THE PLIGHT OF THE POW/MIA AND ATTENDANT LEGAL PROBLEMS

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"We are honored to have had the opportunity to have served our country under difficult circumstances . . ."1

Americans have been captured or listed as missing in action in various conflicts since the Revolution.2 However, the problems of the missing3 and captured American personnel and their families have been particularly acute during the recent war in Indochina.

The initial difficulties of a prisoner of war and of his family are likely to be of a similar nature in that both the man in captivity and the family at home experience psychological and perhaps physiological trauma.4 However, as the man’s missing status continues, legal problems as well are likely to arise for his family.5 The extreme length of America’s involvement in the Vietnam War served to accentuate the problems, legal and otherwise, of the missing and their families to a degree unparalleled in American history.6

A few facts may help put the legal problems of the Vietnam missing and their families in perspective. During the War of 1812, one American sailor was listed as being a prisoner of war for just

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2. The first Americans captured by the British at the beginning of the Revolution were released within two months in exchange for British POWs at Charlestown, Mass., June 16, 1775. Hearings on American POWs in Southeast Asia Before the Subcomm. on Nat’l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, 92 Cong., 1st Sess., pt. 1, at 479 (1971) [hereinafter cited as 1971 Hearings].

3. "Missing" as used in this paper will include all related categories including captured (POW) to be discussed infra.


over five years. However, the seaman was actually impressed into the Royal Navy and probably was not held captive in the sense of being incarcerated in close quarters. In more modern times, prior to Vietnam, the longest any American serviceman had been a prisoner of war was for a period of approximately three years and nine months. During the Indochina conflict, nearly a thousand Americans were either missing or held captive for periods ranging from five to eight and one-half years. Hundreds of other men were listed as being in a missing status for lesser periods of time.

Many legal problems have arisen as a result of prisoners of war (POW) or missing in action (MIA) status of Americans in previous wars. The Vietnam War was certainly not unique in that respect. If the period of captivity is short, then the legal problems of the prisoner and his family will likely be minimal. On the other hand, if a man were held in a missing status for years, a common occurrence in World War II, Korea, and to a much greater extent Vietnam, his attendant legal problems would be exacerbated. In the joy accompanying the return of captured Americans in Vietnam, it was easy to forget that the status of the great majority of the missing is still unresolved.

It should be remembered that as of the time this article is published, some Americans will have been in a missing status for an entire decade. During that time the families of the missing may have bought and sold real and personal property; drafted and probated wills; experienced deaths within the family; and in some cases wives may even have sought divorce. Reviewed in the context of prolonged absence, it should be apparent that the legal problems of the known prisoner of war or the missing in action and his family, while not unique to the Vietnam era, are often more severe and greater in number than the problems experienced by Americans in similar situations in previous wars. The

7. Seaman John Straughan was taken off the U.S.S. Chesapeake by a boarding party from the victorious HMS Leopard, June 22, 1807, and returned to U.S. control July 11, 1812. Straughan's widow sued for his pay earned while a POW and collected $1,096, 43 years after his repatriation. Straughan v. United States, 1 Ct. Cl. 324 (1865).
8. 5 B. FRANK & H. SHAW, VICTORY AND OCCUPATION, HISTORY OF USMC OPERATIONS IN WORLD WAR II (1968). The first Americans captured in World War II were Marine embassy and legation guards taken at Peiping and Tientsin, China, December 8, 1941. The last World War II American POWs to be repatriated were released at Nagasaki, Japan, September 22, 1945. Id. at 731-32, 786.
10. Id.
failure to resolve the status of the missing, for whatever reasons, can only intensify old legal problems and spawn new ones.

This article will highlight the legal difficulties that the family of a POW/MIA may have faced during his absence, as well as discuss legal problems that a prisoner of war may encounter upon his return. In addition, case and statutory law which might prove helpful to an attorney advising a POW/MIA or his family will be noted.\(^\text{11}\)

**The Legal Rights and Responsibilities of the POW**

Legal problems must be framed in relation to the rights and duties of a POW and of the power that detains him. Such rights and duties are set forth in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949,\(^\text{12}\) which applies to undeclared as well as declared conflicts.\(^\text{13}\) Captured servicemen are also governed by their own armed forces regulations, such as the Code of Conduct for American Armed Forces.\(^\text{14}\)

**Common Legal Problems of POW/MIA Families**

The first area of legal problems pertains to the legal or quasi-legal\(^\text{15}\) difficulties which have been experienced by family members of missing personnel. It should be noted that some legal problems would have arisen even if the man had never gone overseas, for example, the legal aspects associated with real property conveyancing. However, in many cases, routine legal problems were made more complex by the missing man's absence and consequent inability to participate in family affairs.

