1943.

24. In the event an applicant is transferred from the post, camp, or station at which a preliminary application form was executed, before citizenship is granted or denied, certain prescribed information regarding the matter will be furnished the Enlisted Branch, Office of The Adjutant General. Par. 7, id.

CHAPTER 3 - LOSS OF CITIZENSHIP

The means by which a person may lose his United States citizenship are set out exclusively in the Nationality Act of 1940.[1]

Citizenship is forfeited in the event of conviction by a court-martial of deserting the military or naval service in time of war.[2] Forfeiture similarly results from the commission of any act of treason against the United States for which the individual is convicted by court-martial or by a court of competent jurisdiction.[3]

The taking of an oath or other formal declaration to a foreign state will effect the loss of United States citizenship, as will voting in an election or plebiscite in a foreign state, or accepting any office under the government of a foreign state for which only nationals of such state are eligible.[4] Service in the armed forces of a foreign state involves the loss of citizenship if a foreign oath of allegiance is taken. Even

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1. Sec. 408 (54 Stat. 1171; 8 U.S.C. 808).
2. Sec. 401 (54 Stat. 1168; 8 U.S.C. 801; M.L. 1939, Sup. II, sec. 558).
3. Ibid.
4. Ibid.

without taking such an oath citizenship will be lost if the person had dual nationality in both the United States and the country with whose forces he serves, provided the service is not expressly authorized by laws of the United States.[5]

The formal renunciation of citizenship before a diplomatic or consular officer of the United States in form prescribed by the Secretary of State will effectively terminate United States citizenship. Similarly, loss of citizenship follows naturalization in a foreign state, provided that a child will not lose citizenship by the foreign naturalization of a parent until the child attains 23 years of age without acquiring permanent residence in the United States.[6] Persons who have become United States citizens by naturalization may lose such citizenship by taking up residence in a foreign state for a certain length of time.[7]

The Nationality Act of 1940 prescribes the judicial

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5. Ibid.

6. Ibid.

7. The rule is subject to specified exceptions, such as residence abroad on account of ill health, studies, and representation of an American concern (54 Stat. 1170; 8 U.S.C. 806). Unless one of the exceptions applies, 2 years' continuous residence in the foreign state of which he was formerly a national, or 5 years' residence in any other foreign state, may effect loss of American citizenship (54 Stat. 1170; 8 U.S.C. 804).

procedure for revoking citizenship acquired illegally or through fraud.[8] Servicemen who have been naturalized under the special procedure authorized by Title X of the Second War Powers Act may have their citizenship revoked if they are subsequently dishonorably discharged.[9]

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8. Sec. 338 (54 Stat. 1158; 8 U.S.C. 738).

9. 56 Stat. 183; 8 U.S.C., Sup. II, 1004; M.L. 1939, Sup. II, sec. 2269. The citizenship of such servicemen is, of course, also subject to forfeiture or revocation upon any of the grounds heretofore mentioned and applicable to all naturalized citizens.

ADDENDA

Page VII - 6, footnote 12:

"Chinese persons or persons of Chinese descent" have been added to the list of persons eligible to become naturalized citizens, by act of 17 Dec. 1943 (Public Law 199, 78th Cong.) amending sec. 303, Nationality Act of 1940.

Page VII - 17, line 4:

Act of 20 Jan. 1944 (Public Law 221, 78th Cong.; Bull. 2, WD, 1 Feb. 1944) amends sec. 401 (g), Nationality Act of 1940, to provide that court-martial conviction of wartime desertion will effect loss of citizenship only if there is separation from the service by dismissal or dishonorable discharge as the result of such conviction; and further that citizenship lost by conviction of wartime desertion (whether prior or subsequent to the act) is restored by restoration to active duty in time of war or reenlistment or induction in time of war with permission of competent authority (whether prior or subsequent to the act).

ADDENDA

PART VIII

PAY AND ALLOWANCES

CHAPTER 1 - PAY

1. General

The material of this Part is devoted almost exclusively to the general laws, regulations and schedules under which personnel of the Army of the United States receive pay for military duty performed and allowances for rated or actual expenses incurred while performing that duty. Since the "Chief of Finance, under the authority of the Secretary of War, is charged with the disbursement of all funds of the War Department, including the pay of the Army",[1] no attention will be paid to fiscal, accounting, and administrative matters concerning pay and allowances. Accrual, stoppage, forfeiture, and allotment of pay will be discussed.

The current basic legislation governing pay of the Army is the Pay Readjustment Act of 1942, as amended.[2] As in earlier legislation,[3] the act classifies Army personnel into commissioned

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1. Sec. 9a, National Defense Act (10 U.S.C. 172; M.L. 1939, sec. 70). Payment of troops is a function of command. Cir. 114, WD, 5 May 1943.

2. Approved 16 June 1942, effective 1 June 1942 (56 Stat. 359; M.L. 1939, Sup. II, sec. 1371c-1; Bull. 28, WD, 1942), as amended, inter alia, by act 2 December 1942 (56 Stat. 1937; 37 U.S.C. 191). The section numbers in this Chapter, unless otherwise noted, are those of the Pay Readjustment Act of 1942, as amended. The act is set out in M.L. 1939, Sup. II, Chapter 26a.

3. The previous basic compensation act, now repealed together with other legislation inconsistent with the 1942 act, was

officers, warrant officers, enlisted men and female nurses,[4] and prescribes pay and allowance schedules for the several grades of rank in the Regular Army.[5] The act also provides that no person affected by the act shall suffer any reduction in the pay or allowances to which entitled on 1 June 1942, the effective date of

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3. (cont.)
that of 10 June 1922 (42 Stat. 625). The new legislation was designed to provide increased compensation and eliminate many of the complexities and inequalities existent in prior laws and results in the equalization of the pay of those of the same grade and length of service in the several components of the Army of the United States. S. Repts. 1185, 1624, 77th Congress.

4. Sec. 13 places female nurses in 5 annual pay grades ($1080 - $1800) and provides additional sums ($600 - $2500) based on positions held, and the rental and subsistence allowances established for officers of the first pay period. For the duration of the present war and six months thereafter, however, the act 22 December 1942 (56 Stat. 1072; 10 U.S.C. 164; M.L. 1939, Sup. II, sec. 2165f-1) grants to members of the Army Nurse Corps (see Part V, Chapter 2, supra) the same relative rank, pay and allowances as are provided for commissioned officers without dependents.

5. Personnel of the reserve forces when on active duty in the service of the United States and personnel of the National Guard when in Federal service or when performing the duties provided for by sections 94, 97, and 99 of the National Defense Act (see Part V, Chapter 3, supra) receive the same pay and allowances as are authorized for persons of corresponding grade and length of service in the Regular Army (secs. 3, 14). Selectees receive the pay and allowances provided for other enlisted men of like grade and length of service in the component to which assigned. Selective Training and Service Act of 1940, as amended (54 Stat. 886; 50 U.S.C. 303; M.L. 1939, Sup. II, sec. 2225-3(d)). See Part V, Chapter 8, supra.

the act. The act has been implemented by Executive Orders and Army Regulations and interpreted in decisions of the Comptroller General of the United States, opinions of The Judge Advocate General and Bulletins of the Finance Department.

2. Types of Pay

Compensation is based on the grade held, with percentage increases for length of service and certain types and places of duty and stated sums for other types of duty and for meritorious service. Army pay is divided into the following five categories:

(a) Base
(b) Longevity
(c) Additional
(d) Retirement
(e) Separation

Additional pay ((c) above) is subdivided into the following types:

(1) Foreign Duty
(2) Sea Duty
(3) Aviation
(4) Parachutist
(5) Distinguished Service Award
(6) Arms Qualfication
(7) Stenographic
(8) Aide
(9) Mount
(10) Diving Duty

a. Base Pay. Commissioned officers in the grades from colonel to second lieutenant usually receive the basic pay and allowances provided for those in the sixth to the first pay periods respectively.[1] These annual amounts are $4000, $3500, $3000,

1. Sec. 1 (M.L. 1939, Sup. II, sec. 1371c-1); see Table I, column

$2400, $2000, and $1800. When, however, officers below the grade of colonel complete a certain number of years of service they become entitled to receive the pay and allowances of the next higher pay period. Thus, a captain with 17 years of service receives the base pay and allowances of the 4th pay period.[2]

With a few exceptions,[3] the base pay of warrant and flight officers falls into the first four pay periods provided for commissioned officers, but length of service does not entitle them to higher base pay. The maximum pay and allowances payable to a warrant officer is $458.33 per month.[4]

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1. (cont.)
3, at end of this chapter. By act 7 July 1943 (Public Law 114, 78th Cong.; Bull. 14, WD, 16 July 1943), warrant officers temporarily commissioned in the Army of the United States under the act 22 Sept. 1941 (see Part V, Chapter 9, supra) are not to have their pay and allowances reduced below that to which entitled at the time of such temporary appointment. Section 1 of the 1942 pay act allows full time contract surgeons the pay and allowances of the second pay period.

2. Sec. 1; see Table I, column 2. In time of war an officer serving with troops operating against the enemy who, under competent orders, exercises a command above that pertaining to his grade is entitled to receive the pay and allowances of the grade appropriate to the command exercised but not above the pay of a brigadier general. Act 26 April 1898 (30 Stat. 365; 10 U.S.C. 694; M.L. 1939, sec. 1428). Par. 3, AR 35-1620, 1 Jan. 1930, states that when a command devolves upon an officer by reason of his seniority, he is not entitled to the additional pay for exercising command higher than that pertaining to his grade.

3. See Table II, column 2, at end of this chapter.

4. Sec. 8.-

For pay purposes, enlisted personnel are divided into seven pay grades, master sergeants and first sergeants occupying the first grade with base pay of $138 per month and privates falling in the seventh grade at $50 per month. Base pay increases only with promotion.[5]

b. Longevity Pay. Commissioned officers,[6] warrant officers,[7] enlisted personnel,[8] and nurses[9] receive a 5 percent increase in the base pay of the pay period or pay grade after each 3 years of specified service up to 30 years. The same service which is counted for longevity pay purposes is also counted for pay period purposes in the case of commissioned officers. Thus, a second lieutenant with less than five years' service is in the first pay period. At the end of four years of service he receives $157.50 per month; after completing five years he would increase his base pay and move into the second pay period and be paid at the rate of $175.00 per month; and after completing six years he would increase his longevity pay and receive $183.33 or $166.67 (base

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5. Sec. 9; see Table IV, at end of this chapter.

6. Secs. 1, 3, 3A.

7. Sec. 8.

8. Sec. 9.

9. See note 4, supra; par. 321.3, TM 14-250, 1 Mar. 1943.

pay of second pay period) plus 10 percent (2 periods of 3 years x 5%).[10]

Commissioned officers, in computing pay for pay period and longevity purposes are credited with full time for any period during which they have held commissions in any or all of the following: Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, Public Health Service, Organized Militia prior to 1 July 1916, active National Guard,[11] National Guard Reserve, National Guard of the United States, Officers Reserve Corps,[12] Naval Militia, National Naval Volunteers, Naval Reserve Force, Naval Reserve, Marine Corps Reserve Force, Marine Corps Reserve, Coast Guard Reserve, Reserve Corps of the Public Health Service, Philippine Scouts, and Philippine Constabulary.[13] During the existence

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10. Table I, columns 3, 4, 5, and 6.

11. Time during which a commission was held in the inactive National Guard may not be counted in computing longevity pay. 22 Comp. Gen. 907.

12. Time during which a commission was held in the Officers' Reserve Corps, even though the officer was carried in the Inactive Reserve, is to be included in computing the longevity pay of a Reserve officer on active duty. 22 Comp. Gen. 358; SPJGA 1942/4050, 3 Sept. 1942.

13. Certain additional service by Coast and Geodetic Survey officers and by Regular Army officers in the military service on 30 June 1922 is also credited. Sec. 1; par. 203.2, TM 14-250, 1 Mar. 1943. Retired officers recalled to active duty are allowed to count for pay purposes all the enumerated service, including time in which they were in an inactive status. 22 Comp. Gen. 664.

of any war and for 6 months thereafter, in computing longevity and pay periods, officers are also credited with service as enlisted men, warrant officers and Army field clerks in the foregoing services, with a few additions.[14]

Warrant officers receive longevity credit for any active Federal service in the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, Public Health Service or their reserve components; for service in the active National Guard; and service in the Naval Reserve, Marine Corps Reserve and the Coast Guard Reserve.[15]

Enlisted personnel receive credit for longevity pay for all active Federal service in any of the services mentioned in

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14. This list of services includes the Regular Army Reserve and Enlisted Reserve Corps.
From the period of enlisted service must be deducted, inter alia, periods of absence on account of sickness due to misconduct, absence without leave, or absence because of misconduct. 22 Comp. Gen. 759; II Bull. JAG 79, sec. 1371c-3A; see AW 107. Time of absence on duly authorized leave is included in the service which may be counted for longevity pay purposes. 27 Comp. Dec. 549; par. 3f, AR 35-1680, 5 Aug. 1942.

15. Sec. 8; par. 4j, AR 35-2220, 29 Sept. 1942. Par. 315.3, TM 14-250, 1 Mar. 1943, states that the service for which longevity credit is given is active service in any grade in any of the services, the time of commission-holding in which, entitles commissioned officers to longevity credit at all times. A warrant officer may count only active and may not count inactive service on the retired list either as an enlisted man or warrant officer. 22 Comp. Gen. 664.

the title of the act[16] or their reserve components; service in the active National Guard and in the Enlisted Reserve Corps, Naval Reserve, Marine Corps Reserve and the Coast Guard Reserve.[17]

Nurses receive longevity credit for active service as members of the Army Nurse Corps, Navy Nurse Corps and as Reserve Nurses since 2 February 1901.[18]

c. Additional Pay

(1) Foreign Duty Pay. Commissioned officers and nurses are entitled to receive a ten percent increase of base (not base and longevity) pay while on duty in any place beyond the continental limits of the United States or in Alaska and warrant officers and enlisted personnel receive twenty percent of base pay for similar service. Pay for this type of duty is effective 7 December 1941 and will conclude 12 months after the termination

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16. The services mentioned are the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service. Par. 111.3, TM 14-260, 10 Dec. 1942, however, states that service in the Public Health Service will not be counted for longevity pay. An enlisted man may not count inactive service in the Officers' Reserve Corps. 22 Comp. Gen. 732. Time lost under conditions disentitling one to active duty pay may not be counted for longevity. Par. 111.4, TM 14-260, 10 Dec. 1942.

17. Sec. 9.

18. Effective 22 Dec. 1942. See note 4, supra.

of the present war is proclaimed by the President.[1]

Foreign duty pay is payable from the date of departure from the United States to the date of return, both dates inclusive, but is not payable for periods of temporary duty, authorized leave or while sick in hospital, if such duty is performed in the United States.[2]

(2) Sea Duty Pay. Commissioned officers and nurses[3] receive a ten percent and warrant officers and enlisted personnel a twenty percent increase of base pay while on sea duty.[4] Generally, sea duty covers that performed while permanently assigned on a vessel owned or operated by the United States Army Transport Service and engaged in transit of the seas as distinguished from domestic harbor service. Service on Army mine plan-

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1. Sec. 2; AR 35-1490, 31 Aug. 1942.

2. Par. 232.2, TM 14-250, 1 Mar. 1943. Personnel of the Army Air Forces performing reconnaissance or patrol flights beyond the continental limits of the United States from bases on the continent are not entitled to foreign duty pay whether or not the periods of such flights exceed one day. 21 Comp. Gen. 1050. When directed by orders, duty in Canada of a temporary nature not merely incident to or in connection with a paramount or primary duty in the United States constitutes foreign duty. 22 Comp. Gen. 437; see MS. Comp. Gen., B-25847, 25 May 1942. The Canal Zone is not included within the meaning of the term "continental limits of the United States". SPJGA 1942/5615, 27 Nov. 1942.

3. See p. VIII - 4, note 4, supra.

4. Sec. 2; AR 35-1490, 31 Aug. 1942.

ters and sweepers, cable ships, and supply boats moving between United States ports, or even while operating within a domestic harbor and receiving rations and quarters in kind aboard vessel, is compensable at the additional rate. Duty on board a vessel undergoing repairs in the United States for a period of more than 30 days will not entitle the performer to additional pay unless he lives aboard the vessel and receives rations and quarters in kind.[5]

(3) Aviation Duty Pay. Flying pay is divided into two classes. Officers, warrant officers, enlisted personnel, and nurses who, pursuant to orders of competent authority, participate regularly and frequently in aerial flights under regulations prescribed by the President[6] receive an increase of 50 percent of their pay.[7] A second type of aviation pay is provided for in

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5. Par. 233.3, TM 14-250, 1 Mar. 1943. Army personnel are entitled to additional pay for sea duty if the conditions of service at sea exist, namely, service under orders of a department and in vessels employed by authority of law. Marine travel incident to foreign duty is not sea duty. 21 Comp. Gen. 1050.

6. Sec. 18, AR 35-1480, 10 Oct. 1942. The regulations were prescribed in E.O. 9195, 7 July 1943 (Bull. 35, WD, 16 July 1942).

7. The pay to which the percentage is added is the total of base, longevity, foreign or sea duty, and distinguished service award pay. AR 35-1480, 10 Oct. 1942; AR 35-1490, 31 Aug. 1942; par. 506.3, TM 14-250, 1 Mar. 1943; par. 305, TM 14-260, 10 Dec. 1942.

The $75 per month base pay of aviation cadets includes extra pay for flying risk. They also receive a subsistence money allowance of $1 per day and are furnished quarters, clothing, etc., at Government expense but are not entitled to longevity pay. Par. 1, AR 35-2580, 12 June 1943.

annual appropriation legislation and is payable at the rate of $720 per year to certain "nonflying" officers.[8]

Flying officers are defined[9] as officers who have received aeronautical ratings as pilots of service types of aircraft, aircraft observers or as other members of combat crews, flight surgeons, and commissioned or warrant officers undergoing flight training.[10] Nonflying officers entitled to additional pay are commissioned and warrant officers and nurses, who do not hold aeronautical ratings but who, pursuant to orders of competent authority, perform a specified number of flights within certain periods of time.[11] Enlisted men of all arms and services may qualify for the 50 percent increase when, under competent orders, they meet the flight requirements.[12]

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8. Military Appropriation Act, 1944 (Public Law 108, 78th Cong.; Bull. 13, WD, 9 July 1943).

9. Act 4 Oct. 1940 (54 Stat. 963; 10 U.S.C. 292-1); Military Appropriation Act, 1944, supra, note 8.

10. Provision for flight surgeons and trainees is for the duration of the war and 6 months. See note 9, supra. An aviation medical examiner is not a flying officer within the definition. 22 Comp. Gen. 730.

11. Pars. 221, 317, 321.4, TM 14-250, 1 Mar. 1943.

12. Par. 120, TM 14-260, 1 Dec. 1942. Each enlisted man on duty with the Army Air Forces may be required to participate regularly and frequently in aerial flights; if he is a qualified aircraft pilot or observer or is assigned to pursue a course of instruction to qualify as such, he will be required so to participate. Pars. 303.1, 303.2, id.

The flight requirements for flying officers and others eligible to receive the 50 percent increase in pay and for non-flying officers to receive the $60 per month are set out in detail in AR 35-1480.[13]

(4) Parachutist Pay. An officer or warrant officer engaged on parachutist duty who is rated as a parachutist or is undergoing training for such rating, who is assigned or attached as a member of a parachute unit, and for whom parachute jumping is an essential part of his military duty, receives $100 per month as an additional item of pay. Under the same conditions, an enlisted man receives $50 per month. None may receive parachutist pay while receiving flying pay.[14]

(5) Distinguished Service Award Pay. Each enlisted man who has been awarded a medal of honor, distinguished service cross, distinguished service medal,[15] distinguished flying

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13. 10 Oct. 1942. In general, the percentage increase may be earned during 1 month (10 or more flights totaling 3 hours or a minimum of 4 hours), 2 months (20 or more totaling 6 hours or minimum of 8 hours), or 3 months (30 or more totaling 9 hours or a minimum of 12 hours). The flat sum may be earned by taking 3 or more flights within a ninety-day period pursuant to orders. An "aerial flight" is a journey in an aircraft, beginning when it takes off from a point of rest and terminating when it next comes to a stop. E.O. 9195, 7 July 1942 (Bull. 35, WD, 16 July 1942).

14. AR 35-1495, 22 Aug. 1942.

15. Act 9 July 1918 (40 Stat. 871; 10 U.S.C. 696; M.L. 1939, sec. 1434).

cross, or soldier's medal[16] is entitled, during active service, to additional pay at the rate of $2 per month from the date of the act or service. The sums are payable for each bar issued in lieu of additional medals or crosses, beginning on the date of the later award.[17] A commissioned or warrant officer does not receive pay for awards received as an enlisted man, with one exception.[18]

(6) Arms Qualification Pay. The Pay Readjustment Act of 1942[19] authorizes the President to prescribe regulations under which enlisted men may receive additional monthly compensation between $1 and $5 for special qualification in the use of the arm or arms they may be required to use.[20]

(7) Stenographic Pay. Enlisted men detailed to serve as stenographic reporters for general courts-martial, courts

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16. Act 2 July 1926 (44 Stat. 789; 10 U.S.C. 1430; M.L. 1939, sec. 1434).

17. AR 35-1500, 8 Oct. 1942.

18. The exception is in the case of one who, while serving as an enlisted man, received a certificate of merit for which he was subsequently issued the Distinguished Service Medal. In this case $2 per month is payable to him. If he had received the medal originally, he would not be entitled to the additional sum. MS. Comp. Gen. A-26747, 22 May 1929; pars. 225, 317, TM 14-250, 1 Mar. 1943.

19. Sec. 16.

20. The regulations setting out the graduated amounts of arms qualification pay and the conditions of payment (AR 35-2380, 20 June 1940), have been suspended for the duration of the war. Cir. 219, WD, 7 July 1942.

of inquiry, military commissions, and retiring boards receive extra pay at the maximum rate of 10 cents for each hundred words.[21]

(8) Aide Pay. Commissioned officers below the grade of major are entitled to additional pay of $200 per year when assigned as aides to a major general and $150 per year when assigned as aides to a brigadier general.[22] Other general officers may have aides assigned but only those aides authorized by law may receive the additional pay.[23]

(9) Mount Pay. If an officer of company grade provides himself with a suitable mount at his own expense, he is ordinarily entitled to additional pay at the rate of $150 per year.[24]

(10) Diving Duty Pay. The act of 10 April 1943[25] provides additional pay for officers and enlisted men engaged in

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21. Act 25 Aug. 1937 (50 Stat. 805; 10 U.S.C. 699; M.L. 1939, sec. 1436); par. 2h, AR 35-4120, 18 Mar. 1942.

22. R.S. 1261 (10 U.S.C. 692; M.L. 1939, sec. 1421); AR 35-1700, 10 July 1937.

23. For authorized aides, see Cirs. 275, 303, WD, 1942. For aides to a permanent major general holding temporary rank of lieutenant general, see I Bull. JAG 297, sec. 1421.

24. Act 11 May 1908 (35 Stat. 108; 10 U.S.C. 803; M.L. 1939, sec. 1420); AR 35-1720, 19 Dec. 1941. The Military Appropriation Act, 1944, provides that no additional pay for mounts shall be paid during the current fiscal year.

25. Public Law 33, 78th Cong.; Bull. 7, WD, 17 April 1943; see AR 35-1485, 10 April 1943, and AR 775-50, 3 Aug. 1943.

diving duty. Enlisted men qualified in various classes receive additional monthly pay at rates between $10 and $20 - the statutory limits are $5 to $30 - and at certain footage rates for dives of over 120 feet or equivalent pressure. Officers and enlisted men on duty as divers in salvage or repair operations in depths over 90 feet or in less than 90 feet under extraordinarily hazardous conditions receive $5 per hour or fraction thereof while so employed.

d. Retirement Pay. Under certain circumstances, retirement pay is payable to all members of the Army of the United States although only Regular Army personnel may be retired and placed on the retired list.[26] The numerous retirement pay acts[27] generally provide for pay at varying percentage rates of the active duty pay received at the time of retirement or discharge.[28]

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26. See p. VI - 21, supra. In general the retirement pay laws applicable to commissioned officers are applicable to warrant officers and nurses. Pars. 318, 327, TM 14-250, 1 Mar. 1943.

27. The principal enactments are set out in Chapter 27, M.L. 1939 and Sup. II, and in AR 35-1760, 10 Aug. 1942.

28. With the exception of the case of the General of the Armies of the United States, the maximum retirement pay rate is 75%. Other rates, multiplied by the number of years of service for which entitled to credit not to exceed 75%, are 4% (e.g., original appointee over 45 years of age, but if retired for physical disability the flat 75% rate applies); 3% (e.g., warrant officers of the Army Mine Planter Service with more than 20 years' service); and 2 1/2% (e.g., officer applicant for retirement with 15 - 29 years of service may be retired

Readjustment of retirement pay benefits may be made as of 1 June 1942[29] for officers receiving retired pay before that date if, at the end of their active status they had had commissioned service which would have entitled them to higher pay, had the Pay Readjustment Act of 1942 been in effect at the conclusion of their active status.[30] Active duty after retirement may be counted in computing retired pay, both as to percentage rates and percentage increases.[31]

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28. (cont.)
at the President's discretion at such rate). By act 29 June 1943 (Public Law 101, 78th Cong.), retirement rank and pay in cases of physical disability are generally related to the temporary grade in which serving at time of incurrence of disability. Enlisted personnel generally receive retirement pay at the rate of 75% of pay when retired at the end of 30 years' service or after 20 years' service for permanent physical incapacity incurred in line of duty.

29. The effective date of the Pay Readjustment Act of 1942.

30. SPJGA 1942/3399, 31 July 1942. The Comptroller General has held, however, that the provisions of sec. 3A, Pay Readjustment Act of 1942, permitting the counting by officers of certain warrant and enlisted service for pay purposes in time of war and for six months thereafter, do not apply to retired officers not on active duty. MS. Comp. Gen. B-32302, 28 July 1943 (2 Bull. JAG, 323, sec. 1371c-15).

31. MS. Comp. Gen. B-20321, 26 Aug. 1942. An enlisted man on the retired list who would be eligible to receive pension or compensation under laws administered by the Veterans' Administration, if he were not receiving retired pay, may waive the latter and elect to receive the former. Later he may waive the pension and be restored to retired pay. Act 30 June 1941 (55 Stat. 395; 30 U.S.C. 26b; M.L. 1939, Sup. II, sec. 1089a).

Under the provisions of the act 23 April 1930[32] retirement takes effect on the first day of the month following the month in which the retirement would otherwise become effective but the rate of retired pay is computed as of the date retirement would have occurred if the legislation had not been enacted.

e. Separation from Service Pay. This unofficial classification of pay includes the compensation or donation payable to certain Army personnel on being wholly retired, discharged, or relieved from active duty.[33]

Regular Army officers[34] wholly retired from the service[35] receive one year's pay and allowances of the highest rank held by

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32. 46 Stat. 253; 5 U.S.C. 47a; M.L. 1939, sec. 322a. Under War Department policy, one who would normally retire on the first or any subsequent day of the month is held in active service and continues to draw pay and allowances to include the last day of the month. If, however, during the interim a longevity period or the service requisite for a higher pay period is completed, the benefit of neither is receivable. Par. 4, AR 35-1760, 10 Aug. 1942.

33. Retirement pay is deemed to be sufficiently different from the classes of pay discussed in this section as to permit separate discussion of it. See sec. d, supra.

34. The rules and regulations governing the pay of warrant officers and nurses on separation from service are generally the same as those relating to commissioned officers. Pars. 318, 327, TM 14-250, 1 Mar. 1943.

35. These are officers who have become incapacitated for active service not as a result of an incident of service and the President has determined "wholly" to retire them, i.e., return them to civilian life. See Part VI, Chapter 1, supra.

them at the time of retirement.[36] When Regular Army officers, have been placed in class B -- not worthy of retention -- under section 24b of the National Defense Act[37] and a board has found the classification to be due to the officers' neglect, misconduct or unavoidable habits, they are discharged; if the finding is negative and the officers have 10 or more years of commissioned service, they are retired at the 2 1/2 percent rate (i.e., multiplied by number of years of service) but if their service is of less than 10 years they are discharged with one year's pay.[38] An officer[39] who is honorably discharged for failure to pass the

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36. R.S. 1275 (10 U.S.C. 984; M.L. 1939, sec. 324)

37. Act 4 June 1920 (41 Stat. 773; 10 U.S.C. 571; M.L. 1939, Sup. II, secs. 141, 225). This section of the act is suspended during the national emergency declared by the President on 27 May 1941. Its place is taken by the act 29 July 1941 (55 Stat. 606) which provides for removal from the active list of officers who have performed substandard work or whose retention is not justified for "other good and sufficient reasons". Removed officers with less than seven years' commissioned service are honorably discharged and those with seven or more are retired (1) at the rate of 75% of active duty pay if they have more than 30 years commissioned service or have served in the military or naval forces at any time before 12 Nov. 1918; (2) others are retired at the percentage product rate of 2 1/2 x number of years of service countable for pay purposes.

38. "Pay" includes longevity increases and other monetary items usually denominated pay but not allowances. United States v. Mills, 197 U.S. 223; par 2, AR 35-1740, 1 June 1943.

39. Regular Army, other than officers of Medical, Dental, and Veterinary Corps. See acts cited in par. 1, AR 35-1740, 1 June 1943.

examination for promotion by reason of disability not contracted in line of duty is entitled to one year's pay.[40]

When the sentence of an officer dismissed by sentence of court-martial does not impose a forfeiture of pay and there is no absence without authority or on account of the officer's misconduct, pay is due to the date he is chargeable with notice of dismissal.[41]

Upon release from confinement under a court-martial sentence of dishonorable discharge for fraudulent enlistment, a donation of $10 is made to the enlisted man discharged otherwise than honorably.[42] By act 7 March 1942[43] men discharged on ac-

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40. If the disability was contracted in line of duty, the officer is retired with the rank to which his seniority entitled him to be promoted. Act 1 Oct. 1890 (26 Stat. 562; 10 U.S.C. 932; M.L. 1939, sec. 224a).

41. 27 Comp. Dec. 13; par. 4, AR 35-1740, 1 June 1943; par. 4, AR 35-1620, 1 Jan. 1930. The Judge Advocate General has held (see p. VIII - 33, note 5, infra) that an officer is entitled to be paid monthly while awaiting final action on a sentence of dismissal, with or without forfeitures. Apparently, therefore, if regular monthly pay and allowance vouchers have been submitted and paid, the sentence will operate only on the amounts accrued from the first day of the month in which final action is taken. If, however, payments accrued have not been made, it would appear that they are forfeited.

42. Military Appropriation Act, 1944, supra, note 8.

43. 56 Stat. 140; 10 U.S.C. 919; M.L. 1939, Sup. II, sec. 1464; C 1, AR 35-1460, 15 Dec. 1924; AR 35-2480, 23 May 1942. A fraudulent contract of enlistment is not void but voidable only at the option of the Government. A fraudulent enlistee

count of fraudulent enlistment, who in the judgment of their unit commanders are without funds to meet their immediate needs, may be furnished a donation not to exceed $10.[44]

When an Air Corps Reserve officer who has not been selected for a commission in the Regular Army is released from active duty that has been continuous for one or more years, the sum of $500 is payable to him for each complete year of active service. The payment may be prorated for fractions of a year if the release from active duty is otherwise than at the officer's request or as a result of inefficient or unsatisfactory service.[45]

3. Accrual of Pay

The first date on which a particular pay status of an officer beings depends on the circumstances under which the pay status is entered. The pay of the grade in which a new appoint-

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43. (cont.)
is not entitled to any arrears of pay unless the Government waives the objection but it has been the practice not to charge against amounts subsequently due the sums already paid him. See, generally, AR 35-1460, 15 Dec. 1924.

44. The Military Appropriation Act, 1944, made funds available for this purpose. These discharged men may also be furnished transportation in kind to their homes or other places elected by them, the cost not to exceed that to the place of enlistment, induction, or the local Selective Service board.

45. Act 16 June 1936 (49 Stat. 1524); act 3 April 1939 (53 Stat. 559); act 3 June 1941 (55 Stat. 240; 10 U.S.C. 300a; M.L. 1939, Sup. II, sec. 1354); this payment is in addition to pay and other benefits otherwise provided.

ment is made does not commence until formal acceptance of the appointment is effected.[1] Members of the National Guard, when called into the military service of the United States by the President, begin to receive pay and allowances on the date of their appearance at the company rendezvous.[2] In the case of members of the National Guard of the United States ordered into active military service, pay and allowances begin on the effective date of the order, if they report in person at the unit rendezvous on that date.[3] Organized Reserves personnel receive pay from the date of necessary compliance with the order to active duty to the date of actual relief from duty.[4]

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1. Par. 305, TM 14-250, 1 Mar. 1943. Until the oath of office is taken, the right to pay does not accrue but when taken relates back to the date of entry on duty and entitles the appointee to pay and allowances for the intervening period. See Part VI, Chapter 1, sec. 2, supra. Although a promotion to a higher grade is a new appointment, pay and allowances, by reason of the act 14 Oct. 1942 (see Part VI, Chapter 1, sec. 6, supra) generally are payable from the date of the order announcing it, assuming such date to have been after 7 Dec. 1941.

2. Par. 27a, AR 130-10, 27 Mar. 1940. See Part V, Chapter 3, supra.

3. Par. 27b, id. If absent from the vicinity of the rendezvous pay begins from the date when travel to the rendezvous or training center is begun. See Part V, Chapter 4, supra.

4. Pars. 2b, 21b, AR 35-3420, 10 Mar. 1943; JAG 210.451, 6 April 1928; SPJGA 1943/6203, 7 May 1943. If travel is by airplane, the date is that of actual commencement of travel. 20 Comp. Gen. 309.

In the case of enlisted men, pay and allowances commence on the date of enlistment.[5] Inductees under the Selective Training and Service Act of 1940, as amended, begin to receive pay on the date of their induction into the Army of the United States, unless immediately they are furloughed to the Enlisted Reserve Corps. In the latter case, the rule relating to the Organized Reserves is applicable.[6]

4. Computation of Pay

The daily rate of military pay is one-thirtieth of pay at the monthly rate. In the computation of pay for services rendered during a fractional part of a month in relation to annual or monthly compensation, each month is considered as consisting of 30 days without regard to the actual number of days in any month, thus excluding the 31st day of any calendar month and treating February as though it had 30 days.

Entry into service during a thirty-one day month and continuing until its end entitles one to pay from the date of entry to the 30th of the month, both dates inclusive.[1] Entry

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5. Par. 107.1, TM 14-260, 10 Dec. 1942. A member of the Regular Army Reserve (see Part V, Chapter 2, supra), however, is entitled to pay and allowances only from the date on which he is accepted for active duty. Par. 107.2, id.

6. Par. 107.5. id. See Part V, Chapter 5, supra.

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1. Members of Reserve components are paid for the 31st. Par. 2c, AR 35-3420, 10 Mar. 1943.

during February and continued service until the end of that month results in payment of one month's pay less as many thirtieths as the number of days elapsed prior to the date of entry on duty. Unauthorized absence on the 31st day of a month results in forfeiture of one day's pay.[2]

5. Effect of Absence

When on ordinary or sick leave of absence, "full pay and allowances"[1] are payable to officers otherwise entitled to pay but when ordinary leave is taken in excess of the statutory limits[2] only half pay and no allowances are payable[3] Enlisted men when on authorized furlough are entitled to full pay and the regulation allowance of commutation in lieu of rations, as provided in annual appropriation acts and at rates announced annually in War Department Circulars.[4]

Pay and allowances do not accrue to any person in the

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2. Act 12 June 1906 (34 Stat. 248; 10 U.S.C. 865; M.L. 1939, sec. 1483); see AR 35-1340, 22 Sept. 1933.

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1. The term includes base, longevity and additional pay, and rental and subsistence allowances. Par. 1b, AR 35-1400, 29 Nov. 1929.

2. Normally 30 days a year. See AR 605-115, 14 July 1942; AR 615-275, 16 Feb. 1940.

3. Par. 1, AR 35-1400, 29 Nov. 1929. No pay and allowances accrue in case of excess leave by nurses.

4. Par. 5, id.; par. 8, C 2, 2 July 1943, AR 35-4520, 24 Feb. 1943.

military service during unauthorized absences in excess of 24 hours, unless excused as unavoidable.[5] Except in cases of unauthorized absence of officers resulting from overstaying leaves of absence, unauthorized absences of less than 24 hours duration do not affect pay and allowances whether they are in one day or in two days.[6] In cases of unauthorized absence, the fiscal question of whether it is absence without leave or in desertion is for administrative determination.[7] Even where the issue is tried by court-martial, however, the administrative determination need not follow the judicial determination.[8]

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5. Par. 3a, AR 35-1420, 15 Dec. 1939; par. 208.1, TM 14-250, 1 Mar. 1943 (officers) and pars. 114.1, 607, TM 14-260, 10 Dec. 1942 (enlisted men). The Army Regulations cite R.S. 1265 (10 U.S.C. 841; M.L. 1939, sec. 1443) but the statute seems to apply only to officers' pay; see also sec. 6 of the Pay Readjustment Act, supra, making officers' rental allowances, for example, payable "at all times". In the case of enlisted men, Article of War 107 and basic principles of contract law appear to sanction the regulations.

6. Par. 2, AR 35-1420, 15 Dec. 1939. In cases of unauthorized absence in excess of 24 hours the day of departure is a day of absence and the day of return is a day of duty for purposes of computing pay and allowances. In the excepted case the day of return is a day of absence, whatever the hour.

7. Par. 1a, AR 35-1420, 15 Dec. 1939. Only in case of desertion, for example, are the enlisted man's deposits and interest thereon forfeited. AR 35-2600, 16 May 1936. However, such forfeiture cannot be imposed by sentence of court-martial. MCM, 1928, par. 103g.

8. For example, the finding of not guilty of desertion does not foreclose the administrative finding of unauthorized absence. See cases cited in par. 1d, AR 35-1420, 15 Dec. 1939.

Personnel in arrest or confinement by the civil authorities receive no pay for the time of such absence. If, however, they are released without trial or are tried and acquitted, their right to pay for the time of such absence is restored.[9] If convicted, compensation for the period of absence may not be paid.[10]

When any officer or enlisted man is absent from his regular duties for more than one day due to the effects of a disease, as distinguished from injury,[11] which is directly attributable to and immediately follows intemperate use of alcoholic liquor or habit-forming drugs, he is not entitled to pay, as distinguished from allowances, for the period of absence.[12] The same result

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9. Par. 10, AR 35-1420, 15 Dec. 1939. If the civil detention occurs while absent without leave, the action taken by the civil authorities will not change the military status. MCM, 1928, par. 132.

10. Par. 11, AR 35-1420, 15 Dec. 1939. Enlisted men awaiting trial by court-martial or the result thereof are not paid until the result is known, unless otherwise directed by the Secretary of War. This does not apply to allowances. Par. 1b, AR 35-2320, 1 April 1942.

11. If the absence from regular duties for more than one day is due to injury incurred as a result of misconduct, no loss of pay or allowances results. See AR 345-415, 23 Nov. 1933. In the case of an enlisted man, however, the time must be made good. AW 107. Pay and allowances do not accrue to an enlisted man after the date of an order executing a sentence of dishonorable discharge nor as long as he remains in confinement under a similar sentence the execution of which has been suspended. Act 4 March 1915 (38 Stat. 1065; 10 U.S.C. 876; M.L. 1939, sec. 1449); see SPJGA 1943/4644, 21 Apr. 1943.

12. Act 17 May 1926 (44 Stat. 557; 10 U.S.C. 847a; M.L. 1939, sec. 1442).

obtains in cases of similar absence on account of the direct effects of venereal disease due to misconduct, if the absence is within one year following the appearance of the initial symptoms. In either case, if the period during which pay if forfeited exceeds one month at any one time, $5 for each full month during which pay is forfeited is paid for necessary personal expenses.[13]

6. Stoppages and Forfeitures[1]

Forfeiture is, in legal contemplation, the sanction which attaches to certain conduct and results in the receipt by Army personnel of a lesser amount than is called for by pay schedules. Stoppage, properly speaking, is the administrative action by which such sanction is applied. In this section as in most War Department publications the terms are used interchangeably to mean the general process by which Army pay is reduced, exclusive of the procedures for detention, deduction and allotment of pay which are separately treated,[2] and nonaccrual for certain types of absence which was the subject of the preceding section.

The following are items for which pay of an officer may

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13. Ibid.; see AR 35-1440, 15 Nov. 1933. As long as full duty status continues, no pay is lost. SPJGA 1943/6101, 23 April 1943.

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1. See also, sec. 5, supra, and sec. 7, infra. See generally AR 35-1800, 7 Oct. 1937; AR 35-2440, 20 May 1942; AR 35-2460, 21 May 1942.

2. Infra, secs. 8 and 9.

be stopped, listed in the order of precedence as prescribed in AR 35-2440, 20 May 1942, for enlisted men's accounts:

(a) Indebtedness of accountable officers.[3]

(b) Loss or wrongful disposition of or damage to military stores or property of the United States.[4]

(c) Subsistence supplies purchased on credit.[5]

(d) Allotments paid before notice of discontinuance of them is received.[6]

(e) Payments made but disallowed by the General Accounting Office.[7]

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3. R.S. 1766 (5 U.S.C. 82; M.L. 1939, sec. 1516), as restricted by the act 16 July 1892 (27 Stat. 177; 10 U.S.C. 877; M.L. 1939, sec. 1516), prohibits payment to persons who are entrusted with public funds and who are in arrears to the United States and contains a limitation that such stoppage is not to be made against commissioned officers unless the indebtedness is admitted, or shown by the judgment of a court or the stoppage is made by order of the Secretary of War. McCarl v. Pence, 18 F. (2d) 809; JAG 123.5, 10 Apr. 1922; Dig. Op. JAG, 1912-40, sec. 1516(4), as corrected, I Bull. JAG 186, sec. 1516(4); see also SPJGA 1943/6035, 17 April 1943.

4. R.S. 1303 (10 U.S.C. 871; M.L. 1939, sec. 1518); R.S. 1304 (10 U.S.C. 872; M.L. 1939, sec. 1517); AW 83.

5. R.S. 1299 (10 U.S.C. 875c; M.L. 1939, sec. 1519).

6. Act 2 March 1899 (30 Stat. 981), as amended by act 6 Oct. 1917 (40 Stat. 384; 10 U.S.C. 894; M.L. 1939, secs. 1531, 1619).

7. The act 26 May 1936 (49 Stat. 1374; 5 U.S.C. 46b; M.L. 1939, secs. 1520a, 1628) authorizes withholding the pay of persons in the Executive Branch of the Government whenever the statement of the account of the disbursing officer has been disallowed.

(f) Overpayments.

(g) Illegal payments.

(h) Rations furnished in the field.[8]

(i) Excess baggage transportation charges.[9]

(j) Court-martial fines and forfeitures.

(k) Forfeitures under AW 104.[10]

The pay of enlisted men may be stopped for the following items and their order of precedence is as follows:

(a) Reimbursement to the United States;[11]

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8. See Cir. 297, WD, 1942.

9. Act 23 March 1910 (36 Stat. 255; 10 U.S.C. 821; M.L. 1939, sec. 1531a).

10. Except for these and court-martial fines and forfeitures, stoppages are made only on approval of the Secretary of War. The notices of stoppages of officer's pay are contained in a monthly circular to disbursing officers prepared by the Chief of Finance. Par. 8, C 4, 2 June 1943, AR 35-1800, 7 Oct. 1937; par. 9, id. Deductions are made from the first payment of the stoppage ordered by the Secretary of War. An officer may file a claim with the General Accounting Office and may appeal an adverse ruling to the Comptroller General.

A stoppage of pay does not affect pecuniary allowances nor may it be used to satisfy private creditors. Pars. 12, 15, id.

11. This is preceded by the deduction for the maintenance of the United States Soldiers' Home and does not include court-martial fines and forfeitures. It includes overpayments, Government property lost or damaged, rewards and expenses for apprehension of deserters, those absent without leave, and escaped military prisoners. $15 is paid to a civil officer or other person arresting such personnel and $25 in case of arrest and delivery at a military post ($10 and $15 in cases

(b) Reimbursement to certain individuals and agencies, as authorized by statutes or Army Regulations;[12] and,
(c) Court-martial fines and forfeitures.[13]

By the act 22 May 1928[14] it is provided that when it has been administratively determined that an enlisted man is indebted to the United States or any of its instrumentalities,[15] the indebtedness may be collected in monthly installments from his pay on current pay rolls but that the total amount collected for such purpose may not exceed two-thirds of the soldier's rate of pay[16]

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11. (cont.)
of Philippine Scouts personnel). Federal officials and employees may be paid actual expenses within the maxima. These expenses are charged against the enlisted man concerned. AR 35-2620, 16 May 1942.

12. Including post laundry and exchange, disbursing officers when they have refunded overpayments made to enlisted men, and damage to private property within AW 105. See statutes set out in par. 1, AR 35-2440, 20 May 1942.

13. Par. 10, AR 35-2440, 20 May 1942.

14. 45 Stat. 698, as amended by act 26 June 1934 (48 Stat. 1222; 10 U.S.C. 875a; M.L. 1939, sec. 1521).

15. The term "instrumentalities" extends only to those instrumentalities of the United States which are dependent on appropriated funds under the control of the Secretary of War and to the instrumentalities of the War Department which are dependent for their existence upon the administrative authority of the Secretary of War. Dig. Op. JAG, 1912-40, sec. 1521(4).

