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Officer Retention And Professional Organizations

By: Major Charles A. White, International and Comparative Law Division, TJAGSA

These remarks were recently made before senior JAGC officers and SJA's at the 1973 Judge Advocate General's Conference.

I.

We talk a lot about professionalism in the Army but it is a very difficult thing to articulate. The 18th Advanced Class, 1969-70, did a study which talked in terms of ten problem areas for senior officers in the JAG Corps. These reports reflected such phrases as "lack of recognition of Judge Advocates as professionals" and talked in terms of "frustrated and limited practice."

The SJA's views of professionalism tend to go along the following lines:

They talk about the defense counsel who always follows the canons of *"conservative* professional ethics."

The professional is one who does not file more than one frivolous or dilatory motion a month and the one who devotes the majority of his efforts in extenuation and mitigation.

The SJA looks upon the captain as one who works twelve hours a day, does not write letters or make waves or gum up the works, *and* he attends with his wife all post social events, especially those which are sponsored by the Judge Advocate section.

He meets all deadlines and above all, he keeps his hair cut.

Sound familiar?

The judge's view of a professional is a counsel that does not waste the court's time—translated to mean one that does not waste *his* time. However, the field grade officers in this Corps represent only a small fraction of the total staffing of our law firm, and are we really interested only in what professionalism means to the senior officer?

We should direct our attention to those captains and junior officers comprising the remaining 77% of the Corps. The feedback that we get from lawyers coming through the Basic Classes can be characterized as follows: we are looking at a man who wants a chance to make his own way, a chance to handle his own case and, yes, even a chance to make his own mistakes. He wants recognition, he wants experience, he wants responsibility, and he wants a chance for unlimited development.

TJAGSA has discussed some complex theories of management. I would like to relate some of these theories to the situation that we are facing today. PP&TO has given us a good picture of the JAG recruiting and what the input of the Corps is going to be the next few years. But it neglects *retention* —and *retention* is *your* problem! Relatively, there is little that the Department of the Army can do and there is little the JAG School can do. I would ask each of you to review your own retention rates. When we discuss the management principles, think back over the years to the officers you had in your shops and of those who have stayed—and

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those that have passed out of the Army and into civilian practice.

II.

When we talk in terms of people we use such terms as "Maslow's theory" and "the Hertzberg studies." According to Maslow, basic human needs or goals are all related to each other, being arranged in a hierachy of prepotency. This means that the most predominant goal will monopolize one's consciousness and will tend of itself to organize the reinforcement of various individual capacities. The less prepotent needs are minimized, even forgotten or denied. But when a need is fairly well satisfied, the next higher need emerges, in turn to dominate the conscious life and to serve as the center of organization of behavior, since gratified needs are not active motivators. Human needs are arranged according to the priority shown below.

MASLOW'S THEORY OF MOTIVATION
(HIERARCHY OF NEEDS)

Self Actualizations Needs
Esteem Needs
Safety Needs
Physiological Needs

(Figure 1)

Maslow says the first of all human needs is physiological. We are talking about air, light, water and shelter and the things needed to stay alive. To illustrate: a man who is worried about where his next meal is coming from is not interested in dealing in political theory or governmental relationship. But once his physiological needs are satisfied they tend to diminish and he looks toward safety —in the physical sense and in the psychological sense. He is trying to protect those things which he has secured for himself, whether it be a mortgage on his home, long-term employment job security, or something else which he considers worthy of protection. Once he has met this safety need, he begins to seek social needs. He in turn is looking for friends, acceptance and growth. There are

a lot of people who never go beyond this point —they never go beyond the physiological, the safety, or the social needs. The Army is particularly suited, I think, to satisfy these first three needs. It gives a man three squares a day, he has job protection as long as he performs and he should have the social life.

The fourth of Maslow's needs is "esteem." This is a man's respect; his recognition as being competent; his reputation and his prestige. Finally man moves up to the realm which is the highest one, of self-actualization. Here he realizes that he has been trained: he is competent, he can perform. At this level he desperately needs the outlet to fulfill himself, to achieve his capability, and to become what he considers he should be and rise to his potential. And I would submit that it is in *this* area where we have problems in the Army. Once a man has achieved status within the first three levels of needs, *if* he cannot fulfill and cannot move up, then he is going to leave the Army and leave the JAG Corps. He will move into an area where he thinks he will find esteem and self-realization.

III.

Let us discuss some of the JAG "noise" that we call dissatisfiers. They should look quite familiar. Why? Because the young military lawyer is talking about the SJA and the SJA office. Professor Hertzberg, considering Maslow's hierarchy of needs, conducted some very extensive surveys in industry. He attempted to isolate the things which people talked about and the items which were causing them problems. The problems Hertzberg identified are not unlike the problems which we have in the Army.

DISSATISFIERS

Company Policy and Administration
Supervisor
Salary
Interpersonal Relations
Working Conditions
(Figure 2)

First of all Hertzberg noted working conditions. Sound familiar? How many SJA offices have the physical facilities which fill the expectations of what a lawyer's office should look like. How many gripe hours are spent on "the rug" and the sharing of offices between two attorneys. He then discussed interpersonal relationships. This is the fellow worker who takes an extra ten minutes on his coffee break causing concern among the fellow employees, or the trial counsel who doesn't pull his share of the workload for the chief of justice. The problems that we have in the Corps today are not too unlike the experience that Hertzberg discovered in industry.

And then he talked about salary, which reminds me, whatever happened to pro-pay? Sound familiar again? The salary he is being paid is not enough, he is not getting his true worth, he is not fulfilling what he thinks a lawyer should be paid, etc. Then he mentions the boss: he says the supervisor is an old fudd; that he got out of law school so long ago that he does not understand what the law is today. We finally get to company policy and administration—which translates into DA regulations that do not make any sense, the "chicken" rules that are promulgated by the post, the harrassment in the form of directives and orders, the haircut regulation perhaps. Sounds familiar also, doesn't it?

But the very interesting thing that Hertzberg discovered was that the dissatisfiers were *neutral.* You could correct every one of these gripes and it would still not make any difference as to whether he stayed on the job or not. How many times do we find ourselves concentrating on these factors in attempts to retain a person in the service? The man who has an interesting job is going to like the Army, and his work, even though he is living in a tent. At the same time, a man who is working in a huge office with all the comforts will leave the service because he does not feel that the work is fulfilling.

So Hertzberg identified some further categories of motivation. These are the things we can concentrate on that will make a difference. Hertzberg identified five such motivators.

MOTIVATORS

Achievement
Recognition
Job Itself
Responsibility
Advancement

(Figure 3)

We have a particular problem in the Army in that there is not too much we can do about the last one—advancement. If a man is good, bad, or mediocre, he is going to spend his time in grade regardless. That gets us into something we *can* do something about—responsibility. General Prugh has mentioned that it is time we give the captains in this Corps more responsibility. Responsibility is something we can work with, it is an ingredient that we can add, as SJA's, as middle managers and as top management of this Army law firm.

The job itself is something which we have some control over. Oftentimes we will have to create interesting jobs for our subordinates —secure permission for that claims officer to litigate third party medical recovery in the courts. We must redesign the SJA shops to reapportion the good tasks and the mundane responsibilities into balanced jobs. These are the things that will keep a man in the Army and make him satisfied as he goes up his own hierarchy of needs. Most of all, we are talking about recognition, the recognition of one's self as a professional. The last motivator is achievement. Achievement is relatively subjective. There is not too much we can do about this. The other motivation factors will have a bearing on it, but achievement is what that attorney feels inside if he has produced.

IV.

It would seem to me that the Army has met the needs on a physiological, safety and social level—but we are still falling down and losing personnel because the Army is having difficulty in changing over and meeting the esteem and self-actualization needs of an individual. If a man wants to be a recognized authority in the field of tax, labor, environmental protection or consumer affairs, we've got to find a place *in the Army* so that we can fulfill *his* expectations to do the things which *he* wants to do and not have to leave the Army to find another source of employment or another base from which to operate. This brings me to the point of my discussion. We talk about how professional organizations can help the SJA to retain these officers in the Army and to permit them to fulfill their own expectations and stay with the Corps. The General Counsel of the Army, Mr. Robert Berry, gave a recent speech about the Modern Volunteer Army. He was reflecting upon the public attitude of this new "VOLAR concept", and he said the public had a tendency to think of the military establishment as of the military people shopping in their military commissaries, going to military movies, sitting in their military quarters, thinking military thoughts, yes with their highly publicized and unique "military minds." During the Vietnam War, the military was considered immoral but the indictment which Mr. Berry described is much worse—it is that the military is *irrelevant*. And there is no greater cut that you can give a man than to say that what he is doing, when judged against the overall values and goals of society, is irrelevant. Being irrelevant is something that this military law firm can never afford to be. Because whether we are in the service for an OVB-3, or a Regular's 20 or 30 years, at some point we are all going to leave. We cannot afford to have the number of years that we have spent in the military practice considered as irrelevant by the profession or by the public. The poet, John Donne said that "no man is an island unto himself" and likewise the military practice of law is not an island unto itself. It cannot insulate itself from the rest of the profession. This point was well emphasized by Secretary Calloway when he told the JAG Conference that it was our responsibil-

ity as a Corps to bring balance to the Army. Through our professional contacts we would serve as a conduit *out* for the Army's position and message and *in* for criticism and public opinion. We must make the military practice of law relevant to the junior partners of this Corps.

Now let me name a few ways I think we can do it. This Corps is awfully good at writing. Our captains produce a prodigious amount of paper each day—opinions, messages, DF's,—good writing, good research, and it is all timely. Take a look at some of it with an eye to publication—not in-house, but outside, in the trade journals, in the bars of the states where you are living. See if it is the type of thing that can be published with a little rewriting and a new title. If so, encourage that man to publish this article or you help publish his article. Many professional organizations, have publications and house organs which go out to the general public at large. Major Jim Endicott is the Associate Editor of "Law Notes," which is a joint publication of the ABA General Practice Section and the Young Lawyer Section. It has a distribution of roughly 120,000 lawyers and Jim can place articles, written by your captains on any subject, into publications which go to the general legal public.

One of the best success stories of the Corps involves Bill Lehman, now stationed out at Fort Lewis. Bill was a member of the 21st Advanced Class. He wrote a thesis on Child Abuse in the Military and as part of that thesis he was concerned with the model child abuse reporting law. He was introduced to the right person last year in the ABA and this year he was named as co-chairman of the Juvenile Law Committee for the Young Lawyers Section of the American Bar. And better than that, he was given a $1,000 budget with his committee assignment. He now has the opportunity to go out and develop that model law and make himself an expert to the entire community. He has the organization behind him to visit the state legislatures and to lobby for the enactment of a model law which he helped create. *That* sounds like recognition to me, and if he can fulfill perhaps his desires for esteem and self-actualization in the military there is no need for him to go into private practice to achieve the same thing.

Now, not every officer is going to be so inclined. Not every officer desires all of these needs [Fig. 2]. He may not go beyond the first four, but I ask that you look for the ones in your shop that are, and make it easier for them to participate outside of the isolated military community. In some respects, it is easier for a military lawyer to be active in professional organizations. He has the ability to fly space available around and outside the country on military aircraft. On commercial operations he can fly at half fare. Civilian Personnel Regulations, 5 CFR Part 410, recognizes government TDY travel for civilian attorneys; Army Regulations 1-211 allows TDY for military attorneys attending professional conferences. Reserve officers receive points for going to professional organization meetings. Administrative absence, fully covered in Army Regulations 630-5, should at a minimum be granted to the junior officers. The Young Lawyers Section of the ABA will pay the travel expenses for its committee chairmen to its mid-year meeting. The Federal Bar Association will pay half of the travel of the chapter delegates to its annual meeting unless the delegate travels on "military stand-by." Very few senior JAGC officers have the time or, I presume, the inclination, to start a Federal Bar chapter at his post, but that is not to say that one of his captains may not. One of these captains may like to be the President. He may desire to have such a chance to step outside his military environment in a professional capacity. We have model by-laws at the JAG School and there are enough people in this Corps who are willing to work with any JA Officer to make his task and his chapter presidency an absolute success. The Federal Bar chapters are involving the U.S. attorneys throughout the country. In two chapters they have brought their local congressman in and they have gotten the congressman committed,

because he will listen to local attorneys, in support of a pro-pay bill on the floor of Congress. This is the type of thing that has some tangible benefits.