\(^{11}\) There is a paucity of reported case law concerning interpretations of POW/MIA legal problems. The reasons for this can only be hypothesized.


\(^{13}\) *The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, Art. 2, provides that the convention applies to any "declared war or any other armed conflict . . . even if the state of war is not recognized by one of them." (Emphasis added.) The United States, Republic of Vietnam, and the Democratic Republic of Vietnam have each acceded to or ratified the convention. The International Committee of the Red Cross, depository of the convention, has held that the two Vietnams' ratification of the convention has bound the National Liberation Front (Viet Cong) to its provisions. For a more complete discussion see *1971 Hearings*, supra note 2.


\(^{15}\) Many legal problems overlap administrative facets of the POW/MIA problem, *e.g.*, regulations concerning the disbursement of pay and allowances and shipment of household effects.
The 590 families of American military and civilian POWs released during Operation Homecoming in early 1973 have begun the task of resolving the difficult legal problems that may have arisen during the POW's captivity. Unfortunately, the families of the 1,359 Americans who remain unaccounted for will continue to experience legal difficulties.

POWER OF ATTORNEY

Many men missing in Indochina left no power of attorney; even if they had, the power frequently expired during the period of their missing status. The reasons for the failure to execute a power of attorney can only be surmised. Some men were unaware of the difficulty their next of kin might encounter during a prolonged absence. Perhaps some servicemen avoided executing a power of attorney just as they would avoid drafting a will: the experience often conjures unpleasant thoughts.

Finally, some men do not wish their next of kin to have the quantum of control over their affairs that a power of attorney, even if limited, would provide. Unfortunately, individuals were frequently advised by military attorneys to place an expiration date on any power of attorney they might execute. The expiration date was to coincide approximately with the man's expected return from overseas. This advice, though well intentioned, was often given before the prospect of MIA/POW status became a common occurrence.

Because a power of attorney is worthless if the person executing it is deceased, some merchants refuse to honor the power if

16. The repatriation phase of Operation Homecoming (formerly known as Egress/Recap) commenced February 12, 1973, with the return of 116 military personnel from North Vietnam and continued through April 1, 1973, with the return of Capt. Robert White, U.S. Army, by the Viet Cong. A breakdown of repatriates by service affiliation is as follows: Army—77; Navy—138; Air Force—325; Marine Corps—28; civilian—24. In addition to the Vietnam returnees, John Downey, who was captured during the Korean conflict, was repatriated in 1973. Hearings on American POWs and MIAs in Southeast Asia before the Subcomm. on Nat'l Security Policy and Scientific Development of the House Comm. on Foreign Affairs, 93d Cong., 1st Sess., pt. 4, at 56 (1973).

17. Los Angeles Times, April 2, 1973, at 13, col. 3. Department of Defense status changes reduced the number of unaccounted servicemen in Southeast Asia to 1,284 as of May 26, 1973.

18. See Comment, supra note 5 for a thorough treatment of the power of attorney problem. This writer is aware of one POW who wrote a letter, while in captivity, to his wife, which she received that stated in part "If you want my power of attorney, here it is." Most POW censors were not so liberal in letting material helpful to a POW or his family go through the mails.
they know that the man who granted it is listed as missing instead of captured.\textsuperscript{19} This problem has been addressed through the enactment of federal legislation revitalizing powers of attorney which have expired while a serviceman is classified as missing.\textsuperscript{20} The legislation affects only those powers of attorney in which a serviceman's named relative is the grantee of the power.\textsuperscript{21} The new legislation does not apply to powers of attorney executed after January 22, 1973, if the language of the power specifies that it is to expire on a certain date.\textsuperscript{22}

\textbf{Transfer of Property in Which POW/MIA Has an Interest}

Families have experienced difficulties in transferring real or personal property in cases where the missing man's signature is required. Buyers or sellers dealing with POW/MIA families are, in many cases, apprehensive about closing property transfers due to the provisions of the Soldiers and Sailors Relief Act.\textsuperscript{23} The act is designed to protect absent servicemen (missing or not) from having their interests irretrievably harmed. However, a bona fide purchaser's title is not rendered void by the Soldiers and Sailors Relief Act, even if a judgment is subsequently set aside.\textsuperscript{24} Nevertheless, wives of missing men have encountered difficulties in purchasing or selling homes, as well as in other transactions involving large sums of money.\textsuperscript{25} Title insurance companies are hesitant to insure titles where community property is involved and no valid power of attorney exists.\textsuperscript{26}

\textbf{Conservatorships}

Some POW/MIA families have found that conservatorship proceedings have been necessary or expedient in completing certain property transfers in which the POW/MIA has an interest. A number of states have passed special legislation designed to aid

