



D A PAMPHLET 27-50-4 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D. C.

NEW LEGAL ASSISTANCE POLICY

The following letter from General Prugh to Staff Judge Advocates and Legal Assistance Officers announces a new policy with regard to legal assistance.

"1. The purpose of this letter is to provide interim policy guidance pending formal revision of AR 608-50 Legal Assistance, 28 April 1965.

2. Legal Assistance Officers will follow the policies enumerated and explained in Chapter 1, "Legal Assistance" of Department of Army Pamphlet 27-12 *Legal Assistance Handbook*, 31 July 1970, as well as those prescribed in Army Regulation 608-50, "Legal Assistance", 28 April 1965, as modified by this letter.

a. Pilot Legal Assistance Program attorneys will follow the special instructions governing that program.

b. JAGAA Bulletin, subject "Administering the Army Legal Assistance Program", 4 March 1965, is rescinded.

3. The Code of Professional Responsibility requires that lawyers represent their clients competently and zealously within the bounds of the law. A legal assistance officer, in adhering to these provisions, is authorized to sign letters written on behalf of his client; to negotiate with adverse parties; and to perform all professional functions, short of actual court appearance unless authorized to do so by The Judge Advocate General, to secure an appropriate resolution of his client's problem. However, he will in each case take affirmative measures to insure that his actions and opinions are not construed as those of the commander on whose staff he serves;

as those of the United States Army; or as binding upon the United States Government. Correspondence signed by the legal assistance officer should in most cases contain the following language:

This letter is written in my capacity as a legal assistance officer of the armed forces acting on behalf of my client, _____ . As such, it reflects my personal, considered judgment as an individual member of the legal profession. It is not to be construed as an official view of this headquarters, the United States Army, or the United States Government.

4. Occasionally, a client will seek advice concerning civilian criminal problems of a misdemeanor or felony nature. Except where such matters may be handled as pilot program cases or upon approval of a request to The Judge Advocate General, the individual may not be represented by military counsel. However, the defendant should be informed of the nature of possible court proceedings which the State might initiate, and on his request, should be assisted in obtaining the services of civilian counsel. Similarly, various official matters pertaining to servicemen including pay, allowances, promotions, reductions, and board actions, are the responsibilities of other staff sections and should not be handled in the legal assistance program. A member having a problem incident to his official military status should be referred for further assistance to a specifically named individual in the proper staff section which has responsibility for the action. The Legal Assistance Officer properly may discuss the

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serviceman's problem directly with the responsible staff officer concerned in order to insure that the serviceman's position is clearly communicated and understood. However, the attorney should not become an advocate in the case. Subsequently, should the staff officer's decision be adverse to the serviceman, the Legal Assistance Officer, in his discretion, may refer the problem to the Staff Judge Advocate for further legal consideration.

5. The Staff Judge Advocate or the officer designated by him to supervise the office legal assistance program should provide leadership and counsel to the younger lawyers serving under him. Legal Assistance Officers, in turn, must recognize that their chief is the equivalent of a senior partner in a law firm and is properly solicitous and responsible for the quality of professional service the clients receive. All attorneys in the office, whether members of the Judge Advocate General's Corps or not, and whether officer, warrant officer, enlisted, or civilian employee, will be accorded the courtesy and consideration befitting their professional status. Further, the supervised use of reservists in legal assistance functions on Saturdays, Sundays, and in the evenings, as well as during normal duty hours, is encouraged. These attorneys possess skill in local practice and procedures and are of value to both the clients and the Army.

6. Staff Judge Advocates should make constant efforts to improve the efficiency and appearance of legal assistance offices. Professional standards require that all communications between attorney and client be privileged. This can occur only when a lawyer has an office constructed to insure complete privacy. Soundproofing in the form of rugs, drapes and other materials should be utilized to prevent conversations being overheard. Commanders should be invited to visit and inspect the legal assistance facilities on a regular basis.

7. Liaison with federal, state and local bar programs for the delivery of legal services is

encouraged. Membership in professional organizations, especially local branches engaged in the delivery of legal services pertinent to the military community, is also encouraged, as is attendance at local command expense at professional meetings and seminars.

8. Direct communication between Legal Assistance Officers at any and all levels is authorized where necessary and appropriate to the prompt resolution of a client's problem

or in furtherance of the Legal Assistance program of the Army.

9. In an effort to reduce the administrative load of legal assistance offices in the field, the Annual Report presently required by Army Regulation 608-50 has been discontinued. However, it is suggested that information pertaining to the workload of individual legal assistance offices continue to be maintained locally."

THE NEW FEDERAL RULES OF EVIDENCE

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In March 1965, Mr. Chief Justice Warren created an Advisory Committee to draft a uniform set of evidentiary rules for the Federal courts. In late 1971, the Committee submitted its draft to the Supreme Court. On November 20, 1972, with Mr. Justice Douglas dissenting, the Supreme Court approved the rules and authorized Mr. Chief Justice Burger to transmit the rules to the Congress.¹ The Court's order provides that the proposed Federal Rules of Evidence will become effective on July 1, 1973. Mr. Chief Justice Burger has transmitted the rules to Congress to permit Congress to examine and comment upon the Rules.

The order indicates that the Court is issuing the rules pursuant to the statutory grants of authority in Titles 18 and 28 of the United States Code. For that reason, Congress may defer the rules' effective date or veto the rules. The Senate has already adopted legislation to prevent the rules from taking effect until the adjournment *sine die* of the 93rd Congress' first session,² and the House of Representatives is considering similar legislation. Nevertheless, at the time of the writing of this article, it still is possible that Congress will not intervene and, hence, that the rules will take effect in the middle of this year.

The promulgation of the new Federal Rules of Evidence for the Federal civilian courts will affect military evidence law. In pertinent

part, Paragraph 137 of the Manual states that:

So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . will be applied by courts-martial.³

Where the Manual is silent on a subject which the Federal Rules address, the new Federal Rules will become the military rule. This is the first in a series of three articles concerning the Federal Rules of Evidence. The first two articles will compare the present Manual rules with the proposed Federal Rules. The third article will complete the comparison and attempt to assess the effect which the Federal Rules' promulgation will have on military evidence law.

I. A COMPARISON OF THE MANUAL AND FEDERAL RULES OF EVIDENCE

The proposed Federal Rules represent the Supreme Court's attempt to create a uniform and comprehensive body of evidence law for Federal civilian courts. The Advisory Committee which drafted the rules organized them into eleven Articles. Each Article deals with a major subdivision of evidence law.

ARTICLE I. GENERAL PROVISIONS

The first Article contains general procedural rules which are similar to the Manual rules. Both the Manual and Federal Rule 104(a)

announce that the judge's evidentiary rulings are final.⁴ Both incorporate the mandate of *Jackson v. Denno*, 378 U.S. 368 (1964) that the judge may not submit a confession to the jurors until he has made a preliminary finding that the confession is voluntary.⁵ Finally, both the Manual and Federal Rule 105 confer upon the judge the common-law power to summarize and comment upon the evidence.⁶

Although the procedural rules in the Manual and Article I are similar, there are three important differences. The first is that Federal Rule 104 contains a general provision that "(i)n making his determination (of the admissibility of evidence) he (the judge) is not bound by the rules of evidence except those with respect to privileges.⁷ To explain this provision, the Advisory Committee pointed out that the exclusionary rules of evidence are basically products of the lay jury system; the rules relate to types of evidence which lay jurors are likely to misuse.⁸ The Committee reasoned that considering the exclusionary rules' origin and purpose, it is unnecessary to apply them to rulings by a trained, dispassionate judge.⁹ The Manual rule contrasts sharply with Federal Rule 104. The Manual relaxes the evidentiary rules only when the judge rules on the introductory matters of an application for a continuance and witnesses' availability.¹⁰ The draftsmen of the 1969 Manual emphasized the impact which evidentiary rulings have on the case's outcome, taking the position that a wholesale "relaxation of ordinary evidentiary rules would be inappropriate. . . ." ¹¹

The second difference is that Federal Rule 107 limits the application of the rule of completeness. The rule of completeness has two aspects: First, if one party introduces part of an oral statement, writing, or recording on direct examination, the other party may introduce any other part of the same statement, writing, or recording on cross-examination if the part relates to the same subject-matter as the part introduced on direct examination. This aspect of the rule is simply an application of the restrictive rules concerning scope of cross-examination. Second, if one party offers

to introduce part of an oral statement, writing, or recording, the opponent may force the proponent to introduce at the same time any other part which is necessary to place the offered part in proper context. This aspect of the rule prevents the proponent from taking statement out of context and thereby misleading the jurors. Traditionally, the courts have applied both aspects of the rule to oral statements as well as writings. For example, the Manual provides that if the proponent offers part of a witnesses' former testimony, "he should, at the request of the opposite party, be required to offer all of the former testimony of the witness that is relevant to the part offered."¹² Federal Rule 107 applies the second aspect of the completeness rule to only writings and recorded statements.¹³ The Advisory Committee Note accompanying Rule 107 indicates that the Committee deliberately refrained from applying the completeness rule to oral statements.¹⁴ The Note briefly—and somewhat cryptically—states that "(f)or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."¹⁵

The third difference is that Rule 104 establishes a special procedure for rulings on conditionally relevant evidence. The Rule reads:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.¹⁶

To illustrate conditional relevancy, the Advisory Committee pointed out that the relevance of a purported written admission is conditioned upon proof of authorship; the writing has no logical relevance unless the writing is authentic and genuine.¹⁷ The Committee believed that the jurors should ultimately decide whether the conditions determining the evidence's relevance exist.¹⁸ Consequently, the Committee drafted Rule 104 to limit the judge's function to ruling "whether the foundation evidence is sufficient to support a finding of fulfillment of the condition."¹⁹ If the judge admits the evidence, the jurors then make an independent determination

whether the condition exists.²⁰ The rule expressed in Rule 104 appears to be the prevailing, common-law view.²¹ For its part, the Manual does not appear to except conditionally relevant evidence from the general rule that the judge's evidentiary rulings are final.²²

ARTICLE II: JUDICIAL NOTICE

Federal Rule 201 governs judicial notice. At first glance, there appears to be marked differences between Federal Rule 201 and the Manual rules on judicial notice. However, further analysis shows that the differences are more apparent than real.

The first apparent difference is that Federal Rule 201 is expressly limited to adjudicative facts, while the Manual has no such limitation.²³ Professor Kenneth Davis, the administrative law expert, first clearly enunciated the distinction between adjudicative and legislative facts.²⁴ Simply stated, adjudicative facts are the facts a court must have to adjudicate in a concrete dispute between parties; adjudicative facts are facts about the particular persons, objects, and transactions involved in the case. Legislative facts are the facts a court needs to create and reform the law; legislative facts are generalized political, economic, and social factors judges rely upon in the law-making process. Like Federal Rule 201, the Manual deals with judicial notice of facts which Professor Davis would classify as strictly adjudicative. Moreover, like Federal Rule 201, the Manual does not deal with the types of generalized political, economic, and social factors which Professor Davis would classify as strictly legislative. However, unlike the Federal Rule, the Manual treats such matters as public officials' signatures and governmental seals as subjects of judicial notice. The Manual makes it clear, though, that these matters may only be inferred to be true or genuine and that the opponent may introduce contradicting evidence. Thus, the Manual combines "the principle of judicial notice in its narrow sense with the principle of inferring the genuineness of certain signatures and seals."²⁵ While Federal Rule 201 does not

characterize these matters as subjects of judicial notice, the Rule treats them in a manner very similar to the Manual. It must be remembered that in the typical case, the effect of judicially noticing the signature or seal will be the authentication of the document the signature or seal is affixed to. Federal Rule 902 states that documents bearing such signatures or seals are "self-authenticating": documents bearing such purporting signatures and seals are admissible without foundational proof of authenticity.²⁶ Under Federal Rule 902 as under the Manual, the opponent is permitted to introduce controverting evidence. Thus, the result is the same; the document bearing the purporting signature or seal is admitted into evidence, and the opponent is then permitted to introduce contradicting evidence.

Another superficial difference is that while Federal Rule 201 briefly describes the types of judicially noticeable matters, the Manual contains a detailed list.²⁷ Both the Manual and Federal Rule 201 recognize the two, widely-accepted grounds of judicial notice: (1) the fact is a matter of common knowledge, either universally or within the court's territorial jurisdiction; and (2) the fact is a verifiable certainty, that is, a matter which is capable of accurate and ready verification by source materials whose accuracy is reasonably unquestionable. Federal Rule 201 states only these "general categories." The Advisory Committee concluded that it would be unwise to include a "detailed treatment of such specific topics as facts relating to the personnel and records of the court . . . and other governmental facts."²⁸ In addition to stating the general categories, the Manual includes the "detailed treatment of specific facts . . ." which the Advisory Committee omitted. However, except for the matters which Federal Rule 902 treats as a basis for authenticating evidence, the specific matters listed in the Manual are all applications of the two traditional grounds of judicial notice.

Still another supposed difference is that the Manual does not contain any provision similar to Federal Rule 201's requirement that upon the proponent's request, the judge must exercise his power of judicial notice.²⁹ Admittedly,

the only pertinent Manual language is the wording that "(t)he following are the principal matters of which judicial notice *may* be taken. . . ." ³⁰ At best, the language is inconclusive. It is certainly arguable that, at least in certain cases, the military judge must exercise his power upon request. If a fact is truly a matter of common knowledge or a verifiable certainty, it would seem to be an abuse of the judge's discretion to refuse to notice the matter. By invoking the relatively swift, informal judicial-notice procedure and dispensing with the time-consuming, formal presentation of evidence, the judge can ordinarily expedite the trial. If the proponent submits sufficient materials to permit the judge to ascertain the fact's judicially noticeable character, the judge's refusal to notice the fact would be indefensible. It is believed that in practice, most military judges adhere to the view that judicial notice is mandatory upon request.

