

HIGHWAY TO JUSTICE

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GROPING FOR THE BOUNDARIES OF INDIAN COUNTRY

*By Judge J. Matthew Martin
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In February 2018 the National Highway Traffic Safety Administration's (NHTSA) National Center for Statistics and Analysis issued a Research Note in its Traffic Safety Facts Series regarding NHTSA's effort in determining when a fatal crash occurs on an Indian¹ reservation.² The Research Note illustrates the significant difficulties in acquiring accurate data on crashes on Indian reservations.

For example, in 2016, using only the Fatality Analysis Reporting System (FARS)³ NHTSA recognized 298 fatalities on Indian reservations.⁴ Utilizing a different analytical basis, the derived Bureau of Indian Affairs (BIA) element from geospatial software, an entirely different number of traffic deaths emerged: 321.⁵ The primary analytical reasons for the discrepancy is that "the FARS special jurisdiction coding is not 100 percent accurate and the derived BIA elements using the geospatial software are not 100 percent complete."⁶

Any reasonable scientific methodology is hindered by centuries of human interference in tribal self-governance on the part of the dominant American culture, and specifically by policies enacted by Congress and by the Supreme Court of the United States. For example, law students are bewildered to learn that, in 1823, the Supreme Court declared that all the lands in the hands of the indigenous peoples of the United States (and those lands to become part of the United States) were not actually owned by the natives.⁷ Instead, the titles to these vast lands were owned by the government and the natives had merely a right of occupancy, a possessory interest.⁸

To a large extent, this holds true today. Indian reservations are comprised of lands held by the government in trust for the various tribes. Individual Indians have only a possessory interest. The same holds true for tracts held in common by any particular tribe.

However, it is not quite as simple as that. Beginning in the latter part of the 19th Century and continuing for decades, Congress pursued a policy of assimilation, where the "Indianness" of native peoples would

be absorbed into the great American melting pot and Congress could, by and large, get out of the business of overseeing tribal nations. As a subset of this policy, Congress developed a plan called "allotment," where individual Indians would be assigned formerly tribal lands in fee simple. For groups of people who had no cultural experience in land ownership of this fashion, the result was predictable, with numerous Indians swindled and victimized and enormous amounts of acreage passing out of tribal control. Thus, in many places, Indian lands resemble more of a checkerboard, rather than a contiguous mass. As observed in Image 1 in the Research Note, even on reservations with intact external boundaries, there may be lands within the reservation that are privately owned by non-Indians.⁹

Lacking clear direction from Congress, the Supreme Court has only added to the confusion. In one significant case, the Court held that by giving states an easement to maintain highways passing through their reservations, the tribes also divested themselves of tribal court jurisdiction to hear civil lawsuits against non-tribal members arising out of crashes on those very highways.¹⁰

Law enforcement, the source of much data on traffic fatalities, is similarly muddled. Tribal police, BIA Agents, Federal Bureau of Investigation agents, and State law enforcement officers¹¹ all vie for the ability to exercise police power over Indian lands in an ever-changing continuum, which affects not only major crimes¹² such as vehicular homicide, but reckless driving, impaired driving, and cases involving no car seat for minors. The racial identity of the offender, and the victim, core components of jurisdictional analysis in cases arising on Indian reservations, also add to the jurisdictional confusion. Multiply by 573 federally recognized Indian tribes¹³ and the scope of the problem becomes more apparent. By comparison, ascertaining the number of fatal crashes in the state of Florida is a cinch.

To its credit, NHTSA has been clever. Recognizing that both the FARS tool and the geospatial software have limitations within this context, NHTSA researchers combined the two techniques to propose a more

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We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to the editor, Hon. Neil E. Axel neilaxel49@gmail.com with a copy to the staff liaison, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Winter issue is November 28.