16. "Rate of pay" has been construed to mean the amount of earned pay for the month including pay for qualification in arms, distinguished service award pay and other items of pay. MS. Comp. Gen. A-25204, 19 March 1929. The pay of an enlisted man does not include travel "pay" (treated in Chapter 2,

for that month. If pay for any month has been partially forfeited by sentence of court-martial or otherwise legally withheld, no deduction may be made under the act which would reduce the actual pay received for that month below one-third of the authorized rate of pay. The Secretary of War may remit or cancel any part of such indebtedness either on honorable discharge or prior thereto when he is of the opinion that the interests of the Government would best be served by such action.[17]

7. Court-Martial Fines and Forfeitures

The forfeiture of pay[1] imposed by court-martial, on promulgation of the sentence, becomes a debt due to the United

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16. (cont.)
infra, as an allowance) and therefore the latter may not be used in satisfaction of a debt due the United States. 20 Comp. Dec. 707. The enlistment allowance is not included within the pay which may be stopped under AW 105 nor may it be stopped under the act 22 May 1928 but it may be made the subject of stoppage on account of payments disallowed by the General Accounting Office. Pars. 5, 6, AR 35-2440, 20 May 1942.

17. Act 22 May 1928; see note 14, supra.

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1. The pay to which the Table of Maximum Punishments is applicable is the total of base pay and longevity pay only. MCM, 1928, par. 104c. Since, however, foreign duty pay (see sec. 2c(1), supra) is a percentage increase of base pay, it is also subject to forfeiture. SPJGA 242.12, 12 April 1942. With the exception of aviation cadets (see p. VIII - 12, note 7, supra) aviation pay is not subject to forfeiture by court-martial. SPJGA 1942/5986, 19 Sept. 1942.

States.[2] Unless an authorized sentence includes forfeiture of allowances, for example, "and to forfeit all pay and allowances due or to become due", allowances are not affected.[3] In the absence of a direction by the Secretary of War, enlisted men awaiting trial or the result of trial by court-martial are not paid until the result is known.[4] An officer, however, is entitled to receive monthly pay and allowances notwithstanding the fact that he is awaiting final action on his tendered resignation or on a sentence of dismissal with or without total forfeitures adjudged against him by court-martial, or that his discharge or dismissal is otherwise impending.[5]

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2. 16 Comp. Dec. 811. Upon promulgation of the sentence of an enlisted man, the company commander is required to make the notation on the pay rolls necessary to cause the sentence to be executed. Par. 12, AR 35-2460, 21 May 1942.

3. Par. 6, AR 35-2460, 21 May 1942. All elements of pay, within the statutory limits, may be used to satisfy all indebtedness. All allowances, except travel allowances, may be used to satisfy indebtedness except those created by the United States Soldiers' Home deductions and court-martial fines and forfeitures. Par. 406.1, TM 14-260, 10 Dec. 1942.

4. See p. VIII - 27, note 10, supra. On promulgation of the sentence, however, a partial forfeiture is charged against monthly pay, beginning with the first day of the month in which the court-martial order is issued. Par. 416.6, TM 14-260, 10 Dec. 1942. In a case of total forfeiture of pay due and to become due, the forfeiture would appear to operate against all pay due.

5. Par. 6f, AR 35-1740, 1 June 1943; SPJGA 1943/4171, 23 March 1943.

In cases other than those where total forfeitures are authorized, a court-martial forfeiture, together with other authorized forfeitures and deductions, except for allotments made at the request of the accused, may not in the case of enlisted men exceed two-thirds of the monthly pay.[6] Stoppages in existence at the date of sentence or later authorized take precedence to the extent contemplated by AR 35-2440.[7] Thus, until sufficient pay accrues to satisfy indebtedness which is accorded priority by the regulations there is no sum against which the court-martial forfeiture can run.[8]

The power to remit court-martial sentences extends to all

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6. E.O. 8727, 1 April 1941 (Bull. 8, WD, 1941). Class F deductions required as enlisted men's contributions to the family allowance (see Chapter 3, infra) are to be deducted from monthly pay and the rate of forfeiture is applied to the remainder. Cir. 288, WD, 28 Aug. 1942; par. 416.3, TM 14-260, 10 Dec. 1942. This policy does not amend MCM, 1928, par. 104, and therefore a forfeiture based on the full amount of pay, though violative of policy, would not be illegal. SPJGA 1942/5329, 13 Nov. 1942. In general, payments of the family allowance cease at the end of the month in which the Office of Dependency Benefits receives notice of the existence of facts calling for its termination, e.g., conviction by a military court and sentence to imprisonment and dishonorable discharge, suspended or unsuspended. See pars. 74f and g, Personal Affairs of Military Personnel and Aid for Their Dependents, War Department, January 1943.

7. 20 May 1942; see Chapter 3, infra. Par. 18, AR 35-5520, 4 March 1941, states that, as to allotments, only unpaid Class E allotments are forfeited by operation of court-martial sentences. See sec. 9, infra.

8. 14 Comp. Dec. 490.

uncollected court-martial forfeitures[9] and a remission involving forfeiture of pay is also effected as to any unexecuted portion of the forfeiture by a discharge.[10] When a legal sentence involving forfeiture of pay has been executed, only Congress can authorize repayment of the amount forfeited.[11]

8. Deduction and Detention

Ten cents for the maintenance of the United States Soldiers' Home is deducted each month from the pay of each warrant officer, enlisted man and aviation cadet on the active list of the Regular Army and Regular Army Reserve.[1] The deduction takes priority over all stoppages and forfeitures of pay, is applied against pay only, and does not have the effect of reducing the rate of pay in applying the two-thirds rule in the collection of

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9. Act 4 June 1920 (41 Stat. 797; 10 U.S.C. 1521; M.L. 1939, sec. 407).

10. Par. 10g, AR 35-2460, 21 May 1942. When the remission is simultaneous with and part of the action of approval of the sentence, it operates on pay which otherwise would be forfeited by approval of the sentence. If the action is separate, pay forfeited by approval of the sentence is not restored. Par. 10i, id.

11. Par. 10j, id.

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1. Act 13 Feb. 1936 (49 Stat. 1137; 24 U.S.C. 44a; M.L. 1939, sec. 1126. The sum collected, up to a maximum of 25 cents, is fixed from time to time by the Secretary of War based on the needs of the Home. See AR 35-2440, 20 May 1942.

debts.

The Class F deduction as provided in the Servicemen's Dependents Allowance Act, as amended,[2] sometimes called an allotment,[3] is deducted monthly from the enlisted man's pay. When public quarters are furnished an enlisted man of the first three grades for his dependents, his monthly pay is reduced by or charged with 90 cents per day during such period as any of his dependents is receiving a family allowance.[4]

The pay of enlisted men detained under sentence of court-martial[5] is repaid to them only on final statements, unless, prior to the rendition of such statement, a remission of sentence takes place.[6]

9. Allotments[1]

The Secretary of War is authorized to permit Army per-

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2. Act 23 June 1942 (56 Stat. 381; 37 U.S.C. 201; M.L. 1939, Sup. II, sec. 1166-1) as amended by act 26 October 1943 (Public Law 174, 78th Cong.; Bull. 21, WD, 8 Nov. 1943). See p. VIII - 34, note 6, supra.

3. The deduction for Class A dependents is compulsory. The term "allotment" usually connotes a voluntary act.

4. Sec. 108(b), Servicemen's Dependents Allowance Act, as amended, note 2, supra.

5. MCM, 1928, par. 104c.

6. Par. 9, AR 35-2460, 21 May 1942. See p. VIII - 35, note 10, supra.

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1. See generally, AR 35-5520, 4 March 1941; see also sec. 8, supra.

sonnel generally to make allotments from their pay for the support of their families and relatives and for other proper purposes.[2] An allotment refers to a definite portion of pay which is authorized to be paid to another person or institution pursuant to regulations. It is a voluntary act of the allotter and carries no corresponding allowance or other obligation of the Government and requires no administrative adjudication to become effective. No property rights vest in the allottee until the allotment is paid[3] and payment is effected only by collection or negotiation by the payee of the check.[4]

Officers, nurses, and warrant officers may allot base, longevity, and foreign service pay and rental and subsistence allowances but not aviation or parachutist pay.[5] Enlisted personnel may allot so much of their base, longevity and foreign service pay and monetary allowances for dependents as will leave, after all deductions have been made, a balance of $10 or a greater amount determined by their commanding officers as sufficient for

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2. Act 2 March 1899 (30 Stat. 981) as amended by act 6 Oct. 1917 (40 Stat. 385) and act 16 May 1938 (52 Stat. 354; 10 U.S.C. 894; M.L. 1939. sec. 1450, 1619).

3. 2 Comp. Gen. 144.

4. 24 Comp. Dec. 151.

5. Par. 7a, C 4, 12 Jan. 1943, AR 35-5520, 4 Mar. 1941.

their personal needs. Aviation and parachutist pay may not be included.[6] With certain restrictions,[7] allotments may be made to individuals and banks, and for life insurance premiums, and usually must be for a period of six months.

Allotments are divided into the following classes:

Class B - Purchase of United States War Savings Bonds.[8]

Class D - Premiums on Government insurance.

Class E - Premiums on commercial life insurance, savings, and payments to dependents and relatives.[9]

Class N - Premiums on National Service life insurance.

Class X - Payments to dependents residing in a foreign country where there is a finance officer, when personnel are on duty outside the continental limits of the United States.

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6. Par. 7b, id.

7. For example, no allotments may be made to enemy aliens or to persons residing at the same station as the allotter. Par. 5d, id.

8. Cir. 44, WD, 10 Feb. 1943; Cir. 152, WD, 3 July 1943.

9. The Secretary of War may order an allotment of the pay of a person in the military service for the rental of premises occupied by dependents. Sec. 302, Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1102) and secs. 9 and 10, act 6 Oct. 1942 (56 Stat. 771, 772; 50 U.S.C. 532; M.L. 1939, Sup. II, sec. 2235).

TABLE I—*Officers' monthly rates of pay and allowances*

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)
Grade	Years of service for pay periods [1]		Pay for years of service counted for longevity											Allowances			
														With dependents		Without dependents	
	Over years	Pay period	3 years and less	Over 3 years	Over 6 years	Over 9 years	Over 12 years	Over 15 years	Over 18 years	Over 21 years	Over 24 years	Over 27 years	Over 30 years	Subsistence 30-day month	Rental	Subsistence 30-day month	Rental
General of the Armies of the United States.	------	------	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	$1,125.00	Allowances fixed by President $8,000.00 per annum.			
General [2]	------	------	666.67	667.67	666.67	666.67	666.67	666.67	666.67	666.67	666.67	666.67	666.67	$42	$120	$21	$105
Lieutenant general [2]	------	------															
Major general	------	------															
Brigadier general	------	------	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00	42	120	21	105
Colonel	------	------	333.33	350.00	366.67	383.33	400.00	416.67	433.33	450.00	466.67	483.33	500.00	42	120	21	105
Lieutenant colonel	30	6															
Lieutenant colonel	------	------	291.67	306.25	320.83	335.42	350.00	364.58	379.17	393.75	408.33	422.92	437.50	63	120	21	105
Major	23	5															
Major	------	------	250.00	262.50	275.00	287.50	300.00	312.50	325.00	337.50	350.00	362.50	375.00	63	105	21	90
Captain	17	4															
Captain	------	------	200.00	210.00	220.00	230.00	240.00	250.00	260.00	270.00	280.00	290.00	300.00	42	90	21	75
First lieutenant	10	3															
First lieutenant	------	------	166.67	175.00	183.33	191.67	200.00	208.33	216.67	225.00	233.33	241.67	250.00	42	75	21	60
Second lieutenant	5	2															
Second lieutenant	------	1	150.00	157.50	165.00	172.50	180.00	187.50	195.00	202.50	210.00	217.50	225.00	42	60	21	45

[1] Includes all service counted for pay-period purposes.

[2] General and lieutenant general entitled to an additional money allowance of $2,200.00 and $500.00 per annum, respectively.

TABLE II.—*Monthly rates of pay, warrant officers and flight officers, Army of the United States*

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Grade	Pay period	Pay for years of service counted for longevity										
		3 years or less	Over 3 years	Over 6 years	Over 9 years	Over 12 years	Over 15 years	Over 18 years	Over 21 years	Over 24 years	Over 27 years	Over 30 years
Chief warrant officer [1]	4	$250.00	$262.50	$275.00	$287.50	$300.00	$312.50	$325.00	$337.50	$350.00	$362.50	$375.00
Chief warrant officer [1] Master, AMPS [2]	3	200.00	210.00	220.00	230.00	240.00	250.00	260.00	270.00	280.00	290.00	300.00
Chief warrant officer Chief engineer, AMPS [2]	------	175.00	183.75	192.50	201.25	210.00	218.75	227.50	236.25	245.00	253.75	262.50
First mate, AMPS [2] First assistant engineer, AMPS [2]	------	162.50	170.63	178.75	186.88	195.00	203.13	211.25	219.38	227.50	235.63	243.75
Warrant officer (junior grade) Flight officer Second mate, AMPS [2] Second assistant engineer, AMPS [2]	1	150.00	157.50	165.00	172.50	180.00	187.50	195.00	202.50	210.00	217.50	225.00

[1] Normally, a chief warrant officer receives the same pay as a chief engineer, Army Mine Planter Service, but the Secretary of War may designate chief warrant officers to receive the base pay of the third and fourth pay periods.

[2] Army Mine Planter Service.

NOTE.—No warrant officer may receive for base pay, pay for length of service, and allowances for subsistence and rental of quarters a sum in excess of $458.33 per month. Deduction of the necessary amount should be made from his rental allowance.

TABLE III.—*Officers' monthly subsistence and rental allowances, Army of the United States*

Pay period and general officers	With dependents		Without dependents	
	Subsistence (30 days)	Rental	Subsistence (30 days)	Rental
General officers [1]	$42	$120	$21	$105
Sixth pay period	42	120	21	105
Fifth pay period	63	120	21	105
Fourth pay period [2]	63	105	21	90
Third pay period [3]	42	90	21	75
Second pay period [4]	42	75	21	60
First pay period [5]	42	60	21	45

[1] The allowances (subsistence and rental) of the General of the Armies of the United States are fixed by the President at $8,000 per annum.

[2] Includes chief warrant officers who are authorized by the Secretary of War to receive the pay and allowances of the fourth pay period.

[3] Includes masters of the Army Mine Planter Service and chief warrant officers who are authorized by the Secretary of War to receive the pay and allowances of the third pay period.

[4] Includes contract surgeons; ordinarily, chief warrant officers; and chief engineers of the Army Mine Planter Service.

[5] Includes warrant officers (junior grade); flight officers; and all mates and all assistant engineers of the Army Mine Planter Service.

TABLE IV. -- Monthly rates of pay of enlisted personnel, Army of the United States

Rank	Grade	Base pay	Years of service									
			Over 3	Over 6	Over 9	Over 12	Over 15	Over 18	Over 21	Over 24	Over 27	Over 30
Master sergeant[1] First sergeant	1	138.00	144.90	151.80	158.70	165.60	172.50	179.40	186.30	193.20	200.10	207.00
Technical sergeant	2	114.00	119.70	125.40	131.10	136.80	142.50	148.20	153.90	159.60	165.30	171.00
Staff sergeant Technician, third grade	3	96.00	100.80	105.60	110.40	115.20	120.00	124.80	129.60	134.40	139.20	144.00
Sergeant Technician, fourth grade	4	78.00	81.90	85.80	89.70	93.60	97.50	101.40	105.30	109.20	113.10	117.00
Corporal[2] Technician, fifth grade	5	66.00	69.30	72.60	75.90	79.20	82.50	85.80	89.10	92.40	95.70	99.00
Private, first class	6	54.00	56.70	59.40	62.10	64.80	67.50	70.20	72.90	75.60	78.30	81.00
Private	7	50.00	52.50	55.00	57.50	60.00	62.50	65.00	67.50	70.00	72.50	75.00

Saving clause: Nothing in this act will reduce the pay below that to which otherwise entitled on May 31, 1942.

[1]Master sergeant over 4 years, less than 6 years--$148.60; over 8 years, less than 9 years--$154.90.

[2]Corporal over 4 years, less than 6 years--$69.40.

CHAPTER 2 - ALLOWANCES

1. General

Various types of allowances[1] are payable to Army personnel in addition to pay. These allowances are divided into five general classes:[2]

(a) Rental
(b) Subsistence
(c) Travel
(d) Enlistment
(e) Uniform and Equipment.

Rental, subsistence, and travel allowances are payable to officers[3] and enlisted men,[4] the enlistment allowance only to enlisted men, and the uniform and equipment allowance only to officers. The Pay Readjustment Act of 1942, as amended,[5] is the basic legislation

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1. See Chapter 1, sec. 1, of this Part.

2. There is another type of allowance, the personal money allowance, payable to generals and lieutenant generals, which, because of the number of recipients, is deemed to be of limited interest. Generals are entitled to a personal money allowance of $2200 annually and lieutenant generals $500 annually.

3. Unless otherwise noted, "officers" as used in this Chapter include commissioned officers, warrant officers. and Army nurses.

4. The rental and subsistence allowances payable to enlisted men are treated in this chapter according to the usual division: (1) station allowances and (2) allowances while traveling.

5. Approved 16 June 1942, effective 1 June 1942 (56 Stat. 359; M.L. 1939, Sup. II, sec. 1371c-1; Bull. 28, WD, 1942) as amended by act 6 March 1943 (Public Law 5, 78th Cong.; Bull. 4, WD, 22 March 1943; Cir. 87, WD, 29 March 1943). The section numbers in this Chapter, unless otherwise stated, refer to this act.

affecting allowances. As is true of pay, the amounts of various allowances generally differ with the pay periods (officers) and pay grades (enlisted men), dependency or non-dependency,[6] and type of duty. Matters concerning forfeiture and nonaccrual of allowances have been adverted to in Chapter 1 of this Part, relating to pay.

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6. As used in the Pay Readjustment Act of 1942 the term "dependent" includes at all times a lawful wife and unmarried children under 21 years of age. "Children" include stepchildren and adopted children who in fact are dependent on the person claiming dependency. "Dependent" also includes the father or mother of the person concerned provided he or she is in fact dependent on the person for his or her chief support. Sec. 4. "Chief support" means the major portion of the means of livelihood. 2 Comp. Gen. 41.

Adoptive parents are not included in the terms "father" and "mother" within the scope of section 4 of the act for the purpose of increased rental and subsistence allowances. Comp. Gen. B-34962, 29 June 1943. The following, although in fact dependent, are not "dependents" within the meaning of sec. 4: sister (MS. Comp. Gen. B-31792, 27 January 1943), brother (MS. Comp. Gen. B-32021, 4 Feb. 1943), grandmother (SPJGA 1943/7008, 27 May 1943), or divorced wife entitled to alimony (MS. Comp. Gen. B-27650, 19 Aug. 1942; I Bull. JAG 231, sec. 1371c-4).

The issue of dependency is for resolution after ex parte representation by the officer claiming allowances based thereon. The evidence must be clear and convincing (MS. Comp. Gen. B-28633, 31 Oct. 1942). For a general discussion and example of the need for exactness and clarity in furnishing evidence in support of a claim of dependency, see 20 Comp. Gen. 460.

The determination of the fact of dependency under laws providing for the pay, allowances, and other emoluments to enlisted men is to be made by the Secretary of War or his designated subordinate and is final and conclusive. Sec. 10, act 7 March 1942 (56 Stat. 145; 50 U.S.C. 1010; M.L. 1939, Sup. II, sec. 2165a-10); see MS. Comp. Gen. B-30337, 9 Dec. 1942.

In general, officers and enlisted men whose wives are in

2. Rental Allowance[1]

a. Officers. No rental allowance accrues to an officer with or without dependents who is assigned quarters at his permanent station unless a competent superior authority[2] certifies that such quarters are not occupied because they are inadequate for the occupancy of the officer and his dependents, if any. If, however, quarters are furnished but the officer's dependents are prevented from occupying such quarters by reason of orders of competent authority, the officer is entitled to the rental allowance. No rental allowance accrues to an officer without dependents while he is on field duty[3] unless his commanding officer certifies that

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6. (cont.)
the military service of the United States and receive quarters and subsistence in kind or allowances therefor, are not entitled to receive rental and subsistence allowances as persons with dependents based on such marital status. See par. 605, TM 14-250, 1 Mar. 1943; see SPJGA 1942/5230, 12 Nov. 1942; see also cases cited in Cir. 121, WD, 17 May 1943.

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1. The basic Army Regulations are 35-4220, 20 April 1943 and 35-4520, 24 Feb. 1943.

2. The person charged with the assignment of quarters, normally the post commander. Par. 13, AR 210-10, 20 Dec. 1940.

3. "Field duty" means service, under orders, with troops operating against an enemy, actual or potential. E.O. 9255, 12 Oct. 1942. The question as to what duty by officers is or is not "field duty" is for ultimate determination by the Comptroller General. All duty of officers with troops, whether within or without the United States, is considered "field duty" prohibiting the payment of rental allowance to officers without dependents while on such duty. Par. 615.8, TM 14-250, 1 Mar. 1943; Finance Bulletin 150, 1942.

he was required to procure quarters at his own expense; nor does the rental allowance accrue to such officer while on sea duty,[4] except for temporary periods of such duty not exceeding 3 months. For fiscal purposes the statute provides that the mentioned certifications are to be conclusive.[5]

When adequate public quarters are available at a permanent station for an officer and his dependents such quarters are required to be assigned, but commanding officers may consider the advisability of using the quarters for other military purposes in view of War Department restrictions on the movement of dependents and household goods[6] and the undesirability of removing the families of reserve personnel from established abodes. When an officer, under such circumstances, does not occupy quarters, public or private, with his dependents, he may be assigned accommodations on the same basis as an officer without dependents without affecting

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4. "Sea duty" in general means service at sea on a vessel under orders (1) to report for duty on board a designated vessel or (2) assigning the officer to duty in command of vessels or to the staff of an officer in command of vessels. E.O. 9255, 13 Oct. 1942.

5. Sec. 6, as amended by act 6 March 1943 (Public Law 5, 78th Cong.; Bull. 4, WD, 22 March 1943). Any quarters at his permanent station voluntarily accepted and occupied by an officer who has no dependents or by an officer with his dependents are conclusively presumed to be adequate and no rental allowance is paid. Par. 615.6, TM 14-250, 1 Mar. 1943.

6. SPJGA 1943/6585, 10 May 1943; sec. 4, infra.

his right to the full rental allowance but such assigned quarters may not exceed a room and a bath.[7]

Since officers without dependents are to be assigned quarters considered suitable to the conditions of service at their stations, those serving with troops operating under field conditions are considered as being adequately quartered whether they are living in permanent or temporary buildings, or tents. This rule also obtains because there is no necessity of providing themselves with quarters at their own expense.[8]

When on leave status, rental allowances do not accrue to an officer assigned quarters at his permanent station, unless the assignment is terminated; if not assigned quarters, the rental allowance accrues during leave unless dependents occupy quarters; and if assigned quarters and when on leave he is relieved from duty at his permanent station, the rental allowance accrues unless his dependents occupy the quarters.[9]

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7. Par. 22, AR 35-4220, 20 April 1943.

8. Ibid. Where an officer with no dependents is assigned inadequate quarters but occupies them on a full time basis, he is not entitled to a rental allowance, whether or not he maintains additional quarters elsewhere at his own expense. 79 Ct. Cl. 166; see 22 Comp. Gen. 734.

9. Par. 27, AR 35-4220, 20 April 1943. In general, a fractional part of a day is not recognized; therefore, no rental allowance accrues to an officer on the day his assignment to quarters is terminated. 5 Comp. Gen. 723.

The rental allowances to which the various classes of officers are entitled are set out in Table III preceding this chapter. It will be noted that, as in the case of pay, the rental allowances generally vary with the pay periods into which officers fall either by grade or special provision. General officers, with the exception of the General of the Armies, receive the rental allowances provided for colonels or those of the sixth pay period.[10] An officer with dependents, whether one or more, receives a monthly rental allowance $15 greater than that payable to an officer without dependents.[11] In both cases, an increase in pay period results in a $15 monthly increase in rental allowance until the fifth pay period is reached after which increase in grade or pay period carries no such increment.

Rental allowances are based on a 30-day month and are the same regardless of the number of days in the month.[12]

Officers on temporary duty away from their organizations at oversea stations may be allowed a per diem allowance to cover the additional actual cost of quarters.[13]

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10. Sec. 7.

11. For the duration of the war and six months thereafter, the rental and subsistence allowances of an Army nurse are those provided for commissioned officers without dependents. See p. VIII - 4, note 4, supra.

12. Par. 602.2, TM 14-250, 1 Mar. 1943.

13. Par. 606, id.

b. Enlisted Men.

(1) Station Allowance. An enlisted man not furnished quarters in kind[14] is granted a money allowance in lieu thereof, dependent on the conditions under which he is performing duty. A maximum daily rate of $5, inclusive also of the subsistence allowance, is provided for in the Pay Readjustment Act.[15] While on furlough, sick in hospital, or absent from permanent duty in a pay status, and as long as his permanent station remains unchanged, the quarters allowance continues to be payable to the enlisted man.[16]

An enlisted man of the first three grades, having one or more dependents,[17] is entitled to receive, for any period during

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14. "Quarters in kind" include those Government-owned or held under lease, or obtained by contract, and sleeping-car or stateroom accommodations. The furnishing of the latter accommodations does not preclude the payment of rental allowance during the performance of travel by the dependents of enlisted men of the first three grades on permanent change of station. Par. 606.1, TM 14-260, 10 Dec. 1942; see sec. 4, infra.

15. Sec. 10. E.O. 9206, 27 July 1942 (Bull. 41, WD, 1942) prescribes the regulations and maximum daily quarters (rental) and subsistence allowances payable to enlisted men in nontravel (station) and travel status. The regulations and amounts are also contained in AR 35-4520, 24 Feb. 1943. In the United States, in nonemergency situations, the maximum quarters allowance is $1.25 per day.

16. Par. 8, AR 35-4520, 24 Feb. 1943.

17. See p. VIII - 48, note 6, supra.

which quarters are not provided and available for such dependent or dependents, the money allowance authorized for an enlisted man not furnished with quarters in kind. Although receiving such allowance for himself, he may also receive it for dependents if by reason of orders of competent authority they are prevented from dwelling with him.[18] The rate of such quarters allowance for dependents is the same as that for the enlisted man, even where he is stationed outside the United States and his dependents remain within the continental limits.[19]

(2) Allowance while Traveling.[20] Enlisted men while traveling on duty and not furnished quarters in kind are entitled to monetary allowances between $2 and $1.25 per day, varying with the type and place of duty and number of days of detention en route.[21] The quarters allowance while traveling and the station

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18. Sec. 10.

19. Finance Bulletin 82, 1941. The $5 per day limitation on quarters and rations allowances does not limit the quarters allowance for dependents. 20 Comp. Gen. 522.

20. To be distinguished from "travel allowance". For latter, see sec. 4, infra.

21. See p. VIII - 53, note 14, supra. The maximum rate covers a detention not to exceed 3 days in one place; the next graduation is the 4th to the 6th day inclusive; and the last, the 7th to the 31st day inclusive. After the 31st day, the station allowance becomes applicable. Special rules apply in cases of air travel and travel duty in connection with the National Guard.

allowance are mutually exclusive and not cumulative.[22]

3. Subsistence Allowance

a. Officers. A subsistence allowance of 70 cents per day is payable to officers.[1] As shown by Table III preceding this Chapter, the number of allowances in the cases of officers with dependents varies according to pay period, while officers without dependents in all pay periods receive only one subsistence allowance. The amount is usually stated as a monthly sum but actually varies with the number of days in the month. Thus a captain with dependents receives $42 subsistence allowance during a 30-day month, and a captain without dependents receives $21.70 in a 31-day month, or $19.60 in a 28-day month.

An officer on a travel status and entitled to mileage, to reimbursement of actual expenses, or to per diem, is not deprived of the subsistence allowance.[2] When messing with their organizations, officers are entitled to the allowance but must pay for the rations drawn in kind from their organization.[3] When on

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22. Par. 615.2, TM 14-260, 10 Dec. 1942.

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1. Sec. 5.

2. Pars. 14, AR 35-4220, 20 April 1943.

3. The cost of rations drawn may be stopped against the pay of officers. See Chapter 1, sec. 6, supra.

temporary duty away from their organizations at oversea stations, officers may be furnished per diem allowances to cover the additional cost actually borne by them above their organization allowances.[4]

b. Enlisted Men

(1) Station Allowance. An enlisted man not furnished rations in kind is granted a money allowance in lieu thereof. As long as his permanent station remains unchanged, he continues to receive the subsistence or rations allowance while sick in hospital or absent from permanent duty station in a pay status.[5]

Executive Order 9026[6] provides the amounts of the subsistence allowance payable in various places, all within the sum of $5, including the quarters allowance.[7] Annual appropriation acts provide for an allowance of commutation in lieu of rations to enlisted men on furlough, the rate of which is announced in War Department Circulars. Where, however, an enlisted man is on furlough from a station at which he receives the monetary allowance in lieu of rations, he continues to receive such allowance while

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4. Par. 606, TM 14-250, 1 Mar. 1943.

5. Sec. 10.

6. See p. VIII - 53, note 15, supra.

7. $1.50 per day is the maximum standard in the United States, except under certain conditions when $3 is payable.

his permanent station remains unchanged.[8]

(2) Allowance while traveling. A monetary allowance in lieu of rations in the maximum amount of $3 per day is paid to enlisted men traveling on duty and not furnished rations in kind.[9] The ration allowance is not payable in the following cases: (1) Journeys on which rations can be carried and cooked; (2) travel on Army transports or on commercial vessels at Government expense when the passage rate includes meals; and (3) when meals are obtained by the use of meal tickets.[10]

4. Travel Allowance

a. General. The Pay Readjustment Act of 1942[1] provides the general schedule of allowances payable to personnel under travel orders for their own travel, that of their dependents, and the transportation of baggage and household effects. The annual appropriation acts usually make additional provisions when appro-

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8. Par. 608.5, TM 14-260, 10 Dec. 1942.

9. See p. VIII - 53, note 15, supra. The amounts generally decrease with the length of detentions, if any, en route. A fractional part of a day is computed as follows: less than 12 hours - 1/3 day; 12 to 18 hours - 2/3 day; 18 to 24 hours - 1 day. Par. 615.1, TM 14-260, 10 Dec. 1942.

10. Par. 4, AR 35-4520, 24 Feb. 1943.

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1. Sec. 12.

priating funds payable under the basic and other acts pursuant to which travel allowances may be paid.

In general, the payment and amount of allowances depend on the terms of the travel orders issued[2] and whether the travel is by land (rail or automobile), sea, or air; in commissioned or enlisted status; with or without troops;[3] and on permanent change of station[4] or otherwise.

Except where travel is performed by Government automobile and completed within a 10-hour period of the same day, a travel status includes all travel without troops together with

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2. The general rule is that rights vested under an order may not be modified or changed. Travel orders may be issued, however, to correct or amend a prior order so as to make it conform to facts as they existed at a past date or to correct a clerical error, MS. Comp. Gen. B-29074, 14 Oct. 1942; SPJGA 1943/4045, 25 Mar. 1943; see also MS. Comp. Gen. B-30168, 8 Mar. 1943. See generally, AR 35-4890, 28 May 1943.

3. Par. 4, AR 35-4820, 19 Sept. 1942. The Secretary of War, under special circumstances, may determine travel to be without troops regardless of the following definitions:
   a. Travel with troops: (1) Under orders for movement of a body of 50 or more men (exclusive of officers) traveling together; or a separate group of lesser number who are rationed in kind instead of on a commuted, per diem, or meal ticket basis. (2) Under orders directing officers to accompany troops, as defined in (1) above.
   b. Travel without troops: (1) Cases not included in a above. (2) Travel by air when impracticable to carry mess and shelter facilities.

4. "Permanent change of station" generally includes the change from home to first station and last station to home. Sec. 12.

necessary delays en route incident to the mode of travel. Included also within travel status is necessary temporary duty away from permanent station without regard to the period of temporary duty and it is immaterial whether travel is within the duty district as distinguished from the official post of duty, or whether duty en route may be involved.[5]

b. Travel by Personnel[6]

(1) Officers. While on active duty and while traveling under competent orders without troops, officers receive a mileage allowance of 8 cents per mile, computed by the shortest usually traveled route, as prescribed in the Official Mileage Tables of the War Department. A deduction of 3 cents per mile is made for the land grant mileage included in the established route of travel. When traveling under orders on a mileage basis, the officer may be furnished transportation[7] by the Government. In such case, 3 cents per mile is deducted for the distance for which transportation is furnished.

Officers traveling on official business and away from

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5. Par. 3, C 1, 19 June 1943, AR 35-4820, 19 Sept. 1942.

6. See generally, AR 35-4820, 19 Sept. 1942.

7. Exclusive of sleeping and parlor car accommodations. The type of transportation furnished may also be commercial aircraft and Government automobile. Par. 2, AR 35-4870, 10 Mar. 1942.

their designated posts of duty may be paid a per diem allowance, not exceeding $6 per day, in lieu of subsistence.[8] This per diem allowance is authorized only in connection with travel when by reason of the length of temporary duty it is considered that expenses incurred may or will exceed the reimbursement on a mileage basis and thus cause a financial loss to the traveler. Except in the case of a travel order calling for a portion of the journey to be performed by air or beyond the continental limits of the United States, no travel order may prescribe both a per diem allowance and mileage.[9]

Travel by air in commercial aircraft is permitted without regard to the cost of such transportation as compared with other modes of transportation. When such travel[10] is without

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8. Sec. 12. The per diem allowance is payable whether or not the travel is performed repeatedly between places in the vicinity and without regard to the length of absence from the designated post of duty. Military Appropriation Act, 1944 (Public Law 108, 78th Cong.; Bull. 13, WD, 9 July 1943. When travel orders affirmatively authorize a per diem only during periods of travel between official headquarters and temporary duty stations but fail to authorize the allowance while at the latter, it will be concluded that there was no intention to grant the allowance at the temporary duty station. MS. Comp. Gen. B-33493. 15 April 1943.

9. SPJGA 1943/3575, 8 Aug. 1942; par. 9b, C 1, 19 June 1943, AR 35-4820, 19 Sept. 1942. Reimbursement in the excepted travel usually would be on a per diem basis and the remaining travel on a mileage basis.

10. Including travel between airports and centers of population or posts of duty when incidental to travel on commercial aircraft.

troops and pursuant to orders of competent authority to travel by air, the cost is borne by the Government and the traveler may be paid actual and necessary expenses[11] not in excess of $8 per day, or instead, a per diem allowance of $6 in lieu thereof.[12]

When competent orders entitle them to transportation or transportation and subsistence, as distinguished from mileage, officers who travel by privately owned conveyance are entitled, in lieu of transportation in kind by the shortest usually traveled route, to a money allowance at the rate of 3 cents per mile for the same distance. If the orders call for such payment, reimburse-

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11. The types of expenses allowable are set out in paragraph 8, AR 35-4820, 19 Sept. 1942. The actual cost of transportation, including sleeping and parlor car accommodations, is not included in the term "actual and necessary" (rooms, meals, tips, etc.) but is reimbursable and payable in addition to expenses included within that term. Except in the case of travel by air on official business away from the designated post of duty under competent orders, "actual" or "actual and necessary expenses" may not exceed $7 per day, or a per diem allowance in lieu thereof in the amount of $6. Actual expenses only may be paid for travel under orders in Alaska and outside the continental limits of the United States. Sec. 10.

12. Sec. 12. Air travel under orders is to be distinguished from the case where orders call for travel in a mileage status (these do not designate the mode of transportation to be used) and the travel is accomplished by air, whether the transportation is procured by Government transportation request or from personal funds. See note 7, supra. If a transportation request is used, there will be deducted from the mileage payable, the cost thereof and the amount of 3 cents per mile for any land grant railroad mileage involved.

ment will also be made for actual and necessary expenses or a per diem in lieu thereof, but not for a period longer than would have been required had advantage been taken of Government transportation over the shortest usually traveled route.[13] When highway travel is performed on a mileage basis by automobile, the distance is computed on the basis of the highway distance shown by standard highway guides--if not shown, the odometer reading is used--but where such distance is in excess of that shown in the Official Mileage Tables, the latter govern. In no event may the payment for highway travel exceed the amount which would be payable had the travel been performed by rail via the official route, with appropriate land grant deductions.[14]

In cases of sea travel under competent orders, only actual and necessary expenses[15] may be paid, whether the voyage is made on a commercial or Government-owned vessel.[16]

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13. Sec. 12; par. 7, AR 35-4820, 19 Sept. 1942. The cost of operating the private conveyance is borne by the traveler.

14. Ibid. Travel orders containing the code symbol "TPA" (travel by officer or his dependents by privately owned automobile is authorized) permit the traveler to be on detached service during the time required for direct travel by automobile even though selection of another means of travel would call for an earlier arrival time at the duty station. See AR 605-180, 16 July 1942.

15. See note 11, supra.

16. Par. 1, AR 35-4820, 19 Sept. 1942.

Officers discharged from the service, except by way of punishment for an offense, receive travel allowances of 4 cents per mile from the place of discharge to the place of residence at the time of appointment.[17] Members of the reserve components generally receive the mileage allowance from home to first duty station on being ordered to active duty and from last station to home on relief from active duty.[18]

(2) Enlisted Men. Ordinarily, enlisted men traveling under orders are furnished transportation in kind but where it is not furnished, they are entitled to a money allowance of 3 cents per mile, regardless of the mode of travel.[19] Subject to the same regulations as officers, when traveling by privately owned conveyance under orders which entitle them to transportation, enlisted men are entitled to the money allowance of 3 cents

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17. Act 2 March 1901 (31 Stat. 902; 10 U.S.C. 751; M.L. 1939, sec. 1468). Whether or not an officer intends to travel to the place to which he is paid travel allowances on discharge, is immaterial as far as payment is concerned. 25 Comp Dec. 792.

18. Par. 2, AR 35-4820, 19 Sept. 1942. Regulations covering special cases of mileage and other travel allowances on duty and leave status are contained in AR 35-4830, 13 Aug. 1942 and AR 35-4840, 15 Dec. 1924.

19. Military Appropriation Act, 1944 (Public Law 108, 78th Cong.; Bull. 13, WD, 9 July 1943).

per mile.[20] The monetary allowance in lieu of rations and quarters while traveling is also payable.[21]

Enlisted men discharged from the Army, except by way of punishment for an offense, receive 5 cents per mile for the distance from the place of discharge to the place of enlistment.[22] The right to the allowance does not accrue in cases of dishonorable discharge, or discharge for fraud, conviction by the civil authorities, for the soldier's own convenience, to accept commission, etc.[23] In general, the "place of enlistment" is that at which Army pay began to accrue.[24]

c. Travel of Dependents. When an officer,[25] or enlisted man above the fourth grade, having dependents, is ordered to

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20. Par. 627.1, TM 14-260, 10 Dec. 1942. If, however, transportation in a Government-owned conveyance is available for his use, the money allowance may not be paid to an enlisted man. 16 Comp. Gen. 578.

21. See secs. 2 and 3, supra. When traveling by air and not furnished rations and quarters in kind, enlisted men may be paid a per diem allowance of $6 per day in lieu thereof. Par. 1, AR 35-4540, 1 Aug. 1935.

22. AR 35-2560, 27 Feb. 1943. Army Regulations at times refer to this type of allowance as "travel pay". It would seem properly to be an allowance.

23. Par. 3, id.

24. See Chapter 1, sec. 3, supra.

25. Army nurses are not entitled to transportation of dependents at Government expense. 22 Comp. Gen. 645.

make a permanent change of station, the Government will furnish transportation in kind, or pay money in lieu thereof, to the new station for such dependents.[26] No such allowance is payable when the change of station is temporary.

The act of 5 June 1942[27] provides that when military personnel are on duty at places designated by the Secretary of War as within zones from which their dependents should be evacuated for military reasons, or when ordered to duty at places where Government quarters are not available for dependents or to which they may not accompany military personnel, those for whom travel allowances are authorized[28] may have their dependents and household goods moved at Government expense to any designated location and later to a duty station at which such restrictions do not apply. The act also provides that when military personnel are assigned to temporary duty away from permanent stations on orders

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26. Sec. 12 of the Pay Readjustment Act of 1942, supra, empowered the President to permit payment of money in lieu of transportation for travel completed but not furnished in kind. By E.O. 9222, 15 Aug. 1942, the President authorized such cash payments.

27. 56 Stat. 315; 50 U.S.C. 764; M.L. 1939, Sup. II, sec. 2204a.

28. Rights granted by statutes authorizing transportation in kind or the commercial cost thereof for completed travel by dependents of officers and enlisted men are the rights of such military personnel and not the dependents. MS. Comp. Gen. B-28404, 29 Sept. 1942.

which do not provide for return to such stations or do not specify or imply any limit to the period of absence, dependents and household goods for whom transportation is authorized may be moved to a location in the United States designated by such personnel and later from such location to a permanent duty station.

Apparently without reference to any specific statutory authority, Army Regulations,[29] for "military reasons", restrict the movement of dependents and household goods at Government expense on permanent change of station[30] to one movement after 1 September 1942, except in the cases of mass evacuation and return of military personnel to civil life through discharge, retirement or relief from active duty.[31] Notwithstanding this blanket restriction, the same regulations seem to authorize[32] the

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29. AR 55-120, 26 April 1943 (Transportation of Individuals) and AR 55-160, 26 April 1943 (Transportation of Authorized Baggage).

30. If dependents or household goods are transported from a place other than the permanent duty station, any excess cost must be paid by the officer or enlisted man concerned. Par. 8a, AR 55-120, 26 April 1943; MS. Comp. Gen. B-30470, 29 Jan. 1943. As to household goods, see par. 14a, AR 55-160, 26 April 1943.

31. The General Accounting Office has advised that in the absence of judicial interpretation no payments for transportation will be approved for transportation which is administratively refused for military reasons. MS. Comp. Gen. B-32057, 16 Feb. 1943.

32. See par. 8a(4), AR 55-120, 26 April 1943 and C 3, 28 June 1943; par. 14g, AR 55-160, 26 April 1943.

payment of money allowances or the furnishing of transportation in kind for dependents and household goods in the exceptional cases which are the subject of the act of 5 June 1942: in cases of extended temporary duty or duty at places where dependents can not be quartered, the transportation is authorized first to a place designated by the officer or soldier and then later from such designated location to a permanent duty station where dependents may be quartered.

d. Transportation of Baggage and Household Goods.[33]

Officers and enlisted men of the first four grades are entitled to transportation at Government expense of baggage and household goods within certain weight limits on temporary and permanent changes of station.[34] The restrictions on transportation of household goods[35] do not apply to movements on temporary change of station.

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33. See generally, AR 55-160, 26 April 1943.

34. Dependent on the grade of the traveler, the allowable weights on temporary change of station are 2000 lbs. to 400 lbs., including professional books and papers; on permanent change of station 24,000 lbs. to 3000 lbs., exclusive of professional books and papers. Usually baggage tariffs permit free carriage of 150 lbs. of baggage on railroad tickets. Under certain conditions baggage not accompanying the traveler may be sent by express or freight. The common form of transportation is by railroad; special considerations attach to movement by motor van and Army transport

35. See discussion in preceding subsection.

The act 5 June 1942[36] provides that personnel in service on that date for whom transportation of household effects is authorized may elect to have such effects moved at Government expense from their permanent stations to any point in the United States for storage at their own expense for the duration of the present war, with subsequent removal at Government expense to permanent duty stations to which they are later assigned.[37]

5. Enlistment Allowance

Every honorably discharged enlisted man of the first three grades who re-enlists in the Army within a period of 3 months from the date of his discharge is entitled to receive an enlistment allowance equal to $50 multiplied by the number of years served in the enlistment period from which he was last discharged. Under the same conditions, enlisted men of the other grades receive an allowance similarly computed on a $25 basis.[1]

Members of the Regular Army Reserve[2] in inactive status

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36. See note 27, supra.

37. Permanent change of station orders are not necessary but only one such shipment may be made at Government expense. Cir. 314, WD, 16 Sept. 1942; par. 14d, AR 55-160, 26 April 1943.

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1. Sec. 10.

2. See Part V, Chapter 2, sec. 4, supra.

are entitled to an enlistment allowance of $24 per year which is payable in installments for each 4-month period at the rate of $2 per month. Upon being discharged or ordered to active duty, the reservist ceases to be entitled to this type of enlistment allowance. When qualified and accepted for active duty, however, the reservist receives an additional sum at the rate of $3 per month for each completed month he has been enlisted in the Regular Army Reserve but not to exceed $150.[3]

6. Uniform and Equipment Allowance

The act 4 December 1942[1] authorizes an allowance of $250 for uniforms and equipment to be paid to the following personnel serving during the present war and 6 months thereafter in the Army of the United States or any of its components:

(a) Commissioned officers on active duty on 3 April 1939, or thereafter accepted for active duty, in the grade of second lieutenant, first lieutenant, or captain and who were entitled to the pay of 1st, 2nd, or 3rd pay period on 3 April 1939 or at the time of acceptance for active duty.

(b) Persons on active duty on 3 April 1939, or thereafter accepted for active duty, in any temporary or permanent grade of warrant officer or flight officer.

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3. Sec. 30, National Defense Act; MS. Comp. Gen. B-30576, 11 Jan. 1943.

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1. 56 Stat. 1039; 10 U.S.C. 361b, 904a; M.L. 1939, Sup. II, sec. 2165d-1.

The allowance is not payable to:

(a) Persons accepted for active duty on or after 1 June 1942 who are entitled to receive the pay of the 4th pay period or above at the time of acceptance.