\textsuperscript{19} Id. at 86.
\textsuperscript{21} Id.
\textsuperscript{22} Id. As an example of new state legislation in this area, CAL. CIV. Code § 2356 (Cum. Supp. 1974) provides that where an MIA's power of attorney is concerned, parties are deemed to be without notice of death or incapacity of the principal.
\textsuperscript{24} Id.
\textsuperscript{25} Personal experience of the writer concerning POW/MIA wives in the San Diego area. The problem may have been less severe in a non-community property state.
\textsuperscript{26} STAFF JUDGE ADVOCATE (USAF SPACE & MISSILE SYSTEMS ORGANIZATION, LOS ANGELES, CALIFORNIA), ATTORNEY'S GUIDE FOR ASSISTANCE TO POW/MIA FAMILIES (1972).
POW/MIA families in conservatorship proceedings. The new legislation simplifies traditional conservatorship actions. The special streamlined proceedings are often designed for situations where the property to be transferred is valued below a specified amount. The obvious import of the new legislation is that it aids families in disposing of property such as boats or automobiles which might be expected to depreciate in value during the time that a man remains in missing status.

It was noted earlier that the length of the Vietnam War has directly contributed to the type and severity of POW/MIA family problems. The new state legislation discussed above is a good example of the measures necessary to alleviate some of these difficulties. It was not until the Indochina conflict had continued for several years that most states began enacting special conservatorship legislation pertaining to missing servicemen. The length of the conflict, rather than the number of men missing or captured, precipitated the interest leading to the legislation. It was not until ten years after the first American casualty in Vietnam, and the first men to be listed as MIA had been in such a status for eight years, that legislation pertaining to the POW/MIA was enacted.

DIVORCE AND MARRIAGE PROBLEMS

While statistics are unavailable, it seems fair to say that a significant proportion of women married to POW/MIAs may have considered seeking a divorce as the Vietnam War dragged on and the years of separation continued. Such thoughts seem reason-


28. As an example, California, Nebraska, New Hampshire, and Washington provide for a simplified conservatorship proceedings for property of less than $5,000 value. New Mexico has no such monetary limit and the Texas statute applies only to community property. See note 27 supra.


31. As of September 3, 1971, 38% of missing Army personnel, 47% of USMC, 76% of Navy, and 78% of Air Force missing were married. 1971 Hearings, supra note 2.
able when one considers that the great majority of men listed in any type of missing status never return.

At the conclusion of the repatriation phase of Operation Homecoming, April 1, 1973, only 31 percent of those listed as missing in Southeast Asia had returned. Those wives who did divorce their husbands prior to their returning or being declared dead lost the right to continue to receive military benefits of pay and allowances that would normally accrue. Upon receiving notification of divorce, the services would cease making payments to a woman except for child support payments ordered by a court.

Other women have chosen to have had their husbands declared dead by a court pursuant to the laws of the appropriate state even though no declaration of death has been made by the military or civilian agency having cognizance of such matters. The latter course of action, of course, obviates the necessity for divorce proceedings. If a wife were to have her husband declared dead, such declaration would have no effect upon the military. Presumably his pay and allowances, which would continue to accumulate, would be paid to his wife in amounts indicated on his Record of Emergency Data, executed before he went overseas. If the wife were to remarry, she would cease to receive the missing man's pay and allowances as she would no longer be his next of kin. The writer is not aware of a case where the wife had her husband declared dead, remarried, and then at a later date her first husband returned.

In 1971, the United States Comptroller General was called upon to rule in a unique unpublished case which arose out of the actions of a MIA wife domiciled in California. Though admittedly unusual, the case illustrated difficulties which could develop for an MIA wife. Sandra Christensen was married to a Navy lieutenant who was declared missing on March 1, 1966. In accordance with the lieutenant's wishes, as expressed in his Record of Emergency Data, his wife received 80 percent of his pay and allowances. On December 4, 1969, Sandra remarried without securing a divorce from her MIA husband and without having had him declared dead; the lieutenant had neither been declared dead by a

32. Supra notes 16 and 17.
33. 50 U.S.C. App. § 521 (1970). Section 521 of the Soldiers and Sailors Relief Act invests courts with discretionary power to grant a stay in any action in which a military person is a party. This power to stay actions is discretionary when exercised sua sponte by the court. One might well ask why courts have not invoked their discretionary staying power in the area of divorce to protect the missing man. 50 U.S.C. App. 521 (1970).
court nor by the Department of Defense. The Secretary of the Navy, through his authorized representative, discontinued the wife's benefits. On August 11, 1971, Sandra's petition to the Superior Court of San Diego County to have the second marriage declared a nullity was granted,35 pursuant to California Civil Code Section 4401 et seq.36 which authorizes annulment proceedings in marriages entered into where a spouse believed the first spouse to be dead at the time of the second marriage.