Many of us senior JAGs are pretty much set in our ways. I doubt seriously if any of us who are not members of a professional organization right now would spend the $60 it takes to join the ABA, considering our time in practice. But it costs the captain only $7.-50. And if he wants to, after the first year, he can have his entire dues waived for up to four years. Two basic classes ago, if you asked who were members of professional organizations, you got a 2 or 3% response. Our 69th basic class of 88 had 25-30 members. These officers want to get involved. They want to fulfill their own desires, whether it be environmental law or patent law or whatever the case may be. I am asking you to give them the opportunity.

The progress which this Corps has seen within the past few years has been phenomenal. Four years ago we started a concentrated effort to involve the young military lawyers. Within the ABA, the Young Lawyers Section was given a military slot on the Executive Council, elected each year, and corresponding to a 3-to-5 state civilian bar representation. In 1972-73 there were young military lawyers in leadership slots within the Young Lawyers Section that controlled or had substantial input on $10,000 out of a total section budget of $188,000. This year, it is $132,000 of a $256,000 section budget. And that's professional fulfillment! In addition, there are five military members on section councils of other sections of the ABA. If your captains express an interest in these committees and sections, support them.

V.

What is in it for us? I hope that it is going to help retention. Heaven knows, little else has. Professional associations give our officers the recognition, the responsibility, and above all, it gives them the opportunity. It should show him that he is in fact ahead of his civilian contemporaries. The participation of these officers will increase the prestige of the military bar. The participation will help recruiting among the law students that come to all of these meetings. It gives the Corps an input into ABA publications. It is going to better inform the public of what the military lawyer does, as we are the most misunderstood bar, I think, in existence in the world. And lastly, our officers will associate with the very top of the legal profession. And if he does these things within the Army, the chances are very good that this captain will not leave the Army in order to have the opportunity to achieve the same thing.

Before we turn the Corps over to the next generation of military lawyers we have an obligation to make the bar a little better than it was when we received it from those who preceded us. I quoted John Donne earlier when I talked about no man being an island and drew the analogy that the military bar could not be such an island. The second part of that Donne quote is even more familiar. It says, "Ask not for whom the bell tolls, it tolls for thee." The thing that we can least afford is to have that bell toll for the active military bar in this country, because if it does, there's not a single member of this group who, individually, will survive professionally on his own.

Marijuana Dog Searches After *United States v. Unrue*

By: Captain Frederic I. Lederer, JAGC, Instructor, Criminal Law Division, TJAGSA and Second Lieutenant Calvin M. Lederer, MP/JAGC, Hofstra University Law School

It appears from field reports that the use of marijuana detector dogs has become more commonplace throughout Army installations. Accordingly, an increasing number of Judge Advocates are encountering the numerous legal and practical difficulties connected with

dog searches. In our first article[1] we discussed the nature of such searches and while we briefly touched on the question of their legal foundation we chose not to address ourselves in depth to the nature of the intrusion itself.[2] In view of the recent decision of the Court of Military Appeals in *United States v. Unrue*,[3] it now appears appropriate to examine the nature of dog searches within the Fourth Amendment context. Consideration of applicable civilian case law is essential to a proper understanding of *Unrue*.

The threshold question within this area is of course the very nature of the dog's intrusion. In the use of a dog *per se* a search within the ambit of the Fourth Amendment, and if so, is it an unreasonable one? In the abstract a strong case can be made that the use of a detector dog is not a "search." The supporting argument would maintain that: firstly, the presence of the dog as it is usually employed (e.g., in barracks; at gates where vehicles normally must pause) is not improper as long as it remains in an area where there is a minimal expectation of privacy (e.g., the "common" areas of a barracks); and secondly, the "operation" of the dog is not a search because its detection of odors is the equivalent of plain view (i.e., plain smell)[4] which is not considered a search.[5] Thus a seizure would result without a constitutionally prohibited search. This approach to the problem, while of academic interest, appears to be of little value to the practicing counsel in the field in light of civilian precedents. The closest analogue to the dog search seems to be the magnetometer "search" of airline passengers pursuant to the anti-hijacking program. The basic content of the hijacking prevention program is well known. Airline passengers who match a secret physical and psychological profile are noted.

> All passengers will have their carry-on hand baggage searched (physically and/or by X-ray device) and will pass through a metal detecting magnetometer. Persons matching the profile who yield positive magnetometer readings will be searched.[6]

While usually only those persons matching the FAA profile are searched after a positive magnetometer reading, it appears that the profile "match" need not be a necessary prerequisite. Indeed, even the magnetometer search has been held unnecessary by some Circuits.[7] Most of the airline case holdings have been based on implied consent of the passengers and/or the peculiar border-like nature of the airline search. A number, however, have dealt expressly with the questions of the nature and legality of the magnotometer search.

Without exception, those cases that have dealt with the question[8] have held that the magnetometer search is indeed a search within the meaning of the Fourth Amendment. The marijuana dog search is sufficiently similar to the magnetometer search that it would be fruitless at this stage to argue another conclusion. What must then be considered is the question of the search's reasonableness.

The principal civilian case on the subject is *United States v. Epperson*.[9] In *Epperson*, the defendant went through a magnetometer[10] at Washington's National Airport. After the device gave a positive reading, the defendant was searched. The search yielded a pistol. At trial *Epperson* challenged the magnetometer use alleging illegal search. The Fourth Circuit held that the magnetometer *was* a search within the meaning of the Fourth Amendment but also held that it was a *reasonable* one that did not require probable cause. After a discussion of *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968), the Court concluded that unusually pressing circumstances (threat of hijacking), minimal violation of privacy, and insufficient time to obtain a warrant all compelled a holding that the search was a reasonable one. *Epperson* was cited with approval by the Second Circuit in *United States v. Bell*.[11] In *Bell*, the Court stated:

> (the) contention of appellant that the use of the magnetometer constituted an unreasonable search is baseless. None of the personal indignities of the frisk discussed by Chief Justice Warren in *Terry* . . . are

> here present. In view of the magnitude of the crime sought to be prevented, the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is in our view a reasonable caution.[12]

Judge Friendly, concurring, went a good deal further, suggesting that a search designed to prevent crime was clearly distinguishable from a search designed to find evidence of past-completed crime. The Third Circuit[13] has also followed *Epperson*, although attempting to limit its opinion somewhat more specifically to the hijacking context than have other courts. The most recent case to present an in-depth examination of the entire airport search problem is *United States v. Davis*.[14] *Davis*, unlike the previously noted cases, did not involve a magnetometer search, but rather a simple search of the defendant's briefcase which yielded a loaded gun. At trial Davis moved to suppress the weapon. In an unusually lengthy and scholarly opinion the Court rejected the Government's contentions that the search could be justified either as a *Terry* type frisk or because Davis did not have a reasonable expectation of privacy with respect to his carry-on luggage. The Court specifically pointed out that even if Justice Harlan's concurrence in *Katz* was accepted,[15] that did not mean that "any kind of governmental intrusion is permissible if it has occurred often enough."[16] Having rejected these arguments, the Ninth Circuit used[17] the Supreme Court cases on administrative inspections[18] to supply the proper standards for airport searches. The court then stated:

> The essence of these decisions is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

The Court conceded that such searches would detect contraband and lead to apprehension of law violators but believed that this consequence did not alter the essentially administrative nature of the screening process. The Court strongly warned all concerned that if the airport search were to be subverted into a general search for evidence of any crime it would exclude the proffered evidence. *Davis*, like the other cited precedents, attempts to walk a thin line clearly using a balancing test with the threat of explosion and death sharply tilting the scales.

To date four circuits, and possibly a fifth,[19] have accepted the *Epperson* conclusion. The marijuana dog search is sufficiently similar to the magnetometer search to allow it to partake of the same rationale, if one makes the basic assumption that the Army's drug problem approximates the hijacking threat. While perhaps hard to accept, this proposition has apparently been accepted by the Court of Military Appeals.[20] More importantly, the argument can be made that the use of a marijuana detector dog which is primarily used against property[21] represents a lesser intrusion into an individual's privacy than a magnetometer[22] which is used primarily to search the person.[23] The lesser intrusion into privacy may outweigh the smaller probability of immediate harm[24] caused by drugs.

Before turning to consideration of the military precedents, it is interesting to examine the only civilian case that, to our knowledge, has considered the use of marijuana detector dogs. *People v. Furman*,[25] involved a confidential informant who supplied a U.S. Marshal with a tip that an individual of specific description would attempt to leave the San Diego Airport on a given flight to Portland, Maine, and that he might *possibly* have drugs. The information was transmitted to a state narcotics agent who went to the airport at the appropriate time. After verifying all of the informant's specific information, the agent had a marijuana dog borrowed from Customs walk around in the airline baggage area.[26] The dog alerted to a suitcase belonging to the defendant. The defendant was detained and the dog alerted to a second suitcase he was carrying. The suitcases were then opened yielding

a total of 46 kilograms of marijuana. The Court found that the dog's alert, when considered along with the informant's information, was enough to supply probable cause to search. The Court stated:

> Adequate foundation was laid establishing the reliability of Link (the dog) as an investigative device. Evidence of Link's high level performance and great degree of accuracy in detecting marijuana odors justified reliance on Link's reactions as corroboration of the informant's tip. Although we are aware of no reported cases involving the use of dogs as marijuana detectors, their use in tracking fugitives has long been admissible in evidence to show an accused was the doer of a criminal act. . . . The officers as reasonably prudent men were justified in the search and seizure.[27]

Thus even if probable cause were to be required in dog searches (as indeed may be required in situations where regulatory type searches are inapplicable) there is some civilian precedent for the dog's ability to supply probable cause.

With the civilian cases as a proper foundation it is appropriate to turn to the military case law. There is at present only one case on point, *Unrue*. Arguably, however, a proper understanding of *Unrue* requires an understanding of yet another military case, *United States v. Poundstone*.[28] *Poundstone* involved a U.S. base camp in Vietnam that was experiencing a serious narcotics abuse problem. The battalion commander concerned ordered a search of all battalion vehicles and accompanying personnel passing through the camp gate.[29] Thus the commander intended to stop the importation of drugs into his area. Poundstone was searched after the truck he was riding in was stopped. Having been found to have heroin in his pockets, he challenged the search in court. The decision of the Court of Military Appeals consisted of three individual opinions. Judge Quinn's lead opinion contained the following language illustrative of the entire opinion:

> Whether denominated a search or an "administrative investigation," other types of examination of the person or his property, although not based upon probable cause, are not violative of the protection against unreasonable search. . . . When such action is "crucial part of the regulatory scheme" of a Government program and presents only a limited threat to the individual's "justifiable expectations of privacy," the Government may lawfully enter private property without probable cause. . . . In every case of detention of person or property the standard of measurement of the Government's action is the rule of reason.[30]

Judge Darden limited his concurrence to gate searches, stating, however, that "(t)his Court has long recognized 'the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command.'"[31] Judge Duncan, in dissent, suggested that the Court's opinion would not allow servicemen a reasonable expectation of privacy from inspection anywhere on an installation and that proof of military exigency would not need to be shown according to the majority's opinion.[32] The extent of the *Poundstone* holding is difficult to determine. The case is too easily distinguishable from any other set of facts,[33] and by traditional analysis much of the opinion can be branded "dictum." Yet it clearly revealed that two of the Court's judges preferred to expand the traditional limits on inspections when dealing with narcotics. With *Unrue* the Court's direction becomes clearer.