(b) To a chief warrant officer entitled to the pay and allowances of the 4th pay period at the date of acceptance for active duty or who was entitled to such pay on 3 April 1939.

(c) Graduates of the United States Military Academy.

The allowance may not be paid more than once to any person. Any uniform allowance paid under prior acts is deducted from the sum of $250 and only the difference is payable.[2]

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2. Chapter 8, TM 14-250, 1 Mar. 1943.

CHAPTER 3 - FAMILY ALLOWANCES

The Servicemen's Dependents Allowance Act of 1942, as amended[1], provides for the payment of an initial allowance and a monthly allowance to dependents of enlisted men[2] in active service on or after 1 June 1942. The pay of the enlisted man is charged with or reduced by a fixed sum (known for payroll purposes as a Class F deduction) monthly during such time as the monthly allowance, as distinguished from the initial allowance, is paid.

This statute enables the Selective Service System to reclassify and select for military service large numbers of men previously deferred because of dependency.[3] The magnitude of the payments which have been made under the act is unparalleled: it has

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1. Act 23 June 1942 (56 Stat. 381, M.L. 1939, Sup. II, sec. 1166-1 et seq.) as amended by act 20 Aug. 1942 (56 Stat. 747) and by act 26 Oct. 1943 (Public Law 174, 78th Cong.; Bull. 21, WD, 1943.)

2. Except enlisted men of the first three grades who on 1 Nov. 1943 were receiving or had applied for and were entitled to receive the monetary allowance in lieu of quarters for dependents. Sec. 108b, Servicemen's Dependents Allowance Act, supra.

3. In the Spring of 1942, the basis of 65% of all deferments. Hearings before the Senate Committee on Military Affairs on S. 2467, 77th Cong., 2d Sess., p. 10. The act also amends the Selective Training and Service Act of 1940 to provide that entitlement to family allowances shall be taken into consideration in determining advisability of deferment. Sec. 201a, act 23 June 1942 (56 Stat. 386; M.L. 1939, Sup. II, sec. 2225-5(e).)

been estimated that in the spring of 1943 almost 3 million relatives and dependents of enlisted men were already receiving these payments.

Section 111 directs the Secretary of War to administer the act for the Army and expressly provides for the delegation of this general power to subordinate officers. Pursuant to this authority there have been delegated to the Office of Dependency Benefits[4] all administrative functions including that of making necessary regulations and passing upon all applications for allowance.

Since payment of family allowance is made only after approval of the Office of Dependency Benefits, the problems incident to the administration of the statute are primarily the concern of that agency and its legal staff. Troop commanders and their staff judge advocates are not required to pass upon most of the legal questions relating to entitlement to family allowances.[5]

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4. The original delegation was made to the Allowance and Allotment Branch of The Adjutant General's Office (AG 243 (6-8-42) FA). The name of this unit was later changed to the Office of Dependency Benefits (Adm. Memo No. 53, Hq. SOS, 12 Oct. 1942; Memo No. W 600-20-42, 16 Oct. 1942). This office has very recently been transferred to the supervision of the Fiscal Director, Army Service Forces.

5. The Military Affairs Division of the Office of The Judge Advocate General has occasionally been called upon for interpretation of the provisions of the statute and of current and proposed regulations. A representative selection of these opinions is included in J.A.G.S. Text No. 9 (Selected Opinions - Military Affairs).

As far as units in the field are concerned, their function is chiefly to set in operation and to superintend the machinery for the filing of the application (WD, AGO Form No. 625) in accordance with the provisions of Circulars Nos. 225 and 288, War Department, 1942, and Circulars Nos 69 and 90, War Department, 1943.

In those instances in which it may be necessary for the judge advocate to anticipate the action of the Office of Dependency Benefits in family allowance matters, reference should be had first to the language of the act and to the instructions contained in the mentioned circulars and in the pamphlet, Personal Affairs of Military Personnel and Aid for their Dependents, published by the War Department in January, 1943. The essential information on such subjects as eligibility, amounts, forms, termination, etc., will be found in those publications. No useful purpose will be served, therefore, by the restatement or paraphrasing of such information in these materials.

Of paramount importance to judge advocates, on the other hand, are the rules relating to the effect of the Servicemen's Dependents Allowance Act of 1942 upon court-martial forfeitures and upon other deductions which are authorized to be made from the pay of enlisted men of the four lowest grades. The act itself contains no express provision in this connection but the matter has been clarified in a line of opinions of The Judge

Advocate General[6] and in War Department Circular 288, 28 August 1942. There are reprinted in this chapter, therefore, an opinion of 8 July 1942 which served as the basis for Circular 288 (p. VIII-75); an opinion of 13 November 1942 interpreting and limiting the scope of the mentioned circular (p. VIII - 82); and a later memorandum containing additional discussion of the underlying policy considerations (p. VIII - 85).

There is also included (p. VIII - 88) a reprint of the opinion of The Judge Advocate General of 4 December 1942 indicating generally the effect of the family allowance statute upon the act of 22 May 1928 which imposed certain limitations upon the amount of a soldier's pay which might legally be withheld.

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6. See, e.g., SPJGA 242.2, 5 July 1942; id., 8 July 1942; SPJGA 240, 10 July 1942; SPJGA 242.4, 15 July 1942; id., 27 July 1942 (I Bull. JAG 105, sec. 402(8)); id., 19 Aug. 1942; id., 21 Aug. 1942; SPJGA 1942/4332, 19 Sept. 1942; SPJGA 1942/4964, 23 Oct. 1942; SPJGA 1942/5277, 11 Nov. 1942 (I Bull. JAG 325, sec. 402(8)); SPJGA 1942/5329, 13 Nov. 1942 (I Bull. JAG 325, sec. 402(10)).

SPJGA 242.4 July 8, 1942

MEMORANDUM for The Judge Advocate General.

Subject: Effect of act June 23, 1942 (Public Law 625, 77th Cong.) on forfeiture of pay by courts-martial.

1. By cablegram (RCB7WED 51 GVT NL 2EX) dated June 29, 1942, opinion was requested by the Commanding General, Fort Shafter, Territory of Hawaii, in connection with the following inquiry:

"REQUEST INXNS AS TO WHAT PART OF PAY UNDER NEW SCHEDULE IS SUBJECT TO FORFEITURE BY COURTS MARTIAL PARTICULARS REFERENCE TO CLASS A MANDATORY CONTRIBUTION FOR DEPENDENT UNDER SERVICEMANS DEPENDENTS ALLOWANCE ACT AND CLASS E INSURANCE ALLOTMENTS IN LIEU OF CLASS D AND N END PENNELL"

2. Title I of the act of June 23, 1942 (Public Law 625, 77th Cong.), provides generally for the monthly payment of a family allowance, in accordance with a specific schedule of amounts, to certain dependents, denominated "Class A" and "Class B", of enlisted men of the Army in grades four to seven, inclusive. Class A dependents include any person who is the wife, child, or former wife divorced who has not remarried and to whom alimony has been decreed and is still payable, of such enlisted man (secs. 103, 120b). Class B dependents include, subject to certain other qualifications, any person who is the parent, grandchild, brother, or sister of such enlisted man, found by the Secretary of War to be dependent upon the enlisted man concerned for a substantial portion of his support (sec. 103). The allowance payable to the dependent or dependents of such an enlisted man consists of the Government's contribution to the allowance and "the reduction in or charge to the pay of such enlisted man" (sec. 102). The payment of a monthly family allowance to any Class B dependent or dependents may be terminated upon receipt by the War Department of a written request from the enlisted man concerned that the allowance shall be terminated (sec. 104).

Other provisions of the act, pertinent to the consideration of the instant case, are as follows:

"Sec. 106. (a) For any month for which a monthly family allowance is paid under this title to the de-

pendent or dependents of any such enlisted man the monthly pay of such enlisted man shall be reduced by, or charged with, the amount of $22, and shall be reduced by, or charged with, an additional amount of $5 if the dependents to whom such allowance is payable include both Class A and Class B dependents. The amount by which the pay of any such enlisted man is so reduced or with which it is charged shall constitute part of the monthly family allowance payable to his dependent or dependents. [Underscoring supplied] * * *

"Sec. 110. (a) Any family allowance granted under the provisions of this title to the dependent or dependents of any enlisted man shall continue to be paid irrespective of the pay accruing to such enlisted man.

"(b) In case of the desertion or imprisonment of any enlisted man * * * the family allowance thereafter payable to such dependent or dependents and the reduction of or charge to pay of such enlisted man shall be determined in accordance with such regulations as may be prescribed by the Secretary of department concerned." (Underscoring supplied)

3. The Manual for Courts-Martial, U. S. Army, 1928, provides in pertinent part as follows:

"103. g. Forfeiture; fines; detention of pay.--* * * See, generally, as to forfeitures, Army Regulations relating to the Finance Department, particularly AR 35-2460 (Court-martial forfeitures--enlisted men). * * *

"104. b. General limitations.--The limitations herein (104) do not exclude any other applicable limitations; for example, those set forth in 102 and 103.

"A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against an accused:

"Forfeiture of pay at a rate greater than two-thirds of his pay per month. * * *

"c. Maximum punishments.--* * * In computing what the maximum amount of forfeiture is in dollars and cents (see forms of sentence, App. 9) the soldier's base pay (of the reduced grade if the sentence carry a reduction) plus pay for length of service will be taken as the basis. * * * "

4. Section 9 of the act of June 16, 1942 (Public Law 607,

77th Cong.), establishes, effective June 1, 1942, the base and longevity pay for the several grades of enlisted men of the Army. Under the provisions of subparagraphs 104b and 104c of the Manual for Courts-Martial, supra, in cases not involving a sentence of dishonorable discharge and total forfeiture of pay and allowances due and to become due, a court-martial, in computing the prescribed maximum amount of forfeiture, is not authorized to exclude any amount legally withheld from the pay of an enlisted man, unless it can be said that withholding such amount operates as a reduction of the enlisted man's base and longevity pay prescribed by law. The same conclusion applies to existing Army regulations.

It will be noted that subsection 106(a) of the act, supra contains a mandatory requirement that "the monthly pay of such enlisted man shall be reduced by, or charged with, the amount of $22 ($27 if the dependents receiving the allowance include both Class A and Class B dependents), for any month for which a monthly family allowance is paid to his dependent or dependents" (underscoring supplied). In my opinion the underscored language is employed in the sense of reducing the pay received by the enlisted man by a debit charge of the amount specified in the act, rather than in the sense of a reduction of the amount of base and longevity pay to which his account is to be credited. This view finds support in the fact that Class A dependents are those to whom the enlisted man is legally liable for support or payment of alimony, so that payment of the allowance to them, without his consent, is in the nature of a discharge of his legal obligation; and payment to a Class B dependent, to whom he may or may not owe a legal obligation of support, may also be considered as a discharge of his legal obligation because such payments are made subject to his option to terminate the payments. It follows that the mandatory reduction in, or charge against, the pay of the enlisted man concerned does not operate to reduce his pay, as such, but diverts part of it to persons to whom he has a legal obligation to provide support, pay alimony, or has elected to assist in supporting.

The monthly reduction or charge against pay required by the act here considered is comparable to the monthly deduction from the pay of enlisted men of the Regular Army for the support of the Soldiers' Home under the act of February 13, 1936 (40 Stat. 1137; 24 U.S.C. 44a). This office has held (Mil. Jus. Info. Bull. No. 8, Sept. 22, 1941, par. 1) that although reviewing authorities may, as a matter of policy, modify a sentence which imposes the maximum authorized forfeiture without regard to the mandatory deduction for the Soldiers' Home, such deduction has no bearing on the legality of the forfeiture.

Inasmuch as subsection 110(a) of the act, supra, provides that the family allowance shall continue to be paid irrespective of the pay accruing to such enlisted man, there is an apparent recognition that the pay of an enlisted man, during certain periods, might be insufficient for the purpose of contribution to the family allowance due to forfeitures by sentence of court-martial, or other unauthorized stoppages. Also, the authority granted the Secretary of War, under subsection 110(b), to prescribe by regulation the family allowance payable and the reduction of or charge to pay of an enlisted man during a period of desertion or imprisonment of the enlisted man concerned, indicates a recognition of the possibility of continuing the family allowance during a period when such enlisted man is in a nonpay status; and, that under such circumstances, the enlisted man's contribution would, of necessity, be in the nature of a debit charge against possible future pay. I therefore conclude that title I of the act of June 23, 1942, supra, neither affects the computation of the maximum amount of forfeiture of pay authorized by paragraph 104c, Manual for Courts-Martial, 1928, nor requires that the amount of his contribution to family allowance remain unforfeited.

5. A prior opinion of this office (JAG 242.4, Mar. 22, 1918) and a decision by the Comptroller of the Treasury (24 Comp. Dec. 621, 624) might appear initially to be at variance with the foregoing conclusion. The Comptroller held, in accord with the views of The Judge Advocate General, as follows:

> "7. The monthly compulsory allotments of pay, class A, under the provisions of sections 200 to 210 of the act of October 6, 1917 (40 Stat., 402 to 405), the allotments under class B of said law, the Liberty-loan allotments, and the premiums on war-risk insurance are not disturbed or affected by such sentences of courts-martial imposing a forfeiture of pay."

The quoted decision, however, had specific reference to a court-martial sentence reading, "to forfeit two-thirds of his pay for one month", and the question whether such forfeiture was applicable to the entire month's pay, or, if not, to what amount it applied. Both of the decisions were predicated upon then existing Army regulations (pars. 1370, 1370 1/2, AR, 1913) which provided in pertinent part as follows:

> "1370. Authorized stoppages will be entered on the pay rolls and deducted at times of payment in the following order:

"1. Reimbursements to the United States.
"2. Reimbursements to individuals, as the quartermaster or post exchange, for instance.
"3. Forfeitures for desertion and fines.
* * *
"1370 1/2. A sentence imposing forfeitures of a part of pay for a month or number of months means the forfeiture each month for the specified number of months of the specified part of that portion of pay which is not required to be allotted to dependent relatives of Class A under the provisions of Article II of the act approved October 6, 1917, commonly known as the war-risk insurance act (C.A.R. No. 67, Jan. 31, 1918). * * * when stoppages of the nature specified in sections 1 and 2 of paragraph 1370 stand against the soldier, the forfeiture will not begin until such stoppages have been satisfied. * * * "

In the light of the facts and the quoted regulations, the following conclusion of The Judge Advocate General (JAG 242.4, Mar. 22, 1918) has no application to the instant case:

"* * * the court-martial sentence does not operate upon that part of the soldier's pay which is compulsorily withheld as an allotment. As to the Liberty Loan allotment and the insurance premium, it is the view of this office that these should be regarded as Government obligations within the meaning of the provision of Paragraph 1370 1/2, A.R., directing that 'when stoppages of the nature specified in sections 1 and 2 of paragraph 1370 stand against the soldier, the forfeitures will not begin until such stoppages have been satisfied.'"

6. It is not clear from the basic cablegram in what connection the reference to "Class E insurance allotments in lieu of Class D and N" was intended. It is assumed that the inquiry is directed to the question whether Class E allotments and deductions of Class D and Class N should first be deducted from the enlisted man's pay in computing the maximum amount of forfeiture which a court-martial may legally impose as a sentence.

The allotments and deductions of the mentioned classes are voluntary. If it were held that these should be deducted from the computation for maximum forfeitures authorized, an enlisted

man could, in most cases, limit the punishment by way of forfeiture of pay to which he would otherwise be subject. Apparently in recognition of this possibility, subparagraph 12a(5), Army Regulations 35-5520, March 4, 1941, provides:

> "a. Allotments will be discontinued prior to the expiration of the period for which granted --
> * * *
> "(5) When forfeiture of pay by sentence of court martial is such that if the allotment is continued the forfeiture cannot be collected in full prior to the discharge of the allotter."

Paragraph 4 of the same regulations provides:

> "Insofar as concerns the action of disbursing officers making payments in the field, all Class E allotments and Class D and Class N deductions should be treated alike; * * *."

Although the court-martial may properly consider the amount of such allotments and deductions before passing sentence in any case, the maximum amount of authorized forfeiture is not affected by the existence of such allotments or deductions.

7. As subparagraph 103g of the Manual for Courts-Martial specifically refers to Army Regulations 35-2460, "Courts-Martial Forfeitures -- Enlisted Men", it is my opinion that such regulations might be appropriately amended effectively to provide for a change in existing requirements as to forfeitures, in the event it is considered expedient as a matter of policy to exclude a mandatory contribution to the family allowance under the act of June 23, 1942, supra, or voluntary allotments or deductions of the classes previously mentioned from the pay subject to forfeiture by sentence of a court-martial. In this regard, attention is invited to the War Department policy announced in paragraph 32, Special Regulations No. 72, 1919, and the provision subsequently appearing in paragraph 311, Manual for Courts-Martial, 1921.

8. a. It is therefore recommended that the basic communication be referred to the Director of Military Personnel, Services of Supply, by first indorsement, prepared for the signature of The Judge Advocate General, stating:

> The basic cablegram has been acknowledged as indicated by the inclosed copy. In my opinion the mandatory contri-

bution from the pay of an enlisted man to the family allowance provided by the act of June 23, 1942 (Public Law 625, 77th Cong.), is neither required nor intended to be deducted in computing the maximum amount of authorized forfeiture of pay which a court-martial may impose, in cases not involving a dishonorable discharge, under the provisions of paragraph 104c, Manual for Courts-Martial, 1928. Class E allotments, Class D deductions, and Class N deductions, similarly, are not required to be deducted in making such computation. However, in view of the policy followed by the War Department during the First World War in connection with such allotments and deductions, it is recommended that consideration be given to the expediency of adopting a similar or modified policy at this time. It is further recommended that instructions be published requiring that the amount of contribution to the family allotment, if any, be entered on the court-martial charge sheet, in addition to voluntary allotments to dependents and insurance deductions. A copy of the memorandum prepared in this office on the subject of the instant inquiry is inclosed herewith for your information.

b. It is further recommended that reply to the basic cablegram be made by radiogram to the Commanding General, Hawaiian Department, prepared for the signature of The Judge Advocate General, stating:

CONTRIBUTIONS TO FAMILY ALLOWANCES AND OTHER ALLOTMENTS AND DEDUCTIONS DO NOT UNDER PRESENT LAWS AND REGULATIONS AFFECT MAXIMUM AMOUNT WHICH MAY BE FORFEITED BY COURTS MARTIAL STOP WAR DEPARTMENT CONSIDERATION OF POSSIBLE MODIFICATION OF POLICY THIS REGARD HAS BEEN RECOMMENDED.

/s/ C. B. Mickelwait

C. B. Mickelwait,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5329 November 13, 1942
(242.4)

MEMORANDUM for The Judge Advocate General

Subject: Effect of act of June 23, 1942 (Public Law 625, 77th Cong.), on forfeiture of pay by courts-martial.

1. By first indorsement (SPFDR 242.4/3757A-Fort Benjamin Harrison) dated October 31, 1942, these papers were referred for opinion as to the

> "* * * proper amount which may be deducted from the pay of an enlisted man, $50 rate, for court martial forfeitures who has a Class F deduction of $22.00 per month in view of the apparent conflict between Par. 6, War Department Circular 288, 1942, and opinion of your office dated July 15, 1942, your file SPJGA 242.4."

2. The pertinent part of the mentioned communication reads as follows:

> "2. Paragraph 6, WD, Cir. 288, 1942, clearly states that the maximum amount of forfeiture per month authorized is two-thirds of the amount remaining after deduction of the Class F allotment, and it is well understood that a Courts-martial should not assess a forfeiture in excess of that amount. However, instances arise in which, through inadvertence or otherwise, the Court has assessed a forfeiture in excess of the amount remaining after deduction of the Class F allotment, and the sentence has been duly approved by the convening authority. Following is an example: A soldier whose rate of pay is $50.00 per month has a Class F allotment of $22.00 per month, leaving a balance of $28.00. This soldier is sentenced to forfeit $20.00 of his pay for one month. May the entire $20.00 be collected from the balance of $28.00 or may only $18.67 be collected?"

3. In an opinion of this office (SPJGA 242.4, July 8, 1942) construing the effect of the act of June 23, 1942 (Public Law 625,

77th Cong.), on forfeiture of pay by a court-martial, it was held that the provisions of the mentioned act neither affected the computation of the maximum amount of forfeiture of pay authorized by paragraph 104c, Manual for Courts-Martial, 1928, or required that the amount of his contribution to family allowance remain unforfeited. However, in that opinion it was suggested that consideration be given by the War Department to the expediency of adopting a policy similar to that followed during the First World War for uniform application in the future. The mentioned opinion (SPJGA 242.4) dated July 15, 1942, reiterates the view expressed in the former opinion.

Subsequent to the dates of the mentioned opinions, War Department Circular No. 288, dated August 28, 1942, was published, paragraph 6 thereof, reading as follows:

> "Class F deductions required as the enlisted man's contribution to the family allowance will not be disturbed or affected by court-martial forfeiture of pay nor be included in the computation of the enlisted man's pay for the purpose of determining the amount of court-martial forfeiture that may be assessed. For example: If an enlisted man's monthly base and longevity pay is $60 and the monthly Class F deduction for the family allowance contribution is $27, the maximum amount of forfeiture per month authorized is two-thirds of the amount left after subtracting the $27 Class F deduction from the $60 monthly pay (two-thirds of $33 or a forfeiture of $22 per month in this case). The amount of the family allowance contribution, if any, will be entered on court-martial charge sheets."

In a later opinion of this office (SPJGA 1942/4964 (242.4) Oct. 23, 1942) it was held that the War Department policy, as announced in the above-mentioned circular contemplates that the amount of any Class F deduction for family allowance shall be deducted from the monthly pay of an enlisted man and that the per diem rate of pay to be forfeited under a court-martial sentence in cases of absence without leave will be computed on the basis of the balance remaining.

4. In view of the foregoing opinions of this office it is believed that the provisions of paragraph 6, War Department Circular No. 288, 1942, is a statement of policy for the guidance of all authorities exercising court-martial jurisdiction. The mentioned

circular does not purport to amend paragraph 104, Manual for Courts-Martial 1928, or reduce the maximum punishments as prescribed by the President. It therefore follows that a sentence directing forfeiture of two-thirds of the full amount of pay is not illegal or void, and if executed it may not be disturbed. However, it is the opinion of this office that in all cases in which such sentences have not been executed, proper steps should be instituted to correct the sentence so that it will conform to the War Department policy as announced in the mentioned circular.

5. It is therefore recommended that these papers be returned to the Chief of Finance, by second indorsement, prepared for the signature of the Acting Chief of Division, stating:

> Under the stated circumstances it is the opinion of this office that the forfeiture of the entire sum of $20 in one month would not be illegal, but would be contrary to the policy announced in paragraph 6, War Department Circular No. 288, dated August 28, 1942. It is further opinion of this office that an otherwise lawful sentence involving a forfeiture in excess of that set forth in the mentioned circular is not illegal, and if executed may not subsequently be remitted. However, in the case of a sentence which does not conform to the provisions of the mentioned circular and has not been fully executed, appropriate steps should be instituted to remit any unexecuted portion of the sentence which is in excess of that authorized under the mentioned policy.

Irvin Schindler,
Lieutenant Colonel, J.A.G.D.,
Acting Chief of Military Affairs Division.

SPJGA
(242.4)

MEMORANDUM for The Judge Advocate General.

Subject: Policy expressed in War Department Circular No. 288, August 28, 1942.

1. By letter dated October 28, 1942, Colonel C. A. Wickliffe, Staff Judge Advocate, Third Service Command, raised a question as to the proper interpretation of paragraph 6, War Department Circular 288, August 28, 1942, as applied to per diem rates of court-martial forfeitures, and suggested that an inequitable situation is created, as between those enlisted men from whose pay Class F deductions are made and those having no such deduction, if forfeitures are computed on the balance of pay remaining after Class F deductions are made. The stated basis of such inequity is the fact that the actual amount of a forfeiture, in terms of money, will be less in the case of an enlisted man from whose pay a Class F deduction has been made than in the case of an enlisted man whose pay is subject to no such deduction.

2. By letter dated October 20, 1942, General L. H. Hedrick, Assistant Judge Advocate General, European Theater, raises the same question as to interpretation and makes the same suggestion as to an alleged inequity created by the present policy. General Hedrick's suggestion for the alleviation of this condition is that forfeitures in the case of a man who does not have a deduction should be computed on the same basis as one who does. Colonel Wickliffe, on the other hand, suggests the converse, subject to a mentioned limitation.

3. The evolution of the present policy in this respect may be traced through the opinions of this office. Shortly after the passage of the act of June 23, 1942 (Public Law 625, 77th Cong.), the question was presented whether the amount of Class F deductions was subject to court-martial forfeitures. In SPJGA 242.4, July 8, 1942, this office took the position that under then existing law and regulations Class F deductions were neither required nor intended to be deducted for the purpose of computing court-martial forfeitures less than total. In that opinion, however, it was pointed out that a different policy had been followed by the War Department during the First World War and recommended consideration of the re-adoption of that policy.

4. Pursuant to the above suggestion, the War Department published instructions to the field (Radiogram, AG 243 (7-18-42) FA; and a radiogram dated August 5, 1942) that Class F deductions should not be included in the computation of pay for the purpose of determining the amount of court-martial forfeitures. Some confusion arose as to the interpretation of these instructions (SPJGA 242.4, Aug. 19, 1942) and by opinion SPJGA 242.4, August 21, 1942, recommendation was made to the War Department that previous instructions be clarified as suggested therein. Pursuant to this recommendation pertinent provisions were embodied in War Department Circular No. 288, supra, which was published shortly thereafter.

5. It now appears that the instructions contained in paragraph 6 of that circular are not entirely clear, as they have already been questioned from three sources. In order to overcome any possible doubt as to the meaning of that paragraph as applied to per diem rates of forfeitures, recommendation is made in the draft of Case No. 4589 that an illustration of per diem forfeitures be incorporated into that paragraph.

6. The letters of General Hedrick and Colonel Wickliffe, however, propose changes in the basic policy involved. From the fact that the present policy was in effect during the First World War, it may be inferred that it was considered equitable at that time. Aside from that, however, the force of the argument that the situation is inequitable is not apparent. Although it is undoubtedly true that in one case two-thirds of the pay of an enlisted man may be more, in terms of dollars and cents, than in the other case, by the same token, the third remaining to the man in the first case is more, in terms of dollars and cents, than that remaining in the other. The proportion of what the soldier would receive as pay, which is forfeited is the same in each case, whereas, if the policy were changed in either of the ways suggested, the proportion would be different. Even as between two men whose pay is not subject to Class F deductions, the amount of a forfeiture will vary if one is on foreign duty and the other is not, but this seems to be no reason for decreasing the amount which can be forfeited when a man is on foreign duty. If Colonel Wickliffe's suggestion were adopted, in those cases where the amount of the forfeiture equalled or exceeded the balance remaining after the Class F deduction, it would, in effect, amount to a total forfeiture, so far as the man is individually concerned. If General Hedrick's suggestion were adopted, it would make a part of the pay of those whose pay is not subject to Class F deduction immune to forfeiture, without the same considerations of public policy as

are involved in the amount of the Class F deduction.

7. From the foregoing considerations, it is believed that no recommendation for a change in the existing policy should be made. If this view is approved it is suggested that the following paragraph be embodied in the reply to General Hedrick, reply having already been made to Colonel Wickliffe:

> Your construction of the pertinent instructions regarding Class F deductions in connection with court-martial forfeitures was correct. The ambiguity in the cablegrams from The Adjutant General is believed to have been largely clarified by paragraph 6, War Department Circular No. 288, August 28, 1942. However, there still exists some uncertainty regarding per diem forfeitures and I am accordingly recommending that there be added between the penultimate and last sentences of the mentioned paragraph the following sentence
>
> > Similarly, in the case of a per diem forfeiture it should be imposed at the rate of $1.10 per day (one-thirtieth of $33, his daily pay after the family allowance contribution has been deducted).
>
> Your suggestion that uniformity of forfeitures for the same offenses being desirable, this office should take steps looking to a change in the existing War Department policy regarding this matter has been studied. The present policy was based upon the analogous procedure which was prescribed by the pertinent regulations which governed the administration of similar laws during World War I. For this reason and in view of the fact that an informal study of the matter indicates that the present arrangement is probably as equitable and satisfactory, viewed from all angles, as can be devised, I do not contemplate recommending at this time any changes in the existing policy.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

SPJGA 1942/5716 December 4, 1942
(243)

MEMORANDUM for The Judge Advocate General.

Subject: Effect of act of June 23, 1942 (Public Law 625, 77th Cong.), on reduction of pay of soldiers who have Class F deductions.

1. By first indorsement (SPFDR 248.2/378634x352 CVJ:Jet. (C 11-20-42)) dated November 6, 1942, opinion was requested whether "in effecting collections on pay rolls under the provision of Army Regulations 35-2440, in the case of enlisted men, the Class F allowance should be considered as a reduction of pay, thereby limiting the amount available for collection to two-thirds of the balance of the pay, or whether the Class F allowance should be considered as a part of the pay of which the enlisted man receives the benefit himself, thereby making available for collection two-thirds of the total pay due".

2. The basic communication is a letter (AFS-OCS-TT016) from the Director of Training, Officer Candidate School, Finance Department, Duke University, Durham, North Carolina, dated October 10, 1942, addressed to the Chief of Finance requesting information as to the proper procedure in handling Class F deductions and deductions for indebtedness to the United States on pay rolls. Inclosed with the mentioned letter are sample pay rolls showing possible methods of handling the mentioned deductions.

3. The act of May 22, 1928 (45 Stat. 698), as amended by act of June 26, 1934 (48 Stat. 1222; 10 U.S.C. 875a) provides:

> "That under such regulations as the Secretary of War shall prescribe, when it has been administratively ascertained that an enlisted man of the Army is indebted to the United States or any of its instrumentalities, the amount of such indebtedness may be collected in monthly installments by deduction from his pay on current pay rolls: Provided, That the aggregate sum of such deductions for any month shall not exceed two-thirds of the soldier's rate of pay for that month: And provided further, That whenever any part of the pay of a soldier for a certain month shall have been legally forfeited by sentence of court-martial, or otherwise legally

authorized to be withheld, then no deduction under this Act shall be so applied as to reduce the actual pay received by the soldier for that month below one-third of his authorized rate of pay therefor; * * * And provided further, That nothing in this Act shall be construed to prevent collections of such indebtedness on final statements from pay, in the proportions hereinbefore indicated, or from clothing allowance savings."

Section 106a of the act of June 23, 1942 (Public Law 625, 77th Cong.; W.D. Bull. 29, 1942), provides:

"For any month for which a monthly family allowance is paid under this title to the dependent or dependents of any such enlisted man the monthly pay of such enlisted man shall be reduced by, or charged with, the amount of $22, and shall be reduced by, or charged with, an additional amount of $5 if the dependents to whom such allowance is payable include both Class A and Class B dependents. The amount by which the pay of any such enlisted man is so reduced or with which it is so charged shall constitute part of the monthly family allowance payable to his dependent or dependents."

Subparagraph 3a, Army Regulations 35-2440. dated May 20, 1942, provides:

"* * * The words 'rate of pay' as used in the act of May 22, 1928 (par. 1b), are construed to mean the amount of earned pay for the month, which includes additional pay for qualification in arms, specialist pay, distinguished service award, and other similar items. See M.S. Comp. Gen. A-25204, March 19, 1929."

Subparagraph 7d, Army Regulations 35-2440, dated May 20, 1942, provides:

"The act of May 22, 1928 (par. 1b), clearly limits the aggregate sum of deductions on account of indebtedness for any month to two-thirds of the enlisted man's rate of pay for that month. To authorize the deduction of all pay for a particular month would do violence to the plain terms of the

> statute and defeat the intent of Congress. * * * Deductions for indebtedness under the provisions of the act of May 22, 1928, should be limited to two-thirds of the enlisted man's pay for any particular month regardless of the fact that the pay roll may reveal credit for accrued pay of previous months. See Op. JAG, November 26, 1938 (Dig. Op. JAG, 1912-40, sec. 1521(1))."

4. It is to be noted that the act of May 22, 1928, as amended, supra, provides that whenever any part of the pay of a soldier for a certain month shall have been legally forfeited by sentence of a court-martial, or otherwise legally authorized to be withheld, no deduction under the act shall be so applied as to reduce the actual pay received by the soldier for that month below one-third of his authorized rate of pay. As the act of June 23, 1942, supra, provides that the monthly pay of any enlisted man shall be reduced by, or charged with, the amount of his share of the family allowance, such amount may be regarded as an amount "legally authorized to be withheld" within the provisions of the act of May 22, 1928, as amended, supra. Therefore, under the act of May 22, 1928, supra, whenever any part of the pay of a soldier for a certain month shall have been legally forfeited by sentence of court-martial, or withheld as the soldier's share of the family allowance, or otherwise legally authorized to be withheld, no deduction to satisfy indebtedness to the United States may be so applied as to reduce the actual pay received by the soldier for that month below one-third of his authorized rate of pay. Thus, if a soldier's pay for any given month is subject to a court-martial forfeiture and to a charge for the family allowance, and if these items together reduce the pay actually received by the soldier to one-third or less of his rate of pay, no deduction to satisfy indebtedness to the United States may be made. On the other hand, if the court-martial forfeiture plus any other amounts legally authorized to be withheld amount to less than two-thirds of the soldier's rate of pay, a deduction may be made under the act of May 22, 1928, supra, provided such deduction is in an amount which, when added to the other mentioned withholdings, will not reduce the pay actually received by the soldier to less than one-third of his authorized rate of pay as defined in subparagraph 3a, Army Regulations 35-2440, May 20, 1942. For example, if a soldier whose authorized rate of pay is $60 for a given month and whose contribution to the family allowance is $27, is sentenced to forfeit two-thirds of his pay for that month, the actual amount of such forfeiture under the provisions of paragraph 6, War Department Circular No. 288, August 28, 1942, would be two-thirds of the amount remaining after the family

allowance is deducted, or $22. In this case the amount of the forfeiture plus the amount "legally authorized to be withheld" for the family allowance amounts to $49 and the soldier would actually receive $11. As this amount is less than one-third of his "authorized rate of pay" ($20), no deduction for indebtedness to the Government may be made under the provisions of the above-mentioned act of May 22, 1928. On the other hand, the other circumstances remaining the same, if the court-martial forfeiture had been $5 the amount of such forfeiture plus the other amount legally authorized to be withheld would amount to $32, leaving $28. Out of this latter amount a deduction for indebtedness to the Government might be made under the act of May 22, 1928, but such deduction could not be "so applied as to reduce the actual pay received by the soldier for that month below one-third of his authorized rate of pay therefor". Accordingly, under these circumstances, a deduction up to but not exceeding $8 might properly be made for indebtedness to the Government.

5. It is therefore recommended that these papers be returned to the Chief of Finance by second indorsement prepared for the signature of The Judge Advocate General, reading as follows:

> With reference to the question presented in the preceding indorsement, the soldier's share of the family allowance as provided in section 106a of the act of June 23, 1942 (Public Law 625, 77th Cong., W.D. Bull. 29, 1942), is regarded as an amount "legally authorized to be withheld" within the meaning of that term as used in the act of May 22, 1928 (45 Stat. 698), as amended by the act of June 26, 1934 (48 Stat. 1222; 10 U.S.C. 875a). Under the provisions of the last-mentioned act, when any part of a soldier's pay for a certain month shall have been legally forfeited by sentence of court-martial, or otherwise legally authorized to be withheld, no deduction shall be so applied as to reduce the actual pay received by the soldier for that month below one-third of his authorized rate of pay therefor. Accordingly, it is my opinion that under the provisions of the last-mentioned act and subparagraph 7d, Army Regulations 35-2440, May 20, 1942, a deduction may not be made in satisfaction of indebtedness to the Government if such deduction, plus any applicable court-martial forfeiture, plus any charge against the soldier's pay for family allowance, and any other amounts legally authorized to be withheld, will reduce the actual pay received by him for that month below one-third of his authorized rate of pay therefor, as defined in subparagraph 3a, Army Regulations 35-2440, May 20, 1942. For example, if a soldier

whose authorized rate of pay is $60 per month contributes $27 to the family allowance for a given month and is sentenced by court-martial to forfeit $22 for that month, the actual pay received by him is less than one-third of his authorized rate of pay, or $20. In that case no amount is available from which a deduction might be made for indebtedness to the Government. On the other hand, other circumstances remaining the same, if the court-martial forfeiture is $5, the amount thereof plus the amount legally authorized to be withheld for the family allowance, would leave a balance of $28. From this amount a deduction not exceeding $8 might properly be made, under the act of May 22, 1928, supra, in satisfaction of indebtedness to the Government.

Charles W. West,
Colonel, J.A.G.D.,
Chief of Military Affairs Division.

CHAPTER 4 - MISSING PERSONS

The act of 7 March 1942,[1] as amended by act of 24 December 1942,[2] provides principally for the continuation of the pay and allowances of military personnel officially reported as missing, missing in action, interned in a neutral country or captured, beleaguered or besieged by an enemy.

Such persons, unless they are absent without authority, are entitled to receive or to have credited to their accounts the same pay and allowances to which they would ordinarily be entitled.[3] In the absence of an official report of death, provision is made[4] for the continuation of allotments of pay for the support of dependents or the payment of insurance premiums for a period of twelve months from the date of commencement of absence although the period for which the allotments were executed may otherwise expire during such twelve month period. If there are no previously executed allotments or if the existing allotments are insufficient for the reasonable support of dependents or the payment of

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1. 56 Stat. 143; 50 U.S.C. 1001; M.L. 1939, Sup. II, sec. 2165a-1; sec. III, Bull. 14, WD, 14 Mar. 1942.

2. 56 Stat. 1092; 50 U.S.C. 1003; M.L. 1939, Sup. II, sec. 2165a-3; sec. II, Bull. 2, WD, 5 Jan. 1943.

3. Sec. 2

4. Sec. 3.

insurance premiums, the Secretary of War is authorized to direct the payment of sums necessary for such purposes.[5] The Secretary has full administrative control over the payments;[6] prior to the end of the twelve month period following the commencement of absence he is required to cause a full review of the case to be made and either to make an administrative finding of death or, "if the person may reasonably be presumed to be living", to continue the pay, allowances and allotments.[7] The finding of death includes a designation of a date upon which death is presumed to have occurred for purposes of the termination of the payments of pay and allowances, settlement of accounts and the payment of death gratuities.[8] Another section[9] authorizes the transportation at Government expense of the dependents and household and personal effects of any person reported as missing, as a result of military operations, interned or captured, to the official residence of record of such person or, upon application by dependents, to such location as the Secretary may designate.

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5. Ibid.
6. Secs. 4, 5, 9, 10.
7. Secs. 5, 6
8. Sec. 5.
9. Sec. 12. This section applies also to persons officially reported as dead or injured.

Legal questions relating to this statute are infrequently presented to the judge advocate assigned to echelons lower than the War Department. When such problems arise reference should be had to the language of the act as amended and to Circulars Nos. 97 and 372, War Department, 1942, and Circular 195, War Department, 1943.

Since the amendment of the statute in December, 1942, the questions presented to the Office of The Judge Advocate General have related chiefly to two general subjects:

(a) The effect of a delayed determination of death upon the pay, allowances and allotments paid or payable under the act; and

(b) The procedure to be followed in disposing of the property and effects of persons reported as missing or missing in action.

The first of these subjects has been comprehensively discussed in a recent opinion of The Judge Advocate General, a portion of which is reprinted in this Chapter (p. VIII - 97). The matter has been submitted to the Attorney General for his consideration.

The disposition of the effects of persons reported as missing or missing in action, etc., has been the subject of many opinions of the office. Section 12 of the act merely provides for the transportation of these effects to the residence of their owner or, upon application by dependents, to such other place as the Secretary of War may designate. The procedure to be followed

in shipping and accounting for this property is set out in Circular 195, War Department, 1 September 1943.[10] The Quartermaster General, with the advice of The Judge Advocate General, has issued detailed instructions to be followed by the Effects Quartermaster, Army Effects Bureau, Kansas City Quartermaster Depot, Kansas City, Missouri, in the ultimate disposition of the effects.

The Judge Advocate General has pointed out that neither this nor any other statute authorizes the sale as distinguished from the disposition of effects of living persons.[11] This statutory authority to transport the effects is not to be confused with the much broader powers of the summary court under AW 112 over the property of deceased persons.[12]

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10. Par. 16b, thereof. This circular supersedes all previous instructions regarding the disposition of effects of deceased as well as those of missing persons.

11. SPJGA 1943/3444, 9 March 1943; see J.A.G.S. Text No. 9 (Selected Opinions - Military Affairs).

12. See Part IX, Chapter 2, infra; par. 16a, Cir. 195, WD, 1 Sept. 1943.

SPJGA 1943/9904 14 July 1943

MEMORANDUM for the Secretary of War.

Subject: Interpretation of Public Law 490, 77th Congress, as amended.

1. By informal disposition slip dated 26 June 1943, the Chief, Legislative and Liaison Division, War Department General Staff, referred for opinion certain questions relating to entitlement to pay, allowances, and allotments under the provisions of Public Law 490, 77th Congress (act 7 Mar. 42, 56 Stat. 143; 50 U.S.C., App. 1001 et seq.), as amended by Public Law 848, 77th Congress (act 24 Dec. 42, 56 Stat. 1092), propounded by the President, War Department Dependency Board, in a memorandum dated 7 June 1943, to the Assistant Chief of Staff, G-1.

2. The mentioned memorandum points out that by reason of the failure of the enemy to dispatch prompt reports there has been considerable delay in the receipt by the War Department of evidence that a person carried as absent in a status of missing, missing in action, prisoner of war, or interned has died and sets forth specific instances of such delay in cases involving officers and enlisted men who were serving in the Philippine Islands. According to the memorandum, it appears that this delay has brought about a need for an authoritative determination of the following questions arising under Public Law 490, as amended, supra, in connection with the administration thereof by the War Department:

> "* * * does the period of entitlement to pay 'while so absent' under provisions of Section 2, Public Law 490, extend to the date the department receives evidence that the missing person had died or does it extend only to the time of death as reported or as administratively determined from the information received. If it be determined that the period of entitlement to pay extends only to the time of death, there will exist the further question as to the entitlement of the dependent to retain allotments from pay for the interim period from death to the time of receipt of evidence that death has occurred. * * * "

* * * * *

10. In summary, it is my opinion that:

a. The period of entitlement to pay and allowances "while so absent" under the provisions of section 2 of Public Law 490, 77th Congress (act 7 Mar. 42, 56 Stat. 143; 50 U.S.C., App. 1003) extends only to the date of death as finally administratively determined.

b. Under the provisions of the cited act, dependents of missing persons are entitled to retain allotments paid from pay and allowances which were credited to the account of the missing persons concerned subsequent to the death of such persons as finally administratively determined, but prior to the date of such determination.

c. Where payment of unallotted pay and allowances of a person administratively determined to be dead is made to the person otherwise entitled thereto, and it is subsequently discovered that the missing person actually died before the date of death, as administratively determined, there is no entitlement in the person so paid to the amount of such payment which was based on pay and allowances credited for the period subsequent to the actual date of death.

d. Where allotments such as those mentioned in b, above, have been paid, the Government may not withhold from pay and allowances credited prior to death, or from other indebtedness of the Government to the deceased, an amount not to exceed the amount of allotments so paid, but is required to disburse the mentioned credits in the manner provided by the act of 30 June 1906 (34 Stat. 750; 10 U.S.C. 868).

Myron C. Cramer,
Major General,
The Judge Advocate General.

ADDENDA

Page VIII - 19, section 2e:

Mustering-Out Payment Act of 1944. Members of the Army honorably discharged or relieved from active duty and members of the WAAC honorably discharged on account of disability are entitled to receive mustering-out pay on discharge or relief from duty. Those who have served less than 60 days receive one payment of $100; those who have served more than 60 days but not outside continental U. S. or in Alaska, two payments of $100 each; and those who have served more than 60 days including service outside continental U. S. or in Alaska, three payments of $100 each. The first payment is made at the time of relief from active duty; the second and third, where appropriate, monthly thereafter. Reference should be made to the Act for certain excepted classes of persons. In general, these include persons whose base pay exceed that of the third pay period, those in retirement pay status, students and cadets. Act 3 Feb. 1944 (Public Law 225, 78th Cong.; Bull. 3, WD, 10 Feb. 1944). Regulations issued by the Secretary of War to implement the statute are contained in Cir. 138, WD, 11 Apr. 1944. See also, Cir. 50, WD, 4 Feb. 1944; Cir. 123, WD, 28 Mar. 1944.

The following persons have been held to be entitled to mustering-out pay: an enlisted man in a non-pay status during his entire period of service because of venereal disease EPTI; a member of the ERC called to active duty but discharged two days later because of physical disability; an erroneously inducted selectee who was discharged after only one day of active duty. SPJGA 1944/3070, 11 Apr. 1944.

The following persons have been held not entitled to receive mustering-out pay: an officer who resigned for the good of the service (SPJGA 1944/3587, 7 Apr. 1944); an enlisted person who received a "blue" discharge (SPJGA 1944/3615, 17 Apr. 1944).

Page VIII - 21, line 9:

Delete the words "for fraudulent enlistment."

Page VIII - 22, footnote 45.

Air Corps Reserve officers entitled to receive a lump-sum payment under section 2, as amended (55 Stat. 240), of the Act of 16 June 1936, are not entitled to mustering-out payments. Mustering-Out Payment Act of 3 Feb. 1944 (Public Law 225, 78th Cong.; Bull. 3, WD, 10 Feb. 1944).