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reliable methodology. Utilizing this new protocol, NHTSA arrived at a 28 percent increase for the year 2016: 380 motor vehicle fatalities on Indian lands.¹⁴

NHTSA and the BIA should consider adopting a standard definition of the Indian lands they are categorizing. Congress has done so for the purposes of crimes and this definition might well serve as a template for investigating fatal crashes:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹⁵

Standardization can only increase the reliability of the data gleaned from it. While more work remains, NHTSA has taken a significant step forward in that direction as we grope for the boundaries of Indian Country.

Endnotes:

1. In this article, I use the terms tribes, Natives, indigenous peoples, and Indian interchangeably. I avoid the more widely used term, Native American. This reflects an ongoing and somewhat contentious debate in American Indian Studies about which among these types of terms should be used when referencing indigenous peoples in the Americas and elsewhere. The term Indian is among the most disfavored on this list, not only because of the obvious but, at times, confusing geographical inaccuracies, but also because it is a colonial label which ignores the rich cultural diversity of indigenous nations in North America. Noting its disfavor, I nonetheless employ the word Indian primarily because it is the term used by the government in many statutes and in case law and because it is simply difficult to tiptoe around it. The stigma of colonialism also arguably infects the word tribe, and it is thusly losing favor in academic circles. See Wilkins and Stark, *American Indian Politics and the American Political System*.
2. Stewart, T., & Longthorne, A. (2018, February). *Methodology on identifying fatal motor vehicle traffic crashes that occurred on Native American reservations in the United States* (Research Note. Report No. DOT HS 812 475). Washington, DC: National Highway Traffic Safety Administration available at: <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812475>.
3. FARS is a census of fatal motor vehicle traffic crashes in the 50 States, the District of Columbia, and Puerto Rico. To be included in FARS, a crash must involve a motor vehicle traveling on a roadway and must result in the death of at least one person (a vehicle occupant—driver or passenger—or a nonoccupant—pedestrian, bicyclist, or other) within 30 days of the crash. *Id.* at 1.
4. *Id.*
5. *Id.*
6. *Id.* at 4.
7. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
8. *Id.*
9. Stewart, T., & Longthorne, A., note 2, *supra*, Image 1, p. 3; see also, *Montana v. United States*, 450 U.S. 544 (1981).
10. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)
11. See Public Law 280 (Pub.L. 83–280, August 15, 1953, codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326).
12. 18 U.S.C. § 1153.
13. <https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf>
14. Stewart, T., & Longthorne, A., note 2, *supra*, p. 4.
15. 18 U.S. Code § 1151.

THE IMPACT OF THE GERHARDT DECISION ON MARIJUANA IMPAIRED DRIVING CASES

By Honorable Mary A. Celeste
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One of the major consequences of legalizing marijuana is that it can affect drivers on the roadways. Courts across the country are facing issues such as the applicability of the long established standardized field sobriety test for alcohol-driving impairment to determine marijuana-driving impairment; the characteristics indicative of marijuana-driving impairment; and the blood nanogram concentration levels that establish marijuana-driving impairment. On January 6, 2017, the Massachusetts Supreme Court heard oral arguments in the case of *Commonwealth v. Gerhardt*,¹ and became the first State to consider the admissibility of roadside field sobriety tests when a police officer suspects that a driver has been operating a vehicle while under the influence of marijuana.

As far as marijuana-driving cases go, the facts of the *Gerhardt* case were not unusual. The defendant (Gerhardt) was stopped for driving without working tail lights. Once stopped, an officer saw smoke inside the vehicle and detected the odor of marijuana. The defendant stated that he had smoked around three hours before the stop, although another passenger said it had only been 20 minutes. Gerhardt pulled two marijuana cigarettes (“roachies”) from an ashtray and handed them to the officer. In a subsequent search, officers found two more roaches.²

All the facts related to the *Gerhardt* stop established probable cause to request that he perform standardized field sobriety tests and Gerhardt consented. For purposes of alcohol impairment, the standardized field sobriety tests consist of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn.³ In this case, Gerhardt failed several of the tests by failing to stand heel to toe as instructed, swaying, and by placing his foot down multiple times on the one leg stand.⁴