Unrue arose at Fort Benning. Because of what was considered to be a serious drug problem, the 197th Infantry Brigade set up two mobile checkpoints within its area. At the first point, drivers' licenses were checked and the attention of vehicle occupants directed to a sign reading, "Attention, narcotics check, with narcotics dogs. Drop all drugs here and no questions asked. Last Chance." An "amnesty" barrel was located under the sign. The car in which Unrue was riding was stopped at both points. At the second, a marijuana detector dog was walked around the car. The dog alerted and the passengers were apprehended, disembarked and searched. Heroin was found in Unrue's wallet (vegetable mat-

ter, presumably marijuana, was found underneath one of the car seats). The dog's alert, according to lower Court opinions, was the basis for finding probable cause to *apprehend*, with the search of the person being based on search incident to lawful apprehension. *Unrue* is not a clear opinion. Judge Quinn, joined by Judge Darden, first holds that a gate search theory will not justify the search stating that, even if a gate search is justified without probable cause, the road block did not constitute a proper gate search. After finding that Unrue did not consent to the search, Judge Quinn holds that a commander may, in cases of "military necessity" (defined by the Judge as whatever in light of all the circumstances is reasonable) be required "to maintain regulatory systems which necessitate inspection of persons and private effects without consent." The types of military necessity, says Judge Quinn, are searches to protect the security of a command (he does not define "security") and inspections to effectuate a proper military regulatory program. In his view, the drug problem at Fort Benning was [34] so serious as to constitute a serious threat to morale, capability, and health. Judge Quinn cites the anti-hijacking program for the proposition that the number of instances of prohibited conduct does not alone determine the degree of danger and need and means to oppose it. In its later paragraphs, the opinion suggests implied consent to the dog search because of the posted notice. The Court discusses the use of technical devices to augment human senses assuming for purposes of the opinion that *Katz* prevents "Orwellian" surveillance using sophisticated technological devices. At the same time, however, the Court seems to imply that the detector dog is a proper augmentation or extension of human senses.[35] Abandoning the discussion, Judge Quinn simply points out (after having said that the use of the dog "to detect odors . . . that a human inspector could not detect through his own sense of smell was not unreasonable") that, in his opinion, by the time Unrue's car reached the second checkpoint, "any justifiable expectation of privacy as to odors emanating from it was just 'not of impressive dimensions.'" Judge Quinn concludes, somewhat surprisingly, by citing our earlier article as authority that the dog, having been proved capable, was sufficient to supply probable cause to *search*. The conclusion is surprising in that the facts only show that the dog supplied probable cause to *apprehend*. The difference between cause to apprehend and cause to search may be of little practical importance, but constitutes slippage in an unsettled area of the law. The earlier part of Judge Quinn's opinion would justify a regulatory search without dogs. Why then is there the special effort to hold that the dogs may supply probable cause? One possible explanation exists. The Court may have adopted the same reasoning used in the airline search cases discussed previously, making the decision that the drug problem approximated the hijacking threat. Having accepted a balancing test that weighs personal privacy against the Government's interests in having combat ready troops, the Court may be saying that, in order to minimize the intrusion into personal privacy of the soldier, a dog that is sufficiently reliable to supply probable cause must be used. Thus the Court would be sharply limiting a rationale that would otherwise appear to allow virtually unlimited drug "shakedowns" in barracks and vehicles. If this is indeed the true holding of *Unrue*, the defense counsel in a dog case must either contest the existence of "military necessity," or must attack the dog's reliability or other facts of the case.[36] Query: Is the drug problem to be judged by conditions Army-wide, installation-wide, or unit-wide? What is the proper community?

What then of the barracks search for marijuana, or indeed for any contraband? As indicated previously there is authority in *Poundstone* and *Unrue* for regulatory searches designed to cope with problems that threaten the unit's security or mission. Limiting *Unrue* somewhat to its facts, the barracks search for drugs using a sufficiently reliable dog appears perfectly proper regardless of the barracks configuration. At some point, however, we expect that the individual's expectation of pri-

vacy will become paramount, and probable cause will become necessary. For example, if a commander suspects a specific individual of drug abuse, there is no authority that we are aware of which would allow a search of the individual or his belongings without probable cause (unless as in *Furman* the dog is properly in the area, in which case the "plain smell" problem must be faced). While the search of lockers seems justified, there is no way of predicting just how far such preventive inspections may lawfully go unless *Poundstone* is accepted without reference to its combat setting. *Unrue* will allow stops and vehicle searches by marijuana dogs on an installation plagued by drug abuse, but what of vehicles containing civilians? Should the status of an individual matter? Are BEQ's or BOQ's qualitatively different from barracks? If not, what of family quarters on post? Similarly, questions as to the necessity for commander's authorization to search (or judge's warrant) arise. Inspections, depending upon regulation, do not require probable cause or necessarily specific authorization from a unit commander.[37] Can a platoon sergeant expand the traditionally informal "health and welfare" inspection to include use of a marijuana dog without his commander's express authorization? The answers are far from clear and hopefully will not arise if commanders are properly counseled by local judge advocates.

Poundstone and *Unrue* arguably represent something new in military criminal law. While they present problems far beyond the scope of this article, they do suggest that evidence detected by dogs is here to stay. It will be for later cases, military and civilian (including the predictable federal habeas corpus petitions) to answer the questions raised within. A trend in the law, military and civilian, appears to be taking shape. As the age of the draft-free (perhaps publicity-free) modern volunteer Army dawns, judge advocates have no choice but to ponder the possible interpretations of "reasonableness" and "military necessity." Where indeed will "reasonable" means [38] to search stop and 1984 begin? [39]

Footnotes

1. Lederer and Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs*, THE ARMY LAWYER, DA Pam 27-50-4 (April 1973), 12, hereinafter cited as Lederer & Lederer.
2. *See* Kingman, *Marijuana Detection Dogs as an Instrument of Search: The Real Question*, THE ARMY LAWYER, DA Pam 27-50-5 (May 1973), 10.
3. —— U.S.C.M.A. ——, 47 C.M.R. ——, 14 Cr.L. 2028 (No. 26,552, 21 Sep. 1973) hereinafter cited as *Unrue*. This case is digested at 73-12 JALS 1 (DA Pam 27-73-12).
4. The plain smell doctrine depends on the fact that what is detected is actually particles floating in the air from the original substance. While numerous cases have accepted smell as probable cause to search, Mr. Justice Traynor in People v. Marshall, 69 Cal. Rptr. 585. 442 P.2d 665 (Cal. 1968) specifically held that plain smell is not the same as plain view because "(e)ven a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband can be found." It appears, however, that this aspect of Marshall has been overruled. Guildi v. Superior Court, 14 Cr. L. 2001 (Calif. 5 September 1973).
5. *See e.g.*, Ker v. California, 374 U.S. 23 (1963); United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 947 (1972).
6. *See e.g.*, United States v. Doran, 482 F.2d 893 (9th Cir. 1973).
7. United States v. Davis, 482 F.2d 893 (9th Cir. 1973) hereinafter cited as *Davis;* United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).
8. *See*, United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. den.*, 405 U.S. 947 (1972) hereinafter Epperson; United States v. Fern, 14 Cr. L. 2042 7th Cir. 20 Sep. 1973); United States v. Bell, 464 F.2d 1180 (3rd Cir. 1972); United States v. Lopez, 328 F. Supp. 19077 (E.D.N.Y. 1971); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972). *Cf.* United States v. Miles, 470 F.2d 1217 (9th Cir. 1973).
9. *See* note 8 *supra*.
10. Magnetometers detect the presence of metal. They may be of the passive variety in which case they detect changes in the earth's magnetic field caused by the presence of metal; or the active variety which, like x-ray machines, emit waves. Most of the cases cited in note 8 *supra* appear to have used passive magnetometers.
11. *See* note 8 *supra*.
12. 464 F.2d 667, 673.
13. United States v. Slocum, 464 F.2d 1180 (3rd Cir. 1972).
14. *See* note 7 *supra*.
15. Justice Harlan in Katz (389 U.S. 347, 361 (1967)) posited a two stage test: did the person concerned have an actual (subjective) expecta-

tion of privacy and if so was that expectation one that society is prepared to recognize as reasonable? Davis at 905.

16. Davis at 905.
17. *Id.* at 908.
18. *Id.* at note 40 citing United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Camera v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967), and a number of circuit court opinions.
19. *See* United States v. Cyzewski, 13 Cr.L. 2553 (5th Cir. 29 Aug 1973) involving retrieval and search of suitcases from an aircraft and containing the following language: "(w)e sustain the search because at no point in the authorized security procedure did defendants' innocence become clear to the Marshals."
20. *See* text at note 24 *infra*.
21. "Narcotics/contraband detector dogs will not be utilized to search the person of individuals." Para. 3-3(f), AR 190-12, MILITARY POLICE WORKING DOGS (19 Jan. 1973).
22. Unlike the magnetometer which will detect only masses of metal, legal and illegal in character, a properly trained drug detector dog is specific only for illegal drugs. Thus, in theory the only privacy breached is that of the lawbreaking contraband holder.
23. It is interesting to note that the Courts have long required search warrants but have seldom required arrest warrants. Is the obvious conclusion correct?
24. The harm involved within this context is primarily the deleterious effects of drug abuse on combat preparedness and its secondary results. The number of hijacking attempts is astronomically less than the number of drug users. Should this matter?
25. 30 Cal. App. 3rd 454, 106 Cal. Rptr. 366 (1973).
26. The Court did not discuss this facet of the case but apparently considered the presence of the dog in the room proper and the use of the dog as not constituting a search. Query: how did the Court escape People v. Marshall? *See* note 4 *supra*.
27. Furman, 106 Cal. Rptr. 366, 367.
28. 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973), hereinafter cited Poundstone.
29. A warning sign was posted at the gate.
30. Poundstone, 46 C.M.R. 277, 280, quoted without internal citation.
31. *Id.* at 282. Citing, United States v. Brown, 10 U.S.C.M.A. 482, 489, 28 C.M.R. 48, 55 (1959).
32. *Id.* at 286.
33. Clearly, Poundstone was a combat oriented situtution and can be distinguished on that basis alone. However, while such circumstances can be urged as justification for virtually anything, Judge Duncan in dissent pointed out the lack of adequate foundation to justify the Court's conclusion. What is apparent is that the Court has indeed relaxed the requirements for cause to search in combat areas contrary to the suggestion that this would be improper. *See* Kingman article *supra* note 2 at footnote 16.
34. Judge Quinn indicates that there were about 30 cases a quarter involving drug use and that 100% of "solved" theft cases featured offenders involved with drugs (query: how many cases were "solved?"). Judge Quinn states: "(w)hether a condition is so epidemic as to necessitate Government action to counter the risk of harm that can result from continued lack of control does not, in our judgment, depend upon the number of occasions the condition evidences itself." Unrue at 6. Judge Duncan in dissent points out that no evidence was introduced to show if any of those cases, military and civilian, impacted upon the command's security or ability to perform its mission.
35. We assume that there is indeed some point where technology cannot be considered an extension of human senses. *Compare*, Marshall, *supra* at note 4 with State v. Gallant, 13 Cr.L. 2507 (Sup. Jd. Ct. Maine, 31 Jul. 1973), sustaining a radiographic examination of a letter that ultimately proved to contain heroin. The location of that point is impossible to determine at present. The Court in Unrue cites United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 947 (1972) for the proposition that use of a flashlight by a police officer to illuminate dark places on public streets is perfectly proper. Actually, Wright sustained an officer's use of a flashlight to peer into the privacy of an individual's garage raising the question in a more relevant fashion. (However, see the extremely well-written dissent.)
36. *See* Lederer & Lederer.
37. Para. 152 MCM (1969) Rev.
38. Truly reasonable means does include, in our opinion, the use of reliable drug detector dogs if that use is properly limited in scope.
39. *Cf.* note 19 *supra*.