Page VIII - 33, footnote 3 should read:

Par. 6, AR 35-2460, 21 May 1942. All elements of enlisted men's pay, within the statutory limits, may be used to satisfy all indebtedness which is the proper subject of stoppage. The

propriety of applying allowances to the satisfaction of indebtedness is less clear. No allowances may be used to satisfy Soldiers' Home deductions or court-martial fines and partial forfeitures. Par. 406.1, TM 14-260, 10 Dec. 1942. Travel allowances may not be deducted to satisfy an enlisted man's debt to the United States. Par. 21b, AR 35-2440, 20 May 1942. An officer's rental and subsistence allowances may not be stopped by reason of an arrearage to the United States under R.S. 1766 (5 U.S.C. 82; M.L. 1939, sec. 1516). Dig. Op. JAG, 1912-40, sec. 1516(1).

Page VIII - 53, second paragraph, section 2b(1):

In time of war and for six months thereafter, payment of the monetary allowance in lieu of quarters for dependents is suspended. An enlisted man of the first three grades who was receiving or was entitled to receive and had applied for the allowance on 1 November 1943 is permitted an election between continuing to receive the allowance in lieu of quarters and having his dependents receive the family allowance provided in the Servicemen's Dependents Allowance Act of 1942. Once made by the enlisted man, the election is irrevocable. Payment of the monetary allowance in lieu of quarters for dependents is further conditioned upon the maintenance of a voluntary allotment equal to the allowance for the support of the dependents on whose account it is claimed. (Sec. 108b, Servicemen's Dependents Allowance Act of 1942, 56 Stat. 381, as amended by act 26 Oct. 1943; Public Law 174, 78th Cong.; Bull. 21, WD, 8 Nov. 1943.) See also Part VIII, Chapter 3.

For reduction in or charge to pay of enlisted men of first three grades furnished public quarters for his dependents, see sec. 8, supra, page VIII - 36.

Page VIII - 56, footnote 7:

Executive Order 9386, 15 Oct. 1943 (Sec. II, Bull. 19, WD, 21 Oct. 1943), effective 1 Nov. 1943, established a new maximum standard of $1.80 per day in the United States, except under certain stated conditions.

Page VIII - 59, subsection 4b(1).

Under current War Department policy, officers traveling on orders issued on or after 1 March 1944 receive mileage only if on

permanent change of station, except when traveling with troops and except where travel by air is directed or travel is performed by Government plane. Officers traveling on temporary duty, unless traveling with troops, and officers traveling by air on permanent change of station receive $7 per diem. Officers stationed on temporary duty receive a per diem allowance: $3 if public quarters are available; $7 if not available ($5 at service schools). Except for duty at a service school, the per diem allowance is not paid for more than thirty days at one point, whether or not duty at that point is continuous. No per diem allowance should be authorized where the temporary duty will not compel the officer to incur more than the normal expense for subsistence which would have to be met at his permanent station. Travel with troops is defined as duty with a body subsisted en route from a kitchen car, rolling kitchen, or like facilities for preparing complete cooked meals. Travel orders no longer specify the method of reimbursement but designate the type of travel or duty: i.e., permanent change of station (PCS), travel with troops (TT), public quarters available (GQ), or "no per diem while on temporary duty at --." Cir. 60, WD, 10 Feb. 1944.

Page VIII - 60, line 2; page VIII - 61, line 4:

By act of 26 June 1943 (Public Law 92, 78th Cong.; par. 1b (2), C 2, 13 Sept. 1943, AR 35-4820, 19 Sept. 1942) the maximum amount payable as a per diem allowance in lieu of subsistence for travel on official business or in lieu of expenses for air travel under competent orders, was raised to $7 per day.

ADDENDA

PART IX

DECEASED PERSONS

CHAPTER 1 - DEATH GRATUITY

1. Basic Statute

The pertinent provisions of the act of 17 December 1919, as amended,[1] are as follows:

> "That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Quartermaster General of the Army [2] shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. * * * "

2. When Payable

Under the statute, the death gratuity must be paid to the appropriate beneficiary of the deceased immediately upon the official notification of death from wounds or disease not the result of misconduct.

The procedural provisions and requirements relating to official notification of death appear in Army Regulations.[1] In

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1. 41 Stat. 367; act 4 June 1920 (41 Stat. 766); act 2 March 1923 (42 Stat. 1385; 10 U.S.C. 903; M.L. 1939, sec. 862).

2. The payments are now made by the Chief of Finance. See M.L. 1939, sec. 862, note; par. 1a, AR 35-1540, 19 Dec. 1942.

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1. Sec. II, AR 600-550, 14 May 1943. See also 17 Comp. Dec. 528; Cir. 195, WD, 1 Sept. 1943.

addition, reports of death from the enemy[2] transmitted by the International Red Cross and released by the Provost Marshal General are considered to be official notifications for the purposes of this act. Under the act of 7 March 1942[3] an administrative finding by the Secretary of War of the death of a person originally reported as missing, missing in action, interned or captured, will be accepted for death gratuity purposes.

Death "from wounds or disease" has apparently been interpreted to include death from any cause; for example, death by drowning has been held to fall within the purview of the statute.[4]

Payment of the gratuity may not be made if death is the result of the deceased's own misconduct. A discussion of the meaning and content of this standard will be found in Part X, Chapter 2, infra.

Although the foregoing statute is by its terms applicable only to members of the Regular Army, by the act of 10 December 1941,[5]

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2. See par. 177, FM 27-10, Rules of Land Warfare, 1 Oct. 1940, quoting art. 4, Geneva (Red Cross) Convention of 27 July 1929 (47 Stat. 2074); par. 21, AR 850-75, 30 June 1943.

3. 56 Stat. 145, as amended by act 24 Dec. 1942 (56 Stat. 1053 50 U.S.C. 1005; M.L. 1939, Sup. II, sec. 2165a-5); see Part VIII, Chapter 4, supra.

4. 27 Comp. Dec. 649.

5. 55 Stat. 796, amending act 3 April 1939 (53 Stat. 557) as theretofore amended by act 25 July 1939 (53 Stat. 1079; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117.

the benefits of the earlier enactment were granted to the "dependents" of all other officers, warrant officers and enlisted men of the Army of the United States called or ordered on extended active Federal service for more than thirty days who, while so employed, die not as a result of their own misconduct.[6] Since substantially all members of the Army of the United States now in service are on duty for an indefinite period, the death gratuity statute may be assumed to be applicable, for all practical purposes, to all male[7]

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6. 22 Comp. Gen. 37; I Bull. JAG 113, sec. 1117(1); par. 2a(4), AR 35-1540, 19 Dec. 1942.

7. The act also applies to all members of the Army Nurse Corps on extended active duty. Act 8 March 1928 (45 Stat. 249; 10 U.S.C. 903a; M.L. 1939, sec. 862); par. 1c(1), AR 35-1540, 19 Dec. 1942, as changed by C 1, 1 Feb. 1943; see also 22 Comp. Gen. 101; I Bull. JAG 178, sec. 862(8). It is believed that the act applies to women appointed as dietitians and physical therapy aides in the Medical Department of the Army pursuant to section 2 of the act of 22 Dec. 1942 (56 Stat. 1072; par. 1c(2), AR 35-1540, 19 Dec. 1942, as changed by C 1, 1 Feb. 1943); to the technical and professional female personnel in categories required for duty outside the continental United States appointed or enrolled in the Medical Department of the Army pursuant to section 6 of the act of 22 Dec. 1942, supra (see par. 1c(3), AR 35-1540, supra); to female physicians and surgeons appointed in the Medical Department of the Army pursuant to the act of 16 April 1943 (Public Law 38, 78th Cong.; sec. I, Bull. 8, WD, 1943), and to members of the Women's Army Corps (act 1 July 1943; Public Law 110, 78th Cong.; sec. II, Bull. 12, WD, 1943). In view of certain ambiguities, however, it has been recommended (SPJGA 1943/10183, 26 July 1943), that questions as to the applicability of the statute to female personnel be submitted to the Comptroller General for decision.

military personnel[8] now on active duty.[9]

3. Amount Payable

The statute provides for the payment of "an amount equal to six months' pay at the rate received * * * at the date of * * * death".

The word "pay" has been defined generally as including every kind and character of compensation, other than allowances, received by the man concerned at the date of his death.[1] Thus it has been held to include the ten per cent increase in base pay for foreign service,[2] the additional pay for officers serving as aides to general officers,[3] the addition to pay provided for officers of company grade who furnish themselves with mounts,[4] flight

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8. The decisions of the Comptroller of the Treasury and of the Comptroller General, summarized in par. 2a, AR 35-1540, 19 Dec. 1942, indicate that the statute is applicable to Regular Army warrant officers, enlisted personnel of the Philippine Scouts and the teacher of music, leader of the Military Academy Band. It does not apply, however, to cadets of the United States Military Academy. Par. 2b, id.; but cf. 15 Comp. Dec. 39.

9. 21 Comp. Gen. 121.

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1. Par. 3, AR 35-1540, 19 Dec. 1942.

2. 14 Comp. Dec. 851; 14 Comp. Dec. 882.

3. 14 Comp. Dec. 851.

4. Ibid.

pay,[5] the increase in compensation formerly paid to enlisted personnel for specialist ratings,[6] and the sum of $10 per month formerly provided by section 8 of the act of 18 August 1941[7] for selectees in service for more than twelve months.[8]

Payment of the death gratuity may be made only at the "rate received" at the date of death. Accordingly, if the deceased is neither receiving nor entitled to receive any pay at the date of his death, there is no basis for computing the death gratuity and it will not be paid. Illustrative of this principle is the holding that if the deceased was absent without leave at the time of death, with no pay accruing to him during such period of unauthorized absence,[9] payment of the death gratuity may not be

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5. 7 Comp. Gen. 476. In this case the officer had not in fact completed by the time of his death the flights then a necessary condition precedent to qualify him for additional flying pay but there remained sufficient time for him to make the required flights. It was held that the death gratuity was to be computed on the basis of the full rate of pay authorized by his assignment and status, including flying pay.

6. 14 Comp. Dec. 851. Such payments are no longer made. Sec. 19, Pay Readjustment Act of 1942 (act 16 June 1942; 56 Stat. 369; 37 U.S.C. 119; M.L. 1939, Sup. II, sec. 1371c-19(2)).

7. 55 Stat. 626, 627; M.L. 1939, Sup. II, sec. 2227-8; repealed by sec. 19, Pay Readjustment Act of 1942 (act 16 June 1942; 56 Stat. 369; 37 U.S.C. 119; M.L. 1939, Sup. II, sec. 1371c-19(2)).

8. 21 Comp. Gen. 361.

9. Par. 3a, AR 35-1420, 15 Dec. 1939.

made.[10] Likewise if a soldier is, at the time of his death, in confinement under a sentence of dishonorable discharge, the execution of the discharge having been suspended under authority of the act of 27 April 1914 (38 Stat. 354), no pay accrues to him at the time of his death,[11] and the death gratuity will not be paid.[12] By a parity of reasoning, if the man concerned dies at a time when his pay is partially reduced, even though temporarily, there is a proportionate reduction of the death gratuity.[13] On the other hand, if the deceased was promoted shortly before his

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10. 8 Comp. Gen. 217; I Bull. JAG 43, sec. 862 (5a); MS. Comp. Gen. B-25495, 7 May 1942; I Bull. JAG 286, sec. 862(5a); MS. Comp. Gen. B-29310, 16 Oct. 1942. A fortiori, payment may not be made if the deceased was in desertion. Dig. Op. JAG, 1912-40, sec. 862(4); JAG 42-100, 1 May 1913.

11. Act 4 Mar. 1915 (38 Stat. 1065; 10 U.S.C. 876; M.L. 1939, sec. 1449).

12. Dig. Op. JAG, 1912-40, sec. 862(4); JAG 247, 14 Aug. 1920; but cf. 4 Comp. Gen. 415.

13. 15 Comp. Gen. 352. In that case, a statute required each Army officer to take a furlough of one month without pay during the current fiscal year. The officer died shortly after the start of the fiscal year without having taken his furlough. It was concluded that as he would actually receive one twelfth less pay during that particular fiscal year, a like deduction should be made in the death gratuity.

There is some doubt as to the applicability of this principle when military personnel die while a portion of their pay is being forfeited by order of a court-martial; an early opinion of the Comptroller General (4 Comp. Gen. 415) held that an enlisted man of the Navy was legally receiving all pay ordered forfeited by a general court-martial.

death,[14] or if he is otherwise legally entitled, at the time of his death, to receive the pay of a higher grade,[15] the death gratuity will be computed upon the rate of pay for the higher grade.

If at the date of his death, the deceased was legally receiving pay, the death gratuity will be paid even though his right to such pay might have been avoided. Thus, where a soldier fraudulently enlisted and died prior to discovery thereof, it was determined[16] that as the contract of enlistment was voidable but not void, and as it had not been avoided, the death gratuity should be paid.

4. To Whom Payable

a. Widow. The death gratuity statute first requires the payment of the gratuity to the "widow" of the deceased, if there be one. Any woman who, at the time of the death of the man concerned was recognized as his legal wife under applicable state law, is considered to be his "widow" within the meaning of this statute. If it appears that common law marriages are recognized in the appropriate state and that the requirements thereof have

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14. II Bull. JAG 247, sec. 862(4); MS. Comp. Gen. B-33661, 29 May 1943; but cf. I Bull. JAG 334, sec. 862(4); MS. Comp. Gen. B-27979, 27 Oct. 1942.

15. I Bull. JAG 177, sec. 862(4); MS. Comp. Gen. B-26484, 28 July 1942.

16. 15 Comp. Dec. 614; 9 Comp. Gen. 26.

been complied with, payment will be made to a surviving common law wife.[1] By the same reasoning, if the marriage has been terminated by a final decree of divorce under applicable state law, a surviving divorcee is not the "widow" of the deceased and does not receive the gratuity.[2]

Even if a member of the Army of the United States has a lawful wife, existing pertinent regulations[3] require that he take affirmative action to designate her as the beneficiary payable on his death. The statute, however, contains a mandatory provision for the payment of the gratuity "to the widow" and requires that a beneficiary be designated only if the man concerned has no wife (or children). It is therefore evident that even though the deceased has not actually designated his wife (or any other person)

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1. II Bull. JAG 247, sec. 862(3); SPJGA 1943/9673, 26 June 1943; Dig. Op. JAG, 1912-40, sec. 862(3); JAG 243.7, 21 Nov. 1918; 22 Comp. Dec. 406. Payment will not be made, however, to a woman who enjoyed the deceased's affections but did not bear his name. 11 Comp. Gen. 138; Dig. Op. JAG, 1912-40, sec. 862(3); JAG 291.1, 8 Jan. 1919.

2. 10 Comp. Gen. 78; 16 Comp. Gen. 890. If, however, only an interlocutory decree has been entered which under state law does not finally terminate the marriage, and death occurs prior to the entry of the final decree, the surviving wife is a "widow" within the purview of the statute. 6 Comp. Gen. 704. If the deceased has remarried after a final divorce decree, the second wife is, of course, his "widow". 19 Comp. Gen. 56.

3. Par. 3, AR 600-600, 31 Jan. 1931; see chart in par. 7c(1), AR 35-1540, 19 Dec. 1942.

as his beneficiary, she will nevertheless receive the gratuity on his death.[4] Indeed, even if the man concerned does not want his wife to receive the death gratuity and, with the specific intention of defeating her rights thereto, designates some other dependent relative as his beneficiary, such action is ineffectual and only his widow will receive the death gratuity.[5] A widow has, therefore, an absolute right to the death gratuity which is vested by operation of law.

b. Children. The death gratuity statute provides for payment thereof "if there be no widow to the child or children".

Normally all legitimate children are included within the statute. The Comptroller General has determined,[6] however, that

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4. 6 Comp. Gen. 704; par. 2a, AR 600-600, 31 Jan. 1931; par. 7a (1), AR 35-1540, 19 Dec. 1942.

5. 1 Comp. Gen. 547. A dependent unmarried minor child cannot be designated to the exclusion of the widow. Dig. Op. JAG, 1912-40, sec. 862(3); JAG 247, 29 Mar. 1927. The widow's right to the gratuity cannot thus be defeated even though she is mentally incompetent (I Bull. JAG 334, sec. 862(2); SPJGA 1942/5446, 19 Nov. 1942) or though the husband had lived apart from her for many years because of her misconduct (SPJGA 1943/4460, 3 April 1943) or had instituted divorce proceedings (6 Comp. Gen. 704).

   It is nevertheless advisable that all military personnel who wish their wives to receive the gratuity, comply with the regulations and designate their wives as beneficiaries for such a designation is ordinarily regarded as evidence sufficient to establish the identity of the payee. See note 1 to the chart in par. 7c(1), AR 35-1540, 19 Dec. 1942.

6. 5 Comp. Gen. 92.

when an officer permitted his infant child to be adopted by another, the infant was the child of the foster parents and not of the officer, and therefore was not a "child" within the purview of the death gratuity statute. It may be inferred, therefore, that a child adopted by a person in the military service would be held to be a "child" within the meaning of the statute. The Judge Advocate General has decided[7] that children by a wife subsequently divorced enjoy the benefits of the statute. On the other hand, such benefits have been denied illegitimate children.[8]

The class of children entitled to receive the death gratuity has been further narrowed by the act of 2 March 1923[9] which reads in pertinent part as follows:

> "None of the funds herein, heretofore, or hereafter appropriated shall be used for payment of the six months' pay (authorized by the act of December 17, 1919, * * *) to any married child or unmarried child over twenty-one years of age of a deceased officer or enlisted man who is not actually a dependent of such deceased officer or enlisted man."

All married children are thereby prohibited from receiving the benefits of the death gratuity statute even though they

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7. Dig. Op. JAG, 1912-40, sec. 862(3); JAG 247, 29 March 1927. The digest does not disclose who had the custody of the children.

8. Dig. Op. JAG, 1912-40, sec. 862(3); JAG 247, 29 March 1921.

9. 42 Stat. 1385; 10 U.S.C. 903; M.L. 1939, sec. 862; reprinted in par. 1b, AR 35-1540, 19 Dec. 1942.

have been designated as beneficiaries by the deceased, are still under twenty-one and were actually dependent upon him at the time of his death.[10] It has further been decided by the Comptroller General that the death gratuity is payable to an unmarried child over twenty-one only if such child was in fact dependent upon the deceased at the time of his death.[11] Accordingly, only the rights of unmarried minor children remain unaffected by the act of 2 March 1923; such children will receive the gratuity even though it affirmatively appears that they were not dependent upon the deceased at the time of his death.[12]

If the deceased leaves no widow, then, subject to the limitations imposed by the quoted portion of the act of 2 March 1923, his children have an absolute right to the death gratuity, identical to that of a widow, which right is not dependent upon

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10. 18 Comp. Gen. 567; par. 5c(2), AR 35-1540, 19 Dec. 1942, as changed by C 1, 1 Feb. 1943; 22 Comp. Gen. 797; II Bull. JAG 72, sec. 862. In the case first cited above, it was decided that the statutory phrase "over twenty-one years of age * * * who is not actually a dependent" modified only the words "unmarried child" and not the words "any married child".

11. 22 Comp. Gen. 797; II Bull. JAG 72, sec. 862; par. 5c(1), AR 35-1540, 19 Dec. 1942, as changed by C 1, 1 Feb. 1943.

12. I Bull. JAG 43, sec. 862(3); MS. Comp. Gen. B-21908, 9 June 1942.

designation[13] and cannot be defeated by the designation of another beneficiary.[14]

c. Other Dependent Relatives. The death gratuity statute provides that "if there be no widow or child", payment thereof shall be made "to any other dependent relative" of the deceased "previously designated by him". The statute also directs the Secretary of War to "establish regulations requiring each officer and enlisted man having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death". Pursuant to this statutory directive, regulations have been issued requiring the designation of beneficiaries by military personnel.[15]

If the deceased leaves no widow or child qualified to receive the death gratuity, and has failed or refused to designate

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13. Existing pertinent regulations (par. 3, AR 600-600, 31 Jan. 1931; see chart in par. 7c(1), AR 35-1540, 19 Dec. 1942), nevertheless, appear to require designation of children in appropriate cases.

14. II Bull. JAG 203, sec. 862(3); SPJGA 1943/6639, 17 May 1943. This rule was somewhat relaxed, however, in a case in which the Comptroller General authorized payment to a designated beneficiary who, though not the lawfully appointed guardian of the deceased's unmarried minor child, had the actual care and custody of the child. I Bull. JAG 286, sec. 862(3); MS. Comp. Gen. B-28822, 1 Oct. 1942.

15. Par. 3, AR 600-600, 31 Jan. 1931. It should be noted that these regulations are now in the process of revision. See SPJGA 1943/10183, 26 July 1943.

any other qualified beneficiary, no death gratuity will be paid.[16] In the absence of such a designation, even a very close relative who was actually dependent upon the man concerned at the date of his death has no right to receive the gratuity.[17] To prevent a forfeiture, it has been the practice to permit persons in the military service who have wives or qualified children or both, to designate other dependent relatives as secondary beneficiaries to receive the gratuity in the event there are no qualified primary beneficiaries living at the date of death and to permit all persons including those who have neither wives nor qualified children, to designate primary and successive secondary beneficiaries from among their dependent relatives. Payment of the death gratuity may be made to such a secondary beneficiary in the event that the primary beneficiary dies prior to the death of the designator,[18] is disqualified from receiving the death gratuity,[19] or relinquishes all

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16. 14 Comp. Dec. 913; 15 Comp. Dec 721; 1 Comp. Gen. 771; 8 Comp. Gen. 161; I Bull. JAG 43, sec. 862(2); MS. Comp. Gen. B-25337, 23 April 1942; Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 4 April 1927; id., 13 Sept. 1927; par. 5a, AR 35-1540, 19 Dec. 1942.

17. 1 Comp. Gen. 771; 8 Comp. Gen. 161; I Bull. JAG 43, sec. 862 (2); MS. Comp. Gen. B-25337, 23 April 1942.

18. 4 Comp. Gen. 628.

19. The word "child" in the statutory phrase "if there be no widow or child" means a child not prohibited from receiving the gratuity by the above-quoted provision of the act of 2 March 1923. 4 Comp. Gen. 730. Moreover, if the beneficiary primar-

rights thereto.[20]

The regulations prescribing the manner in which beneficiaries must be designated merely implement a statute which does not itself state how the designations should be made. This fact has formed the basis for the view that the designation may be effective even though not made in strict conformity with the regulations.[21] No departure from the regulations will be recognized, however, unless it is clear that there has been an actual informal designation which is "entirely free from doubt, or fraud, or mistake".[22] For example, payment of the death gratuity has been refused where the only evidence of a designation was an informal statement by the soldier that he intended a certain beneficiary to

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19. (cont.)
ily designated is not within the class of dependent relatives, a secondary designated beneficiary who is within the class may receive the gratuity. I Bull. JAG 177, sec. 862(2); MS. Comp. Gen., B-27157, 28 July 1942; MS. Comp. Gen. B-27151, 28 July 1942.

20. II Bull. JAG 153, sec. 862(2); MS. Comp. Gen. B-28242, 9 April 1943.

21. 15 Comp. Dec. 372.

22. 20 Comp. Dec. 60, 63. The death gratuity may not be paid to a dependent relative designated as beneficiary for another purpose under another statute. 1 Comp. Gen. 330. A testamentary bequest of the decedent's residuary estate likewise does not constitute the designation of a beneficiary. 21 Comp. Dec. 856; see par. 6a. AR 35-1540, 19 Dec. 1942.

receive the gratuity.[23] A like result was reached where the only evidence was that a soldier had orally stated that he had filled out a designation card.[24] Where, however, the soldier was seen to fill out and file a designation card which was thereafter apparently lost by the Army, evidence of such facts and of what was stated on the card was considered sufficient to support payment of the gratuity.[25]

In another class of cases, consideration was given to the effectiveness of partial but incomplete compliance with the procedure outlined in the regulations. Where an unsigned designation card was found among a deceased officer's effects, and evidence was submitted that the officer had stated that he was holding the card to obtain the signature of a witness, it was decided[26] that there was not a sufficient designation. Where, however, there was direct evidence that the deceased intended to designate

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23. 17 Comp. Dec. 377; 24 Comp. Dec. 42. The fact that the statement is in writing appears to be immaterial. 20 Comp. Dec. 60. In a recent case, a paper attached to an officer's will, which bore a statement that his mother was the dependent designated to receive the gratuity, was considered an insufficient designation. I Bull. JAG 177, sec. 862(2); MS. Comp. Gen. B-27152, 11 Aug. 1942.

24. 17 Comp. Dec. 490.

25. 17 Comp. Dec. 587; 22 Comp. Dec. 532; 24 Comp. Dec. 675.

26. Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 30 Oct. 1926.

a beneficiary when filling out the card, but was prevented from signing it by serious illness, payment of the gratuity in conformity with the designation made thereon was permitted.[27] In a number of instances, also, the beneficiary has been inaccurately named or described on the designation card. In such instances, wherever it was possible to identify with reasonable certainty the person intended, payment of the death gratuity was approved.[28]

A designation, once properly made, may of course be revoked by a specific instruction to that effect[29] or by the subsequent designation either of the same or of different beneficiaries.[30] It is not revoked, however, merely by the termination of a period of enlistment or by a change in military status; a designation once made and not otherwise revoked remains effective throughout the active service of the man concerned.[31]

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27. 15 Comp. Dec. 372; 20 Comp. Dec. 599; see also 3 Comp. Gen. 80; par. 6b, AR 35-1540, 19 Dec. 1942.

28. 15 Comp. Dec. 610; 24 Comp. Dec. 303; II Bull. JAG 153, sec. 862(2); MS. Comp. Gen. B-33594, 10 April 1943. Contra: I Bull. JAG 286, sec. 862(2); MS. Comp. Gen. B-28806, 24 Sept. 1942.

29. Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 13 March 1929.

30. 18 Comp. Dec. 277; par. 4, AR 600-600, 31 Jan. 1931.

31. 25 Comp. Dec. 260; 5 Comp. Gen. 914; I Bull. JAG 334, sec. 862(2); MS. Comp. Gen. B-30377, 25 Nov. 1942.

The only persons who may be designated as beneficiaries to receive the death gratuity are "dependent relatives" of the deceased. The Comptroller General recently found occasion to reconsider the meaning of the word "dependent" as used in this portion of the statute, and announced[32] the unique and liberal view that any relative with an insurable interest in the life of the deceased is a "dependent" relative within the meaning of the statute. Any designated relative who had such an insurable interest will now receive the death gratuity even though it affirmatively appears that he was financially independent of the deceased.[33] Fathers, mothers, sisters and brothers of the deceased are said to have an insurable interest in his life by virtue of relationship alone, and therefore no factual showing thereof need be made.[34] More remote relatives, such as uncles and aunts, are required to furnish further evidence of their insurable interest in the life of the

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32. 22 Comp. Gen. 85; I Bull. JAG 177, sec. 862(2); par. 7c(5), AR 35-1540, 19 Dec. 1942. This decision is amplified and further explained in 22 Comp. Gen. 797; II Bull. JAG 72, sec. 862.

33. 22 Comp. Gen. 85; note 32, supra; I Bull JAG 226, sec. 862(2); MS. Comp. Gen. B-28437, 7 Sept. 1942; MS. Comp. Gen. B-28438, 7 Sept. 1942. Accordingly the statement in par. 2b, AR 600-600, 31 Jan. 1931, that the relative must be "actually dependent" does not reflect the present law.

34. 22 Comp. Gen. 797; note 32, supra; par. 7c(5), AR 35-1540, 19 Dec. 1942.

deceased.[35]

A "relative" within the purview of the death gratuity act is any person who is related to the man concerned by consanguinity (blood) or by affinity (marriage).[36] Thus, step-parents[37] and half-sisters and half-brothers[38] have been determined to be relatives of the deceased. A divorced wife, however, is not a "relative";[39] nor may the deceased effectively designate either his executors or his estate as his beneficiaries.[40] It has also been decided[41] that the father of an illegitimate son, who has never legitimated the son in accordance with the governing local

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35. 22 Comp. Gen. 85; id., 797; see note 32, supra. The mentioned opinions indicate that an insurable interest may be shown by evidence that the relative stood in loco parentis to the deceased, made contributions to his education or support, had a debtor-creditor relationship with him, or otherwise had a reasonable expectation of pecuniary advantage from the continuance of his life.

36. Par. 2a, AR 600-600, 31 Jan. 1931; Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 4 May 1920.

37. 19 Comp. Dec. 651; 5 Comp. Gen. 948; I Bull. JAG 286, sec. 862(2); MS. Comp. Gen. B-28914, 24 Sept. 1942.

38. I Bull. JAG 334, sec. 862(2); MS. Comp. Gen. B-29981, 14 Nov. 1942.

39. 4 Comp. Gen. 730.

40. Cf. 18 Comp. Dec. 277; Dig. Op. JAG, 1912-40, sec. 862(1); JAG 42-140, 22 May 1913.

41. 13 Comp. Gen. 429.

law, is not a "relative" of the son within the purview of the death gratuity statute. A foster-parent is a "relative" in those instances when there has been a formal adoption through legal proceedings,[42] but not otherwise.[43]

5. Incidents of Beneficiary's Right

The gratuity payable to the beneficiary is not considered a part of the deceased's pay and allowances.[1] Accordingly, it appears that the beneficiary's right thereto against the Government is direct and not derivative and would not be subject to defenses which the Government might legally have against the deceased.[2]

The question has also been considered whether the beneficiary's right to the gratuity is one personal to him which does

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42. I Bull. JAG 226, sec. 862(2); MS. Comp. Gen. B-25497, 17 Sept. 1942; II Bull. JAG 72, sec. 862; MS. Comp. Gen. B-32132, 17 Feb. 1943; Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 22 Nov. 1920.

43. 13 Comp. Gen. 439; II Bull. JAG 72, sec. 862; MS. Comp. Gen. B-32359, 19 Feb. 1943; Dig. Op. JAG, 1912-40, sec. 862(2); JAG 247, 22 Nov. 1920; cf. 9 Comp. Gen. 39.

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1. 15 Comp. Dec. 576.

2. In an early case, it was decided that the Government cannot set off against a beneficiary claiming the gratuity, the debts due it by the deceased. Semple v. United States, 24 Ct. Cl. 422.

not survive in the event of his death, or is more in the nature of a property right. For some years, the former view prevailed;[3] but in 1935, the Court of Claims held[4] that the beneficiary has a vested interest in the gratuity at the date of the death of the man concerned and therefore that if the beneficiary dies thereafter but prior to receiving payment of the gratuity, the right thereto survives and passes to the beneficiary's personal representatives. As this view has now been adopted by the Comptroller General,[5] it may be assumed that the beneficiary has an assignable property interest in the gratuity.[6]

It is not at all clear what types of improper action on

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3. 18 Comp. Dec. 660; 22 Comp. Dec. 524; 3 Comp. Gen. 642; cf. 16 Comp. Gen. 595.

4. Campbell v. United States, 80 Ct. Cl. 836.

5. I Bull. JAG 374, sec. 862(2); MS. Comp. Gen. B-30573, 7 Dec. 1942.

6. Section 3477 of the Revised Statutes, as amended by act 27 May 1908 (35 Stat. 411) and act 9 October 1940 (54 Stat. 1029; 31 U.S.C. 203; M.L. 1939, Sup. II, sec. 801; par. 2b, AR 35-6040, 12 June 1942), prevents voluntary assignment of a claim therefor prior to its allowance (I Bull. JAG 329, sec. 701; MS. Comp. Gen. B-29850, 3 Nov. 1942) but does not affect assignments by operation of law (Western Pac. RR. v. United States, 268 U.S. 271). In one instance, however,when a beneficiary was in the military service serving overseas and a voucher for the death gratuity was executed by his attorney in fact under a power of attorney broad enough to cover the execution of such a voucher, the Comptroller General allowed the claim. I Bull. JAG 369, sec. 701; MS. Comp. Gen. B-29711, 7 Dec. 1942.

the part of the beneficiary will deprive him of his right to the gratuity. It has been decided, however, that any beneficiary who has wrongfully taken the life of the man concerned will not be permitted to profit by his own wrong and may not be paid the gratuity.[7]

6. Missing Persons

Statutory provision has recently been made[1] for payment of the death gratuity to the appropriate beneficiaries of military personnel who are first officially reported as missing, missing in action, interned in a neutral country or captured by an enemy, upon a subsequent finding of death by the Secretary of War. The effect of this statute upon the pay and allowances of such personnel prior to death is referred to in an earlier portion of these materials.[2]

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7. Par. 5a, AR 35-1540, 19 Dec. 1942; MS. Comp. Gen. A-60953, 12 June 1935; but cf. Dig. Op. JAG, 1912-40, sec. 862(3); JAG 247, 16 June 1924.

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1. Act 7 March 1942 (56 Stat. 143) as amended by act 24 Dec. 1942 (56 Stat. 1092; 50 U.S.C. 1001 et seq.; M.L. 1939, Sup. II, sec. 2165a-1 et seq.; sec. III, Bull. 14, WD, 1942; sec. II, Bull. 2, WD, 1943). See opinions cited in page IX - 9, note 14, supra.

2. See Part VIII, Chapter 4, supra.

CHAPTER 2 - DISPOSITION OF EFFECTS

1. Basic Law

Recognition of the practical necessity of securing and disposing of the personal effects of persons subject to military law upon their death appears in Article of War 112,[1] which reads as follows:

> "In case of the death[2] of any person subject to military law the commanding officer of the place of command[3] will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected,

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1. Act 4 June 1920 (41 Stat. 809; 10 U.S.C. 1584; M.L. 1939, sec. 470).

2. With reference to "missing" persons, see Part VIII, Chapter 4, supra.

3. It has been determined that the phrase "place of command" is a clerical error and that the phrase should read "place or command". JAG 220.871, 31 Aug. 1920; Dig. Op. JAG, 1912-40, sec. 470(9); M.L. 1939, sec. 470n.

through the Quartermaster Department,[4] at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department[5] for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

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4. The Quartermaster Department was consolidated into the Quartermaster Corps by section 3, act 24 August 1912 (37 Stat. 591).

5. The functions formerly performed by the Auditor for the War Department are now performed by the General Accounting Office. Sec. 304, act 10 June 1921 (42 Stat. 24; 31 U.S.C. 44; M.L. 1939, sec. 1646).

> "The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment."

Colonel Winthrop's study of the antecedents of the provisions of this article[6] discloses that at an early period courts-martial were invested with a peculiar probate jurisdiction in the matter of the administration of the estates of deceased military personnel. Vestiges of this concept may be found in such provisions of the present article of war as those for the securing and disposing of effects by summary courts, for findings of family relationships by summary courts and for the collection and payment by them of local obligations and sales of personal effects. Nevertheless, The Judge Advocate General has concluded that Article of War 112 is neither a statute of descent and distribution[7] nor a statute for the administration of estates[8] and that the summary court, in acting pursuant thereto, is not functioning as

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6. Winthrop, Military Law and Precedents (2d ed., 1920 reprint), p. 761.

7. JAG 220.5, 19 June 1922; Dig. Op. JAG, 1912-40, sec. 470(1); JAG 210.8, 12 Aug. 1918; Dig. Op. JAG, 1912-40, sec. 470(5); JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470 (6).

8. JAG 210.871, 22 Sept. 1923; id., 8 June 1932; Dig. Op. JAG, 1912-40, sec. 470(6).

an executor or administrator,[9] and has no power to adjust private disputes or conflicting claims to the effects.[10]

The article has rather been construed[11] as merely designating certain individuals to whom possession of the effects of deceased soldiers should be relinquished by the military authorities. It has been said that such action does not invest the recipient with any title to the effects in question and that a refusal to turn the effects over to any person apparently entitled to receive them does not divest such person of any title thereto; such matters are controlled solely by applicable state law.[12]

Article of War 112 has been implemented[13] by sections V and VI, Army Regulations 600-550, 14 May 1943, and, as to the

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9. JAG 220.871, 25 June 1921; Dig. Op. JAG, 1912-40, sec. 470(2).

10. Cf. JAG 210.871, 8 June 1932; Dig. Op. JAG, 1912-40, sec. 470 (6).

11. JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470 (6); JAG 210.8, 12 Aug. 1918; Dig. Op. JAG, 1912-40, sec. 470(5).

12. JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470 (6). It should nevertheless be noted that, under certain circumstances, the article authorizes (but does not direct) the summary court to do certain acts apparently affecting the title to property, e.g., to pay local debts and to sell property.

13. The War Department has authority to issue regulations prescribing the action to be taken by summary courts. JAG 220.871, 31 Aug. 1920; Dig. Op. JAG, 1912-40, sec. 470(9).

effects of persons subject to military law dying outside the limits of the states of the United States and the District of Columbia, when the widow or legal representative of any such deceased person is not present, by paragraphs 16a and 16d, Circular No. 195, War Department, 1943.[14]

2. When Widow or Legal Representative is Present

When the widow or legal representative of the deceased is present, Article of War 112 authorizes action by the commanding officer alone without the employment of a summary court. Under such circumstances, the immediate commanding officer of the deceased is required[1] promptly to secure all the decedent's "effects then in camp or quarters" and to deliver them to his "legal representative or widow".

The term "effects" has been interpreted to mean all personal property in the possession of the deceased at the time of his death which is capable of being packed, crated and transpor-

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14. Procedures are also provided for the disposition both of effects of "missing" persons (par. 16b, Cir. 195, WD, 1 Sept. 1943) and of lost, abandoned or mislaid personal property which is to be returned to the United States (par. 16c, id.).

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1. Par. 25a(1), AR 600-550, 14 May 1943; JAG 6-155, 18 Sept. 1914; Dig. Op. JAG. 1912-40, sec. 470(4).

ted.[2] However, only such of these effects as are "in camp or quarters" may be taken into custody. Hence there is no authority for attempting to secure effects which are not in camp or quarters but are in storage,[3] in a safety deposit box,[4] or in the possession of a third person.[5]

Once the appropriate effects have been secured, if both the widow and the legal representative of the deceased are present, the commanding officer may at his option deliver the effects either to the widow or to the legal representative.[6] It is considered better practice, however, for him to give a preference to the legal representative.[7] If only one of these parties is pres-

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2. JAG 524, 17 Oct. 1919; JAG 524 21, 3 Aug. 1938; Dig. Op. JAG, 1912-40, sec. 470(11). A privately owned automobile is a part of the decedent's "effects". SPJGA 1943/3444, 9 March 1943; SPJGA 1943/4693, 10 Apr. 1943. Liberty bonds are also considered a part of the decedent's "effects" (JAG 168, 6 Dec. 1924; Dig. Op. JAG, 1912-40, sec. 470(9)), but a life insurance policy in favor of a third party is not. JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470(6).

3. SPJG 524.21, 25 Mar. 1942.

4. SPJGA 220.871, 22 June 1942; I Bull. JAG 27, sec. 470(7).

5. SPJG 524.21, 23 Mar. 1942.

6. JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470 (6).

7. Ibid.

ent, delivery may properly be made to that person.[8] Such of these effects as clearly appear to have been owned by some person other than the deceased should, however, be delivered to that person.[9]

There is normally little difficulty in determining whether a claimant is the "widow" of the deceased. In every instance, applicable state law is controlling.[10]

The term "legal representative", as used in the article, has been construed[11] to mean only an executor or administrator

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8. Ibid. In view of the fact that delivery does not operate to vest title, the effects may legally be delivered to a widow who has murdered her husband.

9. JAG 210.872, 30 March 1923; id., 12 Apr. 1923; Dig. Op. JAG, 1912-40, sec. 470(3); cf. JAG 220.871, 6 Oct. 1931; JAG 451.1, 2 Aug. 1934; Dig. Op. JAG, 1912-40, sec. 470(8). All Government issue property other than clothing necessary for burial is withdrawn and turned over to the appropriate supply officer. Par. 27, AR 600-550, 14 May 1943; par. 16a(2), Cir. 195, WD, 1 Sept. 1943.

10. SPJGA 210.871, 22 Apr. 1942; cf. SPJGA 1943/4147, 27 Mar. 1943; II Bull. JAG 144, sec. 470(4). In the event there are several claimants, and doubt exists as to which is the legal widow, the conclusion may properly be reached that no widow is present. Cf. JAG 220.871, 29 May 1928; Dig. Op. JAG, 1912-40, sec. 470(6).

11. JAG 220.8, 7 Feb. 1918; id., 24 June 1918; Dig. Op. JAG, 1912-40, sec. 470(4). In appropriate cases, the legal representative may be a public administrator (JAG 6-155, 18 Sept. 1914; Dig. Op. JAG, 1912-40, sec. 470(4)) or a special or temporary administrator appointed to conserve the assets of the decedent's estate (SPJGA 220.871, 22 June 1942; I Bull. JAG 27, sec. 470(7).

duly appointed by a proper court. The appointment of any such legal representative must ordinarily be proved by certified copies of appropriate court records.[12] If such certified copies are furnished the military authorities must accept them as valid and may not collaterally inquire into the jurisdiction of the appointing court.[13]

3. When Neither Widow nor Legal Representative is Present

a. Securing of Effects. When neither the widow nor the legal representative is present, the effects of the deceased are secured by the summary court designated under Article of War 112 by the commanding officer.[1]

b. Local Debtors and Creditors. The article grants the summary court so appointed "authority to collect and receive any debts due decedent's estate by local debtors" and "to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's pos-

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12. JAG 220.8, 24 June 1918; JAG 220.872, 8 May 1922; Dig. Op. JAG, 1912-40, sec. 470 (4). An affidavit by the claimant is insufficient proof. Ibid.

13. JAG 210.871, 22 Sept. 1923; Dig. Op. JAG, 1912-40, sec. 470 (6); but cf. SPJGA 210.871, 22 Apr. 1942.

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1. Par.25a(2), AR 600-550, 14 May 1943; par. 16a(2), Cir. 195, WD, 1 Sept. 1943.

session under this article will permit". It should be noted initially that this portion of the article grants the summary court the "authority" to collect and receive the mentioned debts or to pay the mentioned creditors but does not compel him to do so.[2] Accordingly, it is believed that the summary court may either exercise or refrain from exercising such authority at his option.[3] For the duration of the war, however, when death occurs outside the limits of the states of the United States and the District of Columbia, the summary court is required[4] to collect and receive such debts[5] and to pay such creditors.

Although the "effects" to be secured by the summary court are expressly limited to those in "camp or quarters", no such restriction is placed upon "debts" which may be collected or "credit-

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2. JAG 210.871, 10 Jan. 1919; JAG 220.871, 12 March 1919; id., 25 June 1921; Dig. Op. JAG, 1912-40, sec. 470(2).

3. Where the deceased owes certain debts for personal property purchased on conditional sale or subject to a chattel mortgage, the summary court may, in appropriate cases, refrain from paying such debts and permit the property to be repossessed. JAG 220.871, 6 Oct. 1931; JAG 451.1, 2 Aug. 1934; Dig. Op. JAG, 1912-40, sec. 470(8); but cf. JAG 220.871, 24 Aug. 1927; JAG 210.871, 11 Oct. 1932; Dig. Op. JAG, 1912-40, sec. 470(10).

4. Par. 16a(2), Cir. 195, WD, 1 Sept. 1943.

5. As the relation between bank and depositor is generally considered to be that of debtor and creditor, bank deposits are debts due decedent's estate within the purview of the statute. SPJGA 1943/7415, 1 July 1943.

ors" who may be paid. The only requirement is that such debts be due by "local debtors" or to "undisputed local creditors". The latter terms have therefore been construed[6] to mean any debtors and creditors in the vicinity of the decedent's "camp or quarters" as distinguished from those at a distance therefrom, such as, for example, at the place of residence of the decedent.[7]

c. Delivery of Effects. As soon as practicable after the collection of the decedent's effects, it is the duty of the summary court, where death occurs within the limits of the states of the United States or the District of Columbia, to send such effects either to the widow or legal representative of the deceased, if such exist, and if not to his son, daughter, father, mother, brother[8] or sister, in the order named,[9] or to the beneficiary

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6. SPJGA 1943/7415, 1 July 1943; cf. JAG 210.871, 10 Jan. 1919; JAG 220.871, 12 Mar. 1919; Dig. Op. JAG, 1912-40, sec. 470(2).

7. It is believed that in overseas commands, the vicinity of camp or quarters will, of necessity, embrace a much larger area than in continental United States. Cf. JAG 210.871, 10 Jan. 1919; JAG 220.871, 12 Mar. 1919; Dig. Op. JAG, 1912-40, sec. 470(2).

8. A half-brother falls within the purview of the statute. JAG 220.871, 16 Jan. 1919; Dig. Op. JAG, 1912-40, sec. 470(5). If there be more than one brother, the effects should be sent to the elder. JAG 210.8, 12 Aug. 1918; Dig. Op. JAG, 1912-40, sec. 470(5).

9. JAG 210.8, 12 Aug. 1918; JAG 220.871, 9 June 1924; Dig. Op. JAG, 1912-40, sec. 470(5).

named in the deceased's will,[10] if there be one.[11] If death occurs outside the limits of the states of the United States and the District of Columbia,[12] the summary court ships the personal effects to the Effects Quartermaster, Army Effects Bureau, Kansas City Quartermaster Depot, Kansas City, Missouri, deposits any money belonging to the deceased's estate with a local disbursing officer in return for a treasury check to be indorsed payable only to the Effects Quartermaster, and forwards such check expeditiously to the Effects Quartermaster.[13] The Effects Quartermaster has been appointed a summary court under Article of War 112,[14] and all subsequent action in determining the distributee to receive per-

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10 It has been suggested that the proper procedure is to notify the legatees initially that the effects will be turned over to the appropriate personal representative if seasonably appointed (JAG 10-210, 9 Aug. 1912; Dig. Op. JAG, 1912-40, sec. 470(7)), and to hold the effects for a reasonable time to determine whether a legal representative will be appointed (JAG 220.871, 21 Mar. 1932; Dig. Op. JAG, 1912-40. sec. 470(7)).