Although accepted as reliable in alcohol-impaired driving cases, the research on the effectiveness of field sobriety tests to assess marijuana impairment is mixed. Some research indicates that they are effective in identifying marijuana-driving impairment, while some research concludes they are only moderately successful.⁵

Notwithstanding this, the primary psychoactive ingredient in marijuana is known to impair critical abilities necessary for safe driving. As noted by the Court in *Gerhardt*

the primary psychoactive substance in marijuana, tetrahydrocannabinol (THC), is known to have an impact on several functions of the brain that are relevant to driving ability, including the capacity to divide one’s attention and focus on several things at the same time, balance, and the speed of processing information. While not all researchers agree, a significant amount of research has shown that consumption of marijuana can impair the ability to drive.⁶

Unlike alcohol impairment, current breath or blood testing is not able to provide a scientifically reliable measure of a level of impairment. For example, the July 2017 NHTSA Marijuana-Impaired Driving Report to Congress stated that there is a “poor correlation of THC concentrations in the blood with impairment” and that setting per se levels is not meaningful.⁷ Further, in 2016, the AAA Foundation for Traffic Safety reported that there “is no evidence . . . that any objective threshold exists that established impairment, based on THC concentrations [and that a] quantitative

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Dates to Remember

October 22 – 26
National School Bus Safety Week

October 21 – 27
National Teen Driver Safety Week
TEEN DRIVING ISSUES

October 31
Halloween
IMPAIRED DRIVING
Buzzed Driving is Drunk Driving



November 22
Thanksgiving Holiday Travel
OCCUPANT PROTECTION
Buckle Up. Every Trip. Every Time



December 12 – 23
Pre-Holiday Season
IMPAIRED DRIVING
Buzzed Driving is Drunk Driving



December 13 – 31
Holiday Season
IMPAIRED DRIVING
Drive Sober or Get Pulled Over



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threshold for *per se* laws for THC following cannabis use cannot be scientifically supported.”⁸ Although there is research currently underway to determine how marijuana impacts critical brain functions for driving. Presently the evidentiary value of standardized field sobriety tests takes on heightened importance in marijuana-impaired driving cases.

Amid all this attention on marijuana and driving, the long-awaited *Gerhardt* decision was handed down in September 2017. The applicability of standardized field sobriety tests to marijuana-driving impairment presented a few important legal issues for the Massachusetts Supreme Court. In its decision, the Court recognized that standardized field sobriety tests were first established to detect alcohol driving impairment, not marijuana or drug-driving impairment. The court then noted, there are conflicting studies on the topic and no consensus in the scientific community to support their applicability to marijuana-driving impairment. The Court concluded, however, that the standardized

lack of scientific consensus regarding the use of standardized FSTs in attempting to evaluate marijuana intoxication does not mean, however, that FSTs have no probative value beyond alcohol intoxication. We conclude that, to the extent that they are relevant to establish a driver’s balance, coordination, mental acuity, and other skills required to safely operate a motor vehicle, FSTs are admissible at trial as observations of the police officer conducting the assessment.⁹

In so holding, the Court in *Gerhardt* held that field sobriety tests such as the one-leg stand, and the walk-and-turn may provide relevant evidence of one’s impairment and that a police officer may testify without being qualified as an expert as to his or her observations of the defendant’s performance on those tests. Specifically, the Court noted that these tests may be admissible as evidence of “a defendant’s balance, coordination, ability to retain and follow directions, and ability to perform tasks requiring divided attention, and the presence or absence of other skills necessary for the safe operation of a motor vehicle.”¹⁰ The Court placed some limits on such testimony in that the officer may not suggest that the Defendant’s performance established that the individual was under the influence, or that he had “passed” or “failed” the standardized field sobriety tests.¹¹