The final seeming difference is that Federal Rule 201 requires the jurors to accept judicially noticed facts as established while the Manual permits the opponent to introduce contradicting evidence. ³¹ The difference is illusory. Both the Manual and the Analysis of the Manual's contents explicitly states that only "some" of the matters listed in Paragraph 147 admit of contradicting evidence. ³² There is an inescapable inference that other matters listed in Paragraph 147 do not admit of contradicting evidence. The Manual lists signatures and seals as examples of the judicially noticeable matters which admit of contradicting evidence. The Federal Rules deal with such matters in Rule 902 rather than Rule 201. Federal Rule 902 uses self-authentication terminology rather than judicial notice terminology but a judge applying Rule 902 should reach the same result as a military judge under the Manual: the judge admits the document bearing the signature or seal into evidence, and the opponent then may introduce contradicting evidence. On the other hand, if the fact noticed is a matter of common knowledge or a verifiable certainty, the judge applying Rule 201 would not permit the opponent to submit contradicting evidence to the

jurors. Matters of common knowledge and verifiable certainties are not facts which, in the Manual's language, "can be judicially noticed only in the sense that they may be inferred to exist, to be true, or to be genuine. . . ." ³³ The Manual's language indicates that only matters which fall within this language admit of contradicting evidence. For that reason, it is submitted that if the fact noticed is a matter of common knowledge or a verifiable certainty, then under the Manual as well as under Federal Rule 201, the judge should not permit the opponent to submit contradicting evidence to the court members or jurors.

ARTICLE III: PRESUMPTIONS

With respect to every ultimate, material fact in the case, the judge must assign the initial burden of going forward to one of the two parties or sides. If the party bearing the burden fails to sustain the burden, the judge will make a pre-emptory ruling against him. In effect, the judge will rule that the party has not presented sufficient evidence to permit the jurors or court members to rationally conclude that the disputed fact exists. A permissive inference arises when the proponent barely sustains his burden of going forward. At this point, the judge rules that the proponent may submit the issue to the jurors because he has presented credible evidence of fact B and fact B has sufficient probative value to establish the existence of the ultimate fact A. In effect, the judge rules that if the jurors believe the evidence of B, they *may* infer that A exists. If the proponent presents more compelling evidence, he might not only sustain his burden of going forward but also shift the burden to his opponent. At this point, a presumption is said to arise. Under the classical presumption doctrine, a true presumption is a mandatory inference. ³⁴ The judge rules that if the jurors believe the evidence of B, they *must* infer that fact A exists. The burden of going forward has shifted in the sense that unless the opponent presents sufficient evidence to rebut the presumed fact A's existence, the judge will make a pre-emptory, conditional

ruling against the opponent. The ruling takes the form of an instruction to the jurors that if the jurors believe the evidence of B, they must infer A's existence. Viewed in this light, a presumption is a procedural device for allocating the burden of going forward. The traditional, Thayerian doctrine is that since a presumption is merely a procedural device for allocating the burden, the presumption disappears from the case if the opponent shoulders his burden and presents sufficient evidence to rebut the presumed fact's existence.³⁵

The draftsmen of the 1969 Manual evidently attempted to write the traditional presumption doctrine into the Manual. The Manual draws a sharp distinction between true presumptions and mere permissive inferences. The Manual cautions that permissive inferences "are sometimes loosely referred to as 'presumptions' but . . . actually are not presumptions at all. . . ." ³⁶ The Manual indicates true presumptions as both mandatory inferences and procedural devices for allocating the burden of going forward. When distinguishing permissive inferences from true presumptions, the Manual emphasizes that "(t)he drawing of these (permissive) inferences is not mandatory. . . ." ³⁷ ; the language unmistakably implies that a true presumption is a mandatory inference. Even more explicitly, the Manual asserts that "(t)he term 'presumption' is applied to facts which courts are bound to assume in the absence of adequate evidence to the contrary." ³⁸ When describing the sanity presumption's effect, the Analysis of the Manual's contents states that

if, after considering all the evidence in the case, a reasonable doubt of sanity is not raised in the minds of the finders of fact they would be theoretically *obliged* to find the accused to be sane. . . .³⁹

In addition to characterizing presumptions as mandatory inferences, the Manual describes presumptions as "procedural rules governing the production of evidence. . . ." ⁴⁰ The Analysis is even a clearer reflection of traditional presumption doctrine; the Analysis states that presumptions are "solely procedural rules. . . ." ⁴¹ The inclusion of this lan-

guage in the Manual and Analysis might persuade the Court of Military Appeals to adopt the view that presumptions are simply procedural devices for allocating the burden of going forward. If the Court is willing to take that step, they might then adopt the corollary doctrine that the presumptions disappear when the opponent presents sufficient evidence to rebut the presumed fact. The adoption of the corollary doctrine would necessitate overruling *United States v. Biesak*,⁴² but the Court's adoption of the corollary doctrine is highly probable if the language of the Manual and the Analysis moves the Court to embrace the view that presumptions are solely procedural devices for allocating the burden of going forward.

The Federal Rules represent a radical departure from traditional presumption doctrine. Consequently, the Federal Rules differ markedly from the Manual rules. There are three significant differences.

First, the Federal Rules announce a general proposition that a presumption operating against a criminal defendant may operate as only a permissive inference. Federal Rule 303 states that:

Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so.⁴³

The accompanying Note states that "(t)his rule is based largely upon . . . *United States v. Gainey*, 380 U.S. 63 . . . (1965)." ⁴⁴ In the *Gainey* case, the Supreme Court upheld a statutory presumption. Although the Court sustained the presumption, the Court seemed to go to great pains to emphasize that the trial judge had given the presumption the effect of only a permissive inference. Some commentators have suggested that in *Gainey*, the Court attempted to give advance warning that if the Court must ever squarely face the issue, the Court will hold that it is unconstitutional to permit a mandatory inference to operate against an accused.⁴⁵ In the recent *Winship*

case,⁴⁶ the Supreme Court held that Due Process demands that the judge apply a presumption of innocence and require proof beyond a reasonable doubt. There is a strong argument that it is an impermissible infringement upon the innocence presumption to permit a mandatory inference to operate against an accused. Although the Advisory Committee does not make its interpretation of *Gainey* explicit in the Note, the Committee seems to have adopted the argument.

Second, the Federal Rules reject the Thayerian view that the presumption disappears if the opponent presents sufficient evidence to rebut the presumed fact's existence. The Note accompanying Rule 301 makes rather short shrift of the Thayerian view:

The so-called "bursting bubble" theory under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too slight and evanescent an effect.⁴⁷

The Advisory Committee adopted the contrary Morgan view that a presumption shifts the ultimate burden of proof as well as the burden of going forward. Federal Rule 301 provides that:

In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.⁴⁸

Third, in drafting Federal Rule 303, the Advisory Committee apparently attempted to incorporate the Substantive Due Process limitations upon the legislatures' power to create presumptions. Like all governmental powers, a legislature's power to create presumptions is subject to the limitations stated in the Bill of Rights. One of those limitations is Fifth Amendment Substantive Due Process. Substantive Due Process requires that the legislature act rationally. For that reason, an arbitrary or irrational presumption violates the Due Process Clause. *Tot v. United States*⁴⁹ was the first case in which the Supreme Court may not be applied in a criminal case unless

there is a rational connection between the proved fact and the presumed fact. *Leary v. United States*⁵⁰ embellished the *Tot* doctrine by defining the phrase, "rational connection"; the proof of the foundational fact must have sufficient probative value to make it more likely than not that the presumed fact exists. In a dictum in a recent case, *Turner v. United States*,⁵¹ the Supreme Court suggested that the test for the constitutionality of a presumption in a criminal case is whether the judge is satisfied that the foundational fact's probative value is sufficient to establish the presumed fact's existence beyond a reasonable doubt.⁵² The Note accompanying Rule 303 does not cite *Tot*, *Leary*, or *Turner*. However, it is difficult to believe that Rule 303 was not worded with this line of authority in mind:

When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.⁵³

The Rule's concluding sentence adopts the view of some commentators that the *Turner* dictum applies only to presumptions which supply an essential element of the charged offense or negative an affirmative defense.⁵⁴ Unlike Rule 303, the 1969 Manual does not expressly incorporate the constitutional limitations on the creation of presumptions. Of course, if a particular limitation is constitutionally based, the limitation will apply in a court-martial.

ARTICLE IV: RELEVANCY AND ITS LIMITS

The Federal Rules' statement of the general concept of relevance is quite similar to that

in the Manual. Like the Manual, Federal Rule 401 merges the concept of materiality into that of relevance. Rule 401 states that:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.⁵⁵

The Manual contains comparable language:

Evidence is not relevant, as that term is used in this Manual, when the fact which it tends to prove is not part of any issue in the case.⁵⁶

In addition to stating the general concept of relevance, both the Manual and the Federal Rules address several particular problems of legal relevance: uncharged misconduct, habit and routine practice, character, and withdrawn guilty pleas.

Uncharged misconduct

Federal Rule 404 adopts the general rule that evidence of specific acts of uncharged misconduct is inadmissible as evidence of the accused's character but admissible as evidence of other matters such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁵⁷ The Manual contains the same two basic rules.⁵⁸ However, on its face, the Manual provision seems to impose a stricter standard of admissibility. While Federal Rule 404 indicates that the evidence is admissible if merely relevant to one of the listed issues, the Manual requires that the evidence have "substantial value as tending to prove something other than a fact to be inferred from the disposition of the accused. . . ."⁵⁹ Many courts follow the substantial-relevance rule because of the highly prejudicial nature of evidence of uncharged misconduct.⁶⁰ It remains to be seen whether the Federal courts will read the stricter standard of admissibility into Federal Rule 404. The Note accompanying Rule 404 adverts to the prejudicial nature of evidence of uncharged misconduct.⁶¹ The Note does not indicate that the Committee intended to lower the prevailing, strict standard of admissibility. After consulting the explanatory Note,

the Federal courts will probably construe Rule 404 in much the same manner as the military courts have construed Paragraph 138g.

Habit and routine practice

Like the Manual, Federal Rule 406 admits evidence of a person's habits or a business' routine practices to show that on a particular occasion, the person acted in conformity with his habit or the business with its routine practice by either opinion evidence or evidence of "specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."⁶² The Manual provision is almost identical to Rule 406. Paragraph 138e of the Manual provides that opinion evidence is admissible "concerning habit or usage. . . ."⁶³ Paragraph 138h points out that evidence of specific acts of habitual behavior is admissible if the number of instances is sufficient "to warrant a finding of the habit or usage."⁶⁴

Character evidence

Both the Manual and the Federal Rules permit the accused to "place his character in issue." The phrase, "place his character in issue," is admittedly misleading. When the accused invokes this rule, his character does not become one of the material facts in the case: rather, the court is permitting the accused to use his character as circumstantial evidence of his conduct on a particular occasion. In essence, the accused is permitted to prove that he had a good character and to argue that on the occasion in question, he probably acted in conformity with his good, law-abiding character. While the Manual and the Federal Rules agree that the accused should be permitted to use this type of evidence, there are important differences between the Manual and Federal Rules with respect to the scope of character and the methods of proving character. The Manual permits the accused to place in issue either a specific, relevant character trait or his general, moral, law-abiding character. Federal Rule 404 permits the accused to place in issue only a specific "pertinent trait."⁶⁵ The Manual and Rule 404

are in accord that after the accused has placed his character in issue, the defense and prosecution may use both reputation and opinion evidence to prove character. However, the Manual and Federal Rule 405 differ greatly on the question whether the parties may use evidence of specific acts of conduct to prove character. To date, the majority view has been that a party may inquire as to specific acts only during the cross-examination of character witnesses. Moreover, the courts subscribing to the majority view have generally held that since the justification for the cross-examination is testing the basis of the reputation evidence elicited from the witness, the cross-examiner must ask "Have you heard?" rather than "Do you know?" The Supreme Court adopted the majority view in *Michelson v. United States*.⁶⁶ The Analysis of the Manual's contents indicates that draftsmen intended to adopt the *Michelson* doctrine.⁶⁷ At least with respect to reputation evidence, the draftsmen intended that military counsel would be required to observe the traditional restrictions on the wording of the questions asked on cross-examination. Rule 405 eschews the *Michelson* doctrine. Rule 405 states simply that "(o)n cross-examination, inquiry is allowable into relevant specific instances of conduct."⁶⁸ In the Note accompanying the Rule, the Advisory Committee expressly rejected the *Michelson* reasoning:

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469 . . . (1948). . . . The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked what he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions.⁶⁹

The Manual and Federal Rules discuss evidence of the victim's character as well as evi-

dence of the accused's character. Here again there are significant differences between the Manual and Federal Rules. In the first place, the Manual and Federal Rule 404 appear to differ on the question of when evidence of the victim's character is admissible. The Manual states that evidence of the victim's character is admissible whenever "it is relevant to an issue in the case."⁷⁰ Under the Manual, if the evidence was logically relevant, the trial counsel would be permitted to introduce evidence of the victim's character even if the accused had not first opened the issue. Rule 405 provides that the prosecuting attorney may introduce such evidence only in rebuttal of defense evidence. The Rule states that the prosecution may introduce evidence of the victim's peacefulness to rebut defense evidence that the victim was the aggressor and that otherwise, the prosecution may introduce evidence of the victim's character to rebut defense evidence of the victim's character. In the second place, the Manual and Federal Rules differ as to the permissible scope of the evidence. The Federal Rule permits evidence of only a specific "pertinent trait."⁷¹ It is arguable that the Manual permits proof of the victim's general character. The Manual employs broad language that "(e)vidence of persons other than the accused. . . ." may be admitted.⁷² The examples of admissible evidence which the Manual cites are all examples of specific traits such as peacefulness, but the Manual does not expressly prohibit evidence of general moral character. In the third place, while both the Manual and Federal Rule 405 permit the use of reputation and opinion evidence to prove character, they differ on the use of specific acts of conduct. On its face, Rule 405, the general provision on methods of proving character, applies to proof of a third party's character as well as the accused's character. If so, specific instances of conduct would be admissible only during cross-examination. The Manual liberally authorizes the admission of evidence of specific acts to prove a third person's character; and contains no restriction prohibiting admission on direct examination.⁷³

Withdrawn guilty pleas

Federal Rule 410 provides that neither a withdrawn guilty plea nor an offer to plead guilty nor any statement made in connection with such a plea or offer is subsequently admissible against the accused. The Manual is silent on this question. Nevertheless, following the Supreme Court's lead in *Kercheval v. United States*,⁷⁴ military courts have reached the same result they would have reached if they had applied Rule 410. For example, the military courts have held that if the judge permits the accused to withdraw his guilty plea, both the accused's admissions during the providency inquiry⁷⁵ and the accompanying stipulation of fact⁷⁶ are inadmissible.