11. It has been decided that neither the person designated to be notified in case of emergency nor the beneficiary designated to receive the death gratuity is a "beneficiary" within the meaning of the article. JAG 220.871, 9 June 1924; Dig. Op. JAG, 1912-40, sec. 470(5).

12. If death occurs on board a transport, see par. 16a(6), Cir. 195, WD, 1 Sept. 1943; par. 26, AR 600-550, 14 May 1943.

13. Pars. 16a(3), (4) and (5), Cir. 195, WD, 1 Sept. 1943.

14. See SPJGA 1943/9674, 1 July 1943

sonal effects and money is taken by him.[15]

There is no limitation as to the weight of the effects which may be so transmitted.[16] Existing pertinent Army Regulations,[17] however, prohibit shipment of privately owned automobiles under the foregoing circumstances.

d. Distributees Unknown. If the summary court finds that none of the named distributees exist, or that they or their addresses are not known or are not readily ascertainable, he is authorized, but not compelled, to sell, at public or private sale, not earlier than thirty days after the death of deceased, all the effects of deceased except certain named articles valuable chiefly as keepsakes. As has been noted above, when death occurs outside the limits of the states of the United States and the District of Columbia and if the widow or personal representative of the deceased is not present, the summary court at the overseas station may not exercise the authority granted by this portion of Article of War 112[18] because, as stated above, his duty is to transmit the

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15. Par. 16a(7), Cir. 195, WD, 1 Sept. 1943.

16. JAG 524, 17 Oct. 1919; JAG 524.21, 3 Aug. 1938; Dig. Op. JAG, 1912-40, sec. 470(11); par. 14b, AR 55-160, 26 Apr. 1943.

17. Pars. 16b, 11, AR 55-160, 26 Apr. 1943; but cf. sec. 12, act 7 Mar. 1942 (56 Stat. 146; 50 U.S.C. 1012; M.L. 1939, Sup. II, sec. 2165a-12); SPJGA 1943/3444, 9 Mar. 1943; SPJGA 1943/4693, 10 Apr. 1943; SPJGA 1943/10440, 21 July 1943; II Bull. JAG 286, sec. 2165a-12.

18. Par. 16a(2), Cir. 195, WD, 1 Sept. 1943.

effects to the Effects Quartermaster who acts as summary court in such circumstances.[19]

It is apparent from the statute that a sale cannot be made by a summary court when the name and address of a distributee designated by the statute is known.[20] However, if after reasonable inquiry the summary court is unable to discover the existence or addresses of any of the persons specified in the article of war, a formal finding thereof may be made[21] and the appropriate effects converted into cash by either public or private sale.[22] The summary court has authority to fix the price at which such effects

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19. The Effects Quartermaster makes distribution of effects received in accordance with existing laws and detailed instructions issued by the Quartermaster General. Par. 6, W600-61-43, 28 July 1943.

20. JAG 220.871, 25 June 1921; Dig. Op. JAG, 1912-40, sec. 470(2); JAG 220.871, 24 Aug. 1927; Dig. Op. JAG, 1912-40, sec. 470 (10). One exception has been made to this rule, the statutory authority for which appears to be somewhat doubtful. Sale by a summary court has been permitted when the person entitled to the possession of the effect by Article of War 112 expressly authorized and directed the sale. JAG 210.871, 11 Oct. 1932; Dig. Op. JAG, 1912-40, sec. 470(1); see SPJGA 1943/3444, 9 Mar. 1943.

21. JAG 220.871, 18 Dec. 1918; Dig. Op. JAG, 1912-40, sec. 470 (9); cf. SPJGA 220.871, 22 June 1942; I Bull. JAG 27, sec. 470 (7).

22. JAG 220.871, 18 Dec. 1918; Dig. Op. JAG, 1912-40, sec. 470 (9). It is not lawful, however, to salvage the property. JAG 220.871, 31 Aug. 1920; Dig. Op. JAG, 1912-40, sec. 470 (9).

may be sold at private sale.[23] Neither effects enumerated in Article of War 112, nor any papers of value or papers involving property rights, including stocks, bonds and other forms of purely commercial paper, may be sold by the summary court.[24]

The proceeds of the sale and any other cash belonging to the estate of the decedent must thereafter be deposited with a disbursing officer of the Army,[25] who will furnish the summary court with an appropriate receipt therefor.[26]

Thereafter, the summary court transmits to the War Department[27] the receipt for such deposits, valuable papers belonging to the deceased, and the remaining articles which are valuable

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23. JAG 220.8, 24 June 1918; Dig. Op. JAG, 1912-40, sec. 470(4). If the property purchased at the sale is to be shipped, shipment is made at the buyer's expense. Ibid.

24. Sec. 1, act 21 February 1931 (46 Stat. 1203; 10 U.S.C. 1584a; M.L. 1939, sec. 862a; par. 30b, AR 600-550, 14 May 1943).

25. Par. 31, AR 600-550, 14 May 1943; SPJGA 1943/6392, 30 Apr. 1943; II Bull. JAG 145, sec. 470(9).

26. Par. 31, AR 600-550, 14 May 1943.

27. A consideration of the appropriate action which will thereafter be taken is beyond the scope of this chapter. In this connection, however, in addition to the provisions of Article of War 112 and of sec. 304, act 10 June 1921 (42 Stat. 24; 31 U.S.C. 44; M.L. 1939, sec. 1646), reference may be made to the act of 21 February 1931 (46 Stat. 1203; 10 U.S.C. 1584a et seq.; M.L. 1939, sec. 862a) and to sec. 1, act 30 June 1906 (34 Stat. 750; 10 U.S.C. 868; M.L. 1939, sec. 863).

chiefly as keepsakes, together with his inventory of the effects secured by him and the account of his transactions.

ADDENDA

Page IX - 3, line 15:

The act of 17 December 1943 (Public Law 198, 78th Cong.; sec. I, Bull. 25, WD, 30 Dec. 1943) amended the act of 17 December 1919 by providing (a) that if there be no widow or child or previously designated dependent relative, the Secretary of War may cause the gratuity to be paid to any grandchild, parent, brother or sister or grandparent determined by the Secretary of War to be dependent upon the soldier or officer, such determination to be final and conclusive on the accounting officers of the Government; and (b) that if a beneficiary dies prior to payment of the gratuity, it shall be paid to the next living beneficiary in the statutory order of succession.

ADDENDA

PART X

LINE OF DUTY

CHAPTER 1 - THE PURPOSES OF LINE OF DUTY DETERMINATIONS

Judge advocates in the field and at headquarters installations are frequently required to pass upon matters involving the "line of duty" status of members of the military service.

The basis of these inquiries is largely statutory. A number of separate and, for the most part, unrelated acts of Congress have imposed as a condition to the conferring or withholding of certain benefits and liabilities, an administrative finding that disability or death was or was not incurred "in line of duty". Out of statutory context the term is, at best, an approximation.

Nor is the question always limited to the three words of art, "line of duty". Several other verbal criteria have been employed in these statutes. While, for example, the term "incident to service" has been held to be synonymous for some purposes with "line of duty",[1] the test as to whether or not the incapacity resulted from "misconduct" is certainly of much narrower scope.[2]

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1. See p. X - 13, infra.

2. See p. X - 17, infra.

Executive Orders of the President, Army Regulations and similar departmental directions implement the statutes by prescribing the procedure for the making of line of duty determinations. In many instances they also include considerable substantive material which is binding upon the military establishment[3] and forms the fundamental source of authority for all cases to which it is applicable.[4]

Under the current regulations, the investigating officer is required ultimately to answer only two questions: (a) "Was the disability incurred in line of duty?", and (b) "Was it the proximate result of the person's own misconduct?"[5] Although this procedure obviates the necessity of referring in the first instance to the basic statutes, judge advocates should be familiar with the legal incidents of line of duty and the content of the enactments which produce them.

It is here proposed, first, to summarize the more important statutes of current application which call for a determination of line of duty or other similar status; in the second

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3. Winthrop, Military Law and Precedents (2nd ed. reprint 1920) pp. 31-33; par. 1a(1), AR 1-15, 12 Dec. 1927.

4. See p. X - 34, infra.

5. See p. X - 87, infra.

chapter, to set forth and partially to annotate the elements which, in general, control the merits of the determination; and, finally, in Chapter 3, to indicate briefly some aspects of the administrative procedure which may be presented to a judge advocate for consideration. The many other legal questions involving the interpretation and application of the particular laws will be adverted to only incidentally, if at all.

1. Disability Benefits and Pensions.

The so-called Economy Act of 1933[6] repealed all prior laws granting pensions, disability allowance, compensation and other allowances and privileges to war veterans and former members of the military service for injury or disease incurred or aggravated in line of duty. The same statute[7] authorized a wholly revised system of benefits which includes the payment of pensions to:

> "(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a pre-existing disease or injury incurred in line of duty in such service."

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6. Sec. 17, Title I, act 20 March 1933 (48 Stat. 11; 38 U.S.C. 717; M.L. 1939, sec. 1156).

7. Sec. 1, Title I, act 20 March 1933 (48 Stat. 8; 38 U.S.C. 701; M.L. 1939, sec. 1139). Benefits payable to World War veterans under this act are properly called "compensation" and not "pension". Sec. 33, Title III, act 28 March 1934 (48 Stat. 526; 38 U.S.C. 700)

and to:

> "(c) The widow, child, or children, dependent mother or father, of any person who dies as a result of disease or injury incurred or aggravated in line of duty in the active military or naval service."

The schedules of amounts payable under the basic statute are prescribed by Executive Orders promulgated in the form of Veterans' Regulations[8] and amended from time to time by act of Congress.[9] Separate rate tables are provided for death or partial disability resulting from war and peacetime service and for total disability. The act, as frequently augmented and amended, is administered by the Administrator of Veterans' Affairs.[10]

In 1939 these pension benefits, inter alia, were ex-

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8. M.L. 1939, sec. 1140.

9. M.L. 1939, Sup. II, sec. 1140.

10. E.O. 8099, 28 Apr. 1939, as amended by E.O. 8461, 28 June 1940; E.O. 9051, 6 Feb. 1942. Pursuant to these Executive Orders, however, all questions as to eligibility for retirement pay are for the final determination of the Secretary of War who is also granted complete administration of death gratuities. Sec. 11, act 17 Oct. 1940 (54 Stat. 1197; 38 U.S.C. 11a-2; M.L. 1939, Sup. II, sec. 1146), providing for the finality of determinations by the Veterans' Administration of all questions of fact or law under all acts administered by that Administration, was apparently enacted with reference to already existing divisions of jurisdiction and did not affect the finality of the determinations of the Secretary of War with respect to the excepted matters. See Van Horne v. Hines (App. D.C.) 122 F. (2d) 207. As to the similar question with respect to act 26 Sept. 1941, dealing with retirement pay for Reserve officers, see section 5, infra.

tended to all members of the Army of the United States "who suffer disability or death in line of duty from disease or injury while so employed".[11] Officers, warrant officers and enlisted men of all components of the wartime Army are "in all respects entitled to the same pensions, compensation, retirement pay and hospital benefits as are now or may hereafter be provided by law or regulation" with respect to the personnel of the Regular Army.

Very shortly after the outbreak of the present war, Congress amended Veterans' Regulation No. 1(a) to provide for the payment of pension benefits at World War rates to members of the Army of the United States or their dependents if disability or death results from injury or disease incurred in line of duty while the nation is at war.[12]

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11. Sec. 5, act 3 April 1939 (53 Stat. 557 as amended by act 25 July 1939 (53 Stat. 1079; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117). The statute granting to members of the O.R.C. and E.R.C. the same benefits payable to civil employees of the United States, for injury in line of duty, is applicable only to time of peace (act 15 July 1939; 53 Stat. 1042; 5 U.S.C. 797; M.L. 1939, Sup. II, sec. 1117).

12. Sec. 1, act 19 December 1941 (55 Stat. 844; M.L. 1939, Sup. II, sec. 1140). These rates are also applicable if the injury or disease was received in line of duty either as a direct result of armed conflict or while engaged in extra hazardous service, including such service under conditions simulating war, even if the United States is not "engaged in war".

The term "line of duty" has been defined in Veterans' Regulation No. 10.[13] Since the section which contains the definition has been amended by act of Congress[14] and inferentially approved as amended, it is presumably to be regarded as the controlling authority in all line of duty cases to which it relates.[15] A later statute[16] further delimits the types and methods of evaluation of proof of "service connection" in these cases and directs the Administrator of Veterans' Affairs to incorporate these Congressional rules of evidence in his regulations.

2. National Service Life Insurance.

The insurance payable under the National Service Life Insurance Act[1] is not conditional upon death "in line of duty"

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13. Sec. VIII, Veterans' Regulation No. 10 (M.L. 1939, sec. 1144).

14. Act 16 June 1938 (52 Stat. 754; 38 U.S.C., chap. 12, note).

15. The definition is at variance in at least two respects with the general rules applied by the Attorney General and The Judge Advocate General in their opinions. See fuller discussion in Chapter 2, infra.

16. Act 20 Dec. 1941 (55 Stat. 847; M.L. 1939, Sup. II, sec. 1060a). See also act 5 June 1942 (56 Stat. 325; M.L. 1939, Sup. II, sec. 1094) establishing a presumption of death from seven years' absence and lack of other evidence after diligent search.

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1. Sec. 602, Title VI, act 8 Oct. 1940 (54 Stat. 1009; 38 U.S.C. 802; M.L. 1939, Sup. II, sec. 1070b). The original War Risk Insurance Act required a finding as to line of duty status but, as reenacted in 1924 and subsequently amended, this requirement was eliminated (M.L. 1939, sec. 1070).

but accrues upon "the death of such person occurring while such insurance is in force". Pursuant to certain amendments of the act, however, the temporary granting of automatic policies and waiver of premiums thereunder during periods of total disability were, under certain circumstances, expressly made dependent upon the line of duty character of the death or disability.

The actual outbreak of the present war was sudden and many members of the armed forces were unable to make timely application for National Service Life Insurance, some by reason of extended duty in outlying stations. Many others failed or neglected to apply, expecting that their military service would be peacetime service. Congress, declaring its intention to extend these insurance benefits to such persons, amended the act[2] by providing that all persons who died in active service and in line of duty between 8 October 1940 and 19 April 1942 without having in force insurance in the aggregate amount of $5000 under the War Risk Insurance Act, the World War Veterans' Act or the National Service Life Insurance Act, "shall be deemed to have applied for and to have been granted" a policy in the sum of $5000. Death in line of duty is defined to include death resulting from disease or injury incurred in line of duty.

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2. Sec. 10, act 20 December 1941 (55 Stat. 846; M.L. 1939, Sup. II, sec. 1070b).

Similarly, if total disability results from injury or disease incurred in line of duty within the same period and continues for six months, an automatic insurance policy is provided and premiums waived during the continuation of such total disability, but no later than 20 April 1943.[3]

The administration of all matters relating to National Service Life Insurance has been delegated to the Administrator of Veterans' Affairs.

3. Burial Expenses

Certain expenses in connection with burials and funerals will be paid by the United States in all cases of persons dying while on active military duty and of war veterans regardless of line of duty status.[1] "Service connection" is, however, a condition precedent to the payment of such expenses in the cases of veterans of the Army who are not war veterans but who were discharged for disability incurred in line of duty.[2] Provisions

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3. Ibid., as amended by act 11 July 1942 (56 Stat. 657-659; M.L. 1939, Sup. II, sec. 1070b).

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1. M.L. 1939, sec. 859; AR 30-1830, 1 March 1939.

2. Act 17 Oct. 1940 (54 Stat. 1193; M.L. 1939, Sup. II, sec. 861). The payment is in the discretion and subject to the jurisdiction of the Administrator of Veterans' Affairs, as limited by statute and Executive Order. Par. 10b, AR 315-360, 26 Nov. 1942, provides for the making of a line of duty determination by the medical board which passes on all discharges for disability.

for the payment of burial expenses of members of the National Guard and Organized Reserves who die while not on active duty but while undergoing hospitalization for disease or injury incurred in line of duty while on active duty,[3] are of limited application in wartime.

4. Domiciliary Care; Medical and Hospital Treatment

In addition to the pension and compensation benefits already outlined, the Economy Act of 1933, as amended, also authorized the Administrator of Veterans' Affairs to furnish medical and hospital treatment and (in cases of permanent disability, tuberculosis or neuropsychiatric ailments) domiciliary care to:

(a) Honorably discharged veterans of any war who are suffering with injuries or diseases incurred or aggravated in active service and in line of duty;

(b) All persons honorably discharged for disabilities incurred in line of duty and who are suffering from injuries or diseases thus incurred or aggravated;

(c) Veterans of any war, not dishonorably discharged, who are unable to defray the necessary expenses, regardless of the service connection of the disability.[1]

The details of administration and procedure are controlled by

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3. M.L. 1939, sec. 860; par. 2b, AR 30-1830, 1 March 1939.

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1. Sec. 6, Title I, act 20 March 1933 (48 Stat. 9; 38 U.S.C. 706) as amended (see M.L. 1939, sec. 1147).

Veterans' Regulation No. 6(a).[2]

Line of duty status was also involved in time of peace in determining the rights to medical and hospital treatment of members of the National Guard, Enlisted Reserve Corps and Officers Reserve Corps who were injured or contracted disease while on active duty or in connection therewith.[3] This provision was later amended to assure the authority of the Secretary of War to provide hospital, medical and surgical treatment and domiciliary care for all persons in the active military service or on active duty or in training, "without reference to their line of duty status".[4]

5. Retirement of Officers

When a Regular Army officer has become incapable of

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2. M.L. 1939, sec. 1148. The act of 3 April 1939 (53 Stat. 557; 10 U.S.C. 456), as amended (see M.L. 1939, Sup. II, sec. 1117), confers these benefits on all personnel of the Army of the United States in active service for more than 30 days. Reserve officers of the AUS, whose disability occurred on active duty between 28 February 1925 to 26 September 1941 and in line of duty, are now similarly entitled to the same hospital benefits by virtue of the act of 26 September 1941 (55 Stat. 734; 38 U.S.C. 12; M.L. 1939, Sup. II, sec. 1117).

3. Act 15 June 1936 (49 Stat. 1507; 32 U.S.C. 164a, 164b; 10 U.S.C. 455a, 455b, 455c; M.L. 1939, sec. 1088).

4. Act 15 July 1939 (53 Stat. 1042); sec. 5, act 14 October 1940 (54 Stat. 1137; 32 U.S.C. 164d; 10 U.S.C. 455e; M.L. 1939, Sup. II, sec. 1088).

performing his duties, he must be retired from the service.[1] If a retiring board finds that his incapacity is the result of an incident of service and this decision is approved by the President, he is retired from active service and placed on the list of retired officers.[2] If the incapacity is found not to be the result of an incident of service, the President then determines whether the officer is to be retired from the active service or wholly retired from the service.[3]

The test as to whether incapacity was or was not "the result of any incident of service" has been said to be substantially equivalent to the line of duty criterion and the terms

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1. R.S. 1245; M.L. 1939, sec. 342.

2. Ibid. This statute applies only to Regular Army officers but retirement pay is now payable to all similarly disabled officers of the AUS (act 3 April 1939; 53 Stat. 557; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117) and specifically to Reserve Officers if disability occurred on active duty between 28 February 1925 and 26 September 1941, and in line of duty (act 26 September 1941; 55 Stat. 734; 38 U.S.C. 12; M.L. 1939, Sup. II, sec. 1117). Both these acts use the term "line of duty" in preference to "incident of service". The decisions of the Secretary of War on all questions of law and fact relating to retirement pay are conclusive.

3. R.S. 1252; M.L. 1939, sec. 342. The names of officers wholly retired from the service are dropped from the Army Register and they are, in effect, discharged. They become civilians and cannot be readmitted to the service otherwise than by new appointment. Miller v. U.S., 19 Ct. Cl. 338; 19 Op. Atty. Gen. 202; par. 21, AR 605-245, 17 June 1941. As to the procedure before Army Retiring Boards, see AR 605-250, 1 June 1943.

are used interchangeably in retirement cases.[4]

6. Retirement of Enlisted Men

Under the provisions of a statute passed shortly before the outbreak of this war, an enlisted man of the Regular Army or of the Philippine Scouts who has served twenty years or more in the military forces of the United States and who has become permanently incapacitated for active service due to physical disability incurred in line of duty is placed on the retired list and entitled to pay and allowances accordingly.[1] The benefits

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4. Dig. Op. JAG, 1912, p. 986; Dig. Op. JAG, 1912-40, AR 345-415, p. 953. Another act of Congress provides for the payment of retirement pay to "emergency officers" of the World War, i.e., other than Regular Army, Navy and Marine Corps officers, retired for disability in line of duty and resulting directly from such war service. Sec. 1, act 24 May 1928 (45 Stat. 735; 38 U.S.C. 581; M.L. 1939, sec. 1122). These payments were specifically excepted from the repeal provisions of the Economy Act. Sec. 10, Title I, act 20 March 1933 (48 Stat. 10; 38 U.S.C. 710; M.L. 1939, sec. 1154). The Veterans' Regulation promulgated under this act required a showing that the "causative factor" of the disease or injury arose out of the performance of military duty (Veterans' Reg. No. 5; M.L. 1939, sec. 1154a) and the regulation was held not to enlarge the statutory language (Barnett v. Hines (App. D.C.) 105 F. (2d) 96). This causality requirement was incorporated in the subsequent enactment which also provided that if the disability is clearly shown to have been incurred in or aggravated by active service and in fact in line of duty without benefit of any other presumption, then it will be considered to have directly resulted from performance of duty. Sec. 1, act 15 July 1940 (54 Stat. 760; 38 U.S.C. 582a; M.L. 1939, Sup. II, sec. 1154).

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1. Act 30 June 1941 (55 Stat. 394; 10 U.S.C. 939; M.L. 1939, Sup. II, sec. 343a).

of this statute are automatically extended to all members of the Army of the United States by the provisions of the prior act of 3 April 1939.[2]

The procedure for the determination of eligibility for retirement under the act, which is controlled by Army Regulations,[3] includes the appointment of a board by the commanding officer of the general hospital where the soldier is a patient. If the incapacity results from any injury, the functions of this board are supplementary to those of the "line of duty board" (now a single investigating officer) appointed under the provisions of AR 345-415 to determine the line of duty character of the injury itself.[4]

7. Posthumous Appointment and Promotion

The act of 28 July 1942[1] provides for the issuance of a commission to any person in the military or naval service after

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2. 53 Stat. 557; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117 (including citations to amendatory acts).

3. Sec. II, pars. 10-19, AR 615-395, 6 June 1942.

4. Par. 12b, id.

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1. 56 Stat. 722; 10 U.S.C. 491a, b, c, d, 612; M.L. 1939, Sup. II, sec. 150. A similar statute of 1925 (sec. 1, Pub. Res. 3 March 1925; 43 Stat. 1255; 10 U.S.C. 488) applied only to service in World War I.

8 September 1939 who:

(a) Was duly appointed to a commissioned grade, or

(b) Shall have successfully completed the course at a training school for officers and shall have been recommended for appointment by the officer commanding the school, or

(c) Shall have been officially recommended for appointment or promotion and such recommendation shall have been duly approved by the Secretary of War,

and shall have been unable to receive or accept the appointment or promotion by reason of his death in line of duty. Section 4 of the act authorizes the issuance of posthumous warrants to enlisted men who shall have been officially recommended for appointment or promotion to a noncommissioned grade and shall have been unable to receive or accept the appointment or promotion because of death in line of duty.

The posthumous status under this statute is purely honorary and carries no bonus, gratuity, pay or allowances.[2]

8. Time Made Good Under AW 107

The 107th Article of War provides that:

"Every soldier who in an existing or subsequent enlistment * * * through the intemperate use of drugs or alcoholic liquor or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status,

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2. Sec. 5, act 28 July 1942.

> for such period as shall, with the time he may have served prior to such * * * inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

This article and the two statutes next to be considered establish a standard that is clearly not coextensive with "line of duty". True, when disease or injury is "the result of misconduct" of a soldier, it can never be regarded as having been incurred in line of duty. Yet the converse does not hold: disease or injury may be outside the limits of line of duty even when no misconduct is involved.

The confusion which exists as to the meaning of these terms is perhaps due in part to the fact that the organization commander and the medical officer are required by Army Regulations[1] to note the applicability of AW 107 to a particular injury or disease in the column of the Daily Sick Report (WD, AGO Form No. 5) headed "In Line of Duty". The substantive material contained in these regulations and the procedure therein provided as to line of duty inquiries, will be considered in later sections.

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1 Par. 1f(1), AR 345-415, 23 November 1933. When the injury resulted from misconduct or the venereal disease due to misconduct showed its initial symptoms more than one year prior to the absence from duty, the notation "No, 107 AW" is made in the column headed "In line of duty" to indicate that the time lost is to be made good.

The liability imposed on soldiers by AW 107 to make good lost time may be waived by the Government through discharge by competent authority.[2] The Secretary of War may therefore reopen any case decided adversely to the soldier where such decision is later revealed to have been erroneous.[3]

9. Forfeiture of Pay

The act of 17 May 1926[1] requires the forfeiture of the pay of any person in the military or naval service for a period of absence from regular duties for more than one day on account of the effects of:

(a) A disease, as distinguished from an injury, which is directly attributable to and immediately follows his own intemperate use of alcoholic liquor or habit-forming drugs, or

(b) A venereal disease due to his own misconduct when the absence occurs within a period of one year following the initial symptoms of such disease.

This law applies only to absences from duty result-

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2. Dig. Op. JAG, 1912-40, sec. 466(6).

3. Ibid.; JAG 220.7191, 2 September 1930.

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1. 44 Stat. 557; 10 U.S.C. 847a, 847b; 34 U.S.C. 882a, 882b; M.L. 1939, sec. 1442. The Judge Advocate General has approved proposed legislation looking to the repeal of this act. SPJGA 1943/4035, 30 March 1943.

ing from the effects of certain diseases and not to injury cases.[2] When, in the opinion of the organization commander or the medical officer, the sickness is due to the causes within the purview of the act, he will enter the notation "No, AR 35-1440" in the line of duty column on the Daily Sick Report which, by itself, indicates that pay is to be forfeited and also, in the case of enlisted men, that lost time is to be made good under AW 107.[3]

10. Death Gratuities

Upon the death "from wounds or disease, not the result of his own misconduct" of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, an amount equal to six months' pay is paid, under a 1919 statute to the widow, and if there be no widow to the child or children, and if there be no widow or child, to any designated dependent relative.[1]

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2. See par. 2, AR 345-415, 23 November 1933, which also points out that the standards set by the act may be encompassed by but are narrower in character than determination of line of duty status, properly so-called. This paragraph also contains definitions of terms used in the statute and administrative suggestions for the determination of the date of appearance of initial symptoms.

3. Par. 1f(2), AR 345-415, 23 November 1933.

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1. Act 17 Dec. 1919 (41 Stat. 367; 10 U.S.C. 903; M.L. 1939, sec. 862. When children are the beneficiaries the gratuity is paid only to unmarried children under 21 years of age and to those over that age who are actually dependent. Act 2 March 1923 (42 Stat. 1385; 10 U.S.C. 903; M.L. 1939, sec. 862).

Section 2 of the act expressly excludes from these benefits officers or enlisted men, or their beneficiaries, of any other component of the Army other than the Regular Army. The act of 3 April 1939[2] extended to all members of the Army of the United States who suffer disability or death in line of duty from disease or injury while so employed the same pensions, compensation, retirement pay, and hospital benefits as were then or were thereafter to be provided for Regular Army personnel. This act was held not to comprehend the 6 months' death gratuity.[3]

In order to confer the death gratuity benefits upon the dependents of all Army personnel, the act of 3 April 1939 was amended on 10 December 1941[4] by the addition of the words "including for their dependents the benefits of the act of December 17, 1919 (41 Stat. 367), as amended". The only test of eligibility for benefits contained in the extension act was "disability or death in line of duty from disease or injury while so employed". The Comptroller General has recently held,[5] however, that Congress

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2. Sec. 5, act 3 April 1939 (53 Stat. 557; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117).

3. MS. Comp. Gen., B-9734, 13 June 1940; B-13673, 20 Dec. 1940; B-13209, 15 Nov. 1940; id., 20 March 1941; B-17896, 7 July 1941.

4. 55 Stat. 796; 10 U.S.C. 456; M.L. 1939, Sup. II, sec. 1117.

5. MS. Comp. Gen., B-25768, 15 July 1942; I Bull. JAG 113, sec. 1117(1).

intended to incorporate the standard of the original death gratuity statute in the act as amended and that the gratuity is conferred subject only to the condition that the soldier's death shall not have been the result of his own misconduct. This rule would appear not to exclude deaths occurring during unauthorized absences but inasmuch as a soldier absent without leave is not entitled to pay, there is no basis for computing the six months' gratuity if he dies in that status.[6]

11. Retention in Service for Medical Care

Under the provisions of the act of 12 December 1941[1] any enlisted man of the Army of the United States in active service whose term of enlistment expires while he is suffering from disease or injury "incident to service and not due to his misconduct" is retained in the service beyond the expiration of his term of enlistment until he has recovered sufficiently to meet the physical requirements for reenlistment or until it shall be determined that such recovery would be impossible. During such extended period he is to receive medical care or hospitalization at Government expense and his pay and allowances.

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6. MS. Comp. Gen., B-25495, 7 May 1942; I Bull. JAG 43, sec. 862(5a).

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1. 55 Stat. 797; 10 U.S.C. 628a; M.L. 1939, Sup. II, sec. 253. The statute required changes in several Army Regulations; see Cir. 119, WD, 23 April 1942.

The present importance of this statute is slight, at least for the duration of the war. Five days prior to its enactment, the term of service of all enlisted men in the Regular Army and Enlisted Reserve Corps was automatically extended for the duration of the war and six months thereafter[2] and the same result was accomplished with respect to all components of the Army of the United States on 13 December 1941 by Congressional Joint Resolution.[3] During such extended term of service discharge purported to be for expiration of term of service is void unless ordered by the President, the Secretary of War or certain other designated commanders.[4]

The statute is interesting in that it uses the term "incident to service", theretofore employed only in connection with retirement of officers, and adds the seemingly unnecessary proviso that the disability not be the result of misconduct. This language has apparently been taken to mean the same as "line of duty", at least for purposes of administration.[5]

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2. Sec. 55, National Defense Act, as amended. See JAG 342.06, 25 Feb. 1942; sec. III, Cir. 118, WD, 23 Apr. 1942.

3. Sec. 2, act 13 December 1941 (55 Stat. 800; 50 U.S.C. 732; M.L. 1939, Sup. II, sec. 2228-2).

4. See JAG 342.06, 25 Feb. 1942; sec. III, Cir. 118, WD, 23 April, 1942.

5. See par. 20 1/2, C 4, 27 Aug. 1942, AR 345-125, 1 Feb. 1932.

12. Admission to Soldiers' Home

One of the three classes of "members" entitled to the facilities of the Soldiers' Home is:

> "Second. Every soldier and every discharged soldier, whether Regular or Volunteer, who has suffered, or may suffer, by reason of disease or wounds incurred in the service and in the line of his duty /disability?/ rendering him incapable of further military service, if such disability was not occasioned by his own misconduct." [1]

A "member" of the Soldiers' Home is defined as any soldier of the Army of the United States who has contributed to its support.[2]

13. Form of Discharge for Disability

One purpose of line of duty determinations has no direct statutory basis. Article of War 108 requires that every enlisted man be given a certificate upon discharge. Pursuant to this general direction, the War Department has promulgated regulations[1] governing the form which such certificate is to take upon discharge for disability.

Upon receipt of WD, AGO Form No. 40 (Certificate of

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1. R.S. 4821 (24 U.S.C. 49; M.L. 1939, sec. 1133).

2. R.S. 4814 (M.L. 1939, sec. 1123).

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1. Sec. II, pars. 7-18, AR 615-360, 26 Nov. 1942.

Disability for Discharge), the commanding officer of a general hospital is directed to convene a board of medical officers to examine the enlisted man and, among other things, to pass upon the line of duty origin of the disability.[2] If the disability was incurred in line of duty, an honorable discharge (WD, AGO Form No. 55) is given unless otherwise directed by the board of officers appointed to determine the character of the man.[3] If the disability was the result of the misconduct occurring in the man's current enlistment, a blue discharge (WD, AGO Form No. 56) will be given.[4] If the misconduct occurred prior to the current enlistment, then the blue certificate will be called for unless the white or honorable discharge is specially merited by the nature of the man's service or the disability was noted on the enlistment or induction papers or unless the character board otherwise directs.[5]

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2. Pars. 11, 12, id. In view of the likelihood of claims for pension arising from disability discharges, special care is demanded in setting forth the origin of the disability.

3. Par. 17a, AR 615-360, 26 Nov. 1942.

4. Par. 17b(1), id.

5. Par. 17b(2), C 1, 1 March 1943, AR 615-360, 26 Nov. 1942.

CHAPTER 2 - THE MEANING OF LINE OF DUTY AND RELATED TERMS

1. General Considerations

Although line of duty questions are a part of the normal military routine, there exists some uncertainty as to the precise meaning and content of this and similar terms and as to their proper application in individual cases.

One reason for confusion has been emphasized in the preceding chapter: the purposes of line of duty inquiries are many and they have their origins in different statutes containing different terminology. They are controlled administratively by various officers of the Government. The several standards which are customarily subsumed under the heading "line of duty" are by no means identical.

The meaning and scope of line of duty has, moreover, changed considerably since it was first used in our statute law in 1799. It will be seen in a subsequent historical discussion that a gradual expansion of the concept has come about as a result of Congressional enactment, departmental regulation and judicial opinion in the past century and a half.

Some uncertainty has always stemmed from the fact that many officers and agencies of the Government have simultaneously undertaken to define line of duty within statutory and regula-

tory limits. The Judge Advocate General, the Attorney General, the Comptroller General, the Administrator of Veterans' Affairs and the Federal courts have not always been in complete agreement.

Even the decisions of one agency and at one period of time are sometimes difficult to reconcile. In the first place, the reported opinions rarely contain full statements of facts. Furthermore, when the determination rests in the nebulous areas of "gross negligence", "misconduct" or "proximate cause", it is natural that findings should vary. Whatever the apparent inconsistency in particular results, there are certain rules of general application which each officer of the Government is bound to apply.

2. Historical

The act of 2 March 1799[1] first used line of duty status as a condition for the payment of Navy pensions. A similar statute relating to Army personnel was passed three years later.[2]

During the first half of the 19th century the scope of the standard appears to have been clouded in uncertainty.[3] One thing seems fairly clear: no incapacity of a member of the mili-

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1. 1 Stat. 716.

2. Act 16 March 1802 (2 Stat. 135).

3. See 7 Op. Atty. Gen. 149.

tary service was regarded as having been suffered in line of duty unless it were affirmatively shown to be the direct result of the performance of a distinctly military duty. Thus, in a very early case,[4] where a soldier had a pass to leave his post to "go about his private affairs" and was assaulted by the sentinel at the gate, his injury was held not to have been incurred in line of duty.

An extended opinion of Attorney General Cushing in 1855[5] is the historical landmark of interpretation in this field. Mr. Cushing approached the problem on a conceptual level and his opinion has since been quoted and cited with approval to widely divergent effect.

This opinion for the first time clearly distinguished "in line of duty" from the broader term "in active service" and the much narrower "on duty".[6] Yet it did require as a basis for a line of duty finding:

> "Some line of co-ligation with the performance of duty of an official or professional nature";[7]

or again:

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4. 2 Op. Atty. Gen. 590.

5. 7 Op. Atty. Gen. 149.

6. Id., at 159.

7. Ibid.

> "Though a soldier or sailor, he is not the less a man and a citizen with private rights to exercise and duties to perform; and, while attending to these things, he is not in the line of his public duty." 8

It was, however, the rule from the beginning, as it is today, that incapacity resulting from misconduct would be regarded as out of line of duty.[9]

In 1897 the Circuit Court of Appeals for the Eighth Circuit in Rhodes v. United States[10] expressly adopted the reasoning of Attorney General Cushing. There the Government sued to recover a pension alleged to have been fraudulently obtained by means of a false statement as to when the disease was in fact contracted. In addition to upholding recovery, the court expressed itself further on the necessary causal connection between military duty and line of duty status, stating, among other things, that injuries received while hunting wild animals with permission or while squabbling with comrades for amusement, would not form the basis for a pension.

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8. Id., at 162.

9. In Mr. Cushing's words, "No man, it is clear, is acting in the line of duty, while the act he performs is a violation of his duty". Id., at 151. This rule was followed in 1881 in 17 Op. Atty. Gen. 172.

10. 79 Fed. 740.

The Court of Claims in 1913 in Moore v. United States[11] was presented with a similar question. If the case is confined strictly to its facts, it stands only for the proposition that death due to disease contracted while on duty was "in line of duty" although it culminated and death occurred while the deceased officer was on leave of absence. This holding is not in conflict with the Rhodes case but the language of the opinion represented a sharp break with the prior view and subsequently exerted far-reaching influence. The court said:

> "As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. * * * The provisions for furloughs and leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command." [12]

Prior to the Moore decision the military administration of the expression "in line of duty" had been guided by the opinion of Attorney General Cushing and by certain statutory definitions.[13]

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11. 48 Ct. Cl. 110.

12. Id at p. 13. The further gratuitous pronouncement of the court that it should not be called upon to decide when the germs of disease "first began to incubate" (p. 114), appears to be unsupported by authority.

13. The act 12 April 1866 defined the term as it was used in a pension law for disabled Civil War veterans. It required the granting of the bounty for wounds "received while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit".

A direct correlation between the performance of military duty and disability or death was always a condition precedent to the conferring of benefits or withholding of penalties. Although the earlier Judge Advocate General opinions contain no extended general discussions of the scope of line of duty, the strict view may be discerned in the adjudication of particular fact situations.[14] In any event, absence on leave or furlough was regarded in the ordinary case as sufficient to require a finding of "not in line of duty".[15]

The Moore case gave the impetus during the First World War to a broader construction of the phrase by The Judge Advocate General. Upon the authority of the Court of Claims decision it was held in at least three cases in 1918 that leave or furlough was not a disqualifying factor.[16] A few days after the armistice an opinion was published[17] adopting generally the

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14. See, for example, Dig. Op. JAG, 1912, p. 686 (C. 101, 28 July 1894; C. 12423, 19 April 1902); p. 688 (R. 41,257, 10 June 1878; R. 51,347, 13 Jan. 1887; C. 3063, 31 March 1897; C. 14627, 8 May 1903).

15. Dig. Op. JAG, 1912, pp. 8, 654, 688, 689, 691. Exceptions were made in certain cases of passes and special types of furlough; see p. X - 57, infra.

16. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.4, 8 Oct. 1918; JAG 220.8, 3 Feb. 1918; JAG 220.46, 22 Nov. 1918).

17. Dig Op JAG, 1912-40, p. 952 (JAG 220.46, 22 Nov. 1918). This opinion involved the construction of the original War Risk Insurance Act which contained both phrases, "line of

liberal view and repudiating the requirement of correlation between military duty and incapacity. The language of the 1855 opinion of the Attorney General was disapproved and the test of the Moore case ("submitting to all the laws and regulations of the military service and not the result of misconduct") incorporated into the opinion of the office.

Throughout this early period some other governmental agencies adhered to the older concepts. The Navy[18] and the Pension Bureau,[19] for example, still required a showing of effective causation between an act of military duty and the death or disability.

The current War Department approach to line of duty and much of the actual wording of present Army Regulations relating thereto, originated in a 1919 opinion of the Attorney General.[20] Addressed to the Secretary of the Treasury as a discussion of proposed regulations under the War Risk Insurance Act,

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17. (cont.)
duty" and "not the result of his own misconduct". It is doubtful that The Judge Advocate General intended to adopt for all purposes the statement in the Moore case to the effect that the "line of duty" and "misconduct" tests were coextensive and synonomous.

18. See Dig. Op. JAG, 1912-40, p. 952 (JAG 220.46, 22 Nov. 1918).

19. See Dig. Op. JAG, 1912-40, p. 966 (JAG 42.520, 24 Mar. 1917).

20. 32 Op. Atty. Gen. 193.

this opinion contains a definition of line of duty which is consistent with the liberal construction although it purports to adopt the rule of the Rhodes case and to disapprove the dicta of the Court of Claims in the Moore case. The Attorney General stated that disability was in line of duty when suffered in active service, whether on duty, furlough, leave or arrest unless the injury or disease was caused (1) by wilful misconduct or (2) by something done in pursuing some private avocation or business and which has intervened, as the producing cause between his public service or performance of duty and the injury or disease.[21]

Several months later the Attorney General felt it necessary to add to this test another intervening and producing cause which would operate to take the disability out of line of duty:

> "Something which grows out of relations unconnected with the service or is not the logical incident or provable effect of duty in the service." [22]

This language has been taken verbatim into the currently operative Army Regulations.[23] The precise limits of this last proviso are still unclear since, if it is interpreted literally, it appears

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21. Id. at p. 22.

22. 32 Op. Atty. Gen. 193.

23. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

to revert to the "co-ligation" theory of 1855. An analysis of the cases in which this portion of the rule has been applied since 1920, will be attempted in a later subsection.[24]

The opinion of 1919 had pointed out that mere coincidence of time between the disqualifying circumstances and the disability is not enough; the intervening cause has also to be the producing cause of the injury or disease.[25] In 1931 the doctrine of proximate cause was definitely established in line of duty cases. In an opinion of the Attorney General in that year[26] it was held that an injury resulting from an accident during a period of absence without leave was not the proximate result of misconduct although clearly not in line of duty. The proximate cause doctrine is now uniformly applied by the Attorney General and by The Judge Advocate General.[27]

The content of line of duty has changed in specific types of fact situations and these changes will hereinafter be considered in connection with the individual legal rules. The basic shift of opinion, however, amounts, in reality, to a new rule of presumption or burden of proof. In Civil War days no

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24. See section 10 of this chapter, infra.

25. 32 Op. Atty. Gen. 12, 19.

26. 36 Op. Atty. Gen. 478.

27. See p. X - 73, infra.

incapacity was considered of line of duty character unless a connection with military duty was affirmatively shown.[28] Today, any death or disability incurred while in active service is presumptively line of duty unless one or more disqualifying circumstances are actually proved.[29]

3. Army Regulations

The merits of line of duty are controlled by the following Army Regulations:

AR 345-415, 23 Nov. 1933 (Daily Sick Report)
AR 40-1025, 12 Oct. 1940 (Records of Morbidity and Mortality)
AR 600-550, 14 May 1943 (Deceased Personnel)

In AR 345-415 it is provided that all diseases or injuries of Army personnel suffered while in active service "should be reported as originating in the line of duty, unless in the opinion of the reporting officer the information available is sufficient to warrant the opinion that it --

(a) Existed prior to entry into the service;

(b) Was contracted while absent from duty without permission;

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28. Attorney General Cushing said (7 Op. Atty. Gen. 149, 166): "In this view, it seems to me, not that the mere fact of an officer having died in the service, and with utter absence of proof as to the origin or cause of his death, suffices to raise a pension". Compare his statement immediately following that when the "proofs are balanced * * * it would be reasonable to presume in favor of the pension".

29. See p. X - 38, infra.

(c) Occurred as the result of something which he was doing in pursuance of a private avocation or business;

(d) Grew out of relations unconnected with the service or was not the logical incident or probable effect of duty in the service; or

(e) Occurred in consequence of wilful neglect or misconduct of the man himself.[1]

AR 40-1025 contains the same list of disqualifying factors prefaced by the statement that all diseases or injuries "may be assumed to have occurred in line of duty, unless the medical officer knows that the disease or injury", etc.[2]

This subparagraph represents the distillation of all prior interpretation and learning on the subject and is, in effect, the code which guides the military administration of line of duty. Like all general rules, it cannot be used to solve every specific case. Yet all determinations within the War Department must be consistent with it.

A recent change has been made in paragraph 1c(4) of AR 345-415,[3] as follows:

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1. Par. 1e(1), AR 345-415, 23 Nov. 1933.

2. Par. 18a, AR 40-1025, 12 Oct. 1940. Cf. the somewhat different set of five circumstances requiring a finding of "not in line of duty" in Veterans' Regulation No. 10 (M.L. 1939, sec. 1144).

3. C 1, 10 Nov. 1942, AR 345-415, 23 Nov. 1933.

"(4) Injuries

* * *

"(b) Battle casualties, as defined in paragraph 21(7), AR 40-1080,[4] injuries received while operating or riding in Government vehicles or airplanes, and injuries received while on maneuvers, during authorized athletic exercises, or otherwise engaged in the execution of military duty, will be considered to have been incurred in line of duty provided misconduct or gross negligence is not a contributory factor."

In all such cases the line of duty status is determined by the commanding officer and the surgeon. When the surgeon believes, however, that the injury is likely to result in permanent disability and eventually in a claim against the Government and when the injury does not fall in any one of the categories above enumerated, or was incurred while on pass, furlough or leave, or as a result of misconduct or gross negligence, an officer must be appointed to investigate and report upon all the circumstances.

Similarly, with respect to death cases, the recently revised AR 600-550,[5] requires an investigation:

(a) When the commanding officer and the surgeon disagree, or

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4. " * * * a traumatism or injury (including those incident to the use of chemical agents), which occurs as the result of a hostile act on the part of a military enemy. This term includes not only cases which occur in battle at the front but also those occurring elsewhere as the result of any hostile act by the enemy, such as the bombing of installations on the line of communications or sinking of transports by submarine.