Since the standardized field sobriety tests could be used only as observations and not scientific evidence of impairment, these observations alone would not be “sufficient to support a finding that a defendant’s ability to drive safely was impaired due to the consumption of marijuana, and the jury must be so instructed.”¹²

What other factors then should be considered in determining driving impairment? Such factors or evidence may include drug testing, erratic driving, physical evidence such as the odor or presence of marijuana or paraphernalia, admissions of drug use, a defendant’s physical appearance, drug recognition expert testimony,¹³ or other indicia of impaired driving. Interestingly, *Gerhardt* did not involve the testimony of a drug recognition expert, and the decision focused on the admissibility of a lay person’s observations.

This may cause the “road” to conviction in marijuana-driving cases to narrow in Massachusetts and perhaps in other *Daubert* states. Massachusetts, federal courts, and over half of the state courts in the U.S. use the *Daubert* standardized for the admissibility of scientific evidence.¹⁴ Does this mean that other courts will adopt the Massachusetts analysis on the admissibility of standardized field sobriety tests in marijuana-driving cases even though the Massachusetts decision is not binding on them? Is the Massachusetts Supreme Court ruling in *Gerhardt* setting the stage for how courts should treat standardized field sobriety tests for marijuana-driving-impairment cases and maybe even all drugged-driving cases?

The impact of *Gerhardt* may depend on how other courts view its holding and reasoning. It is important to recognize, however, what the Court in *Gerhardt* held and did not hold. The Court held that without rendering an opinion a police officer may testify as to his or her observations of one’s performance on standardized field sobriety tests and may do so without being qualified as an expert. It held that these observations may not be sufficient in and of themselves on which to rest a conviction, but may be considered by jurors who “may use their common sense in evaluating whether the Commonwealth introduced sufficient evidence to satisfy its burden of proof.”¹⁵

All things considered, driving under the influence of marijuana, and driving under the influence of drugs in general, is an escalating problem for the roadways and the courts. State trial and supreme courts will have to make important decisions about how to address the science establishing impairment, the role of the drug recognition expert, and the applicability of standardized field sobriety tests in drugged-driving cases. Will the Massachusetts findings regarding marijuana and driving influence how courts will treat driving under the influence of other drugs as well? Slowly the answers will come.

This article is an abbreviated version of the full article as published by the American Judges Association Court Review with permission. The entire article may be found at <http://aja.ncsc.dni.us/publications/courtv/cr53-4/CR53-4Celeste.pdf>

Endnotes:

1. *Commonwealth v. Gerhardt*, 477 Mass. 775, 81 N.E.3d 751 (2017).
2. *Id.* at 778-79.
3. *DWI Detection and Standardized Field Sobriety Test (SFST) Refresher* (NHTSA October 2015) to be found at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_ig_refresher_manual.pdf
4. *Commonwealth v. Gerhardt*, 477 Mass. at 779.
5. See e.g. Hartman et al., *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment*, 92 *Accident Analysis & Prevention* 219–29 (July 2016); Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance During Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 *Psychopharmacology* 439–46 (2012); K. Papafotiou et. al., *An Evaluation of the Sensitivity of the Standardized Sobriety Tests (SFSTs) to Detect Impairment Due to Marijuana Intoxication*, 180 *Psychopharmacology* 107–14 (2005); Luke A. Downey et al., *Detecting Impairment Associated with Cannabis with and without Alcohol on the Standardized Field Sobriety Tests*, 224 *Psychopharmacology* 581–89 (2012); AJ Porath-Waller & DJ Beirness, *An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification Program*, 15 *Traffic Injury Prevention* 125–31(2014).