Facts, Trends And "Watchpoints" — Army Non-Judicial Punishment

By: Captain Royal Daniel and Lieutenant Co lonel John L. Costello, Jr., Developments, Doctrine & Literature Department, TJAGSA

FY 74 has been and will remain a period of change in nonjudicial punishment procedures. Eventual assessment of the changes and their impact requires a definition of the "now" as a standard against which comparisons can be made. Available data permits certain general statements about the period FY 66-73 and more specific statements about the period 1 Jan 70—30 June 73.

The information below is derived from USALSA figures for the period mentioned. Over 2,000,000 instances of nonjudicial punishments in the Army have been recorded since the beginning of FY 65, 500,000 of which occurred during the 14 fiscal quarters ending 30 Jun. 73. TJAGSA has these and other data from the quarterly JAG-2 Reports in modern data processing facilities which provide the capability to analyze and compare court-martial and Article 15 statistics with each other and with relevant descriptors of conditions in the Army. This is the first product.[1]

Since 1 Jul 65 the Article 15 rate per thousand troops has advanced from 156 to 228; most of the advance occurred during the first five years of the period. At the same time the absolute numbers of punishments imposed decreased by 43%. That decrease substantially parallelled reductions in the size of the Army, but the increase in the rate per thousand suggests the presence of determinants of troop misbehavior and command response other than mere numbers of troops. These determinants are listed below.

The number and rates of Article 15's certainly are relevant to any assessment of the state of discipline in a command. They are also relevant to the computation of expected workload and manpower requirements. The absolute numbers are specially critical in this period, since a superficial analysis would suggest lower workloads resulting from fewer cases. However, the new procedures are going to be more costly to both commanders and SJA's in terms of time expended on each punishment proceeding. Appraisal of these opposing forces will require finite measurement and careful management. The rough data now available permit a tentative assertion that Army attorneys have been involved with only two or three percent of the Article 15's imposed Army-wide. The number of appeals and supplementary actions has been a small portion of the total, as were the reported preimposition consultations. Counsel's involvement will obviously increase, not only in terms of soldier contact, but also in the commander contact necessary to start the new procedures rolling. Since new missions are classically the strongest points in manpower proceedings, the time for improved time accounting is now. See *The Army Lawyer*, Aug 73, pp. 11-14.

Looking at some substantive aspects, analysis of data from Army-wide JAG-2 Reports Jan 70—Jun 73 indicates:

1. About 1% of all persons offered Article 15 punishment refuse it.

2. Of those "refusers," 35% are not subsequently tried for the offense involved in the offer of punishment.

3. Of those who are tried, a declining number, presently 75%, are convicted. Thus, of all refusers less than half are ultimately punished for the breach which prompted the commander's initial response.

(100% - 35% = 65%, the number tried. 65% x 75% = 49%, the number convicted).

4. Since the current Article 15 rate per thousand is 228, nearly 23% of the Army's total population (disregarding multiple offenders) is affected. Again disregarding multiple offenders (who cannot be identified at this level) the 1% refusal rate produced 1739 refusals in FY 73. Applying the other

rates presented above, 609 were never tried and 278 were acquitted at a subsequent trial. These 887 cases or so each year do not appear significant in terms of nearly 190,000 annual impositions of Article 15 Army-wide. In terms of one jurisdiction they may be significant, and in terms of harm to the system when a commander's bluff is successfully called, they are quite significant.

5. Nonjudicial punishments fall more heavily upon personnel in the lowest four enlisted grades, as might be expected. Based on grade distributions reported by MILPERCEN as of 31 Jul 73, the Army strength was divided among 14% Officers, 31% Enlisted, E-5 or above, and 55% in Grade E-4 and below. Nonjudicial punishments during the last Fiscal Year were distributed as follows:

Officers	1%
E-5 & Above	13%
E-4 & Below	86%

Other Army justice data have similarly stable characteristics which permit confident analysis, particularly in terms of each other. The most significant outcome of that analysis is a determination that the Article 15 rate is substantially independent of, i.e., not causally connected with, any court-martial rate or with troop strength. The gaping question then is how to explain the rising rate? Rising "incident rates" provide an obvious, intuitive answer, but there may well be other contributing factors. These include the complexity and cost of alternatives such as courts-martial or administrative discharge procedures, command policies and the zero-draft /MVA environment. Research on this part of the problem will continue; comments from the field will be welcomed.[2]

SJA's may repeat the earlier portion of this analysis for their own commands by manipulation of appropriate elements of their own JAG-2 reports and local troop strengths. Direct application of the Army-wide figures to any one installation would be inappropriate, but they will serve as indicators of areas for local analysis and a standard against which local behavior may be appraised. The SJA will, of course, be watching the impact of recent procedural changes in Article 15. The preceding analysis provides a convenient summary of conditions at the time of change against which developments may be gauged.

Footnotes

1. The Article 15 figures Army-wide behave well from a statistician's point of view. For the 2½ year period on which the above discussion is based, the Mean of the Article 15 rate was 231.25 and the Standard Deviation only 14.66. The stability of the quarterly figures is validated by characteristics of the annual population FY 65-73. In that case the Mean is 193.42 and the Standard Deviation only 24.29. The lower Mean for the 9 year period of course reflects rates of 156-180 in the early years. The Standard Deviations are near or below ⅓ of the Mean in each case (14/77 and 24/64) which indicates a stable distribution in which the Mean (average) represents the total experience fairly.
2. Correlation coefficients of annual data over the last 22 years indicate that no more than 80% of the variations in total disciplinary actions is explained by variations in troop strengths. We will have more on this later. There is, however, an intriguing correspondence between the number of Selective Service Act Violations tried in Federal District Courts and the number of Army Article 15's (Corr. Coeff. = .96452). This may measure some of the spill-over of civilian attitudes into the Army.

Racial Confrontation: A Three Phase Approach

By: Captain David E. Graham, Instructor, International and Comparative Law Division, TJAGSA

The Judge Advocate General has tasked TJAGSA to prepare a Handbook on Race Relations. The proposed handbook will take the form of case studies dealing with various

pertinent topics. The study that follows is the first of several that will be sent to the field for preview.

You are invited to submit comments or suggestions on the format and the discussion within. They should be addressed to The Judge Advocate General's School, Civil Law Division, ATTN: Captain Ronald Griffin, JAGC, Charlottesville, Virginia 22901.

* * *

The Factual Situation.

In February of 1974, Camp Devine, a medium sized Army post in a midwestern state, is undergoing a high degree of racial tension. For several months there have been serious altercations between white and black troops in the NCO Club, a facility which has become predominantly black oriented. During one recent incident three black soldiers were taken into custody and placed in pretrial confinement. There has been a consistent demand by a black solidarity organization on post that the three individuals be released and all charges dropped. A march, sponsored by this organization, is now underway, and has drawn a sizeable number (100-150) of participants. There has been some property destruction, public and private, as a result of the march thus far, and the marchers appear to be becoming more unruly. As they make their way to the Post Headquarters, the CG places a call to the SJA, informs him of the march, and asks that he report to the HQ at once. What role should the SJA play in this apparently inevitable confrontation? Is his office prepared to meet this crisis? If called upon, what advice should he give? These are only some of the questions which run through his mind as the SJA makes his way to the office of the CG.

SJA Actions.

In dealing with this incident, the SJA must realize that there are three distinct aspects of any confrontation process. What are these? What considerations do they entail? What actions on the part of the SJA do they require?

1. The Need For A Contingency Plan.

Although no one plan can be written to meet every racial disturbance that might occur within a given command, there does exist the need for guidelines which detail, as specifically as possible, what actions will be taken and who will take them. The responsibilities of every staff agency, including the office of the SJA, must be clearly defined. In doing so, it is important to remember that "confrontations" vary in purpose and degree. Thus, a well conceived plan must provide for responses tailored to meet various levels of escalation and should call for reaction based on the concept of displaying as little command force as possible, whenever this is possible. For obvious reasons, the SJA should play an important role in formulating these policy guidelines.

2. Actions During A Confrontation.

The overall role of the SJA in various types of racial confrontations should be detailed in the above mentioned contingency plan. It is recommended that he not be content to remain silent until his advice is requested. He must make himself available to his commander and provide not only advice on illegal or questionable courses of action during a confrontation, but also, assuming the existence of good rapport, advice and assistance relating to the overall handling of the disturbance.

In dealing with a racial incident, the SJA and his office must do everything within their power to get the facts. Consideration might be given to the use of several JA's at the scene of the confrontation. Acting in conjunction with the military police, these attorneys could record events as they occur. The benefit to be derived from the use of such objective fact gatherers must be weighed against the damage to the credibility of the SJA office which might result, however. There is also a possibility that specific defense counsel may play a significant role in some racial confrontations. These individuals may be able to deal

effectively with a group if they address them solely in their roles as counsel to soldiers who are the cause celebre of the disturbance. Again, however, they should never be used in a capacity which would portray them as simply an extension of command authority.

It is singularly important that the CG be able to look to his SJA as being the most objective individual on his staff. With this in mind, it is recommended that the SJA not serve as spokesman for the command in a confrontation situation, unless his commander feels that the incident merits the SJA's personal contact with a particular group. This does not minimize the need for the SJA to be constantly available throughout a confrontation, however, giving both legal and non-legal advice. This guidance will be given in response to both demands or requests made by the participants in a disturbance and to inquiries by the CG as to whether he should or is legally able to take certain courses of action. Thus, the SJA must be prepared to give this advice *before* the commander issues his orders.

The individual designated to speak for the command should ordinarily be identified in the contingency plan, and alternate spokesmen should be designated. This command representative need not and perhaps should not be the CG, as he will most probably serve as the reviewing authority on any charges resulting from the confrontation. The spokesman must be someone close to the commander, a person who has credibility and who will be instantly recognized by the troops. He must have the ability to both communicate and maintain an objective and rational attitude toward individuals who may subject him to verbal abuse and demonstrate contempt for command authority. Moreover, he must be advised that he should refrain from making promises or issuing ultimatums which are impossible to keep or enforce.

It would be impractical for the SJA to recommend that military police be kept away from a confrontation, even if it is not of a violent nature. In most cases, they are the first elements of the command on the scene. However, it is recommended that an attempt be made to handle the situation with as small a show of force as possible, with due consideration being given to the safety of other personnel and property. The tendency to over-react must be guarded against, and each individual must be treated with respect. If all efforts at negotiation fail and violence does erupt, an attempt should be made to meet the violence quickly and forcefully, but with common sense and legally correct methods of apprehension. In some instances, it might be advisable to quickly arrest a rock-thrower in a crowd or to remove an original troublemaker from the scene, if he can be positively identified. However, the mood of the crowd might indicate that this action would only serve to encourage more violence. Moreover, if a large group of individuals is involved, it would be unwise to attempt to make a mass arrest. If some initial arrests are made, the SJA must be prepared to give advice as to whether these individuals should be placed in pretrial confinement. Consideration must again be given to the immediate effect this will have on the confrontation in progress. The pros and cons must be carefully weighed in light of all existing factors.

It is obvious that no standard policy guidelines can be recommended for use in every case of confrontation. As indicated, must will depend on the situation and the mood and actions of the individuals involved. Again, it is emphasized that at least a general policy with regard to the amount of force to be used in various types of disturbances should be detailed in a preconceived contingency plan. An effective and legitimate use of force dictates close liaison between all elements of the command. An active and informed SJA can do much toward ensuring this desired relationship by offering both legal guidance and advice dictated by good judgment and common sense.

