
REPORT ON THE INVESTIGATION OF ISSUES CONCERNING NOMINATIONS
FOR GENERAL OFFICER POSITIONS IN THE JUDGE ADVOCATE GENERAL'S
CORPS, U.S. ARMY

JANUARY 3, 1991.—Ordered to be printed

Mr. NUNN, from the Committee on Armed Services,
submitted the following

REPORT

Within each Military Department of the Department of Defense, the Judge Advocate General is responsible for managing and supervising uniformed lawyers, as well as many civilian lawyers. The Judge Advocate General is the senior military lawyer within each Military Department. General officers within the Judge Advocate General's Corps occupy positions of special trust and bear responsibility for the integrity of legal services, including the integrity of the military justice system, within the Military Departments.

During the 101st Congress, there were five nominations for general officer positions within the Judge Advocate General's Corps of the Army. Three were for brigadier general positions, and two were for major general positions.

After these nominations were referred to the Committee on Armed Services, the Committee received information concerning the promotion selection process which raised serious questions about the leadership and management of the Judge Advocate General's Corps in the Army. At the request of the Committee, the Department of Defense ordered an investigation into these matters. The investigation, which was conducted by the Deputy Inspector General of the Department of Defense, confirmed that there were serious irregularities in the promotion selection process.

The Committee's inquiry and the Department's investigation led to the following actions on these nominations: (1) as a result of information provided to the Committee, and at the request of the Department of the Army, one of the nominations for promotion to brigadier general was returned to the President by the Senate at the end of the 1st Session of the 101st Congress; this nomination was not resubmitted by the President when Congress reconvened in 1990; (2) as a result of flaws in the selection process documented in the Inspector General's report, the remaining two nominations for brigadier general were withdrawn by the President in September

1990; (3) as a result of issues raised in the Inspector General's report, the nomination for the position of the Judge Advocate General was returned to the President by the Senate at the end of the 101st Congress; and (4) the nominee for the position of the Assistant Judge Advocate General was confirmed by the Senate in October 1990.

BACKGROUND TO COMMITTEE ACTION

On July 19, 1989, the Committee received a letter from the Department of Defense which stated that three colonels in the Judge Advocate General's Corps would be nominated for promotion to the grade of brigadier general in the Army. The letter advised the Committee that the Department had reviewed "potentially adverse information" concerning one of the nominees, Colonel John R. Bozeman. The adverse information concerned Colonel Bozeman's role as Staff Judge Advocate (SJA) of the 3d Armored Division in connection with a series of courts-martial tainted by unlawful command influence. The letter stated that information "about Colonel Bozeman's role is inconsistent, and the Army found no basis for taking action against him." The letter concluded that the information was "not viewed as being serious enough to preclude favorable consideration of the recommended nomination." The Deputy Inspector General's investigation would subsequently conclude that the information in this letter was incomplete and misleading.

The Senate received the nominations of the three judge advocates for promotion to brigadier general on July 24, 1989. At that time, the nominations of Major General William K. Suter (to serve as the Judge Advocate General) and Brigadier General John L. Fugh (to serve as the Assistant Judge Advocate General) also were pending before the Committee.

During the summer of 1989, the Committee received information which indicated that the process for selecting the nominees for the three brigadier general positions was tainted. The Chairman and Ranking Minority Member of the Committee directed the Committee's staff to begin an informal inquiry.

On September 27, 1989, the Army Board for Correction of Military Records (ABCMR) reviewed allegations that one of the nominees, Colonel Bozeman, had improperly participated in a selection board that considered, and did not select, a major who had served as appellate defense counsel in the 3d Armored Division command influence cases. During the course of the hearing, the ABCMR received testimony from a number of present and former senior judge advocates, alleging that the leadership of the Judge Advocate General's Corps had failed to provide for timely and effective investigation of the command influence cases, and had ignored principles of accountability and responsibility with respect to the role of Colonel Bozeman in those cases. The ABCMR determined that Colonel Bozeman should not have participated as a member of the selection board, and ordered that the major be selected for promotion to lieutenant colonel.

On October 11, 1989, the Chairman of the ABCMR provided a memorandum to the General Counsel of the Army outlining the testimony that had been presented to the Board about the manage-

ment of the Army JAG Corps. The Chairman noted that he had served on the ABCMR for nearly 15 years, and "[o]f the perhaps thousands of cases I have reviewed during this period, I have never been so profoundly disturbed over any case as I am over [this] case," particularly in light of testimony from "senior and highly respected JAGC officers." He concluded his memorandum by recommending that "a complete investigation be conducted of JAG activities involving the 3d Armored Division command influence cases, TJAG organization and operations, the JAGC Officer Personnel and Promotion system, and the current recommended JAGC General Officer promotion list."

On October 20, 1989, the Vice Chief of Staff of the Army advised the Committee that he had directed the Inspector General of the Army to inquire into allegations about Colonel Bozeman resulting from the ABCMR hearing. No mention was made of the broader concerns about the Army JAG Corps raised by the Chairman of the ABCMR.

On November 16, 1989, the Deputy Assistant Secretary of Defense (Resource Management and Support) advised the Committee, taking note of the investigation concerning Colonel Bozeman, that upon completion of the investigation, the Department would provide "relevant information" to the Committee. As a result of that letter, the nomination of Colonel Bozeman was returned to the President at the end of the First Session of the 101st Congress. This action was taken under Senate Rule 31.6, which provides that "if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." Prior to adjournment of the 1st Session of the 101st Congress on November 22, 1990, the Senate agreed to waive Rule 31.6 with respect to a number of nominees, which did not include Colonel Bozeman. When the Senate reconvened on January 23, 1990, the President did not resubmit that nomination.

The transcript of the ABCMR hearing, as well as other information received by the Committee, indicated the possibility of serious irregularities in the selection process warranting an inquiry into the 1989 brigadier general selection board as well as a broader inquiry into the management of the Army Judge Advocate General's Corps. On December 1, 1989, the Chairman and Ranking Minority Member jointly wrote to the Secretary of Defense requesting that the DoD Inspector General conduct such an investigation. On January 23, 1990, the Secretary of Defense requested the Deputy Inspector General to conduct the investigation, and asked him to complete his report by April 30, 1990.

The Deputy Inspector General submitted his report to the Secretary of Defense on May 25, 1990. On June 18, 1990, the Secretary of Defense advised the Committee that he had received the report and that he would provide a copy to the Committee "after I have had an opportunity to give this important matter the serious consideration that it deserves." On August 13, 1990, the Secretary submitted the report, along with his comments, to the Committee on Armed Services.

Based upon the Deputy Inspector General's findings that the 1989 Brigadier General's Board was tainted, the Secretary recommended that the two remaining nominations for promotion to brigadier general be withdrawn. The President withdrew those nominations on September 10, 1990. Although the selection procedure was flawed, there was nothing in the Deputy Inspector General's report which reflected adversely on those two nominees.

The Deputy Inspector General's Report also did not contain any information adverse to Brigadier General Fugh. However, the report contained significant information concerning the role of Major General Suter in the processing of the 1989 brigadier general nominations. His actions are considered as part of the following discussion.

COMMITTEE ANALYSIS

The following represents the Committee's analysis of the facts as set forth by the Deputy Inspector General of the Department of Defense and the Committee's own conclusions based on those facts. The Committee also took into consideration applicable judicial opinions and the comments of Major General Suter and Colonel Bozeman made in response to the Deputy Inspector General's report.

I. UNLAWFUL COMMAND INFLUENCE

The history of military justice has been marked by the tension between: (1) the legitimate prerogative of military commanders to compel obedience to orders in dangerous, hostile, and arduous circumstances; and (2) the need to ensure that this command prerogative does not unlawfully influence the testimony, recommendation, or actions of the commander's subordinates. As the Court of Military Appeals noted in *United States v. Thomas*, 22 M.J. 388, 393-94 (CMA 1986):

Command influence is the mortal enemy of military justice. * * *

The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence. * * *

[C]ommand influence "involves 'a corruption of the truth-seeking function of the trial process.'"

Although the Uniform Code of Military Justice (UCMJ) has ancient roots, the modern Code dates from the post-World War II era. During that war, over 16 million men and women served in uniform, and over 2 million courts-martial were conducted. As evidenced in hearings before this Committee after World War II, the operation of the court-martial system was severely criticized by veterans groups, the bar, and the public. Various studies and reports documented serious deficiencies, particularly in terms of improper command influence on court members and witnesses. Detailed hearings and debates led to enactment of the UCMJ in 1950. Congress has amended the UCMJ a number of times since its enact-

ment, improving the efficiency of the military justice system while protecting the fundamental rights of servicemembers.

As presently structured, the military justice system provides commanders with broad powers which, in combination, are unavailable to any one person elsewhere under American law. For example, the commander has power to: (1) decide whether a servicemember will be tried by a court-martial or whether allegations of misconduct will be dealt with through nonjudicial or administrative proceedings; (2) determine which offenses will be tried; (3) choose the members of the court-martial (i.e., the fact-finders, who serve a function similar to jurors); and (4) review the trial, with authority to approve the findings and sentence or to substitute any less severe findings or sentence as a matter of law or clemency.

Members of a court-martial, unlike civilian jurors, are not randomly selected. Instead, under Article 25 of the UCMJ, the commander has broad authority to pick those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

The commander, by virtue of his office, also has vast powers over persons connected with courts-martial. For example, the commander frequently is in the rating chain over the staff judge advocate and the trial counsel (the prosecutor), as well as over many of the witnesses who might testify before a court-martial.

One of the commander's crucial powers is to decide which of the following types of courts-martial will hear the case:

A summary court-martial, which can impose a sentence of up to 30 days confinement.

A special court-martial, which can impose a sentence of up to six months confinement.

A special court-martial empowered to adjudge a bad conduct discharge.

A general court-martial, which can adjudge any punishment authorized by law for the offenses being tried.

Not all commanders may refer cases to all types of court-martial. In an Army division, for example, the authority to convene most courts-martial typically is reserved to the division and brigade commanders. Subordinate commanders are responsible for making recommendations on the disposition of charges, or taking non-criminal action (such as imposing nonjudicial punishment under Article 15). A superior commander may withhold the authority of a subordinate from acting in an individual case or classes of cases, but the superior commander may not influence the discretion of the subordinate in making a recommendation or taking action where that discretion has not been withheld.

Congress has established a number of statutory protections designed to ensure that these vast powers are administered in a fair manner, including: (1) a requirement that the accused be represented by qualified counsel; (2) ensuring that the accused has an equal opportunity to obtain witnesses; (3) a prohibition on unlawfully influencing the action of a court-martial; (4) a prohibition against failure to enforce or comply with the procedural requirements of the UCMJ; (5) establishment of a military judiciary rated through JAG rather than command channels; (6) right to elect trial by military judge, at the discretion of the accused; (7) review of all cases

involving a punitive discharge or confinement for a year or more by senior military judges on a service Court of Military Review; (8) establishment of an independent civilian tribunal, the Court of Military Appeals, to review decisions of the Courts of Military Review; and (9) discretionary power of the United States Supreme Court to review decisions by the Court of Military Appeals.

Congress has recognized that, as a practical matter, the most effective way to preclude unlawful command influence is through a professional Judge Advocate General's Corps within each of the Military Departments. By law, each Military Department has a Judge Advocate General, whose appointment is subject to confirmation by the Senate. Under Article 6 of the UCMJ, the assignment of judge advocates is made upon recommendation of the Judge Advocate General. Commanders, as a matter of law, are required "at all times [to] communicate directly with their staff judge advocates * * * in matters relating to military justice." In cases involving serious offenses, the commander may not refer the case to trial without receiving the advice of his staff judge advocate, and may not act on the results of the trial without receiving such advice.

Recognizing that a staff judge advocate in the field could face substantial difficulties in dealing with a commander unwilling to heed legal advice, Article 6 of the UCMJ expressly provides that "the staff judge advocate * * * of any command is entitled to communicate directly with the staff judge advocate * * * of a superior or subordinate command, or with the Judge Advocate General." Article 6 also requires that the Judge Advocate General or senior members of his staff "make frequent inspections in the field in supervision of the administration of military justice."

II. UNLAWFUL COMMAND INFLUENCE IN THE 3D ARMORED DIVISION

In a series of decisions beginning with *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) and culminating with *United States v. Thomas*, 22 M.J. 388 (CMA 1986), the appellate courts found unlawful command influence in the military justice system administered by the 3d Armored Division during 1982 as a result of a series of speeches by the division's Commanding General, Major General Thurman E. Anderson, which had been prepared with the assistance of his staff judge advocate, Colonel John R. Bozeman. An element of the speeches was devoted to testimony by commanders on behalf of servicemembers during the sentencing phase of courts-martial.

A court-martial is divided into two phases. During "findings," the court members determine whether the accused is guilty of the charged offenses (or any lesser included offenses). During "sentencing," if the accused has been convicted, the members determine the appropriate sentence within the range of punishments authorized in the Manual for Courts-Martial. If the accused has elected a judge-alone trial, both functions are performed by the military judge. The sentencing proceedings are adversarial, and much of the information is derived from testimony, particularly concerning the military record of the accused and the accused's potential for further useful military service.

The Commanding General's remarks

There are widely differing accounts of what the Commanding General said in his speeches, but there is general agreement that at least part of his remarks enunciated his "consistency" theory in which he expressed concern about "cases in which subordinate commanders had recommended trial by general or bad-conduct discharge special courts-martial, then testified during sentencing proceedings that the accused was a 'good soldier' who should not be discharged." *United States v. Treagle*, 18 M.J. at 650.

As emphasized by the courts, as well as by the Deputy Inspector General of the Department of Defense, the Commanding General's view of military justice was erroneous as a matter of law under the Uniform Code of Military Justice. His "consistency theory" was defective on at least four counts.

First, under the Uniform Code of Military Justice, as implemented by the President in the Manual for Courts-Martial, it is not inconsistent for a subordinate commander to recommend trial by a certain type of court-martial and then testify at trial that the accused should not be discharged. A general court-martial, for example, is empowered to adjudge a wide variety of punishments, ranging from forfeitures in pay, reduction in rank, confinement, discharge, and for certain offenses, death. There are no offenses, however, for which discharge is a mandatory punishment. Indeed, in the military justice system, the only mandatory punishment is for wartime spying under Article 106. One of the primary reasons for allowing the commander who convenes a court-martial to pick the members (as opposed to random selection of members) is to provide for selection of members whose military experience makes them "best qualified" to exercise the discretion necessary to adjudge an appropriate sentence.

Second, the Commanding General's "consistency theory" ignores the discretionary nature of sentencing in the military justice system. During the time the 3d Armored Division "consistency theory" speeches were given, the Manual for Courts-Martial specifically stated that "the determination of a proper punishment for an offense rests within the discretion of the court". The Manual also expressly noted that the Table of Maximum Punishments, which listed the maximum punishment for each offense under the UCMJ, "should not be interpreted as indicating what is an appropriate sentence in an individual case." The Manual stated that the punishment "should be determined after a consideration of all the facts and circumstances involved in the case, regardless of the stage of trial at which they were developed." The Manual specifically authorized the accused to introduce evidence in mitigation, including "particular acts of good conduct or bravery, and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a good servicemember." Manual for Courts-Martial, 1969 (rev. ed), paragraphs 75-76. Similar provisions are in effect today. Manual for Courts-Martial, 1984, R.C.M. 1001-1003.

Thus, it was and is perfectly appropriate for a subordinate commander recommending that charges be tried by general court-martial to believe that the soldier, if convicted, should be sentenced to

various punishments (including confinement) but to also believe that the soldier should be afforded the opportunity for further military service after punishment and rehabilitation—and to testify at trial as to that soldier's military record and potential for further service.

Third, the Commanding General's theory failed to take into account the impact that events subsequent to the forwarding of charges might have on the testimony of a subordinate commander. As recognized in the Manual for Courts-Martial, it is likely that a substantial amount of information relevant to sentencing may be developed at trial. Therefore, it is appropriate for a subordinate commander to believe, at the time charges are forwarded, that an allegation is so serious that a general or special court-martial should have the option of considering discharge—based upon all the evidence the court-martial will receive during trial—even if the subordinate commander personally believes at the time charges are forwarded that retention would be appropriate.

A related consideration is that a substantial period of time may pass between the forwarding of a subordinate commander's recommendation and the sentencing phase of trial. During that period, the commander may have an opportunity to form a view of a soldier's potential for further service that will lead the commander to testify at trial that the soldier should be retained.

Finally, it is important to note that even if the court-members vote to convict the servicemember, they might find the accused guilty of offenses that are less serious than those referred to trial. Thus, even if a subordinate commander believed on the basis of information available at the time charges were forwarded that a discharge should be considered, it is appropriate for the commander to take a different view at trial based upon the findings of the court-martial.

As noted in the Deputy Inspector General's report: "These concepts are basic and should have been well-known and understood by COL Bozeman in 1982."

The impact of the Commander General's remarks on his subordinates

As noted in the *Treacle* opinion, the Commanding General expressed his views before audiences composed of subordinate commanders and noncommissioned officers at least 10 times between April and December 1982. The problem was not only that he harbored an incorrect view of the law, but that he repeatedly disseminated his views with so little care for their content or impact that they eventually compromised the administration of military justice through the division.

The Army Court of Military Review, in the *Treacle* case, 18 M.J. at 650-51, discussed in detail the devastating impact of the general's remarks on his subordinates. According to a summary of one meeting, taken from the contemporaneous notes of a battalion commander, the general "took a dim view of the chain of command coming into a court-martial and offering testimony on behalf of the accused when the chain of command themselves had been the ones that had referred the whole case to the court." While some battalion commanders perceived the Commanding General to be encour-

aging recommendations for lower level courts-martial, others understood him to be discouraging favorable character testimony once a recommendation had been made for trial by a court-martial empowered to adjudge a punitive discharge.

Company commanders generally understood the Commanding General's remarks as discouraging recommendations for lower level courts-martial. According to one company commander's summary, the general "was tired of officers and noncommissioned officers preferring charges against soldiers, bringing them to court and then giving testimony as to their good character."

Noncommissioned officers (NCOs) who attended the meetings had a wide variety of perceptions about the general's message. One interpreted it as: "Don't recommend guys for court-martial, send them up there, and turn right around and be a character reference for them, saying they're good guys." Others viewed the message as one requiring NCOs to give testimony in support of commander's recommendations: "[I]f the commander * * * preferred charges against a soldier . . . then NCO's, particularly NCO's in that chain of command, should support him." Some even viewed the message as not only discouraging favorable testimony during sentencing, but also as discouraging testimony on behalf of an accused soldier on the issue of guilt or innocence.

According to the court in *Treakle*: "Many who attended these meetings also understood General Anderson to be prescribing a mandatory definition for the phrase 'good soldier', a definition which did not include those guilty of serious offenses. For example, [H]e had difficulty understanding why senior NCOs, people in key positions, could go in and testify on soldiers being good soldiers * * * when they had just been convicted of serious crimes. * * *" The court also noted that many recalled the Commanding General saying that these situations "made him angry and that he expressed his anger by his demeanor as well." The court observed: "Nearly everyone who heard him took his message seriously. * * * Some felt an implied threat and feared reprisal for those who did not comply."

In *United States v. Giarratano*, (unpub. Dec. 7, 1983), the first major trial court decision in the 3d Armored Division cases, the military judge summarized the impact of the Commanding General's remarks on the division:

The oral and written comments of Major General Anderson and the oral and written comments of his subordinates would logically cause members of the Third Armored Division, one, to believe that the chain of command who prefers a case presumably believes that the accused is guilty; and two, that the extenuation and mitigation testimony made by the accused's chain of command is: A, not meaningful; B, not credible; C, should be ignored; and D, once charged and convicted of a drug or sex offense, or other serious crime, the accused should be discharged. Taken together, these comments could reasonably cause an accused to be convicted quicker and the eventual sentence imposed to be greater. * * *

The convening authority's conduct and expressions * * * when viewed in its best light by taking the convening authority's own belief of what he said, * * * is still, one, a form of command influence; and two, legally incorrect. [Emphasis added.]

On January 25, 1983, the Command Sergeant Major of the 3d Armored Division disseminated a memorandum to NCOs which included the following interpretation of the Commanding General's theory: "Noncommissioned officers DON'T * * * Stand before a court-martial jury or an administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty." 18 M.J. at 651. When a member of the Army's Trial Defense Service brought this to the attention of Colonel Bozeman a month later, the SJA undertook a number of actions, including an attempt to limit distribution of the memorandum, an assessment of the impact of the letter on pending cases, and issuance of letters from the Commanding General and Command Sergeant Major noted the right of soldiers to have available witnesses testimony on their behalf.

These steps failed to correct the underlying problem. As noted by the Deputy Inspector General, Colonel Bozeman's attempts to stop or restrict dissemination of the Command Sergeant Major's letter met with "mixed results". The Commanding General's letter completely failed to correct his erroneous "consistency theory."

In December 1983, the military judge in *United States v. Girratano* made the following observations about the attempts at corrective action:

To date, no effective remedial action has been taken. The 4 March 1983 and 15 September 1983 retraction letters were not effective remedial action necessary to cure the taint caused by the comments of Major General Anderson and his subordinates. Further, the retraction letters did not receive the emphasis nor dissemination required to address the problem.

III. KEY JUDICIAL OPINIONS

During 1983, judge advocates assigned to the Army's Trial Defense Service gathered information about the impact of the convening authority's speeches on the administration of military justice in the 3d Armored Division. In December 1983, the military judge in *Girratano* ruled that the comments of the Commanding General and his subordinates constituted unlawful command influence. The judge undertook a number of remedial actions, including precluding the government from introducing any character testimony unfavorable to the accused and prohibiting the convening authority from reviewing the case.

In the first major appellate decision, *United States v. Treakle*, 18 M.J. 646 (ACMR 1984), the Army Court of Military Review affirmed the conviction but set aside the sentence on the basis of unlawful command influence. The court 18 M.J. at 653, made it clear that although they believed the convening authority had acted "in good faith," his actions were contrary to well-established principles of military law:

Correction of procedural deficiencies within the military justice system is within the scope of the convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of experience have demonstrated that the risks often outweigh the benefits.

The court also emphasized the vital role played by the convening authority's staff judge advocate in preventing unlawful command influence:

The balance between the command problem to be resolved and the risks of transgressing the limits set by the Uniform Code of Military Justice is to be drawn by the commander with the professional assistance of his staff judge advocate. Although the commander is ultimately responsible, both he and his staff judge advocate have a duty to ensure that directives in the area of military justice are accurately stated, clearly understood, and properly executed.

With respect to the specific problems in the 3d Armored Division, the court said:

In this case, General Anderson and his staff judge advocate neglected two important principles:

- (1) Announce policies and directives clearly. * * *
- (2) Follow up to see that directives are correctly understood and properly executed. * * *

In the following two years, there were numerous cases arising out of the 3d Armored Division in which the Army Court of Military Review ordered remedial action to correct the taint of unlawful command influence. In *United States v. Thomas*, 22 M.J. 388 (CMA 1986), which involved four separate cases, the Court of Military Appeals determined that the remedial actions taken by the Army Court of Military Review had been sufficient to permit affirmation of the post-remedial action findings and convictions. The court, 22 M.J. at 400, emphasized the importance of corrective action ordered by the Army court:

Lest our action [affirming these cases] be construed as a tacit acceptance of illegal command influence in military justice, we emphasize that the decisions of the court below were preceded by extensive remedial action at that level. Indeed, we commend that court for recognizing the inherent dangers caused by illegal command influence and for deciding each case in a manner consistent with legislative intent and prior case law.

The court singled out the Commanding General and his staff judge advocate for particular criticism:

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that *his legal advisor failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice.* (Emphasis added).

The court also emphasized the magnitude of the difficulties created by the effect of the unlawful command influence in the 3d Armored Division:

The delay and expense occasioned by General Anderson's intemperate remarks and by his staff's implementation of their understanding of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly—if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources—as well as those of this Court—required to identify and to surgically remove any possible impact of General Anderson's overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many—both in and out of the Armed Services—to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.

IV. FAILURE TO ASSESS RESPONSIBILITY AND ENSURE ACCOUNTABILITY

As noted by the Court of Military Appeals in *Thomas*: "Command influence is the mortal enemy of military justice." 22 M.J. at 393. Unlawful command influence is prohibited by Article 37 of the Uniform Code of Military Justice. Article 98 makes it a criminal offense to "knowingly and intentionally fail[] to enforce or comply with any provision of the [Uniform Code of Military Justice] regulating the proceedings before, during, or after the trial of an accused."

Despite these prohibitions, the leadership of the Judge Advocate General's Corps failed to ensure a thorough investigation of the command influence problem in the 3d Armored Division. As a result, no one was held accountable or responsible for the chain of events which, as described by the courts, undermined the administration of justice in the 3d Armored Division.

According to the Deputy Inspector General's Report, the only interest expressed by the leadership of the JAG Corps in investigating these matters was reflected in September 1983, while the initial cases were being litigated at the trial level, but before any decisions were rendered. Major General Hugh R. Overholt, who was then serving as the Assistant Judge Advocate General, wrote to the Commander-in-Chief, U.S. Army Europe (CINCUSAREUR), asking him to undertake "such inquiry and any corrective action or recommendations you deem appropriate."