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6. *Id.* at 780-81. See also *Marijuana-Impaired Driving: A Report to Congress* at 11-13 (NHTSA July 2017).
7. *Marijuana-Impaired Driving: A Report to Congress* (NHTSA July 2017) (see Technical Report Documentation Page).
8. *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis* (AAA Foundation for Traffic Safety, May 2016).
9. *Commonwealth v. Gerhardt*, 477 Mass. at 776.
10. *Id.* at 783.
11. *Id.* at 784.
12. *Id.* at 785.
13. Drug recognition expert testimony is evidence presented by a specially trained police officer who administers an established standardized 12-step protocol developed to determine whether one is under the influence of drugs. Although trial court decisions may differ as to the admissibility of such testimony, most if not all reported appellate decisions favor admissibility. See e.g. *State v. Chitwood*, 369 Wis.2d 132, 879 N.W.2d 786 (2016).
14. See *50 State Survey of Daubert/Frye Applicability* (American Bar Association) to be found at: <https://apps.americanbar.org/litigation/committees/trialevidence/daubert-frye-survey.html>
15. *Commonwealth v. Gerhardt*, 477 Mass. at 787.

TWO NEW REPORTS PROVIDE JUDGES WITH VALUABLE RESOURCES ABOUT IMPAIRED DRIVING

In May, the Governor's Highway Safety Association (GHSA) issued a report on drug-impaired driving that focused on critical issues faced by courts and highway safety policy makers particularly regarding marijuana and opioids. The report is a valuable resource in that it details the scope of drug use and its impact on the adjudication of impaired driving cases. The report describes the impact of marijuana and opioids on driving, as well as suggested strategies for States to adopt to reduce the incidence of drug-impaired driving. Regarding the detection of marijuana- or opioid-impaired drivers, the Report suggests that there are a number of observations and indicia that come into play in determining whether one is impaired by marijuana or opioids, including a drug recognition expert (DRE) evaluation. As noted in Judge Celeste's article elsewhere in this issue, these observations and indicia may include driving observations, the odor or presence of drugs, admissions of drug use, observations from standardized field sobriety testing, and drug testing. Regarding DRE testimony, the GHSA Report notes that

[w]hile a DRE evaluation can add substantially to a DUID case, it's not essential. The critical components are behavioral evidence consistent with impairment by a drug test and a drug and a laboratory test to confirm the drug's presence." [Report at page 25]

Among the recommendations outlined in the report is a recommendation that States not adopt or enact *per se* laws for opioids taken by prescription or marijuana in medical or recreational states. The concern is that, unlike alcohol, there is insufficient science to correlate a degree of impairment with the level of drugs in the blood or urine. The GHSA report can be found at: <https://docs.house.gov/meetings/IF/IF17/20180711/108525/HHRG-115-IF17-20180711-SD003.pdf>.

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TWO NEW REPORTS PROVIDE JUDGES WITH VALUABLE RESOURCES ABOUT IMPAIRED DRIVING

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This past June, the National Center for State Courts released its latest report that reviews the latest research on ignition interlock programs and the effectiveness of such devices in impaired driving cases. The report also provides a national perspective of how ignition interlock devices are utilized State-by-State, and summarizes various reports issued since 2012 on the impact of ignition interlock utilization on recidivism, the application of interlock devices for motorcycles and youthful drivers, as well as ways to improve ignition interlock programs.

The report then summarizes each State's ignition interlock laws, identifying who administers the program, when it may be required, and for how long. The Report may be found at <http://home.trafficresourcecenter.org/~media/Microsites/Files/traffic-safety/Ignition%20Interlock%20Report%20Final.ashx>



WELCOME



Judge Rodney D. Ring (Ret.) has been selected to serve as the new Oklahoma State Judicial Outreach Liaison effective June 2018. Judge Ring served in the United States Army from 1970-1972, and he later went on to attend and graduate from Cameron University in 1974 with a B.S. in Sociology. Judge Ring furthered his studies by obtaining a Juris Doctor from the University of Oklahoma College of Law in 1987. Judge Ring served as an Oklahoma District Court

Judge for 20 years until his retirement in 2011. After retirement, he became the Visiting Assistant Professor at the University of Oklahoma College of Law from 2013-2017 until he assumed the role of Adjunct Assistant Professor in 2017, where he currently serves in addition to the new role of State Judicial Outreach Liaison.