Upon having her second marriage annulled, Sandra petitioned the Secretary of the Navy to resume the benefits she had previously received from the pay account of Lieutenant Christensen. The matter was referred to the Comptroller General who ruled that upon the annulment of the second marriage, Sandra again became the lawful wife of the missing lieutenant, and hence was entitled to receive the benefits that had been terminated as a result of her second marriage.37 The Comptroller General cited a 1970 California case, In re Estate of LeMont,38 which indicated that the wife in a similar case (but not involving a POW/MIA) was a partner to a "restored" marriage upon the annulment of the second marriage. In other words, the first marriage resumed as if the second had never occurred. The Comptroller General did note, however, that should evidence be received that the missing man had died during the second marriage of the wife, prior to the annulment, the matter would have to be reconsidered.39

It should be noted that under California law, Sandra Christensen would not have been the lieutenant's widow had he died while Sandra was still married to her second spouse, even though the second marriage was subsequently annulled. In such a case California statutes make an exception to the general rule that the annulment of the marriage is retroactive.40 The above discussion only applies where the second marriage was entered into in the belief that the spouse in the first marriage was dead.41

LEGAL PROBLEMS IN RELATION TO STATUS OF POW/MIA

The remainder of this article will deal with legal problems

36. CAL. CIV. CODE §§ 4401, 4425(b) (West 1970).
40. CAL. CIV. CODE § 4401 (West 1970).
41. Supra note 36.
that may be anticipated as a result of the return of the POWs and the eventual status changes of men listed in various missing categories. As previously noted, the large majority of men listed in a missing status did not return during Operation Homecoming. These non-returning men will eventually be declared presumptively dead or will be declared dead as of a certain date if sufficient information is received that would point a positive date of death.

Individuals commonly referred to as POW/MIA include those military or civilian U.S. Government personnel who are listed as "missing", *missing in action*, *interned in a foreign country*, *captured*, *beleaguered*, *besieged* or *detained in a foreign country against his will*.

The law provides that the status of a missing man must be fully reviewed before the end of the first 12 month period that he

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42. Not all men are missing as a result of hostile action or their own misconduct. The men missing for reasons other than as a result of hostile action or their own misconduct might be better termed "missing" vis-a-vis an "MIA" classification. As of December 9, 1972, 117 Americans were listed as "missing" vis-a-vis MIA in the Vietnam theatre. *U.S. Naval Institute Proceedings* 223, May, 1973.

43. MIA connotes a missing status as a result of hostile action, even if the hostile action is quite indirect or presumed.

44. The term "interned" usually applies to citizens of a belligerent nation who find themselves in a neutral country when their own country is at war. The circumstances of 11 U.S. Army aviators who inadvertently landed in neutral Portugal January 15, 1943, and were interned are discussed in 11 J. Bar Assn. D.C. 98 (1944). *See also 1971 Hearings*, note 2 supra at 483-84.

45. "Captured" indicates that one is a POW or PW (World War II term) in the hands of the enemy.

46. "Beleaguered" and "besieged" are often used synonymously but can be distinguished. "Beleaguered" applies to individuals who find themselves at large in enemy territory, but neither captured nor surrounded in a restricted geographical location. American servicemen who were thought to be alive and to have escaped capture in the Japanese occupied Philippines during World War II were listed as "beleaguered." *See Unpub. Compt. Gen. B149213 (1962).*

47. Classical examples of personnel in a "besieged" status would include the Wake Island garrison, captured en masse December 23, 1941, after a siege of over two weeks. *See F. Hough & V. Ludwig, 1 History of USMC Operations in World War II (1958).* The American personnel at Corregidor from December 8, 1941, until the island's fall May 6, 1942, were listed as being "beleaguered," although it would seem that they were in fact "besieged." *See Unpub. Compt. Gen. B149213 (1962).*

48. One five man B-25 crew flying from U.S.S. Hornet on the April 18, 1942, raid over Tokyo was forced to land in the allied Soviet Union. The crew was "detained against their will" by the Russians until their escape through Iran, May 24, 1943. *See G. Glees, Doolittle's Tokyo Raiders 193 et seq. (1964).*
was reported missing.\textsuperscript{49} The Army and Marine Corps routinely conduct yearly reviews of their missing men, while the Air Force and Navy review the status of their absentees as circumstances warrant.\textsuperscript{50} The reviews are conducted by the appropriate service secretary (for military personnel), agency head (for civilian federal employees), or their designees.\textsuperscript{51}