Footnotes

1. Mr. Justice Douglas dissented on the ground that the Congress has not granted the Court authority to establish evidentiary rules. The statutory grant in civil cases, 28 U.S.C. §2072, states that the Court is authorized to prescribe rules of "practice and procedure. . . ." The statutory grant in criminal cases, 18 U.S.C. §3771, contains a similar reference to "rules of . . . practice, and procedure. . . ." The corresponding Code provision is Article 36, 10 U.S.C. §836. Article 36 provides that the President may prescribe rules for "(t)he procedure, including modes of proof. . . ." in courts-martial. Article 36's wording is some evidence that Congress believes that evidentiary rules fall within the broad purview of the term, "procedure."
2. S. 583, 93d Cong., 1st Sess. §1 (1973).
3. MANUAL FOR COURTS-MARTIAL, 1969 (Revised edition) 137 (hereinafter cited as MCM).
4. Compare MCM, para. 53d(2) (e) with FED.R.EV. 104(a).
5. Compare MCM, para. 140a(2) with FED.R.EV. 104(c).
6. Compare MCM, para. 73c with FED.R.EV. 105.
7. FED.R.EV. 104(a).
8. FED.R.EV. 104, Advisory Comm. Note.
9. *Id.*
10. MCM, para. 137.
11. DA PAM 27-2 ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION 27-1 (July 1970).
12. MCM, para. 145b.
13. FED.R.EV. 107.
14. FED.R.EV. 107, Advisory Comm. Note.
15. *Id.*
16. FED.R.EV. 104(b).
17. FED.R.EV. 104, Advisory Comm. Note.
18. *Id.*
19. *Id.*
20. *Id.*
21. McCORMICK, EVIDENCE §227 (2d ed. 1972); 7 WIGMORE, EVIDENCE §2135 (3rd ed. 1940).
22. MCM, para. 53d(2) (e).
23. Compare MCM, 1969, (Rev.), para. 147a with FED.R.EV. 201(a).
24. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV.L.REV. 364 (1942).
25. ANALYSIS OF CONTENTS, *supra* note 11 at 27-31.
26. FED.R.EV. 903.
27. Compare MCM, para. 147a with FED.R.EV. 203(b).
28. FED.R.EV. 201, Advisory Comm. Note.
29. Compare MCM, para. 147a with FED.R.EV. 201(d).
30. MCM, para. 147a (emphasis added).
31. Compare MCM, para. 147a with FED.R.EV. 201(g).
32. MCM, para. 147a; ANALYSIS OF CONTENTS, *supra* note 11 at 27-31.
33. MCM, para. 147a.
34. 9 WIGMORE, EVIDENCE §2487 (3rd ed. 1940).
35. 9 WIGMORE, EVIDENCE §2491 (2) (3rd ed. 1940); THAYER, PRELIMINARY TREATISE ON EVIDENCE ch. 8 (1898).
36. MCM, para. 138a.
37. *Id.*
38. *Id.*
39. ANALYSIS OF CONTENTS, *supra* note 11 at 27-2 (emphasis added); *United States v. Yates*, 16 CMR 629 (AFBR 1954).
40. MCM, para. 138a.
41. ANALYSIS OF CONTENTS, *supra* note 11 at 27-1.
42. 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).
43. FED.R.EV. 303(c).
44. FED.R.EV. 303, Advisory Comm. Note.
45. See e.g., McCORMICK, EVIDENCE §346 (2nd ed. 1972).
46. *In re Winship*, 397 U.S. 358 (1970).
47. FED.R.EV. 301, Advisory Comm. Note.
48. FED.R.EV. 301.
49. 319 U.S. 463 (1943).
50. 395 U.S. 6 (1969).
51. 396 U.S. 398 (1970).
52. See, McCORMICK, EVIDENCE §344 (2nd ed. 1972); Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL.L.REV. 81, 105 (1972).
53. FED.R.EV. 303.
54. See e.g., Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL.L.REV. 81 (1972).
55. FED.R.EV. 401.
56. MCM, para. 137.
57. FED.R.EV. 404(b).
58. MCM, para. 138g.
59. *Id.*
60. McCORMICK, EVIDENCE §190 (2nd ed. 1972).
61. FED.R.EV. 404, Advisory Comm. Note.
62. FED.R.EV. 406.

63. MCM, para. 138e.
 64. *Id.* at para. 138h.
 65. FED.R.Ev. 404(a)(1).
 66. 335 U.S. 469 (1948). The reason for the *Michelson* rule was that the only permissible method of proving character was reputation evidence.
 67. ANALYSIS OF CONTENTS, *supra* note 11 at 27-4 and -5.
 68. FED.R.Ev. 405(a).
 69. FED.R.Ev. 405, Advisory Comm. Note.
70. MCM, para. 138f(3).
 71. FED.R.Ev. 404(a)(2).
 72. MCM, para. 138f(3).
 73. *Id.*
 74. 274 U.S. 220 (1927).
 75. *United States v. Barben*, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963).
 76. *United States v. Daniels*, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

ADMISSIBILITY OF EVIDENCE FOUND BY MARIJUANA DETECTION DOGS

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Just as the attention of the public has become increasingly centered on the illicit drug trade so have law enforcement agents intensified their efforts to cope with the traffic. One of the more effective instruments developed to detect hidden drugs and deter drug abuse has been the dog. Dogs¹ have been trained² within the Department of Defense³ to detect marijuana and heroin. It is the purpose of this article to discuss in brief the difficulties such searches raise when the prosecution attempts to have the resulting evidence admitted at trial and to proffer some suggestions for both defense and trial counsel involved in a marijuana⁴ dog case. At the outset it should be noted that there is a paucity of cases involving narcotics detection dogs.⁵

The typical barracks⁶ dog search approximates the following pattern: A commander—frequently at brigade level—will arrange for a detector dog and handler (usually under the control of the PMO) to search a unit. The decision to search may be made alone or in conjunction with a subordinate commander. The dog and handler are then transported unannounced to the unit where the barracks are either emptied of personnel and guards posted, or the unit members are ordered to stand by their bunks and lockers. Somewhat obviously, the former is to be preferred if the purpose of the search is examination of the barracks and lockers. The dog is walked through the barracks guided by the handler—the importance of whose activities cannot be

overemphasized. The dog should smell everything in its path. While the dog *may* detect airborne scent and follow it to its source, more likely the dog will have to smell the immediate proximity of an area to detect marijuana within it. The dog will, when it believes it has located marijuana, “alert” to the substance by whining, pawing the area, trying to play with the substance, and displaying similar actions. At this point, the officer accompanying the dog team will authorize seizure, or in the case of a container such as a wall locker, will authorize entry and search.

Two threshold questions present themselves: is the given search one that is dependent upon probable cause for legitimacy and, if so, who has actually authorized it? These questions are as old as the law of search and seizure but pose certain peculiarities in this context. A search of public property⁷ or open fields⁸ does not require probable cause nor does seizure of contraband found in plain view.⁹ Yet — may a dog be walked through the middle of a barracks? In the broadest sense, the question is that of the reasonable expectation of privacy by the soldier billeted in the barracks. While he may not expect a dog, he is well aware that his quarters are for many purposes public and open to any member of the command as well as to numerous visitors. While the situation may differ slightly where barracks which are divided into rooms rather than bays, the question is one of degree. It is suggested that

where the individual has no expectation of substantial privacy, no cause is necessary to walk the dog through the area, and any contraband found may be seized.¹⁰ The weight of the policy behind the military's drug suppression program must be considered to be a primary factor involved in the determination not to expand the right of privacy in the military in this setting. Such a determination has already been signaled by a military court.¹¹

On the other hand, intrusion into those areas normally considered private necessitates either probable cause or a shakedown inspection theory. Use of a dog would seem to nullify any attempt at explaining a search as a traditional shakedown inspection devoted to a unit's readiness or health and welfare. However, recent case law indicated that a shakedown inspection may be ordered for the express purpose of finding contraband such as illegal weapons and drugs,¹² and that any contraband seized may be used in subsequent criminal prosecution. Accordingly, if every room and locker were shaken down as in a normal shakedown inspection and the dog was used simply to assist in the shakedown, probable cause, depending upon what the dog actually alerts to, might not be necessary to establish the legality of the search and subsequent seizure. Assuming that this theory fails or that the more normal and economical type of dog search (opening only those lockers and perhaps entering only those rooms the dog alerts to from the outside) is used, probable cause will be necessary¹³ to secure admission of seized evidence at trial.

If probable cause is necessary, the question of command authorization is raised. In the typical barracks dog search counsel will note that a distinct question may be raised as to which commander actually authorized the search. If the company commander was ordered to open any locker the dog alerted to, it is probable that the superior commander was the authorizing officer¹⁴ and any foundation to be laid in court to admit the evidence will, as will be discussed below, have to explore *his* knowledge of the dog's background.

The issue will be one of the discretion available to the authorizing officer. In dog searches as in other search cases, the person authorizing a search must have the power to do so. Practical experience suggests that some commanders may erroneously believe they may delegate their powers to anyone in a most informal manner when dogs are involved. While we are unaware of any dog case that involved search warrants, the question of the ability of a military judge to authorize search of an area or a container that a dog alerts to is obvious and of great interest.

The principal question in regard to marijuana dog use is: can a dog alone supply probable cause to search? When this question was first posed, the official response was a conservative (but hedged) no.¹⁵ In light of recent case law the better answer would seem to be that the dogs can indeed supply probable cause. Only three military appellate cases¹⁶ have dealt with the question however briefly and indirectly. *United States v. Unrue* involved a marijuana dog search of a vehicle after it passed a road-block warning of search by narcotics dogs (an opportunity was supplied before search to drop any drugs into an "amnesty barrel").¹⁷ The dog alerted to the car and its five occupants were disembarked and apprehended. Subsequent body searches revealed heroin in the possession of Unrue. The Court of Military Review held that the dog's alert was sufficient to supply probable cause to *apprehend*. The record of trial¹⁸ indicates that the Brigade Commander who was held by the Court to have actually authorized the search (rather than the Brigade S-2 who was actually in charge of the operation and search) had observed the dog in action and was satisfied as to its reliability in the detection of marijuana. While the difference, if any, between probable cause to apprehend and probable cause to search is unclear in this context (when the dog's alert indicates the probable immediate presence of seizable contraband) and not within the scope of this article, it seems unlikely that a standard of proof that justifies such a severe deprivation of liberty (apprehension) as well as subsequent search

based on the apprehension would be held less strict than a standard that justifies only invasion of privacy.

While the Air Force Court of Review in *United States v. Ponder* specifically did not decide the point, it stated (citing Wigmore's discussion of bloodhound evidence)¹⁹ that assuming arguendo a dog could supply probable cause, the dog would have to be shown to have been "well trained and well tested."²⁰ The Court explicitly noted that a foundation of reliability was required to be shown before the court could proceed to consider the actual search. The Court further held that the dog's reliability had to be made known to the Commander authorizing the search prior to the authorization. In *Ponder* the Commander's general knowledge of the dog training program was held insufficient to justify the search. There is no reason to believe that knowledge of the mere fact that a dog has graduated from a military drug detection course will be held sufficient reason to accept a dog's reliability without further inquiry. In concept the closest thing to marijuana dog searches in prior law has been the use of bloodhound evidence. In the usual case the prosecution has sought to use the fact that a given individual was tracked by a dog to show the identity of the alleged perpetrator. The states have split²¹ on the admissibility of such evidence with the majority of the Southern states accepting it. Those states that have rejected bloodhound evidence seem to have done so primarily on the grounds that a dog is inherently unreliable, and/or is in the position of an expert witness who cannot be cross examined. A distrust of such evidence in view of the lack of scientific evidence to explain the sense of smell has also been evidenced.²² Examination of the cases suggests that the primary reason why states have banned use of bloodhound evidence has been the fear that it unduly impresses juries which may rely on it to deprive a defendant of liberty or life. While of course the law of search and seizure's purpose may be said to protect the privacy of an individual against unreasonable invasion, clearly the consequences of the use of blood-

hound evidence differ from those surrounding admission of evidence found by the marijuana detection dog. In the first, a man's liberty may depend solely on the actions of a dog that cannot be examined. In the second, the consequence is simply a breach of privacy that leads to perfectly good evidence. If sufficient precautions can be taken to prevent unreasonable breaches of privacy, a balancing between the right to privacy, particularly as it exists in the military,²³ against the current necessity to prevent drug use (particularly heroin traffic) should yield a holding that evidence found by dogs is admissible. Such a balancing is, in practical terms, inescapable, and at least one military trial court has already indicated such thinking.²⁴ Certainly detection of a drug's odor by law enforcement agents has long been considered sufficient to supply probable cause to search.²⁵ What is involved here is only the expansion of the doctrine to a tool of law enforcement — a tool which experience has shown, when reasonable precautions are taken, to be an unusually effective one.

The question must then be: what are reasonable precautions? Such safeguards must be the laying of a foundation at trial that shows the dog is in fact reliable and that the commander or magistrate authorizing the search was aware prior to authorization of sufficient facts to convince him of the individual dog's reliability. Such a test is akin to that necessary to legitimize a search based on an informer's testimony or a search based on a mechanical detection instrument.²⁶ In view of the bloodhound cases, it seems unlikely that a good faith reliance on erroneously stated evidence of reliability would support a commander's decision to search.

To support the foundation suggested above, the following requirements should be met by commanders or judges before dog searches are authorized:

- (1) the commander or judge should be briefed in detail as to the general content of the marijuana detection dog course with emphasis placed on how the dog actually detects the drug;

(2) the commander or judge should be briefed by the dog handler (who should keep permanent records to supply the information)²⁷ as to the training and performance of the actual dog to be used—both before graduation and during subsequent live searches and practices. The handler should specify reliability in terms of the type of search (i.e. parcel, building, or vehicle);

(3) if another individual is to conduct the search, instructions should be clear and preferably written. Where the intent is simply to send the dogs to a unit to be used as a subordinate may determine, it is essential that the subordinate's discretion be indicated.