3. Actions Following a Confrontation.

Some of the most difficult and critical decisions confronting an SJA involved in a ra-

cial confrontation are those he must make following the disturbance. This is especially true in light of the fact that a commander may have his own predetermined and very definite views on these matters. Initially, it is important that a complete list of grievances set forth by the participants in the incident be compiled. The command should then analyze and respond to these as quickly and as thoroughly as possible. A rapid and honest response to these requests, or perhaps demands, should do much to reduce the level of tension on post. The SJA can be instrumental in this process.

Coincidental with his involvement in preparing responses to the complaints received by the command, the SJA must advise the commander as to what disciplinary action should be taken against certain participants in the confrontation. This is critical advice. Some personnel may already be in pretrial confinement following arrest. The decision must be made as to whether these individuals should remain incarcerated and whether other identifiable participants in the disturbance should be so confined. All relevant factors must be considered.

Possibly the most difficult decisions an SJA and his office must make are those regarding the individuals to be charged and the charges to be made against them. These decisions should be based on a fundamental policy guideline. *Do not "overcharge."* There is a fundamental difference between a group of three and three hundred persons involved in a racial disturbance. In the former case, all three individuals are most probably equally involved in the incident, whereas, in the latter situation, the great majority of participants are simply going along with the crowd. It is most inadvisable to arrest 150 participants in a confrontation and charge all of these individuals with disorderly conduct. Serious consideration should be given to charging only those who have clearly been identified as engaging in acts of assault or destruction of property.

Once the decisions have been made with regard to which individuals will be charged, the SJA must determine the types of charges to be brought against them. Consideration should be given to lowering, or at least not escalating, these charges. There would appear to be a tendency to overuse conspiracy, and charges of riot and mutiny are inadvisable in situations involving a failure to obey a lawful order or an assault. Once the charges have been made against specific individual participants in a disturbance, it is recommended that their cases be handled in as expeditious a manner as is legally and practically possible. Unnecessary prolongation of the pretrial and trial procedures often gives rise to unwarranted criticism and difficulty.

The SJA has still other considerations to make and advice to give during the trial and pretrial process. In the area of assignment of counsel, attention must be given to requests for specific judge advocates and the availability of these attorneys. Moreover, the SJA must ensure that his office cooperates with civilian counsel to the fullest extent possible. He must also be prepared to deal with publicity that might be generated by the trials and should give advice with regard to press releases and comments made within the command in order to ensure that these are accurate and not prejudicial. Consideration must also be given to policy guidelines regarding the presence of spectators, the press, and demonstrators at the trials. In making all of these decisions, the SJA must bear in mind the sensitive nature of the subject and the possibility that both he and his office will be subjected to unmerited criticism. This should not deter him from handling the matter in an objective and totally professional manner.

Following the return of normalcy to the post, the SJA can be instrumental in investigating the unit or units that were involved in the disturbance in order to determine its cause. Moreover, if, as a result of the incident, some individuals are punished and others are not, it is important that the troops be told why. This will do much to dispel many of the mythical and disruptive rumors always associated with a disturbance of this nature.

Checklist.

A. Contingency Plan

1. The plan must have SJA input.
2. The responsibilities of the SJA office must be specified, as well as those of every other staff agency.
3. The plan should be tailored to meet varying types of confrontations.
4. The plan must be periodically updated and distributed to all concerned.

B. SJA Actions During a Confrontation

1. Do not remain silent; offer legal and non-legal advice in an objective manner.
2. Gather all available facts surrounding the incident.
3. If defense counsel becomes involved, ensure he does not become an "enforcer."
4. It is recommended that the SJA not serve as the spokesman for the commander.
5. The CG, as reviewing authority, should not become directly involved, unless this is absolutely essential.
6. Ensure that the command spokesman possesses communicative skills and is formed as to what he can and cannot do.
7. Recommend as small a show of force as possible; do not overreact.
8. Arrest only those engaged in destruction of property or acts of assault and only if this will not further exacerbate the situation.
9. Make no "mass" arrests.
10. Carefully consider the ramifications of placing certain individuals in pre-trial confinement.

C. Actions Following A Confrontation

1. Charge only those who can clearly be identified as engaging in destructive acts or assaults.
2. Place individuals charged after the confrontation in pre-trial confinement only when absolutely necessary.
3. Do not "overcharge."
4. Handle all cases as expeditiously as possible.
5. Carefully consider and respond to all requests for specific counsel.
6. Cooperate fully with civilian counsel.
7. Review press releases.
8. Set up policy guidelines for spectator behavior at trials.
9. Aid in investigating causes for the confrontation.
10. Stand ready to explain the actions of the SJA office to the troops.

It cannot be overemphasized that the goal of the SJA should be the prevention of any form of racial confrontation. However, if such an incident does occur, the three phase approach discussed above should provide the basis for responsible and well reasoned reaction.

Policy For Providing Assistance To Staff Judge Advocates

From: The Office of The Judge Advocate General

1. The following research and support may be provided by OTJAG to Staff Judge Advocates and military and civilian legal officers assigned to CONUS and oversea commands and installations:

a. Written legal opinions carrying the imprimatur of The Judge Advocate General.

b. Copies of selected prior office opinions.

c. On an emergency basis, oral advice, re-

search, and reference to pertinent statutes, legislative history, directives, instructions, regulations, and other printed material, usually in response to telephone requests. In such circumstances the requester will be advised that the information provided does not constitute an opinion of The Judge Advocate General regarding the issues presented.

2. As The Judge Advocate General is the legal advisor to the Secretary of the Army and the Army Staff, extreme care must be exercised to insure that, in providing assistance to individual service members and military lawyers, an opinion is not given by the Office of The Judge Advocate General to an interested party in a matter which may come before The Judge Advocate General in his official capacity. The appearance or existence of conflicts of interest must be avoided.

3. The following guidance is provided in submitting requests for OTJAG assistance.

a. All requests should emanate from, or be approved by, the Staff or Command Judge Advocate. Response will not ordinarily be made to requests from trial counsel. If a request is received from a trial counsel, and reply is considered appropriate, the response will be provided to the Staff Judge Advocate. Responses to requests received from defense counsel will depend upon the nature of the request, but normally any response will be by the Chief, Defense Appellate Division.

b. Except in emergencies, requests will be in writing, signed by the Staff or Command Judge Advocate, and forwarded through technical channels (e.g., SJA of intermediate higher headquarters).

c. The attorney requesting assistance must have exhausted all research facilities reasonably available to him.

d. Unnecessarily multiple and unduly complex questions, especially those involving nonlegal policy considerations, should be avoided. Purely hypothetical questions will not be answered.

4. The following exceptions to the above apply:

a. Direct communication between Staff Judge Advocates and The Judge Advocate General is authorized pursuant to Article 6b, UCMJ, as appropriate.

b. Correspondence to the International Affairs Division may be forwarded directly to OTJAG; however, an information copy should be provided the SJA of intermediate higher headquarters.

c. In matters pertaining to civil litigation (AR 27-40), direct contact between judge advocates and action attorneys in the Litigation Division, OTJAG, is encouraged on all matters before State and Federal Courts in which the Army has an official interest.

d. Potential private relief bills involve purely equitable and policy determinations. These bills are reserved for exceptional cases in which an individual can establish that his claim has substantial merit, but he cannot recover because of the statute of limitations, or there is no statutory or regulatory authority for payment. Requests for guidance may be submitted directly to the Legislative Relief Office, OTJAG, subject to the following:

(1) The claim has substantial merit and relief should be considered on equitable grounds.

(2) The individual has exhausted all judicial and administrative remedies.

(3) Care should be taken to avoid any commitments to individuals concerning the position DA may take pending a reply to a request for guidance.

The Expanded Legal Assistance Program

By: Captain Kenneth E. Gray, 22nd Advanced Class, TJAGSA

These remarks were made at the 1973 Judge Advocate General's Conference.

I would like to set forth a few of my personal thoughts on the expanded legal assistance program, as developed from my past two and one-half years of exposure to it in the field. My experience indicates that there are a lot of good things to say about this program. I have had the opportunity to talk to a lot of fellow JAG officers and far and away, most of their comments have also been quite favorable. I was especially interested in their observations on the need for the program and its value to the servicemen. However, a few remarks left me quite distressed—some individuals feel that the expanded legal assistance program serves no practical purpose; that it takes too much manpower away from military justice operations; or that it is strictly a luxury. I even received a career orientation from one officer who suggested that I should get out of legal assistance and return to military justice since it was the only area of importance in military legal work.

As an ardent supporter of the expanded program I cannot let these remarks go unanswered. I think they evidence a basic misunderstanding of the program and the need for it. To these officers I would pose three questions: does the serviceman want this type of program; does he need it; and does the JAG Corps have any responsibility to provide it?

General Prugh's JAG Conference address noted that legal services rank third on the serviceman's list of military expectations. We are all aware that only a small number of servicemen are involved in courts-martial. So when the majority of servicemen talk in terms of better legal services they are not normally referring to the military justice area. They are concerned about those problems customarily included within "legal assistance." Today's serviceman, especially the younger one with whom we normally deal in the expanded program, is often a high school graduate with possibly some college education. He may have a family of his own. He generally will have more spending money in his pocket and be more aware of the civil problems he may encounter than was his predecessor. He will be looking to us as military attorneys for guidance and assistance.

Besides the serviceman's desire for this type of program, I would believe that the military lawyer himself now wants it—especially the young lawyer who is actually working in the legal assitance office under the traditional program. Most of us at some time or another have had the opportunity to do legal assistance work. We can all probably recall some of the frustrations it caused. In particular, I mean that client who, for example, has asked for adoption advice. Of course, we explained what an adoption was, what the procedures were in the state, and what could be done in order to obtain the desired goal. Then we presented the client with that inevitable list of civilian attorneys and assumed that this would take care of the problem. The client usually sat there with a puzzled look, as if to question the termination of the interview. After being asked if we really were not going to do anything further, we usually gave that apologetic reply about the state controlling our practice in the local jurisdiction, etc. More times than not, this was an embarrassment to us as professional attorneys, and it left many JAG officers a little frustrated.

In regard to my second question I would like to note a comment from Dr. Lee R. Morris, vice-president of Insurance Company of North America, in his speech to the American Bar Association Conference on pre-paid legal services. Dr. Morris stated, "that research studies support the belief that the use of lawyers is positively correlated with income, social status, and occupation. Research in the field supports the contention that legal services are essentially inaccessible to middle

income Americans." Dr. Morris was not talking about *low* income individuals. He was talking about *middle* income individuals. If legal services are generally unavailable to this group, what about the people we serve in the expanded program—the E1s-E4s? Obviously these legal services would be otherwise unavailable to them in the civilian community.

It might be beneficial for those of us who have not dealt with the costs of civilian legal services to examine a case or two in order to see where the serviceman stands. An uncontested divorce in New Jersey will normally cost from $500-700. If the responding spouse wants an attorney the costs are doubled. If the case is to be contested the fee may run from $750-1,000 per attorney. If the case cannot be settled in one hearing, each attorney might ask another $250-300 for the additional court appearances. The E1s-E4s normally just do not make enough money to afford costs of this type.

As to the serviceman's need for the expanded program I would like to make an observation on an area discussed during the JAG Conference. This concerns civilian law enforcement personnel, their discretion in filing charges and the built-in protections of the county prosecutor and grand jury. It was stated that very little abuse exists in this area, to the citizens' benefit. While I agree with this assertion when it comes to felonies, I take issue with it when applied to offenses at the inferior court level. This was, of course, the area of criminal law with which the program at Fort Dix was most closely involved.

Before I left my assignment at Dix, I made a check of certain types of contested cases our office handled in the last ten to twelve months. In regular traffic cases, 14 of 20 cases involving pleas of innocence resulted in not guilty findings. For drug cases, the Fort Dix office won 11 of 14 contested cases. Our miscellaneous criminal actions (drunk and disorderly, assault and battery, trespass, possession of stolen property, bad checks, etc.) involved 23 of 30 successful cases. These figures indicate that the office average between 70-79 percent wins at the inferior court level. This is in contrast to about a ten percent win ratio for defense counsel at the GCM level and about a twenty percent win ratio for civilian defense attorneys at the indictable offense level. The Staff Judge Advocate, Fort Monmouth, has advised me that the expanded program at his installation has had a similar success rate.