CINCUSAREUR referred the matter to his SJA for "a preliminary inquiry to determine whether a formal investigation was required." According to the Deputy Inspector General's report, the SJA did not conduct an investigation. Instead, he confined his review to the documents that had been provided to him from Washington. As he told the Deputy Inspector General: "I was puzzled, frankly, as to why it [the request from Washington] was sent at all. It seemed like a cover-your-ass operation from the Pentagon so that they could tell people, well, we got USAREUR looking into it. That's always a good thing to say, 'USAREUR's looking into it.'" As a result, the USAREUR SJA relied on materials provided by Washington, and limited his investigation to the issue of whether the Commanding General's remarks could be "perceived" as amounting to unlawful command influence.

The USAREUR SJA did not conduct any further inquiry to obtain witnesses or collect documentary evidence, and did not look into the issue of whether the Commanding General or any member of his staff should be held responsible for unlawfully influencing courts-martial. On October 20, 1983, in his report to CINCUSAREUR, the USAREUR SJA recommended that there be a discussion of "lessons learned" with the Commander of the 3d Armored Division, and that no further investigation be directed. These recommendations were adopted.

In December 1983, the military judge in *United States v. Giarratano* found that there was unlawful command influence in the 3d Armored Division. The military judge also found that "[t]o date, no effective remedial action has been taken."

Despite the express finding in *Giarratano* of unlawful command influence, and of the failure to take effective remedial action, no action was taken by the leadership of the Army's Judge Advocate General's Corps to initiate an investigation into responsibility for the unlawful command influence.

From 1984 through 1986, the Army Court of Military Review decided numerous cases arising out of the 3d Armored Division. In several cases, such as *United States v. Treacle*, 18 M.J. 646 (ACMR 1984), the court expressly criticized the staff judge advocate of the 3d Armored Division by name for his failure to deal properly with the command influence problem. Judge Yawn (who concurred in the *Treacle* court's reversal of the sentence, but dissented from the court's ruling that the illegal command influence only extended to character witnesses), 18 M.J. 663, 664, indicated that this was more than a mistake in judgment:

My study of the evidence leads me to conclude that there was a conscious and unprecedented assault by General Anderson and members of his command upon the integrity of the military justice system during his tenure as commander. * * *

General Anderson * * * set out to preclude favorable testimony in extenuation and mitigation for soldiers convicted of serious offenses, and he apparently was assisted in this by his Staff Judge Advocate.

Judge Yawn also noted, 18 M.J. at 667, that judge advocates in the Army's Trial Defense Service were hampered in their attempt to investigate the command influence issue:

[T]he evidence I have discussed came primarily from the determined efforts of trial defense counsel * * *. This evidence was not easily gathered by them. Some witnesses who heard the General's remarks initially were free and open when discussing with defense counsel their perceptions of the General's lectures, but later became reticent after their supervisor or, in one case, the Staff Judge Advocate, had talked to them.

In *United States v. Thomas*, as noted earlier in this report, the Court of Military Appeals graphically described the scope of the command influence problem in the 3d Armored Division cases, and observed that either the SJA "failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable to unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice."

Despite the seriousness of these allegations, there was no investigation of either the Commanding General or his staff judge advocate. The failure to investigate is particularly disturbing in light of a policy letter, issued by the Secretary of the Army in 1981, which stated: "Any and all allegations of impropriety made against US Army general officers * * * will be reported to the Department of the Army and referred to the Deputy Inspector General for appropriate action." In this case, the Commanding General completed his tour at the 3d Armored Division, and served in another two-star assignment before retirement, with no official action to assess his accountability for the 3d Armored Division problem. Likewise, the 3d Armored Division SJA, Colonel Bozeman, completed his tour and moved on to other favorable assignments, without an official assessment of his responsibility for the command influence cases.

When the *Thomas* decision was issued by the Court of Military Appeals in September 1986, it not only represented the culmination of the appellate litigation, it also represented an unusually strong criticism of a staff judge advocate. The appellate courts could take no action to determine the precise nature of Colonel Bozeman's responsibility for the command influence problem or to hold him accountable. Their role was to decide specific appeals of courts-martial. Once they had determined that there was command influence, their role was limited to assessing the impact on specific cases. The duty to assess responsibility and ensure accountability rested with Colonel Bozeman's superiors, not the appellate courts.

The Deputy Inspector General's report underscores the failures of the JAG Corps leadership at that time:

MG [Major General] Clausen [the Judge Advocate General at the time the cases arose] and MG Overholt [the Assistant Judge Advocate General, and later Judge Advocate General] decided at an early stage to rely on the litigation process for resolution of factual issues arising from the 3d Armored Division cases. The focus of these cases was on

whether defendant's rights had been affected by unlawful command influence rather than on whether MG Anderson and COL [Colonel] Bozeman were personally responsible for that unlawful command influence. * * *

The need to resolve the command influence problem should have transcended individual case considerations. The failure to resolve the issues promptly in 1983 has resulted in lingering doubts and concerns which no remedy really can cure. * * *

[T]he facts demonstrate a singular failure of the JAG Corps senior leadership * * * to be self-critical. There could and should have been a review or investigation to evaluate COL Bozeman's role in this matter, and, even more important, to determine if there were systemic problems in the JAG Corps, and if there were lessons to be learned for the future. When the JAG Corps senior leadership failed to take that action, they, in effect, adopted a view that the 3d Armored Division command influence was a MG Anderson problem and not a staff judge advocate problem. * * *

The failures of the JAG Corps leadership were compounded in 1986 when the Court of Military Appeals issued its lead 3d Armored Division opinion in the *Thomas* case. At that time, Colonel Bozeman was serving as the Executive to the Judge Advocate General (Major General Overholt). The Executive position is considered to be one of the most prestigious positions in the JAG Corps. Colonel Bozeman's rater was Major General William K. Suter, the Assistant Judge Advocate General (and later, the nominee to be the Judge Advocate General).

To the extent that the JAG Corps leadership sought to rely on the litigation process to develop information about the 3d Armored Division command influence problem, that process was completed when the *Thomas* decision was issued. Despite the specific criticisms of Colonel Bozeman's performance in the *Thomas* opinion, neither Major General Overholt, nor Major General Suter (who was then serving in the position most directly responsible for officially recording an assessment of Colonel Bozeman's performance) took any action to investigate, to assess, or to ensure accountability for the breakdown of the Army's military justice system in the 3d Armored Division. In other words, the Army JAG Corps leadership first decided to rely on the litigation process, and then, when the completed process identified specific problems in the JAG Corps, decided to ignore the issues raised by the Court of Military Appeals.

V. THE 1989 BRIGADIER GENERAL SELECTION BOARD

Tampering with the membership of the selection board

In 1989, there were three potential general officer vacancies in the Judge Advocate General's Corps in the Army. There were 115 colonels in the zone of consideration, including Colonel Bozeman.

According to the Deputy Inspector General's report, the Army General Officer Management Office (GOMO) recommended that three of the five members of the board be members of the Judge

Advocate General's Corps, consistent with the Army's general policy for specialty branch selection boards. The Chief of Staff of the Army chose the Judge Advocate General of the Army, Major General Hugh Overholt, and two other Army judge advocate general officers, as well as two non-lawyers, to serve on the selection board.

At some point prior to the convening of the selection board, according to the Deputy Inspector General's report, Major General Overholt asked one of the other general officers for his opinion about several candidates, including Colonel Bozeman. The officer told Major General Overholt that Colonel Bozeman was "carrying a lot of baggage," referring to the 3d Armored Division command influence issues. Major General Overholt also asked him about two other candidates (one of whom was selected by the board), and the officer responded that he believed both were too junior to be serious contenders for promotion to brigadier general.

Subsequent to this conversation, Major General Overholt recommended to the Chief of Staff of the Army that one of the members of the selection board (the general officer with whom he had discussed the candidates) be replaced by another judge advocate general officer. The reason cited by Major General Overholt was that both officers recently had failed of selection for promotion to major general, and that the judge advocate he was recommending to serve on the board "is handling this information" better than the other. Based upon this recommendation, the Chief of Staff changed the composition of the board. The new member of the board was the judge advocate who, as USAREUR SJA, previously had recommended against further investigation of the 3d Armored Division command influence cases. As will be discussed in greater detail below, the board selected Colonel Bozeman for promotion to brigadier general.

In reviewing this matter, the Deputy Inspector General concluded: "[T]he replacement of [the judge advocate] on the Board raises a clear question of impropriety. . . . The evidence suggests that the Board's composition was adjusted in order to avoid a particular outcome, which in turn seriously compromises the integrity of the promotion process."

Failure to disclose the command influence issue in the pre-board screening process

The Army has an informal procedure, known as a pre-board screening, which is attended by representatives of the Army Inspector General, the Commander of the Criminal Investigation Command, the Judge Advocate General, the General Officer Management Office, and the Vice Chief of Staff. According to the Deputy Inspector General's report, the pre-board screening is intended to present the Vice Chief of Staff with "any and all potentially adverse information concerning the officers who will be considered by a particular Promotion Board." The Vice Chief of Staff then determines "whether any such information presented is sufficiently significant to be presented to the Board as adverse information" in accordance with the procedures designed to ensure fairness to all concerned (including notice to the individual, an opportunity

to respond, and provision of the information to all selection board members in writing).

The concept of adverse information is not limited to criminal misconduct. During the screening for the 1989 brigadier general selection board, for example, the personal bankruptcy of one candidate was raised, and the Vice Chief of Staff decided to provide that information to the Board. The candidate whose personal bankruptcy was brought to the attention of the board was not selected.

Because the Judge Advocate General, Major General Overholt, was serving as a member of the board, he was disqualified from participating in the pre-board screening. His place in the pre-screening process was taken by the Assistant Judge Advocate General, Major General Suter. According to the Deputy Inspector General's report, Major General Suter did not disclose to the Vice Chief of Staff Colonel Bozeman's involvement in the 3d Armored Division's command influence problems. The Deputy Inspector General's report strongly criticized this failure:

[A]ny and all potentially derogatory information should be brought up at such briefings to help preclude situations such as addressed in this report. Thus, we strongly believe MG Suter should have offered information on COL Bozeman at the pre-board briefing. * * * We believe MG Suter erred when he failed to present to [the Vice Chief of Staff] a description of COL Bozeman's relationship to the 3d Armored Division command influence issues.

An incomplete presentation to the selection board

Major General Suter's failure to disclose adverse information during the pre-board screening meant that the board was not presented with an accurate, written account of the command influence issue. Although the command influence issue was not discussed in any of the official materials presented to the board, it was discussed during the board's deliberations by Major General Overholt, who was serving as a member of the board. As described in the Deputy Inspector General's report, this created a situation in which the non-lawyer members of the board were forced to rely upon an incomplete, verbal presentation by Major General Overholt.

According to the Deputy Inspector General's report, when the board met, Colonel Bozeman emerged as one of the leading candidates. Major General Overholt, as a member of the board, discussed the 3d Armored Division matter, but did so in a way that led the non-lawyers on the Board to believe that Colonel Bozeman had no responsibility for the command influence problem. The President of the board, for example, told the Deputy Inspector General that Major General Overholt had advised the selection board "that what [COL] Bozeman had done was probably about right and that the action taken by the Commander and the Sergeant Major was perhaps independent, or they ignored advice or acted in a way that he had no control over." As the Deputy Inspector General's report concluded, "the information presented to the Board cast COL Bozeman's role in the 3d Armored Division command influence problem

in a favorable light, and * * * criticisms of COL Bozeman were discounted."

The Deputy Inspector General's report notes that "there was no claim, and we found no indication, that Colonel Bozeman was not competitive with the other candidates on the basis of his military record, excluding the 3d Armored Division and the [Army Board of Correction for Military Records] matters. His military personnel record, as it was considered by the [Selection] Board, was outstanding." The problem was that, as a result of the failure of the Army JAG Corps leadership to conduct any meaningful investigation of, or to assess his responsibility and ensure accountability for, the 3d Armored Division matter, there was not a proper assessment as to what information should have been presented to the selection board in order to ensure an accurate evaluation of Colonel Bozeman's entire record.

Staffing the nominations

After the board met, the General Officer Management Office submitted the nominations to the Army's Office of General Counsel for review, and was informed by the office of the 3d Armored Division command influence cases. The memorandum from the General Counsel's office noted that there had been allegations of unlawful command influence, but that information about Colonel Bozeman's role was "inconsistent" and that "[n]o basis was found for taking any action against COL Bozeman." As noted in the Deputy Inspector General's report, the memorandum was misleading because "it conveyed a message that the evidence was inconsistent and, therefore, unpersuasive, and it suggests that some inquiry was held that led to the conclusion that there was no basis for action. * * * [N]o one * * * in the Army ever undertook such a review."

The memorandum, despite its reassuring tone, caused Lieutenant Colonel Stephen R. Smith, Chief of the General Officer Management Office, to ask Major General Suter about the cases. According to Lieutenant Colonel Smith's notes of the conversation, Major General Suter said that Colonel Bozeman "did nothing wrong. Cases were looked at '400' ways and he [Colonel Bozeman] was [the] only voice of reason. Defense soiled Bozeman. No action because no basis."

The Deputy Inspector General's report notes: "LTC Smith recalled that, during the telephone conversation, MG Suter indicated that COL Bozeman had advised his commander properly, that COL Bozeman had taken the proper steps, and that, although it was an unfortunate situation, it was COL Bozeman who had followed through to ensure that service members' rights were protected." The report also notes that Lieutenant Colonel Smith "recalled that MG Suter had 'put [his] mind at ease' through his responses that the board had been aware of and had considered the situation, that the 3d Armored Division matters should not preclude COL Bozeman's promotion, and that, in fact, the way COL Bozeman had handled himself in the 3d Armored Division situation only went to prove that he is general office material."

The nominations were then forwarded through the Army to the Secretary of Defense. The nominations were accompanied by a memorandum which noted that there had been allegations of un-

lawful command influence, but that information about Colonel Bozeman's role was "inconsistent" and that "the Army found no basis for taking any action against him." As noted above, the Deputy Inspector General concluded that the memorandum did not accurately portray the command influence cases, and was misleading in implying that there had been an investigation of Colonel Bozeman's role.

Although incomplete and misleading, the memorandum triggered concern within the Office of the Secretary of Defense (OSD). The Deputy Assistant Secretary of Defense (Resource Management and Support) asked Major General Suter to brief him on the issue. As noted in the Deputy Inspector General's report, the Deputy Assistant Secretary "came away from the meeting with the impression that the question of COL Bozeman's responsibility for command influence in the 3d Armored Division had been thoroughly investigated and that COL Bozeman's actions were found not to warrant censure."

As a result of the deficiencies in the staffing process, the Deputy Inspector General's report concluded that responsible officials were not provided with the information they needed to make a decision on selecting Colonel Bozeman for promotion:

[W]e do not believe that the promotion board, Army officials, or other Department of Defense officials had sufficient information before them about his actions in the 3d Armored Division to make that judgment.

VI. MAJOR GENERAL SUTER'S COMMENTS ON THE INSPECTOR GENERAL'S REPORT

Major General Suter was provided with an opportunity to comment on the Deputy Inspector General's report, and he submitted comments to the Secretary of the Army on July 2, 1990. Those comments were forwarded to the Committee by the Department of Defense on August 13, 1990, and were considered carefully by the Committee in reviewing the Deputy Inspector General's report. Rather than mitigating concern over the issue raised by the Deputy Inspector General, key elements of Major General Suter's comments underscore the problems identified in the Deputy Inspector General's report.

In his comments, Major General Suter attempted to deflect personal responsibility for the failure to assess responsibility and ensure accountability for the 3d Armored Division cases. He noted that the cases arose in 1982 and 1983, and that he was not part of the leadership until August 1, 1985. He observed that his predecessors decided to leave "further investigation to the military justice litigation process." He also noted: "I do not now question that an independent investigation of Colonel Bozeman's involvement in and responsibility for the situation in 3rd Armored Division would have been desirable or appropriate. Indeed, as late as 1985, when I became the Assistant Judge Advocate General, I raised this possibility with MG Overholt. He rejected it."

When the *Thomas* decision was issued in 1986, Major General Suter was the Assistant Judge Advocate General, the second highest officer in the Army JAG Corps, and was Colonel Bozeman's

rater. Despite the specific criticisms of Colonel Bozeman in the *Thomas* case, the Army JAG leadership, including Major General Suter, took no action to assess responsibility or ensure accountability. This is of particular concern in light of the leadership's apparent decision to permit the issues to be developed through the litigation process instead of through administrative investigation. Having decided to rely upon the litigation process for such investigation, it was incumbent upon the leadership to take action when specific deficiencies were identified by this process. The failure of the leadership, including Major General Suter, to do so is inexcusable.

Major General Suter's explanation for his failure to disclose the 3d Armored Division cases during the Vice Chief of Staff's pre-board screening also is troubling. In his comments on the Deputy Inspector General's report, Major General Suter stated that it "never occurred" to him that he should "raise COL Bozeman's involvement in the 3d Armored Division cases as part of the pre-board screen," based on his "understanding of COL Bozeman's role in the 3rd Armored Division cases, and on the nature of information normally given as part of the pre-board screen." He noted that, in his view, the goal of the pre-board screen was "to determine if there are completed investigation reports concerning the officers . . . that are adverse, relevant and material. The presence of a JAGC general officer at the screening board was, in my mind, for the purpose of providing legal advice concerning the documents presented to the group." He added: "Even if I held the personal opinion that Colonel Bozeman had committed misconduct, I question the propriety of bringing up such a matter in this way [to the pre-screening board] in the absence of any documented finding to that affect. . . . I do not believe it would have been appropriate for me to try to communicate such matters to the board—of which I was not a member. These were matters for the members themselves to raise, as they were instructed in the MOI [Memorandum of Instruction.]"

The first problem with Major General Suter's explanation is that there were official documents, including the opinion in the *Thomas* case, which were adverse, relevant, and material, and which could have, and should have, been presented to the Vice Chief of Staff of his consideration. Second, to the extent that more detailed findings were not available, the fault lay with the Army JAG Corps leadership, including Major General Suter, for not ensuring that such an investigation was undertaken. Third, the issue was not, as Major General Suter implies, whether he would communicate his personal views directly to the selection board; rather, the issue was whether he would provide his client, the Vice Chief of Staff, with information necessary to permit his client to decide whether such information should be transmitted to the selection board under established procedures (requiring a written communication shared with all board members, with an opportunity for the affected officer to submit a rebuttal). Fourth, Major General Suter's narrow view of the information that should have been presented to the pre-screening process do not reflect the views of his client, the Vice Chief of Staff, who told the Deputy Inspector General "that he would have liked for the information to have been brought up at

the pre-board screening briefing." Fifth, Major General Suter apparently decided that the selection board should learn about the 3d Armored Division cases from the members of the selection board (i.e., the judge advocate corps members of the selection board) rather than as a result of a decision by the Vice Chief of Staff as to what information should be provided to the selection board.

Finally, his explanation is inconsistent with his other statements about the post-board review process. As noted earlier in this report, after the selection board met, the nominations were accompanied within the Department of Defense by a memorandum which described the 3d Armored Division cases in a manner described by the Deputy Inspector General as "misleading." In the course of discussing the memorandum, Major General Suter explained the inclusion of information about the 3d Armored Division cases on the basis that "it was appropriate to alert decisionmakers of the existence of a potential source of controversy." Major General Suter's recognition that it was appropriate to raise Colonel Bozeman's involvement in the 3d Armored Division cases as part of the post-board staffing process underscores the inadequacy of his justification for his failure to alert the key decisionmaker in the pre-board screening process—the Vice Chief of Staff—as to information which should have been considered for submission to the selection board.

The purpose of the screening board was to provide the Vice Chief of Staff with information, and permit the Vice Chief to decide what should be presented to the selection board. As the legal representative to the screening board, Major General Suter was uniquely positioned to bring the *Thomas* case to the attention of the screening board, so that his client—the Vice Chief of Staff—could make an informed decision as to whether the information should be presented to the selection board. In failing to do so, he withheld information necessary for his client to make such an informed decision.

Major General Suter's comments to the post-board staffing process raise additional concerns. Major General Suter noted that Major General Overholt, who was nearing retirement "tasked me to 'move' the selections through the Pentagon." Major General Suter added that "once the board made its selections, I believed it was my duty to support the selections, including Colonel Bozeman's." Major General Suter's responsibility during the post-board process, however, was not to the selection board in general or Major General Overholt in particular. His client was the Secretary of the Army. It was Major General Suter's duty, as the senior uniformed lawyer responsible for providing legal advice on these nominations, to ensure that his client was fully and completely informed of all information in his possession relevant to a decision that the client must make. In this case, that decision was whether the Secretary of the Army should transmit the selection board report to the Secretary of Defense, and the recommendations the Secretary of the Army should make to the Secretary of Defense concerning the individuals whose names were on that report. Because Major General Suter perceived that his primary duty was to the selection board rather than to the Secretary of the Army, he failed to provide the Secretary with the full range of information

which the Secretary was entitled to receive from the senior uniformed lawyer responsible for the matter.

CONCLUSIONS

The Secretary of the Army, in his Memorandum of Instruction, told the 1989 brigadier general selection board that—

You will endeavor to recommend the officers who have consistently demonstrated the highest standards of integrity, personal responsibility and professional ethics. * * *

The board was not able to make its own determination as to whether Colonel Bozeman met that standard because those who knew of the command influence cases, and who were in position to assess accountability and responsibility, failed to do so. Likewise, those who reviewed the nomination after the selection board met also were not provided with the information that was necessary to assess the fitness and qualifications of the nominee.

The responsibility for this failure rests with those lawyers, including Major General Overholt and Major General Suter, who were aware of the 3d Armored Division cases but failed to give a complete or timely account to those responsible for the nomination.

As noted in the Deputy Inspector General's report, the leadership of the Army JAG Corps was uniquely positioned to ensure that adequate information was set forth in Colonel Bozeman's military record, disclosed to the selection board, and provided to reviewing officials. The Committee is particularly concerned that the leadership repeatedly failed to fulfill its obligations to assess responsibility, ensure accountability, and provide the selection process with appropriate information.

The 3d Armored Division command influence cases represented a major breakdown in the administration of military justice. Yet the Army JAG Corps leadership failed to ensure that there was a thorough investigation to assess responsibility and ensure accountability.

In 1986, the Court of Military Appeals issued the *Thomas* decision, which specifically criticized the role of Colonel Bozeman, as the 3d Armored Division SJA, in failing to deal with the command influence cases. At that time, Colonel Bozeman was the Executive to Major General Overholt, the Judge Advocate General. Major General Suter, the Assistant Judge Advocate General, was Colonel Bozeman's rater. Neither Major General Overholt nor Major General Suter took any action to assess responsibility or ensure accountability.

The failure of the Army JAG Corps leadership to assess responsibility and ensure accountability after the *Thomas* decision is especially serious in light of the earlier decision by the JAG Corps leadership to permit the issues to be developed through appellate litigation rather than through an investigation. Having relied on the appellate process, the inability or unwillingness of the Army JAG leadership to initiate action was inexcusable after the appellate courts had specifically noted Colonel Bozeman's failure to ensure the integrity of the military justice system.

In April 1989, Major General Overholt was designated to serve on the brigadier general selection board, along with two other judge advocate general officers and two non-lawyers. Major General Overholt discussed the merits of several candidates, including Colonel Bozeman, with one of the general officers, and then arranged to have him removed from the board. According to the Deputy Inspector General's report: "The evidence suggests that the Board's composition was adjusted in order to avoid a particular outcome, which in turn seriously compromises the integrity of the promotion process."

In May 1989, Major General Suter represented the Judge Advocate General's Corps during the pre-board screening prior to the convening of the 1989 brigadier general selection board. As Colonel Bozeman's rater at the time the appellate courts had found that Colonel Bozeman had failed to ensure the integrity of the military justice system, and as a senior judge advocate whose service included a period as Chief Judge of the Army Court of Military Review, he was well-aware of the appellate cases that had specifically discussed Colonel Bozeman's role. As the legal representative to the pre-screening board, he was uniquely situated to bring to the pre-screening board's attention knowledge of adverse information about one of the candidates who would be considered by the board. That information was well-known throughout the Judge Advocate General's Corps because of the published court opinions in the 3d Armored Division cases. He improperly failed to bring these matters to the attention of the screening board.

Although the records presented to the board contained nothing about the 3d Armored Division cases, Major General Overholt, as a member of the board, presented the board with a description of the cases. According to the Deputy Inspector General's Report, Major General Overholt's presentation "cast COL Bozeman's role in the 3d Armored Division command influence problem in a favorable light, * * * [and] criticisms of COL Bozeman were discounted."

In May and June 1989, Major General Suter was called upon to brief Army and OSD officials responsible for the nomination about Colonel Bozeman's role in the 3d Armored Division cases. His briefings created the erroneous impression that the question of Colonel Bozeman's responsibility for command influence in the 3d Armored Division has been thoroughly investigated and that his actions were found not to warrant censure. According to the Deputy Inspector General, "the oral briefings given by MG Suter gave a benevolent account of COL Bozeman's role in the 3d Armored Division. MG Suter's reported account[s] are not consistent with the court cases."

In summary, the leaders of the Army JAG Corps engaged in a continuing pattern of conduct involving a failure or refusal to meet their professional responsibilities. The 3d Armored Division cases represented a major breakdown in the administration of military justice, involving one of the fundamental principles under the UCMJ—the prohibition against unlawful command influence. The leadership of the Army JAG Corps, however, failed to ensure that there was a timely investigation. Although the leadership purport-

ed to rely on the litigation process to develop the issues, they then chose to ignore issues concerning Colonel Bozeman specifically raised by the appellate courts. The leadership compounded these errors by withholding vital information during the pre-screening process for the 1989 brigadier general's board, and by presenting misleading information about the 3d Armored Division cases during the selection board proceedings and the post-board review process.