5. 14 May 1943.

(b) When "death is due or suspected to be due to foul play, violent or unnatural causes, misconduct or gross negligence, or when death is sudden from unknown causes, except death from wounds or injuries received in action, field exercises, drill, prescribed athletics, or authorized flights".

These recent changes do not modify the substantive law of line of duty. The statement that injuries incurred "in the execution of military duty" will be considered in line of duty in the absence of misconduct, is merely a partial restatement of the broader general rule contained in the same regulations. Obviously, injuries thus incurred do not come within any of the five grounds for disqualification therein set forth but other injuries may nevertheless come within line of duty. The purpose of these changes is procedural and in that connection they will be considered in Chapter 3.

The regulations also contain a great deal of advisory material for use in special cases. Paragraph 18b(1), AR 40-1025, contains a working definition of misconduct for medical officers and paragraph 18b(2) relates to the manner of dealing with operation and treatment. Paragraphs 18a(1) and 18b(4),(5),(6), and (7), AR 40-1025, as changed by Changes 1, 21 August 1942, are used in determining whether disease was contracted prior to or after entry into service. An extended analysis of suicide and its relation to line of duty problems may be found in paragraph 18e, AR 600-550.

4. Presumptions and Burden of Proof

The general instructions contained in Army Regulations as to the determination of line of duty status[1] amount, in effect, to a rebuttable presumption: all diseases and injuries suffered while on active military service[2] will be presumed to be in line of duty and not the result of misconduct unless certain facts are sufficiently shown.

This rule of presumption is a codification of the view long held and often expressed by the officers charged with the quasi-judicial function of passing finally upon these determinations. As far back as 1896 The Judge Advocate General approved a circular of the Surgeon General which remarked upon the justice of resolving all doubts in favor of the officer or soldier involved.[3] In more recent years there have been frequent instances in which the rule has been stated and applied.[4]

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1. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

2. No disability or death suffered while on inactive service or prior to compliance with orders to report for active duty can be regarded as having been incurred in line of duty. SPJGA 1943/6203, 7 May 1943; SPJGA 1943/6502, 19 May 1943.

3. Dig. Op. JAG, 1912, p. 686 (IIA). See also 7 Op. Atty. Gen. 149, 166.

4. Dig. Op. JAG, 1912-40, p. 952 (JAG 220.46, 8 Apr. 1919); p. 957 (JAG 220.46, 6 Mar. 1923); p. 963 (JAG 220.46, 7, 9 Nov. 1917); p. 965 (JAG 220.46, 20 Apr. 1929); p. 970 (JAG 220.46, 31 Jan. 1928); JAG 210.46, 28 Apr. 1932; SPJGA 220.46, 4 May 1942; id., 29 July 1942; SPJGA 1942/4873, 18 Oct. 1942; SPJGA 1943/789, 19 Jan. 1943.

The reason ascribed for presuming line of duty status in the absence of evidence to the contrary, is the "gratuitous nature" of the statutes involved in these cases.[5] It has been seen[6] that some of the statutes are far from beneficial in character but rather carry penalties and liabilities, such as the forfeiture of pay or the obligation to make good lost time; yet these acts, since they involve a forfeiture of rights, must be strictly construed[7] and the same result is reached as far as the scope of line of duty is concerned.

The Veterans' Administration has never given general application to this rule of presumption and burden of proof. Section VIII of Veterans' Regulation No. 10[8] provides that when injury or disease occurs on leave the burden of proof is on the claimant to show that it occurred in the line of duty; when it occurs while at camp or post of duty, the burden rests upon the

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5. Dig. Op. JAG, 1912-40, p. 970 (JAG 220.46, 31 Jan. 1928).

6. See Chapter 1, supra.

7. Crawford, Statutory Construction, sec. 240, note.

8. M.L. 1939, sec. 1144. In the same cases in which the Veterans' Administration shifts the burden of proof, Army Regulations merely require a more careful investigation (par. 1c(4)(c), C 1, 10 Nov. 1942, AR 345-415, 23 Nov. 1933) and presume line of duty status unless the reporting officer can fulfill the burden by proving a disqualifying circumstance (par. 1e(1)).

Government. The act 20 December 1941,[9] did not shift the burden but merely provided for the promulgation of rules as to certain permissible types of evidence and authorized the Administration to accept lay evidence in lieu of official records in cases involving persons who have engaged in actual combat.

The present War Department practice is to require nothing more prima facie than proof of disability or death in the active military service:

> "Affirmative evidence is required to overcome this presumption and to warrant a finding that death is due to misconduct. Mere conjecture cannot and does not overcome this legal presumption * * *."[10]

Certain other special rules of presumption have become established in line of duty cases. Venereal diseases and all conditions resulting from chronic alcoholism and drug addiction will be held to have resulted from misconduct unless it is affirmatively shown that they were in fact innocently acquired.[11] This applies also to paresis or other conditions which are unmistakably the result of venereal infection. It would obviously be impractical to require the medical officer to document a finding of

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9. 55 Stat. 847; 39 U.S.C. 726.

10. SPJGA 1942/4873, 18 Oct. 1942.

11. Par. 18b(1), AR 40-1025, 12 Oct. 1940. A similar rule is contained in section IX, Veterans' Regulation No. 10 (M.L. 1939, sec. 1144).

misconduct in these cases and since experience has demonstrated that only a small percentage of such diseases are in fact innocently contracted, no substantial injustice will be done.[12]

In death cases there is a presumption that death was not the result of suicide.[13] If it is established that death was due to suicide it may still be regarded as in line of duty if the deceased was at the time mentally irresponsible[14] and any mental unsoundness developed after 6 months' continuous service is presumed to be of service origin in the absence of contrary evidence.[15] In the same manner, the rules which aid the medical officers in determining the service origin of certain other diseases[16] are also in the nature of rebuttable presumption created by the regulations.

5. Misconduct

For some statutory purposes (e.g., death gratuities, making good time lost under AW 107, forfeiture of pay for absence

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12. Dig. Op. JAG, 1912-40, p. 969 (JAG 210.85, 22 Sept. 1924).

13. Dig. Op. JAG, 1912-40, p. 968 (JAG 220.46, 16 May 1919; JAG 247, 15 May 1933); SPJGA 1942/4873, 18 Oct. 1942.

14. Par. 18e(2), AR, 600-550, 14 May 1943.

15. Ibid. For a discussion of suicide and its relation to line of duty, see p. X - 53, infra.

16. Par. 18a(1), 18b(4),(5),(6),(7), C 1, AR 40-1025, 12 Oct. 1940.

due to disease) the term line of duty is a misnomer and the only question to be determined is whether misconduct was the proximate cause of the disability. For this reason the investigating officer is required to state his conclusion not only as to line of duty status but separately also on the issue of misconduct. In every case, however, a finding that disease or injury was the proximate result of misconduct will compel the conclusion that such disease or injury was incurred "not in line of duty".

The only attempt in Army Regulations to define or to delimit misconduct appears in the instructions to medical officers.[1] After announcing the reversal of the usual presumption in cases of venereal disease, chronic alcoholism and drug addiction, the paragraph continues:

> "Other injuries and diseases will be held to have resulted from misconduct when caused by an act of commission or omission wrong in itself, an act contrary to the principles of good morals, or as a result of gross negligence, gross carelessness, or self-infliction of wounds."

Although the general terms in which this direction is couched make it of limited practical value in the solution of specific problems, some types and patterns of fact situation have arisen repeatedly. From the findings in these cases a series of "rules of law" have crystallized.

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1. Par. 18b(1), AR 40-1025, 12 Oct. 1940.

a. Violation of Military Orders. In 1855 Attorney General Cushing expressed the view that no man acted "in the line of duty" when the act he performed was a violation of his duty.[2] It has since been uniformly held by all administrating agencies that disobedience or failure to obey written or verbal orders of a superior officer or command constitute misconduct within the meaning of the line of duty statutes.

(1) In several aviation cases the violation of Army Regulations governing the operation of aircraft has brought injuries out of line of duty when the injury proximately resulted from the infraction.[3]

(2) Similarly when a sentinel on guard loaded an automatic pistol contrary to orders and was injured by its accidental discharge his action was held to be wilful misconduct.[4] In several other cases involving the discharge of firearms it was carefully pointed out that no military order had in fact been violated and that in the absence of gross negligence no finding of

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2. 7 Op. Atty. Gen. 149.

3. Dig. Op. JAG, 1912-40, p. 955 (JAG 210.46, 24 Sept. 1930) (Stunting at less than 1500 feet); p. 956 (JAG 210.46, 5 Dec. 1930); 1930 M/S Ops. JAG No. 84

4. Dig. Op. JAG, 1912-40, p. 958-9 (JAG 220.46, 25 July 1919).

misconduct could be made.[5]

(3) By the same token, disobedience of military orders and regulations relating to the operation of motor vehicles constitutes "willful misconduct".[6]

(4) In cases involving railroad accidents, any action contrary to military orders, as distinguished from private company regulations and civil law, is sufficient basis for a finding of misconduct.[7] In one case when injury was suffered by a guard who slept while his partner stood on guard, the line of duty status of the injury was held to be dependent entirely upon the content of the instructions issued to the men.[8]

In many instances the lack of causal connection between disobedience and disability has kept the injuries and diseases

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5. Dig. Op. JAG, 1912-40, p. 959 (JAG 220.46, 25 Aug. 1919; JAG 220.46, 18 Oct. 1919; JAG 220.46, 22 Sept. 1918). In the second of these opinions it was said, "A warning of the danger of an act does not amount to an order not to commit the act, and while a disregard of such warning may be negligence, it does not amount to disobedience of an order." But cf. SPJGA 1942/5462, 19 Nov. 1942; SPJGA 220.46, 14 July 1942.

6. Dig. Op. JAG, 1912-40, p. 962 (JAG 220.46, 8 Feb. 1919).

7. Dig. Op. JAG, 1912-40, p. 965-6 (JAG 220.46, 5 Sept. 1918); p. 966 (JAG 220.4, 1 Oct. 1918) ("A custom, however well established, cannot excuse disobedience of a military order.").

8. Dig. Op. JAG, 1912-40, p. 966 (JAG 220.46, 11 Jan. 1919).

within the limits of line of duty.[9] Driving a Government vehicle without authority on private business constitutes misconduct but is not the proximate cause of injury or death which results rather from the improper manner of operation; injury or death suffered under such circumstances is not "the result of his own misconduct"[10] although, at the same time, it is not in line of duty because it grows out of something done "in pursuance of a private avocation or business".[11]

Veterans' Regulation No. 10[12] seems to provide that disobedience of orders of a superior officer or violation of rules and regulations of an organization disqualifies a claimant for pension benefits for injuries contemporaneously sustained, without any showing of causal relationship. It is seriously to be doubted, however, that a pension would be refused to the de-

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9. Dig. Op. JAG, 1912-40, p. 958 (JAG 220.46, 7 Apr. 1919); p. 962 (JAG 220.46, 4 Aug. 1919; 7 Aug. 1919; id., 8 Dec. 1932); p. 960 (JAG 210.46, 8 July 1928).

10. Dig. Op. JAG, 1912-40, p. 962 (JAG 220.46, 8 Dec. 1932). For a general discussion of proximate cause, see p. X - 73, infra.

11. See p. X - 63, infra.

12. M.L. 1939, sec. 1144. The test of line of duty, according to section VIII, "will not be met if it appears that at the time the injury was suffered or disease contracted, the person on whose account benefits are claimed * * * (4) was acting in disobedience of the lawful orders of his superior officer or in violation of the rules and regulations of his organization * * * ". (Underscoring supplied)

pendents of a soldier killed by lightning while walking in his company area with one button of his blouse unfastened.[13]

b. Breach of Military Discipline or Good Morals. The medical officer is called upon to decide whether or not a certain act is "wrong in itself" or "contrary to the principles of good morals".[14] The generality of this instruction has been limited by opinions in prior cases. Some acts are always regarded as breaches of military order and discipline. Thus, for example, an injury received by a soldier in an affray in which he is the aggressor is considered the result of his own misconduct and not in line of duty.[15] Even an insulting and provoking epithet by an intoxicated soldier has been held to be a sufficient breach of discipline.[16]

Loud and disorderly conduct can constitute misconduct,

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13. The wording of this regulation resembles the language used in 32 Op. Atty. Gen. 12.

14. Par. 18b(1), AR 40-1025, 12 Oct. 1940.

15. Dig. Op. JAG, 1912-40, p. 953 (JAG 54-022.1, 30 June 1915); p. 954 (JAG 220.46, 7 Jan. 1919; id., 19 Jan. 1928); SPJGA 220.46, 12 May 1942; SPJGA 220.46, 2 Jan. 1943.

16. Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 31 Dec. 1926). This is apparently true despite the rule that mere words, however threatening or insulting, do not constitute an assault. MCM, 1928, par. 149 l.

within the meaning of this rule.[17] The same is true of "horse-play" of a highly dangerous character which goes beyond the bounds of triviality, such as playing with an open knife.[18] In these instances the opinions of The Judge Advocate General sometimes state that the acts which caused the injuries constituted "disorders to the prejudice of good order and military discipline" under the 96th Article of War[19] but there appears to be no requirement that facts be established sufficient to justify conviction by court-martial.[20]

The reported cases involving acts "contrary to good morals" are few in number. Adulterous relations[21] and resort to

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17. Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 19 Jan. 1928; JAG 210.46, 4 Oct. 1937).

18. Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 24 Feb. 1928). This case might have been decided on the ground of gross negligence; see p. X - 49, infra.

19. See Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 19 Jan. 1928; id., 24 Feb. 1928; id., 31 Dec. 1926); SPJGA 220.46, 12 May 1942.

20. The measure of proof is lower in line of duty cases than in court-martial trials. See p. X - 85, infra. The commission of an offense made punishable by the Articles of War would, a fortiori, be misconduct for line of duty purposes. See, e.g., Dig. Op. JAG, 1912-40, p. 974 (JAG 220.46, 14 Feb. 1919; id., 1 Nov. 1919)(attempt to escape arrest or confinement).

21. Dig. Op. JAG, 1928, p. 15. In another apparently extreme case (Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 12 Jan. 1928)) where the conduct of an enlisted man with a married woman aroused a suspicion on the part of the husband that their relations were improper and resulted in the fatal shooting of

"a house of questionable reputation"[22] have been held to be misconduct.

c. Violation of Civil Law. The technical violation of a civil statute or of a rule of civil common law is not conclusive on the issue of misconduct.[23] It has been argued that obedience of a specific military command may sometimes necessitate such a violation.[24] Consideration has also been given to the fact that the statute may be unknown to the soldier at the time of the occurrence.[25]

On the other hand the violation of certain types of civil statutes has been held to indicate such a reckless disregard of law as to be misconduct. This tendency has been especially

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21. (cont.)
the soldier, it was held that, regardless of whether there had in fact been improper relations, the death was the result of the soldier's own "wilful misconduct".

22. Dig. Op. JAG, 1912-40, p. 955 (JAG 220.46, 26 Jan. 1928).

23. Dig. Op. JAG, 1912-40, p. 965 (JAG 220.46, 17 June 1919; id., 2 Aug. 1919); Ops. JAG, 1918, p. 1006-1009. See also SPJGA 220.46, 2 June 1942, involving the violation of a South Carolina law prohibiting the boarding of moving freight trains and said to have been designed to prevent fraud against the railroads.

24. Ops. JAG, 1918, p. 1006-1009.

25. 1929 M/S Ops. JAG, No. 25, p. 74. But cf. Dig. Op. JAG, 1912-40, p. 961 (JAG 210.46, 11 Dec. 1928) involving a violation of "three State laws enacted in the interest of safety which the officer must be presumed to have known".

marked in cases involving traffic and other safety measures designed to prevent such injuries as were there involved.[26] In these cases the acts, which are incidentally violative of civil law, may also be found to constitute gross or wilful negligence or, under some circumstances, a "disorder to the prejudice of good order and military discipline" or "contrary to the principles of good morals".

Some opinions have made a distinction between an act malum in se and an act simply malum prohibitum.[27] Here again, no sharp line of demarcation can be drawn and the decision rests largely upon a value judgment as to the impropriety of the particular conduct.

d. Gross Negligence. Under the terms of the Army Regulations injury or disease is not incurred in line of duty if it "occurred in consequence of wilful neglect or misconduct".[28]

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26. Dig. Op. JAG, 1912-40, p. 961 (JAG 210.46, 11 Dec. 1928); p. 962 (JAG 220.46, 31 May 1929); JAG 220.46, 29 Sept. 1941. Here, too, unless the injury is the proximate result of the violation it is not removed from line of duty. SPJGA 1943/-7153, 21 May 1943; SPJGA 1943/526, 8 Jan. 1943; JAG 326.21, 12 Sept. 1939.

27. 1929 M/S Op. JAG No. 25, p. 74; Dig. Op. JAG, 1912-40, p. 962 (JAG 220.46, 31 May 1929). Par. 18b(1), AR 40-1025, 12 Oct. 1940, includes within the meaning of misconduct "an act of commission or omission wrong in itself".

28. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

Somewhat redundantly, misconduct is then defined as including "gross negligence" and "gross carelessness".[29]

Simple negligence alone does not remove from line of duty.[30] Only when the act is so grossly negligent as to indicate reckless disregard of the reasonable standards of care, does it come within the ban.[31]

A variety of adjectives has been employed to characterize the degree of negligence necessary to constitute a ground for disqualification. Thus the words "gross", "culpable", "wilful" and "reckless" have all found expression in the opinions and the interchangeable use of different terms has caused some apparent confusion.[32] It is agreed, however, that a negligent act is

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29. Par. 18b(1), AR 40-1025, 12 Oct. 1940.

30. Dig. Op. JAG, 1912-40, p. 953 (JAG 220.46, 3 Apr. 1940); p. 957 (JAG 220.46, 3 Mar. 1919); p. 958 (JAG 220.4, 7 Oct. 1918; JAG 220.46, 21 Jan. 1919; id., 2 July 1919); p. 959 (JAG 220.46, 18 Oct. 1919; id., 22 Sept. 1928; id., 17 June 1919; id., 27 Aug. 1919); p. 960 (JAG 220.4, 4 Nov. 1918; JAG 220.46, 9 Nov. 1928); p. 962 (JAG 220.46, 4 Aug. 1919; id., 8 Dec. 1932); p. 963 (JAG 54-022, 7 Oct. 1913; JAG 220.46, 16 Nov. 1919); p. 964 (JAG 220.46, 6 Aug. 1919); SPJGA 1943/653, 13 Jan. 1943.

31. Dig. Op. JAG, 1912-40, p. 956 (JAG 210.46, 5 Dec. 1930); p. 958 (JAG 220.46, 16 Dec. 1925); p. 961 (JAG 210.46, 9 Sept. 1929; id., 13 Nov. 1931); p. 970 (JAG 220.46, 29 Aug. 1929).

32. In Dig. Op. JAG, 1918, pp. 1006-1009, it is said that "error of judgment, failure to avoid known dangers when engrossed in work, contributory negligence, however gross, if without the element of wilfulness resulting in disability or death, do not remove the soldier from the line of duty".

"tantamount to misconduct" when it is so reckless and inconsistent with the exercise of care that it partakes of the nature of a wilful or deliberate, wrongful act. When a negligent act is also a violation of military regulations[33] or of civil safety laws[34] or is combined with a condition of extreme intoxication,[35] a finding of gross negligence amounting to misconduct is clearly justified.

Close cases are frequently presented and different officers, in applying the same rule to the same or similar facts, may reach different conclusions.[36] But divergence in judgment as to the degree of negligence does not in any way negative the existence of the general rule.

e. Intoxication. The mere drinking of intoxicating liquor violates no law and does not in itself constitute misconduct.[37] Thus, when a soldier on furlough drank a pint of liquor and died because of unknown poison placed therein by an unknown

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33. Dig. Op. JAG, 1912-40, p. 956 (JAG 210.46, 5 Dec. 1930).

34. Dig. Op. JAG, 1912-40, p. 961 (JAG 210.46, 11 Dec. 1928); p. 962 (JAG 220.46, 31 May 1929).

35. Dig. Op. JAG, 1912-40, p. 961 (JAG 210.46, 9 Sept. 1929; id., 13 Nov. 1931).

36. Compare, e.g., Dig. Op. JAG, 1912-40, p. 958 (JAG 220.46, 16 Dec. 1925) with SPJGA 1943/653, 13 Jan. 1943.

37. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.46, 16 Feb. 1932); Nekoosa-Edwards Paper Co. v. Industrial Comm., 154 Wis. 105; MS. Op. Atty. Gen., 20 Jan. 1931.

person or persons, his death was regarded as having been incurred in line of duty and not the result of his own misconduct.[38]

It is often stated in the opinions that "voluntary intoxication ordinarily constitutes wilful misconduct".[39] Analysis of the cases reveals, however, that intoxication is generally held to be misconduct per se when it brings about acts such as insulting language [40] or disorderly conduct[41] or causes wanton negligence.[42] In this type of case as well as any other relating to the issue of misconduct, unless the disability is proximately caused by the condition of intoxication, it is not "the result of his own misconduct" and is not for that reason removed from line of duty.[43]

The presumption of misconduct from conditions due to chronic alcoholism, provided for in AR 40-1025, has already been

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38. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.46, 16 Feb. 1932).

39. See, e.g., Dig. Op. JAG, 1912-40, p. 971 (JAG 220.46, 7 May 1912); p. 964 (JAG 220.46, 15 Oct. 1919); 1932 MS. Op. JAG, 16 Feb. 1932; id., 18 Nov. 1932.

40. Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 31 Dec. 1926).

41. Dig. Op. JAG, 1912-40, p. 954 (JAG 210.46, 4 Oct. 1937).

42. Dig. Op. JAG, 1912-40, p. 957 (JAG 220.4, 21 Sept. 1918); p. 970 (JAG 220.46, 29 Aug. 1929).

43. Dig. Op. JAG, 1912-40, p. 955 (JAG 220.46, 6 Dec. 1932; id., 14 Dec. 1932); p. 956 (JAG 220.46, 5 Oct. 1928; JAG 210.46, 7 May 1919); p. 964 (JAG 220.46, 15 Oct. 1919).

adverted to.[44]

f. Suicide. The legal principles which control the determination of line of duty status in cases of disease or injury are in all respects applicable to instances in which death results therefrom. The administrative procedure is somewhat different[45] but the question whether death occurred in line of duty is generally answered by reference to the rules herein discussed with respect to disability cases. The additional issue of suicide in death cases, however, requires independent treatment.

Paragraph 18e of Army Regulations 600-550[46] contains a rather full analysis of suicide in its relation to line of duty. Suicide is defined as "the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind". Suicide constitutes misconduct and death resulting therefrom is not in line of duty.

If the person who takes his own life is mentally unsound[47]

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44. See p. X - 40, supra.

45. See Chapter 3, p. X - 80, infra.

46. 14 May 1943.

47. "Mental unsoundness" is defined (par. 18e(2)) as the inability "to realize the direct physical or moral consequences of the act" or the inability of one having such realization to refrain from the act because of "derangement of the reasoning or volitionary faculties".

at the time, the suicide is not in itself misconduct. If the mental unsoundness was due to misconduct of the deceased then his death was due to such misconduct and was not in line of duty. If the mental unsoundess was innocently acquired then death was not due to misconduct and was in line of duty unless removed from that status by some disqualifying factor other than misconduct. It is apparent that the rule as to mental irresponsibility represents a limitation upon the general definition of misconduct[48] which includes "self-infliction of wounds".

The presumption against suicide has been applied by the courts[49] and by The Judge Advocate General.[50] Some affirmative evidence of self-destruction is necessary and a mere possibility or suspicion of suicide is not sufficient.

If there is such substantial proof, however, there must be some evidence of mental irresponsibility to prevent a finding of misconduct. Such mental unsoundness is not to be presumed from the mere fact of the suicide even in the absence of any

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48. Par. 18b(1), AR 40-1025, 12 Oct. 1940.

49. See Travelers' Ins. Co. v. Allen, 237 Fed. 78.

50. Dig. Op. JAG, 1912-40, p. 967-8 (JAG 220.46, 16 May 1919); p. 968 (JAG 247, 15 May 1933); SPJGA 220.461, 28 June 1942; SPJGA 220.46, 7 Sept. 1942; SPJGA 1942/4873, 18 Oct. 1942; Sup. VI, Dig. Op. JAG, 1912-30, p. 20, sec. 459a.

showing of motive.[51] On the other hand in view of "the natural repugnance of any sane man against taking his own life, it should ordinarily require very little definite proof of actual unsoundness of mind, in addition to the fact of actual or attempted self-destruction, to justify a finding of mental irresponsibility".[52]

This requirement of a minimum of proof of mental unsoundness is amply borne out by the reported cases. Symptoms in cases involving officers, no more serious than worry and inability to concentrate on work,[53] nervousness, absent-mindedness and depression[54] and insomnia and irritability,[55] have been held sufficient basis for findings of mental irresponsibility. The Judge Advocate General has even indicated some impatience with the technical jargon of abnormal psychology when there is some evidence to

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51. Dig. Op. JAG, 1912-40, p. 967 (JAG 220.4, 23 Aug. 1918); Dig. Op. JAG, 1912-30, sec. 456 (JAG 210.46, 12 Aug. 1925); par. 18e(4), AR 600-550, 14 May 1943.

52. Par. 18e(4), AR 600-550, 14 May 1943.

53. Dig. Op. JAG, 1912-40, p. 968-9 (JAG 210.46, 10 Jan. 1928).

54. Dig. Op. JAG, 1912-40, p. 969 (JAG 210.46, 10 Jan. 1928).

55. Dig. Op. JAG, 1912-40, p. 969 (JAG 220.46, 21 Jan. 1928). But cf. the earier case (p. 967 (JAG 220.4, 23 Aug. 1918)) where evidence that a soldier "kept by himself" and "did not enter into the usual life of the camp" was held insufficient to establish mental disorder.

support the finding.[56]

The Regulations also contain a practical presumption or "rule-of-thumb" to the effect that mental unsoundness developed after 6 months' continuous service is to be considered as of service origin and incurred in line of duty in the absence of evidence to the contrary.[57]

6. Absence on Leave, Furlough or Pass

Prior to the decision of the Court of Claims in Moore v. United States[1] in 1913 it was generally held that injury or disease suffered on leave or furlough was not incurred in line of duty.[2] Even by that time, however, many exceptions had become established: disability could be in line of duty if incur-

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56. Dig. Op. JAG, 1912-40, p. 969 (JAG 210.46, 29 Apr. 1929) (" * * * whatever technical term be applied to the mental condition of deceased at the time of his suicide act * * *").

57. Par. 18e(2), AR 600-550, 14 May 1943.

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1. 48 Ct. Cl. 110.

2. Dig. Op. JAG, 1912, p. 8 (C. 25634, 1 Oct. 1909; C. 19323, 24 Feb. 1906); p. 654 (C. 23666, 7 Dec. 1908); p. 689-690 (C. 13357, 29 Sept. 1902; C. 26949, 23 June 1910). This rule was incorporated into the act of 12 April 1866 defining line of duty and excluding wounds received while on furlough or leave of absence.

red while on pass for not more than 24 hours,[3] on sick furlough,[4] on veteran furlough[5] or, although on leave or furlough, when en route to a duty station or to a place for reporting.[6] As far back as 1855 Attorney General Cushing had stated that a soldier might be called upon to perform an act of military duty while on leave or furlough and would thus return to "the line of duty".[7]

The Court of Claims expressed the then revolutionary view that "the provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command". This ruling was followed by the opinions of The Judge Advocate General[8] and the present Army Regulations make no reference to absence with authority as a dis-

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3. Dig. Op. JAG, 1912, p. 687 (C. 15600, 10 Dec. 1903; C. 2658, 16 Oct. 1896; C. 17202, 1 Dec. 1902; C. 23666, 21 Sept. 1909; id., 8 Sept. 1910; C. 24393, 7 May 1910; id., 1 June 1910; id., 3 Oct. 1910; C. 26949, 23 June 1910).

4. Dig. Op. JAG, 1912, p. 690 (P. 44, 462, Jan. 1891).

5. Dig. Op. JAG, 1912, p. 690 (P. 47, 448, June, 1891).

6. Dig. Op. JAG, 1912, p. 688 (C. 2658, 14 Oct. 1896).

7. 7 Op. Atty. Gen. 149, 163.

8. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.4, 28 Oct. 1918; JAG 220.8, 23 Feb. 1918; JAG 220.46, 16 Feb. 1932).

qualifying factor.[9]

Of course the fact that the injury or disease was incurred while on authorized leave does not conclusively establish its line of duty status. The incapacity may still fall within one or more of the classes of cases excluded from line of duty.

7. Absence Without Leave

The basic regulations provide that each injury or disease is to be reported as not in line of duty if it "was contracted while absent from duty without permission".[1] This rule has been echoed in the reported opinions and it is uniformly held that disability or death due to injury or disease contracted while A.W.O.L. is out of line of duty for all purposes.[2]

Certain exceptional cases should here be noted:

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9. Par. 17c, AR 40-1030, 6 June 1924, now superseded, specifically required the fact of absence with leave to be mentioned in the medical officer's report. In pension cases under the jurisdiction of the Administrator of Veterans' Affairs, the burden of proof shifts to the claimant when injury or disease occurs while on leave. Sec. VIII, Veterans' Regulation No. 10; M.L. 1939, sec. 1144.

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1. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

2. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.4, 9 Nov. 1918; JAG 210.46, 16 Apr. 1931; id., 6 Jan. 1932); p. 972 (JAG 220.46, 11 Dec. 1918); p. 973 (JAG 220.46, 8 Mar. 1928; id., 30 Jan. 1928; id., 17 Apr. 1930).

(a) When death occurs while absent without leave but results from a disease of service origin, death is regarded as having occurred in line of duty. [3]

(b) When a soldier is mentally irresponsible at the time he goes absent without leave and dies while in that status, his death is considered as having occurred in line of duty. [4]

(c) When, in a rather unusual early case, a sergeant, while absent without permission, was killed while endeavoring to quell a quarrel between some enlisted men and a party of civilians, it was held that, since at the time of the shooting he was acting in discharge of his duty under AW 24 (now AW 68), he was at the time in line of duty. [5]

If absence without leave removes disability and death from line of duty, a fortiori, absence in desertion is a disqualifying circumstance.[6] Proof of intent not to return, to shirk important service or to avoid hazardous duty, is unnecessary in a line of duty case but may be the decisive factor in the interpretation of the term "in active service" as it is used, for example, in the appropriation act providing for the burial of men who die in active service.[7]

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3. Dig. Op. JAG, 1912-40, p. 972 (JAG 220.46, 25 July 1919); Dig. Op. JAG, 1912-30, sec. 469 (JAG 220.46, 26 April 1919).

4. Dig. Op. JAG, 1912-40, p. 972-973 (JAG 220.46, 15 Mar. 1923).

5. Dig. Op. JAG, 1912-40, p. 972 (JAG 42-310, 30 Nov. 1912).

6. Dig. Op. JAG, 1912-40, p. 973 (JAG 220.46, 7 Apr. 1919).

7. See 38 Op. Atty. Gen. 239, holding that the terms "in active service" or "on the active list" include men absent without leave but not deserters.

Absence without permission brings disease or injury out of line of duty if it is merely coincident in time with such disease or injury. No causation need be proved. The rule applies "irrespective of the manner or circumstances" under which the disability or death occurs, even if it is accidental.[8]

On the other hand, the mere fact of the absence without leave is not decisive of the question whether the disease or injury was "the result of his own misconduct". Absence without leave is misconduct but it is difficult to imagine a situation in which it could be the producing or proximate cause of the incapacity. A showing of absence without authority is insufficient in itself, lacking a further showing of causal relationship, to serve as the basis for the conclusion that the incapacity was the "result" of misconduct.[9]

8. Arrest and Confinement

The fact that a soldier is a military prisoner when he suffers injury or death does not in itself place him out of the

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8. Dig. Op. JAG, 1912-40, p. 971 (JAG 220.4, 9 Nov. 1918; JAG 210.46, 6 Jan. 1932).

9. See Dig. Op. JAG, 1912-40, p. 971 (JAG 210.46, 6 Jan. 1932); p. 973 (JAG 220.46, 17 Apr. 1930); SPJGA 220.46, 25 July 1942. In 36 Op. Atty. Gen. 478, it was held that time lost due to injuries sustained while absent without leave did not have to be made good under AW 107 since "the injuries cannot be said to be the result of their tardiness".

line of duty.[1] Even before the turn of the century The Judge Advocate General ruled that a military prisoner who incurred disability while aiding in the suppression of a mutiny, while at work or simply as a result of the confinement would still retain line of duty status.[2]

The Attorney General stated in 1855 that it would be unjust to add to the legal sentence of a court-martial the serious indirect aggravation of incapacity for pension.[3] In a later case a soldier confined in the guardhouse brooded over his confinement until he became insane. The Judge Advocate General stated that "to urge that it was not in line of duty because he was confined due to his own misconduct, would be no more reasonable than to hold that he was confined because of original sin".[4]

In short, the misconduct which brought about the confinement does not carry over to the disability and submission to punishment is regarded as a part of the military duty of the

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1. Dig. Op. JAG 1912-40, p. 973 (JAG 220.46, 10 June 1919); p. 974 (JAG 220.46, 31 Aug. 1928); SPJGA 220.46, 4 May 1942.

2. Dig. Op. JAG, 1912, p. 687 (C. 2658, 15 Oct. 1890; C. 3063, 1 Apr. 1897). See also Dig. Op. JAG, 1912, p. 687 (C. 25809, 20 Nov. 1909); p. 689 (R. 41, 256, 10 June 1878; C. 3063, 31 Mar. 1897; C. 14627, 8 May 1903).

3. 7 Op. Atty. Gen. 149, 164-5

4. Dig. Op. JAG, 1912, p. 687 (C. 25809, 20 Nov. 1909).

soldier. No distinction appears to be made in the War Department between military confinement pending trial and after sentence but Veterans' Regulation No. 10 expressly excludes from line of duty injury or disease suffered while confined under sentence of court-martial or civil court or while resisting lawful arrest.[5]

When disease was contracted during confinement by civil authorities, although not as a result of a breach of prison discipline, it was held that the death was not incurred in line of duty but not as the result of his own misconduct.[6] The Judge Advocate General distinguished the cases involving military confinement and, despite the absence of a finding of misconduct as a proximate cause of disease, apparently considered the surrender to civil authorities and the confinement and plea of guilty a sufficient severance of connection with the military service to remove the death from line of duty.

Clearly when a prisoner is injured or killed while attempting to escape, his misconduct is the proximate cause of the incapacity and can not be regarded as in line of duty[7] unless

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5. M.L. 1939, sec. 1144.

6. Dig. Op. JAG 1912-40, p. 974 (JAG 220.46, 8 April 1926).

7. Dig. Op. JAG, 1912-40, p. 974 (JAG 220.46, 14 Feb. 1919; id., 1 Nov. 1919).

it is due to mental irresponsibility.[8]

A prisoner of war is in line of duty and in the absence of any information concerning his death the fundamental presumption operates in favor of a finding that he died in line of duty and not as a result of his own misconduct.[9]

9. Private Business, Employment or Avocation

Army Regulations exclude from the scope of line of duty injury or disease which "occurred as the result of something which he was doing in pursuance of a private avocation or business".[1] This is the same wording employed by the Attorney General in 1919 in his draft of regulations for the Secretary of the Treasury.[2] The rule has been uniformly applied by all governmental agencies: when a soldier engages in a purely personal and private pursuit he is regarded as having stepped outside the line of duty and if, in connection with such private endeavor, he is injured or contracts disease, he is not entitled to the rights, privileges and immunities granted or withheld by the line of duty statutes.

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8. Dig. Op. JAG, 1912-40, p. 973-4 (JAG 220.8, 19 Feb. 1918).

9. Dig. Op. JAG, 1912-40, p. 974 (JAG 220.491, 12 Feb. 1919).

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1. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

2. 32 Op. Atty. Gen. 12.

Thus, in a typical case, a soldier, while absent on furlough, took employment with a railroad company and while engaged in this employment he was killed. His death was held not to be in line of duty since it occurred while he was "indulging in an occupation for private gain".[3]

In another case an officer of the Air Corps who had been granted authority to fly privately owned aircraft for hire or reward was accidentally killed while so engaged. The Judge Advocate General held his death not to be in line of duty[4] but a recent change of Army Regulations relating to the piloting of other than Government owned aircraft would under certain conditions require a different result.[5]

In several cases it has been decided that the unauthorized use of a Government vehicle for personal business ipso facto removes the user from line of duty status.[6]

The question has frequently arisen whether participation

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3. Dig. Op. JAG, 1912-40, p. 970-971 (JAG 220.46, 28 Feb. 1923).

4. Dig. Op. JAG, 1912-40, p. 955 (JAG 220.46, 18 May 1927; JAG 210.46, 14 Sept. 1929).

5. Sec. II, Cir. 126, WD, 1940, changing par. 11a, AR 95-5, 21 April 1930.

6. Dig. Op. JAG, 1912-40, p. 962 (JAG 220.46, 8 Dec. 1932); SPJGA 1943/526, 8 Jan. 1943; SPJGA 1942/2423, 9 June 1942, JAG 220.46, Sept. 1928; JAG 220.46, 12 Oct. 1920.

in the various forms of recreation and athletic exercise brings about a severance of the necessary service connection. It appears well established that normal and proper recreation either on or off the post will not remove from line of duty.[7] Injury suffered in an authorized boxing contest,[8] death by accident on a hunting trip authorized by a "hunting pass"[9] and death incurred as the result of a football game,[10] have been held in line of duty. The military policy to encourage manly sports and healthful exercise will not, however, extend the scope of line of duty to include injuries sustained in a private automobile racing contest[11] or in a wrestling match at a carnival,[12] especially when a large element of hazard is present. The factor of remuneration is immaterial in these cases: in the boxing case above mentioned the soldier received a small amount of money in addition to his Army pay while in the automobile racing case no money was involved.

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7. Dig. Op. JAG, 1912-40, p. 966-7 (JAG 42-520, 24 Mar. 1917) (differing with a contrary conclusion of the Pension Bureau).

8. Dig. Op. JAG, 1912-40, p. 967 (JAG 220.46, 6 Apr. 1928).

9. Dig. Op. JAG, 1912-40, p. 970 (JAG 54-020, 29 Mar. 1915).

10. Dig. Op. JAG, 1912, p. 654 (C. 23666, 3 Feb. 1909; id., 11 Mar. 1909).

11. Dig. Op. JAG, 1912-40, p. 967 (JAG 220.46, 18 May 1927; id., 29 July 1929).

12. 1929 M/S Ops. JAG, No. 41.

10. Relations Unconnected With the Service

In 1920 the Attorney General, expressing the belief that the previous definition was incomplete, added another "intervening and producing cause" which would operate to remove injury or disease from line of duty, as follows:

> "Something which grows out of relations unconnected with the service or is not the logical incident or provable effect of duty in the service."[1]

This proviso has been incorporated verbatim in the Army Regulations.[2]

The precise meaning of this disqualifying factor has never been clearly stated and its present scope and application are quite uncertain. Obviously, if the clause is given a literal interpretation, it represents a return to the view expressed by Attorney General Cushing in 1855 requiring proof of direct causal connection between military service and death or disability. Carried forward logically, it would cause all disease and injury suffered while on leave or furlough to be regarded as not incurred in line of duty. And the narrow view had in 1918 been expressly repudiated by The Judge Advocate General.[3]

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1. 32 Op. Atty. Gen. 193.

2. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

3. Dig. Op. JAG, 1912-40, p. 952 (JAG 220.46, 22 Nov. 1918).

An analysis of the very few pertinent cases reveals a current tendency not to apply this rule at all but rather to resolve all close questions in terms of one or more of the other grounds for removal from line of duty.

The opinion of the Attorney General which first announced the test[4] included an adjudication of two cases purportedly to illustrate the reason for the test. In one case a female yeoman of the Naval Reserve upon her return from overseas was killed by her husband who thereupon committed suicide and left notes indicating that he had committed the murder because he believed his wife unfaithful. The yeoman's death was held to be not in line of duty since it grew out of her domestic, as distinct from her naval, relations. In the other case a naval officer on leave was injured by a pistol shot in attempting to assist a woman in distress on his return from Coney Island to his home. This injury was held outside of line of duty, the opinion stating:

> "It /the injury/ resulted from the performance by him of a duty which he owed not as a soldier or as an incident to his military or naval duties but as a member of society."

The case of the female yeoman has its counterpart in

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4. 32 Op. Atty. Gen. 193.

later opinion of The Judge Advocate General[5] in which the conduct of an enlisted man with a married woman aroused the suspicions of the husband and resulted in a fatal shooting of the soldier by the husband. It was held that "regardless of whether there had in fact been improper relations" the death grew out of relations unconnected with the service and was not incurred in line of duty. But the opinion also held that death was due to the wilful misconduct of the soldier and a very recent opinion[6] explains the case on the misconduct theory, i.e., that the soldier's conduct in continuing to associate with the woman was improper even if there had been no adulterous relations. Moreover, it has been held that injuries suffered in an altercation arising out of rivalry for the affections of a single woman, in the absence of misconduct or other disqualifying cause, were incurred in line of duty.[7]

The ruling in the case of the gallant naval officer is also in accord with early opinions of The Judge Advocate General[8] which state that disability or loss of life while trying to save

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5. Dig. Op. JAG, 1912-40, p. 954 (JAG 220.46, 12 Jan. 1928).

6. SPJGA 1943/7028, 25 May 1943.

7. SPJGA 210.46, 14 Sept. 1942; id., 12 Aug. 1929.

8. Dig. Op. JAG, 1912, p. 686 (C. 101, 28 July 1894; id., 12423, 19 Apr. 1902).

another's life is outside of the line of duty. Yet in a more recent opinion[9] the contrary view was adopted and an injury accidentally sustained while assisting others to extinguish a fire in a rural community was held to be in line of duty. The office pointed out that failure to render such assistance would have reflected unfavorably upon the service and:

> " * * * while the act in which he was engaged when injured was not incident to his military status he did not thereby step out of the line of his duty as a soldier." (underscoring supplied)

This opinion appears to be completely at variance with the standard as it appears in Army Regulations.

One further case requires consideration in this connection. When a soldier was surrendered to civil authorities for a criminal offense to which he confessed and pleaded guilty, and, prior to trial, died of a disease contracted subsequent to his surrender, it was held that his death was not in line of duty but not the result of his own misconduct.[10] The opinion discloses no ground other than that "the confinement was not military but civil". Misconduct was expressly negatived as the proximate cause of the disease and the decision can be explained only by reference to this "incident of service" standard or by rough

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9. Dig. Op. JAG, 1912-40, p. 970 (JAG 220.46, 15 Sept. 1928).

10. Dig. Op. JAG, 1912-40, p. 974 (JAG 220.46, 8 Apr. 1926).

analogy to the rule that absence without leave automatically removes from line of duty.[11]

It is submitted that the illustrative cases contained in the opinion of the Attorney General in 1920 would now be decided otherwise. The reported opinions appear to indicate that the standard of connection with or incidence of the service is rarely, if ever, applied in present day line of duty cases. To the extent that it remains a factor to be considered, no attempt has apparently been made to limit its application or to reconcile it with the remainder of the body of law in this field.

11. Disease or Injury Contracted Before Entry Into Service

It has long been recognized that disease or injury which existed prior to entry into the military service cannot be regarded as having been incurred in line of duty even if the symptoms appear for the first time after entry. This rule has been codified in Army Regulations as one of the five factors which remove disease or injury from the scope of line of duty.[1]

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11. A soldier turned over, upon application under AW 74, to the civil authorities, is not technically absent without leave while held by them under such delivery. MCM, 1928, par. 132.

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1. Par. 1e(1), AR 345-415. 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

The Moore opinion,[2] which inspired the liberal attitude toward line of duty during and since World War I, contained a statement, seemingly unnecessary to the decision, to the effect that it was immaterial when and where the germs of disease were contracted. This view has not been followed in the military administration of the subject and the earlier holding of Rhodes v. United States[3] still serves as the basic statement of the rule.

The Army Regulations governing the making of line of duty entries by medical officers contain a rather comprehensive series of instructions for the determination of the date of origin of diseases and injuries. It is first provided that military records and the medical history are to be considered along with the usual clinical and pathological course of the condition and the reporting officers are warned that the symptoms of some diseases and conditions appear only after many months or even years.[4]

The presumption contained in Veterans' Regulation No. 1 (a)[5] holding every person employed in the military service for

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2. 48 Ct. Cl. 110.

3. (CCA, 8th) 79 Fed. 740.