While I have every respect for the legal talents of the attorneys at the Fort Dix office, I am convinced that much of our success resulted from the dismissal of cases which should never have been before the courts. Many cases were won on motions to suppress or motions to dismiss made immediately after presentation of the state's case. Had it not been for our presence, any serviceman unable to afford civilian representation, would certainly have suffered because of this abuse of discretion.

Another point should be made regarding the specific expertise that can be provided by a military attorney through the expanded program. Cases in the financial area can arise under these circumstances as they apply to support obligations in domestic relations actions or civil contract cases. You will find that very few civilians understand our pay operations or are willing to believe the problems a serviceman can have with the Finance and Accounting Office. In addition, the military attorney can often provide more knowledgeable advice to both his client and the court in cases involving the Soldiers and Sailors Civil Relief Act. In this instance it is truly surprising how little the courts and attorneys know of the Act. It is not unusual to find a judge continuing a case to research a question involving a host state's ability to tax a nonresident serviceman or to require him to register his car in the host state. In these areas where military status grants unusual rights and immunities to the serviceman, our personnel need the utmost protection.

If the serviceman wants and needs some form of legal service, someone must be responsible for providing it. In this regard I would like to note an article by Mr. Barlow

Christensen, senior research attorney for the American Bar Association, as it appeared in 22 *Harvard Law School.* Mr. Christensen states.

> That the legal profession has long nurtured a marvelous rhetoric about itself. Sometimes this rhetoric has been restrained and scholarly as in Roscoe Pound's definition of the legal profession as a group of men pursuing a learned art as a common calling in the spirit of public service. Sometimes it has been expansive and superlative ridden, portraying the lawyer as a combination of Santa Claus, Schweitzer and Zorro. Running throughout, however, has been the theme that the lawyer does differ radically from the milkman, the liquor dealer or the manufacturer of cigarettes; that one major element of this difference is a fundamental commitment to the element of service before gain. Indeed the lawyer is or should be different. This public service concept of professionalism is certainly one of the reasons for the existence of the legal profession's state granted monopoly on the business of providing legal services to the public. But, the rhetoric has implications not always completely appreciated by the profession and there is reason to question whether the profession's performance always matches the rhetoric or responds adequately to the obligations imposed by it.

The obligations imposed on our civilian counterparts extend to us in the military as well. I believe if we can understand the concept of the serviceman's desire for this type of program and his need for it, we can better understand our responsibilities in this area.

I am not going to be so naive as to assert that legal assistance should take priority over military justice, claims, or any other SJA office function. But for anyone who does harbor a criticism of the type mentioned earlier, I simply ask you to review the questions raised within. Examine them in the light of my observations and the needs of the personnel assigned to your own post or installation. If you do this with an open mind, I am sure you will realize that legal assistance is at least as important as your other office functions—and that evolution into the expanded program is a necessary component of a future effective JAG Corps.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Alderman Reminder.

All Judge Advocates should consider the decision of the U.S. Court of Military Appeals in the case of *U.S. v. Alderman,* 22 USCMA 498, 46 CMR 498 (1973), which applied the decision of *Argersinger v. Hamlin,* 407 U.S. 25 (12 June 1973) to the military. As a result of the *Alderman* decision, evidence of post-*Argersinger* convictions by summary court-martial in which confinement was adjudged and served, without the accused having been provided with counsel or having waived counsel, should not be introduced as matter in aggravation at a subsequent trial. The use of such evidency may well result in a finding of prejudice to the accused and the taking of judicial corrective action.

2. Grants of Immunity.

Paragraph 68*h*, *Manual for Courts-Martial, United States, 1969 (Revised edition),* provides that a general court-martial convening authority may grant or promise immunity to persons who are subject to trial by court-martial. With the enactment into law of Title II of the "Organized Crime Control Act of 1970" (18 U.S.C. §§ 6001-6005), which embodied a broad new witness immunity statute applicable to Federal judicial, administrative, and congressional proceedings, a question arose as to the continued existence of the convening authority's powers of immunity under the *MCM, 1969 (Rev.).*

The Assistant Attorney General, Office of Legal Counsel, Department of Justice, has ex-

pressed the opinion that, although the new immunity statute is applicable to trials by courts-martial, the statute did not eliminate, but did modify, the convening authority's power under the *MCM, 1969 (Rev.)*, to grant immunity to persons subject to trial by court-martial.

Whether a prospective witness may be granted immunity by the convening authority under paragraph 68*h*, *MCM, 1969 (Rev.)*, or whether the convening authority must request the Attorney General to approve the issuance of the grant of immunity under Title II of the "Organized Crime Control Act of 1970," depends upon two factors: (1) the status of the prospective witness, and (2) the interest of the Department of Justice in the case in which the grant of immunity is desired. The prospective witness' status is relatively easy to determine: Is the witness subject to trial by court-martial? If not, the convening authority is without any independent authority to grant immunity to the witness. The authority to grant immunity under paragraph 68*h*, *MCM, 1969 (Rev.)*, exists only with regard to witnesses who are subject to trial by court-martial. However, even if it is determined that the witness is subject to trial by court-martial, the convening authority should not grant immunity until it is determined that the Department of Justice has no interest in the case. This inquiry should start with an examination of the 1955 Memorandum of Understanding between the Department of Justice and the Department of Defense (Chapter 7, Army Regulation 27-10, 26 November 1968). If it is believed that the interests of the Department of Justice may be involved, the local U.S. Attorney should be contacted. If a specific U.S. Attorney cannot be identified, or if agreement with the local U.S. Attorney cannot be attained with respect to the particular grant of immunity, the Chief, Criminal Law Division, Office of The Judge Advocate General, should be requested to coordinate the matter directly with the Department of Justice.

If the prospective witness is subject to trial by court-martial and it is determined that there is no Department of Justice interest in the case, the general court-martial convening authority may proceed to issue the grant of immunity under paragraph 68*h*, *MCM, 1969 (Rev.)*. Prior coordination with the Criminal Law Division, Office of The Judge Advocate General is not required in such cases.

If the prospective witness is not subject to trial by court-martial or it is determined that there is a Department of Justice interest in the case, the grant of immunity must issue under Title II of the "Organized Crime Control Act of 1970." In addition, there may be cases where it is desired to have the Attorney General authorize the issuance of the grant of immunity even though the convening authority could issue the grant of immunity under paragraph 68*h*, *MCM, 1969 (Rev.)*. If the grant of immunity is to issue under Title II of the "Organized Crime Control Act of 1970," the following procedures are applicable:

(1) A proposed order to testify for the signature of the general court-martial convening authority should be drafted, including therein the requisite findings that the witness is likely to refuse to testify on Fifth Amendment grounds and that the testimony of the witness is necessary to the public interest;

(2) Forward the unsigned proposed order to the Office of The Judge Advocate General, ATTN: DAJA-MJ, requesting that the proposed order be forwarded to the Department of Justice for the approval of the Attorney General;

(3) Include the following information in the request, if available:

a. Name, citation, or other identifying information of the proceeding in which the order is to be used;

b. Name of the individual for whom the immunity is requested;

c. Name of the employer or company with which the witness is associated;

d. Date and place of birth of the witness;

e. FBI number or local police number, if any;

f. Whether any State or Federal charges are pending against the prospective witness and the nature of the charges;

g. Whether the witness is currently incarcerated, under what conditions, and for what length of time;

h. Military status and organization;

i. Whether the witness would be likely to testify under a grant of immunity precluding the use of his testimony against him;

j. Factual basis supporting the finding that the witness is likely to refuse to testify on the Fifth Amendment grounds;

k. General nature of the charges to be tried in the proceeding at which the witness' testimony is desired;

l. Offenses, if known, as to which the witness' testimony might tend to incriminate the witness;

m. Date upon which it is anticipated the order will be issued;

n. Summary of the expected testimony of the witness as it applies to the particular case in issue.

The following is a sample form for an order to testify:

DEPARTMENT OF THE ARMY
HEADQUARTERS, CAMP JONES
CAMP JONES, TEXAS

ORDER TO TESTIFY

1. As an officer empowered to convene general courts-martial, and pursuant to the provisions of sections 6002 and 6004, Title 8, United States Code, I hereby make the following findings:

a. Private E1 John Doe possesses information relevant to the pending trial by general court-martial of Private E1 James Roe, and the presentation of his testimony at this trial is necessary to the public interest.

b. On 1 October 1973, Private E1 John Doe made a sworn statement to an agent of the United States Army Criminal Investigation Command implicating himself in criminal conduct at Camp Jones, Texas, on or about 30 September 1973.

c. It is likely that Private E1 John Doe would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

d. Counsel for Private E1 John Doe has informed the Trial Counsel for the above mentioned case that he would advise Private E1 John Doe to adhere to his right to remain silent under the Fifth Amendment to the U.S. Constitution should he be subpoenaed to testify at any court-martial concerning events at Camp Jones.

2. On the basis of these facts, pursuant to section 6004, Title 18, United States Code, I hereby order Private E1 John Doe to appear and testify before the general court-martial now convened for the trial of Private E1 James Roe. As provided in section 6002, Title 18, United States Code, no testimony given by Private E1 John Doe pursuant to this order shall be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States as set forth in Exhibit 1 annexed hereto.

JOHN SMITH
Major General, USA
Commanding

Normally, requests should be initiated so as to allow for approximately two weeks to process the request. If more expeditious handling is necessary, the Chief, Criminal Law Division, should be notified.

Upon receipt of the written approval of the Attorney General or his designated representative, the order to testify may be issued immediately, or issuance may be delayed until such time as the witness invokes his rights under the Fifth Amendment and refuses to testify. It is noted that a court-martial does not fit within the definition of a "court of the United States [18 U.S.C. §6001 (4)]. Instead, a court-martial fits within the definition of a proceeding of an "agency of the United States" [18 U.S.C. §6001 (1)] Section 6004 governs the issuance of orders to testify to witnesses at proceedings before an agency of the United States. Under section 6004, an order to testify is to be issued only if:

(1) the testimony or other information from the witness may be necessary to the public interest, and

(2) the witness has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

When the issuance of a grant of immunity has been authorized by the Attorney General, the following information must be furnished to the Immunity Unit, Criminal Division, Department of Justice, after the prospective witness has testified, the prospective witness has refused to testify, or the proceedings have been terminated without the witness being called to testify:

(1) Name, citation, or other identifying information of the proceeding in which the order was requested;

(2) Date of the examination of the witness;

(3) Name and address of the witness;

(4) Whether the witness invoked the privilege against self-incrimination;

(5) Whether the immunity order was issued;

(6) Whether the witness testified pursuant to the order;

(7) If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded.

This information should be furnished to the Office of The Judge Advocate, ATN: DAJA-MJ, for further transmittal to the Department of Justice.

3. Securing Real Evidence.

Judge advocates whose duties require the handling of real evidence, in conjunction with court-martial proceedings, should take reasonable precautions to insure that the evidence is available when needed at trial, and that the chain of custody is intact. OTJAG occasionally receives reports of poor judgment on the part of some individuals whose lax practices in this regard have caused them embarrassment and the loss of cases. One such report involved a judge advocate who left narcotics evidence in an unlocked desk drawer. He arrived the next morning prepared for trial and discovered the evidence missing. A desk drawer, or the back seat of one's automobile, is a poor substitute for a locked safe or the CID evidence room.