The Judge Advocate General is the senior uniformed lawyer in each Military Department. Each Military Department is responsible for procurement, personnel, and management issues of enormous importance to the men and women of the Armed Forces, to the Department of Defense, and to the Nation. It is the responsibility of the Judge Advocate General, with respect to matters entrusted to uniformed lawyers, to ensure that the Military Department's activities are conducted in accordance with the spirit as well as the letter of the law. In the high pressure environment that characterizes decisionmaking in military affairs, the Judge Advocate General plays a crucial role as the conscience of the civilian and military leadership, and as an example to military lawyers stationed throughout the world.

As the Court of Military Appeals observed in the *Thomas* case, the 3d Armored Division command influence cases were damaging not only to the individual servicemembers involved in those cases, but to the military justice system in general. The leadership of the JAG Corps was presented with a series of opportunities to address the issue of accountability and responsibility for those cases within the Judge Advocate General's Corps. In each case, they failed to provide their clients with the advice necessary to make a proper assessment of a potential nominee for the high honor of being selected as a general officer.

The integrity of the promotion process is essential to the integrity of the officer corps. The Judge Advocate General must ensure that the promotion process is administered in a fair and equitable manner. Those responsible for the JAG Corps leadership failed to fulfill that role with respect to promotions within the JAG Corps, which cast serious doubt upon their ability to serve that function for the Army as a whole. This is a matter that requires the immediate attention of the civilian leadership of the Department of the Army and the Department of Defense.

The Committee notes that the Deputy Inspector General recommended, and the Secretary of Defense endorsed, a number of actions to address the problems identified in the investigation, including:

- Review of policies and procedures for investigating allegations against judge advocate personnel.

- Review of training for commanders on command influence problems, with particular emphasis on lessons learned from the 3d Armored Division issue.

- More precise specification of the types of information that are appropriate for pre-selection board screenings.

- Review of the Deputy Inspector General's report by the Secretary of the Army to determine what other actions might be

appropriate with regard to the leadership and management of the JAG Corps.

The 3d Armored Division cases and subsequent actions by the leadership of the JAG Corps do not reflect well on an organization that should serve as a model of fairness and integrity for the rest of the Army. The steps recommended by the Deputy Inspector General should result in a thoroughgoing review of the delivery of legal services within the Army. The Committee will monitor this situation very closely in the next year to ensure that timely and effective reforms are undertaken in the management of the Army JAG Corps.

APPENDIX

[The following was released by the Department of Defense under the Freedom of Information Act and reflects redactions made by the Department of Defense.]

DEPARTMENT OF DEFENSE
OFFICE OF THE INSPECTOR GENERAL

REPORT OF INVESTIGATION

CASE NUMBER

S90C00000077



DATE

May 25, 1990

Investigation of Issues Relating to the Promotion
Nomination of Colonel John R. Bozeman, U.S. Army
Judge Advocate General Corps (JAGC) and Related Matters

(27)

ERRATA

The following line was inadvertently omitted from the bottom of page 12 of the original report:

exact words used by MG Anderson, he had gotten the distinct

TABLE OF CONTENTS

Introduction.....	Page 1
Organization of Report.....	ii

PART ONE.

UNLAWFUL COMMAND INFLUENCE

I. INTRODUCTION.....	1
II. FACTS.....	2
A. Evolution of the Topic.....	2
B. COL Bozeman's Notes.....	5
C. MG Anderson's Briefings of Subordinates.....	5
D. NCOs and the Soto Case.....	6
E. MAJ Buchanan.....	7
F. LTC Mueller.....	8
G. CPT Marchessault.....	9
H. The CSM Haga Letter.....	9
I. TDS Informal Inquiry.....	11
J. Stanley Discovery Request.....	15
K. COL Bozeman's Permanent Change of Station (PCS).....	16
L. CSM Reid DF.....	17
III. COURT DECISIONS.....	17
A. <u>U.S. v. Giarratano</u>	17
1. LTC Johnson and LTC Johnson.....	17
2. Special Findings.....	18
B. <u>U.S. v. Treakle</u>	20
C. <u>U.S. v. Thomas</u>	23
IV. ANALYSIS AND CONCLUSIONS.....	24

PART TWO.

OTJAG RESPONSE TO UNLAWFUL COMMAND INFLUENCE
AT 3D ARMORED DIVISION

I. INTRODUCTION.....	27
II. FACTS.....	27
A. MG Overholt Letter.....	27
B. BG Holdaway Response.....	27
C. Decision Not to Investigate.....	31
D. Army Staff Reactions and Corrective Measures..	33
1. GEN Wickham Note.....	33
2. Response to BG Hansen.....	34
E. Defense Appellate Division (DAD) Findings-- Lack of Implementation.....	34

F. BG Holdaway's Response to DAD Findings.....	35
G. OTJAG Response to The Army Chief of Staff.....	35
III. ANALYSIS AND CONCLUSIONS.....	36

PART THREE.

MAJ ██████████ NONSELECTION
 BY THE 1988 JAG CORPS LIEUTENANT COLONEL SELECTION BOARD
 AND REQUEST FOR PROMOTION RECONSIDERATION

I. INTRODUCTION.....	38
II. FACTS.....	38
A. Nonselection by 1987 Board.....	38
B. Nonselection by 1988 Board.....	38
C. Nonselection by 1989 Board.....	39
D. MAJ ██████████ Request for Promotion Reconsideration.....	39
E. Military Personnel Law Branch Opinion.....	40
F. ODCSPER Decision.....	41
G. MG Surut's Letter.....	41
H. Second ODCSPER Decision.....	42
I. ABCMR Decision.....	42
J. ABCMR Record.....	43
K. 1988 Promotion Board Record.....	45
L. COL Bozeman's Actions on the 1988 JAG Corps Lieutenant Colonel Promotion Board.....	46
M. No Direct Evidence that COL Bozeman Knew of MAJ ██████████ Role in 3d Armored Division Cases.	46
N. Circumstantial Evidence Relating to Col Bozeman's Possible Knowledge of MAJ ██████████ Role in 3d Armored Division Cases.....	46
III. ANALYSIS AND CONCLUSIONS.....	47

PART FOUR.

THE 1989 JAG CORPS BRIGADIER GENERAL PROMOTION BOARD

I. INTRODUCTION.....	50
II. FACTS.....	50
A. Membership on the 1989 JAG Corps Brigadier General Promotion Board.....	50
B. Pre-board Screening by the Vice Chief of Staff.	54
C. Relationship of MAJ ██████████ Request for Reconsideration on Pre-board Screening Process.	55
D. Instructions to the 1989 JAG Corps Brigadier General Promotion Board.....	56
E. Board Deliberations.....	60

b7c

III. ANALYSIS AND CONCLUSIONS..... 63

PART FIVE.

STAFFING THE 1989 JAG CORPS BRIGADIER GENERAL
PROMOTION NOMINATIONS

I.	INTRODUCTION.....	66
II.	FACTS.....	66
	A. Identification and Description of Adverse Information.....	66
	B. Army Management Response to Adverse Information	67
	C. Army Staffing of the Nominations.....	69
	D. Office of the Secretary of Defense Staffing of the Nominations.....	72
	E. Submission of Nominations to Senate Armed Services Committee.....	76
III.	ANALYSIS AND CONCLUSIONS.....	76

PART SIX.

ALLEGED OTJAG MANAGEMENT IMPROPRIETIES

I.	INTRODUCTION.....	79
II.	FACTS.....	79
	A. Selection of COL Bozeman to be Executive Officer (XO), OTJAG.....	79
	B. Alleged Improprieties by COL Bozeman as XO.....	79
	1. Influencing ACOMR Judges.....	79
	2. COL Bozeman's Assignment as SJA for the 18th Airborne Corps.....	80
	3. COL Bozeman's Relationship with MG Overholt	80
	C. TJAG Obstruction of DAD.....	80
	1. MG Clausen's Opposition to the DAD Proposal to Send a Fact Finding Team to Europe.....	80
	2. The "Illegal" Order.....	80

PART SEVEN.

SYSTEMIC PROBLEMS IN THE JAG CORPS

I.	INTRODUCTION.....	83
II.	GENERAL OBSERVATIONS.....	83

L9000000XXX

May 25, 1990

U.S. ARMY JUDGE ADVOCATE
GENERAL CORPS ISSUES

INTRODUCTION

This investigation was initiated at the request of the Secretary of Defense. The Secretary's request was based on a December 1, 1989, letter from the Chairman and Ranking Minority Member of the Committee on Armed Services, United States Senate (hereinafter referred to as the Senate Armed Services Committee or SASC). In their letter, Chairman Sam Nunn and Senator John W. Warner expressed their concern "about the overall management and leadership of the Army Judge Advocate General's Corps (JAG Corps) and the Army's own system of oversight in this area." They requested an investigation by the Inspector General, Department of Defense, into issues related to (1) the promotion of Colonel (COL) John R. Bozeman to the grade of brigadier general (BG) in the JAG Corps, (2) alleged flaws in JAG Corps management over an extended period, (3) oversight of the JAG Corps, and (4) processing senior officer promotions. On January 23, 1990, the Secretary asked the Deputy Inspector General to investigate and to be as responsive as possible to the Senators' concerns. The Honorable Susan J. Crawford, Inspector General, Department of Defense (IG, DoD), did not participate in this investigation except as a witness because of her prior service as General Counsel, Department of the Army.

One of the major issues addressed in this inquiry was first presented in testimony before the Army Board for the Correction of Military Records (ABCMR) in the case of Major (MAJ) [REDACTED]. In an October 11, 1989, memorandum to Ms. Crawford, the Chairman of the ABCMR described the impressions he had gathered from the testimony. The Vice Chief of Staff of the Army, then directed the Army Inspector General (DAIG) to investigate. The initial scope of the investigation focused on COL Bozeman, and was later expanded to cover the subject matter addressed by Chairman Nunn and Senator Warner in their letter of December 1, 1989. The DAIG investigators suspended their work when the Secretary of Defense requested this investigation.

The DAIG investigators, COL [REDACTED] and Lieutenant Colonel (LTC) [REDACTED] transferred all of their notes and interview transcripts to the OIG, DoD. They also explained the steps they had taken, the issues they had identified, and the evidence they had gathered. Their assistance in the early stages of our investigation was invaluable. COL [REDACTED] and LTC [REDACTED] interviewed a number of the key witnesses in this case. We have made no distinction between interviews conducted by the DAIG investigators and those that we conducted.

This investigation has its origins in a problem of command influence affecting military justice in the Third (3d) Armored

b7c

Division. Major General (MG) Thurman E. Anderson (now retired), Commanding General of the 3d Armored Division, made statements beginning in April, 1982, that led to challenges of about 350 courts-martial based on allegations of improper command influence exerted by MG Anderson. Litigation of these issues began in 1983, and resulted in decisions by the U.S. Army Court of Military Review (ACMR) and the U.S. Court of Military Appeals (CMA). Numerous cases were returned to the trial court level for hearings on the impact of command influence on the original trial, rehearings on sentencing, and rehearings on the merits. The 3d Armored Division command influence cases were unprecedented, both in terms of the number of cases affected and in the burdens created for the Army military justice system. Virtually all of the fact finding prior to the DAIG investigation was accomplished through the efforts of the litigants, primarily Trial Defense Service (TDS) attorneys on behalf of court-martial defendants.

We and the DAIG investigators took taped sworn testimony from 40 witnesses. In addition, we examined a considerable amount of testimony and many affidavits, pleadings, and decisions from the 3d Armored Division command influence litigation. We reviewed records of investigations of a military justice administration problem in the First (1st) Armored Division during the 1982-1983 timeframe. We also examined personnel records, records of JAG Corps Promotion Boards, and the record in the Major (MAJ) [REDACTED] ABCMR case.

ORGANIZATION OF REPORT

This report is divided into seven parts. Part One discusses the existence of unlawful command influence at the 3d Armored Division--how it developed and how it was handled--with particular concern for the role played by COL Bozeman, the Staff Judge Advocate (SJA) at the 3d Armored Division at the time.

Part Two considers the response of the Army Office of the Judge Advocate General (OTJAG) to the unlawful command influence problem at the 3d Armored Division including efforts to investigate, contain, and remedy the situation.

Part Three focuses on the propriety of COL Bozeman's participation in a 1988 JAG Corps Lieutenant Colonel Selection Board which did not promote an officer, MAJ [REDACTED] who had been a significant participant in court cases on behalf of defendants who were critical of MG Anderson and COL Bozeman.

Part Four concerns the 1989 JAG Corps Brigadier General Promotion Board--including its formation, members, instructions, and recommendations.

Part Five addresses the manner in which the nominations made by the 1989 JAG Corps Brigadier General Promotion Board were

staffed within the Department of Defense and transmitted to the Senate.

Part Six deals with a number of additional allegations of management improprieties within the OTJAG.

Part Seven is a brief overview of allegations and perceptions of systemic management problems in the JAG Corps.

There are no recommendations in the report. Recommendations will be made to the Secretary of Defense in a separate memorandum.

PART ONE

UNLAWFUL COMMAND INFLUENCE

I. INTRODUCTION

On February 12, 1982, MG Thurman E. Anderson (now retired), formerly Commanding General, 2d Armored Division (Forward), became the Commanding General of the 3d Armored Division. The Staff Judge Advocate (SJA) at the 3d Armored Division was LTC John R. Bozeman (now Colonel (COL) Bozeman), who had been SJA there since June 1981. Shortly after assuming command, MG Anderson, with the assistance of notes prepared by COL Bozeman, began to address subordinates on issues of military justice. His comments were later determined by military courts to have introduced unlawful "command influence" into the court-martial process, requiring the review of hundreds of court-martial cases at the 3d Armored Division.

As the Court of Military Appeals said in U.S. v. Thomas, 22 M.J. 388 (CMA 1986):

Command influence is the mortal enemy of military justice....The exercise of command influence tends to deprive service members of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence.

The Court concluded that, "...in cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence."

¹ An article that appeared in the September 7, 1984 Army Chief of Staff's Weekly Summary for dissemination to Army general officers worldwide stated, "An attempt to influence subordinates in the exercise of their independent and unfettered discretion concerning recommendations for disposition is specifically prohibited by Article 37, UCMJ [Uniform Code of Military Justice]; Rule 104, MCM [Manual for Courts-Martial], 1984; and paragraph 3-4b, AR [Army Regulation] 27-10. - Unlawful command influence detracts from good order, discipline, morale, and unit cohesiveness and adversely impacts on the ability of a unit to accomplish its mission." This article is referred to on page 35 of this report.

The following is a chronology of events surrounding the "command influence" issue at the 3d Armored Division. It begins with a description of pertinent activities engaged in by MG Anderson and COL Bozeman, followed by a discussion of a series of specific events that, individually and collectively, address the nature and extent of the command influence problem at the 3d Armored Division, and concludes with summaries and quotations from relevant court decisions.

II. FACTS

A. Evolution of the Topic

COL Bozeman informed us that when MG Anderson assumed command of the 3d Armored Division, the division was overwhelmed with court-martial cases. The use of summary courts-martial had declined; most cases were being referred to special courts-martial which were empowered to adjudge a bad conduct discharge (BCD). COL Bozeman stated that he had convinced MG Anderson this was a mistake because greater use of summary courts-martial would expedite cases and reduce the backlog.

According to COL Bozeman, on one occasion MG Anderson said, in the context of how many trials were pending, "You know, one thing I don't like to see is when a commander recommends a case for BCD special, and then he comes in and says the guy ought to be retained." COL Bozeman did not consider this as a proscription on testifying, but rather as a prescription for referring cases to the lowest appropriate court. In his statement to us, COL Bozeman stated the proposition as follows: "Don't send me a case for a BCD special if you believe or you would testify that the individual should be retained in the service, because it makes no sense to send something up to a discharge level court martial, and then come in and tell me he shouldn't be discharged, shouldn't be there in the first place." He concluded, "That proposition is a technically correct statement of the law; more than that, it is pro-defense."

In the 1985 DuBay² hearing in U.S. v. Thompson, 19 M.J. 690 (ACMR 1984), Judge Cole, a Military Judge, discussed at length the testimony of MG Steven E. Nichols, the Deputy Commanding General of V Corps during MG Anderson's tour as 3d Armored

² A DuBay hearing is a post-trial session under Article 39(a), Uniform Code of Military Justice, to enter findings on specified matters. DuBay hearings are typically ordered by an appellate court to more fully develop the factual basis for an issue raised on appeal. The genesis of DuBay hearings is United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), in which the Court of Military Appeals remanded the case for a limited hearing on the issue of unlawful command control.

Division commander. Judge Cole found MG Nichols' testimony "very illuminating" on the entire issue of unlawful command influence and MG Anderson's theory, which Judge Cole referred to as MG Anderson's "consistency theory". Judge Cole summarized MG Nichols' testimony as follows:

1. General Anderson has had his "consistency theory" for many years and began to espouse it at least while he was the Commanding General (CG), 2d Armored Division and the General Court Martial (GCM) Convening Authority of the unit. That assignment came just prior to his assignment as 3d Armored CG. Command Sergeant Major (CSM) Haga also followed General Anderson from 2d Armored to 3d Armored.

2. MG Anderson's theory is that: When a commander forwards a case to a punitive level court-martial, recommending elimination of the service member, it is inconsistent for that commander, after conviction, to testify on Extenuation and Mitigation that the accused should not be punitively discharged. This is his theory in its pure form--unadulterated by summarization for effect.

3. It is uncertain what the genesis of this "concern" was. It is clear that MG Anderson had a habit of reading the entire SJA Review of a case as well as a considerable portion of the record--especially the testimony in Extenuation and Mitigation. This is a bit unusual, especially in a very busy jurisdiction. This "concern" case with him to 3d Armored Division. It also appears the General's concern was not generated by any fall-out from inconsistencies. The discharge rate was not low. There was no perceived concern that lawyers, court members, court reporters, etc., were being ill used. The concern was not directed toward the solving of any particular problem area in the administration of military justice. COL Bozeman did testify that the CG was very interested and involved in the court-martial process and that he was concerned that

³ CSM Haga played a crucial role in subsequent events, described below.

everything went according to the rules and regulations--as he understood them.

4. There is no question that the concern expressed by MG Anderson was directed toward the officer responsible for the inconsistency and not toward the idea that a soldier was unnecessarily placed in jeopardy. The CG's reaction when he read or detected an example of this inconsistency was that the individual didn't know what he was talking about.

5. The only explanation for MG Anderson's concern in this area and his subsequent emphasis on it is that this is a pet peeve he has. It shows to him a lack of intestinal fortitude in the person to stand up and be counted. MG Anderson mentioned his pet peeve to groupings of commanders as well as staff and also to senior non-commissioned officers (NCOs). The consistency theory does not lend itself to a hard hitting, quick concept by a General walking up and down the stage, covering many subjects in a short period of time. Having spoken on the consistency theory many times, both in the 2d Armored Division and the 3d Armored Division it became abbreviated to "What really pisses me off is when someone sends a case forward for a BCD and then comes in and testifies on his behalf." It was very illuminating that MG Nichols during his testimony reverted to the use of the words "testify in his behalf" when it was clearly understood that we were all talking about testifying for retention or no punitive discharge.

6. MG Anderson discussed his consistency theory with MG Nichols frequently. They seemed to have the same philosophy. MG Nichols appeared to clearly understand what concerned MG Anderson, how it affected him and how and why he chose to address this subject to his command. The testimony of MG Nichols is very significant as it appears to articulate MG Anderson's thought process--when not under attack.

7. The only explanation MG Anderson could give for including groups of senior NCO's [non-commissioned officers] in his consistency theory pitch was that they work

closely with their commanders, consult closely and are therefore part of the court-martial recommending process.

B. COL Bozeman's Notes

The documents reflect that a meeting of all the convening authorities under MG Anderson's jurisdiction was planned for mid-April 1982. COL Bozeman and MG Anderson discussed various issues to be addressed during the meeting. COL Bozeman agreed it would be a good idea for MG Anderson to discuss the importance of summary courts-martial and, in his words, "the hierarchy of disciplinary action" at the meeting.

On April 7, 1982, COL Bozeman prepared for MG Anderson notes on the topics to be discussed (Enclosure 1). Paragraph 10 of those notes is entitled, "Witnesses on extenuation and mitigation" and states:

a. Common scenario: serious offense at BCD level; company commander testifies that soldier (can be rehabilitated) (should not be discharged) (should not be confined) (should be returned to the unit "this afternoon").

b. Apprise company level commanders of the general inconsistency of recommending a GCM [General Court-Martial] or BCD and discharge of the accused from the service, and then testifying to the effect that the accused should be retained.

c. CAUTION: These remarks don't mean don't testify for one of your soldiers or tell a subordinate not to testify. It is occasionally appropriate to seek a result that an otherwise good soldier will be placed under a suspended punitive discharge. If retention in the service is appropriate, maybe you've recommended the wrong level of disposition.

C. MG Anderson's Briefings of Subordinates

On April 13, 1982, MG Anderson spoke to the court-martial convening authorities under his jurisdiction. He discussed a number of points concerning military justice, using the notes prepared for him by COL Bozeman. At the conclusion of the meeting, he invited COL Bozeman to make comments. COL Bozeman did not do so, believing that the points had been properly made.

In the fall of 1982, COL Bozeman attended another meeting at which MG Anderson discussed the point summarized in COL Bozeman's April 7, 1982, notes. The meeting was attended by the 3d Armored Division brigade and battalion commanders. Again, COL Bozeman believed that MG Anderson properly stated the point.

D. NCOs and the Soto Case

The evidence shows that between April and December, 1982, MG Anderson addressed this topic at least eight times. Junior officers and noncommissioned officers (NCOs) were present at some of these meetings. COL Bozeman was generally aware of the meetings he did not attend but told us that he was not aware until March 1983, that NCOs were present during some of the sessions.

The evidence reflects that in some of the meetings MG Anderson referred to a recent case in which the accused's entire chain of command had testified in his support. COL Bozeman told us that he now believes MG Anderson was referring to U.S. v. Soto, (unpublished). In that case, Soto, a staff sergeant, was accused of selling hashish to an undercover agent. The charges were referred to a special court-martial empowered to adjudge a BCD. Thereafter, every member within SGT Soto's chain of command testified on his behalf. COL Bozeman told us:

At the time I didn't realize the impact [the Soto case] had on General Anderson. But when you read his testimony you can see that it did have a significant impact.

MG Anderson had spoken to subordinates twice prior to the date of the Soto case. COL Bozeman advised us:

I am convinced that without the Soto case, the subject would have dropped into oblivion. But the Soto case resurrected in his mind and he began to discuss the topic. This time, though, if you read the statements of the people, it's clear he's talking about a case. This is the case he's talking about....

And he introduces this notion of the chain of command. In other words, what I think happened is he began to present his issue and do two things different with it. He presented it against the backdrop of the Soto case. So now you've got a commander who has started out talking to you about a case in which the whole chain of command came in to testify.

He introduced--he then probably went to his-- he says this is what he did, and I don't doubt him--I went to my "don't recommend a BCD if you would testify." And he rolls NCOs into it. With that combination, it's just highly--it's a set up for misinterpretation. (emphasis added)

E. MAJ Buchanan

During the period from February to December 1982, there were two other incidents that merit mention. The first occurred in March, before MG Anderson had made his first presentation to the convening authorities on April 13. The incident was not reported until several years later in the 1985 DuBay hearing in U.S. v. Thompson, supra. In that hearing, MAJ Michael A. Buchanan, who was assigned to the 3d Armored Division from June 1980 until July 1983, testified concerning the court-martial of Specialist Four Gregory Johnson, 564th Military Police (MP) Company, who was accused of negligent homicide in the death of a German local national that Johnson was attempting to apprehend for blackmarking. The case had been referred to a general court-martial. Battalion Commander, LTC Mark A. Mueller, testified on behalf of Specialist Johnson concerning the lack of weapons training MPs received. MAJ Buchanan testified for the prosecution in U.S. v. Johnson, (unpublished), to the effect that the MP weapons training was adequate.

According to MAJ Buchanan's 1985 testimony, he was sitting in the waiting room waiting to testify when COL Bozeman approached him and asked him to come to COL Bozeman's office, which MAJ Buchanan did. MAJ Buchanan testified that after a bit of conversation, COL Bozeman asked MAJ Buchanan why LTC Mueller was going to testify for the defense. MAJ Buchanan did not immediately respond. According to MAJ Buchanan, COL Bozeman then said, "COL Mueller's testifying for the defense seems to me to be improper." After another pause, COL Bozeman added, "I not only feel that way, but the command does too." Finally, MAJ Buchanan suggested that COL Bozeman would have to ask LTC Mueller why he was testifying. Shortly thereafter, the conversation ended.