4. Pars. 18a(1)(a) and 18a(1)(c), C 1, 21 Aug. 1942, AR 40-1025, 12 Oct. 1940.

5. Veterans' Regulation No. 1(a), par. 1(a), Part II (M.L. 1939, sec. 1140).

6 months or more to have been prima facie in sound condition when enrolled for service, is set out in the Army Regulations and paraphrased for purposes of Army administration.[6] The same presumption, without the 6 months' limitation, had formerly been employed in connection with the earlier War Risk Insurance Act.[7]

In addition to these general instructions there are several special rules set forth which are applicable to certain special conditions. In tuberculosis cases the 6 month presumption is variously applied according to the nature and stage of the disease.[8] Other statements of policy and rules based on medical experience are provided with respect to certain psychoses and mental ailments,[9] certain chronic and degenerative diseases[10] and hernia.[11] A similar six month rule is provided as to mental irresponsibility in suicide cases.[12]

If death or any untoward effect is the direct result of

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6. Par. 18a(1)(b), C 1, 21 Aug. 1942, AR 40-1025, 12 Oct. 1940.
7. See Dig. Op. JAG, 1912-40, p. 968 (JAG 220.46, 24 Jan. 1919).
8. Par. 18b(4), AR 40-1025, 12 Oct. 1940.
9. Par. 18b(5), C 1, 21 Aug. 1942, AR 40-1025, 12 Oct. 1940.
10. Par. 18b(6), id.
11. Par. 18b(7), id.
12. Par. 18e(2), AR 600-550, 14 May 1943. See p. X - 56, supra.

treatment or operation and not to the usual course or natural progress of the ailment, it will be regarded as having occurred in line of duty, regardless of the line of duty status of the original injury or disease.[13]

12. Proximate Cause

The doctrine of proximate cause figures prominently throughout the law of line of duty. In all cases involving misconduct the soldier's rights under the line of duty statutes will not be adversely affected unless the death or disability is proximately caused by the misconduct in question.[1] A similar showing of causation is required in order to remove from line of duty disease or injury allegedly incurred as a result of something done in pursuance of a private avocation or business or growing out of relations "unconnected with the service". Injury or disease contracted while absent without leave, on the other hand, requires no showing of proximate cause since that status is an automatic disqualification.

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13. Par. 18b(2)(a), AR 40-1025, 12 Oct. 1940. See Dig. Op. JAG, 1912-40, p. 969 (JAG 54-011, 11 Jan. 1913); 38 Op. Atty. Gen. 65.

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1. But cf. Veterans' Regulation No. 10 (M.L. 1939, sec. 1144) in which disobedience of orders, if merely coincident in time, would appear to be sufficient.

There exists a certain amount of confusion as to the meaning of the term "proximate cause". In the first place, a varied terminology is to be found in the literature of the subject: the one basic paragraph of the Army Regulations uses "result of", "grew out of" and "consequence of", all presumably to the same effect;[2] and The Judge Advocate General's opinions include such other synonyms as "incident of",[3] "primary cause",[4] "direct cause"[5] and "moving cause".[6]

Regardless of terminology, it is uniformly held that when misconduct is only a "contributory" cause of death or disability, and not the proximate cause, the death or disability is not the result of misconduct and is in line of duty unless otherwise excluded.[7] Formerly the use of the term "contributory negligence" caused some confusion as to the requisite causal

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2. Par. 1e(1), AR 345-415, 23 Nov. 1933; par. 18a, AR 40-1025, 12 Oct. 1940.

3. Dig. Op. JAG, 1912-40, p. 955 (JAG 220.46, 26 Jan. 1928).

4. Dig. Op. JAG, 1912-40, p. 956 (JAG 220.46, 5 Oct. 1928).

5. Dig. Op. JAG, 1912-40, p. 953 (JAG 220.46, 3 Apr. 1940); p. 962 (JAG 220.46, 7 Apr. 1919).

6. Dig. Op. JAG, 1912-40, p. 953 (JAG 220.46, 3 Apr. 1940).

7. Dig. Op. JAG, 1912-40, p. 953 (JAG 220.46, 3 Apr. 1940); JAG 220.46, 10 May 1938; JAG 220.46, 20 Sept. 1941; SPJGA 1942/-5816, 11 Dec. 1942.

relationship in these cases.[8] The recent change in AR 345-415[9] which provides that certain injuries are to be considered in line of duty "unless misconduct or gross negligence is a contributory factor", does not alter the present rule since it serves simply as a procedural mechanism for the solution of the clear cases. Where misconduct is shown to be a contributory factor an investigating officer must still decide if it was the proximate cause.

Civilian courts and legal authorities have also encountered considerable difficulty in arriving at a definition of proximate cause which may be universally applied. Certainly the logician's definition has little utility for the lawyer.[10] One scholar, after analyzing the better known rules, wrote that:

> "The question of causative relation is in reality one of fact and degree, and all attempts hitherto made at laying down universal tests of a more and more specific nature have resulted in propounding rules which are demonstrably erroneous."[11]

He concluded that the only workable definition of proximate cause

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8. See, e.g., Dig. Op. JAG, 1912, p. 688 (C. 2474, 3 Aug. 1896); p. 689 (C. 13077, 26 Aug. 1902; C. 2474, 3 Aug. 1896).

9. C 1, 10 Nov. 1942.

10. Pollock's comment (Torts, 6th Ed., p. 36) that "the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause", is perhaps doubly appropriate in reference to the soldier.

11. Smith, Legal Cause in Actions for Tort, Selected Essays on the Law of Torts, p. 719.

despite its vagueness, was "a substantial factor in producing the damage complained of".[12]

The recent Judge Advocate General opinions involving proximate cause, of which there are many, do not undertake to analyze the term closely but they confirm the view that the question of causation is one of "fact and degree" and is not susceptible of convenient, specific definition.

CHAPTER 3 - PROCEDURAL ASPECTS OF LINE OF DUTY

1. Reports of Disease or Injury

The procedure for ascertaining and reporting facts and findings as to line of duty status is controlled by Army Regulations. AR 345-415, as changed, governs the preparation of the Daily Sick Report in which all diseases and injuries are classified according to line of duty character first by the organization or detachment commander and then by the medical officer.[1]

Formerly, in every case of injury (except battle casualties as defined in AR 40-1025[2]) which, in the opinion of the

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12. Id., p. 711.

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1. Par. 1c, 1d, AR 345-415, 23 Nov. 1933.

2. See p. X - 36, supra, and note 4.

surgeon, was likely to result in permanent disability and eventually be made the basis of a claim against the Government, the commanding officer of the station or command would convene a board of not more than three officers, at least one of them a medical officer, to investigate and report upon all the circumstances of the injury.[3] By Changes No. 1, 10 November 1942, however, two important innovations have been introduced:

(a) All injuries received while operating or riding in Government vehicles or airplanes, while on maneuvers, during authorized athletic exercises or otherwise while engaged in the execution of military duty, as well as all battle casualties, are conclusively deemed to be in line of duty unless misconduct or gross negligence is a contributory factor. As to these injuries the entries by the commanding officer and the surgeon are final and no further investigation is required.

(b) In every case of injury other than those enumerated (including injury incurred while on pass, furlough or leave) which, in the opinion of the surgeon, is likely to result in permanent disability and a claim against the Government, the commanding officer is to appoint one officer, preferably of field grade, to investigate and report upon all the circumstances. This investigating officer, who need not be a medical officer,[4] takes the place of the board of officers and submits his report on the new WD, AGO Form No 51 (Report of Investigation), dated 13 October 1942.

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3. Par. 1c(4)(b), AR 345-415, 23 Nov. 1933.

4. See SPJGA 210.46, 19 Aug. 1942. The investigating officer appointed under this paragraph may be, and in practice frequently is, the same person who is appointed claims officer pursuant to par. 7c, AR 25-20, 15 Mar. 1943, to investigate all accidents in which property has been damaged or personnel injured.

The entire procedure has in this way been streamlined. Certain clear cases are disposed of by sick book entry; investigations are undertaken by one officer; and the form of report has been simplified. When an investigation is required, it is further provided that there shall be attached to the form a certificate of the medical officer stating the extent of the injuries, the possibilities of future disability, the sobriety of the patient, whether or not he was under the influence of drugs and his mental condition when first examined; a certificate of his organization commander as to his duty status; and a synopsis of all evidence considered in the investigation.[5]

Originally the Report of Investigation, like the earlier report of board proceedings, was forwarded to The Adjutant General by the appointing authority.[6] Under Changes No. 2, dated 18 February 1943, however, the original and one copy of the completed WD, AGO Form No. 51 are sent to the commanding general of the service command who takes final action. Reports prepared outside the continental limits of the United States are still transmitted (original copies only) to The Adjutant General. There is no specific provision requiring the appointing authority

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5. Par. 1c(4)(d), C 2, 18 Feb. 1943, AR 345-415, 23 Nov. 1933.

6. Par. 1c(4)(b), AR 345-415, 23 Nov. 1933; par. 1c(4)(e), C 1, 10 Nov. 1942, AR 345-415, 23 Nov. 1933.

to take action on the report or to note his action thereon but the form itself contains a space for his approval.

This procedure is applicable only to injury cases. Diseases are classified as to line of duty status only by entry in the Daily Sick Report and by such other procedures as may be specifically provided for in particular statutes and regulations.[7]

With respect to the determination of line of duty status for the purposes of the act of 17 May 1926 (forfeiture of pay) and AW 107 (making good time lost), certain special machinery for review is provided.[8] Where the surgeon and the organization commander disagree or where the patient appeals, the case is referred to the commanding officer of the station or analogous command.[9] The person in whose case the entry in the Sick Report is made is afforded the opportunity to appear and to be heard on his objections to the entry.[10] The determination of the organization commander and the surgeon is said to be "final" except in the event of disagreement between the two or appeal by the patient,

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7. See, for example, the references to medical boards appointed to determine eligibility for retirement and discharge for disability, supra, pp. X - 12 et seq., X - 23.

8. Par. 3, AR 345-415, 23 Nov. 1933, and C 1, 10 Nov. 1942.

9. Par. 3a(1), id.

10. Par. 3f, id.

in which cases the decision of the commanding officer has the same degree of finality.[11] In the event that "new and convincing evidence" is discovered, however, the finding may be changed.[12]

In disease cases when a patient is transferred from one hospital to another and the commanding officer of the second hospital has reason to doubt the correctness of the line of duty finding or where it remains undetermined, a board of three medical officers is appointed to investigate and adjudge.[13] The change to AR 345-415, substituting a single investigating officer for the former board of officers in injury cases, has no relation to this procedure, nor does it affect the functioning of other medical boards appointed pursuant to regulations for specific statutory purposes.[14]

2. Reports of Death

The death of every person subject to military law must

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11. Par. 3a(1), id. See p. X - 85, infra.

12. Par. 3a(2), id., (citing JAG 242.4, 28 Sept. 1932). See p. X - 85, infra.

13. Par. 3b, id. When appointed by the commanding officer of a general hospital, the decision of the board is final if approved by such commanding officer; if disapproved, it goes to the War Department for final decision. When the board is appointed by the commander of a service command, Army or similar administrative authority, his action is final.

14. See note 7, supra.

be reported by the surgeon to the commanding officer and the deceased's immediate commander.[1] This report contains, inter alia, a determination as to the line of duty and misconduct question.

Formerly, an investigation was necessary whenever the commanding officer and the medical officer disagreed on these issues or the death was "due or is suspected to be due to foul play, violent or unnatural causes, or when death is sudden from unknown causes, except death from wounds or injuries received in action".[2] Pursuant to the recent revision of AR 600-550, however, these regulations were altered in two respects:

(a) There were added to the classes of cases in which no investigation need be undertaken all deaths "from wounds or injuries received in field exercises, drill, prescribed athletics, or authorized flights".[3]

(b) In place of the board of officers, a single officer, preferably of field grade, is appointed to investigate and to submit his report on WD, AGO Form No. 51.[4] This officer, who may also act as summary court for the purpose of inquest and disposition of effects, submits the same documentary evidence as is required in the case of disability due to injury[5] in addition to a

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1. Par. 2, AR 600-550, 14 May 1943. As to the special procedure in cases of deaths occurring outside the continental limits of the United States, see pars. 4, 5, AR 600-550, 14 May 1943.

2. Par. 21a, AR 600-550, 6 Mar. 1936.

3. Par. 18a(3), AR 600-550, 14 May 1943.

4. Par. 18a(1), id.

5. Ibid.; see p. X - 78, supra.

report of the post mortem examination, if required, and a copy of the findings of any coroner's inquest held over the remains.[6]

The procedure in death cases has thus been streamlined in the same manner as in cases of injuries. No distinction is made, however, between deaths due to injury and those resulting from disease.

Under current regulations, the original and three copies of WD, AGO Form No. 51 are forwarded with the action of the appointing authority noted thereon, to the commanding general of the appropriate service command for final action. He notes his action on all copies of the report and transmits the original to The Adjutant General and a copy to the Veterans Administration.[7] Reports from outside the continental limits of the United States are forwarded directly to The Adjutant General.

3. Method and Measure of Proof

The primary guide for investigating officers in the marshalling and classifying of information obtained in the course of investigation is WD, AGO Form No. 51. It calls for specific findings as to duty status, authority for absence, intoxication, condition with regard to drugs, negligence, violation of law or

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6. Pars. 18b(1), 21d, AR 600-550, 14 May 1943.

7. Par. 18f, id.

orders, gross negligence and mental soundness. At the suggestion of The Judge Advocate General[1] there were inserted in the form spaces calling for determinations as to causal relationship in cases of intoxication, indulgence in drugs or violation of law or orders.

The Army Regulations contain other evidentiary instructions. The unsubstantiated statement of the patient is not to be considered as conclusive evidence of the circumstances of an injury.[2] Under the new procedure certain certificates are to be annexed to the report and it is provided that all statements of witnesses must be sworn except that of the injured individual.[3] In death cases, moreover, the investigating officer is enjoined to make a thorough investigation of all facts leading up to and connected with the death.[4]

Although the special line of duty investigation is no longer undertaken by a board of officers, the general provisions of AR 420-5, 20 May 1940, dealing with the manner of conducting

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1. SPJGA 210.46, 19 Aug. 1942. There is no apparent reason why a finding of fact as to proximate cause is not called for with respect to par. 4(b)(gross carelessness or negligence).

2. Par. 1c(4)(a), AR 345-415, 23 Nov. 1933.

3. Par. 1c(4)(d), C 2, 18 Feb. 1943, AR 345-415, 23 Nov. 1933; par. 18a(1), AR 600-550, 14 May 1943.

4. Par. 18d, id.

and reporting investigations, are still applicable. When specific provisions relating to line of duty matters conflict with the instructions in AR 420-5, those regulations direct that the specific provisions shall govern.[5]

Some miscellaneous procedural problems have from time to time arisen in connection with boards of officers appointed to make line of duty determinations. The fact that the investigations are now undertaken by a single officer would not appear to affect the force of the opinions in these cases.

a. No one is entitled as a matter of right to be represented by counsel at a hearing before a board to determine line of duty status.[6]

b. Irregularities, such as the fact that the recorder of a line of duty board was also the investigating officer and a witness before the board, do not necessarily affect the legality of the proceedings because the board is advisory in character and acts primarily as a fact finding agency of the appointing authority.[7]

c. There is basis in at least one opinion for a re-

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5. Par. 1, AR 420-5, 20 May 1940.

6. Dig. Op. JAG, 1912-40, p. 953 (JAG 210.46, 12 July 1929); see par. 7, AR 420-5, 20 May 1940.

7. SPJGA 220.46, 14 July 1942; see par. 2, AR 420-5, 20 May 1940.

quirement of proof in line of duty cases beyond a reasonable doubt.[8] The overwhelming majority of cases, however, indicates that a mere preponderance of evidence is sufficient.[9] Inasmuch as there is no question of criminal guilt involved in any of these determinations, the reasonable doubt rule would appear to be inappropriate.

d. In several types of line of duty procedures determinations by certain officers are said to be "final".[10] The findings and recommendations by agencies subordinate to those having such final authority have advisory force only and need not be adopted.[11] Yet this finality is subject to the limitation that new evidence may be subsequently received and the approval of findings reconsidered.[12] When there has been fraud involved

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8. Dig. Op. JAG, 1912, p. 986 (C. 12992, 21 July 1902). See Dig. Op. JAG, 1912-40, p. 963-964 (JAG 220.46, 1 May 1919); par. 30c, AR 605-250, 19 Jan. 1924.

9. Dig. Op. JAG, 1912-40, p. 953 (JAG 220.46, 6 July 1933; id., 3 Apr. 1940); p. 965 (JAG 220.46, 20 Apr. 1929); p. 968 (JAG 247, 15 May 1933); JAG 220.46, 29 Sept. 1941; SPJGA 210.46, 11 Apr. 1942; SPJGA 1943/526, 8 Jan. 1943.

10. Par. 1e(1)(a), C 2, 18 Feb. 1942, AR 345-415, 23 Nov. 1933 (injury cases); par. 3a(1), AR 345-415, 23 Nov. 1933 (cases under act of 17 May 1926 or AW 107); par. 3b, AR 345-415, 23 Nov. 1933 (disease cases where medical board is appointed).

11. Par. 2, AR 420-5, 20 May 1940; JAG 220.46, 18 Nov. 1941; id., 31 Jan. 1942; SPJGA 1943/4439, 3 Apr. 1943.

12. Par. 3a(2), AR 345-415, 23 Nov. 1933; JAG 242.4, 28 Sept. 1932; JAG 220.46, 31 Jan. 1942; SPJGA 1943/4439, 3 Apr. 1943.

in the original determination the Government may sue to recover benefits improperly obtained.[13] Conversely, when a finding of misconduct is found to have been erroneously made with respect to AW 107, the Government may waive the liability imposed upon the soldier to make good time lost.[14]

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13. Rhodes v. United States, 79 Fed. 740.

14. Dig. Op. JAG, 1912-40, sec. 465(6).

REPORT OF INVESTIGATION

(Under provisions of: (par. 1c(4)(c), AR 345-415) (par. 21, AR 600-550))*

Station or command ..... Date .....

1. Person (injured) (deceased)* .....
(Name, Army serial number, grade, and organization)

.....

2. (Nature of injuries) (cause of death)* .....
(Medical diagnosis)

.....

.....

3. How incurred .....
(Complete details as to how, when, and where (injury) (death)* was incurred, including hour and date)

.....

.....

4. Investigation of the circumstances surrounding this (injury) (death)* has been made. All available witnesses were interrogated. The following pertinent facts were found to be correct:

(a) Present for duty (yes) (no)*.

(b) Absent (with) (without)* authority.

(1) Hour and date of commencement of absence .....

(2) Hour and date of termination of absence .....

(c) (Was) (was not)* within the territorial limits indicated by the authorization to be absent.

(d) (Was) (was not)* under the influence of intoxicants. The use of intoxicants (was) (was not)* the proximate cause.

(e) (Was) (was not)* under the influence of drugs. The use of drugs (was) (was not)* the proximate cause.

(f) (Was) (was not)* exercising reasonable care for his own safety.

(g) (Was) (was not)* violating a civil, moral, or military law, nor military orders or instructions, written or verbal. The violation (was) (was not)* the proximate cause.

(h) (Was) (was not)* due to gross carelessness or negligence.

(i) (Was) (was not)* mentally sound.

5. REMARKS: .....

.....

.....

.....

.....

FINDINGS

(In line of duty) (not in line of duty)*
(Not due to his own misconduct) (due to his own misconduct)*

.....
Investigating Officer.

APPROVED:

.....
Commanding officer.

* Strike out inapplicable words.

[Additional sheets may be used for extension of remarks under paragraphs 2, 3, and 5]

W.D., A.G.O. Form No. 51
October 13, 1942

16—81173-1 U. S. GOVERNMENT PRINTING OFFICE

ADDENDA

Page X - 35, line 3; page X - 63, line 9:

Sec. VI, Cir. 321, WD, 11 December 1943, announces changes in AR 345-415 and AR 40-1025 providing that injury incurred as a result of something done in pursuance of a private avocation or business will be removed from line of duty only when it is not of a class specifically encouraged or authorized by the War Department. Section IV of the same circular encourages and authorizes employment of military personnel in agriculture or essential war industries if an emergency labor shortage exists and such employment will not interfere with customary civilian employment.

Page X - 70, line 7:

A recent opinion of The Judge Advocate General (SPJGA 1943/13325, 23 Sept. 1943), holding that pregnancy of a member of the Women's Army Corps, regardless of her marital status, is not the result of misconduct but not in line of duty, appears to be based, at least in part, upon the ground that the condition "grows out of relations unconnected with the service."

Page X - 70, section 11:

Par. 1e(3), C 3, 14 July 1943, AR 345-415, 23 November 1933, provides for the entry on the Daily Sick Report of the symbols EPTE ("existed prior to enlistment") or EPTI ("existed prior to induction") in appropriate cases. It is pointed out that neither of these entries justifies the withholding of pay but that they are used to assist commanders in determining line of duty status.

ADDENDA

PART XI

BOARDS OF OFFICERS

CHAPTER 1 - GENERAL

Any commander may designate an officer of his command to assist him in the finding of facts. If the matter is of such a complex or extensive character as to require the services of more than one officer, a "board of officers" may likewise be appointed.[1] This part of the materials and of the course in Military Affairs is devoted to a brief consideration of the procedures and the legal nature of the activities of officers appointed to conduct such investigations.

There is no limit imposed by law upon the subject matters which may serve as the occasion for the appointment of investigating officers or boards. In the vast field of Army administration[2] innumerable issues of fact are raised and affirmative action is

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1. Recent changes in claims and line of duty procedure reveal a definite War Department policy in favor of assigning such investigatory duties to a single well-trained officer rather than to a board consisting of a number of less well-informed officers. See, e.g., par. 7c, AR 25-20, 15 March 1943; par. 1c(4)(c), C 1, AR 345-415, 23 Nov. 1933.

2. It is the stated aim of the War Department to shift to the administrative agencies of the Army Service Forces the responsibility for the making of investigations and thereby to relieve other Army agencies. Par. 7a(3), AR 25-20, 15 March 1943. At the same time the final authority to pass upon some types of board proceedings (e.g., line of duty, reclassification, certain types of claims cases) has been delegated to the commanding generals of service commands, thereby relieving the War Department pro tanto of the administrative burden.

ordinarily dependent upon their resolution. The commander normally relies upon his subordinates for the investigation and reporting of the relevant facts; he may wish to be guided also by their recommendations as to the nature of the action to be taken. Yet it is axiomatic that full responsibility for final action rests upon the commanding officer regardless of the reliance he places upon his advisers.

Army Regulations provide for the appointment of investigating officers or boards for certain purposes. In some instances special, detailed procedures are prescribed. Wherever the regulations do not contain specific procedural guidance, the general rules set out in AR 420-5, 20 May 1940, in all cases govern.

The chart found at the beginning of Chapter 2 offers a rough comparison of the general provisions of AR 420-5 with the corresponding procedural requirements applicable to five of the more important types of boards. Another skeleton chart follows which serves to indicate some of the other types of boards the authority for whose appointment may be found in Army Regulations.

There are also set out in Chapter 3 of this Part copies of suggested forms for use by particular types of boards of officers together with the general form of report and check list intended for use by the majority of those boards for which no specialized technique is provided. Neither the charts nor the

forms, however, should be regarded as a complete treatment of the requisites of any particular board procedure. In each case the appropriate regulations, opinions, orders and other directives should be consulted.

CHAPTER 2 - CHARTS

CHART
BOARDS OF OFFICERS

BOARD	STATUTORY AND AR BASIS	PURPOSE	APPOINTED BY	COMPOSITION	MEMBERS TO BE SENIOR IN RANK TO SUBJECT	RECORDER, HOW APPOINTED	MEMBERS TO BE SWORN	MEMBERS SUBJECT TO CHALLENGE	AUTHORITY TO ISSUE PROCESS	FEES FOR REPORTER, INTERPRETER, WITNESSES	SUBJECT ENTITLED TO COUNSEL	RECOMMENDATIONS TO BE MADE	DISPOSITION OF REPORT	REMARKS
GENERAL	AR 420-5	To ascertain facts (par. 2)	Any commanding officer.	Varies	No general legal requirement.	Usually junior member of board as constituted.	No (par. 4)	No (par. 6)	No	No	Not generally as matter of legal right (par. 7)	Yes, when required by regulations or when appropriate (par. 25).	In triplicate to convening authority (par. 28).	AR 420-5 applies in absence of statute or regulations; any specific direction controls (par. 1).
COURTS OF INQUIRY	AW 97 - 103, incl. AR 600-300	To examine into transactions of or accusations or imputations against officers or soldiers (AW 97; par. 2a).	Any C.O., preferably one with court-martial jurisdiction over person and subject matter (par. 2b).	3 or more officers, plus one recorder (AW 98; par 3a)	Yes (par. 3c)	Yes, separately appointed; has no vote. (AW 98; par. 3d)	Yes (AW 100)	Yes (AW 99; par. 11)	Yes (AW 101; par. 9a)	Yes (AW 1[illegible]; pars. 6, 7, & 9)	Yes, of subject's own selection if available (AW 99; par. 12)	No, unless specifically ordered (par. 15)	Record to convening authority. Original of proceedings with orders of reviewing authority then to TJAG. (par. 16). When President is convening authority record goes directly to TJAG (par. 16b)	Used also in procedure for classification of Regular Army officers, now suspended (AR 605-200).
RETIRING	M.L. 1939, sec. 325. AR 605-250	To determine facts of disability of officer and make findings as to extent and service connection of incapacity (par. 11).	Secretary of War (par. 4a)	Not less than 5; not more than 9. 2/5 must be medical officers (par. 4a, 4b)	Yes, except medical officers (par. 4a).	Yes, separately appointed; has no vote (par. 7).	Yes (par. 17)	Yes (par. 16)	Yes (par. 22a)	Yes (pars. 8, 9)	Yes, civil or military if available (par. 15a)	No, expressly forbidden (par. 33a)	To TAG for presentation to Secretary of War for action by President (par. 33a).	Ratio of medical officers to members present must remain at 2 to 5. If board finds incapacity it must find whether it arose as an incident of service (par. 29a).
COMMITMENT	AR 600-505	To determine whether person subject to military law is insane and whether he should be committed to St. Elizabeths Hospital (par. 2).	Officer exercising GCM jurisdiction or C.O. of a named hospital (par. 4a)	3 officers, 2 of whom must be medical officers and 1 of these 2 perferably a specialist in nervous and mental disorders (par. 4).	No (par. 5)	Yes, separately appointed; has no vote (par. 7).	Yes	Yes	No (par. 10b (1))	No (par. 10b(2))	Yes, appointed by convening authority; civil counsel at own expense (par. 11).	Yes (par. 13)	In quadruplicate to convening authority for action and transmittal in triplicate to TAG for action by Secretary of War. If he approves copy of record to hospital (pars. 15, 16).	Procedure of retiring boards adopted as far as practicable (par. 10a). No person to be directed to appear on less than 5 days written notice (par. 11).
RECLASSIFICATION	AR 605-230	To determine appropriate action when officer is assigned to duties for which he is not fitted or is unsatisfactory in his current assignment (par. 2).	CG of Service Command or Department (Pars. 9, 12).	5 or more officers plus one or more recorders. At least one line officer, one medical officer, one officer of same component of service as subject (par. 12b).	Yes, except recorder. (par. 12b)	Yes, separately appointed; has no vote (par. 12b)	Yes (par. 12c(3)).	Yes (par. 12c(3)).	No	No	Yes, of officer's own selection, if available and at no expense to Government (par. 12c (4)).	Yes, one of prescribed courses of action or other suitable action (par. 12d)	To convening authority, when recommends demotion, discharge, relief from active duty or removal from active list, record goes to TAG for formal action (par. 13).	Not to be used for disciplinary purposes or for punishment (par. 4). Board may recommend reassignment, demotion, relief from active duty, removal from active list, discharge, hospitalization, return for C-M trial or other action (par. 12d).
SECTION VIII	Sec. VIII, AR 615-360	To determine whether EM should be discharged prior to ETS for inaptitude, lack of adaptability, undesirable habits or traits of character, or for disqualification through misconduct. (par. 5la	Commanding Officer or if C.O. is also company commander then next higher commander (par. 5lc)	3 officers, if practicable, including one medical officer (par. 5le).	Yes, (board of officers in case of EM)	No AR provision; in practice the junior member acts as recorder.	No (par. 5ld(1))	No provision; see AR 420-5	No	No	No AR provision - not entitled as matter of right but should ordinarily be afforded privilege of selection.	Yes, discharge or no; if no, then recommends type of duty (par. 5ld(3))	To convening authority for approval or disapproval, then to CG of Service Command or C.O. of named gen. hospital, reception center, staging area, port of embarkation or general officer commanding administrative unit. (par. 5le).	Rules of special courts-martial assimilated as far as practicable (par. 5ld(1)). Policy is not to separate from service unless no useful service can be obtained from EM (par. 52).

CHART
ADDITIONAL TYPES OF
BOARDS OF OFFICERS
FOR WHICH PROVISION IS MADE IN
ARMY REGULATIONS

BOARD	STATUTORY AND AR BASIS	PURPOSE
Claims	AR 25-20; all claims regulations in 25 series; AR 35-6640; AR 100-64.	To investigate all accidents or incidents which may result in claims in favor of or against the Government.
Line of Duty	AR 345-415; AR 600-550.	To investigate facts of injury or death and to determine whether or not it occurred in line of duty or is the result of the misconduct of the person concerned.
Departmental (Infantry, Engineers, Quartermaster, Field Artillery, Signal Corps, etc.)	See under the respective base numbers of ARs for each arm or service.	To investigate matters of interest to the particular arm or service and to make recommendations as to policies and suggested action.
Disposition	AR 40-590; AR 40-600.	To investigate medical condition of patients and to advise the commanding officer of a hospital as to their disposition.
Examining	AR 605-5, 7, 8, 10, 20, 30, 35, 140-5 (appointment of officers); 605-40, 70, 75 (promotion of officers); 610-10, 15, 20 (warrant officers); 615-15, 150, 160 (enlisted men); 625-5 (officer candidates).	To examine and inquire into the fitness and qualification for appointment or promotion of officers, warrant officers and enlisted men.

Additional Types of Boards of Officers, etc. (cont.)

BOARD	STATUTORY AND AR BASIS	PURPOSE
Efficiency (N.G.U.S.)	Sec. 76, National Defense Act; AR 605-230.	To inquire into the capacity and general fitness of any officer or warrant officer of the National Guard for continued Federal recognition.
Misconduct, inefficiency, etc. (O.R.C.)	Par. 74c, C 1, AR 140-5.	In peacetime to investigate reports of misconduct or other unfitness on part of Reserve officers. In wartime limited to Reserve officers not on active duty.
Financial responsibility	Par. 3b, AR 35-180.	To determine financial responsibility for improper certification; convened at request of disbursing officer who made erroneous disbursements thereon.
Improper Acceptance of Enlistment	Par. 19, AR 600-750.	To investigate and determine whether or not improper enlistment was due to negligence on part of any individual connected with it.
Physical examination of National Guard units	Pars. 54, 55, 60, AR 130-10.	To examine physically all personnel of National Guard unit to be inducted into the Federal service.
Physical fitness of officers	Par. 7, AR 605-155.	To test the physical fitness of an officer in connection with physical examination.
Efficiency rating of officers	Par. 3b(2), AR 605-515.	To recommend annual and general efficiency ratings to chiefs of arms and services.

Additional types of Boards of Officers, etc. (cont.)

BOARDS	STATUTORY AND AR BASIS	PURPOSE
Examination of gunners	Par. 4, AR 345-1000.	To examine gunners for qualification and to keep records of marks received.
Post Exchange loss	Par. 27, AR 210-65.	To investigate loss of post exchange property.
Post Restaurant loss	Par. 5, AR 210-100.	To investigate loss of post restaurant funds.
Sales Control	Par. 7c, AR 35-820.	To investigate and pass upon all cases involving refunds to purchasers from special deposit funds.
Damage, loss or destruction of vessels	Par. 5, AR 55-500.	To investigate occurrences in which a WD or Army vessel is lost, damaged or destroyed.
Inventory and survey of redelivered vessels	Secs. II, III, AR 55-520.	To prepare inventory of consumable stores and to survey vessels redelivered to owner to determine damages sustained in service of WD.

CHAPTER 3—FORMS

1. GENERAL (AR 420-5)

REPORT OF PROCEEDINGS OF BOARD OF OFFICERS

Post, station, or organization_____
Place_____
Proceedings of a board of officers which convened at_____
_____
pursuant to_____
a copy of which is attached as exhibit A.

The board met pursuant to the foregoing order at_____
at_____ on _____.
(Time) (Date) (Place)

Members present at each meeting:

Members absent at each meeting:

PURPOSE:

_____ appeared before the board (with) (without) counsel.

The order appointing the board and the substance of the regulations under which it was convened were read aloud by the recorder. _____
(Grade and name)
_____ was asked if he desired to challenge any member of the board for cause, and replied_____ (insert here entry of any challenge and the action taken thereon).

Written advance notification to_____
(Grade and name)
dated_____, was received and read in evidence, and is hereunto appended as exhibit B.

_____ was present during all open sessions or the board, (Grade and name) was afforded full opportunity to cross-examine adverse witnesses, to present evidence in his own behalf, to testify in person or submit a written statement, and to submit a brief. (If there were exceptions the facts should be stated.)

(Here insert a verbatim account of the calling, swearing, and examination of witnesses, and other proceedings, including the admission of exhibits, following with appropriate modifications the corresponding parts of appendix 6, M. C. M., 1928.)

The premises, place, or property involved in the subject matter of the investigation were visited and inspected by the board as follows:

FINDINGS:

The board having carefully considered the evidence before it finds:

_____
_____
_____

RECOMMENDATIONS:

In view of the above findings the board recomends:

1.
2.
3.

The board adjourned at _____ (Time) on _____, 19__.

_____,
(President)

_____
(Member)

_____ _____,
(Recorder)

ACTION BY CONVENING AUTHORITY:

Check list.—The following check list applies to the majority of boards and should be used as a final check of the report of proceedings:

a. Is copy of order appointing board attached as an exhibit?

b. Are dates, hours, and places of all meetings shown?

c. Are members of board accounted for as present and absent?

d. Is the purpose stated consistent with the order convening the board?

e. Was individual concerned present at open meetings? If not, does the record show why?

f. If he had counsel, was counsel present?

g. Was order appointing the board and the substance of the regulations under which convened read to him?

h. Did he state that he had no objection to any member?

i. Did individual under investigation object to any member of the board? If so, was final action taken on his objection?

j. Was he permitted to examine and cross-examine witnesses, submit evidence, testify or make a statement, submit a brief?

k. Was he advised of allegations and evidence against him?

l. Were all witnesses who gave testimony before the board sworn?

m. Are depositions, affidavits, certificates properly signed and executed?

n. Are exhibits properly identified in the record?

o. Are copies of each document, etc., properly authenticated as true copies?

p. Does record show whether or not premises, places, or property were visited and inspected?

q. Do findings cover each essential fact required by the order appointing the board or the regulations under which appointed?

r. Does the evidence support each finding?

s. Are the findings in proper form and specific as to places, dates, persons, and events?

t. Are the recommendations consistent with the findings?

u. Do recommendations cover each requirement of the order or regulations?

2. RETIRING BOARDS (AR 605-250)

Form for procedure of report.—The record to be transmitted to the Secretary of War will follow substantially the following form:

Proceeding of Army retiring board convened at ——— on the —— day of ———, 19—, by virtue of the following orders (here copy orders convening the board and any orders modifying the original detail).

The board met pursuant to the foregoing order at —— a. m. Present (here (Time)
name the members of the board and the recorder, with the grade and organization of each).

——— (name, grade, and organization of officer whose capacity is to be inquired into) appeared before the board pursuant to paragraph ——, Special Orders No. ———, War Department, dated ———, 19—, and stated that he did not desire counsel; (or) introduced ——— as counsel.

The order convening the board was then read, and ——— (insert the name of the officer before the board for examination) was asked if he had any objection to offer to any member present; to which he replied in the negative, (or, if the officer challenged any member of the board) that he challenged ——— on the following grounds (here insert objections). The challenged member then stated (insert the statement of the challenged member, who should be requested to respond to the challenge and inform the board upon its merits. If the officer before the board for examination desires to put the challenged member on his *voir dire*, the record should continue).

——— (insert name of officer before the board for examination) having requested that the challenged member be sworn on his *voir dire*, ——— (insert name of member challenged) was duly sworn by the recorder and testified as follows: (here insert testimony of the member).

The board was then closed and, on being opened, the president of the board announced that the challenge was not sustained (or) that the objection was sustained. (In the latter case the record should state that the challenged member then withdrew.)

——— (the officer before the board for examination) was then asked whether he objected to any other member present; to which (etc., as before).

The members of the board, the recorder, the reporter, and the interpreter (if there is one) were then duly sworn. The officer ordered before the board was then duly sworn and made the following statement (here record statement), or testified as follows (here record questions and answers, which will include officer's statement whether or not he desires a copy of the proceedings). The recorder then submitted all papers referred to the board from the office of The Adjutant General. The officer before the board for examination and his counsel were then given opportunity to inspect such papers. The papers were then read by the board and are hereto attached marked _____.

——— and ———, who had been designated as medical witnesses, appeared and filed with the board their orders designating them as witnesses.

Having previously examined ———, the medical witnesses filed with the board their written reports, which are appended hereto and copies of which have been furnished ——— (or) upon the request of ——— copies of which were furnished him.

———, one of the medical witnesses, being first duly sworn, read his written report of his examination and further testified as follows: (Here insert testimony. Then follow with similar entry as to the other medical witnesses. If the medical report is a joint one the entries will be modified accordingly.)

(The board then proceeds with the examination of the medical officers designated as witnesses, and with any other testimony that the board or the recorder thereof may then desire to introduce, tending to show the incapacity of the officer before the board for examination, and will insert such testimony in the record, including the cross-examination.) Preceding the testimony of each witness the fact that the witness was sworn should appear by an entry in the record similar to the following): ——— (insert name, grade, and organization of witness) was duly sworn, (or) affirmed, and testified as follows:

(When an objection to any question is made, the objection and the board's ruling thereon should be stated. The record entry of the board's ruling on the objection may be in the following form: The board was closed, and upon being opened, the president announced (here insert board's wording)).

(At the conclusion of the testimony follow with): The president of the board asked ——— and his counsel if the officer before the board desired to be called as a witness, to call witnesses, or to make an oral or written statement, or both, or if counsel desired to make a statement, to which they replied in the ———, (Here record all answers to questions or statements made.)

The board was then closed for deliberation, and having maturely considered the case, finds that _____ (insert name, grade, and organization of officer) is (or is not) incapacitated for active service. (If the board finds the officer incapacitated, then add) that said incapacity is (or is not) the result of an incident of service, that the cause of said incapacity is (here insert cause), that the cause of said incapacity is (or is not) an incident of service, that said incapacity originated on or about _____ (here insert date of origin), and that said incapacity is (or is not) permanent.

The board then adjourned ———.

_____

_____

President.

_____

_____

Recorder.

Form for minority report.—The minority report, if there is one, will be in the following form:

In re proceedings of an Army retiring board relative to the case of ——— (name, grade, and organization of officer), I (or we), the undersigned member(s) of the said board, dissent from the findings and decision of the board in the above entitled inquiry in the following particulars (here insert statement showing wherein the minority member or members disagree with the majority and their reasons therefor)

The undersigned, having maturely considered the case, find that _____ _____ (name, grade, and organization of officer) is (or is not) incapacitated for active service. (In case incapacity is found, then state the cause of such incapacity, the date of origin thereof, whether such incapacity is (or is not) the result of an incident of service, and that said incapacity is (or is not) permanent.

_____ (Place)

_____ (Date)

_____

_____

Member

_____

_____

Member

3. COMMITMENT BOARDS (AR 600-505)

. **Models of forms.**—The following forms are furnished as general guides. Modifications to conform to the facts and circumstances of particular cases are authorized.

FORM A

APPOINTMENT OF BOARD

Headquarters _____
_____
_____, 19____

Subject: Board of officers for commitment proceedings.
To: _____ Infantry, Fort _____
(President of Board)

1. Pursuant to authority contained in AR 600–505, a commitment board of three officers named below is hereby appointed to investigate and report upon the present mental condition of Captain _____, Infantry. The board is especially charged with the determination of whether Captain _____ _____ is insane. If the person under investigation is found to be insane, then the board will also determine with regard to mental condition whether such person is unfit to be at large or go unrestrained because of danger to such person or others, and whether he should be committed to Saint Elizabeths Hospital or some other reputable institution for the care and treatment of insane persons. The board will include appropriate recommendations in its report. The procedure of the board will be governed by AR 600–505.

2. Major _____, 8th Cavalry, has this date been detailed (or was detailed on _____) as military counsel to represent Captain _____ in these proceedings.

3. Detail for the board:
Colonel _____, Infantry.
Lieutenant Colonel _____, Medical Corps.
Major _____, Medical Corps.
Captain _____, Field Artillery, recorder without vote.

BY COMMAND OF _____:

_____
Lieutenant Colonel, A. G. D.,
Adjutant General.

FORM B

NOTICE TO ALLEGED INCOMPETENT

Headquarters _____
_____
_____, 19____

Subject: Appointment of commitment board.
Through: Major _____, 8th Cavalry, counsel.
To: Captain _____, Infantry, Fort _____

1. You are hereby notified that pursuant to AR 600–505, a commitment board, consisting of Colonel _____, Infantry, Lieutenant Colonel _____, Medical Corps, Major _____, Medical Corps, members, and Captain _____, Infantry, recorder

without vote, has been appointed to meet at this headquarters (or Fort _____), to determine whether you are insane. In the event you are found to be of unsound mind, the board will also determine whether, with regard to your mental condition, restraint is required and whether you should be committed to Saint Elizabeths Hospital or some other reputable institution for the care and treatment of persons having mental disorders.

2. Major _____, 8th Cavalry, has been detailed as military counsel to represent you in these proceedings and, in case you or your next of kin shall so desire, you may be represented also by civilian counsel employed without expense to the Government.

3. You will be advised by the recorder of the board in writing as to the exact date, time, and place of the meeting of the board. Unless such privilege is waived by your counsel, in writing, you will be allowed 5 days from date of receipt of such notice in which to prepare your case.

4. At the hearing the questions to be decided by the commitment board will be read in your presence and you will be given an opportunity to cross-examine witnesses not called by you, to make such oral or written statement, under oath or otherwise, as you may desire, personally or through counsel, and to introduce witnesses or any other testimony in your own behalf which you or your counsel may see fit to offer.

5. This communication will be read aloud to Captain _____, by his counsel above-mentioned, who will report such action by indorsement hereon.

BY COMMAND OF _____:

_____

Lieutenant Colonel, A. G. D.,
Adjutant General.

1 Incl.
(Copy for military counsel)

1st Ind.

Fort _____, _____, 19___—To Commanding General, _____ Service Command, Services of Supply, through Commanding Officer, Fort _____.

1. In compliance with paragraph 5 of the foregoing letter, I read said letter aloud to Captain _____ at _____ on _____.

2. Receipt of a full and correct copy of said letter is hereby acknowledged.

_____

Major, 8th Cavalry,
Counsel.

FORM C

APPOINTMENT OF MILITARY COUNSEL

Headquarters _____

_____

_____, 19___

Subject: Detail as military counsel before commitment board.

To: Major _____, 8th Cavalry, Fort _____.
(Through Commanding Officer, Fort _____.)

1 Pursuant to paragraph 11, AR 600–505, you are hereby detailed as military counsel to represent Captain _____, Infantry, in proceedings before an Army commitment board, whereof Colonel _____, Infantry, is president, to be convened by the president of said board at _____, at an early date.

2. Your attention is invited to AR 600–505 for further information as to your specific duties.

3. You will endeavor to ascertain if the person to appear before the board is already under legal guardianship or has a civilian attorney or next of kin with whom you can confer or correspond without unduly delaying these proceedings, and, if so, you will acquaint them with the nature of the inquiry about to be made and ascertain whether it is desired that the officer also be represented by civilian counsel, without expense to the Government, and whether or not such next of kin desires to interpose any objection to the commitment of the officer to an institution for the care and treatment of insane persons.

BY COMMAND OF_____

_____

Lieutenant Colonel, A. G. D.,
Adjutant General.

FORM D

NOTICE OF MEETING OF THE BOARD

Fort _____

_____

_____, 19___

Subject: Meeting of commitment board.
Through: Major _____, 8th Cavalry, counsel.
To: Captain _____, Infantry, Fort_____.

By direction of the president of the commitment board appointed in your case, you are hereby notified that said board will meet at _____, at _____ p. m., on _____, 19____.

_____

Captain, Field Artillery,
Recorder of Commitment Board.

1st Ind.

Fort _____, 19___—To Captain _____, Field Artillery, Recorder of Commitment Board, Fort _____.

The above communication was received and read to Captain _____ _____ at _____ on _____, 19____, at _____ a. m. (p. m.)

_____

Major, 8th Cavalry, Counsel.

FORM E

WAIVER OF 5-DAY PERIOD

Fort _____

_____

_____ 19____

Subject: Waiver of 5-day notice.
To: Captain _____, Field Artillery, Recorder,
Commitment Board, Fort _____.

Pursuant to paragraph 11, AR 600–505, as counsel for Captain _____ _____, Infantry, I hereby expressly waive the right to a 5-day period after notice received of meeting of the commitment board and I consent to an immediate hearing (or hearing in 2, 3, etc., days), after this date.

_____

Major, 8th Cavalry,
Counsel.

FORM F

ABSTRACT OF CLINICAL OR OTHER MEDICAL RECORDS

The clinical or other medical records introduced may follow the form usual in proceedings of Army retiring boards.

FORM G

Fort_____

_____

_____, *19___*

Proceedings of an Army commitment board convened at Fort _____, _____, on the _____ day of _____, 19___, pursuant to the following order (or orders):

(Here insert a literal copy of the order or letter appointing the board and of any modifications thereof.)

The board met, pursuant to the foregoing order (or orders), at ____ a. m.

Present: Colonel _____, Infantry.
Lieutenant Colonel _____, Medical Corps.
Major _____, Medical Corps.
Captain _____, Field Artillery, recorder.
Captain _____, Infantry, the officer (warrant officer, etc.) concerned.