**Presumptive Findings of Death (PFOD)**

If information is received that indicates to the satisfaction of the reviewing authority that a man died on a particular date he is declared dead as of that date. If information is received that indicates a man is dead, but it cannot be determined on what date he died, the man is declared “presumptively dead” either one year after he entered a missing status, or on a later date if he continues to be carried in a missing status past the anniversary date of his first year of disappearance.\textsuperscript{52} Hence, it is apparent that if it is not positively known that a man is dead he will be carried in a missing status for at least a year before being declared “presumptively dead.” On the other hand, if evidence is received that a man died on a particular date, he may be declared dead as of that date regardless of when the information is received. If it is found subsequently that a man died on a particular date, the law provides for no recoupment of pay and allowances credited to his account (except for unearned insurance premiums) before the reviewing authority received evidence of his death.\textsuperscript{53}

Prior to November 22, 1972, the date upon which a man was declared actually or presumptively dead would have been of importance to beneficiaries of his Serviceman’s Group Life Insurance policy (SGLI). Commencing June 25, 1970, SGLI benefits were increased from $10,000 to $15,000.\textsuperscript{54} For a time it seemed that those known to have died before June 25, 1970, would leave the lower figure to their beneficiaries. However, on November 22, 1972, the Veterans Administration indicated that the $15,000 SGLI benefit would be paid to beneficiaries of missing men subsequently declared dead regardless of the date of actual death or date the man


\textsuperscript{50} See memoranda from all services to Assistant Secretary of Defense (ISA) delineating presumptive finding of death procedures used by the respective services. 1971 Hearings, supra note 2, at 578.

\textsuperscript{51} Supra notes 49 and 50.


was declared presumptively dead.\textsuperscript{55}

The date on which a missing man is declared to be dead can be quite significant in situations where it is necessary to determine whether the serviceman predeceased another person. No cases from Vietnam have been reported on this point, but fact situations from World War II, directly analogous to similar situations in Vietnam, may serve to emphasize the potential seriousness of the problem as well as the analysis necessary for the court to reach a decision.

The Supreme Court of Oregon in \textit{In re Thornburg's Estate}\textsuperscript{56} was faced with one issue: "Did Lieutenant Thornburg, son and legatee of D. A. Thornburg, predecease his father?" Lieutenant Thornburg never returned from an over-water flight on October 28, 1944. His father died six months later. Lieutenant Thornburg was carried in a missing status and declared presumptively dead October 29, 1945, a year and a day after he disappeared. The court made a point of considering the facts of Lieutenant Thornburg's case in great detail. The court held that the evidence was overwhelming that the lieutenant died on the date he failed to return from his flight. Facts indicated that it was almost certain that Thornburg's plane was mistakenly identified as an enemy and shot down by American pilots who reported the incident on the date he disappeared. Evidence also indicated that the plane fell into the sea, no survivors were observed, and a typhoon swept the area the next day. The case is particularly interesting because under Oregon law the PFOD date made by the War Department was entitled to prima facie probative value.\textsuperscript{57} The court held that the facts effectively rebutted the presumption that the PFOD date was the actual date of death. The son was held to have predeceased his father and accordingly the legacy in question passed to testator's daughter-in-law as provided for in the will.

The facts in these types of cases must be closely scrutinized, for it is obvious that whether a legacy is void or whether anti-lapse statutes apply will depend upon a determination of the actual date of death of an MIA. For probate purposes, this date may or may not be different from the PFOD date issued by the federal reviewing authority.

A Pennsylvania court decided that the actual date of death should be the same as the PFOD date given by the military unless facts were presented to rebut the Pennsylvania statutory pre-
sumption that the PFOD date as supplied by the military and the actual date of death as determined by the court were one and the same. The court in Stone’s Estate found no facts to rebut the presumption and so adopted the PFOD date as the actual date of death for probate purposes. A New Jersey court arrived at an opposite conclusion in construing a New Jersey statute, having the same wording as the one construed by the Pennsylvania court.

The fact situation in the New Jersey case, Lukens v. Camden Trust Co., was similar to that in the Oregon case, In re Thornburg’s Estate noted above. It was obvious that the missing man died on or about the date of his disappearance rather than on the PFOD date many months later.