During the DuBay hearing in Thompson, COL Bozeman was asked if he discussed COL Mueller's expected testimony with anyone else. COL Bozeman did not recall the conversation with MAJ Buchanan. COL Bozeman was not recalled on this point; later, he told us, the prosecutor called him and described MAJ Buchanan's testimony. When the incident was put into context, COL Bozeman recalled it all and in his interview with us refuted MAJ Buchanan's version of the incident. In his statement to us, COL Bozeman said that, based on a prior conversation he had with LTC Mueller, he was not sure whether LTC Mueller was going to testify for the defense or not. Therefore, it was not

plausible that he started the conversation with MAJ Buchanan by asking why LTC Mueller was going to testify for the defense, because he did not know if LTC Mueller was going to testify. Further, COL Bozeman told us that based on a prior conversation with the prosecutor in the Johnson case, he understood that MAJ Buchanan was worried about having to testify about the adequacy of MP training in a manner contrary to the position held by LTC Mueller, who MAJ Buchanan believed was "going places" in the MP Corps. COL Bozeman stated to us:

So I'm walking past and I see poor Buchanan sitting there in his seat and I say, "Come on back here, Mike." I sit down and I talk to him. I said, "Mike, listen. I talked to COL Mueller and here's what he told me is his view of the case." I said, "Here is our view of the case." I said, "We have reviewed this thing and we're convinced that we've got to go forward with the prosecution.

So you come back years later and now Buchanan has come to feel like some command--he got a glimpse of an indication of command influence.

The discrepancy between these two versions of the incident has never been directly resolved.

F. LTC Mueller

The second incident that allegedly occurred prior to 1983 was related by LTC Mueller in an affidavit dated September 14, 1984 (Enclosure 2). LTC Mueller alleged that in the fall of 1982, several months after his testimony in U.S. v. Johnson SUPRA, he was contacted by COL Bozeman who stated that MG Anderson was upset that Specialist Johnson had been retained and had not been immediately reclassified [out of the MP military occupational specialty].

LTC Mueller's affidavit also discussed his testimony in the court-martial of Sergeant (SGT) David Sweet, who was tried and convicted pursuant to a guilty plea of receiving stolen property. LTC Mueller urged SGT Sweet's retention. LTC Mueller alleged that he received a call from COL Bozeman stating that MG Anderson was upset with LTC Mueller's testimony; MG Anderson did not understand how a battalion commander could allow an individual to be court-martialed and then come in and testify as to his good character. According to the affidavit, "LTC Bozeman in effect then stated to me that when a commander recommends court-martial the accused is guilty and should be punitively discharged."

LTC Mueller stated his disagreement with the proposition and stated that it motivated him to send a memorandum to the Deputy Commanding General, V Corps, on January 12, 1983 (Enclosure 3).

This affidavit, submitted in the DuBay hearing in U.S. v. Thompson, SUPXA, was countered by an affidavit submitted by COL Bozeman, dated October 10, 1984 (Enclosure 4), in which all allegations were disputed.

In the Special Findings in U.S. v. Thompson, SUPXA, issued December 4, 1985 (Enclosure 5), Judge Cole found COL Bozeman's affidavit to be credible; he found LTC Mueller's affidavit and memorandum to be "summarizations, conclusions and perceptions he admitted may be wrong, not meant or not stated." Judge Cole concluded that "General Anderson neither directly nor indirectly through his SJA, criticized LTC Mueller for presenting favorable testimony in any court-martial. Nor did General Anderson make any complaints about LTC Mueller to that officer's rating chain."

G. CPT Marchessault

On January 15, 1983, Captain (CPT) Marchessault, an attorney with the TDS reported to COL Bozeman the reluctance on the part of an NCO to testify on behalf of an accused because he believed there was a policy against such testimony. COL Bozeman told us that he reported the issue to MG Anderson, who offered to intercede in order to secure the NCO's testimony. Ultimately, CPT Marchessault determined that the NCO had no favorable testimony to offer, so the issue was dropped.

H. The CSM Haga Letter

On January 25, 1983, Command Sergeant Major (CSM) Robert L. Haga, 3d Armored Division, wrote and distributed a letter concerning "Personal Conduct and Integrity" (Enclosure 6). Attached to the letter was a list of DO's and DON'T's for NCOs. One of the items stated:

Noncommissioned Officers DON'T:

--Stand before a court martial jury or an administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty.

The letter included a paragraph suggesting that its contents be the subject of a Noncommissioned Officer Professionalism Program class and that the list of DO's and DON'T'S should be used to assist the instructor in preparing the lesson plan.

COL Bozeman saw a copy of CSM Haga's letter for the first time on February 28, 1983, when it was provided to his staff by the TDS.

According to COL Bozeman, he took several actions intended to assess, eliminate, or mitigate any adverse effect the Haga letter may have had on the court-martial cases pending at the time. For the first 24 hours after discovery of the Haga letter, COL Bozeman attempted to stop or restrict distribution of the letter, with mixed results. On March 1, 1983, COL Bozeman spoke to CSM Haga. CSM Haga told COL Bozeman that he (CSM Haga) had not informed MG Anderson of the letter and that the thoughts contained in the letter were his own. COL Bozeman showed the letter to MG Anderson, who stated that he had never seen the letter before and directed that action be taken to correct any potential problem.

COL Bozeman stopped processing cases until an assessment of potential impact could be completed. He instituted an "informal inquiry" in each pending case (approximately 85 cases from the date the Haga letter was discovered until COL Bozeman left the command three and one-half months later). COL Bozeman directed his staff to place the Haga letter on the record for all trials in progress and to set up a procedure for continuing to make the letter a part of the record for subsequent trials. In talking with over 200 people involved in the 85 pending cases, COL Bozeman concluded that the letter appeared to have had no effect on testimony favorable to witnesses.

On March 4, MG Anderson issued a letter (Enclosure 7) to his subordinate commanders stating that an accused soldier has an absolute right to have available witnesses, if any, testify about his or her good conduct, reputation or record for efficiency, or any trait desirable in a good soldier. A witness is duty bound to provide any information the court-martial or elimination board would find useful in determining an appropriate sentence or recommendation.

During the first week in March (possibly March 4 and 8, 1983), COL Bozeman met with MAJ Anthony V. "Buck" James and Captain (CPT) Stephen R. Kane of the TDS to discuss the Haga letter. During the meeting, as CPT Kane would later state in an affidavit (Enclosure 9), CPT Kane told COL Bozeman that an officer in one of the 3d Armored Division units (who did not want his identity known until after he left the command) related that he had heard MG Anderson say something similar to the improper guidance contained in the Haga letter. The officer was later identified as CPT Daffron.

⁴ MG Anderson issued a subsequent letter on September 15, 1983, that also addressed testifying on behalf of an accused soldier (Enclosure 8).

COL Bozeman assured CPT Kane and MAJ James that MG Anderson would never have made any comments of that nature or tried to discourage any member of his command from testifying. COL Bozeman told them that each time he had heard the MG Anderson speak on justice-related topics, the theme had always been that commanders should know what they are doing and seek the proper level before referring cases to court.

On March 8, 1983, CSM Haga issued a retraction of his January 25, 1983 letter (Enclosure 10); the offending "DON'T" was omitted. On March 10, 1983, at a quarterly Command Sergeant Major conference attended by COL Bozeman, CSM Haga's retraction letter was distributed and the improper guidance contained in the original letter was discussed.

On March 14, 1983, COL Bozeman and MG Anderson met with TDS attorneys to discuss the CSM Haga letter and answer questions. The meeting was recorded and transcribed.

On March 28, 1983, COL Bozeman and CSM Haga met with TDS attorneys to discuss the CSM Haga letter and to answer questions. CSM Haga denied that MG Anderson knew of the letter and stated that the thoughts expressed in the letter had been his own.

On March 30, 1983, MG Anderson and COL Bozeman addressed all brigade and battalion commanders and all Command Sergeants Major and First Sergeants. During the meeting, MG Anderson encouraged the staffs to come forward if they had favorable information about a defendant and to testify at courts-martial.

I. TDS Informal Inquiry

1. CPT Daffron

CPT Kane had interviewed CPT Daffron on March 3, 1983, and obtained an affidavit from him on May 3, just prior to CPT Daffron's departure from the command. CPT Daffron described MG Anderson's comments at the meeting of 2d Brigade officers at Geinhausen in December, 1982:

...he [MG Anderson] found it Inconceivable, or couldn't believe that officers and senior non-commissioned officers would testify on behalf of an accused soldier at sentencing after the accused soldier had been convicted....

...He [MG Anderson] ended by saying if you feel you have to say something, testify, but don't be dumb about it.

COL Bozeman stated to us that he contacted CPT Daffron by telephone on May 4, 1983 and read CPT Daffron two versions of MG Anderson's comments, as contained on pages 10 and 11 of the transcript of the March 14 meeting with TDS (Enclosure 11); one version was what MG Anderson claimed he had said, the other version was what TDS had attributed as CPT Daffron's recollection. CPT Daffron generally concurred that MG Anderson's version was what was said. In a statement CPT Daffron furnished to COL Bozeman (which COL Bozeman forwarded to TDS), CPT Daffron stated:

To my recollection the main point the CG [Commanding General] brought out while speaking on military justice was that he had a problem with people, that is to say commanders, who would send a man up for a court-martial and then say he was a great soldier and I'd take him back in my unit.

Having been read, by the SJA, what the CG recalled he said on 3 December I would say the basic text is a close parallel to what I heard except for two items. One, I do not remember him referring [sic] to a moral obligation [to testify] and, two, he referred specifically to a case where an NCO was convicted and then his chain of command testified as to his good character and value to the Army.

...This consideration [the commander's decision to recommend a soldier for court-martial] before the trial should match what the commander and his chain of command say during trial.

I do not feel that the CG was ordering me, or any commander to violate his conscience. I do feel that the way his remarks were presented they could be misinterpreted to mean the chain of command should not testify for a convicted soldier....

2. CPT Baker

CPT Kane informally canvassed the 3d Armored Division to determine whether CSM Haga's letter had an impact on potential testimony by unit members. In April 1983, CPT Kane located CPT George F. Baker, III. CPT Baker told CPT Kane that he had attended a new commanders seminar in October 1982, at which MG Anderson spoke. Although CPT Baker was unable to recall the

impression that MG Anderson did not want anyone defending a soldier who had been referred for court-martial. CPT Baker provided a statement to CPT Kane on May 3, 1983 (Enclosure 12).

COL Bozeman interviewed CPT Baker on or about May 23, 1983. CPT Baker told COL Bozeman that MG Anderson's remarks discouraged witnesses. COL Bozeman told us that CPT Baker lacked experience in military justice. In an affidavit filed in U.S. v. Yslava, 18 M.J. 670 (ACMR 1984) on April 18, 1984, COL Bozeman stated that as a result of this lack of experience, it did not surprise him that CPT Baker might have misunderstood what he heard.

3. LTC Bartholomew

On May 11, 1983, CPT Kane and another TDS attorney met with LTC Daniel E. Bartholomew, Commander, 2nd Battalion, 6th Field Artillery, a unit of the 3d Armored Division. The subject of the meeting was a discharge board on one of LTC Bartholomew's soldiers. During the meeting, the TDS attorneys asked LTC Bartholomew if he had ever attended a meeting in which MG Anderson discussed testifying on behalf of an accused soldier. LTC Bartholomew said he had attended such a meeting on April 13, 1982 (one of the meetings at which COL Bozeman was also present). LTC Bartholomew disclosed that he had taken notes during the meeting. Included in the notes was a reference to MG Anderson taking a "dia view" of members of an accused soldier's chain of command testifying on his behalf. LTC Bartholomew told CPT Kane he would sign a statement concerning his recollection of MG Anderson's remarks.

On May 13, 1983, CPT Kane met with LTC Bartholomew so that LTC Bartholomew could review and sign the statement CPT Kane had prepared based on LTC Bartholomew's notes of MG Anderson's comments and notes of the meeting between CPT Kane and LTC Bartholomew. LTC Bartholomew reviewed the statement but declined to sign it until he could obtain legal advice.

On June 21, 1983, LTC Bartholomew spoke with COL Bozeman. When LTC Bartholomew was subsequently contacted by CPT Kane on July 7, 1983, LTC Bartholomew told CPT Kane he had spoken with COL Bozeman, that he (LTC Bartholomew) had no problem with the accuracy of the statement, but that he was worried about how it made MG Anderson look. LTC Bartholomew felt he had been taken advantage of and did not want to be embarrassed or manipulated. On the following morning, he met with CPT Kane and signed the statement but told CPT Kane he felt he had been "had."

COL Bozeman wrote a memorandum for the record dated June 24, 1983, rebutting LTC Bartholomew's recollection of the statements made by MG Anderson. It states:

LTC Bartholomew's notes reflect 'dim view when CO Cdr and ISG say he's a good guy even when they themselves initiated action.' MG Anderson's remarks clearly were concerned with commanders who send a case to the BCD SPCM [special court-martial empowered to adjudge a bad conduct discharge] level and then testify that the accused should be retained. MG Anderson did not direct his remarks to the situation in which commanders and 1st sergeants present favorable testimony about the accused's performance.

LTC Bartholomew's notes also reflect 'officers and NCO's should be educated on what's expected.' MG Anderson had described a situation for which he wanted commanders to be alert. He did not say 'educate officers and NCO's on what's expected' or any other words to that effect....

At the conclusion of the 13 Apr 82 meeting, MG Anderson invited me to make comments. I did not do so, believing then and now that the points had been properly made.

In late 1983, during the trial in U.S. v. Giarratano, SPCM 20588, 20 M.J. 553 (ACMR 1985), 22 M.J. 388 (CMA 1986), LTC Bartholomew testified affirming his recollection of MG Anderson's comments as reflected in the statement he signed for CPT Kane.

4. LTC Cravens

In May, 1983, CPT Kane interviewed LTC James J. Cravens, Jr., who also attended the meeting on April 13, 1982. CPT Kane sought a statement from LTC Cravens concerning his understanding of MG Anderson's remarks. At the conclusion of their discussion, LTC Cravens agreed to prepare and sign a statement and send it to CPT Kane. When LTC Cravens failed to send the statement, he consented to allow CPT Kane to prepare one. CPT Kane prepared the statement from notes of their May meeting and sent the statement to LTC Cravens (Enclosure 13). After receiving the statement, LTC Cravens informed CPT Kane that he had second thoughts about the content of the statement and had not signed it. He also told CPT Kane that he had sought out COL Bozeman and discussed the April 13, 1982 meeting with him and felt that now he had a better recollection of what had transpired. LTC Cravens signed a statement, dated October 5, 1983 (Enclosure 14), that differed significantly from the one prepared by CPT Kane. The prepared statement focused on MG Anderson's emphasis on a case in which the accused soldier's chain of command testified on his behalf and on MG Anderson's

distress that the soldier had perhaps "beaten the charges" because of this testimony. Further, the prepared statement provided:

...I do not recall these comments coming as part of a class on what a commander should consider or the factors a commander should analyze in determining whether or not to prefer charges or the level of court-martial to be recommended. Nor do I recall the CG telling us that we should or must testify if we knew something that would help an accused soldier, and he did not indicate that we had a moral obligation to testify if we knew something beneficial to an accused soldier...

The signed statement said:

...MG Anderson cited an example of a Company Commander who had preferred a General Court Martial charge against a soldier, and during matters in extenuation and mitigation in the soldier's trial, testified that the soldier should be retained in the military. MG Anderson was attempting to highlight the inconsistency of the Company Commander's action in the matter....I interpreted MG Anderson's comments to reflect his concern that commanders should exercise common sense and good judgement when preferring Court Martial charges....I did not interpret MG Anderson's comments to mean that the Chain-of-Command should not testify on behalf of soldiers, or that it should not recommend retention of soldiers during matters in extenuation and mitigation. I was not prejudiced by MG Anderson's comments about this subject nor did I construe his comments to suggest command influence....

J. Stanley Discovery Request

In late March, 1983, the TDS submitted a discovery request in U.S. v. Stanley, (unpublished), to determine if there existed documents indicative of command influence in the 3d Armored Division. In response to the discovery request, file searches were conducted at all 3d Armored Division units at the direction of COL Bozeman. The response to the request was provided in April 1983. The search had failed to turn up any responsive documents. A disposition form (DF) from a trial attorney who had been tasked with responding to the request indicated that he had spoken to the 2d Brigade Commander and had been assured that

there was no policy or document within the 2d Brigade concerning testifying for an accused soldier. The DF also indicated that the trial attorney had conducted an independent search of files in the 2d Brigade and had not found any document or evidence of such a policy.

K. COL Bozeman's Permanent Change of Station (PCS)

On June 23, 1983, COL Bozeman was transferred from the 3d Armored Division to the Army War College in Carlisle Barracks, Pennsylvania. His Officer Evaluation Report (OER) as the SJA for the 3d Armored Division was rendered on June 8, 1983. His rater was COL Gerald B. McConnell, the Chief of Staff of the 3d Armored Division, and his senior rater was MG Anderson. COL Bozeman received [REDACTED] rating, which was the same rating he had received from the previous 3d Armored Division Commander, MG Ulmer. There was no mention of the command influence problem in COL Bozeman's last OER.

ble
COL Bozeman told us that as of the time he left the 3d Armored Division, there was no indication that the "command influence" problem originated with MG Anderson's comments; rather, it was considered to be a problem that stemmed solely from the Haga letter which MG Anderson had neither seen nor approved. He stated:

I'd ask you to keep in mind in this context the relatively limited amount of time that I had to deal with this subject. I ask you not to make the mistake that some make of looking at my involvement through the pile of evidence that now comprises what we know as the Thomas case [supra], or Treakle [18 M.J. 646 (ACMR 1984)], however you want to look at that. That wasn't what I lived.

What I lived was proportionately almost the opposite, where all of the witnesses, all of the indicators were just the opposite. That the CG was not a part of the problem. I ask you to remember Kane's affidavit to this effect himself, where he says that up to the discovery of the Reid DF [see below]...he didn't have any credible evidence to indicate that the CG was part of the problem.

...What I am telling you is that when I left on the 26th of June, or whenever, at that time it was thought to be a Haga letter problem. We were still talking about the Haga letter problem.

L. CSM Reid DF

In mid-August 1983, CPT Kane discovered a DF issued by CSM Campbell Reid, dated December 7, 1982 (preceding the Haga letter by one and a half months) (Enclosure 15). The DF [essentially a memorandum] was distributed in this case to NCOs of the 2nd Brigade of the 3d Armored Division. It was titled "Moral Obligation to Soldiers," and stated in pertinent part:

It has been brought to my attention that many NCO's in key leadership positions while giving testimony at courts martials [sic] are making statements that are not in keeping with the moral ethics of the NCO Corps and causes [sic] us to lose credibility with our soldiers.

I am specifically addressing the issue of testifying at a court martial when a soldier has been convicted of such crimes as rape, sodomy, use of drugs and various other serious crimes. Some of our NCOs tell the court, "Yes I would take him back in the unit, he's a good soldier."

Once a soldier has been convicted, he then is a convicted criminal. There is no way he can be called a "good soldier" even though up until the day he's court martialed he is a super star.

According to subsequent testimony by CPT Kane, when the trial attorney who performed the search of the 2d Brigade for documents responsive to the Stanley discovery request was shown a copy of CSM Reid's DF, he was "genuinely flabbergasted" and stated that he had never seen the DF before.

CSM Reid would later testify in U.S. v. Giarratano, supra, that he had composed the DF after hearing MG Anderson speak on the subject. CSM Reid believed that his DF was consistent with what he had heard.

III. COURT DECISIONS

A. U.S. v. Giarratano

1. LTC Johnson and LTC Johnson

Specialist Five Donald J. Giarratano was accused of wrongfully distributing hashish. On July 26, 1983, a special court-martial was convened by MG Anderson. The accused raised the question of unlawful command influence by MG Anderson. In

extensive evidentiary proceedings before the trial court on this issue, many witnesses (including MG Anderson and COL Bozeman) appeared and some 1400 pages of testimony was taken between October and December 1983. The record of this trial was eventually admitted as an appellate exhibit when the case was appealed to the Army Court of Military Review (ACMR), 22 M.J. 553 (ACMR 1985) and was subsequently admitted in most, if not all, of the cases before that court concerning allegations unlawful command influence in the 3d Armored Division.

COL Bozeman was attending the Army War College in Carlisle Barracks, Pennsylvania, when he was called to testify in U.S. v. Giarratano, supra. Prior to testifying, COL Bozeman requested and received copies of witness statements related to the trial. Attending the Army War College with him were two other former 3d Armored Division officers, LTC Julius F. Johnson and LTC Ross A. Johnson. COL Bozeman asked both officers if they recalled meetings wherein MG Anderson had discussed court-martial referrals and testifying for the accused. Both indicated they did and COL Bozeman told them he would let the court know they were available to testify. Both LTCs Johnsons testified; however, COL Bozeman provided LTC Julius Johnson with copies of the witness statements before he (LTC Julius Johnson) testified. CPT Kane later suggested that COL Bozeman's conversations with the LTCs Johnsons was improper and that he was trying to influence their testimony. COL Bozeman told us he did not understand how giving someone statements reflecting both sides of an issue could be interpreted as an attempt to influence the person.

2. Special Findings

The trial judge in U.S. v. Giarratano, supra, issued his special findings on December 7, 1983 (Enclosure 16). In pertinent part, he stated:

The entire controversy in this case involves comments made by Major General Anderson and his subordinates, which allegedly represent unlawful command influence. —The military justice system operates effectively only when there is public confidence that the system is functioning properly. As such, command influence, either actual or perceived, does violence to the military justice system, as it affects subordinates in unsuspecting ways and must be condemned....

I now turn specifically to the allegation of unlawful command influence. Major General Anderson, in an official capacity as the Division Commander, on several occasions

between April of 1982 and December of 1982 spoke to his unit and above-level commanders and senior NCO leadership on the topic of "Court-Martial Testimony". Major General Anderson today can recall only the broad general theme of "Be consistent". He states that he thinks he has always indicated that people have a moral obligation to testify. However, he does not know if he did say this or not. He would like to believe that he did, assumes that he did, or would hope that he did. In order to determine what message Major General Anderson put out to his commanders and senior NCO leadership, this court must look to what the attendees heard and understood. The oral comments of Major General Anderson and the oral and written comments of his subordinates would logically cause members of the Third Armored Division, one, to believe that the chain of command who prefers a case presumably believes the accused is guilty; and two, that the extenuation and mitigation testimony made by an accused's chain of command is A, not meaningful; B, not credible; C, should be ignored; and D, once charged and convicted of a drug or sex offense, or other serious crime, the accused should be discharged. Taken together, these comments could reasonably cause an accused to be convicted quicker and the eventual sentence imposed to be greater....

The convening authority's [MG Anderson's] conduct and expressions reference the referral of cases by a subordinate, when viewed in its best light by taking the convening authority's own belief of what he said, his position is still, one, a form of command influence; and two, legally incorrect. It adds to the referral process an added requirement not required or contemplated by Paragraph 32f of the Manual for Courts-Martial, 1969 revision. Nor is there anything necessarily inconsistent with recommending a discharge level court and testifying as to the soldier's retainability in the service.

The trial judge determined that none of Giarratano's commanders had attended any of the meetings where MG Anderson addressed testifying at courts-martial or referral and referral

of courts-martial charges. With respect to corrective actions, the trial judge observed:

To date, no effective remedial action has been taken. The 4 March 1983 and 15 September 1983 retraction letters were not effective remedial action necessary to cure the taint caused by the comments of Major General Anderson and his subordinates. Further, the retraction letters did not receive the emphasis nor dissemination required to address the problem.

In spite of the existence of unlawful command influence at the 3d Armored Division, the trial judge concluded that the accused's chain of command in the case had not been affected by the unlawful command influence. The trial judge permitted remedial actions, including a statement that a defense challenge for cause would be sustained against any panel member who was a member of the 3d Armored Division if the accused elected trial by members, ruling that no character evidence would be received that was unfavorable to the accused, and disqualifying MG Anderson from taking further action on the case.

The decision was appealed to the Army Court of Military Review, which on April 12, 1985, concurred in the findings of the trial judge and affirmed his decision. Ultimately, the case, along with three others, was appealed to the Court of Military Appeals (see U.S. v. Thomas, supra, discussed below). Again, the Court affirmed the decision of the lower court.

B. U.S. v. Treakle

On June 24, 1984, the ACMR handed down an en banc decision in U.S. v. Treakle, supra. This case proved to be one of the seminal cases involving unlawful command influence at the 3d Armored Division. The court affirmed the accused's conviction, but set aside the sentence based on a finding of unlawful command influence. The court noted that "...General Anderson's comments about referral recommendations were clearly proper and tended to benefit accused soldiers by encouraging lower-level referrals. The improper portion of the general's comments addressed the testimony of potential witnesses."

The majority opinion stated in pertinent part:

We have considered all the evidence in this case, including that cited in the dissent. We are convinced that although General Anderson acted in good faith and intended his remarks to promote appropriate recommendations, numerous commanders and

senior noncommissioned officers perceived his remarks as discouraging favorable character testimony, and some understood his comments to apply to prefindings as well as presentencing testimony. We are also convinced that under the circumstances it was reasonable for members of the general's audience to reach these conclusions. The consequences of these perceptions are therefore the responsibility of the general and his staff and, through them, the Government.

* * * * *

General Anderson attempted to correct what he perceived to be a command problem. Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits. The balance between the command problem to be resolved and the risks of transgressing the limits set by the Uniform Code of Military Justice is to be drawn by the commander with the professional assistance of his staff judge advocate. Although the commander is ultimately responsible, both he and his staff judge advocate have a duty to ensure that directives in this area of military justice are accurately stated, clearly understood and properly executed.