The local military police and CID units are obliged by virtue of AR 190-22 and 195-5 to maintain a structurally sound and secure room in which to store evidence. For contraband evidence, required security is even tighter. In addition, CID and military police personnel entrusted with any evidence are required to maintain an elaborately documented system for its identification, accountability, and disposal. The prudent judge advocate should utilize these services to the fullest extent practicable. When a judge advocate must take custody of any evidence, he should insure that it is either within his actual physical control or stored in a secure container. Subsequent to trial and until such time as final action is taken on the case, real evidence which is not required to be attached to the record should be returned to the military police investigator or CID agent for safekeeping until final disposition is authorized.

4. Crimes and Offenses Not Capital, Article 134.

In Department of the Army message 212040Z Mar 73, subject: Use of Article 134, UCMJ, it was recommended that, pending the final outcome of *Avrech v. Secretary of Navy*, 477 F.2d 1237 (D.C. Cir. 1973), offenses be charged under the "crimes and offenses not capital" clause of Article 134 or under some other article, rather than under the first two clauses of Article 134. Although there has been ready compliance with this recommendation, certain problems have become apparent with regard to the alleging of offenses under

the "crimes and offenses not capital" clause, and with regard to the maximum permissible punishment in such cases. *United States v. Almendorez,* 46 CMR 814 (ACMR 1972), serves as an example of the types of problems that must be avoided when charging an offense under the "crimes and offenses not capital" clause.

Violations of the United States Code and violations of state law, made applicable by the "Assimilative Crimes Act," 18 U.S.C. § 13 (1969), may be punished under the "crimes and offenses not capital" clause of Article 134. When alleging such an offense, it is imperative that the specification set forth all elements of the offense exactly as stated in the United States Code or applicable state law. Failure to do so renders the specification deficient. The specification should also reference the specific provision of the United States Code or state law alleged to have been violated. In overseas areas, where the United States Code and state laws are not applicable, drug offenses should, for example, be charged under Article 92, as a violation of Army Regulation 600-50, 6 March 1972, as changed by Change 2, 19 April 1973. See *United States v. Ross,* 47 CMR 55 (ACMR 1973).

In determining the maximum permissible punishment for offenses under the "crimes and offenses not capital" clause, the Table of Maximum Punishments, paragraph 127*c*, *Manual for Courts-Martial, United States, 1969 (Revised edition),* must be first examined to determine if the offense, a lesser included offense, or a closely related offense is listed. If so, then the listed maximum punishment governs. However, if the Table of Maximum Punishments does not contain the offense, a lesser included offense, or a closely related offense, then the offense is punishable as authorized by the United States Code or the Code of the District of Columbia, whichever prescribed punishment is lesser, or as authorized by the custom of the service. In the case of an "Assimilative Crimes Act" offense, the punishment authorized under the state law is incorporated into the Federal law. Therefore, the punishment authorized under the state law must likewise be included in the comparison, with the maximum permissible punishment being the lesser of those compared.

Claims Items

From: U.S. Army Claims Service, OTJAG

Vandalism Claims. This Service has recently been queried concerning possible payment under Chapter 11 of AR 27-20 for loss by theft or vandalism of expensive decorative items placed on the porch or on the lawn of assigned quarters such as ceramic elephants and statues. Whether a claim for loss of such items is payable will depend on the facts and circumstances of the particular claim. If claimant did not exercise that degree of care with regard to his property which a reasonable and prudent person would have exercised under the same or similar circumstances, the claim would not be payable (paragraph 11-6a, AR 27-20). The risk of loss of such items by theft or vandalism is greater on some installations than on others and property owners are expected to exercise a degree of care commensurate with the risk involved. It is requested that all Staff Judge Advocates insure that this item receives local publication in the daily bulletin or other information sources to insure that a service member has full knowledge of what is expected in regard to the security of such items.

Legal Assistance Items

From: Legal Assistance Office, OTJAG

1. Interpretation Of New York Residency Rule Is Finally Decided. On 11 October 1973, The Court of Appeals of the State of New York affirmed without opinion the decision of the Appellate Division of the Supreme Court in the Third Judicial Department of the State of New York in the case of *Schold v. State Tax Commission.* The decision in the *Schold* case was that the determination of a permanent place of abode outside the state should not depend merely upon whether the taxpayer lived on or off a military installation. Therefore, a New York resident serviceman who resides on a military base outside the state can now be considered as maintaining a permanent abode outside the state. If such service member meets the other two requirements of not maintaining a permanent abode within the state and of not spending in the aggregate more than 30 days of the taxable year within the state, he can now qualify as a non-resident for income tax purposes. Therefore, in view of the fact that the state has now exhausted its appellate rights, the matter as to whether a New York resident serviceman who resides on a military installation outside the State of New York meets the requirement of maintaining a permanent abode outside the state has been finally concluded. (See "State Income Taxes—Interpretation of New York Residency Rule is Significantly Altered," *The Army Lawyer,* March 1972, p. 8.)

2. Participation in Local Legal Aid Programs. Par 5X of AR 140-4 dated 15 Oct. 1973 provides: "LEGAL AID PROGRAMS. A commander of a judge advocate general service organization detachment or a commander of a troop program unit authorized a staff judge advocate section may request approval from The Judge Advocate General for his unit to participate in legal aid programs sponsored by the local bar association, legal aid society or similar organizations. Approval is contingent upon the program's providing mission oriented training required for the technical proficiency of the unit."

3. Free Assistance In Preparing Federal Income Tax Returns For 1973. This coming year the Internal Revenue Service is planning to offer free assistance to taxpayers in the preparation of their 1973 income tax returns. Individual taxpayers that need assistance in solving problems that they are unable to solve will be able to call the Internal Revenue Service by making toll free calls to any Internal Revenue Service office in the United States. A listing of the toll free telephone numbers will be contained in the official instructions for the 1040 & 1040A forms for 1973. Internal Revenue Service says that they will have adequate manpower at all the Internal Revenue Service offices to handle the expected volume of phone calls.

4. Moving Expenses Requirements Of The Tax Reform Act of 1969. The moratorium that was granted by the Internal Revenue Service to the military services on the withholding and reporting incident to a change of station move expires on 31 December 1973. On 30 October 1973 the Senate Committee on Finance favorably reported H. R, 8214 with the added amendment which will extend the Internal Revenue Service moratorium until 1 January 1975. However, approval by a House-Senate Conference Committee will be necessary before this extension will be enacted. It is believed that there will be no opposition to the amendment.

Judiciary Notes

From: U.S. Army Judiciary

1. 13th Military Judge's Course, 10-28 June 1974. There will be a limited number of vacancies in this course for JAGC officers who desire certification as a special court-martial

trial judge. Present plans are to detail as part-time judges those who are selected and successfully complete the Military Judge's Course. As vacancies occur, part-time judges will be considered for reassignment to the U.S. Army Judiciary. Officers desiring to attend the 13th Military Judge's Course should immediately request an application from the Chief Trial Judge (HQDA (JAAJ-TJ), Nassif Building, Falls Church, Virginia 22041, Autovon 289-1795). The application must be returned not later than 28 February 1974. Applications received after that date will be processed and considered for enrollment in the 14th Judge's Course in 1975.

2. Recurring Errors and Irregularities.

a. In two cases recently received at the Court of Military Review, the forwarding indorsement recommending trial by GCM was signed, "For the Commander," by an officer other than the commander. This is contrary to the provisions of para. 33*i*, MCM, 1969 (Rev.), as emphasized in para. 2-3*b*, AR 27-10, C 3, 27 May 1969.

b. October 1973 Corrections by ACOMR of Initial Promulgating Orders:

(1) Failure to show the correct service number in the name paragraph.

(2) Failure to show in the "Pleas" paragraph that a certain charge and its specification were dismissed on a motion of the defense.

(3) Failure to show a certain Charge and its Specification to which pleas had been entered.

(4) Failure to show that a sentence had been adjudged by a military judge.

(5) Showing incorrectly that the sentence had been adjudged by a military judge.

(6) Failure to show the correct number of previous convictions considered.

(7) Failure to show in the "Authority" paragraph the correct designation of court-martial convening orders.

(8) Failure to show in the "Authority" paragraph that a rehearing was held.

3. JAG-2 Reports. Staff Judge Advocates of each command having general court-martial jurisdiction are reminded that the JAG-2 (R8) report for the period of 1 Oct-31 Dec 73 should be forwarded, airmail, to HQDA (JAAJ-CC) not later than 10 January 1974. Many arithmetical errors in these reports are still occurring. Greater accuracy is urged.

MILPERCEN Sets Forth Policy On OER Appeals

Certain continuing misconceptions regarding the appeals system for Officer Evaluation Reports have prompted this policy statement from the Military Personnel Center (MILPERCEN).

Misunderstanding continues to exist about the Officer Evaluation Report Appeals System. The Army recognizes that some evaluation reports may contain administrative errors prejudicial to the rated officer or may not record objectively the manner in which the officer performed his duties. The appeals system is designed to promote justice and insure fairness to the officer and the Army, but at the same time seeks to avoid impugning the veracity of integrity of the rating officials without just cause. Expanded information concerning appeals has been included in Chapter 8, AR 623-105. Knowledge of and adherence to the following policies and procedures will help produce properly prepared appeals and speed their processing and resolution:

a. An evaluation report accepted by MILPERCEN for inclusion in an officer's official record is considered to have been prepared by the properly designated rating officials and to represent the considered opinions and judgment of such rating officials at the time of preparation. Therefore, they may not at a

later date request that a report be returned by MILPERCEN for amendment, revise their report, or submit a substitute report based, perhaps, on factors other than their observation of the officer's day-to-day performance.

b. Time limitations on appeals have been established as follows:

(1) No appeal is authorized of a report that was part of an officer's file when he was selected by a DA Selection Board for an earlier promotion.

(2) Appeals of evaluation reports on DA Form 67-7 must be submitted within 2 years of the "thru" date shown on the report.

(3) Appeals of efficiency reports on DA Form 67-6 and earlier report forms must be submitted within 5 years of the closing date of the report. A report beyond this time limitation is not subject to appeal, provided it can be determined conclusively by MILPERCEN that the officer had knowledge of the existence of the report in his official file for at least 2 years.

c. An officer may appeal any report which he believes to be administratively incorrect, substantively inaccurate, or in violation of the intent of AR 623-105. However, he should appeal a report he believes improper only if he can provide substantial evidence in support of his belief. In this connection, MILPERCEN does not as a matter of course conduct research to verify appeals claims, so it is incumbent upon the appellant to furnish all pertinent evidence.

d. Substantial evidence is defined as statements from third parties who were in official positions which enabled them to observe directly the manner in which the appellant performed his duties during the rated period, and/or certified copies of other pertinent documentary evidence from official sources. Examples of pertinent documentary evidence are contained in paragraph 8-1c, AR 623-105.

e. The importance of providing substantial evidence is stressed. An appeal that merely alleges that a report is unjust or administratively incorrect is not considered to contain substantial evidence. In this connection, evidence which is not likely to produce favorable action on an appeal includes the following:

(1) Statements from rating officials that they underestimated the rated officer or did not intend to rate him as they did;

(2) Requests that numerical or other ratings be raised;

(3) Copies of awards citations (since there is no correlation between awards received for meritorious service/achievement and evaluation report ratings in that approval of an award is not dependent upon ratings in a report);

(4) Proof of minor administrative errors as a basis for invalidating an entire report;

(5) Claims that a report should be voided because it is not indicative of the appellant's normal performance of duty over an extended period, since each report must stand on its own and consequently has no relationship to other periods of service; and

(6) General character references from individuals who did not observe the appellant during the period of the report itself.

f. An appeal should be prepared in duplicate in the form of a military letter and submitted directly to HQDA(DAPC-PAR-EA), 200 Stovall Street, Alexandria, Virginia 22332. The appeal should identify the officer's priority for processing as outlined in paragraph 8-4a, AR 623-105; indicate the period of the report; briefly describe the specific action requested, stating the basis for error or injustice (administrative or substantive inaccuracies or a combination thereof); and make reference to supporting documentary evidence which will be inclosed. Receipt of appeals is acknowledged by MILPERCEN directly to the originator.

g. Appeals based on claims of administrative error are resolved by MILPERCEN. Those involving claims of injustice or sub-

stantive inaccuracy are forwarded through the officer's career branch to a Department of the Army Special Review Board for adjudication. Personal appearance before the Board is not authorized, and Board proceedings are not released.

h. After resolution of the appeal, the officer's official records are amended as appropriate. If the action taken on the appeal results in material change in the officer's file (e.g., invalidation or significant amendment of the report in question) and the report had been reviewed by a DA Selection Board which did not select the officer for promotion, his records are referred to a DA Standby Advisory Board for appropriate reconsideration. An appeal which is denied is filed for informational purposes in the officer's official records, and a copy is furnished his career branch.

i. MILPERCEN notifies each officer of the final decision on his appeal. A reclama of an unsuccessful appeal will be considered upon presentation of new material evidence in accordance with the 2 or 5-year time limitation. However, neither MILPERCEN nor the DA Special Review Board attempts to identify specific sources from which the officer may seek material evidence or specific types of evidence to support his appeal.