Major _____, 8th Cavalry, military counsel, and _____ _____, Esq., a member of the bar of _____, civilian counsel, also appeared in person and were present throughout the proceedings. _____ _____ was sworn as reporter _____ was sworn as interpreter. The order (letter) above set forth, convening the board, was then read and Captain _____ and his counsel were asked if they had any objection to offer to any member present, to which they replied in the negative. (If objection is made, the record will show the nature of the objection, the answer of the member objected to, and that the member objected to, the recorder, the reporter, and all counsel withdrew and that the board was closed. Upon reopening, the president will announce the decision of the board and the same will be made of record. Should a challenge be sustained, the board should thereupon adjourn and report the action taken to the convening authority, so that a new member or members may be appointed, in which case, it will not be necessary to repeat the preliminary proceedings but merely to give the person concerned and his counsel notice of the date, time, and place of the reconvening of the board. Opportunity shall be afforded the person concerned and his counsel to challenge any new members of the board in like manner.) The members of the board and the recorder were then sworn.

The president of the board explained the purpose of the board to Captain _____, who stated that he understood such purpose (made no reply to the president, etc.).

Major _____, 8th Cavalry, military counsel for Captain _____, then stated that he had informed Captain _____ _____ of the purpose of the board, prior to this hearing, and Captain _____ stated that he had no objection (or declined to make any statement, etc.); and that he had interviewed Mrs. _____, wife of the officer, and explained the purpose of the board to her. (Here set forth any other pertinent statement made by counsel.)

Major _____, Medical Corps, being duly sworn, testified as follows: (Here insert the testimony of such witnesses as the recorder or the board may care to call, including the cross-examination, if any. If there is documentary proof of the consent to commitment of next of kin, it is advisable that it be offered in evidence.)

The president of the board then explained to Captain _____, in detail, his rights, which he stated he understood and that he did not wish to make a statement, oral or written, under oath or otherwise, and that he did not desire to introduce any witnesses (to which he made no reply, or that he wished to make a statement, etc.).

(Here insert the testimony of such witnesses as the person concerned may care to call, including cross-examination, if any, and also the testimony or statement, if any, of the person concerned.)

Military counsel of the person concerned, Major _____, and his civilian counsel, _____, Esq., each stated that they were desirous of submitting the case without further remark (or made the following argument in opposition to the commitment).

The president of the board asked Captain _____ and his counsel if they had anything further to offer and upon receiving a negative answer, the board was closed, and upon being opened the president announced the following findings and recommendations:

FINDINGS

The board, having maturely considered the case, finds—

(a) That Captain _____, Infantry, is (or is not) insane;

(If found insane)

(b) That he is suffering from manic depressive psychosis, manic phase (dementia praecox, catatonic type, etc.);

(c) That by reason of his mental condition he is unfit to be at large or go unrestrained because of danger to himself or others; and

(d) That he should be committed to Saint Elizabeths Hospital or some other reputable institution for the care and treatment of insane persons.

RECOMMENDATIONS

The board recommends that Captain _____, Infantry, be committed to an institution for the care and treatment of insane persons. Two attendants will be necessary, of whom one should be a medical officer

The board thereupon adjourned.

_____

Colonel, Infantry,
President.

_____

Captain, Field Artillery,
Recorder

4. RECLASSIFICATION BOARDS (AR 605-230)

FORM A

RECOMMENDATION FOR RECLASSIFICATION BOARD ACTION

To _____

Subject: Recommendation for reclassification board action.

_____

_____

(Last name) (First name) (Middle name) (Serial No.)

_____

(Grade) (Arm or service)

_____

(Organization) (Race) (Date of birth)

1. Date of recommendation_____
2. Explanation in detail of reasons for the recommendation_____

_____

3. Inclosed are sworn statements of the following witnesses who have knowledge of the facts: _____
4. Duty, if any, for which suited_____
5. Remarks and recommendations_____

_____

(Signature)

Inclosures:

FORM B

PROCEEDINGS FOR RECLASSIFICATION* BOARDS

Record of a reclassification* board in the case of_____

INDEX

TESTIMONY

Name of witness	Direct, page	Cross, page	Redirect, page	Examination by board, page	Recalled, page

*The words, "reclassification board" will be deleted and the words, "board convened under the provisions of Public Law 190," or "efficiency board" will be substituted in appropriate cases (see par. 15*a* and *b*).

EXHIBITS

	No.	Page where introduced
Orders appointing board		
Deposition of		
Affidavit of		
Letter from		
Form A (par. 16)		
Efficiency report		
W. D., A. G. O. Form No. 63 or 64 (Report of Physical Examination)		
(If physical examination is directed under par. 12*c*(5))		
W. D., A. G. O. Form No. 66–1 (Officer's and Warrant Officer's Qualification Card) (par. 7*b*(3))		

Proceedings of a reclassification* board which convened at _____ pursuant to the following order(s) (see exhibit(s)).

_____
(Place)

_____
(Date)

The board met pursuant to the foregoing order(s) at _____
(Time)

Present: (Name those present.)

Absent: (Name those absent and authority for absence.)

The board proceeded with the case of _____
(Name and grade of officer concerned)

who, appearing before the board, introduced _____ as counsel (or who stated, upon being asked by the recorder, that he did not desire counsel).

_____ was sworn as reporter.

The order appointing the board (and order or orders modifying the detail, if any) was (were) read to _____ and he was asked if he objected to any member present named therein sitting as a member of the board in this case. The officer concerned stated that he did not desire to object to any member present named in the order (or made objection as follows):

If objection is made, the record will show the answer of the member objected to, and that the member objected to, the recorder, the reporter, the officer concerned and his counsel, if any, withdrew, and that the board was closed. Upon reopening the board, the president will announce the decision of the board, and same will be made of record. After all objections have been made and met, the record will continue.

*The words, "reclassification board" will be deleted and the words, "board convened under the provisions of Public Law 190," or "efficiency board" will be substituted in appropriate cases (see par. 15*a* and *b*).

The members of the board and the recorder were then sworn. (For form of oath, see AW 100, substituting the word "board" for "court.")

The recorder then read to the board Form A (Recommendation for Reclassification Board Action). The officer concerned was then informed that he was afforded an opportunity to introduce evidence pertinent to the case; that he could take the stand in his own behalf or submit a sworn or unsworn statement.

Here record a summary of all testimony and attach all documents. Care will be exercised that all pertinent testimony and only pertinent testimony is included in this summary. Any witness will be sworn, and the record will so indicate. (See AW 101 and par. 3, AW 19.) In case the officer concerned does not desire to call any available witnesses, submit any evidence in the nature of documents, take the stand, or submit a statement, the record will so show.

The officer having stated that he had no further evidence to offer, the board was then closed, and after mature consideration submits the following:

a. Findings of fact: _____

b. Discussion: _____

c. Conclusions: _____

d. Recommendation: In view of the above, the board recommends_____

_____.

This case was received by the board on _____, a hearing was held
(Date)
on _____, and the findings and recommendation were made on_____
(Date)
_____.
(Date)

The board then at _____, _____ proceeded to other business.
(Time) (Date)

(Or, adjourned until _____, _____) (or adjourned to meet at the
(Time) (Date)
call of the president.)

_____
President.

_____
Recorder.

5. SECTION VIII BOARDS (AR 615-360)

REPORT OF PROCEEDINGS OF BOARD OF OFFICERS

(Convened under par. 51, sec. VIII, AR 615-360)

Station or command _____ Date _____

1. Person _____
(Name, Army serial number, grade, and organization)

2. The above-named soldier appeared before the Board. The provisions of paragraphs 11 and 13*b* and section VIII, AR 615-360, and AR 420-5 were fully complied with.

3. Each finding is thoroughly supported by the evidence appended hereto. (See list of exhibits.)

4. FINDINGS

a. *That he is inapt.

b. *That he does not possess the required degree of adaptability for the military service after all reasonable attempts have been made to reclassify and reassign him in keeping with his abilities and qualifications, actual or latent.

c. *That he is disqualified for service because of enuresis, the underlying cause of which is *mental deficiency, *psychopathic personality, or *lack of juvenile training.

d. *That his conduct has been such as would render his retention in the service desirable were it not for his inaptness and lack of the required degree of adaptability for military service, or enuresis.

e. *That he gives evidence of (habits) (and/or) (traits of character) other than those indicating discharge for physical or mental conditions as provided for in section II. (He is unfit to associate with enlisted men.)

f. *That he is disqualified for service (physically) (in character) through his own misconduct, and cannot be rehabilitated by further military training without detriment to the morale and efficiency of his or any organization.

g. *That attempts to rehabilitate him by special training have failed.

h. *That he is presently qualified for military service.

i. *Other.

5. RECOMMENDATIONS

a. *That he be not discharged from the service under the provisions of section VIII, AR 615-360.

b. *That he be discharged from the service under the provisions of section VIII, AR 615-360, on account of:
(1) Inaptness.
(2) Lack of adaptability for the military service.
(3) Enuresis.
(4) (Habits) (and) (traits of character) which render his retention in the service undesirable.
(5) (Physically) disqualified (in character) for service, through his own misconduct.

c. *That W. D., A. G. O. Form No. 55 (Army of the United States—Honorable Discharge) be given him.

d. *That W. D., A. G. O. Form No. 56 (Discharge from the Army of the United States (blue)) be given him.

e. *That discharge certificate bear the entry, "Not recommended for reenlistment, induction, or reinduction."

f. *That he be retained in service and the following action taken:
(1) That he be assigned without stigma to a special training unit for further special training.
(2) That he be retained in his present assignment.

_____ (Medical officer)

_____ (President)

_____ (Recorder)

6. Action of the convening authority:
*(Approved) *(Disapproved)

Headquarters _____

_____

_____ (Date)

_____ (Commanding)

*Strike out inapplicable words.

When discharge is accomplished, these proceedings will be forwarded to The Adjutant General with the service record and W. D., A. G. O. Form No. 38.

EXHIBITS:
1. Request of immediate commanding officer for appointment of Board.
2. Order appointing Board.
3. Gist of testimony including report of psychiatric examination.

W. D., A. G. O. Form No. 87
16 February 1944
This form supersedes W. D., A. G. O. Form No. 37, 26 June 1943, which may be used until existing stocks are exhausted.

16—86345-1 U. S. GOVERNMENT PRINTING OFFICE

ADDENDA

Page XI - 4, first full paragraph:

Par. 7g, Cir. 289, WD, 9 November 1943, provides that every board of officers which deals with a member of the Women's Army Corps or a matter pertaining to that Corps, except boards composed entirely of medical officers, will include a commissioned member of that Corps when available.

Page XI - 7, Chart:

Changes 1, 5 Nov. 1943, AR 605 - 230, 9 June 1943, and Cir. 280, WD, 5 Nov. 1943, contain certain supplemental provisions relating to reclassification procedure. The mentioned changes provide for the maintenance of separate panels of officers of the Regular Army and the National Guard of the United States who are to sit not only as reclassification boards but also as efficiency boards pursuant to section 76 of the National Defense Act when officers of the National Guard of the United States are ordered before them.

Page XI - 7, Chart:

Changes 18, 1 Jan. 1944, AR 615-360, 26 Nov. 1942, contains a revised Section VIII of the mentioned regulations. Among other things this revision adds enuresis as a ground for Section VIII proceedings and restates in somewhat altered form the War Department policy relating to discharge of enlisted men under this section.

ADDENDA

PART XII

LEGAL ASSISTANCE

CIRCULAR No. 74

WAR DEPARTMENT,
WASHINGTON, March 16, 1943.

***Legal advice and assistance for military personnel.*—1. Sponsorship and purpose.**—The War Department and the American Bar Association have agreed to sponsor jointly the following plan to make adequate legal advice and assistance available throughout the Military Establishment to military personnel in the conduct of their personal affairs. In this regard reference is made to paragraphs 1 to 4, inclusive, War Department pamphlet entitled "Personal Affairs of Military Personnel and Their Dependents."

2. General supervision.—The general organization, supervision, and direction of the plan has been assigned to The Judge Advocate General who will collaborate with the Committee on War Work of the American Bar Association. Similarly, the staff judge advocates of the service commands will collaborate with the committees on war work of the several State bar associations within their respective service commands to aid in the establishment and uniform operation of the plan. (See paragraph 15.)

3. Plan of organization.—Legal assistance offices will be established, as soon as possible and wherever practicable, throughout the Army, so that military personnel can obtain gratuitous legal service from volunteer civilian lawyers and from lawyers who are in the military service. *Such gratuitous legal service should not be considered as charity but entirely as a service of the same nature as medical, welfare, or other similar services provided for military personnel.* In any proper case the legal assistance office may refer the serviceman to civilian counsel for retention by the serviceman upon the usual civilian basis.

4. Establishment and authority.—The commanding general of each service command and the commanding officer of each post, camp, and station within the 48 States and the District of Columbia will establish a legal assistance office for his respective command. Each office will be designated as _____ Legal Assistance Office. The
(Service command, post, camp, station, or unit)
commanding officer of any other installation, including an oversea command, may, if he deems it advisable, establish such an office, with such modifications as may be necessary to meet local conditions. In order to make such service available to all military personnel it is desired that the offices be established wherever possible, including, where practicable, centrally located offices to serve several neighboring small commands and transient military personnel. Such central offices will be established and operated under the direct authority of the commanding general of the service command within which such office is situated and will be designated as _____ Army
(Name of town or city)
Legal Assistance Office.

5. **Military personnel.**—The legal assistance office of any particular command will be under the direct supervision and control of the staff judge advocate of the command, if any, as the "Director" thereof. It will be operated by a qualified commissioned officer (see par. 7) who will be assigned to such duties and designated as "Legal assistance officer." Depending on the size of the command and the volume of service required, qualified "Assistant legal assistance officers" and such other military personnel as may be necessary to operate the office expeditiously will be assigned to such duty. All military personnel so assigned will be within current authorized strengths according to Tables of Organization and/or allotments, and normally will perform such duties in addition to their other duties. ***Limited service personnel, if otherwise qualified, will be employed on this duty to the fullest extent.***

6. **Designated volunteer civilian lawyers.**—*a.* Each such legal assistance office should, as far as practicable, be composed of such military personnel as may be assigned to it and such volunteer civilian lawyers as may be designated for service with that particular office by the appropriate State Bar Association Committee on War Work. See paragraph 16.

b. Arrangements should be made to have one or more of the civilian lawyers so designated visit the legal assistance office on the post at regular intervals during prescribed hours to interview any military personnel who may need or desire their advice and counsel. Such visits should be well publicized and, so far as practicable, be fixed so as to correspond with intervals in the schedule of military duties or training. Arrangements should also be made to refer military personnel having legal problems direct to such designated civilian lawyers at their own offices or, in proper cases, to an established legal aid organization or other appropriate civilian oragnization or lawyer.

c. If it is impractical or impossible to designate such civilian lawyers, as above indicated, the office may be maintained without such civilian lawyers. In that event all cases requiring civilian counsel will be referred to the appropriate State Bar Association Committee on War Work (see par. 16) or established legal aid organization (see par. 17).

7. **Qualification of legal assistance officers.**—The basic qualification for a legal assistance officer will be that he is a licensed attorney at law. As there are a great many lawyers now on active duty, it is believed that qualified personnel for assignment as legal assistance officers are available within nearly all commands. However, if there is no qualified officer available for such assignment, a suitable officer may be assigned as acting legal assistance officer until a qualified officer becomes available. Such acting officers may perform all the functions of legal assistance officers (see par. 8) except those functions that involve the giving of legal advice and counsel.

8. **Functions of legal assistance officers.**—Legal assistance officers may properly perform the following functions:

a. Supervise, direct, and control the military personnel and operation of the legal assistance office in accordance with good legal practice and the policies of the commanding officer, subject to the general supervision and direction of The Judge Advocate General. and the appropriate local and service command staff judge advocates, if any. See paragraph 15.

b. Establish contact with the Committee on War Work of the State in which the command is located (see par. 16) for the purpose of organizing the office and obtaining the names of the local members of the bar who have volunteered and who have been designated by the committee to serve with that particular legal assistance office.

c. Collaborate and maintain liaison with such designated civilian lawyers in the organization and operation of the office.

d. Interview, advise, and assist military personnel and, in proper cases, refer such personnel to a designated civilian lawyer, or to an appropriate bar committee on war work, or established legal aid organization, for needed advice and service in regard to their personal legal problems. (See paragraphs 16 and 17.)

e. Make, from time to time, such reports and recommendations concerning the operation of their offices as may be required of them or that they may deem advisable. Such reports will be made to the commanding officer through the staff judge advocate of the command, if any, who will indorse his views thereon. Information copies of such reports and indorsements and of the orders establishing the office will be forwarded direct to the Legal Assistance Branch, The Judge Advocate General's Office, Washington, D. C., and to the staff judge advocate of the service command within which such office is located.

f. Do any and all things, within the limits of their authority and that they may do as officers of the Army of the United States, necessary to accomplish expeditiously the purpose for which their offices are established.

9. **Office facilities, location, and hours.**—Suitable office space will be provided wherever a legal assistance office is established. Each office will have such available equipment and supplies assigned to it as may be adequate for the purpose. It should be conveniently located so as to be available to all personnel of the command and should be open for business during the hours that will accomplish the purpose for which the office is established and will make such service available to military personnel without interfering with their regular duties. The location and office hours of the office, as well as the legal advice and assistance that it offers, will be published in local orders to be kept posted at all times on all unit bulletin boards.

10. Confidential and privileged character of service provided.—*a.* Inasmuch as the service to be provided by a legal assistance office is essentially legal, the usual attorney and client relationship must be maintained. Consequently, all matters upon which the office is consulted by persons entitled to do so and the files thereof will be treated and considered as *confidential and privileged* in a legal rather than a military sense. Such confidential matters will not be disclosed by the personnel of the office to anyone, except upon the specific permission of the person concerned, and such disclosure may not lawfully be ordered by superior military authority. Strict observance of this rule is essential to the proper working of the office in order to establish confidence in its integrity and to assure all military personnel regardless of grade or position that they may disclose frankly and completely all material facts of the case to the office personnel without fear that such confidences will be disclosed or used against them in any way.

b. A legal assistance office as such will *not* advise or assist military personnel in any case in which such personnel are or probably will be the subject of court-martial investigation or charges. Legal assistance officers should not be consulted by such personnel, and will refuse to receive confidences from them concerning such matters unless authorized by competent orders to defend them pursuant to Article of War 11 or 17.

11. Service only for military personnel.—The service provided by the legal assistance offices will be made available only to military personnel and their dependents, and this will include all members of, and persons serving with, the armed forces of the United States, including Army nurses, members of the Women's Army Auxiliary Corps, and civilian employees actually employed and residing on the military reservation served by the office or employed at an oversea installation.

12. Military personnel of the office.—Military personnel of a legal assistance office will not appear before civil courts, boards, or commissions as attorneys for persons using the facilities of the office (see sec. II, Cir. 358, W. D., 1942). As a general rule such personnel will render service only at the legal assistance office; however, service may be rendered elsewhere in exceptional circumstances.

13. Correspondence.—The Judge Advocate General's Office and the service command staff judge advocates are authorized to correspond direct with such legal assistance offices concerning their supervisory duties in connection therewith. Legal assistance offices are authorized to correspond direct with, and to refer cases to, the legal assistance offices of other commands and other appropriate organizations and persons concerning legal assistance matters.

14. Variations in procedure.—Local conditions may make variations from the above-prescribed procedures necessary for the proper and effective organization and operation of any particular legal assistance office. For this reason the provisions of this circular are intended to be flexible and should be liberally construed in order that the purpose for which such office is established may be accomplished. In no event will a legal assistance office act as a collection agency in any transaction.

The foregoing circular contains the basic information relating to the structure and operation of the legal assistance plan for military personnel. The types of problems presented to legal assistance officers and to the Legal Assistance Branch of the Office of The Judge Advocate General are, of course, infinitely varied and cannot be appropriately treated within the scope of these materials.

There are reprinted, however, two paragraphs from recent Legal Assistance Memoranda which are deemed to be of general interest to judge advocates whose duties may include the supervision of legal assistance offices. Finally, because of the recurring need for the preparation of wills and powers of attorney for officers and enlisted men of the Army, a short standard form of each of these documents is included for general guidance.

(Paragraph 3, Legal Assistance Memorandum No. 4, SPJGE 1943/6291D, 30 June 1943)

> 3. Judge Advocates as Legal Assistance Officers. - In many installations the Post Judge Advocate has been assigned as Legal Assistance Officer. It is the intendment of paragraphs 5, 8a, 8e, and 15, Circular No. 74, supra, that Post Judge Advocates merely will supervise legal assistance offices as the "Director" thereof and will not perform the functions of Legal Assistance Officer. It is so intended for two principal reasons - First, in order to provide an opportunity for other lawyers in the service to perform legal functions, and Second, to relieve Post Judge Advocates of this function, which many of them had previously been performing unofficially, so that they can devote themselves to their regular functions which have been recently increased by claims and other newly added matters. It is suggested that wherever possible (see par. 14, Cir. No. 74, supra) the above-mentioned intendment be

carried out by the assignment of the Post Judge Advocate as the Director and another lawyer in the service as the Legal Assistance Officer for the particular legal assistance office.

(Paragraph 1, Legal Assistance Memorandum No. 5, SPJGE 1943/6291F, 22 July 1943)

1. Military Affairs of Military Personnel. - It has come to the attention of this office that in some instances Legal Assistance Officers have been advising and assisting military personnel in connection with their military affairs, i.e., their status or relations with the Army or the Federal Government. It is the intendment of Circular No. 74, War Department, March 16, 1943 (pars. 1 and 8d), that legal advice and assistance rendered by Legal Assistance Officers shall be confined to the personal legal affairs of military personnel as distinguished from their above-mentioned military affairs. Paragraph 10b, Circular No. 74, specifically prohibits the rendering of advice or assistance in connection with court-martial proceedings and by analogy other matters affecting or concerning a person's military status should be similarly considered. Any matters of this nature coming to the attention of Legal Assistance Officers should be promptly placed in proper military channels. In connection with claims against the United States your attention is invited to subparagraphs 11b, 11c, 11d, and 11e, Army Regulations 25-20, March 15, 1943.

(Form of Will - from Personal Affairs of Military Personnel and Aid For Their Dependents, War Department, January 1943, pp. 19-20)

LAST WILL AND TESTAMENT

I, _____ (name of testator), a legal resident of _____ (City, town, or county) _____, _____ (State or district), United States of America, now in the active military service as a _____ (Grade) (Army serial No. _____), in the Army of the United States, do hereby make, publish and declare this instrument as my last WILL and TESTAMENT, in manner following, that is to say:

1. I hereby cancel, annul, and revoke all wills and codicils by me at any time heretofore made;

2. I hereby give, devise, and bequeath to _____ (Name of person or persons who are to inherit, with relationship, if any) now residing in _____ (City, town, or county), _____ (State or district), _____ (Country), all my estate and all of the property of which I may die seized and possessed, and to which I may be entitled at the time of my decease, of whatsoever kind and nature, and wheresoever it may be situated, be it real, personal, or mixed, absolutely;

3. I hereby nominate, constitute, and appoint _____ (Name of executor, with relationship, if any), of _____ (City, town, or county) _____, _____ (State or district), United States of America, as my executor (executrix) and request that he (she) be permitted to serve without bond or without surety thereon;

4. I hereby authorize and empower my executor (executrix) in his (her) absolute discretion to sell, exchange, convey, transfer, assign, mortgage, pledge, invest, or reinvest the whole or any

part of my real or personal estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my last WILL and TESTAMENT, at _____ (Place of execution), this _____ day of _____, 194__.

_____ /SEAL/
(Signature of testator)

Signed, sealed, published, and declared by the above-named testator, _____ (Name of testator), to be his last WILL and TESTAMENT in the presence of all of us at one time, and at the same time we, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, and do hereby attest to the sound and disposing mind of said testator and to the performance of the aforesaid acts of execution at _____ (Place of execution), this _____ day of _____, 194__.

_____ (Name)	_____ (Address)
_____ (Name)	_____ (Address)
_____ (Name)	_____ (Address)

(Form of Power of Attorney - from SPJG Op. #47 (1942), SPJGA 300.9, 8 June 1942)

POWER OF ATTORNEY

GENERAL

KNOW ALL MEN BY THESE PRESENTS: That, I, _____, a legal resident of _____, now in the military service as a _____(Army Serial No. _____) in the Army of the United States and temporarily residing in _____, have made, constituted and appointed, and by these presents do make, constitute, and appoint _____, whose _____ address is _____, my true and lawful attorney to act in, manage, and conduct all my estate and all my affairs, and for that purpose for me and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with persons jointly interested with myself therein in the doing or executing of, all or any of the following acts, deeds, and things, that is to say:

/Insert here powers to be granted. See attached suggested clauses for various purposes. Each should be used, adapted, or omitted as the needs of the individual case may indicate./

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specially enumerated powers being in aid and exemplification of the full, complete and general power herein granted and not in limitation or definition thereof; and hereby ratifying all that my said attorney _____, shall lawfully do or cause to be done by virtue of these presents.

The terms "estate", "affairs" and property", as used herein include, and shall include at all times and places and under all conditions, real, personal and mixed property of every kind and description whatsoever and wheresoever situated, and all buildings, structures, improvements, fixtures, vehicles, appliances, accessories, furnishings, equipment, choses in action, equities, priorities, permits, rations, quotas, rights of way, mineral and oil rights, water rights, easements, licences, future interests, reversions, remainders, and all other kinds of property or property

rights whatsoever, and every interest, title, equity, tenement, hereditament, appurtenance, right, claim, demand, or action therein and thereunto appertaining, and whether said property or property rights be tangible or intangible, jointly or severally owned, or now or hereafter acquired.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the _____ day of _____, nineteen hundred and _____.

_____ /SEAL/

WITNESSES:

_____

_____

_____

Acknowledgment

_____)
) SS.
_____)

I, _____, do hereby certify, that I am a duly commissioned, qualified, and authorized notary public in and for the _____; and that _____, grantor in the foregoing Power of Attorney, dated _____, and hereto annexed, *(who is personally well known to me as the person who executed the foregoing Power of Attorney)(known and satisfactorily identified to me as such person upon the oath of _____) appeared before me this day within the territorial limits of my authority, and being first duly sworn, *(acknowledged that he had signed)(executed) said instrument after the contents thereof had been read and duly explained to him, and acknowledged that the execution of said instrument by him was his free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my

official seal this _____ day of _____, 19____.

My commission expires _____.

_____
Notary Public

(SEAL)

*Use following alternative clauses according to circumstances.

- - - - - -

SUGGESTED CLAUSES FOR VARIOUS PURPOSES

1. /To Buy, Sell, and Encumber Property/ To buy, receive, lease, accept, or otherwise acquire; to sell, convey, mortgage, hypothecate, pledge, quit claim or otherwise encumber or dispose of; or to contract or agree for the acquisition, disposal, or encumbrance of; any property whatsoever or any custody, possession, interest, or right therein, upon such terms, considerations and conditions as my said attorney shall think proper;

2. /To Hold, Manage, Maintain, etc./ To take, hold, possess, invest, lease, or let, or otherwise manage any or all of my property or any interest therein; to eject, remove, or relieve tenants or other persons from, and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, build on, raze, rebuild, alter, modify, or improve the same or any part thereof;

3. /To Do Business, Settle Accounts, etc./ To make, do, and transact all and every kind of business of what nature or kind soever, including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, legacies, bequests, interests, dividends, annuities, demands, debts, taxes, and obligations, or any rebate, refund or discount thereon, which may now or hereafter be due, owing, or payable by me or to me;

4. /To Execute Instruments/ To make, indorse, accept, receive

sign, seal, execute, acknowledge, and deliver deeds, assignments, agreements, certificates, hypothecations, checks, notes, vouchers, receipts, and such other instruments in writing of whatever kind and nature as may be necessary, convenient, or proper in the premises;

5. [Banking] To deposit and withdraw for the purposes hereof, in either my said attorney's name or my name or jointly in both our names, in or from any banking institution, any funds, negotiable paper, or moneys which may come into my said attorney's hands as such attorney or which I now or hereafter may have on deposit or be entitled to;

6. [To Borrow Money] To contract loans and to borrow any sums of money in my name and upon such terms as my said attorney shall see fit, and to pledge or give as security therefor any or all of my said property;

7. [To Engage in Litigation] To institute, prosecute, defend, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation in connection with the premises

8. [To Act as Proxy] To act as my attorney or proxy in respect to any stocks, shares, bonds, or other investments, rights, or interests, I may now or hereafter hold;

9. [To Use Estate] To occupy, expend or use all or any part of my said estate as now or hereafter constituted for the education, care, support, maintenance and benefit of _____.

10. [To Appoint Substitutes, etc.] To engage and dismiss agents, counsel, and employees, and to appoint and remove at pleasure any substitute for, or agent of my said attorney, in respect to all or any of the matters or things herein mentioned and upon such terms as my attorney shall think fit *(except that the authority hereinabove granted in paragraph numbered nine shall not be exercised in behalf of, or enure to the benefit of, anyone except said _____.

11. [To Execute Government Vouchers] To execute and deliver vouchers in my behalf for any and all allowances and reimbursements properly payable to me by the United States, including but not restricted to allowances and reimbursements for transportation of dependents or for shipment of household effects as authorized by law

and Army regulations; /See W.D. Cir. 149, May 18, 1942/

12. /To Present Claims on the Government, etc./ To execute, acnowledge, present, and prosecute any claim or demand whatsoever on or against the government of the United States, of any sovereign state or authority, or of any political subdivision or instrumentality thereof;

13. /To Endorse Government Check./ To receive, endorse, and collect checks payable to the order of the undersigned drawn on the Treasurer or other fiscal officer or depositary of the United States, of any sovereign state or authority, or any political subdivision or instrumentality thereof; /See W.D. Cir. 149, May 18, 1942/

14. /To File Tax Returns, etc./ To prepare, execute, and file income and other tax returns, and other governmental reports, applications, requests and documents;

15. /To Remove and Ship from Government Depot, etc./ To take possession, and order the removal and shipment, of any of my property from any post, warehouse, depot, dock, or other place of storage or safe keeping, governmental or private; and to execute and deliver any release, voucher, receipt, shipping ticket, certificate, or other instrument necessary or convenient for such purpose. /See W.D. Cir. 49, Feb. 19, 1942/

/Declaration - Acts Done Before Notice of Death and/or While "Missing in Action". (If used it is suggested that it follow the "Giving and Granting" paragraph)/

And I hereby declare that any act or thing lawfully done hereunder by my said Attorney shall be binding on myself, and my heirs, legal and personal representatives, and assigns **(whether the same shall have been done before or after my death, or other revocation of this instrument, unless and until reliable intelligence or notice thereof shall have been received by my said attorney; and) (whether or not I, the grantor of this instrument, shall have been reported or listed, either officially or otherwise, as "missing in action" as that phrase is used in military parlance, it being the intendment hereof that such status designation shall not bar my attorney from fully and completely exercising and continuing to exercise any and all powers and rights herein granted, and that such report of "missing in action" shall neither constitute or be interpreted as constituting notice of my death nor op-

erate to revoke this instrument).

/Substitute Attorney - If used it is suggested that it be inserted just ahead of "In Witness Whereof" paragraph/

In the event my said Attorney, _____, shall die, refuse, or otherwise be unable or fail to act hereunder, I then do hereby appoint _____ of _____, my true and lawful attorney from and immediately after the happening of any such event to act in and manage all my estate, affairs, and property in the same manner and with the same powers and authorities as if the name of said _____, had throughout these presents been inserted instead of the name of said _____ *(except that the authority hereinabove granted in paragraph nine shall not be exercised in behalf of, or enure to the benefit of, anyone other than said _____).

* * * * * * * * *

* Use following clause as circumstances may indicate when power set forth in paragraph numbered 9, supra, is granted.

** Use either or both of the following clauses as desired.

ADDENDA

Page XII - 3:

Paragraphs 2, 4, 8a, 8e, 11 and 13 of the excerpt from Circular 74, WD, 16 Mar. 1943, appearing on pages XII - 3 to 6, supra, have been superseded by Circular 73, WD, 17 Feb. 1944.

ADDENDA

PART XIII

ADMINISTRATION OF OATHS

The amendment of Article of War 114 by the act of 14 December 1942 gave rise immediately to problems of practical application. Circular 32, War Department, 30 January 1943, which is reprinted on the following pages, informed the service of certain legal limitations upon the statutory authority of the persons enumerated in the article to administer oaths for commercial and other civil purposes.

There is also reprinted in this Part (p. XIII - 6, et seq.) a digest of the opinions of The Judge Advocate General[1] which served as the basis for the mentioned circular together with forms of acknowledgment, certificate of authority and jurat suggested for use under AW 114, as amended. It is still necessary to modify and adapt these forms to particular situations and to the legal requirements of the various jurisdictions.[2]

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1. Printed in II Bull. JAG 17, sec. 472(2).

2. Cir. 217, WD, 18 Sept. 1943 contains discussions of the various state statutes pertaining to the administration of oaths and affirmations and the taking of acknowledgments. It should be consulted by officers called upon to perform notarial functions and by judge advocates called upon to decide the propriety of such action.

CIRCULAR No. 32

WAR DEPARTMENT,
WASHINGTON, January 30, 1943.

Administration of oaths and taking of acknowledgments under Article of War 114, as amended.—1. **Statutory authority.**—The act of December 14, 1942 (Public Law 800, 77th Cong.; sec. V, Bull. 61, W. D., 1942), amended Article of War 114 to read as follows:

ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any officer of any component of the Army of the United States on active duty in Federal service commissioned in or assigned or detailed to duty with the Judge Advocate General's Department, any staff judge advocate or acting staff judge advocate, the President of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant, assistant adjutant or personnel adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and shall also have the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents and all other forms of notarial acts to be executed by persons subject to military law: *Provided*, That no fee of any character shall be paid to any officer mentioned in this Act for the performance of any notarial act herein authorized.

2. Acknowledgments for commercial and other civil purposes.—The attention of all concerned is directed to the fact that under the provisions of the above-quoted act the classes of officers named in the act (staff judge advocates, adjutants, etc.) are given "the general powers of a notary public in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law." Although the act confers such authority on such officers, *the legal effectiveness of any instrument executed or acknowledged thereunder, for non-Federal purposes generally is dependent on the laws of the particular State, district, Territory, or other jurisdiction where such instrument is executed or where it is intended to be used.* The now existing laws of most jurisdictions apparently do *not* provide for recognition of oaths given or acknowledgments taken under the provisions of AW 114, as amended, and therefore the legal effectiveness of such acts may generally be considered as doubtful, especially when performed within the United States. For the reasons indicated it is manifestly advisable that the facilities of notaries public and other civil officials recognized by the laws of the particular jurisdiction involved for such purposes should be utilized whenever possible in the administration of oaths and the acknowledgment of instruments for commercial and other civil purposes, such as powers of attorney, deeds, affidavits, etc. All military personnel, and particularly officers of the classes named in the act, are cautioned to govern themselves in such matters as above indicated so that the execution of legally ineffective instruments may be avoided. Whenever available legal advice should be sought concerning such matters.

3. Military administration and other Federal purposes.—The foregoing statements have no application to the power granted by AW 114, as amended, to the classes of officers named "to administer oaths for the purposes of the administration of military justice and for other purposes of military administration." The exercise of such powers is considered proper and legally effective for matters wholly connected with military administration (oaths of office, oaths administered to participants in a court martial, affidavits and certificates to be used solely in military proceedings or for military records, etc.). Oaths administered and acknowledgments taken under AW 114, as amended, are also effective for some other Federal purposes. See paragraph 7. section II, Circular No. 149, section III, Circular No. 173, and section I, Circular No. 340, War Department, 1942.

4. Persons subject to military law.—For a definition of the phrase "persons subject to military law," appearing in the act quoted in paragraph 1, see AW 2 (41 Stat. 787; 10 U. S. C. 1473; M. L., 1939, sec. 359).

[A. G. 013.14 (1–27–43).]

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:

J. A. ULIO,
Major General,
The Adjutant General.

472 (A. W. 114). Authority to administer oaths.

Sec. 1, Ch. II, act of June 4, 1920 (41 Stat. 810); act of Dec. 14, 1942 (56 Stat. 1050); 10 U. S. C. 1586.

(2) Purposes authorized.—A. W. 114, as amended by the act of December 14, 1942, grants, to certain classes of officers designated therein, the general powers of a notary public with respect to oaths administered to and acknowledgments taken from persons subject to military law in the execution of legal instruments or the attestation of documents. The mentioned amendment broadened the classes of officers so empowered and granted them such power wherever they may be serving, whether within or outside the United States. Although such officers are granted such powers, the recognition of their authority in connection with legal instruments sworn to or acknowledged before them for commercial or other civil purposes, and therefore the legal effectiveness of such instruments, depends on the laws of the state, territory, district, or other jurisdiction where the instrument is executed or is intended to be used. The now existing laws of most jurisdictions apparently do *not* provide for the recognition of oaths given or acknowledgments taken under the provisions of A. W. 114, as amended, and therefore the legal effectiveness of such acts may generally be considered as doubtful. An amendment to the Uniform Acknowledgment Act designed to remove this difficulty and to make effective the authority granted by A. W. 114, as amended, has recently been recommended by the Legislative Drafting Committee of the Council of State Governments to the several states for enactment.

Accordingly, until the passage of the above-mentioned amendment to the Uniform Acknowledgment Act or similar remedial legislation by a particular jurisdiction concerned in an individual case, it appears advisable to avoid the use of the authority granted by A. W. 114, as amended, in the administration of an oath or the taking of an acknowledgment in each such case. The use whenever possible of notaries public and other civil officers recognized by the particular jurisdiction for such purpose is therefore recommended in connection with commercial or other civil transactions as distinguished from transactions concerned solely with military administration or other Federal purposes.

The foregoing comments are also applicable to the execution of instruments outside of the United States where the use of the following persons for such purpose is advisable, subject to the requirements of the particular jurisdiction involved: (1) An Ambassador, Minister, Charge d'Affaires, Counselor to or Secretary of a Legation, Consul General, Consul, Vice-Consul, Commercial Attaché, or Consular Agent of the United States; (2) A Notary Public or a Judge or Clerk of a court of record of the country where the acknowledgment is made. (If made by such foreign civil officials the certificate should be authenticated by a certificate under the Great Seal of the country, or by a certificate of a diplomatic, consular or commercial officer of the United States, certifying as to the official character of such officer.)

As most jurisdictions require that the geographical location of the place of acknowledgment be shown on the instrument, it is always advisable to make such showing unless the military situation at the particular place requires otherwise (par. 68, AR 380–5, Sept. 28, 1942). If military necessity requires that the place be not disclosed, an acknowledgment at an undisclosed place accompanied by a certificate of the War Department or regimental or other adjutant stating that the place could not be disclosed when the acknowledgment was taken because of the military situation, and if possible then disclosing the location of the place, may meet the requirements in some jurisdictions. However, such procedure should only be resorted to in extreme and emergency circumstances as a temporary expedient to be replaced, if possible, by a properly executed and acknowledged instrument as soon as the military situation permits.

The forms of acknowledgments, jurats and certificates of authority are also dependent on state, territory, district or other jurisdictional requirements and thus impossible to standardize. The following forms are believed to be in conformity with A. W. 114, as amended, and may be found to be legally effective in some jurisdictions. However, it is recommended that they be used only in an emergency or as a guide, and that care be taken to alter and adapt them when necessary to meet particular requirements. *SPJGA 1943/90, Jan. 21, 1943; 1943/875, Jan. 19, 1943; 1943/889, Jan. 20, 1943; 1943/962A, Jan. 16, 1943; 1943/2334, Jan. 27, 1943. Cir. 32, W. D., Jan. 30, 1943.*

SUGGESTED FORMS FOR USE UNDER PROVISIONS OF A. W. 114, AS AMENDED

ACKNOWLEDGMENT

_____
(City, town, county, district, province, etc.) } SS.
_____
(State, territory, country, etc.)

I, _____, do hereby certify, that I am an officer of the Army of the United States now on active duty in Federal service; that I am now *_____; that as an officer serving in such capacity I have the general powers of a notary public under the provisions of the act of December 14, 1942 (A. W. 114, as amended by Public Law 800, 77th Cong.); that _____, known to me to be a person subject to military law as defined in the act of June 4, 1920 (A. W. 2; 41 Stat. 787; 10 U. S. C. 1473), and known to me to be the person described in and who executed the foregoing instrument dated _____ and hereto annexed, appeared before me this day and being first duly sworn (acknowledged that he had signed) (executed) said instrument after the contents had been read and duly explained to him, and acknowledged that the execution of said instrument by him was his free and voluntary act and deed for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand this _____ day of _____, 194__.

(Signed) _____
(Printed) _____
(Grade, arm or service, Serial No.)
*_____
(Capacity)

CERTIFICATE OF AUTHORITY

_____
(City, town, county, district, province, etc.) } SS.
_____
(State, territory, country, etc.)

I, _____, do hereby certify, that I am a commissioned officer in the Army of the United States now on active duty in Federal service and as part of my official duties have charge of official records which show that _____, at the time of the taking of the above acknowledgment, was a commissioned officer of the Army of the United States on active duty in Federal service and *_____; that in such capacity he was at that time duly authorized by the act of December 14, 1942 (A. W. 114, as amended by Public Law 800, 77th Cong.), to take said acknowledgment; and that I have compared his signature as above inscribed with his signature on official records in my custody and believe that they were written by the same person and that he is the person he purports to be.

In Witness Whereof, I have hereunto set my hand this _____ day of _____, 194__.

(Signed) _____
(Printed)

_____
(Grade, arm or service)

_____
(Capacity; for example, The Adjutant General, Adjutant General, Adjutant, etc.)

_____
(Command; for example, U. S. Army, 1st Div., 10th Inf., etc.)

(Some jurisdictions require that a certificate of this kind be executed by the Secretary of War or The Adjutant General.)

JURAT FORM

_____
(City, town, county, district, province, etc.) } SS.
_____
(State, territory, country, etc.)

[Body of Affidavit, Oath, etc., and signature of person sworn]

Subscribed and sworn to before me, an officer of the Army of the United States now on active duty in Federal service, having the general powers of a notary public under the provisions of the act of December 14, 1942 (A. W. 114, as amended by Public Law 800, 77th Cong.), by virtue of my being now *_____, by _____, known to me to be a
(Name of affiant)
person subject to military law as defined in the act of June 4, 1920 (A. W. 2; 41 Stat. 787; 10 U. S. C. 1473), this _____ day of _____, 194__.

(Signed) _____
(Printed)

_____
(Grade, arm or service, Serial No.)

*_____
(Capacity)

ACKNOWLEDGMENT

[Place undisclosed]

With the Army of the United States of America at an undisclosable place } SS.

I, _____, do hereby certify, that I am an officer of the Army of the United States now on active duty in Federal service; that I am now *_____; that as an officer serving in such capacity I have the general powers of a notary public under the provisions of the act of December 14, 1942 (A. W. 114, as amended by Public Law 800, 77th Cong.); that _____, known to me to be a person subject to military law as defined in the act of June 4, 1920 (A. W. 2; 41 Stat. 787; 10 U. S. C. 1473), and known to me to be the person described in and who executed the foregoing instrument dated _____ and hereto annexed, appeared before me this day and being first duly sworn (acknowledged that he had signed) (executed) said instrument after the contents had been read and duly explained to him, and acknowledged that the execution of said instrument by him was his free and voluntary act and deed for the uses and purposes therein set forth; and I do hereby further certify that the aforesaid acknowledgment was taken by me while serving with the Army of the United States at a place the exact location of which cannot now be disclosed because of the military necessities of the situation.

In Witness Whereof, I have hereunto set my hand this _____ day of _____, 19____.

(Signed) _____

(Printed)

_____
(Grade, arm or service, Serial No.)

*_____
(Capacity)

CERTIFICATE OF AUTHORITY

[For acknowledgment at an undisclosed place]

_____
(City, town, county, district, province, etc.)
_____
(State, territory, country, etc.) } SS.

I, _____, do hereby certify, that I am a commissioned officer in the Army of the United States now on active duty in Federal service and as part of my official duties have charge of official records which show that _____, at the time of the taking of the above acknowledgment, was a commissioned officer of the Army of the United States on active duty in Federal service with the Army of the United States at a place the exact location of which could not then be disclosed because of the military necessities of the situation (but which may now be disclosed as being _____),
(Town, county, district, province, etc.) (State, territory, country, etc.)
and was* _____;
that in such capacity he was at that time duly authorized by the act of December 14, 1942 (A. W. 114, as amended by Public Law 800, 77th Cong.), to take said acknowledgment; and that I have compared his signature as above inscribed with his signature on official records in my custody and believe that they were written by the same person and that he is the person he purports to be.

In Witness Whereof, I have hereunto set my hand this _____ day of _____, 194___.

(Signed) _____
(Printed)

_____
(Grade, arm or service)

_____
(Capacity, for example, The Adjutant General, Adjutant General, Adjutant, etc.)

_____
(Command, for example, U. S. Army, 1st Div., 10th Inf., etc.)

*Insert one of the following clauses according to fact in any of the foregoing forms.

(1) commissioned in the Judge Advocate General's Department
(2) assigned to duty with the Judge Advocate General's Department
(3) detailed to duty with the Judge Advocate General's Department
(4) a staff judge advocate
(5) an acting staff judge advocate
(6) the president of a general court-martial
(7) the president of a special court-martial
(8) a summary court-martial
(9) the trial judge advocate of a general court-martial
(10) the trial judge advocate of a special court-martial
(11) the assistant trial judge advocate of a general court-martial
(12) the assistant trial judge advocate of a special court-martial
(13) the president of a court of inquiry
(14) the recorder of a court of inquiry
(15) the president of a military board
(16) the recorder of a military board
(17) an officer designated to take a deposition
(18) an officer detailed to conduct an investigation
(19) the adjutant of a command
(20) the assistant adjutant of a command
(21) the personnel adjutant of a command.

ADDENDA

ADDENDA

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