In this case General Anderson and his staff judge advocate neglected two important principles:

(1) Announce policies and directives clearly.
General Anderson sought to correct a

perceived problem--inconsistency between recommendations that a case be tried by a court capable of adjudging a discharge and testimony that the accused should be retained in the service. Unfortunately, he sought to disseminate his policy of "consistency" through partly extemporaneous comments to large audiences rather than publishing his guidance in writing. Earlier the staff judge advocate had provided the general with a point paper which included a cautionary warning to ensure that the general did not convey the impression that one would not testify for accused soldiers. The subtle and somewhat contradictory nature of the points in that paper resulted in a message which was simply too complex for successful transmission to a large audience via verbal comments. The resulting confusion was increased by the tone and demeanor the general projected and by the fact that on some occasions he omitted the cautionary comment recommended by his staff judge advocate.

(2) Follow up to see that directives are correctly understood and properly executed. Neither the general nor his staff judge advocate took steps to determine what the members of the 3d Armored Division were gleaning from his comments in this highly sensitive area or what effect his remarks were having on the military justice process. No one in the audience was asked his understanding of the general's message. Trial and defense counsel were not alerted to watch for signs that witnesses were being improperly influenced. The staff judge advocate was absent from many of the meetings at which the general spoke and could not monitor the clarity and effect of the general's delivery. No record was made of what the general actually said.

In his opinion concurring in part and dissenting in part, Judge Yawn stated:

My study of the evidence leads me to conclude that there was a conscious and unprecedented assault by General Anderson and members of his command upon the integrity of the

military justice system in the 3d Armored Division during his tenure as commander.

* * * * *

General Anderson may well not have understood the legal significance of his actions, but I am convinced he knew what he was doing: beginning in April 1982, he set out to preclude favorable testimony in extenuation and mitigation for soldiers convicted of serious offenses, and he apparently was assisted in this by his Staff Judge Advocate.

Judge Yawn also mentions the efforts of the TDS:

First of all, the evidence I have discussed came primarily from the determined efforts of trial defense counsel in their representation of other clients in other cases. This evidence was not easily gathered by them. Some witnesses who heard the General's remarks initially were free and open when discussing with defense counsel their perceptions of the General's lectures, but later became reticent after their supervisor or, in one case, the Staff Judge Advocate, had talked to them.

C. U.S. v. Thomas

On September 22, 1986, the Court of Military Appeals handed down one decision in four cases involving unlawful command influence at the 3d Armored Division. The first named case was U.S. v. Thomas, supra, and another was U.S. v. Giarratano, supra. In the Epilogue to the decision, the Court wrote:

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by General Anderson's intemperate remarks and by his staff's implementation of their understanding

of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly--if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources--as well as those of this Court--required to identify and to surgically remove any possible impact of General Anderson's overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many--both in and out of the Armed Services--to demonstrate that military justice is fair and compares favorably in the respect to its civilian counterparts.

IV. ANALYSIS AND CONCLUSIONS

The existence of unlawful command influence at the 3d Armored Division during MG Anderson's tenure as Commander is well-established by military courts from the trial court level to the Court of Military Appeals, notably by the decisions in U.S. v. Giarratano, U.S. v. Treakle, and U.S. v. Thomas, *supra*, and has been corroborated in our investigation.

The command influence problem stems from the notes COL Bozeman prepared for MG Anderson. The notes were fatally flawed. They touched on one of the most sensitive aspects of military justice, yet in their brevity and inadequacy failed to safeguard the integrity of the military justice system and the right of the defendant to the unfettered testimony of others in the command. If indeed COL Bozeman wished to encourage commanders to refer cases to lower-level courts, that message could have been delivered without any mention of subsequent testimony concerning retention. Instead, both the title and the first paragraph of his notes emphasized testimony. The only comment in the notes on the proper level of referral is, "If retention in the service is appropriate, maybe you've recommended the wrong level of disposition."

It was foreseeable that COL Bozeman's notes, even if delivered exactly as written, would have led to command influence problems in the 3d Armored Division. The probability that at least some listeners would draw the conclusion that they ought not testify on behalf of retention or even as favorable character witnesses was enormous.

There is not, nor should there be, any limitation on a commander's truthful testimony during extenuation and mitigation based on the fact that the commander previously referred charges

to any particular level of court. As the trial judge said in U.S. v. Giarratano, supra, "Nor is there anything necessarily inconsistent with recommending a discharge level court and testifying as to the soldier's retainability in the service." These concepts are basic and should have been well-known and understood by COL Bozeman in 1982.

Although there is no clear evidence that CSM Reid's DF of December 7, 1982, or CSM Haga's letter of January 25, 1983, were staffed, the evidence suggests and we believe they are a reflection of MG Anderson's comments during 1982. Most significantly, they reflect his "pet peeve" that commanders who refer cases to a special court-martial empowered to adjudge a BCD should have the intestinal fortitude to stand up and be counted, wholly unrelated to any concern that a soldier might unnecessarily be placed in jeopardy (see "Evolution of the Topic," page 1, above).

There is no direct evidence indicating that COL Bozeman knew MG Anderson was addressing NCOs about court-martial recommendations and subsequent testimony on behalf of convicted soldiers. However, we are not satisfied by COL Bozeman's explanation that he did not know what MG Anderson was saying to junior officers and NCOs about the need for them to support the court-martial recommendations made by their chain of command, thereby potentially inhibiting testimony on behalf of defendants. MG Anderson's comments occurred over a period of eight months, and were retransmitted by some who heard them. COL Bozeman concluded that no problem existed based on the fact that no one asked questions or sought clarification concerning MG Anderson's remarks. Nonetheless, given the key role played by the SJA in the division's military justice program, we believe the SJA should have known what was going on in the division in that regard over an eight month period, particularly in light of the fact that he had attended at least two of MG Anderson's briefings.

After seeing a copy of the CSM Haga letter addressed to NCOs, COL Bozeman became aware of at least three commissioned officers within the command who had heard one of MG Anderson's presentations and who did not share COL Bozeman's understanding of what MG Anderson had said. Each of those officers believed MG Anderson had included a defendant's entire chain of command in the discussion about not giving favorable testimony when a BCD had been recommended and felt the comments could have been misunderstood by members of the audience. Although other officers and NCOs informally questioned by COL Bozeman and his staff did not have the same perceptions as those three officers, the different perceptions held by three officers, each of whom attended a different presentation by MG Anderson, should have been sufficient to raise serious questions and to require action to determine what MG Anderson actually said, how it was

perceived, and how widespread were the misperceptions and damage to the military justice system among the audiences.

COL Bozeman's approach to the problem was to determine the impact of the command influence issue on individual cases. His efforts did not adequately address the impact of the command influence issue on the command. He should have requested a formal investigation to answer the questions set forth above.

Thus, it fell to the TDS to piece together the facts. It appears to us that rather than making a good faith effort to determine whether MG Anderson was the source of the problem, COL Bozeman attempted to convince potential witnesses that MG Anderson was not. Even after he left the 3d Armored Division, COL Bozeman continued to contact witnesses. We find this troubling. COL Bozeman complained about the potential for distortion in the fact-gathering efforts of TDS and DAD but did not recognize it in his own efforts.

PART TWO

OTJAG RESPONSE TO UNLAWFUL COMMAND INFLUENCE
AT 3D ARMORED DIVISIONI. INTRODUCTION

This part discusses the actions taken by the OTJAG to deal with the 3d Armored Division command influence issues.

II. FACTSA. MG Overholt Letter

The first action by the Office of The Judge Advocate General (OTJAG) in response to the unlawful command influence problem at the 3d Armored Division occurred on September 12, 1983, when MG Hugh R. Overholt, then The Assistant Judge Advocate General (TAJAG) sent a letter to General (GEN) Glenn K. Otis, Commander in Chief (CINC), U.S. Army Europe and Seventh Army (USAREUR), referring the matter for inquiry and any appropriate corrective action or recommendations (Enclosure 17). MG Overholt was acting TJAG, and signed the letter to GEN Otis in that capacity. The decision to refer the 3d Armored Division issue to GEN Otis was discussed with the Deputy Inspector General of the Army and BG Ronald M. Holdaway, the USAREUR Judge Advocate, before the letter was sent.

The letter noted that Defense Appellate Division (DAD) and TDS attorneys were certain to litigate the issue of command influence in 3d Armored Division cases, and cautioned that the information gathered to date, if accurate, indicated the need for corrective action to "neutralize this problem."

MG Overholt explained in the letter that the OTJAG had not evaluated the information because the 3d Armored Division had not had the opportunity for input, and that the forwarded information was not the product of a formal investigation by the OTJAG.

B. BG Holdaway Response

GEN Otis referred the letter to BG Holdaway for action. After examination of the matter, BG Holdaway responded with a memorandum for GEN Otis dated October 20, 1983 (Enclosure 18).

GEN Otis transmitted a copy of the memorandum to TJAG on October 31, 1983. In his forwarding letter, GEN Otis characterized BG Holdaway's effort as "a preliminary inquiry to determine whether a formal investigation was required."

BG Holdaway told us that he did not conduct an investigation, although his inquiry into the matter is sometimes referred to as the "Holdaway investigation."

As an explanation of his actions in the matter, BG Holdaway told us in an interview:

Coming with [the letter from MG Overholt] was a series of, as I recall now, statements by officers in the Third Armored Division, plus a verbatim transcript of a hearing that [Major] General Anderson had had with all the defense counsel of the Third Armored Division.

So you had a very complete factual background at that point, very complete. And I looked at that and determined that that was probably enough.

I took it up to COL Charlie Gentini, who was my chief of criminal law, to look at also. I didn't do all this myself. And let's put this in context. I'm not sitting there doing nothing waiting for some work to come in.

* * * * *

I'm up to my ears in alligators and other problems, and this is one of them and, frankly, not one of the most important, as far as I was concerned. This was something that had happened before my watch, so to speak, and we might have command influence and we might not. I was concerned about that, and I wanted to make sure it was handled correctly.

So I got the complete factual background. I was puzzled, frankly, as to why it was sent at all. It seemed like a cover-your-ass operation from the Pentagon so that they could tell people, well, we got USAREUR looking into it. That's always a good thing to say, 'USAREUR's looking into it.' Because they had all the facts that were there. I don't know why they needed any more from me.

I would have appreciated, of course, 'You better make sure this [MG] Anderson guy isn't a loose cannon.' But, anyway, I viewed it as that. I had this letter anyway.

I took it to [COL] Charlie Gentini and I said, 'I want you to take this transcript, [MG] Anderson and the defense counsel--I want you to take these statements,' and I said, 'I want you to take your deputy and I want one of you to take the position that there is unlawful command influence, and I want one of you to argue that there wasn't unlawful command influence. I want to be confronted with an adversary situation where I'm getting all sides of this. I want to make sure I consider all angles. And also do we need any more?'

I was very reluctant to do any investigation beyond what had been done. It didn't seem required. First of all, we had a very complete transcript of what [MG] Anderson said he meant to say. We had all these statements from these officers.

Now, you could go out and you could interview every officer in the Third Armored Division, and what would you get? You'd get basically the same breakdown of people, some saying, 'Well, this is what I understood [MG] Anderson to say,' [and] others saying, 'No, he didn't mean that at all. He meant something else.'

I also knew that the Defense Appellate Division people here under COL [William G.] Eckhardt were doing their own dredging up of affidavits and all that sort of thing. Based on my experience in [the] Government Appellate [Division] and my experience with COL Eckhardt, who was a very fine officer, tends to be somewhat of a zealot, if I, as the Judge Advocate of USAREUR, had actively at that point gone down and tried to stir up more people, I could have been accused of influencing Defense Appellate's inquiry, so I stayed away. And I didn't have to [do any investigation beyond what had been done]. I had plenty of facts."

The October 20, 1983 memorandum began with a general description of the problem and a recitation of MG Anderson's position as reflected in the transcript of MG Anderson's March 14, 1983 meeting with TDS counsel. BG Holdaway then focused on two issues: command influence and "disconnects" between MG Anderson's statement and the differing interpretations of his statements by members of his command.

The discussion of command influence noted that it was the effect of MG Anderson's and CSM Haga's statements that would determine whether there was unlawful command influence and not their intent. "If [Major] General Anderson's statements had the effect of depriving an accused of favorable testimony, this would constitute unlawful command influence." BG Holdaway went on to say:

Undoubtedly some officers and NCOs perceived that MG Anderson was telling them not to testify for an accused. These officers and NCOs were unlawfully influenced. They, in turn, may have unlawfully influenced personnel under them. Whether such influence affected the legality of any trial depends on whether any of these individuals were going to testify and were deterred from doing so.

Others, including importantly the SJA, perceived that the criticism by General Anderson was directed not to the act of testifying but rather to the forwarding of charges under circumstances where the forwarding officers desired retention.

* * * * *

There is no doubt, as noted above, that some officers and NCOs because of what they perceived General Anderson to be saying were potentially influenced not to testify had they been inclined to do so. General Anderson must bear some responsibility for these misconceptions. He incorrectly assumed that the entire 'chain of command', including NCOs, necessarily concurred in the decision to forward charges. He also assumed that there could not be a change of attitude after charges were forwarded. Further he did not make it clear enough what he was concerned about; his premise, i.e., don't forward the case if you desire retention, was sound enough but he failed to express it as clearly as he should have. Finally, he failed to appreciate the 'multiplier' effect that is often given by subordinates to statements made by general officers.

In the memorandum, BG Holdaway briefly mentioned the CSM Haga letter, noting that CSM Haga was wrong and now understood that he was wrong.

The discussion of "disconnects" between what several officers and NCOs perceived MG Anderson to have said and what MG Anderson told the TDS attorneys he said was essentially an effort to determine whether MG Anderson was dissembling. BG Holdaway dismissed the issue because MG Anderson was recalling extemporaneous comments he had made several months ago. Nor did BG Holdaway imply that the members of the audience were dissembling, either, because they were merely reporting their perceptions of his intent and not his precise words.

BG Holdaway also noted that COL Bozeman, who was both "knowledgeable in the law and a strong staff judge advocate," was present at several of the meetings and would have intervened if MG Anderson had said anything that COL Bozeman perceived as even slightly improper.

BG Holdaway concluded his October 20, 1983 memorandum by recommending that no further investigation be directed; that he, in his capacity as USAREUR Judge Advocate, discuss the lessons learned with MG Anderson; and, that MG Anderson counsel CSM Haga for attempting to deter potential defense witnesses from testifying.

BG Holdaway told us in our interview that his criticism of MG Anderson should be read as an implicit criticism of COL Bozeman, because the errors of MG Anderson were in COL Bozeman's area of responsibility and COL Bozeman should have recognized the same things that MG Anderson is criticized for having failed to recognize. BG Holdaway said that he did not include direct criticism of COL Bozeman in his memorandum to GEN Otis because COL Bozeman was no longer under GEN Otis' command. BG Holdaway believed that implicit criticism should have been evident to TJAG, so he made no special note of it in his communications with TJAG.

BG Holdaway's recommendations, particularly his recommendation that no further investigation be directed, were adopted by GEN Otis.

In December 1983, BG Holdaway sent a letter to all staff judge advocates in Europe asking each to explain the command influence problem to their clients, and to ensure that the pitfalls of commander discussions on military justice topics were understood.

C. Decision Not to Investigate

MG Overholt said during our interview that he and MG Hugh J. Clausen, then TJAG, decided to let the command influence issue be resolved through the litigation of the court-martial cases. He said the decision was reaffirmed when information was developed in the course of the litigation that suggested COL Bozeman might bear

some responsibility for the command influence problems in the 3d Armored Division. Judge Cole's resolution in the Thompson DuBay hearing of the conflict between LTC Mueller's affidavit and COL Bozeman's response appeared to them to justify their reliance on the litigation process for sorting out the issue.

Several witnesses, including JAG Corps general officers, said they were concerned about the lack of an investigation to resolve questions about COL Bozeman's responsibility for the command influence problems in the 3d Armored Division. Those concerns arose when appellate decisions were rendered suggesting that COL Bozeman failed to perceive that a problem was developing, or that he was unable or unwilling to assure that MG Anderson stayed within the bounds prescribed by the Uniform Code of Military Justice. The witnesses said they made their concerns known to MG Overholt, who became TJAG in August 1985, and that he did not act on them. MG Overholt did not recall any recommendations for an investigation. He said that if recommendations were made, they were not asserted in a manner that impressed him. The witnesses say that they did not press the point with MG Overholt.

We asked MG Overholt why the litigation process was relied upon to resolve questions of individual responsibility and for determining whether there may have been some professional misjudgment, misconduct, or dereliction on the part of COL Bozeman or MG Anderson. He replied that the extensive litigation, with multiple opportunities to testify under oath and subject to defense counsel examination, led him to conclude that nothing would be developed by a parallel investigation. MG Overholt went on to explain his views on COL Bozeman's participation:

COL Bozeman was not a suspect. He was not -- that was never an issue. I think one time I got concerned about COL Bozeman was the Mueller affidavit. That is the first time I said 'Hey, this is bad stuff.'...At that point, as I said, a conscious decision was made to let the judge, Judge Cole, look into it. Had Judge Cole found adversely in that situation, I would have felt compelled to open another investigation. And would have. We would have had no other choice.⁵

Later in the interview, while discussing the input he received when he solicited comments on candidates for promotion prior to the 1989 JAG Corps Brigadier General Promotion Board,

⁵ As set forth in Part One of this report, LTC Mueller's affidavit is dated September 14, 1984; it encloses a memorandum dated January 17, 1983; the DuBay hearing addressing the issue was decided by Judge Cole on December 4, 1985.

MG Overholt said that someone commenting about COL Bozeman said, "Remember the 3d Armored situation." He went on to tell us the following:

I was sensitive to the 3d Armored situation. So at that time, I figured he had done the best he could with the situation he had [as a lieutenant colonel. Hell, it happened seven years ago. He was doing a dynamite job as a Corps SJA, so I didn't consider it -- it certainly wasn't a plus, but I didn't consider it a damning factor."

We asked MG Overholt for his comments on the view expressed by several senior JAG Corps officers that the SJA should prevent the commander from lecturing on the subject of military justice because of the fine line between appropriate and inappropriate remarks. MG Overholt rejected the view because he saw it as based on the assumption that an SJA can control his commander. With respect to his ability to control MG Anderson, COL Bozeman told us "I cannot imagine a situation in which if I'd have told GEN Anderson, 'Sir, you can't do that,'--that is all I'd have to say, 'Sir, you can't do that'--that he wouldn't have stopped right away."

D. Army Staff Reactions and Corrective Measures

1. GEN Wickham Note

The June 1984 decision in U.S. v. Treakle, SUPRA, prompted TJAG to inform the Chief of Staff of the Army, then GEN John A. Wickham, Jr., of the decision. MG Clausen sent a memorandum to GEN Wickham summarizing the Treakle decision, in which he stated:

Significant holdings of the Court are as follows:

* * * * *

b. ...The Convening Authority [MG Anderson] made comments on numerous occasions to subordinates concerning their testimony at courts-martial. Although the comments were made in good faith, they were perceived by numerous commanders and senior NCOs as discouraging testimony on behalf of soldiers at courts-martial. The Convening Authority and his Staff Judge Advocate did not take steps to ensure that command policies were clearly expressed, understood and properly executed.

GEN Wickham penned a note on his memorandum to be forwarded to MG Clausen:

This implies that command atmosphere was not neutral concerning CM/UCMJ action. It is improper for convening authority in any way to imply, suggest, or directly influence. What action was taken by USAREUR to counsel CG and his JAG? What action taken to caution other convening authorities in Army? I am not happy with this situation.

2. Response to BG Hansen

BG Hansen, who had recently left the CMR to become Assistant Judge Advocate General for Military Law, followed up on GEN Wickham's question by contacting BG Holdaway and asking what measures had been taken in response to the situation. On July 26, 1984, BG Holdaway sent BG Hansen a copy of the memorandum he had sent to all staff judge advocates in Europe in December 1983, and reference his [BG Holdaway's] contacts with the staff judge advocates to ensure that the message got out.

E. Defense Appellate Division (DAD) Findings--Lack of Implementation

Contrary to BG Holdaway's assurances to BG Hansen, the DAD developed information suggesting that BG Holdaway's message had not been fully implemented. In March 1984, LTC William P. Heaston, the Deputy Chief of the DAD, led a team of DAD attorneys to Germany to assist the TDS in its fact-finding. LTC Heaston came back with at least seven affidavits from TDS attorneys in which they described the continuing impact of MG Anderson's policy, several of which are summarized as follows.

1. CPT Hoffman

In an affidavit dated March 27, 1984, CPT John B. Hoffman related an incident involving a Chapter 14 board. An officer who testified for CPT Hoffman's client was "publicly berated" by his battalion commander. That incident occurred in late October 1983, six months after retraction of the CSM Haga letter by both MG Anderson and CSM Haga.

2. CPT Davidson

In two affidavits, dated March 27 and March 30, 1984,-- CPT Deborah Davidson described several incidents that occurred after CSM Haga and MG Anderson issued letters retracting the Haga letter of January 25, 1983. The essence of her affidavits was that the retractions were not given credence by officers and NCOs. The "support the chain of command" message was still prevalent.

3. CPT McDonough

In an affidavit dated March 29, 1984, CPT Mark McDonough recited similar conclusions based on experiences as late as February 1984.

F. Holdaway's Response to DAD Findings

We asked BG Holdaway what he knew of the DAD findings, since they cast doubt on the effectiveness of corrective measures and BG Holdaway's assurance to BG Hansen in July, 1984, that the message got out. He said he was not provided any information on the DAD findings.

In an April 10, 1984, memorandum reporting the results of his visit to the 3d Armored Division, LTC Heaston said that he had discussed the persistence of the command influence "in very general terms" with the 3d Armored Division SJA (COL Bozeman's successor).

G. OTJAG Response to The Army Chief of Staff

The Criminal Law Division prepared an item for the Chief of Staff's weekly summary for general officers. It was eventually included in the September 7, 1984 summary. It said that commanders have a responsibility to ensure that their subordinates are properly trained and are aware of their authority and responsibilities in the area of military justice. It described the pitfalls of good faith oral instructions that are misperceived, the need to promulgate policies in writing after coordination with their SJA, and the fine line between permissible and impermissible statements from a commander.

On August 27, 1984, BG John L. Fugh, who, as the Assistant Judge Advocate General for Civil Law, was responsible for technical supervision of the DAD and the TDS, sent a memorandum to MG Overholt proposing that MG Overholt address command influence during an upcoming trip to Europe. BG Fugh enclosed a paper on command influence based on conversations with judges, defense counsels, and former commanders; a similar paper prepared by the Chief of the TDS; proposed comments for staff judge advocates; the information paper prepared for the Chief of Staff, with his comments; and the Criminal Law Division's item for the Chief of Staff's weekly summary. BG Fugh cited current perceptions in the field regarding command efforts to get rid of unfit soldiers without regard for legal standards and fairness, staff judge advocates who were losing courage to give correct but unpopular advice, and the unwillingness of OTJAG to take a strong stand, even after court decisions. He urged strong efforts to support judge advocates who were doing the right thing, and to monitor applications, selections and promotions of TDS lawyers involved "to insure against perception of adverse consequences."

III. ANALYSIS AND CONCLUSIONS

MG Clausen and MG Overholt decided at an early stage to rely on the litigation process for resolution of factual issues arising from the 3d Armored Division cases. The focus of these cases was on whether defendant's rights had been affected by unlawful command influence rather than on whether MG Anderson or COL Bozeman were personally responsible for that unlawful command influence. Therefore, information contained in affidavits gathered in the course of the litigation were discounted by COL Bozeman, BG Holdaway, and others.

The action taken by BG Holdaway was not an adequate response to MG Overholt's referral of the matter to GEN Otis "for such inquiry and corrective action as you deem appropriate." We are not persuaded by his disclaimers that he had other important duties that interfered with such an inquiry, or that a thorough inquiry might be read as interference with the DAD. The need to resolve the command influence problem should have transcended individual case considerations. The failure to resolve the issues promptly in 1983 has resulted in lingering doubts and concerns which no current remedy can really cure. By accepting BG Holdaway's inadequate response, TJAG shared responsibility for its inadequacy.

MG Clausen, MG Overholt, and BG Holdaway did not take active steps in 1983 to neutralize the effect of MG Anderson's improper actions. Apart from the remedial actions taken by the 3d Armored Division, the only action taken by the OTJAG were a warning by BG Holdaway at a November 1983 commanders' conference, and his letter of December 1983, encouraging staff judge advocates to speak to their commanders. There is no record reflecting whether staff judge advocates did so or, if they did, whether such conversations had the necessary impact.

None of the remedial actions received the same emphasis, or had the same impact, as the original statements by MG Anderson or the documents circulated by CSM Haga and CSM Reid. As a minimum measure, the retraction of MG Anderson's message should have come from his Corps Commander or GEN Otis so that the emphasis on the retraction and remedy would have matched or exceeded the emphasis on the original statement. For example, in the 1st Armored Division case which was investigated in December 1983, the corrective action was taken by the division commander, a level above the commander who was involved in that case.

BG Holdaway's recommendation that he (BG Holdaway) discuss the problem with MG Anderson, while CSM Haga was to be counseled by MG Anderson, is particularly inadequate, since it suggests stronger (though still very limited) action against the Command Sergeant Major than that taken against the general officer whose policy he was espousing. This recommendation demonstrated a

failure to grasp the seriousness of the problem. In his interview with us, MG Overholt said he felt CSM Haga should have been relieved. We find this suggestion astonishing. It indicates a desire to close out the problem at a lower level instead of asking the natural and proper question--namely, "What is taking place in the Command that would cause two highly regarded noncommissioned officers, CSM Haga and CSM Reid, to issue their erroneous documents within a seven week period?"