Close attention must be paid to applicable state statutes in determining what, if any, effect a presumptive finding of death date established by a federal agency has upon state courts for probate adjudications. At this writing there is a partial moratorium upon changing the status of MIA to “presumptively dead.” It has been anticipated that after the return of the POW during Operation Homecoming, the various federal agencies concerned would begin making presumptive findings of death for those men who did not return. A number of status changes were made until next of kin in New York brought a class action suit in McDonald v. McClucas on behalf of the next of kin of all military servicemen (civilian missing were not included) listed as missing in Indochina. The next of kin alleged that their rights were being irrevocably harmed due to the status changes being made in absence of constitutional safeguards that were required when a person was to be deprived of a protected interest. The government conceded that substantial constitutional questions were presented by the suit. A temporary restraining order was issued pending the decision of a three judge court which would decide whether an injunction should issue or the restraining order should be dissolved. The restraining order does not apply to situations where the next of kin of an MIA requests in writing that the appropriate service secretary not delay action on information the secretary may possess on the missing man.

60. Id. at 888.
62. Supra note 56.
64. Civil No. 73-3190 (S.D.N.Y. 1970) at 7.
In the meantime, the American Joint Casualty Resolution Center (JCRC), with headquarters in Thailand just across the Mekong River from Laos, is continuing its efforts to locate decedent MIAs. According to the truce signed in Paris, January 27, 1973, the parties to the agreement are to assist one another in resolving the status of missing men. Members of the JCRC have, to date, been unsuccessful in obtaining permission to visit suspected crash sites of missing aviators in North Vietnam or in communist controlled areas of Laos, Cambodia and South Vietnam. The JCRC will undoubtedly find it impossible to resolve the status of more than a handful of the missing without the necessary permission. Unless returning POWs can provide reliable information concerning the death of particular MIAs, it would seem that ultimately presumptive findings of death will be made. There are a few instances where men declared dead have later been found to be alive. One Marine listed as killed in action (KIA) was later found to be a POW, and he eventually returned.

**DEATH BENEFITS**

When a man's status is changed from KIA to MIA or POW, the question arises concerning what happens to death benefits paid to the man's beneficiaries. These benefits would consist of a death gratuity equal to six months of decedent's pay, proceeds from Serviceman's Group Life Insurance (SGLI), proceeds from any private insurance policies held, unpaid pay and allowances and social security benefits. The military services have not attempted to recoup payments made in those few cases where erroneous declarations of death were made. Some families have voluntarily refunded such payments to the government.

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65. The JCRC is a joint task force whose army commander reports to the Commander in Chief of the Pacific. It was organized January 23, 1973, with headquarters at Nakhon Phanom, Thailand. Its mission is to assist in resolving the status of U.S. personnel who remain in a missing status. Memorandum from Dr. Roger Shields, Assist. to Sec. of Def. for POW/MIA affairs to Members of Congress, Feb. 2, 1973. See also N.Y. Times, Apr. 13, 1973, at 7, col. 1.

66. The parties include the United States, Republic of Vietnam, Democratic Republic of Vietnam, and National Liberation Front (Viet Cong). Neither the Khmer Rouge (Cambodian communist insurgents) nor the Pathet Lao (Lao communist forces) signed the agreement. Both entities are known to have captured Americans. Agreement on Ending the War and Restoring Peace in Vietnam, art. 8(b), signed Jan. 27, 1973.

67. Id. at art. 10.


70. Benefits paid in good faith will not be recouped by the government. 34 Compt. Gen. 494 (1955).
Additionally, private insurance companies should be able to prevail in an action to recoup death payments disbursed through a mutual mistake of fact just as in civilian cases.\textsuperscript{71} For public relation considerations, an insurance company might choose not to pursue an action to recoup benefits paid to a family of a man declared KIA who later is found to be alive.

\section*{Pay and Allowances of Men in a Missing Status}

The United States Code under the Missing Persons Act provides that pay and allowances of all categories of missing personnel shall continue while they remain in a missing status.\textsuperscript{72} Missing members continue to receive basic pay, subsistence, and any of the following if they were receiving the pay at the time they became missing: special pay, incentive pay, basic allowance for quarters, and station per diem not to exceed 90 days.\textsuperscript{73} A recent change in the law provides that repatriated POWs may continue to receive hazardous duty or incentive pay for up to a year following their release even though they may not be engaged in the activities which entitled them to their pre-capture extra pay.\textsuperscript{74} This change allows men who face hospitalization for a prolonged period after being repatriated to continue to draw their extra pay for at least a portion of the interim period following their return to United States military control.\textsuperscript{75}

The Comptroller General\textsuperscript{76} decided in a published 1966 opin-

\textsuperscript{71} 74 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 221 (2d ed. 1968); See Pilot Life Ins. Co. v. Cudd, 208 S.C. 6, 36 S.E.2d 880 (1945) in which a KIA was later found to be a POW. Beneficiaries were held obligated to return insurance proceeds.