Counsel must bear in mind that investigation into the facts and background of a dog search must be thorough. Pitfalls for both prosecution and defense are numerous. The percentage reliability quoted by a dog handler is usually the number of "finds" of planted marijuana divided by the total number of "plants". It does NOT indicate the number of times the dog has falsely alerted in the absence of the drug. Since the dog will alert to the smell of a drug that has been removed from the area (dead scent) the handler may state that *every* alert of his dog is to past or present contraband. For Fourth Amendment purposes the ability of a dog to detect actual scent as compared with false alerts may be vital. The fact that a dog can find only 10% of planted material only indicates that perhaps 90% of contraband holders will escape detection. Since the fourth amendment protects privacy, one should be more concerned over how many innocent people will have their privacy invaded. Thus the percentage of "true" alerts to total alerts is important. This area has not been adequately explored in dog search cases. Similarly, what effect does the routine alert to dead scent have? Courts that have considered the question have not apparently directed their attention to this matter either.²⁸ If one must have probable cause to believe that contraband is at a given place *now*, as current case law requires, what effect does the dog's possible inability to distinguish and/or signal dead scent to its handler have? Counsel should be further cautioned to care-

fully examine the dog's training. A heroin detection dog, for example, may have been trained to detect materials used to cut heroin rather than to detect heroin proper. Every dog is trained to ignore detractors (i.e. noises, smells, etc.), artificial detractors (substances with smells similar to marijuana) and masking agents (substances such as perfume or gasoline which are used to mask the odor of the contraband) but the degree to which the dog has successfully completed such training will vary with the dog. Dogs generally have short attention spans and are greatly affected by certain working conditions. Contact with a dog's handler is essential to determine a dog's strengths and weaknesses. At the same time counsel should inquire into the background of the handler. It is not impossible for a handler unintentionally or otherwise to cue his dog to give an alert.

Cases involving dog searches and indeed cases that involve animals generally may be expected to occur more frequently in the future. They present a fascinating question as to the interaction between pressing social problems and the developing right to privacy.

Footnotes

1. While dogs of many breeds are used, the working breeds—particularly German Shepherds—seem to be preferred.
2. See U.S. DEP'T OF ARMY, FIELD MANUAL FM 20-20 BASIC TRAINING AND CARE OF MILITARY DOGS (1972); CONARC PROGRAM OF INSTRUCTION 830-F6; Army Reg. No. 190-12 (17 April 1970); U.S. ARMY MILITARY POLICE SCHOOL DEP'T OF SPECIALIZED TRAINING, TRAINER'S GUIDE—MARIJUANA DETECTOR DOGS.
3. Army Marijuana Detection Dogs (MDD) are procured by the USAF Base Procurement Office, Lackland AFB, Texas, and trained for thirteen weeks at the U.S. Army Military Police School, Fort Gordon, GA. Handlers are volunteers from the 4th AIT Brigade, (MP), Fort Gordon, GA.
4. Except where otherwise indicated, use of the term marijuana within this article will include heroin. Marijuana Detection Dogs without further training are unable to detect heroin.
5. See *United States v. Ponder*, 45 C.M.R. 428 (AFCMR), *petition denied*, — U.S.C.M.A. —, 45 C.M.R. 928 (1972); *United States v. Unrue*, 72-16 JALS 3 (ACMR 1972); *United States v. Smith*, — C.M.R. — (NCOMR 1972). Research,

- including an Air Force LITE computer search, has failed to indicate other cases, military or civilian on point. We believe, however, that a number of special courts-martial have ruled on dog searches. *See e.g.* note 27 *infra*.
6. Dogs may be used for virtually any type of search though the categories of building, vehicle, and parcel are often used. Believing that building searches generally present the most problems and subsume within them the problems presented by other types of searches, we have chosen to address ourselves only to building searches.
 7. *Cf.* United States v. Weshenfelder, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971); Army Reg. No. 190-22, para. 2-2(d) (12 Jun 1970).
 8. *See e.g.* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 152; Hester v. United States, 265 U.S. 57 (1924) *but see* United States v. Burnside, 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1965). In Dilger v. Commonwealth, 88 Ky. 550, 11 S.W. 651 (1889), two policemen were walking by a building when they heard screams from inside the building. The policemen rushed inside and arrested the defendant, who had been beating his mistress. The Court upheld the arrest on the theory that the offense was committed in the officer's presence. The Court felt that the information gained through the sense of hearing justified the intrusion into the building. In *Burnside*, the Court assumed that the backyard was a protected curtilage but justified the officer's entry into the backyard on the basis of their plain view of stolen property in the back yard. Perhaps the Court would permit an intrusion into a protected area where the dog's alert in an unprotected, open area furnishes probable cause to believe that contraband is located in a protected area such as a footlocker.
 9. *See e.g.* United States v. Coleman, 32 C.M.R. 522 (ABR 1962).
 10. *Cf.* United States v. Sumner, 34 C.M.R. 850 (AFBR 1964); United States v. Ferrell, 41 C.M.R. 452, 455 (ACMR 1969).
 11. *See* Memorandum Opinion of Colonel Reid W. Kennedy, Military Judge, in United States v. Unrue, GCM convened by the CG, 197th Infantry Brigade, Fort Benning, Georgia (filed 29 Nov 1971).
 12. *See* Gilligan, *Inspections*, THE ARMY LAWYER, Vol. 2, No. 11 (Nov 1972) at 11, and cases cited within. *See generally* Hunt, *Inspections*, 54 MIL. L. REV. 225 (1971).
 13. Though unlikely in our opinion, we do not foreclose the possibility of a form of implied consent if members of a unit are given advance warning of the future use of dogs. Of more interest is the possibility of apprehension of an individual after a dog's alert and subsequent search pursuant to lawful apprehension. *See* United States v. Unrue, *supra* note 5.
 14. United States v. Unrue, *supra* note 5, at footnote 3.
 15. DAJA-MJ 1971/9121, 13 Oct. 1971.
 16. *See* note 5 *supra*.
 17. In view of the case's posture, consent to search was not at issue.
 18. Record, pp. 12, 13, United States v. Unrue, 12 Nov 1971, as cited in Government Appellate Reply Brief. The Army Court of Military Review, though holding the officer conducting the search not to be a proper delegatee of the Commander's power to search, did not discuss this issue in its opinion.
 19. WIGMORE, EVIDENCE, § 177.
 20. United States v. Ponder, 45 C.M.R. 428, 434 (AFCMR 1972).
 21. *See generally* Annot., 18 A.L.R. 3d 1221 (1968).
 22. Query what effect odor detection devices developed for use in Vietnam may have.
 23. *See e.g.* Ally, *Overseas Commander's Power to Regulate the Private Life*, 37 MIL.L.REV. 57 (1967); Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97 (1964); Webster, *The Citizen-Soldier in the Age of Aquarius: Does He Have a Private Life?*, 27 JAG. J. 1 (1972).
 24. *See* note 11 *supra*.
 25. *See e.g.*, McNeil, *Recent Trends in Search and Seizure*, 54 MIL. R. REV. 83, 93 and cases cited at note 39 (1971).
 26. A special court-martial tried at Fort Carson, Colorado, some two years ago, involved a marijuana dog search of a barracks divided into semi-private rooms. The dog entered a room and alerted to a wall locker. The Commander, who had accompanied the search team, authorized search of the locker. Marijuana was found. The Military Judge at the subsequent trial denied the defense motion for appropriate relief to suppress the marijuana holding that the dog had in effect been shown to have been a reliable informant giving probable cause to search. The defendant was convicted (material courtesy of the Office of the SJA, Fort Carson). *See also* note 11 *supra*.
 27. Army Reg. No. 190-12, para. 3-1(d) (17 April 1970).
 28. The facts in *Unrue* did not raise this point directly as the dog's reaction in that case was shown to be different to dead scent from its reaction to "live" scent.

SJA SPOTLIGHT - TJAGSA

By: CPT Stephen Buescher, Editor, The Army Lawyer

Spring has arrived in Mr. Jefferson's country and the dogwoods are about to blossom on the Grounds of the University of Virginia, home of The Judge Advocate General's School. Few, if any, members of the Corps have not had the opportunity to visit the School in Charlottesville, and thus most are familiar with our physical facilities and some of our courses of instruction. However, on 1 March 1973, the School underwent a reorganization, and it is our new organization that is the occasion for this article.

Two events necessitated the reorganization. First was the disestablishment of the Combat Developments Command and the absorption of its judge advocate function by the School. The other was the task given to the School of increased instruction for the Reserves and National Guard. With some reorganization mandated by these events, the School took the opportunity to rearrange existing missions along functional lines. The result is as follows.

I. The Commandant and the Assistant Commandant For Reserve Affairs. The Commandant is, of course, the commander of the School, reporting directly to the Office of The Judge Advocate General. The School is one of the few Army Service Schools that will not come under the Training and Doctrine Command as a result of the new Army reorganization. This line of command is as it was prior to the reorganization.

The position of Assistant Commandant for Reserve Affairs is indicative of the increased importance and emphasis of the Reserve Components in the post-Vietnam Army. In accordance with the goal of functional organization the Assistant Commandant and the three officers serving under him now perform all tasks with regard to Reserve Affairs, but no others. They have three major Reserve Affairs missions: planning, career management and liaison. Planning will be primarily in the area of developing programs to increase the readiness capability of reserve judge ad-

vocate personnel. The Career Management officer will perform for the Reserve Judge Advocate many of the same functions that PP&TO does for active duty personnel except assignment of personnel. The liaison function is new under the reorganization and will involve maintaining communication between major Reserve and Active Army commands and coordinating these activities with the individual Army Readiness Region commanders. This centralization of Reserve Affairs functions should lead to better service for the Reserves and more communication and coordination between them and the active Army.

II. The Academic Department. This Department now has sole responsibility for all law teaching and the preparation of materials and texts used in legal instruction. This includes, of course, the Basic and Advanced Courses, the shorter continuing legal education courses, and all planning, preparation, and presentation of these courses along with preparation of original texts for use by the students. Many of these texts became Army wide pamphlets for use of the entire Corps and the Army in general. The Criminal, Civil, Procurement, and International and Comparative Law Divisions remain, but the Military Operations and Management Division, teaching military rather than legal subjects is transferred to a new department.

A major new academic mission will be the presentation of on-site instruction for Army Reserve and National Guard judge advocates around the country during the year. All faculty members will be "on the road" for approximately three weeks each year. This program, beginning in September will complement an expanded and improved program of both resident and other non-resident courses for the Reserve Component lawyer.

A new Deputy Director for Nonresident Instruction will coordinate Department efforts in the area of military legal instruction for ROTC, in other service schools, and in the

USAR Schools. He will also coordinate the School's extension correspondence course program and will administer these courses through the new people assigned to his office from the former Reserve Affairs Department. The on-site instruction program will be administered by the Deputy Director for Non-resident Instruction in coordination with the Assistant Commandant for Reserve Affairs.

III. Development, Doctrine and Literature Department. This new Department now has the mission and people formerly with the CDC Judge Advocate Agency. Formed by a merger of the Publications Division of the old Plans and Publications Department and CDC, this Department will continue the judge advocate function of CDC to make plans for future judge advocate operations and organization. In addition, this Department will provide resident instruction in military science, with the Military Operations and Management Division, formerly under the Academic Department. It will also plan for professional development and maintain liaison with professional organizations. Finally, the new Doctrine and Literature Division (formerly Publications) will publish the *Military Law Review*, *The Army Lawyer*, and the *Judge Advocate Legal Service*.

IV. The School Secretary. While in the past services were, in large degree, fragmented, the School Secretary now will provide all services and support for the School. This includes responsibility for all Conferences, Visitors, Billiting, the OOM, the Library, the Adjutant and Logistics. Thus, the School Secretary's office will be a convenient single point of contact for those attending the various conferences during the year. He is also responsible for the Alumni Association, the Placement Service and the *Annual Report*. A post judge advocate has been added to provide legal assistance for the School. Finally, his Publications Officer stocks and administers all TJAGSA publications except *Military Law Review*, *The Army Lawyer* and *Judge Advocate Legal Service*.

V. Conclusion. With this new organization the School will be able to maintain its current program for active duty judge advocates, and greatly increase its role with respect to the Reserves and National Guard. For your information phone numbers of the various divisions, some of which are new, are reprinted below. Feel free to call on us. The School is here to serve The Judge Advocate General's Corps through its courses and publications. Your suggestions, comments and contributions are welcome so that we may serve you better.

REPORT FROM THE U.S. ARMY JUDICIARY

Recurring Errors and Irregularities

a. *Conclusions from "Recurring Errors and Irregularities."* In every issue of *The Army Lawyer*, the Judiciary has reported errors and irregularities which it finds in trial records reviewed under Articles 66 and 69. Chief Judge Hodson mentioned a number of these errors at the 1971 Judge Advocate General's Conference (*The Army Lawyer* Vol 1 No 5 (Dec 1971) at 6). Senior Judge Miller reported on continuing errors at the 1972 Conference and distributed a pamphlet, "A Catalogue of Self-Injuries: Trauma and Treatment," to all conferees. Most of these errors are not the result of differing views of the law; they are the result of carelessness. Many

of them are found in the post-trial review and the action of the convening authority, to include the court-martial order promulgating the proceedings. The following are examples: Post-trial review and action dated prior to authentication of the record; post-trial review fails to report recommendations favorable to accused; post-trial review and court-martial order misstates pleas or findings or both; post-trial review misstates maximum punishment; accused not given an opportunity to rebut adverse matter in the post-trial review. See also, the errors discussed in *The Army Lawyer* Vol 3 No 1 (Jan 1973) at 9 and 10. In trying to find reasons for continuing incidence of errors of the type mentioned, court-

martial orders of a number of GCM jurisdictions for the last six months of 1972 were analyzed.