Finally, taking into account the decision to rely on the litigation process for resolution of the command influence problem, we believe the facts demonstrate a singular failure by JAG Corps senior leadership (MG Clausen, MG Overholt and BG Holdaway) to be self-critical. There could and should have been a review or investigation to evaluate COL Bozeman's role in this matter, and, even more important, to determine if there were systemic problems in the JAG Corps, and if there were lessons to be learned for the future. When the JAG Corps senior leadership failed to take that action, they, in effect, adopted a view that the 3d Armored Division command influence was a MG Anderson problem and not a staff judge advocate problem. Later actions, discussed in subsequent parts of this report, created a pattern of ratifying or lending credence to this view. These actions included the selection of COL Bozeman to be Executive Officer to The Judge Advocate General, and a number of actions associated with the Brigadier General Promotion Board that selected COL Bozeman for promotion. Based on that pattern, we believe the actions were motivated, at least in part, by a desire to support the initial JAG Corps senior leadership view of the 3d Armored Division command influence problem.

In a narrower sense, the serious charges against COL Bozeman by LTC Mueller were allowed to fester until they were resolved judicially, in COL Bozeman's favor, in December 1985, although they clearly surfaced no later than September 14, 1984, in LTC Mueller's affidavit (Enclosure 2). LTC Mueller's concerns were in writing as early as January 12, 1983, in a letter from LTC Mueller to the Deputy Commanding General, V Corps (Enclosure 3). But MAJ Buchanan's allegations concerning comments made to him by COL Bozeman about LTC Mueller's expected testimony in the Johnson case, supra, remain unresolved to this day, even though they were specifically mentioned in four ACMR cases in late 1985 (U.S. v. Scott, 20 M.J. 1012, (ACMR, September 18, 1985); U.S. v. Whitaker, 21 M.J. 597, (ACMR, November 8, 1985); U.S. v. Ryan, 21 M.J. 691, (ACMR, December 24, 1985); and U.S. v. Anderson, 21 M.J. 670, (ACMR, December 24, 1985)).

The allegations made by LTC Mueller and MAJ Buchanan were serious in themselves, but of greater significance in the total mosaic of COL Bozeman's professional actions. Allowing them to linger unresolved served neither the JAG Corps nor COL Bozeman.

PART THREE

MAJ ██████ NONSELECTION BY THE 1988 JAG CORPS LIEUTENANT COLONEL SELECTION BOARD AND REQUEST FOR PROMOTION RECONSIDERATION

I. INTRODUCTION

This section of the report focuses on the propriety of COL Bozeman's participation in a 1988 JAG Corps Lieutenant Colonel Promotion Board (more properly called a "selection board"; the use of the term "promotion board" is widespread). The issues are: (A) whether COL Bozeman participated in the Board with the knowledge that one of the officers being considered for promotion, MAJ ██████ had been a significant participant in the court cases that were critical of MG Anderson and COL Bozeman, and (B) whether COL Bozeman took a biased action against MAJ ██████

II. FACTSA. Nonselection by 1987 Board

MAJ ██████ was not selected for promotion by the 1987 JAG Corps Lieutenant Colonel Promotion Board. That Board selected 29 of the 42 officers in the primary zone of consideration. Although he was not selected, MAJ ██████ was within seven places of the cutoff; that is indicated by the fact that his record was identified as a "comparison record."

B. Nonselection by 1988 Board

As he was permitted to do, MAJ ██████ submitted additional material for consideration by the 1988 JAG Corps Lieutenant Colonel Promotion Board. That material included letters from three JAG Corps colonels who had been MAJ ██████ senior raters. MAJ ██████ was not selected by the 1988 JAG Corps Lieutenant Colonel Promotion Board. The Board was comprised of six members: four JAG Corps officers (BG Dulaney L. O'Roark, Jr., the Board president, COL Thomas M. Crean, LTC William O. Gentry, and COL Bozeman), and two others (COL Eugene F. Scott, and

⁶Although the records of Promotion Board voting are destroyed after the Board's work is done, a small number of comparison records from every Board are identified for potential use by Special Selection Boards upon request for promotion reconsideration. If an officer successfully appeals the results of the Board, a Special Selection Board is given the appellant's record and the comparison records of officers who were just above and just below the cut-off line for selection by the regular Board. The appellant's record is then evaluated against the comparison files.

LTC Raymond B. Ansel). The 1988 Promotion Board selected two of the 59 officers who, like MAJ [REDACTED] were "above the zone"; officers who are "above the primary zone" of consideration are those who have been considered and nonselected by at least one previous Board. MAJ [REDACTED] was not identified as a comparison record.

C. Nonselection by 1989 Board

As described in more detail below, MAJ [REDACTED] contested his nonselection by the 1988 JAG Corps Lieutenant Colonel Promotion Board. While that action was pending, MAJ [REDACTED] was considered and not selected by the 1989 JAG Corps Lieutenant Colonel Promotion Board. The 1989 Promotion Board selected two of the 61 "above the zone" officers it considered. MAJ [REDACTED] was not identified as a comparison record.

D. MAJ [REDACTED] Request for Promotion Reconsideration

On November 14, 1988, MAJ [REDACTED] submitted to the Commander, U.S. Total Army Personnel Agency (TAPA), a 13-page request for promotion reconsideration. MAJ [REDACTED] attached voluminous enclosures. In his request, he stated, "The basis of this request is that the participation of board member COL John R. Bozeman...in evaluating my potential for promotion constituted a material error in both law and equity."

MAJ [REDACTED] stated that he had served as a [REDACTED] in the DAD from May 1983 to February 1986, and that he and his staff had played a substantial and material role in establishing in court that the actions of MG Anderson and COL Bozeman were highly improper. He further stated that COL Bozeman was well aware of his (MAJ [REDACTED]) role in that litigation, and that COL Bozeman's participation on the Board at issue "clearly violated fundamental legal and equitable principles of fairness and should result in a reevaluation of [his] potential for advancement...."

MAJ [REDACTED] included letters from six current and former, senior JAG Corps officers in support of his request. He also enclosed copies of court decisions and briefs which, he stated, reflected his personal involvement in the highly-visible 3d Armored Division cases that resulted in "judicial condemnation of...COL Bozeman by name."

On January 13, 1989, LTC (now COL) Richard W. Dixon, then Chief, Promotions Branch, Management Support Division, TAPA, forwarded MAJ [REDACTED] request for promotion reconsideration to the Officer Division, Office of the Director of Military Personnel Management, Office of the Deputy Chief of Staff for Personnel (ODCSPER). In transmitting the file, LTC Dixon recommended that MAJ [REDACTED] be granted reconsideration. His

b7c

rationale for that recommendation was contained in his transmittal as follows:

...We do not imply that Colonel Bozeman failed to abide by his sworn duty to judge Major [REDACTED] military record without prejudice. He may have done so, and Major [REDACTED] was not selected for promotion based solely on the quality of his performance file. Major [REDACTED] does, however, submit excerpts from numerous legal opinions which lead us to believe that Colonel Bozeman may have been professionally and personally embarrassed by the published attacks on his character and performance - the legal problems in the 3d Armored Division were well known and widely published.

While there is no provision in law or regulation for a special selection board in this case, it would be in the interest of promoting the perception of fairness (and also reducing the likelihood of litigation) to view Colonel Bozeman's consideration of Major [REDACTED] record to be a 'material administrative error' in the selection process.

On January 30, 1989, the action officer in the Officer Division, MAJ (now LTC) Dennis L. Chaffee (acting for LTC Thomas A. Wilson, then Chief, Sustainment and Development Branch), forwarded MAJ [REDACTED] request to the Administrative Law Division, Office of the Assistant Judge Advocate General for Military Law, for a legal review and opinion.

E. Military Personnel Law Branch Opinion

On March 15, 1989, LTC John T. Burton, then Chief, Military Personnel Law Branch, Administrative Law Division, responded to the ODCSPER request for review and opinion. He stated, "...there is no authority for the Secretary of the Army...to convene a special selection board on the basis of the matters presented by MAJ [REDACTED]. The opinion rested principally on the fact that the law authorizes the Secretary to provide promotion reconsideration only in certain specific circumstances, i.e., if the action of the Board was contrary to law or involved material administrative error, or if the Board did not have before it material information.

LTC Burton then, in detail, described his position on why MAJ [REDACTED] nonselection did not meet these circumstances. A key conclusion was that MAJ [REDACTED] "attempts to inflate a mere allegation of prejudice on the part of a Board member into a

b7c

presumption that he is entitled to a special selection board as a matter of law." LTC Burton specifically noted, however, that the Secretary could correct an error or perceived injustice by acting through the Army Board for Correction of Military Records (ABCMR). Documentation maintained by the OTJAG indicated that the opinion was made known to and received the concurrence of MG Overholt and MG Suter, and Mr. Darrell L. Peck, Deputy General Counsel (Military and Civilian Affairs), and MAJ Harry D. Brown, both of the Office of General Counsel, Department of the Army (Army OGC).

LTC Wilson of the ODCSPER apparently showed LTC Burton's opinion to MAJ [redacted] soon after it was rendered. MAJ [redacted] gave LTC Wilson a personal note dated March 29, 1989, in which he took issue with points in the opinion and termed the opinion "seriously flawed and purport[ing] to unduly restrict the authority of the Secretary of the Army."

F. ODCSPER Decision

Following receipt of the administrative law opinion from LTC Burton, LTC Chaffee prepared a response to the U.S. Total Army Personnel Command (formerly TAPA) informing LTC Dixon of the ODCSPER disapproval of MAJ [redacted] request for promotion reconsideration. After coordination with the Assistant Deputy for Military Personnel Policy and Equal Opportunity, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), the reply was signed on April 3, 1989, by MG John A. Renner, Director of Military Personnel Management, ODCSPER. The response cited the administrative law opinion and included it as an enclosure. It also advised LTC Dixon that he should inform MAJ [redacted] of his right to appeal the decision to the ABCMR.

G. MG Surut's Letter

On April 6, 1989, MG Lee E. Surut, U.S. Army (Retired), wrote to the Army Chief of Staff on MAJ [redacted] behalf. MG Surut, referring to MAJ [redacted] as his former aide in the 3d Armored Division (a position which MAJ [redacted] held from 1972 to 1974, prior to his transfer from the Field Artillery Corps to the JAG Corps), said, "I do not know the merits of Major [redacted] petition and cannot say categorically that he does deserve a new board. However, it does appear that the 'system' has not given his appeal a full and fair hearing."

MG Surut enclosed a memorandum for the Chief of Staff from MAJ [redacted] dated April 4, 1989. In that memorandum, MAJ [redacted] summarized his career and his objection to his nonselection; he termed COL Bozeman's participation in the Board which did not select him "an egregious conflict of interest," and requested that the Chief of Staff review the unusual facts of his request. MAJ [redacted] said his only recourse was to the ABCMR and, if unsuccessful there, to file a lawsuit. MAJ [redacted] attached to his

DTC

memorandum copies of the same six memoranda from other officers who supported his efforts that were included in his original request for promotion reconsideration.

H. Second ODCSPER Decision

MG Surut's letter prompted a review of the ODCSPER decision. LTC Chaffee of the ODCSPER prepared a response for the signature of the Chief of Staff after confirming with TJAG and the Army OGC the legal opinion on which the original determination was based. The Chief of Staff signed the reply to MG Surut on May 16, 1989. In the response, the Chief of Staff stated that he had had the DCSPER "relook" the action, that the DCSPER had found no basis for the Secretary to direct MAJ [REDACTED] reconsideration, and that he (the Chief of Staff) agreed with the determination. He also stated that a legal review indicated that the circumstances necessary for the Secretary to grant MAJ [REDACTED] reconsideration did not exist, and that MAJ [REDACTED] had recourse to the ABCMR and would be so informed.

By memorandum dated June 7, 1989, LTC Dixon of PERSCOM notified MAJ [REDACTED] of the ODCSPER denial of his request for promotion reconsideration. MAJ [REDACTED] was informed of his right to appeal to the ABCMR. He filed such an appeal on July 3, 1989.

I. ABCMR Decision

The ABCMR held a hearing in connection with MAJ [REDACTED] appeal on September 27, 1989. MAJ [REDACTED] presented five witnesses. COL Bozeman, who was available at the hearing site, was not called as a witness.

The ABCMR issued its report in MAJ [REDACTED] case on October 11, 1989. The ABCMR recommended that MAJ [REDACTED] be promoted to lieutenant colonel.

The ABCMR's recommendation that MAJ [REDACTED] be promoted was not founded upon a conclusion that COL Bozeman in fact took biased action. The ABCMR did not believe such a conclusion was a necessary predicate to its recommendation. The ABCMR concluded:

...the certainty that the applicant received fair and equitable treatment is clouded.... While the evidence is not conclusive that a biased action was taken against him by a member of the promotion board, the circumstances in the case do clearly show the appearance of an injustice resulting in loss of confidence in the officer selection process.

* * * * *

b7c

The Board recognizes the error or injustice in this case concerning the promotion board process and bias against the applicant can not be clearly established. The Board does feel, however, that sufficient perception of bias and injustice does exist to the degree that it possibly may be seen as an injustice against the applicant by a large population of the officer corps and will undermine the integrity of the officer corps selection board system.

J. ABCMR Record

Among the ABCMR's findings, it found:

The application, brief, and testimony presented also indicates publicity surrounding the case of illegal command influence, and that the noted 1988 promotion board member [COL Bozeman] was aware of military court petitions and the resultant judgements and decisions.

The ABCMR record contains the following material relevant to COL Bozeman's possible knowledge of MAJ [redacted] role as one of the participants in the 3d Armored Division command influence litigation:

LTC [redacted] former Deputy Chief of the DAD, told the ABCMR that in the key CMR case (*Treakle, supra*), "MAJ [redacted] was the [redacted] or the attorney that wrote that argument, that argued that case, and led to the decision by the whole Court of Military Review...." COL [redacted] former Chief of the DAD, stated to the ABCMR that MAJ [redacted] was involved in approximately 40 cases in the 3d Armored Division, and "MAJ [redacted] had clearly some of the more volatile ones." Similar statements appear in letters from COL [redacted] and LTC [redacted] which accompanied MAJ [redacted] request for promotion reconsideration. That request was later made part of his appeal to the ABCMR.

In his request for promotion reconsideration, MAJ [redacted] stated:

COL Bozeman was well aware of my involvement in this litigation. It is reflected throughout my file and is a matter of public record.

* * * * *

COL Bozeman's obvious awareness of my substantial participation in proceedings that

b7c

sharply criticized his conduct is evident from my ORB (Officer Record Brief), three OERs and in a letter to the president of the promotion board from COL [REDACTED] the former Chief of DAD, and by virtue of numerous court decisions.

* * * * *

Additional evidence of the visibility and significance of my role is seen by the appearance of my name in the U.S. Army Court of Military Review's Treakle decision....I was also personally involved in the key decision in this litigation by the U.S. Court of Military Appeals, U.S. v. Thomas.

MAJ [REDACTED] also referred to LTC Mueller's affidavit and COL Bozeman's response thereto as evidence of the acrimony engendered by the litigation.

MAJ [REDACTED] request for promotion reconsideration contained numerous exhibits, including a section which he described as:

...[N]umerous representative court decisions involving the 3AD [3d Armored Division] command influence cases. These decisions reflect as a matter of public record (1) my personal involvement, (2) the judicial condemnation of MG Anderson and COL Bozeman by name, and (3) the extremely high visibility accorded this litigation. Also provided are extracts of petitions to the U.S. Supreme Court which were based on lower court decisions with which I was involved. These cases...[which were shown as an enclosure to the request]...are highlighted to note pertinent names and discussions."

MAJ [REDACTED] pointed to a conversation between COL Ronald P. Cundick, his current senior rater, and COL Bozeman after the ABCMR hearing in which COL Bozeman said he had a high opinion of MAJ [REDACTED] and did not connect him with the 3d Armored Division cases. MAJ [REDACTED] said he had limited contact with COL Bozeman, and that COL Bozeman's ability to form an opinion of him suggests that he must have recognized his (MAJ [REDACTED]) role in the 3d Armored Division cases.

b7c

K. 1988 Promotion Board Record

As is customary, the voting records of the Board were destroyed after the Board's work was done. Since MAJ [REDACTED] was not identified as a comparison record, there was no residual information as to the Board's action relating to him.

The record before the 1988 JAG Corps Lieutenant Colonel Promotion Board included only one reference to MAJ [REDACTED] role in command influence cases. His OER for his service from May 26, 1983, to May 25, 1984, bore the following comments from his rater, LTC [REDACTED] in the section on specific aspects of performance:

[REDACTED]

and heavy involvement of branch attorneys in a widespread command influence issue.

[REDACTED]

(emphasis added)

It should be noted that this reference does not explicitly cite the 3d Armored Division cases (there was an incident in the 1st Armored Division during this period that generated a number of command influence cases during this period although in far smaller numbers than the 3d Armored Division cases) nor does it specify acts performed by MAJ [REDACTED] personally.

b7c

L. COL Bozeman's Actions on the 1988 JAG Corps Lieutenant Colonel Promotion Board

As a member of the 1988 JAG Corps Lieutenant Colonel Promotion Board, COL Bozeman took an oath to "perform his duties as a member of the board without prejudice or partiality and having in view both the special fitness of officers and the efficiency of his armed force."

During our interview, COL Bozeman denied that he had been biased against or disadvantaged MAJ [REDACTED]. He said he could not tell us how he voted MAJ [REDACTED] file, but said, "I would have voted him in a way that would have brought him through with everybody else or would have made him awfully close." COL Bozeman stated that, at the time of the Board, he had not recognized MAJ [REDACTED] as having had a role in the 3d Armored Division command influence cases.

The JAG Corps members of the 1988 JAG Corps Lieutenant Colonel Promotion Board were interviewed to see if any remembered a discussion of MAJ [REDACTED] during the Board's deliberations. BG O'Roark recalled some discussion of MAJ [REDACTED] and other West Point graduates who had not made the cut for selection, but no mention of the 3d Armored Division issue. BG O'Roark recognized MAJ [REDACTED] as one of his subordinates; he would have the duty of informing MAJ [REDACTED] of the Board results if MAJ [REDACTED] was not selected. He recalled no adverse comments. The other JAG Corps members had no recollection of a discussion of MAJ [REDACTED]. Those witnesses also said their memories of precise events had faded in the two years since the Board.

M. No Direct Evidence the COL Bozeman Knew of MAJ [REDACTED] Role in 3d Armored Division Cases

COL Bozeman repeatedly told us that he had no knowledge of MAJ [REDACTED] role in the 3d Armored Division cases. We found no direct evidence of any kind that COL Bozeman had actual knowledge of MAJ [REDACTED] role in the 3d Armored Division cases. There was no professional contact between the two officers regarding that appellate litigation.

N. Circumstantial Evidence Relating to COL Bozeman's Possible Knowledge of MAJ [REDACTED] Role in 3d Armored Division Cases

MAJ [REDACTED] name appears among the four lawyers who represented the appellant before the ACMR in Treakle, and appears in two lists each respectively naming the three or four attorneys who represented two appellants consolidated in the Thomas case decided by the Court of Military Appeals. These cases are the leading cases in the disposition of the 3d Armored Division cases. They are extraordinary in the career of a lawyer, for they

b7c

specifically criticize COL Bozeman by name. Treakle was decided on June 29, 1984; Thomas on September 22, 1986.

In our interview with COL Bozeman on March 26, 1990, he stated that he could not believe that MAJ [REDACTED] had been passed over by the 1987 JAG Corps Lieutenant Colonel Promotion Board. Therefore, he reviewed MAJ [REDACTED] files, as well as the files of two or three others who were passed over. The file apparently contained the same information (up to the earlier time period) as the information available to the 1988 Promotion Board.

In that same interview, COL Bozeman stated that, [REDACTED] [MAJ [REDACTED] was a special person for me," and that "I knew [REDACTED] personally from having seen him -- "personally" I don't want to give you an incorrect impression here. I knew him. I had seen him around. [REDACTED] is a very personable, good looking officer, the kind of guy that you, as a supervisor, kind of like right away. So when the 1987 board passed him over the first time, I couldn't believe it." COL Bozeman described MAJ [REDACTED] career, the similarities to his own career, and then analyzed the reasons why MAJ [REDACTED] had been passed over in 1987.

There was apparently no professional contact between MAJ [REDACTED] and COL Bozeman, but they had both attended several office related social functions.

COL James Kucera who, in his role as the Chief of the Government Appellate Division (GAD), had dealt with COL Bozeman on 3d Armored Division litigation issues, told us during interview that the identity of DAD counsel was never mentioned. He described COL Bozeman's response to defense positions as judicious and unemotional, even in cases where COL Kucera thought the defense had crossed the line of zealous representation.

MG Suter came to the position of TAJAG from the Army Court of Military Review (ACMR), where he had participated in over 50 3d Armored Division decisions, including U.S. v. Yslava, 18 M.J. 670 (ACMR 1984) and U.S. v. Cruz, 20 M.J. 873 (ACMR 1985). MG Suter then shared an office suite with COL Bozeman for two years. He said that COL Bozeman never discussed the 3d Armored Division cases with him, and was a "gentleman" about the matter.

III. ANALYSIS AND CONCLUSIONS

There is no evidence that COL Bozeman took biased actions against MAJ [REDACTED] in connection with the 1988 Promotion Board. The votes of the Board are not known; there is no indication that COL Bozeman spoke against MAJ [REDACTED] in the Board proceedings.

There is no direct evidence that COL Bozeman was aware of MAJ [REDACTED] role in the 3d Armored Division cases and that,

b7c

notwithstanding such awareness, he acted in MAJ [REDACTED] potential promotions.

The circumstantial evidence, however, is troublesome. The 3d Armored Division command influence litigation was unusual in its focus on COL Bozeman's professional integrity and professional competence. It is reasonable to expect that a professional who was criticized by name for his professional conduct, as COL Bozeman was in Treakle and Thomas, would be familiar with those cases, including the names of the lawyers who played a role in bringing about that criticism.

The foregoing view is somewhat tempered by the fact that MAJ [REDACTED] was only one of many lawyers listed for the appellants in those two cases and there is no way someone reading the decisions could ascertain the nature or extent of the role played by MAJ [REDACTED].

On the other hand, COL Bozeman knew MAJ [REDACTED]. COL Bozeman's expressed an interest in him and indicated that he liked him. Further, his action in reviewing MAJ [REDACTED] record after the 1987 Promotion Board, a Board in which he had no official interest, is another factor of considerable weight.

In addition, the OER quoted in this part was in MAJ [REDACTED] personnel file when COL Bozeman reviewed the file after the 1987 Promotion Board and before the 1988 Promotion Board. Its reference to "heavy involvement of branch attorneys in a widespread command influence issue" does not specify the 3d Armored Division, but surely is sufficient to alert one with any sensitivity or perception that this may well be--indeed is likely to be--a reference to the 3d Armored Division cases which outnumbered any other command influence cases by a ratio on the order of 10 to 1.

Finally, both in our interview with COL Bozeman and in our review of his affidavits and other material, we were impressed by his intellect and his ability to recall detailed facts accurately. These qualities contribute to our view of the circumstantial evidence that is before us.

Accordingly, we believe that COL Bozeman was aware that MAJ [REDACTED] played a role in the 3d Armored Division cases. Participation in the JAG Corps Lieutenant Colonel Promotion Board consideration of MAJ [REDACTED] with that knowledge, given the unique circumstances in this case, undermines the integrity of the promotion process.

The allegations made in the request for reconsideration were serious and should have been given more thorough considerations. While we tend to agree with the OTJAG opinion that a mere allegation of prejudice was an insufficient basis for granting

b7c

MAJ [REDACTED] reconsideration request, no effort was made to determine whether there was more to MAJ [REDACTED] claim than a mere allegation. The essence of MAJ [REDACTED] request was an allegation of misconduct on the part of COL Bozeman. The effect of the OTJAG action was to dismiss the allegations without an inquiry to determine their validity. When the Army OGC coordinated on the OTJAG opinion, it similarly failed to recognize the seriousness of the allegations and the need for an investigation.

b7c

PART FOUR

THE 1989 JAG CORPS BRIGADIER GENERAL PROMOTION BOARD

I. INTRODUCTION

In the spring of 1989, the Army was faced with the task of filling three brigadier general positions in the JAG Corps. These represented the first opportunities for promotion to brigadier general in the JAG Corps in some four years.

One position was created by the impending promotion of BG Fugh to major general. BG Fugh, the Assistant Judge Advocate General for Civil Law, had been selected as TAJAG to replace MG Suter, who had been selected to replace MG Overholt as TJAG.⁷

The other two positions were created by the imminent retirements of BG Holdaway, Commander, USALSA, and Chief Judge, CMR, and BG O'Roark, the Judge Advocate, USAREUR. BG Holdaway had a mandatory retirement date in August 1989. BG O'Roark had said he would retire on October 1, 1989.

The 1989 JAG Corps Brigadier General Promotion Board was announced by telegram dated April 12, 1989. The telegram stated that the Board would convene on or about May 16, 1989. The announcement was routine and unremarkable.