"Dear Mr. Congressman"

By: Colonel William H. Neinast, Litigation Division, OTJAG

> "I appreciate your letter of August 9 concerning First Lieutenant ——————————. This officer grossly misrepresented the facts to me and I regret that I intervened in the matter.
> "With cordial regards, I am
> "Yours faithfully."

So read the entire letter from the late Senator Spessard L. Holland of Florida to the late Major General Leonard C. Shea, then the Commanding General of the 2d Armored Division.

Lieutenant ——————— complained to the senator that he was being held beyond his ETS on unsupported court-martial charges. General Shea's response to Senator Sparkman's request for information on the case included a classic standard second paragraph that is used with unqualified success by a number of SJA's. This paragraph is the guts of a philosophy that is variously called "never play by the opposition's rules" or "let it all hang out."

SJA's and commanders who do not unravel the whole nine yards in these cases are their own worst enemies. Complaints to Congressman about disciplinary or court-martial problems invariably contain details on only the current troubles of the correspondent. In furthering the time-honored tradition of "being responsive," the odds are that the information supplied by the Army to the Congressmen will be limited to concise discussions of the specific misconduct mentioned in the Congressionals. What a mistake! In most cases, the trouble in which the soldier now finds himself is only his latest escapade. There is usually a long history of his brushes with civilian and military authorities. This is valuable information. Don't waste it.

The classic second paragraph (the first paragraph is always a reference to the Congressman's inquiry) uses the record to turn the tables; it returns the ball to the soldier's side of the court to be played back under our rules.

The ideal second paragraph typically starts, "Private Smoe enlisted for three years on . . ." Then follows an unbiased, unemotional chronological summary of the soldier's military service—the good and the bad. If he received the Good Conduct Medal or awards or recognition for military merit, that's noted. But so are his unauthorized absences, his Article 15's, and his previous convictions. In the typical case, by the time the Congressman gets to the end of such a military record he has

lost any interest he may have had in beating the drums for his constituent.

The Congressman is then in range for the quick kill or the fast break. The third paragraph always starts, "As to Private Smoe's current difficulties . . ." At this juncture, no one really believes that Private Smoe is being picked on or that anyone other than Private Smoe is responsible for his predicament.

The foregoing philosophy or approach is what brought Senator Holland over to the Army's side. The lieutenant told him only about the 19 specifications of hot checks with which he was charged on post. General Shea furnished the missing details; little things like the fact that the lieutenant was awaiting trial in a civilian court for running a bawdy house, the 17 other hot checks with which he was not charged, and the two warnings by his battalion commander about publicly associating with known prostitutes. Is there any wonder that Senator Holland lost interest when he knew the whole story?

SJA's are in a unique position to help their commanders in these cases. An aggressive SJA will even short-stop Congressionals on misconduct cases right at his headquarters level. Why send it to the soldier's unit? The SJA already has, or should have, most of the information needed for a response. If he does not have it, all he need do is send for the soldier's personnel records and make a telephone call to the unit commander for additional facts. The final response to the Congressman can be prepared much quicker this way. In addition, some AG's, who normally have staff responsibility for controlling Congressional correspondence, will willingly transfer full and final responsibility for processing Congressional correspondence on misconduct cases to the SJA. This speeds the process even further by eliminating one more review element in the chain.

In conclusion, General Shea got the attention of the senator by his initial statement of the facts that had been overlooked by the lieutenant. His inclusion of the good entries in the military history as well as the bad lent an aura of unbiased and unemotional reaction. The cake was probably iced when the general did not include a concluding paragraph seen on all too many congressionals, i.e., "Your interest in a member of this command is appreciated." For some reason, such a statement just does not seem consistent with the rest of these letters—it lacks that ring of authenticity. Both the receiving congressman and the person writing the letter recognize such an observation as a blatant overstatement. So why include it and ruin the effects of an otherwise classic letter?

Personnel Section

From: PP&TO

1. ORDERS REQUESTED AS INDICATED:

MAJORS

Name	*From*	*To*
COLBY, Edward L.	USA Leg Svcs Falls Church	USAG Ft Devens, MA
	CAPTAINS	
BARRY, Bruce	OTJAG	USAREUR
BYBEE, Robert B.	USAG Ft Riley, KS	Letterman GH, Pres of SF
CANATELA, Richard	USAG Pres of SF	Korea
ENZ, Jonathan	USATCI Ft Polk, LA	Madigan Hosp Tacoma, WA

CAPTAINS—Continued

Name	*From*	*To*
FINCH, William L.	Stu Det Ft Myer, VA	USAREUR
HANSEN, Gregg A.	USAG Ft Bragg, NC	4th Inf Div Ft Carson, CO
HERGEN, James G.	USAREUR	OTJAG
HOUGH, Richard	USAG Ft Bragg, NC	JFK Ctr, Ft Bragg, NC
KALASH, Dwight	USA Weapons Comd, Rock Is, IL	OTJAG
KIMBALL, Robert	Korea	USAG Pres of SF, CA
LONG, John W.	USAG Ft Bragg, NC	Thailand
MARSHALL, Frank	Qm Ctr Ft Lee, VA	DLI Mont Pres, CA
MASON, Michael	Tng Ctr, Ft Campbell, KY	USATCI Ft Ord, CA
MATHER, Alexander	USAREUR	Sup Com Hawaii
MORRIS, Thomas	USA Tank Aut, Detroit, MI	USA Leg Svc Agy Falls Church
RAYMOND, Perry	USAREUR	4th Inf Div Ft Carson, CO
SIMMONS, Richard	USAG AHS, Arlington, VA	USA Leg Svc Agy Falls Church
SISSON, George	USAI Sch Ft Benning, GA	DLI Mont Pres, CA
SMITH, Brian	JFK Ctr Ft Bragg, NC	Korea
STOHNER, George	Korea	OTJAG
SWINDLE, Arthur	OTJAG	6th Rec Dist Pres of SF
TERRANOVA, Patrick	USAAC Ft Knox, KY	USASTC Ft Gordon, GA
TUBERGEN, Dane	USASTC Ft Gordon, GA	USA Ist Admin Ft B. Harrison
WZOREK, Lawrence	USAAC Ft Knox, KY	Korea
ZUCKER, David C.	USAG Ft Leavenworth	USA Leg Svcs Agy Falls Church

2. **AWARDS:** Congratulations to the following officers who received awards as indicated:

MAJ Fancher, Harry L.	Meritorious Service Medal 22 Jan 71-1 Aug 73
CPT Buescher, Stephen L.	Army Commendation Medal Mar 70-Oct 73
CPT Gray, George C.	Army Commendation Medal 28 Jul 72-30 Oct 73

CPT Kenney, Peter J.	Army Commendation Medal (10LC) May 72-Oct 73
CPT Parsons, William X.	Army Commendation Medal (10LC) 15 Oct 71-8 Nov 73
CPT Ryan, Martin K.	Army Commendation Medal (10LC) 1 Apr 71-19 Jul 73

3. Officer Variable Incentive Pay. PP&TO has received several inquiries concerning the effect of Regular Army status on eligibility to receive the proposed variable incentive pay. The answer is none. Apparently some officers are interested in a Regular Army appointment but do not want to disqualify themselves if legislation is enacted authorizing variable incentive pay. This type of pay has been proposed in a bill (S. 368) known as the "Uniform Service Special Pay Act of 1973." A separate DOD proposal bears the same name. In general, the variable incentive pay would be payable to officers in critical specialties who extend beyond their *"initial* period of obligated service." The proposed amount payable would be $4,000 per year for up to six years. Most JAGC officers have an "initial period of obligated service" of three years. An appointment in the Regular Army would not change that initial period. Thus, Regular Army status would not disqualify an officer from receiving the pay. It is emphasized that the bill has not been acted upon and details as to eligibility have not been determined by DOD.

4. Constructive Credit for Command and General Staff College. PP&TO has received word that constructive credit for C&GSC, as presently authorized by AR 351-18, will not be awarded after 31 December 1973. Personnel who served in qualifying positions in Vietnam are eligible to apply for constructive credit. Applications should be sent to PP&TO.

5. Reassignment (Permanent Change of Station) Orders. Personnel who receive notice from PP&TO that they are being reassigned are normally anxious to receive their orders and frequently call this office in an effort to expedite receipt of their orders. PP&TO does not issue ("cut") orders. We request orders from the Military Personnel Center (MILPERCEN) and send a copy of the request for orders ("RFC") to the gaining command and the individual. After orders are requested by PP&TO, MILPERCEN issues assignment instructions to subordinate commands of the individual concerned. Orders are then issued by the subordinate commands. The entire process normally takes from three to five weeks. In the event of an emergency which requires more expeditious issuance of orders PP&TO should be contacted.

6. Advanced Course Applicants. Personnel interested in attending the 23d Advanced Course, beginning in August 1974, should direct requests in writing to PP&TO. Those who have previously requested to attend need not do so again. Eligibility for attendance is contained in "Your JAG Career," September 1973.

7. Help Wanted.

a. There are openings available in the Appellate Divisions of Legal Services Agency and in Europe. Those officers interested who have 12 to 18 months service contact Captain Thomas Crean, PP&TO.

b. The Office of the Staff Judge Advocate, Headquarters, U.S. Theater Army Support Command, Europe, APO New York 09058, is looking for a civilian court reported to fill a GS-8 position in its main office in Worms, Germany. Interested persons should contact that office.

8. Telecopier Installed at OTJAG. Recently a Xerox 400-1 Telecopier was installed in the Office of the Judge Advocate General. Anyone wishing to transmit a document via the telecopier to OTJAG should call (202) 695-2663 or 695-6248; Autovon 225-2663 or 225-6248.

Current Materials Of Interest

Articles.

Burnett "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates" 64 J. CRIM. L. & C. 270 (1973).

Richardson, "Practicing Poverty Law in New Haven," 59 A.B.A.J. 1161 (Oct. 1973). Deals with the New Haven Legal Assistance Association, of interest to JA's practicing in this field.

Engel, "Information Disclosure Policies and Practices of Federal Administrative Agencies" 68 NW. U.L. REV. 184 (1973). The introductory article of a complete issue on public access to information at all governmental levels.

Cundick, "High Seas Intervention: Parameters of Unilateral Action," 10 SAN DIEGO L. REV. 514 (1973). Appraises policies and values at issue in the controversy over control of the world's oceans, emphasizing rights and duties of coastal states vis-a-vis the international community when foreign vessels present pollution threats to their interests.

Courses.

PLI Sixth Annual Criminal Advocacy Institute: San Diego, January 18-19, $125. For more information write to: Practising Law Institute, 1133 Avenue of the Americas, New York, New York 10036, (212) 765-5700.

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:

VERNE L. BOWERS
Major General, United States Army
The Adjutant General

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