It was noted that there was some correlation between a high percentage of SPCM sentences and multiplicitous charging. An examination of records in the Judiciary indicates that some staff judge advocates refer to trial whatever charges are forwarded by the company commander, although the latter may have totally disregarded paragraph 26, MCM, 1969 (Rev.), and charged the accused with every conceivable offense, major and minor, arising out of one transaction. Some examples of overcharging are: routinely charging a conspiracy whenever more than one accused is involved in the commission of an offense; routinely charging a failure to repair and a separate unauthorized absence commencing with the failure to repair; routinely charging provoking speech and assault and battery when a single incident is involved. Overcharging not only makes proof difficult and unnecessarily increases the number and complexity of trial and appellate problems, but it is an extremely fertile source of error, both at the trial and in the post-trial review and action. Each staff judge advocate should periodically review such performance indicators with a view to correcting faulty procedures and policies.

b. *Identifying Court Members Who are Present or Absent.* Records of trial by general and special courts-martial are failing to set forth the names of the court members who are present and absent. This particular error is noted to be increasing in frequency. The trial guide, Appendix 8b, page A8-8, MCM, states that the persons named in the convening orders will be stated. The following procedure was used in a recent general court-martial: "All persons named in the convening order are present except those who are absent." This statement by the trial counsel does little to inform reviewing authorities who was present and absent.

c. *Opportunity for Defense Counsel to Review Record.* An increasing number of rec-

ords of trial are received without the signature of the defense counsel indicating his being afforded the opportunity to review the record. Subject to unavailability of trial defense counsel, he should be permitted this opportunity.

d. *February 1973 Corrections by ACOMR of Initial Promulgating Orders:*

1. Failure to show the sentence adjudged as corrected by a duly executed "Certificate of Correction."

2. Failure to show amended specifications—five cases.

3. Failure to show in the name line the correct service number of the accused.

4. Failure to show that the pleas to certain Charges and specifications were changed during the trial—three cases.

MONTHLY AVERAGE COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH OCTOBER - DECEMBER 1972

	General CM	Special CM		Summary CM
		BCD	NON-BCD	
ARMY-WIDE	.12	.07	1.20	.65
CONUS				
(incl ARADCOM)	.13	.07	1.37	.68
MDW	—	.02	.12	.02
First US Army	.20	.14	1.61	.94
Third US Army	.11	.04	1.79	.52
Fifth US Army	.11	.07	1.01	.97
Sixth US Army	.13	.09	1.43	.19
USARADCOM	—	—	.17	.13
OVERSEAS	.11	.07	.89	.59
USA Alaska	.03	.09	1.06	.81
USA Forces So. Cmd	.04	—	1.41	.12
USAREUR	.09	.09	.77	.59
Pacific Area	.17	.04	1.10	.52

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas, excepting ARADCOM personnel.

NON-JUDICIAL PUNISHMENT MONTHLY AVERAGE AND QUARTERLY RATES PER 1000 AVERAGE STRENGTH OCTOBER - DECEMBER 1972

	Monthly Average	
	Rates	Quarterly Rates
ARMY-WIDE	16.80	50.40
CONUS (incl ARADCOM)	16.71	50.13

	<i>Monthly Average</i>	<i>Quarterly</i>		<i>Monthly Average</i>	<i>Quarterly</i>
	<i>Rates</i>	<i>Rates</i>		<i>Rates</i>	<i>Rates</i>
MDW	3.28	9.84	USA Forces So. Cmd	20.62	61.85
First US Army	15.47	46.42	USAREUR	17.54	52.61
Third US Army	19.07	57.20	Pacific Area	16.06	48.17
Fifth US Army	16.71	50.13			
Sixth US Army	17.97	53.93			
USARADCOM	14.65	43.96			
OVERSEAS	17.04	51.11			
USA Alaska	13.83	41.49			

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas, excepting ARADCOM personnel.

LEGAL ASSISTANCE ITEMS

From: Legal Assistance Office, OTJAG

TAX ASPECTS OF SURVIVOR BENEFIT PLAN The following excerpt from Department of Army message 191417Z Jan 73 recently dispatched to the field is quoted for information:

"Subject: Survivor Benefit Plan (SBP)

A. Reference. DA Cir 608-41, 20 Oct 72

* * *

Section II

1. Pending a published change to reference, the following applies:

A. Disregard Para 10, sec III DA Cir 608-41, 20 Oct 72. The federal income and estate tax treatment of contributions and benefits under the plan has been changed to make it identical to the Retired Servicemen's Family Protection Plan (RSFPP). Specifically:

(1) The amounts withheld from a military member's retired pay under that law are excluded from gross income for federal income tax purposes.

(2) Members electing participation in the Plan should be advised that the value of the annuity to the surviving beneficiary at the time of the member's death is not subject to inclusion in his estate for federal estate tax purposes.

(3) The monthly annuities paid to the beneficiary under the Plan are subject to inclusion in gross income for federal income tax purposes.

B. Addition: In those cases whereby retirement eligible personnel have died while on active duty, the Survivor Assistance Officer will be instructed to assist the widow with the preparation of the DD Form 1884 as soon as possible, to insure the widow receives an amount equal to the maximum annuity which would have been payable if the member would have been in a retired status on the date of death.

C. Addition: In justifiable cases brought to the attention of military authorities pertaining to widows whose husbands died after 21 September 1972 without having made an election, the widow may be advised that she may submit an application with documentation to the Army Board for Correction of Military Records on DD Form 149 in accordance with AR 15-185. The Board should be provided evidence or statements of witnesses, as conclusive as possible, that the service member would have made an election had he been given an opportunity to do so before he died. This privilege of requesting Board consideration in no way implies that a favorable determination will be made."

MILITARY LEASE CLAUSES One of the recommendations made by the 1972 Command Sergeants' Major Conference was that a standard military clause for lease agreements be developed for utilization of all military personnel within CONUS. The conferees noted that in some cases military personnel receiving early drops or short notice ETS's had been experiencing financial problems caused by lease termination actions.

Department of the Army Pamphlet 27-12 Legal Assistance Handbook, 31 July 1970 contains specific military clauses which may be utilized in leases involving military personnel. Legal assistance officers should coordinate action with base housing officers in an effort to attempt to make sure that landlords include this type of clause in leases involving members of the service. Further, local post media should be utilized to remind service personnel on a regular basis to consult their legal assistance officer before entering into lease agreements. In this manner, many disputes and complaints could be avoided. The Chief, Legal Assistance Office, Office of The Judge Advocate General, should be informed of any problems in this area which cannot be resolved at the local level.

FEDERAL INCOME TAX — REVENUE SHARING — Line 33 of Internal Revenue Form 1040 and line 26 of Form 1040A have given rise to many questions from military taxpayers. Neither the forms nor the appropriate instructions make it clear whether the service member should enter as his principal place of residence his permanent home or his temporary military address. The Internal Revenue Service has indicated that the following guidelines should be used: (a) for the military taxpayer stationed in any of the states, he should enter the locality within which he was stationed at the end of the year. This is true whether he was living on-post or off-post; (b) for the serviceman who is overseas with his family, he should merely indicate in the appropriate line that he was overseas and that his family accompanied him; (c) if the serviceman is overseas and his family has remained in the states, he should complete the appropriate line indicating where his family was residing at the end of the tax year.

STATE INCOME TAXES — WEST VIRGINIA West Virginia uses the New York definition of taxable residents, i.e., it defines as a taxable resident all residents other than those who had no permanent abode in West Virginia, maintained a permanent place of abode elsewhere, and did not spend over 30 days in the state. The Legal Assistance Office

of OTJAG was recently advised by Mr. Donald L. Butler, Director, Income Tax Division, State Tax Department of West Virginia, that the current administrative policy is that a serviceman does maintain a permanent place of abode outside West Virginia “. . . if he leases or rents government quarters and occupies them with his family on a permanently assigned post.” West Virginia’s present administrative policy is in conflict with the All States Income Tax Guide published by the Air Force; and accordingly, the latter should not be followed on the question of residency.

CONSUMER INFORMATION The following consumer information is available for Legal Assistance Officers by writing to: Consumer Product Information, Washington, D.C. 20407

CONSUMER PROTECTION AND EDUCATION

Consumer Education Bibliography. 1971. 192 pp. 4000-0251. \$1.00.

Lists over 4,000 books, pamphlets, articles, audio-visual aids, and teachers' materials of consumer interest.

Consumer News. 4113-7001. \$2.00. Annual Subscription.

Bimonthly newsletter informs consumers of government rulings and actions, new consumer laws, public hearings of consumer interest, and new federal consumer publications.

Don't Be Gyped. 1971. 4 pp. leaflet. 7700-059. Free.

Bait and switch advertising; what it is and how to protect yourself; procedures for reporting to the Federal Trade Commission.

Fair Credit Reporting Act. 1972. 6 pp. leaflet. 7700-092. Free.

Consumer's rights under the Fair Credit Reporting Act of 1971; rights include discovery of own credit rating, dispute of erroneous information, and removal of incorrect information from rating report.

FDA Consumer. 1712-7031. \$3.50 Annual Subscription (10 issues).

Informs consumers of recent developments in the regulation of product safety, plus reports on safe use of specific products.

Forming Consumer Organizations. 1972. 32 pp. 4000-0252. 35¢.

Organization and operation of voluntary groups, suggestions for projects, plus listing of publications of consumer interest.

Guide to Federal Consumer Services. 1971. 151 pp. 4000-0073. \$1.00.

A summary of the consumer-related services, programs, and consumer publications offered by 34 federal departments and agencies.

How to Buy Foods/Como Comprar Los Comestibles. 1971. 31 pp. 0100-1416. 50¢.

A bilingual teaching aid for use in family economics and consumer education courses in secondary schools and adult education programs.

How the Consumer Can Report to the Food and Drug Administration. 1971. 4 pp. 7700-021. Free.

How to report suspected safety hazards, mislabeling or false advertising of foods,

drugs, and cosmetics to the federal government.

Mail Fraud Laws. 1971. 32 pp. 3900-0231. 20¢.

Common mail fraud situations; how the consumer may protect himself; procedure for reporting fraud to the Postal Service.

Mail Order Insurance. 1971. 8 pp. 1800-0022. 15¢.

Four common insurance frauds; how to protect yourself; procedures for reporting to the Federal Trade Commission.

Protection for the Elderly. 1971. 7 pp. leaflet. 7700-051. Free.

How to help an elderly parent or friend protect himself from common frauds; procedures for reporting to the Federal Trade Commission.

Quackery. 1971. 2 pp. 7700-090. Free.

Common medical fraud (quackery) situations; how to protect yourself; procedures for reporting to the Food and Drug Administration.

Truth in Lending. 1970. 6 pp. 7700-011. Free.

Consumer's rights under the Truth in Lending Law of 1969; includes right to discovery of terms of credit.

COUNSELLING SERVICEMEN

By the nature of their duties, judge advocates are often called upon to counsel soldiers. Some counselling arises through the Army's legal assistance program while other instances relate to representation of servicemen before courts-martial or administrative boards.

These counselling sessions provide a rare opportunity for the judge advocate to foster in the soldier a respect for military standards of discipline and appearance. Clearly, the judge advocate, if he is to have credibility,

must himself exhibit the characteristics which he seeks to instill in others. The most easily noticed outward symbol is strict compliance with uniform and haircut regulations.

I urge all judge advocates to make the most of these counselling sessions. The results can be a substantial savings in manpower which otherwise might be lost to the Army.

GEORGE S. PRUGH
Major General, USA
The Judge Advocate General

MILITARY JUSTICE ITEMS

From: Military Justice Division, OTJAG

1. **Pretrial Agreements** Two recent court-martial cases, involving a guilty plea pursuant to a pretrial agreement, have surfaced a prac-

tice wherein the formal terms of the agreement were supplemented by an informal understanding or "gentleman's agreement" be-

tween the trial and defense counsel which was contrary to public policy. The terms of the supplemental agreements provided that the defense counsel would refrain from making pretrial motions and that there would be a request for trial by military judge alone. In both cases, the findings and sentence were set aside and a rehearing was authorized. See *US v. Schaffer*, No. 428654 (ACMR 17 January 1973), and *US v. Petty*, No. 428609 (ACMR 19 January 1973). However, in an earlier similar case, the US Army Court of Military Review set aside the findings and sentence and dismissed the charges and specifications. See *US v. Peterson*, 44 CMR 528 (SPCM 1971). In that case, the court held that a pretrial agreement was void and contrary to public policy where the trial counsel made statements during trial which indicated that the agreement would be considered void if a motion other than speedy trial was made and where the defense counsel acquiesced by not raising an illegal search and seizure motion. The lessons to be learned from these cases are that all provisions of pretrial agreements, supplemental or otherwise, should be reduced to writing or otherwise fully disclosed in the transcript of proceedings and they cannot be used to forbid the trial of collateral issues and eliminate matters which can and should be considered at the trial level and on appeal.

2. Two recent civilian cases of interest to both the military lawyer and military policeman. In *United States v. Kelehar*, — F2d —, (CA5, 8 December 1972), the Court approved the inventory of an impounded vehicle when there was no probable cause to search even though the policeman expected to find fruits of a crime. Police detained defendant Kelehar at a drive-in restaurant after receiving a complaint that he had attempted to pass a counterfeit bill. While in a detained status, the defendant admitted that there were several outstanding misdemeanor warrants against him. The police then properly arrested him and took him into custody. At the request

of the restaurant owner, the police removed the vehicle. Prior to this removal, the police, in compliance with standard inventory procedure, inventoried the car. The police sergeant in charge admitted that he expected to find evidence of the counterfeit operation. The policeman who conducted the inventory saw some currency protruding from the edge of the floor mat. The Court upheld this procedure as reasonable within the meaning of the Fourth Amendment and stressed that the inventory was not a mere pretext for searching.

In *State v. Guinn*, — Del —, (decided 14 December 1972) another court also approved the inventory procedure. However, in that instance the Court held that the inventory of the contents of a satchel inside the closed trunk of the car to be inventoried was not reasonable. The Court agreed with the general reasoning that the inventory was to protect both the possessions of the arrestee and the police from being accused of improper handling of the possessions. However, the Court concluded that securing the satchel would have served both purposes.