II. FACTSA. Membership on the 1989 JAG Corps Brigadier General Promotion Board

On April 18, 1989, LTC Stephen R. Smith, Chief, General Officer Management Office (GOMO), Office of the Chief of Staff, Department of the Army, submitted a memorandum to the Chief of Staff in which he stated:

...In the past I have recommended three officers from the specialty branch being considered to serve as members of the board.

⁷ The Secretary of the Army and Chief of Staff had, on April 11, 1989, jointly recommended to the Secretary of Defense that MG Suter be nominated as TJAG and that BG Fugh be nominated as TAJAG; the recommendations were based on the outcome of a Judge Advocate General Advisory Board which convened March 29, 1989. The Deputy Secretary of Defense acted on the recommendation on April 25, 1989; the President made the recommendation on May 2, 1989; and, the nomination was forwarded to the Senate on May 9, 1989.

This is not a requirement but it has proven successful and added specialty expertise to the board. In keeping with this 'policy' I asked MG Overholt for his recommendation as to which JAG generals should serve. MG Suter and BG Fugh served on the last BG JAG board and are ineligible to serve on this board. Therefore, his only options were himself and BGs O'Roark, Holdaway, and Hansen. Based on this, he recommended himself as a board member and I concur. He also recommended BGs O'Roark and Holdaway even though they are both retiring this summer. He would like BG O'Roark to serve because he is the only 'field' JAG general. He was not as emphatic about BG Holdaway serving. He believes BG Holdaway has a little better knowledge of the JAG requirements than BG Hansen, but that either of them would do a very good job on the board. I would recommend BG Hansen simply because he is not retiring this year (MRD [mandatory retirement date] July 1990)....

LTC Smith thus recommended that the JAG Corps membership of the Board be MG Overholt, BG O'Roark, and BG Hansen. Recommended as president of the Board was Lieutenant General (LTG) Leonard P. Wishart, III. Recommended as the fifth member of the Board was MG James R. Klugh. The Chief of Staff approved the composition of the Board on April 19, 1989.

On or shortly before April 24, 1989, MG Overholt contacted the GOMO; he did that after learning of the above-described Board composition. MG Overholt spoke with Major (now LTC) Allan C. Brendsel, Assistant Chief of the GOMO. Following that call, LTC Smith recommended to the Chief of Staff by memorandum of April 24, 1989, that BG Hansen be replaced on the Board by BG Holdaway. The memorandum included the following explanation:

...MG Overholt now has asked that you consider replacing BG Hansen with BG Holdaway. Both are aware that they were not recommended to be the Assistant, TJAG by the recent TJAG Advisory board. According to MG Overholt, BG Holdaway is handling this information better than BG Hansen and therefore BG Holdaway would be a better board member....

The Chief of Staff approved the change in the Board composition on or soon after April 24, 1989.

In his memorandum to GEN Carl E. Vuono, Chief of Staff of the Army, LTC Smith clearly stated that MG Overholt had cited BG Hansen's relative difficulty in dealing with his nonselection for promotion as his reason for recommending that BG Holdaway replace BG Hansen on the Brigadier General Board. BG Hansen stated during our interview that he had had no such difficulty. That evidence raised the possibility that MG Overholt may have undertaken to have the Board composition changed for some other, unstated reason.

BG Hansen stated that neither he nor BG Holdaway had been particularly disappointed by nonselection for promotion in 1989, and that, in fact, BG Holdaway had been the more disappointed of the two when neither was chosen for promotion some years earlier. BG Hansen also testified that MG Overholt had, at some point prior to the 1989 JAG Corps Brigadier General Promotion Board, asked him for his opinion about several candidates, including COL Bozeman. BG Hansen said that, when asked about COL Bozeman, he responded that he felt COL Bozeman was very capable, but was "carrying a lot of baggage," referring to COL Bozeman's relationship to the 3d Armored Division command influence issues. BG Hansen also said that, when asked about two other candidates (one of whom was selected by the Board), he responded that he believed they were both too junior to be serious contenders for promotion to brigadier general.

When interviewed, LTC Brendsel specifically recalled that MG Overholt's stated reason for requesting the change in Board membership was as it was described in LTC Smith's memorandum to the Chief of Staff.

When we told MG Overholt of the account of his reasons for requesting the change in the Board membership that the GOMO provided to the Chief of Staff, he initially responded, "That was in writing?" He then stated:

I knew at the time that I recommended Holdaway and O'Roark that they were retiring and that was one of the reasons that I recommended them. One of the reasons. I also felt that Wayne [Hansen] had been in Washington, and in particularly in the same job in the Pentagon for a long period of time.

Wayne had also been looking for a job for three years. This was well known in the JAG Corps. In fact, it got to the point of, 'When in the hell is Hansen going to get a job so we can have another promotion?'

I felt that the Corps' perception would be enhanced by having Holdaway and O'Roark on the Board. Number one, they had served in the field. People would say it was not a Pentagon fix, and number two, Hansen is retired in place, anyway; he won't give us a fair shot.

I had more confidence--not that I don't like Wayne. Excellent officer; I have confidence in him. It would be a better perception.

* * * * *

I told...[LTC Smith]...to ask the Chief, and I did not say that Wayne was not handling his non-selection to major general well. If they put that on there, it was a miscommunication. I just said I have more confidence in him, and maybe they read that into that.

Although he acknowledged that BG Holdaway was, like BG Hansen, very senior, he differentiated between the two by indicating that BG Holdaway had had a greater variety of assignments as a brigadier general and, through those assignments, was more in touch with the "field."

MG Overholt "categorically" denied that BG Hansen's comment concerning COL Bozeman's "baggage" had had anything to do with the request that BG Holdaway replace BG Hansen on the 1989 JAG Corps Brigadier General Promotion Board. MG Overholt said that he had had similar discussions with all of the JAG Corps general officers prior to the Board and that, although he was reminded of COL Bozeman's connection with the 3d Armored Division command influence issues, none of those with whom he spoke responded that COL Bozeman definitely should not be selected. MG Overholt said that he had those discussions at some point after the TJAG and TAJAG selections had been announced.

During our interview, MG Suter confirmed that MG Overholt had relatively lesser confidence in BG Hansen. MG Suter also confirmed MG Overholt's claim that BG Hansen had been looking for post-retirement employment opportunities since his earlier nonselection for promotion. The testimony of BG Holdaway included a reference to a discussion between BG Hansen and himself concerning the TAJAG selection. BG Holdaway indicated that BG Hansen was not disappointed by his (BG Hansen's) nonselection.

We again spoke with LTC Smith and LTC Brendsel on April 11, 1990. We showed them the pertinent portion of the transcript of MG Overholt's interview and asked them for their view of whether

the disparity in the accounts of MG Overholt's stated reason for requesting the change in the Board composition could have been attributable to a miscommunication. LTC Brendsel held to his description of what MG Overholt had said. LTC Smith stated that he recalled having also spoken with MG Overholt around the time of MG Overholt's conversation with LTC Brendsel, and recalled MG Overholt having commented on the brigadier generals' reactions to the news of their nonselection for promotion. LTC Smith also commented that his office's function requires absolute accuracy, particularly in presenting to the Chief of Staff accounts of what general officers have said in connection with sensitive personnel matters.

B. Pre-board Screening by the Vice Chief of Staff

On May 11, 1989, the Vice Chief of Staff, GEN Robert W. RisCassi, held what is termed a pre-board screening briefing. In attendance were GEN RisCassi; the Inspector General, LTG Henry Doctor, Jr.; the Commander, U.S. Army Criminal Investigation Command, MG Eugene R. Cromartie; MG Suter (representing TJAG, since MG Overholt was to serve as a Board member); and LTC Smith and CPT Daniel V. Bruno of the GOMO.

Although such briefings were and continue to be routine practice in the case of general officer Promotion Boards, their conduct is not governed by written policy. By all accounts, however, their purpose is to present to GEN RisCassi any and all potentially adverse information concerning the officers who will be considered by a particular Promotion Board. GEN RisCassi then judges whether any such information presented is sufficiently significant to be presented to the Board as adverse information in accordance with the Board's instructions (quoted below).

We learned that at least one item of potentially adverse information, a personal bankruptcy, was presented at the briefing for GEN RisCassi's consideration. GEN RisCassi decided the bankruptcy would be presented to the Board. However, that information never came into play because the officer was not among the Board's tentative selectees. No one, including MG Suter, mentioned COL Bozeman's connection with the 3d Armored Division command influence situation.

MG Suter confirmed during our interview that he did not mention COL Bozeman's relationship to the 3d Armored Division command influence problems during the pre-board screening briefing with GEN RisCassi. He stated:

...At that time, it was not even in my mind...I'll just have to say, it didn't occur to me to raise the issue that [REDACTED] There was no adverse information on him, any more than it would be

on a military judge, let's say, who's reversed on appeal for giving the wrong instructions to the jury.

LTC Smith, the Chief of the GOMO, stated during our interview that he believes information concerning COL Bozeman, of the type which was later presented by Mr. Peck of the Army OGC, should have been presented by MG Suter at the pre-board screening briefing.

GEN RisCassi stated during our interview that he would have liked for the information to have been brought up at the pre-board screening briefing. The Chief of Staff, GEN Carl E. Vuono, stated during our interview that the information probably should have been brought out at the pre-board screening briefing. Both, however, stopped short of saying that MG Suter's not mentioning the information was an error, citing their understanding that the 3d Armored Division command influence issues related to MG Anderson's conduct rather than to COL Bozeman's.

C. Relationship of MAJ [REDACTED] Request for Reconsideration on Pre-Board Screening Process

When viewed together, the chronologies of the processing of MAJ [REDACTED] request for promotion reconsideration and the 1989 JAG Corps Brigadier General Promotion Board raise a question as to whether those persons or organizations who were involved in both actions were remiss in failing either to recognize or to call attention to the implications the former bore on the latter.

The evidence contains no indication that the TAPA/PERSCOM and ODCSPER military personnel officials who were involved in the handling of MAJ [REDACTED] request for promotion reconsideration were aware of COL Bozeman's candidacy in the forthcoming 1989 JAG Corps Brigadier General Promotion Board. Similarly, there was no indication that the military personnel officials in the GOMO and in the Army Secretariat within the TAPA/PERSCOM were aware, or could have been expected to be aware, of the content of MAJ [REDACTED] request for promotion reconsideration.

On the other hand, the entire content of MAJ [REDACTED] request for promotion reconsideration--including his specific claims about COL Bozeman's responsibility for command influence in the 3d Armored Division and excerpts from court decisions on which he based those claims--was presented to the OTJAG as early as late January 1989, months before the 1989 JAG Corps Brigadier General Promotion Board. The OTJAG administrative law opinion was rendered in mid-March, several months before the Board was announced. Both MG Overholt and MG Suter were aware of the opinion, as were officials of the Army OGC. Several days prior to the pre-board screening briefing, MAJ [REDACTED] claims about

b7c

COL Bozeman were again brought to the attention of the OTJAG when the administrative law opinion was reaffirmed by MG Overholt in the course of preparing of response to MG Surut's letter.⁸

During our interview, MG Overholt stated he did not recall his involvement in the administrative law opinion on MAJ ██████████ request for promotion reconsideration. MG Suter recalled the opinion only as one of any number of opinions that the OTJAG routinely renders; he stated that he took no special note of it at the time. MG Suter stated he believes it would be unfair to expect him to have connected the administrative law opinion with the then-pending Promotion Board.

D. Instructions to the 1989 JAG Corps Brigadier General Promotion Board

On May 3, 1989, the Secretary of the Army signed a Memorandum of Instructions (MOI) for LTG Wishart. The MOI listed the revised Board composition. A copy of the MOI was given to each Board member. Significant portions of the seven-page MOI are quoted as follows:

No assessment of demonstrated professionalism or potential for future service can be complete or objective without a review of the individual's entire record. The total person concept should govern; isolated examples of excellence or mediocrity should not be used as sole determinants for a recommendation or the lack thereof. The individual's record provides the most complete compilation available of opinions from many sources, covers a variety of experiences, and assists in judging the whole person. However, the record should be used primarily to assess potential and as an aid in predicting future contributions rather than as a basis for rewarding past performance. It would be desirable for the Board to be able to interview the candidates; however, because this is not practicable, the Board may consider, as an extension of the record, the views of its members who know an officer personally. On the other hand, gossip will not be considered.

* * * * *

⁸ As discussed earlier in this report, the allegations in MAJ ██████████ reconsideration request form a sufficient basis for investigation independent of the 3d Armored Division issues.

b7c

Consideration of Adverse Information: After you have compiled a tentative listing of officers recommended for promotion to brigadier general, you may receive case summaries from The Inspector General (TIG), Commander, Criminal Investigation Command (CIC), and/or the Commander, Central Clearance Facility (CCF), on substantiated, relevant adverse information maintained in official files of their agencies on officers in the zone of consideration. These summaries must be presented to the entire board, and may include information from ongoing investigations (provided the information is substantiated and relevant). The summaries are intended to ensure that all pertinent information is made available to the board in the discharge of this important task. The Board will assess the gravity and credibility of any evidence of misconduct, malfeasance, or impropriety and weigh such evidence in light of the officer's record of superior performance and demonstrated potential that supported the tentative inclusion of the officer among those to be finally recommended. You will endeavor to recommend the officers who have consistently demonstrated the highest standards of integrity, personal responsibility and professional ethics, and who can continue to uphold the proud tradition of the general officer corps.

The Board convened at 7:30 A.M. on May 16, 1989, and received the customary briefings by the Secretary of the Army, the Chief of Staff, and LTC Smith. The formal notes of those briefings contain the following key points:

(1) The Secretary stated, in part:

"Look closely for the officer who has demonstrated a record of working closely and effectively with military commanders....

As the leaders within the JAG Corps, the individuals recommended must be highly respected within the JAG Corps and also by the officers of the line. They must be viewed by all as a soldier/lawyer. Look for those who have sought to develop a professional relationship with the line through support to the commander.

* * * * *

The Army is constantly involved in litigation in such arenas as the Freedom of Information Act, drug testing, contracting, environmental issues and Intelligence community issues, all of which are subject to close scrutiny by Congress and the public. The officers selected, therefore, must be individuals of great judgment if they are to advise the Army leadership properly and expertly on these issues--we cannot afford to make mistakes in such matters."

(2) The Chief of Staff stated, in part:

...Above all, as indicated in your MOI, your personal knowledge of those in the zone needs to be a key ingredient in this selection process. Collectively, as a group, you will personally know many of the eligibles and be able to evaluate their potential and performance. You must share first hand knowledge. But reputation must also be reviewed. Better to air potential problems now than to discover them later."

(3) LTC Smith stated, in part:

"...In compliance with Secretary of Defense guidance, after you have compiled a tentative listing of officers recommended for promotion, you may receive case summaries from TIG; CIC; the Director, Equal Opportunity Office; and or the Commander, Central Clearance facility, on substantiated, relevant, or adverse information maintained in official files of their agencies. These case summaries must be presented to the entire Board. These case summaries will be in writing, but you may request further clarification of facts by the responsible agency through GOMO.

Selection Boards may not request or consider additional information that could not otherwise be made a part of the officer's official record, without notice to the officer and opportunity to comment. While not intended to restrict frank and open discussion based on personal observation, the restriction is designed to prevent the

inclusion of records and files in the Board proceedings which have not been earlier referred to the officer concerned.

Mr. Marsh has recently established a new tenure policy regarding general officers in the Judge Advocate General's Corps. [A summary of the]...current laws and policies concerning tenure and retirement...[was provided the Board members with the MOI].

Be mindful that if you recommend promotion of an officer who is 56 years old or older, you are also recommending that the Secretary of the Army and the Chief of Staff make an exception to the policy requiring general officers to retire at age 59. As such, you should also provide justification for your decision."

The aforementioned summary of tenure and retirement law and Army policy stated, in pertinent part:

By Secretarial policy, general officers...who hold the regular grade of brigadier general or major general...are expected to request voluntary retirement at age 59, even if at that time such officers have not yet reached maximum [35] years of service....

* * * * *

By Secretarial policy, a general officer of the Judge Advocate General's Corps who serves as The Judge Advocate General or as The Assistant Judge Advocate General is expected to request voluntary retirement upon completion of the statutory four-year tour in such position, unless extended in the current position or reappointed to another tour in either position, even if such officer is not required by law to retire. A general officer of the Judge Advocate General's Corps who holds a regular grade of brigadier general is expected to request voluntary retirement upon attaining four years in grade or upon being considered (while serving as a brigadier general), but not selected, for appointment as The Judge Advocate General or The Assistant Judge Advocate General, whichever

occurs later, even if such officer is not required by law to retire.

We found the instructions to the Board appropriate and otherwise unremarkable.

E. Board Deliberations

After receiving the above-described briefings, the Board considered the candidates, 115 colonels with dates of rank on or before May 16, 1988. Records of the Board's proceedings, specifically the records of the members' scoring of individual files, are not maintained; those records are routinely destroyed within days after the Board's conclusion. However, all of the Board members and the Board recorder, CPT Shirley J. Walker, then of the Office of the Department of the Army Secretariat, Management Support Division, PERSCOM, were interviewed. As the interviews were conducted between nearly six months and over eight months after the Board proceedings, no witness's recollection was clear and complete. The following occurred, as best we can determine from the testimony:

(1) Each Board member reviewed each candidate's file and assigned a score in accordance with a standard scoring system. The scores were tabulated, resulting in the identification of a more manageable number of better candidates; whatever that number may have been, it was further reduced to a relatively small number of final contenders, perhaps six. The Board discussed the final contenders in detail. COL Thomas M. Crean and COL Kenneth D. Gray were identified as clearly the highest-standing candidates (though not necessarily in that order). Either COL Bozeman was tied for third place or was rated only slightly higher than the remaining several candidates. In any event, the candidates' scores were very close.

(2) At the point COL Bozeman was identified as a top contender, and clearly no later than the point at which the Board identified COL Bozeman as a selectee, MG Overholt presented to the Board a verbal description of COL Bozeman's relationship to the command influence issues in the 3d Armored Division. The nature and extent of that description is addressed subsequently in this report.

(3) Following MG Overholt's presentation and discussion of the information about COL Bozeman, the Board reached a consensus and chose COL Bozeman for the third position.

LTG Wishart stated during our interview that, after COL Bozeman's selection but before the Board adjourned, he telephoned GEN Riscassi. He did that, he said, because the discussion of COL Bozeman's connection with the 3d Armored Division command influence issues caused him to be concerned

about the possibility that the selection of COL Bozeman might result in some challenge. He stated that, when he described the situation, GEN RisCassi asked if the Board felt COL Bozeman's qualifications warranted his selection; when LTG Wishart responded they did, GEN RisCassi told him to proceed. GEN RisCassi recalled during our interview that LTG Wishart had telephoned him concerning COL Bozeman's tentative selection. Although he did not recall exactly what was said, he stated that LTG Wishart's account was probably accurate. He stated that, in response to such a call, he would have said that it was the Promotion Board's role to weigh all the information and make its recommendations to the Secretary.

The 1989 JAG Corps Brigadier General Promotion Board concluded its business on May 16, 1989, and prepared its report, addressed to the Secretary of the Army, through the Chief of Staff, on that date. The Board adjourned at 4:30 P.M. Also on May 16, LTG Wishart signed an "after-action report" to the Secretary of the Army concerning the Board. That report appears routine and reflects nothing remarkable about the Board proceedings.

During our interview, MG Overholt provided the following account of the information he had provided to the Board Chairman and members concerning COL Bozeman's connection with the 3d Armored Division command influence issues:

I said, 'Len, I need to tell you a little bit about both of these people [COL Bozeman and another candidate still under consideration]. I think there is something you ought to know about John Bozeman. That is the command influence issue. He was involved in the Third Armored Division cases....There is nothing in his record that reflects it at all, if we voted today. Now, however we decide to manage this tie breaker process here, I want you to know about it.'

Wishart said, 'Oh I remember those cases. I did them on the rehearing out at'--he was commander at Leavenworth where a lot of these rehearings took place. He talked a little bit about them. He said, 'I remember that.'

...[MG Klugh] was nodding his head up and down, but I am not sure how much he remembered.

I told him a little bit about what happened; it was [MG]...Anderson's case; that there had been a Court of Military Appeals decision

which had had a line in there that said that John (Bozeman) didn't--or couldn't control his commander.

And, that that was unfortunate. You had to take that into consideration in the vote.

The other members of the Board basically confirmed MG Overholt's description of his statements to the Board.

LTG Wishart stated during our interview that he had the impression that MG Overholt was trying to be very objective in his presentation. He recalled that, when asked whether COL Bozeman had provided poor advice to his commander, MG Overholt responded to the effect "...that what Bozeman had done was probably about right and that the action taken by the Commander and the Sergeant Major was perhaps independent, or they ignored advice or acted in a way that he had no control over." LTG Wishart stated he did not recall references to court decisions in which COL Bozeman had been criticized.

BG Holdaway stated that he recalled that MG Overholt had given a fair summary of COL Bozeman's involvement in the 3d Armored Division command influence issues, and that, on completing the summary, MG Overholt asked for and received his and BG O'Roark's agreement. BG Holdaway said that MG Overholt had noted that COL Bozeman had been the subject of a critical comment by the Chief Judge of the CMA. BG Holdaway said that he (BG Holdaway) had remarked that the Chief Judge's comment had been unfair.

BG O'Roark stated during our interview that he believed MG Overholt had accurately summarized COL Bozeman's involvement in the 3d Armored Division command influence issues. He did not recall whether or not court decisions critical of COL Bozeman were mentioned.

MG Klugh recalled during our interview that MG Overholt and BG Holdaway had both spoken on the subject of COL Bozeman's involvement in the 3d Armored Division command influence issues. Though he did not recall what was said or whether references were made to court decisions which were critical of COL Bozeman, MG Klugh stated that he had concluded from the discussion that COL Bozeman had not done anything unprofessional.

CPT Walker, the Board recorder, stated that, although she had been in and out of the room, she recalled there had been considerable discussion of COL Bozeman during the last stages of the Board's deliberations.

LTC Wishart provided the following testimony concerning the Board's, and his personal, consideration of the information on COL Bozeman:

I wouldn't allow a vote for a long time in there. I wanted to be sure everybody really thought about it and--because I had some personal concerns, not from the point of view of whether COL Bozeman was qualified, but whether or not we would wind up with a challenge because of the baggage he carried. I will tell you that in all sincerity.

And I found myself, personally...,wrestling with the idea of whether I would vote against him because he carried the baggage, or whether my reasons were because I didn't think he was qualified. In other words...I knew I was trying to sort that out in my mind, to be sure that I wasn't going to penalize a guy who was perhaps innocent of any improprieties on his own part.

I cannot tell you, at this juncture, whether I put him ahead of the other one or two we were looking at....But all I do recall, with some clarity, was that I was trying to figure out whether or not...I was going to make my decision on the basis of, would there be a challenge....

And, if that were the case, was it right to vote against him simply because somebody was going to challenge it later on, or did I really think he was the right guy. And I do know we all, as I said, when we finally wrapped it up, as a group said, well, whatever we had heard was not sufficient to tell us that he couldn't serve well and wasn't qualified to serve.

So, when the vote finally went down--I don't know if it was unanimous, and I honestly don't know, really, which way I voted for him. But I do know that I was not unhappy [with the outcome]. There was no minority report or objection when it was all finished.

III. ANALYSIS AND CONCLUSIONS

The failure to disclose the criticism of COL Bozeman at the pre-Board screening briefings and the inadequacy of the

description of his role to the Board are matters of concern. However, the replacement of BG Hansen on the Board raises a clear question of impropriety.

We believe, based on consideration of the totality of the evidence, that MG Overholt gave BG Hansen's dissatisfaction with his nonselection for promotion as reason for requesting the substitution of BG Holdaway for BG Hansen on the Board, but there is at least the perception he had some other reason. Initially, the evidence shows that MG Overholt favored BG Holdaway over BG Hansen to serve on the Board but indicated that either would do a very good job. After BG Hansen was selected for the Board, and after BG Hansen told him that COL Bozeman was "carrying a lot of baggage," and expressed his concern about two other serious contenders for promotion, MG Overholt pressed for replacing BG Hansen. Certainly BG Holdaway was predisposed to favor COL Bozeman since he had not found fault with him during his "investigation" of the 3d Armored Division command influence matter.

The evidence suggests that the Board's composition was adjusted in order to avoid a particular outcome, which in turn seriously compromises the integrity of the promotion process. Although the same selections may have been made if the Board composition had remained unchanged, we believe the perception of impropriety or irregularity cannot be overcome. No one is in a position to reconstruct the action to determine what selections would have been made under other circumstances.

There is no regulation or policy document that clearly prescribes material appropriate for presentation at pre-board screening briefings. However, it is clear that any and all potentially derogatory information should be brought up at such briefings to help preclude situations such as that addressed in this report. Thus, we strongly believe MG Suter should have offered information on COL Bozeman at the pre-Board briefing. Criticisms of COL Bozeman in connection with the 3d Armored Division command influence cases were a matter of record and widely discussed in judge advocate circles. As a minimum, the litigation process found that COL Bozeman at best failed to ensure that policies were communicated clearly or were followed up on. It is well established through testimony that COL Bozeman was widely recognized as a leading contender for selection for promotion to brigadier general. In sum, we believe MG Suter erred when he failed to present to GEN RisCassi a description of COL Bozeman's relationship to the 3d Armored Division command influence issues.