\textsuperscript{73} Id. Travel per diem is excluded. Hevenor v. U.S., 101 F. Supp. 465, 469 (Ct. Cl. 1951).


\textsuperscript{75} Id. The hazardous duty or incentive pay continues for up to a year if the returnee is in a hospitalized or rehabilitation status.

\textsuperscript{76} There have been a number of comptroller general decisions and a lesser number of court decisions interpreting the statutes that provide for the continuation of pay and allowances to MIAs. An attorney handling a case in which pay due a POW or MIA family is at issue should consult the latest published and unpublished reports of the U.S. Comptroller General relating to POW/MIA financial matters. Unpublished decisions may be obtained at nominal cost from the Air Force's LITE Center, as noted previously.

The writer wishes to thank the U.S. Air Force Legal Information Through Electronics (LITE) staff in Denver, Colorado, particularly Mr. Frank Blue and Mr. Robert Lundwell for the retrieval of published and
tion\textsuperscript{77} that an MIA family was entitled to a family separation allowance even though his temporary duty status terminated after 24 days.\textsuperscript{78} This result is consonant with the policy that missing men should receive pay and allowances to which they would be entitled had misfortune not intervened.\textsuperscript{79}

Since a change in the law in 1957, missing men are entitled to a per diem allowance (daily additional stipends to compensate men away from their duty station who must purchase food and lodging on a per day basis) for a maximum of 90 days.\textsuperscript{80} This amendment to the law corrected inequities whereby men captured at the same time might receive vastly different amounts of back pay upon their release simply because one of the men had been on temporary duty and drawing per diem at the time of his capture. This amendment would change the result reached on a World War II case where a sergeant captured at Wake Island in December 1941, received a per diem allowance for the entire three years and nine months he spent as a POW.\textsuperscript{81}

During the early years of the Vietnam War it was held that the cash clothing allowance authorized for enlisted personnel\textsuperscript{82} was not creditable to the pay account of a missing enlisted man\textsuperscript{83} because the allowance was not specifically enumerated by the Missing Persons Act.\textsuperscript{84} While the amount of money involved was minimal, the decision was significant. The opinion implied that an allowance not designated by statute as applicable to a missing man could not be credited to his account. However, that has not always been the case according to a 1959 Comptroller General decision.\textsuperscript{85} The family separation allowance was not listed under the Missing Persons Act, but nevertheless was held to be payable.\textsuperscript{86}

RE-ENLISTMENT AND PROMOTION ASPECTS OF THE MIA PROBLEM

If an MIA’s enlistment expires while he is classified as missing

\begin{itemize}
\item 77. 45 Compt. Gen. 663 (1966).
\item 78. 37 U.S.C. § 427(b)(3) (1970) requires the serviceman to be away from the permanent station on temporary duty for 30 continuous days in order to be eligible for the separation allowance.
\item 81. Dilks v. United States, 97 F. Supp. 702 (Ct. Cl. 1951).
\item 83. 44 Compt. Gen. 657 (1965).
\item 86. See note 78.
\end{itemize}
his period of active service will be extended,\textsuperscript{87} and he will continue to receive commensurate pay. Bonuses are paid to enlisted men for re-enlisting.\textsuperscript{88} A World War II Comptroller General decision indicates that such bonuses would be paid to men whose enlistments were extended while missing.\textsuperscript{89} The amount of their enlistment bonus is no longer computed according to the method used in World War II. Now the bonus is based upon a formula which considers previous enlistments of the individual and the number of years of re-enlistment.\textsuperscript{90} To date, no case deals with the computation of Vietnam POW/MIA re-enlistment bonuses. Due to the present number of missing enlisted men,\textsuperscript{91} this area will undoubtedly be subject to refinement in the future.

At one time, careers of officers who had twice been denied promotion while classified as missing were jeopardized. Statutory provisions provide for the honorable discharge of officers of a certain rank who are not selected for promotion.\textsuperscript{92} The President, however, delegated his authority to the Secretary of Defense or the appropriate service secretaries to suspend these sections of the code.\textsuperscript{93}

A 1968 decision\textsuperscript{94} by the Comptroller General made it unnecessary for temporary promotions\textsuperscript{95} to be formally accepted by the officers concerned, which normally would have to be done before the promotion became effective.\textsuperscript{96} A strict interpretation of the law worked a hardship not only upon missing officers temporarily promoted, but also upon any officer who happened to be temporarily unavailable when the promotion papers reached his duty