Current military case law is generally in accord. A recent case is *United States v. Welch*, 19 USCMA 134, 41 CMR 134 (1969) affirming 40 CMR 638 (1969). The United States Court of Military Appeals approved the introduction into evidence of the contraband discovered in a routine inventory. The Court held that where inventorying was used to safeguard possessions and not as a subterfuge for an illegal search, contraband found would be admissible as evidence in a court-martial. The Court approved the inventory requirements found in AR 190-22.

It should be noted, however, that the United States Court of Military Appeals has refused to admit evidence when it believed an inventory was used as a subterfuge for a search for which there was no probable cause. *United States v. Mossbauer*, 20 USCMA 584, 44 CMR 14 (1971).

MEDICAL CARE RECOVERY UNDER STATE WORKMEN'S COMPENSATION

*By: Captain Michael A. Brodie, Tort Branch,
Litigation Division*

On 29 December 1972 Mr. Allan Clark of the Staff Judge Advocate Office at Fort Bliss, Texas appeared before the Workmen's Compensation Board in Austin, Texas. His experiences can provide a guide for other civilian and military attorneys for recovery of the reasonable value of medical care under state Workmen's Compensation statutes.

The case involved a retired serviceman, X, who was injured at his civilian job. The incident was reported by his employer to the insurance carrier, who directed him to a civilian hospital. Later X left that hospital on his own volition and went to an Army hospital where he received nine days treatment. It was this hospitalization that came under question. Initially the Texas Employers Insurance Association (TEIA) declined our demands for payment, alleging, among other things, they had no control over the treatment at the Army facility.

X's attorney, who had received medical records from the Army but who had not formally agreed to represent the Government's interest, effected a compromise settlement agreement with TEIA, whose order stated "TEIA will pay, or has paid, for all accrued hospital and medical expenses resulting from said injury."

Efforts to collect the Government lien proved futile, with the carrier offering no more

than 70% of the claim. Because of this dispute the Industrial Accident Board (IAB) set a hearing on 29 December 1972 on the issue of medical bills. At that hearing, the TEIA agreed in light of the settlement agreement to pay the Army claim in full.

The appearance of Mr. Clark at this hearing revealed a number of lessons, among which are:

(1) The Industrial Accident Board is now aware of the Army's interest in collecting its medical claims under Workmen's Compensation statutes.

(2) Power of Attorney and Assignment should be obtained from the injured party as soon as possible and placed on file with the IAB.

(3) Unless significant points of law are involved, appearances can normally be made by filing a brief at a full board hearing.

Recovery Judge Advocates are urged to examine their own Workmen's Compensation laws to see if any of the above can be useful in their own recoveries. Additional aid may be obtained from articles in *The Army Lawyer*, volume 1, numbers 4 and 5, and volume 2, number 1.

CLAIMS ITEMS

From: U.S. Army Claims Service, OTJAG

1. In the August issue of *The Army Lawyer*, this Service provided some information to aid in theft prevention in an article titled "The Theft Problem Revisited." The total cost for theft claims has increased by 42% from calendar year 1971 to calendar year 1972 and it therefore appears appropriate to again stress theft prevention. Several offices have

reported they have experienced good theft prevention results from instituting a program of identification for certain personal items. This program could be termed "Operation Identification" and may be implemented as follows:

Unit commanders require the keeping of records of personal items of a value in excess

of \$25.00 to \$50.00. Each soldier is given a card to list such personal items and the identifying numbers. If an identifying number is not already on the item, the soldier is furnished with material to place his serial number on the item. The cards are kept on file in the unit orderly room and the soldiers are instructed to insure that their cards are kept current when they require or dispose of such personal items. The initial list of items is verified by the soldier's platoon officer or designated noncommissioned officer and such verification is reflected by their signature on the card. Subsequent additions and deletions to the list are verified in a similar manner. The marking of items with high theft potential should result in a reduction of their value as an article for resale and discourage the theft of such articles. In addition, this type of record-keeping substantially aids in the proper adjudication of theft claims.

2. Claims Procedures After STEADFAST

After reorganization of CONUS Armies, the U.S. Army Claims Service will assume technical and operational claims supervision and other claims functions which are now the responsibility of the numbered Armies within CONUS. TRADOC and FORSCOM have a limited functional claims mission, to wit, planning involved with providing assistance for large scale maneuvers and Army generated disasters and processing claims generated by their headquarters. TRADOC and FORSCOM will be relied upon by the U.S. Army Claims Service, however, to exercise their inherent authority to insure proper processing of claims by their subordinate commands when such action is deemed appropriate. Installations under these commands will retain a claims mission comparable to their current one with certain modifications.

Under existing procedures, claims responsibility is established on a geographical area basis with each CONUS Army responsible for a specified area. The Armies have assigned area responsibility to subordinate commands and installations located within their geographic area. In order to guarantee that all in-

cidents, wherever they occur, which may result in a claim against, or in favor of the Government are promptly and thoroughly investigated, this concept of area responsibility is retained under the new procedure. Appendix F of Change 4, AR 27-20, which is now being processed by The Adjutant General for publication, assigns area responsibility to 44 commands in CONUS, Alaska, Hawaii and Puerto Rico. These commands are designated "Area Claims Authorities". In general, the area assignments follow assignments now prescribed by the four CONUS Armies. U.S. Army, Alaska, and MDW will be changed from claims settlement authorities to area claims authorities (approving authorities) because of their small claims volume, to simplify claims procedures, and due to their similarity in judge advocate staff composition to the staffs of area claims authorities. These 44 commands have area investigative responsibility. While the immediate responsibility for investigation of claims incidents remains in the unit commander as now set forth in Chapter 2, AR 27-20, the 44 area claims authorities are responsible for supervising claims investigations within their area of geographic responsibility and for seeing that these investigations are properly carried out. Area claims authorities are permitted to designate areas within their general area of jurisdiction to be administered by claims processing authorities. In order to be designated a claims processing authority, the command must have a judge advocate or a legal officer on its staff. Where such a designation is made the claims processing authority will have the responsibility for investigation, processing and adjudication of claims within their designated area. Even though a command is not designated a claims processing authority, it will continue to be responsible for the investigation of incidents and the processing of claims arising out of its activities. Such responsibility may be transferred in whole or in part when the incident occurs in another area as provided by paragraph 2-5, AR 27-20.

The new procedures will be implemented on a phased schedule. The settlement authority

claims functions currently performed at CONUS Army Headquarters will be assumed by the U.S. Army Claims Service. The U.S. Army Claims Service is working closely with the staff judge advocates of each CONUS Army to determine an appropriate date in calendar year 1973 when all new claims will be processed under the revised procedures as outlined above and all old claims will be either processed to completion by the CONUS Armies or forwarded to the U.S. Army Claims Service. The decision as to the processing procedure for claims which may be in backlog will depend on the personnel and facilities still available to the CONUS Armies as they near the end of the phase out of their functions. Since there can be no date certain when all functions of the CONUS Armies will cease for all aspects of claims, it is extremely important for each area claims authority to maintain close liaison during this interim period with the CONUS Army Command Staff Judge Advocate to determine when the processing of certain type claims should commence under the new procedure. In addition, Army National Guard and Reserve units should contact the appropriate CONUS Army headquarters prior to departure for active duty training in order to determine appropriate claims channels. The U.S. Army Claims Service will, of course, provide implementing guidelines which will include proposed target dates, but the logical and efficient transition of the claims functions will depend to a large extent on the good faith cooperation of the area claims authorities, and, in turn, on the cooperation of the claims processing authorities which they will initially designate.

The new procedures depend to a large extent upon voluntary cooperation to be effective and efficient. Despite the above-mentioned inherent authority of TRADOC and FORSCOM, without the direct command channels of the CONUS Armies to incur compliance with claims regulations, The Judge Advocate General and the Chief, U.S. Army Claims Service must place even greater emphasis on voluntary judge advocate cooperation through technical channels. Since the appropriate and

timely adjudication of claims, particularly in the personnel claims area, has such a direct impact on the morale of the service member, these new procedures must be viewed by every judge advocate as a challenge to his professional ability to make the procedures work without any need for direct command control. In addition, this transition period is an appropriate period for each claims office to take a hard look at its internal procedural management. Are claims actions promptly reported on DA Form 3 in accordance with Chapter 14, AR 27-20? Are computer print-outs effectively used as a management tool? Are the benefits of an accelerated small claims procedure being fully utilized? If not, this is a most advantageous time to initiate new local policies. In particular, this is an appropriate time to make a concerted effort to pay the vast majority of meritorious personnel claims for \$500 or less within 24 hours of their submission. (See para. 11-12, AR 27-20). Although it is understandably difficult with all the competing priorities which a staff judge advocate has to continue to maintain, such as a 24-hour goal, the tremendous morale benefits to both the command and the service member are self-evident.

As an exception to the geographical area concept, the Army Corps of Engineers will continue to investigate, process, and approve in their own channels claims arising out of civil works activities. In addition, claims arising from military functions of the engineer districts will be treated the same as civil works claims procedurally.

All disapproval actions on claims arising within areas assigned by Appendix F will be taken by the U.S. Army Claims Service, except those in Hawaii and the Canal Zone where claims settlement authority is in the major Army command. The monetary jurisdiction of area claims authorities will be \$5,000 for Chapter 4 and Chapter 11 claims, \$2,500 for Chapter 3 and Chapter 6 claims, and \$1,000 for Chapter 5 claims. Subject to such limitations as may be imposed by the Chief, U.S. Army Claims Service, in individual cases,

claims processing authorities will have approving authority up to \$2,500 under all chapters except Chapter 5, which will be \$1,000. All unsettled claims will be forwarded by the receiving command (area claims authority or claims processing authority) direct to the U.S. Army Claims Service for settlement.

It is anticipated that little change will occur from past procedures as to which command will initially receive a claim. In the personnel claims area (Chap. 11), claimants will still be informed to present the claim to the nearest service installation which maintains a claims office. In addition, the provisions of paragraph 11-3b of AR 27-20 will continue in effect and permit a member of another U.S. Armed Force, where an installation of his service is not immediately available, to present a claim to the Army for investigation and processing short of adjudication.

Change 4, AR 27-20, will authorize The Judge Advocate General to designate Department of the Army civilian attorneys as "Claims Attorneys" with authority to approve claims under Chapters 4, 5 and 11. This will permit legal officers, e.g., Department of the Army civilian attorneys, to approve claims.

The new procedure is designed to better utilize all legal assets (civilian attorneys as well as judge advocates) wherever located and to task each area claims authority with a claims workload similar to what it had under CONUS Army procedures. It is believed that this will have been accomplished in most cases.

3. Disposition of Claims From Vietnam. The Staff Judge Advocate, USARV/MACV Support Command, recently provided the following proposed procedure for future disposition of claims arising within the Republic of Vietnam.

"Claims filed pursuant to Chapters 3, 11 and 12, (AR 27-20) that have not been settled prior to 10 March 1973 in the Republic of Vietnam will be transferred to the Office of the Staff Judge Advocate, USARPAC, for further disposition. Claims filed pursuant to Chapter 10 (AR 27-20) will continue to be processed by the Foreign Claims Office in

Saigon, APO 96243. Following the departure of military personnel, commissions will operate from USARPAC. Foreign claims will be received and processed by local national personnel who will continue to be employed by the US Army. The Saigon claims office will be administratively supported by the Defense Attache Office, the successor organization to MACV. Claims will be forwarded to USARPAC, following investigation, translation and examination in Saigon. Adjudication and preparation of vouchers, when appropriate, will be accomplished in Hawaii. Adjudicated claims will be returned to Saigon for notification to claimant and payment. DA Forms 3 will be prepared and dispatched to US Army Claims Service from the Saigon Claims Office."

4. Earthquake — Managua, Nicaragua. On the morning of 23 Dec 1972, a disastrous earthquake hit Managua, Nicaragua. The downtown area was completely destroyed and for miles around many homes were shaken from their foundation or destroyed. The MILGROUP in Nicaragua had 10 Army members assigned to their headquarters. Each had his family in authorized quarters living throughout the city.

All of the service member's families were evacuated within 24 hours following the earthquake. Electricity was out for 4 or 5 days after the earthquake, and since thousands were left homeless and hungry, looting occurred all over Managua. Losses to all service members occurred from the earthquake, from lack of electricity, and from theft.

A claims investigation officer from the Southern Command arrived in Managua, Nicaragua on 2 Feb 1973, as requested by MILGROUP Commander, and interviewed each claimant, and examined their property and their quarters.

On-the-spot agreed cost of repair of all items needing repair was made between claimant and the investigating officer.

While somewhat unique in its circumstances, this case is illustrative of the extraordinary work done world-wide by claims personnel in support of the Army community—ed.

JAG SCHOOL NOTES

FY 74 Courses. The School is now working on its calendar for FY 74, to include the short courses and other continuing legal education programs for the Corps. The new mission of providing on-site teaching for Reserve and National Guard judge advocates and the requirement to increase the availability of resident courses will create a heavy additional teaching load for the faculty. The change of mission of the CONUS Armies will also change the quota system. Staff Judge Advocates should be even now budgeting for courses to which they wish to send officers in FY 74.

New Building. As most readers are aware, the University of Virginia let the contract for the building of the new TJAGSA building the first of the year. This building, which will be a total complex of classrooms, faculty offices, administrative offices, library and BOQ, is now well underway on Copeley Hill behind the Barracks Road Shopping Center. The Law School is also under construction and both buildings should be ready for occupancy by late summer of 1974. TJAGSA plans a groundbreaking ceremony to be held on 12 April at the site of the construction. This new "Home of the Military Lawyer" is one which the entire Corps will utilize many years into the future and of which the Corps can be very proud.

Leavenworth Trip. The 21st Advanced Class is scheduled to leave by military aircraft on 4 April to visit Fort Riley and Fort Leavenworth. The purpose of this trip is to enable the class to get a better understanding of the United States Army Retraining Brigade at Fort Riley (the Old CTF), and the operation of the Disciplinary Barracks, as well as State and Federal penal institutions in the Leavenworth area.