Judge Ring currently holds memberships in the Cleveland County Bar Association, Oklahoma Bar Association, Professional Responsibility Tribunal, Vice Chair Master, Chair of Access to Justice Committee, Bench and Bar Committee just to name a few.



Judge Marion E. Edwards (Ret.) has been selected to serve as the new Louisiana State Judicial Outreach Liaison effective July 2018. He attended Northeast Louisiana University and Tulane University. Judge Edwards received his J.D. degree from Loyola University School of Law along with Sheriff Harry Lee. Following law school, he and Sheriff Harry Lee were law partners and later formed the partnership of Edwards, Porteous, Amato and Lee. In 1970,

Judge Edwards accepted a position with the Jefferson Parish District Attorney's Office and served as First Assistant District Attorney for more than 22 years, retiring in 1996 to seek election to the bench.

Judge Edwards was elected unopposed to Division "O" of the Twenty-Fourth Judicial District Court in Jefferson Parish where he served from January 1, 1997 until his election in October of 1998 to the Fifth Circuit Court of Appeal, State of Louisiana. On December 7, 2010, due to the untimely passing of former Chief Judge Edward A. Dufresne, Jr., Judge Edwards assumed the position of chief judge of the Fifth Circuit Court of Appeal. He served as the court's chief judge until his retirement on December 31, 2012. As a retired judge, Judge Edwards is appointed by the Louisiana Supreme Court to sit ad hoc around the state at various courts.

Judge Edwards has served or currently serves on the Board of Directors and Advisory Boards for organizations such as the I CAN Drug Court, and Grace House of Louisiana, a residential rehabilitation facility for women who suffer from the disease of addiction. He has been the recipient of numerous awards with the most recent award in 2017, where he received the C.W. Cox Life Enhancement Award for his service to the community.

Valuable resources can be found at:

- **National Highway Traffic Safety Administration**
<http://www.nhtsa.gov/Impaired>
- **American Bar Association/Judicial Division/NCSCJ**
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html
- **Highway to Justice—Archives**
http://www.americanbar.org/publications/judicial_division_record_home/judicial_division_record_archive.html
- **National Judicial College**
www.judges.org
- **Governor's Highway Safety Association: Impaired Driving Issues**
<http://www.ghsa.org/html/issues/impaireddriving/index.html>
- **AAA Foundation for Traffic Safety**
<https://www.aaafoundation.org/>
- **National Center for State Courts**
<http://www.ncsc.org/>



Save the date for our Louisville Conference, March 31-April 2, 2019.

Lifesavers will host a special evening event (included with your paid registration) at Churchill Downs on Monday, April 1 featuring a buffet dinner and museum and paddock area tour.

<https://lifesaversconference.org/workshops-handouts/>

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NHTSA Webcast: What Judges and Lawyers Should Know About Military Personnel in Impaired Driving Cases

October 16, 2018 | 10 AM Pacific | Honorable Tara A. Osborn | Free Webcast

This webcast is sponsored by the National Highway Traffic Safety Administration (NHTSA), and in collaboration with the American Bar Association (ABA), The National Judicial College has developed this 60 minute webcast to assist judges and lawyers in what they need to know about military personnel in an impaired driving case.

Military defendants pose unique challenges for trial judges and counsel, especially in impaired driving cases. Jurisdictional issues between military, federal, state, and local authorities are common; the military justice system is distinct and separate; administrative consequences to

the defendant are significant; and military service may impact treatment and sentencing options.

Whether you preside in a jurisdiction with a large service member population or have only the occasional military defendant, this program will provide you with the information and tools you need to rule correctly and confidently in these impaired driving cases.

[Read More & Register](#)



We are busy arranging the 2019 Traffic Court Seminar and hope you will make plans now to attend.

SAVE THE DATE

MARCH 18-20, 2019
WASHINGTON, D.C.

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