\textsuperscript{87} 10 U.S.C. § 671(a) (1970).
\textsuperscript{89} 25 Compt. Gen. 543 (1946).
\textsuperscript{90} 37 U.S.C. § 308 (1970). The previous method of computing the bonus was based upon the number of years an individual had served since his last enlistment.
\textsuperscript{91} As of Sept. 3, 1974, 69\% of Army missing, 43\% Marine, 8\% Air Force and 3\% Navy were enlisted personnel. (The great majority of Naval and Air Force missing were pilots or navigators who are commissioned officers). See 1971 Hearings supra note 2.
\textsuperscript{93} Exec. Order No. 11390, 3 C.F.R. 92 (1968 Comp.), as amended, Exec. Order No. 11601, 3 C.F.R. 194 (1974). With only one or two exceptions all officers listed in a missing status were promoted along with their contemporaries in the promotion zone anyway.
\textsuperscript{94} 47 Compt. Gen. 587 (1968).
\textsuperscript{95} 10 U.S.C. § 5784 (1970). A temporary promotion is the standard means by which an officer is promoted to the next higher rank. The rank behind the grade in which the officer is actually serving and upon which his pay and allowances are based.
\textsuperscript{96} 47 Compt. Gen. 587 (1968).
station. It would have been possible, however, to promote officers under other provisions of the code. For example, wartime promotions are effective when made, although they expire six months after the war ends.  

The POWs Return—Benefits and Pending Legislation

Benefits await the returning POW, some of them peculiar to ex-prisoners of war, while others pertain to all veterans. Returning POWs will receive, in addition to whatever back pay and allowances are due them, $3.00 for each day their treatment did not meet the standards of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and $2.00 for each day that they received substandard food under that convention. A commission will evaluate the claims of the returning men. It can be expected, based upon known conditions in enemy prison camps, that the $5.00 daily sum will be routinely given each returning POW. For those who spent long periods of time in captivity the money will add up to more than a token amount.

The amount of gross income allocable to compensation for active service as a member of the armed forces for all MIA/POW personnel is tax free retroactive to 1961. This tax free benefit terminates upon their return to United States control. Some POW/MIA families were able to strengthen their financial posture considerably by taking advantage of the Uniformed Services Savings Deposit Program with its 10 percent interest which was established for the benefit of any serviceman stationed in a combat zone. A bill has been introduced in Congress that would make the interest accrued under this program tax free for those men who were in a missing status.

All servicemen accrue leave at the rate of 30 days a year. Legislation enacted in 1972 removed the 60-day maximum amount of leave that may be accumulated by a missing serviceman. The new legislation would place no limit on the leave that may be accrued by a serviceman while in a missing status, and will pay him for the amount accrued if he does not take it.

102. Id.
Many of the POW/MIA related bills pending in Congress duplicate one another. A number of bills awaiting action in both houses on Capitol Hill would give double retirement credit for time spent in a missing status. The effect of the law would be to allow many ex-POWs to retire much earlier than their contemporaries or to receive more retirement pay for the same number of actual years of federal service than would those members who were not captured.

Bills have been introduced which would provide that every returning POW is presumed to be disabled to a certain percentage rate. This percentage rate is then applied to the base pay of the repatriate to arrive at the amount of the disability payment. These payments are made in addition to all other pay and allowances to which the returned missing person is entitled; such payments are also tax free.

Returning military POWs will have access to military hospitals for themselves and their families while they remain in, or until they are retired from, the military service. G.I. Bill benefits await those who plan to leave the service and further their education. Various state home loan programs such as the California Veteran home loan may be used by them as is the case with any veteran. Some states have enacted veterans' bonuses that give some Vietnam veterans who meet certain state requirements lump sum payments for their services during wartime. Such gratuitous benefits to veterans may contribute to strained relationships among veterans, non-veterans, and the active military.

It may be expected that some returned POWs will experience problems for years as a result of their incarceration.
might be anticipated, a number of ex-POWs continue to incur psychological and physiological difficulties stemming from their captivity. Some of these difficulties are sure to bring with them attendant legal entanglements, in addition to those imposed as a direct result of a man's missing status. The attorney with insight as to some of the difficulties the POWs have experienced, as well as an overview of the legal problems likely to arise, can be of invaluable assistance in aiding the returned POW, his family and the families of the missing who will not return.

The Armed Forces Institute of Pathology, the National Institute of Mental Health, and the Veterans Administration have established the National POW/MIA Medical Research Unit, San Diego, California, in which all four armed services participate, plans to do research into the physical and psychological problems of returned POWs for the next 20 years.

112. Segal, Therapeutic Considerations in Planning the Return of American POWs to Continental United States, MILITARY MED. (Feb. 1973). Vietnam repatriates, in many cases, have suffered stress reactions after their return home. These reactions consist of, among others, euphoria, fear, and depression which have made it difficult for many ex-POWs to readjust to family life. See Time, June 18, 1973, at 67.