Military Justice Training. The School is working with the Sergeants Major Academy and the Defense Race Relations Institute to insure that there is adequate attention given the subject of military justice training at those institutions. Addresses by members of the faculty will highlight the training, and

additional materials are being prepared for the Defense Race Relations Institute so that those going out to handle these matters will have a well-rounded understanding of the working and purpose of military justice.

Board of Visitors. The Board of Visitors of the School will visit Charlottesville on 11-13 April. This will give the Board of Visitors an opportunity to look at all aspects of the School's operation shortly after our reorganization. Members of the Board of Visitors include: Mr. Eberhard P. Deutsch, Colonel John H. Finger, Mr. Myres McDougal, Judge Alfred P. Murrah, Professor John W. Reed, and Mr. Richard Wiley. The Recorder for the Board will be Colonel Birney M. Van Benschoten.

The Board of Visitors will be present at the groundbreaking ceremonies for the new JAG School building.

ROTC Manual. One of the most recently published books prepared by the JAG School is ROTCM 145-85, "Fundamentals of Military Law," prepared specifically for Army ROTC. This new ROTC Manual changes the emphasis in teaching of military law from solely that of military justice to the whole broad scope of legal problems which a young newly commissioned officer should understand. This new manual is supplemented by lesson plans which are being sent out for use with the Manual. These lesson plans were also prepared by the JAG School. It is hoped that this Manual will be available to those Reservists and active Army officers who assist in teaching ROTC throughout the United States. The new book, although including in large part disciplinary problems faced by a newly commissioned officer, also provides information on alternatives to court-martial; an introduction to international law, particularly SOFA and the law of war; material on military personal property, and a chapter on personal affairs law.

Thesis Orals. The last ten days of April will be busy ones for the 21st Advanced Class as they present their thesis orals. Each student will present an oral exposition of his thesis

to a committee made up of his faculty advisor, another TJAGSA faculty member and an outside expert in the field.

Reserve Directory. The United States Army Reserve Directory is available for the use of

legal assistance officers. A copy has been sent to each office and it is an ideal way to contact an interested lawyer who can provide assistance to the legal assistance officer.

ADMINISTRATIVE LAW OPINIONS*

(Post, Camps, and Stations—Prohibited Activities) **Member May Not Sell Mutual Funds On-Post.** A Staff Sergeant (E-6) requested permission to sell mutual funds to other military members, not junior to him, on a military installation. Paragraph 4-5b, AR 210-10, 10 Sep. 1968, prohibits "solicitation" but does not use the word "sell." It was asked whether "solicitation" is synonymous with "sell" and whether the word "commodity" used in the paragraph includes mutual funds. It was concluded that, in commercial transactions, the words solicitation and sell are so closely related as to be synonymous. Further, paragraph 4-5c, AR 210-10 *supra* identifies mutual funds as one type of commodity. This characterization of mutual funds as a commodity may also be applied to paragraph 4-5b, AR 210-10, *supra*. DAJA-AL 1973/3374, 2 Feb. 1973.

(Enlistment And Induction — General) **United States Army Europe Enlistment Option Does Not Guarantee Geographical Area, But Only Assignment Within USAREUR.** An enlisted member enlisted under the USAREUR Enlistment Option (Table 5-29, AR 601-210, 1 May 1968, as changed). The option guaranteed a minimum of 16 months service in USAREUR. The member was assigned to a USAREUR unit in Turkey without having first completed 16 months of service in "Europe." The member argued that AR 614-30, 31 Jul. 1970, as changed, defines the geographical boundaries of Europe and his assignment outside the defined boundaries was a breach of his enlistment commitment. The unit in Turkey was in a 12 month short tour area.

It was stated that while the option guarantees stabilization in USAREUR for 16

months, it does not guarantee assignment to a particular unit within USAREUR for 16 months unless the applicant so requests. This is not stabilization under AR 614-5, 21 Aug. 1969. Accordingly, reassignment within USAREUR was not a breach of the enlistment contract. Assignment to a "short tour area" within USAREUR did not alter the result in as much as the member's tour was not stabilized within the meaning of AR 614-5, *supra*. DAJA-AL 1972/5123, 9 Nov. 1972.

(Prohibited Activities—General) **Use Of Installation Name.** A fraternal organization with local chapters existing as private associations on military installations asked whether para 1-2c(2), AR 230-1, 8 Apr. 1968, as changed by C7, 29 Sep. 1972, prohibits the use of an installation's name in the name of a local chapter. Prior opinions indicated that the regulation is intended to avoid the appearance of officiality by a private association. The mere use of an installation name to indicate geographical location would not violate the regulation. The private associations must, however, conduct its activities in a manner that does not in any way give the impression that the private association is a part of the government or one of its agencies. (See JAGA 1960/3553, 5 Feb. 1960). DAJA-AL 1972/5104, 8 Nov. 1972.

(Boards and Investigations — General) **ROTC Disenrollment Board Failed To Follow Required Procedures.** A member of a Senior ROTC program was disenrolled for inaptitude for military service as demonstrated by lack of general adaptability, skill, handiness or ability to learn. However, no record of board proceedings was made and none of the procedures required by AR 15-6, 2 Aug. 1966 were followed. Apparently, the disenrollment re-

sulted from an informal discussion between members of the ROTC staff. Accordingly, it was opined that the procedure was legally insufficient to support the disenrollment. DAJA-AL 1972/5122, 8 Nov. 1972.

(Boards and Investigations — General)
Presence Of Interloper On Elimination Board Was Not A Jurisdictional Defect. A discharge board was convened to consider the elimination of an enlisted member due to civilian conviction. The board recommended retention. However, the President of the Board was not appointed by the convening authority to sit on the board and was a mere interloper. Paragraph 10, AR 635-206, 15 Jul. 1966, as changed, provides that a board will be comprised of at least three commissioned officers, at least one of whom is in the grade of major or higher. The appointed board in this case consisted of four captains, one lieutenant as alternate and a major, who was absent, and replaced by the interloper. In JAGA 1969/3707, 22 Apr. 1969, it was held that no materially prejudicial error was committed by failure to include a field grade officer. Further, four of the five appointed members were present, which constituted the quorum required by para. 3c(2), AR 15-6, 12 Aug. 1966, as changed.

Thus, the remaining question was whether the presence of the interloper was sufficient to create a jurisdictional defect. The rule is that if the unauthorized member would have been eligible to sit on the board if he had been on orders, his presence will constitute only a procedural defect. The interloper was eligible, and, in fact, was appointed to serve on some administrative boards, although not on the one in this case. Accordingly, a rehearing was not authorized. DAJA-AL, 1972/5157, 9 Nov. 1973.

(Boards and Investigations — General)
Findings Of Elimination Board Did Not Meet Requirements. A board was convened to consider the elimination of an enlisted member for dishonorable failure to pay just debts. The board found that member was "undesirable for retention in the service." This finding

failed to meet the requirements of Section III, AR 15-6, 12 Aug. 1966, as changed, in that the board did not specifically find the member was either "unfit" or "unsuitable."

Further, the recommendation of the board was that their "findings be suspended for six months" and if it was not suspended the member "should be discharged with a general discharge." The board did not make use of the recommendations required by paragraph 17d, AR 635-212, 15 Jul. 1966. Accordingly, the board failed to make findings and recommendations required by applicable regulation. DAJA-AL 1972/5406, 26 Dec. 1972.

(Separation From The Service Grounds)
Member May Not Be Separated For Civil Conviction For Mere Possession of LSD. Member May Be Separated For Civil Conviction For Sale Of LSD And Possession And/Or Sale Of Hashish. TAG requested an opinion as to whether separation was appropriate under Sec. 6, AR 635-206, 15 Jul. 1966, for conviction by an Italian Court of possession and sale of LSD and hashish. The punishment in Italy for possession and/or sale of LSD and Hashish is imprisonment for three to eight years plus a fine. Subparagraph 33a, AR 635-206, *supra*, provides generally that an individual will be considered for discharge when he has been initially convicted by civil authorities of an offense for which the maximum penalty under the UCMJ is confinement in excess of 1 year. If the offense is not listed in the Table of Maximum Punishments, or is not closely related to an offense listed therein, the maximum punishments authorized by the U.S. Code or the D.C. Code, whichever is lesser, apply. Under the rule of *U.S. v. Walker*, 20 U.S.C.M.A. 367, 43 C.M.R. 207 (1971) the maximum punishments for sale or possession of LSD are found in the U.S. Code. Sale of LSD is punishable by confinement for not more than 15 years under the U.S. Code. However, mere possession of LSD is punishable under the U.S. Code by not more than one year confinement. Thus, no action may be maintained under para. 33a, AR 635-206, *supra*, for mere possession of LSD. Hashish is marijuana, and punishment for sale or possession

of hashish is the same as that for marihuana, confinement in excess of one year under the Table of Maximum Punishments. DAJA-AL, 1972/5311, 8 Dec. 1972.

(Pay — Unavoidable Absence) Release Under NATO-SOFA Waiver Of Jurisdiction Does Not Preclude Finding Of Unavoidable Absence. An enlisted member was arrested by Italian civil authorities for possession and sale of hashish. Three days after his incarceration, the U.S. asked for a waiver of Italian primary jurisdiction under the provisions of NATO-SOFA. The Italian Court granted the requested waiver of jurisdiction and the member was retained for several days after his ETS to facilitate out-processing and return to CONUS. After his REFRAD, the member made a claim for back pay and allowances covering his period of incarceration which had been denied on the basis that under paragraph 70, AR 630-10, 24 May 1966, as changed by C6, 15 Nov. 1969, the member's absence was not excusable as unavoidable because it was due to his misconduct and not to circumstances beyond his control. The ABCMR asked for a review of this determination.

The governing statute is 37 U.S.C. 503(a) which is implemented, in part, by AR 630-10,

supra. Paragraph 2m of the regulation defines an unavoidable absence as "when the member was . . . in confinement under charges which were dismissed or of which he was acquitted." The illustrative examples do not cover the factual situation in this case, i.e., a release under a SOFA waiver of jurisdiction. Such a release is not an adjudication on the merits as is a dismissal of charges or an acquittal. Prior opinions have held that acquittal or dismissal of charges on procedural grounds is not a bar to a determination that the absence is unexcusable. (DAJA-AL 1972/3913, 12 Apr. 1972; *id* 1972/3917, 17 Apr. 1972). The determining factor is not criminal culpability, but the presence or absence of misconduct. (39 Comp. Gen. 781, 783 (1960); 47 Comp. Gen. 214 (1967)). There was no question of unavoidability on the part of the Government in this case. The sole issue was unavoidability on the member's part. The test to be used by the commander is a "totality of the facts" test. The standard to be used by a departmental appellate authority in reviewing the decision is a "substantial evidence" standard. In this case the ABCMR could find substantial evidence to support the commander's determination. DAJA-AL 1972/5425, 4 Jan. 1973.

PERSONNEL SECTION

FROM: PP&TO, OTJAG

1. RETIREMENTS. On behalf of the Corps, we offer our best wishes to the future to the following personnel who retired.

Colonel Richard F. Seibert, 28 February 1973

2. ORDERS REQUESTED AS INDICATED:

NAME

FROM

TO

COLONELS

OLK, Henry J. Jr.

Ft. Riley, Kansas

USA Jud, Falls Church, Va.

LIEUTENANT COLONELS

BRIGHT, Fred Jr.
BROWN, Terry W.
DORSEY, Frank S.
HENSON, Hugh

Ft. Rucker, Ala.
OTJAG, Wash DC
Presidio of SF Ca.
USA Alaska

USA Jud, Falls Church, Va.
HQ USA Alaska
USA Jud, w/sta Presidio of SF Ca
C&GSC, Ft. Leavenworth, Ka.

Lieutenant Colonel Ann Wansley, 28 February 1973

CM3 Melvin E. Greenwaldt, 28 February 1973

* The headnotes for these opinions conform to The Judge Advocate General's School Text, "Effective Research Aids For The Preparation of Military Affairs Opinions," February 1971.

LIEUTENANT COLONELS—Continued

NAME	FROM	TO
RYKER, George C. RODRIGUEZ, Simon	AFSC, Norfolk, Va. Europe	Europe USAMED Health Svc, Ft. S. Houston, Tex.
SCHEFF, Richard P. SMITH, Robert B. WHITMORE, Richard	C&GSC, Ft. Leavenworth, Ka. C&GSC, Ft. Leavenworth, Ka. Europe	USA QM Cen, Ft. Lee, Va. OTJAG, Wash DC Presidio of S.F. Calif.

MAJORS

BADAMI, James A. BOLLER, Richard R. COKER, James R. CRAIG, David B. DANCHECK, Leonard ENDICOTT, James A. FELDER, Ned E. FUGH, John L. GIDEON, Wendell R. HARRIS, Harold E. HEMMER, William J. ISKRA, Wayne R. MAYER, Haldane R. McRORIE, Raymond MURRAY, Charles A. NUTT, Robert M.	TJAGSA Korea TJAGSA TJAGSA TJAGSA TJAGSA Europe C&GSC, Ft. Leavenworth, Ka. TJAGSA Ft. S. Houston, Texas TJAGSA TJAGSA TJAGSA SAFEGUARD Sys Ofc, Arl. Va. TJAGSA Stu. Nat'l Law Cen, Geo. Washington Univ. S-F, USMA, N.Y. OTJAG, Wash DC TJAGSA TJAGSA OTJAG	OTJAG, Wash DC S-F, TJAGSA C&GSC, Ft. Leavenworth, Ka. Europe Korea C&GSC, Ft. Leavenworth, Ka. USA Jud, w/sta Ft. Lee, Va. SAFEGUARD Sys Ofc, Arl., Va. Ft. Gordon, Ga. USATC, Ft. Polk, La. S-F, USMA, N. Y. USA Jud, w/sta Europe Ft. Knox, Ky. C&GSC, Ft. Leavenworth, Ka. 82d Abn, Ft. Bragg, N.C. SAFSCOM, Redstone, Ala. C&GSC, Ft. Leavenworth, Ka. AFSC, Norfolk, Va. Hawaii S-F, TJAGSA USA Msl Cmd, Redstone, Ala.
SHIMEK, Daniel W. STONE, Frank R. Jr. SUAREZ, Philip M. WHITE, Charles A. YAWN, Malcolm T.		

CAPTAINS

ARMSTRONG, Henry BAKER, William J. CARPENTER, Bernard CLARKE, George W. COLEMAN, James P. DAVIDSON, Howard DUNSMORE, John W. EGGERS, Howard C. FLANAGAN, John J. FONENOT, Russell FOX, Timothy FRAZEE, Robert M. GIBSON, Michael L. GILLEY, Dewey C. Jr. GODDARD, Richard GIUNTINI, Charles GOLDEN, John C. II GRAVES, Joseph L. GREENE, William P. HARGRAVE, Robert HEASTON, William HOPKINS, Gary L.	TJAGSA Ft. Carson, Colo. TJAGSA TJAGSA TJAGSA Korea Ft. Gordon, Ga. TJAGSA Korea TJAGSA Korea TJAGSA Korea TJAGSA USATC, Ft. Ord, Ca. TJAGSA TJAGSA WRAMC, Wash DC USARHAW Korea Europe Ft. Wolters, Texas	USA Jud, Falls Church, Va. USARHAW ROTC Instr Gp, Northfield, Vt. S-F, TJAGSA USA Avn Sys, St. Louis, Mo. Ft. Devens, Mass. USCONARC, Ft. Monroe, Va. USA Fld Arty Sch, Ft. Sill, Okla. USA Gar, Ft. McArthur, Ga. Admin Cen, Ft. Harrison, Ind. Fitzsimons GH, Colo. Ft. Eustis, Va. USA Ars, Pine Bluff, Ark. QM Center, Ft. Lee, Va. USA Jud w/sta Ft. Bragg, N.C. Engr Sch, Ft. Belvoir, Va. USA Jud, Falls Church, Va. HSC, Ft. S. Houston, Texas TJAGSA Europe S-F, USMA, N. Y. OTJAG
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CAPTAINS—Continued

NAME	FROM	TO
JAEKEL, William	USATCI, Ft. Benning, Ga.	USA Tng Cen, Ft. Gordon, Ga.
KARLSON, Henry C.	TJAGSA	USA Jud, w/sta Ft. Gordon, Ga.
KILMARTIN, Peter	Ft. Leonard Wood, Mo.	US Disciplinary Bks, Ft. Leavenworth, Ka.
KENNETT, Michael	USARPAC, Hawaii	22d Adv Class, TJAGSA
LEAF, Frederick P.	Korea	Europe
LENT, Morris J. Jr.	Engr Center, Ft. Belvoir	S-F, USMA, N. Y.
LEWIS, Jay W.	Ft. Riley, Kansas	S-F, USMA, N. Y.
McKENNA, Robert B.	Korea	OTJAG
MITCHELL, Kenneth	TJAGSA	USA Jud, w/sta Ft. L. Wood, Mo.
MOUSHEGIAN, Vahan	MACV	Europe
MULFORD, Ralph K.	Europe	USA Gar, Ft. Devens, Ma.
MURPHREE, John D.	Ft. Polk, La.	NCO Sch, Ft. Bliss, Tex.
O'BRIEN, Maurice J.	TJAGSA	USA Jud, Falls, Va.
RAY, Paul H.	TJAGSA	C&GSC, Ft. Leavenworth, Ka.
RICH, Royce C.	TJAGSA	Claims Svc, Ft. G. Meade, Md.
RIGGINS, Charles	1st USA, Ft. G. Meade, Md.	OTJAG
RIPPLE, Raymond M.	USA Jud, Falls Church, Va.	S-F, USMA, N. Y.
SALVATORE, Ronald	Alaska	S-F, USMA, N. Y.
SIMMONS, Timothy J.	TJAGSA	USA Gar, Ft. Carson, Colo.
SCANLON, Jerome W.	TJAGSA	Korea
SCHNELL, William	TJAGSA	Europe
SPIRN, Stuart D.	Okinawa	Ft. Eustis, Va.
STRUBHAR, Burton	Ft. Lewis, Wash.	Ft. Wolters, Texas
TAYLOR, Daniel E.	Europe	S-F, USMA, N. Y.
TESTA, Joseph P.	Ft. Benning, Ga.	S-F, USMA, N. Y.
TRAINOR, Charles W.	TJAGSA	US Army Alaska
WALTON, George R.	Europe	CONARC, Ft. Monroe, Va.
WERT, Robert C.	Okinawa	Valley Forge Hosp, Pa.
WRIGHT, Richard W.	USATC, Ft. Ord, Calif.	Alaska

3. Congratulations to the following officers who received awards as indicated:

Colonel William T. Rogers	Legion of Merit (1st OLC) Aug 70 - Jan 73
LTC Robert S. Poydasheff, Jr.	Legion of Merit (1st OLC) Jul 69 - Dec 72
CPT John W. Brickler	Army Commendation Medal Apr 69 - Mar 73
CPT Thomas A. Darner	Meritorious Svc Medal Jul 68 - Feb 73
CPT Donald G. Gavin	Cert of Achievement Jan 71 - Jun 72
CPT James D. Hyde	Army Commendation Medal Jan 70 - Nov 72
CPT Anstruther Davidson	Army Commendation Medal Jun 71 - Jun 72
CPT Thomas J. Kelleher	Army Commendation Medal Dec 68 - Apr 73
CPT Daniel Labowitz	Army Commendation Medal (1st OLC) Oct 71 - Oct 72
CPT Jeffrey L. Mason	Army Commendation Medal Jun 70 - Aug 71
CPT Charles W. Turnbaugh	Meritorious Svc Medal Apr 70 - Jan 73
CPT Carl F. Meyer, Jr.	Army Commendation Medal May 72 - Dec 72
CPT Togo West	Legion of Merit Aug 70 - Feb 72

4. SAFEGUARDS FOR OFFICER EVALUATION REPORTING SYSTEM (OERS)

Recent inquiries from Field Commanders in response to CSA 072200Z Feb 73 indicate considerable interest and desire to comply

with DA guidance and a determined effort to literally apply OERS rating policies. However, commanders are also expressing concern as to whether all possible safeguards are being taken to protect the officer corps during the turbulent transition period. Safeguards

include instructions to DA Selection Boards to be cognizant of turbulence during the introductory year of OERS and the entry of applicable average scores on DA Form 67-7.

As an additional safeguard to further emphasize to DA selection boards and career managers that OERS is in its initial year, all DA Form 67-7 reports for rating periods in CY 73 are being annotated "First Year". This procedure requires no action by local rating officials, Military personnel offices or AG sections and is being publicized for information only; the "First Year" annotation is being accomplished by HQDA upon receipt of reports.

5. ENLISTED PERSONNEL

Personnel management of legal clerks (MOS 71D) and court reporters (MOS 71E) is handled by the Administrative and Specialties Branch, General Support Division, Military Personnel Center, Washington, D.C. 20310. The office Symbol is DAPC-EPC-GA-AM. This was previously designated the Enlisted Personnel Directorate. Requests for personnel actions (e.g., compassionate reassignments, exceptions to reenlistment policy and assignment preferences) must be submitted in accordance with pertinent Army Regulations. Such actions should not be sent to PP&TO. We just aren't staffed to handle it. If you have tried to work it out with MILPERCEN and are unsuccessful then we will attempt to help you. Please try them first.

A representative of the Military Personnel Center recently advised PP&TO that there were insufficient requisitions for legal clerks graduating from the legal clerk course at Fort Benjamin Harrison. In other words, the personnel were available for assignment, but there was no place to send them. It is essential that your local personnel office submit requisitions for legal clerks.

6. New Warrant Officers. Congratulations to Mr. Bill E. Brewer of Ft. Riley, Kansas and Mr. Dennis G. Bailey of the JAG School who were promoted from SFC to W01 on 18 De-

ember 1972 and 26 January 1973 respectively.

7. Justification of Selectees for Attorney Positions: When requesting approval authority from The Judge Advocate General upon the professional qualifications of an applicant selected for a civilian attorney position the appointing officer of the agency concerned is responsible for evaluating the qualifications of selectee and for furnishing a statement justifying the selection of subject candidate over all other candidates referred to him. Selections of course will be made on the basis of merit and qualifications. This information will be submitted along with other documentation requested in CPR A8.2 and Letter JAGC, OTJAG, DA, subject, Employment of Civilian Attorneys, 1 April 1971.

8. Court Reporter Opening The Office of the Army Staff Judge Advocate, Fort Amador, Canal Zone, has an immediate need for a high speed court reporter, grade NM-8, salary range \$10,528.00-\$13,687.00, plus 15% overseas differential. The position requires the taking and preparation of records of courts-martial, administrative hearings, investigations, and boards of inquiry.

The Office of the Army Staff Judge Advocate is located on Fort Amador at the Pacific entrance to the Panama Canal. The position offers the tropical beauty of Panama while working in a newly remodeled and completely air-conditioned office, with easy access to all Central and South American countries.

Those interested in this position should contact:

Overseas Recruitment Center
 OCP DSCPER
 Department of the Army
 12th and Penn. Ave., NW
 Washington, D.C. 20315

TJAGSA ANNOUNCES THIRD LITIGATION COURSE

The local "Universal" party candidate for Congress has demanded the right to campaign on post. The Friends of the Human Environment contend that the new post housing area can't be constructed because it will damage a popular wooded picnic ground. That marijuana defendant convicted last month has petitioned the Federal District Court for a writ of habeas corpus. He claims the military never had jurisdiction to try him. The commander of the nearby college's ROTC unit has three of his cadets asserting conscientious objector claims and another contending that the entire disciplinary structure of the unit "fatally violates fundamental due process rights."

This commander's nightmare illustrates the current trend of federal litigation involving the commander of a military installation. These and other cases will be discussed at the 3rd Litigation Course given at the home of the Army lawyer, 14-18 May 1973. The objective of the course is to train military lawyers for pre-trial practice in federal courts. Although most federal court appearances are made by the appropriate United States Attorney, he will often rely solely on the analysis of facts and law prepared by the local JAG officer. Careful background preparation rather

than Perry Mason pyrotechnics wins cases for the military.

The Litigation Course provides an introduction and refresher course in both substantive and procedural aspects of contemporary military federal court law. Jurisdiction, motion practice, discovery and the drafting of investigative reports will be emphasized. "Open post" questions unanswered by the *Flower* case, environmental challenges, collateral attacks on courts-martial and administrative proceedings highlight the substantive side. Instructors will include judges, trial attorneys, members of OTJAG Litigation Division and Civil Law Division, TJAGSA. Enrollment is limited to 45 students; quotas have been allocated to the major commands. Inquiries concerning quotas should be addressed to your major command training office.

The course will be held at the Howard Johnson's Motor Lodge (phone 703-296-8121), beginning at 0830 hours, Monday, 14 May, and ending at 1500 hours, Friday, 18 May. Students are requested to make their own housing arrangements. Rates at Howard Johnson's are \$12.00 for singles, \$15.00 for double military occupants, and \$16.00 for families.

CURRENT MATERIALS OF INTEREST

Articles

Endicott, *Claims Against the United States—From The Military Point of View*, Law Notes, (Fall 1972) at 17. This article outlines the various claims statutes for the civilian attorney.

Wise, *Military Censorship Is To Censorship As . . . : Prior Restraint In The Armed Forces*, New York University Review of Law and Social Change, Vol. II No. 2 (Summer 1972) at 19. This article examines AR 210-10 and makes a case for its unconstitutionality as contrary to the First Amendment, vague and overbroad.

Young, *An Overview of the Military Criminal Justice System*, 19 Practical Lawyer 45 (Feb 1973). Gives a summary of the military criminal law system for the civilian attorney.

Military Law Symposium, 10 San Diego L. Rev. (1973). This symposium contains the following articles: Forward by Rear Admiral Merlin H. Staring, which outlines the military system of justice and its safeguards for the accused. Ervin, *Military Administrative Discharges: Due Process in the Doldrums*. This article discusses Senator Ervin's proposed legislation and the Bennett Bill, both of which would change the administrative discharge

system by limiting material to be considered by a board and increasing procedural safeguards. Quinn, *Prosecutorial Discretion: An Overview of Civilian and Military Characteristics*. Judge Quinn compares military and civilian discretion not to prosecute and criteria used in making that decision. He concludes that discretion not to prosecute is necessary in both systems to achieve the objectives of the criminal justice system. Hodson, *Courts-Martial and the Commander*, in the military justice system, and makes recommendations for change to remove the appearance of such influence. DeGiulio, *Command Control: Lawful Versus Unlawful Application*. Discusses the commanders role in the military justice system and suggests some limitations which should be placed on that role. Zillman, *In-Service Conscientious Objection: Courts, Boards and the Basis In Fact*. This article examines the administrative and judicial treatment of the CO in the military, with emphasis on factual court review of military administrative actions. Reforms in the system are suggested. Comment, *The Serviceman's Right of Free Speech: An Analytical Approach*, looks at restrictions on free speech in the military and concludes that some expansion of rights is needed. Comment, *Amnesty for Draft Evaders* discusses the Taft and Koch legislation. Comment, *Back-Pay Issues in the Military: O'Callahan v. United States*, looks at the issue of back pay upon a charge of discharge characterization in the context of the *O'Callahan* case.

Walton, *The United States Court of Military Appeals, Infantry* (March, April 1973) at 25, outlines the USCMA and its function for the line officer.

AR 27-10 Interim Change

DAJA-MJ message 1973/11618 effects the following changes in Article 15 procedures. The member now has the right to present evidence, call witnesses, and be accompanied by a spokesman. The member's request for witnesses' appearance must be limited to reasonably available witnesses, ordinarily those present at the installation and those whose appearance can be arranged without the expenditure of travel funds. Unless the commander allows, neither the member nor his spokesman may examine or cross-examine witnesses; the member or the spokesman may indicate to the commander what areas or issues they would like him to question the witness about. The spokesman need not be an attorney, his participation must be completely voluntary, and the Government will not assume liability for any travel fees or unusual costs to ensure his presence. Upon the member's request, the proceeding must be open to the public unless military exigencies or security interests preclude public disclosure. If the member appeals, the execution of any punishment other than reduction, pay forfeiture, or pay detention, is automatically stayed.

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