COL Bozeman's involvement in the 3d Armored Division command influence issues--or, at least, the view of it held by MG Overholt and cited in this part of the report--was discussed and considered by the Board. It is clear, however, that the

information presented to the Board cast COL Bozeman's role in the 3d Armored Division command influence problem in a favorable light, and that criticisms of COL Bozeman were discounted. The invalidity of that view is discussed elsewhere in this report.

Finally, there was no claim, and we found no indication, that COL Bozeman was not competitive with the other candidates on the basis of his military record, excluding the 3d Armored Division and MAJ [REDACTED] matters. His military personnel record, as it was considered by the Board, was outstanding. We believe that COL Bozeman's selection by the Board was not inconsistent with the information as it was presented to the Board.

b7c

PART FIVE

STAFFING THE 1989 JAG CORPS BRIGADIER GENERAL NOMINATIONS

I. INTRODUCTION

This part describes how the nominations made by the Promotion Board were staffed within the Army and the Office of the Secretary of Defense. It details how the adverse information concerning COL Bozeman was characterized and considered.

II. FACTSA. Identification and Description of Adverse Information

On May 17, 1989 (the day after the 1989 JAG Corps Brigadier General Promotion Board met), CPT Bruno of the GOMO sent a memorandum to the Army OGC listing the three selectees and asking whether any of them were currently under investigation or had ever had allegations against them substantiated by that office. He sent a similar memorandum to the DAIG.

Also on May 17, 1989, CPT Bruno sent a memorandum to TJAG requesting that he certify the promotion board as in compliance with law and regulation. MG Suter made the certification on May 22, 1989. By all accounts, MG Overholt was not substantially involved in the processing of the nominations because he was in his final days before retirement and was not present much of the time. The OTJAG role in "shepherding" the nominations through the Departments of the Army and Defense fell to MG Suter.

On May 24, 1989, Mr. Peck of the Army OGC replied to CPT Bruno's May 17 memorandum. He signed in the block of the May 17 memorandum, "Yes, adverse information attached," and enclosed a memorandum, which he also signed, in which he stated the following:

While COL (then LTC) John R. Bozeman was Staff Judge Advocate of the 3rd Armored Division, it was alleged that the Commanding General, MG Thurman E. Anderson, and COL Bozeman, acting on his behalf, exerted unlawful command influence on potential defense witnesses which impacted a large number of court-martial cases. The command influence allegedly began in April 1982 and continued until about March 1983. The appellate courts found that unlawful command influence did occur.

There are at least eleven reported appellate cases, extending through 1986, which mention

COL Bozeman by name. Many of these indicate that the evidence was inconsistent about COL Bozeman's role. No basis was found for taking any action against COL Bozeman.

For entirely unrelated reasons, Mr. Andrew Effron, General Counsel of the Senate Armed Services Committee, recently has asked the Army for information about unlawful command influence cases over the last several years. Therefore, the Committee can be expected to be aware of the 3rd Armored Division cases and raise questions about COL Bozeman's involvement in them.

B. Army Management Response to Adverse Information

MG Overholt stated during our interview that he had told the Army OGC that he wanted to be sure that a description of COL Bozeman's connection with the 3d Armored Division command influence issues was included in the nomination package. Although there is some slight variation in Army OGC accounts of how its attention came to be drawn to the subject, it is clear that Mr. Peck and his subordinate, MAJ Harry D. Brown, originated the May 24 statement. Mr. Peck stated during our interview that he had had MAJ Brown research the decisions mentioned in the statement and that, although he felt that what the cases showed did not technically constitute the kind of information that had to be reported to the SASC under the governing policy, he believed it should be reported nonetheless. He stated he felt that should be done: (1) because, since certain SASC staff members were already aware of COL Bozeman's relationship to the 3d Armored Division command influence cases, not mentioning the matter could subject the Department to criticism; and (2) to show that the Department was not trying to hide anything.

Mr. Peck stated that, because the package he received included no reference to COL Bozeman's relationship to the 3d Armored Division command influence cases, he had anticipated OTJAG resistance to the inclusion of a description of the matter. He said, however, that he encountered no such resistance when he coordinated the statement with MG Suter. The degree to which MG Suter participated in preparing the description forwarded by Mr. Peck is unclear. The statement was at least coordinated with MG Suter. He stated during our interview that he fully supported the inclusion of the statement of adverse information in the package.

Upon receiving Mr. Peck's reply, LTC Smith, the chief of the GOMO, telephoned MG Suter on May 25, 1989, and made the following contemporaneous note of his understanding of the information which MG Suter provided him during that call:

Bozeman did nothing wrong. Cases were looked at '400' ways and he [COL Bozeman] was only voice of reason. Defense soiled Bozeman. No action because no basis. Ephraun (sp) SASC staffer may know him well so he should be notified. Board knew and discussed the issue.

During interview, LTC Smith affirmed the accuracy of his account of his discussion with MG Suter; MG Suter acknowledged the notes were probably a fair representation of what he said to LTC Smith. LTC Smith recalled that, during the telephone conversation, MG Suter indicated that COL Bozeman had advised his commander properly, that COL Bozeman had taken the proper steps, and that, although it was an unfortunate situation, it was COL Bozeman who had followed through to ensure that service members' rights were protected.

LTC Smith stated that his purpose in calling MG Suter had been to determine whether the board which selected COL Bozeman had known about his connection with the 3d Armored Division command influence cases, whether there was anything that precluded COL Bozeman's promotion, and whether COL Bozeman had been considered fairly. He recalled that MG Suter had "put [his] mind at ease" through his responses that the board had been aware of and had considered the situation, that the 3d Armored Division matters should not preclude COL Bozeman's promotion, and that, in fact, the way COL Bozeman had handled himself in the 3d Armored Division situation only went to prove that he is general officer material.

Later on May 25, 1989, MAJ Todd Sain, GOMO, requested comments on and concurrence with a draft of an Action Memorandum from LTC Smith, through the Chief of Staff and Vice Chief of Staff, to the Secretary of the Army. The purpose of the Action Memorandum was to obtain the Secretary's approval of a memorandum to the Secretary of Defense which recommended approval of the results of the 1989 JAG Corps Brigadier General Promotion Board and the nomination of the recommended officers for promotion.

The draft was sent to the Inspector General, who concurred on May 26; TJAG, for whom MG Suter concurred on May 30; the Chief, Legislative Liaison, who did not date his concurrence; and the Army General Counsel, for whom Mr. Thomas W. Taylor, then Principal Deputy General Counsel, concurred on May 31.

Included in the draft Action Memorandum was the statement, "There is an item of potentially unfavorable information on Colonel Bozeman which is summarized at RED TAB." That information, which was an enclosure to the draft Action Memorandum, was as follows:

While Colonel (then Lieutenant Colonel) John R. Bozeman was Staff Judge Advocate of the 3d Armored Division, US Army Europe and Seventh Army, it was alleged that the Commanding General, Major General Thurman E. Anderson, and Colonel Bozeman, acting on his behalf, exerted unlawful command influence on potential defense witnesses which impacted a large number of court-martial cases. The command influence allegedly began April 1982 and continued until about March 1983. The appellate courts found that unlawful command influence did occur.

There are at least eleven reported appellate cases, extending through 1986, which mention Colonel Bozeman by name. Many of these indicate that the evidence was inconsistent about Colonel Bozeman's role. No basis was found for taking any action against Colonel Bozeman.

On June 1, 1989, LTC Smith signed the final version of the Action Memorandum to the Secretary of the Army. The final version, which referred to and incorporated as an enclosure the above-described "RED TAB" information, included the following:

MG Suter has reviewed this ['RED TAB'] information and the entire promotion packet and recommends it be forwarded with the comments on COL Bozeman. MG Suter does not believe the finding should prevent confirmation of the board. He has also requested that he be notified once the SecDef signs the board nomination so he can call his contact on the SASC to discuss the findings on COL Bozeman. If you approve this approach, I will track the nomination and keep MG Suter informed."

LTC Smith stated during our interview that he had included reference to MG Suter in the Action Memorandum only to indicate that MG Suter was the person most knowledgeable on the subject of the "RED TAB" information. MG Suter said during our interview that he did not recall indicating that he would call a contact on the SASC.

C. Army Staffing of the Nominations

On June 1, 1989, the Action Memorandum was initialed by the Vice Chief of Staff, GEN Riscassi, and by the Chief of Staff, GEN Vuono. GEN Vuono annotated the Action Memorandum, "COMO, pl

see me w/ Bill Suter." As directed, MG Suter and LTC Smith met with GEN Vuono and discussed with him the information concerning COL Bozeman; that meeting probably occurred June 2, 1989.

GEN RisCassi stated during our interview that he had approved the package before forwarding it to GEN Vuono because he saw in the materials nothing that indicated that COL Bozeman had been responsible for wrongdoing.

During interview, GEN Vuono recalled that the discussion had occurred but did not remember its specifics. He did recall, however, that his main purpose had been to ensure "that everybody was aware of what the story was because we didn't want anyone to get the impression that we weren't laying all the cards on the table." GEN Vuono stated he reviews potentially adverse information on nominees on a case-by-case basis. As to his approval of the package, GEN Vuono stated he did not recommend against COL Bozeman's promotion because, based on the circumstances of the 3d Armored Division command influence cases as he knew them in another connection, he did not believe COL Bozeman's involvement as the 3d Armored Division Staff Judge Advocate warranted disapproval of COL Bozeman's promotion.

MG Suter's recollection of the meeting with GEN Vuono was much the same as GEN Vuono's. LTC Smith stated during our interview that MG Suter presented to GEN Vuono essentially the same explanation of COL Bozeman's connection with the 3d Armored Division command influence situation as that which MG Suter had previously given him (LTC Smith). LTC Smith said he could not recall any cases in which, when "RED TAB" information had been included in a nomination package, GEN Vuono had not discussed the information with him. LTC Smith stated GEN Vuono's purpose in doing that was to ensure that the promotion board had considered the potentially adverse information, that the board had been run properly and "cleanly," and that all relevant information has been included for consideration by the Secretaries of the Army and Defense.

The Secretary of the Army, the Honorable John O. Marsh, Jr., approved the package on June 13, 1989, according to a notation thereon by his Executive. Mr. Marsh signed an Executive Summary/Cover Brief, dated June 14, 1989, requesting Secretary of Defense approval of the results of the 1989 JAG Corps Brigadier General Promotion Board and recommending the Secretary's nomination of the selected officers for promotion. The Cover Brief/Executive Summary included the following statement:

...there is no evidence of misconduct nor is there, to our knowledge, a pending investigation of alleged misconduct by these officers. There is an item of potentially unfavorable information on Colonel John

Bozeman summarized at RED TAB. Appellate courts concluded that his commander exerted unlawful command influence on potential defense witnesses. However, no basis was found for taking any action against Colonel Bozeman."

Opposite that passage, Mr. Marsh penned the note, "Dick [Cheney]--please note. Jack [Marsh]." The "RED TAB" information was an enclosure to the Cover Brief/Executive Summary.

We did not interview Mr. Marsh or members of his immediate staff as there was no indication in the testimony of other witnesses that their involvement in the processing of the nomination involved more than approval of the action based on the information contained in the package.

Explicit or implicit in the testimony of those who were involved in the coordination of the nominations within the Department of the Army is the view that the judgment of a promotion board that acts with full knowledge of the facts concerning the candidates must be accorded great deference. No witness regarded his role as perfunctory or ministerial; all acknowledged that he could have withheld his coordination and recommended disapproval. Nevertheless, all of the witnesses recognized substantial limitations on their exercise of discretionary authority.

LTC Smith stated during our interview that once a board has made recommendations, those who act on the recommendations must consider whether the board was duly constituted and whether it considered all relevant information; if those conditions are met, the Secretary, the Chief of Staff, and others do not attempt to interfere with the results. LTC Smith recalled a well known, fairly recent instance in which the Secretary of the Navy had improperly involved himself in the process. LTC Smith stated that one should not have the impression that an official involved in the approval of a board outcome may intercede because he or she does not favor that outcome; the first consideration is the sanctity of the board. It was on the basis of this view that LTC Smith proceeded with the processing of the nominations and, he said, that GEN Vuono coordinated on the nominations.

Mr. Peck of the Army OGC stated during interview:

...[T]o remove somebody from a list when he has been selected is not an easy matter, nor a step to be taken lightly.

...[T]here would have to be fairly serious evidence against the person. It would be somewhat like the standard used in appellate

courts before they...overrule a finding of fact by a lower court.

You [would] have to make a decision ...[that]...no reasonable person could have come to that [same] conclusion [as did the promotion board]."

The fact that GEN Vuono's previously-described response to MG Surut preceded his approval of the 1989 JAG Corps Brigadier General Promotion Board results by just two weeks raised the question of whether those involved in the board approval process should have been alerted to allegations concerning COL Bozeman (as presented in the memorandum by MAJ [REDACTED] which accompanied MG Surut's note) through their involvement in preparing and coordinating the letter to MG Surut.

GEN Vuono stated during our interview that he did not connect the two actions. GEN RisCassi, who did not specifically recall the correspondence to and from MG Surut but acknowledged he almost certainly saw it, likewise stated during our interview that he made no such connection.

As previously discussed, Mr. Peck had been consulted concerning the OTJAG administrative law opinion rendered in connection with MAJ [REDACTED] request for promotion reconsideration and had prepared the statement that became the "RED TAB" information in the nomination package. He stated during our interview that he had not connected the two matters; the earlier action represented to him a very technical personnel law question and he had not, at the time, focused on COL Bozeman's involvement.

D. Office of the Secretary of Defense Staffing of the Nominations

An advance copy of the promotion list was received on or shortly before June 14, 1989, by LTC P. T. Henry, U.S. Marine Corps, of the Officer and Enlisted Personnel Management Directorate, Office of the Deputy Assistant Secretary of Defense (Military Manpower and Personnel Policy), Office of the Assistant Secretary of Defense (Force Management and Personnel). In accordance with standard procedure, LTC Henry called to ask that Mr. William G. Rightor of the Office of the Inspector General (OIG), DoD, check OIG records to determine whether any of the officers selected were currently under investigation or had ever had allegations against them substantiated by that office. Mr. Rightor informed LTC Henry on that same date that the OIG was aware of a CMA case which included reference to involvement by COL Bozeman and his commander in command influence. Mr. Rightor sent LTC Henry a copy of the CMA decision on or soon after June 14, 1989. Mr. Rightor reported that no potentially adverse

b7c

information had been found concerning COL Crean and COL Gray, the other officers selected.

The package arrived in the Office of the Secretary of Defense on June 15, 1989, where its routing was controlled by the Office of the Director for Correspondence and Directives, Washington Headquarters Services. On June 16, 1989, the package officially arrived in the Officer and Enlisted Personnel Management Directorate where more correspondence was prepared and added to the package as follows:

(1) An Executive Summary/Cover Brief to the Secretary of Defense to be signed by Mr. David J. Berteau, then Deputy Assistant Secretary of Defense (Resource Management and Support). At the time, Mr. Berteau was temporarily serving in the capacity of Assistant Secretary of Defense (Force Management and Personnel). The Executive Summary/Cover Brief included the following:

...The Office of the Department of Defense Inspector General checked the names of the selectees and identified potentially adverse information concerning one officer. The Secretary of the Army identified the same information and provided the details at...[the aforementioned 'RED TAB']. These incidents should not preclude favorable consideration of the nominations.

(2) A letter to the White House Military Office that was to be signed by Mr. Berteau and accompany the nomination when forwarded by the Secretary of Defense to the President. The letter included the following:

...The Secretary of Defense made that recommendation ...[that the President nominate three officers for promotion to the grade of Brigadier General in the JAG Corps]...after considering potentially adverse information pertaining to Colonel John R. Bozeman.

During the period from June 1981 to June 1983, Colonel Bozeman, then a lieutenant colonel, was the Staff Judge Advocate of the

⁹ The CMA case was not among the records that are normally maintained and checked by the OIG. However, the case and its relationship to COL Bozeman's selection for promotion had been brought to the attention of the Deputy Inspector General through a call from a confidential source on or about May 23, 1989.

3d Armored Division. It was alleged that the Commanding General, 3d Armored Division, Major General Thurman E. Anderson, and Colonel Bozeman, acting on his behalf, exerted unlawful command influence on potential defense witnesses in a number of court-martial cases. The appellate courts found that unlawful command influence did occur.

There are at least 11 reported appellate cases in which Colonel Bozeman is mentioned by name. Information about Colonel Bozeman's role is inconsistent, and the Army found no basis for taking any action against him.

These incidents have been carefully considered and are not viewed as being serious enough to preclude favorable consideration of the recommended nomination. If the President approves this nomination, the enclosed letter will be provided to the Chairman of the Committee on Armed Services of the Senate.

(3) A letter to the Chairman of the SASC, to be signed by Mr. Berteau and accompany the nomination to the Senate following action by the President. The letter contained exactly the same description of the 3d Armored Division command influence issues as did the above-described letter to the White House Military Office.

(4) A memorandum for the President to be signed by the Secretary of Defense. That memorandum contained the following:

I recommend you nominate the 3 officers whose names are on the attached list....

This nomination is based on the results of a selection board I approved....

I have personally reviewed potentially adverse information concerning one officer and will provide the information to the White House Military Office separately. Should you approve this nomination recommendation, the same information will be provided to the Senate Armed Services Committee.

The package was received in the OGC, DoD, on June 20, 1989, and was reviewed and approved for that office by Mr. Forrest S. Holmes on June 21, 1989. It was received by LTG Donald W. Jones,

Deputy Assistant Secretary of Defense (Military Manpower and Personnel Policy), Office of the Assistant Secretary of Defense (Force Management and Personnel), on June 21, 1989. LTG Jones reviewed and approved it on that date. Mr. Berteau received, reviewed, and approved the package on June 22, 1989. On or about that date, Mr. Berteau had MG Suter meet with him to discuss the information concerning COL Bozeman.

MG Suter recalled during our interview that his meeting with Mr. Berteau had been very short. While not recalling the specifics of the meeting, MG Suter stated that he probably assured Mr. Berteau that the promotion board had considered COL Bozeman's relationship to the 3d Armored Division command influence issues.

Mr. Berteau stated during our interview that COL Bozeman's nomination was one of the first he had handled that contained potentially adverse information. He stated that he asked MG Suter to meet with him because he recognized that his coordination on the package represented a recommendation that the Secretary approve the package despite the potentially adverse information, and because he did not feel the package provided sufficient information for him to make such a recommendation. He recalled that the meeting with MG Suter was lengthy, perhaps an hour long. He did remember that MG Suter appeared to be making a presentation of the facts and did not seem to be acting as an advocate for COL Bozeman. Although Mr. Berteau did not remember exactly what MG Suter said, he clearly recalled that he came away from the meeting with the impression that the question of COL Bozeman's responsibility for command influence in the 3d Armored Division had been thoroughly investigated and that COL Bozeman's actions were found not to warrant censure.

The package was received in the Office of the Deputy Secretary of Defense on June 26, 1989. It was reviewed and approved by the immediate staff of the Deputy Secretary of Defense and the Deputy Secretary on that date, and was reviewed and approved by the immediate staff of the Secretary of Defense and the Secretary immediately thereafter. The Secretary signed the above-described memorandum for the President on June 27, 1989. Mr. Berteau signed the above-described letter to the White House Military Office on June 28, 1989.

We did not interview the Secretary or Deputy Secretary of Defense or members of their immediate staffs as there was no indication in the testimony of other witnesses that their involvement in the processing of the nomination involved more than approval of the action based on the information contained in the package.

E. Submission of Nominations to Senate Armed Services Committee

After the President's nomination of the three officers, including COL Bozeman, Mr. Berteau forwarded the above-described letter to Chairman Nunn on July 19, 1989.

As previously described, the ABCMR hearing concerning MAJ ██████ request for promotion reconsideration was held September 27, 1989; the ABCMR report was issued October 11, 1989. It was also on October 11, 1989, that the ABCMR Chairman forwarded to the Army General Counsel the above-described memorandum recommending a wide-ranging investigation based on the outcome of the MAJ ██████ case. After the Army General Counsel met with him, GEN RiscCassi directed that an investigation be conducted by the DAIG; that direction was formalized by a memorandum dated October 23, 1989.

On October 17, 1989, MG Charles E. Dominy, Chief, Legislative Liaison, Department of the Army, and Mr. Taylor of the Army OGC, advised Mr. Arnold L. Punaro, Staff Director of the SASC, of GEN RiscCassi's direction of the DAIG investigation concerning COL Bozeman. Then, or soon thereafter, Mr. Punaro was provided copies of the ABCMR record in the MAJ ██████ case, including the verbatim transcript of the hearing. By letters of October 20, 1989, GEN RiscCassi formally notified Chairman Nunn and Senator Warner of the investigation being conducted "...to resolve questions about the character and fitness of the general officer nominee in accordance with normal practice."

On November 16, 1989, Mr. Berteau wrote to Chairman Nunn suggesting that the investigation concerning COL Bozeman not impede the confirmation of COL Crean and COL Gray; a copy of that letter was also provided to Senator Warner.

By letter of December 1, 1989, Chairman Nunn and Senator Warner asked the Secretary of Defense to conduct the instant investigation. That letter indicated that COL Bozeman's nomination had been returned to the Department of Defense, and that the nominations of COL Crean and COL Gray (as well as the nominations of MG Suter as TJAG and BG Fugh as TAJAG) had been retained by the Senate when the Congress adjourned on November 22, 1989.

III. ANALYSIS AND CONCLUSIONS

The dominant document in staffing the promotion nominations contained the following key paragraph:

There are at least eleven reported appellate cases, extending through 1986, which mention COL Bozeman by name. Many of these indicate

that the evidence was inconsistent about COL Bozeman's role. No basis was found for taking any action against COL Bozeman.

This paragraph had the virtue of openly identifying the major sources of information, evaluation, and criticism about COL Bozeman, if anyone wanted to look at them. On the other hand, it conveyed a message that the evidence was inconsistent and, therefore, unpersuasive, and it suggests that some inquiry was held that led to the conclusion that there was no basis for action. The second sentence of the paragraph was also an alert to a potential problem although the word "inconsistent" is clearly wrong and the word "critical" much more accurate. The last sentence was accurate but misleading. It was not the role of the courts to determine whether there was a basis for taking action against COL Bozeman; no one else in the Army ever undertook such a review.

As reflected in LTC Smith's notes and the recollections of Mr. Berteau, it also appears that the oral briefings given by MG Suter gave a benevolent account of COL Bozeman's role in the 3d Armored Division. MG Suter's reported account are not consistent with the court cases.

We must point out that, based on the record available to us, and putting aside the MAJ [REDACTED] matter, COL Bozeman had an outstanding record after leaving the 3d Armored Division. It is a matter of judgment as to whether his subsequent behavior was sufficient to promote him notwithstanding the errors he made while in the 3d Armored Division. Unfortunately, we do not believe that the promotion board, Army officials, or other Department of Defense officials had sufficient information before them about his actions in the 3d Armored Division to make that judgment.

We find no reason to be critical of those outside of the JAG Corps who acted on the recommendation that COL Bozeman be promoted because of their failure to connect that action with allegations about COL Bozeman contained in earlier correspondence on MAJ [REDACTED] request for promotion reconsideration. Given the enormous volume of correspondence with which the Chief of Staff and the Vice Chief of Staff deal, we cannot fault them for failing to note that information in the correspondence from MG Surut might have a bearing on the totally unrelated matter of COL Bozeman's nomination for promotion. There is no indication that the military personnel officials in the GOMO were aware, or could have been expected to be aware, of the correspondence with MG Surut.

We believe that the officials in the Department of the Army and Department of Defense who recommended COL Bozeman's promotion go forward acted reasonably based on the information available to

b7c

them. However, as explained above, we believe the staff information provided by the Office of the Judge Advocate General and the Office of the Army General Counsel was deficient.

PART SIX

ALLEGED OTJAG MANAGEMENT IMPROPRIETIES

I. INTRODUCTION

This part deals briefly with a number of additional issues, including those raised in the letter of October 11, 1989, from Mr. Charles A. Chase, chairman of the ACMR to the General Counsel, Department of the Army (Enclosure 19).

II. FACTSA. Selection of COL Bozeman to be Executive Officer (XO), OTJAG

We have not determined when COL Bozeman was selected to be XO, OTJAG, but he started to serve in that position in June, 1984 and remained in that position until August 1987. The XO position is regarded by many as the most powerful colonel assignment in the JAG Corps. Whether that is accurate or not, it is a choice assignment and at least potentially very powerful.

COL Bozeman was selected by MG Clausen. There were dissenting views by some members of his staff, including BG Fugh. The essence of the reservations was that the 3d Armored Division command influence cases were unresolved and that a resolution that reflected unfavorably on COL Bozeman might present additional complications if he were serving as XO. These objections were thoughtful when made. At about the same time he became XO, U.S. v. Treakle, supra, was decided on June 29, 1984.

In ways that cannot be measured, we believe it was a costly mistake to select COL Bozeman as XO and to retain him in that position after the Treakle decision, while the LTC Mueller matter was still unresolved and in the face of the unresolved issues presented by MAJ Buchanan.

B. Alleged Improproprieties by COL Bozeman as XO1. Influencing ACMR Judges

As XO, COL Bozeman called ACMR judges about their next assignments at a time when that court was considering 3d Armored Division cases. COL Bozeman did so as part of his official responsibility regarding duty assignments for colonels.

We interviewed five ACMR judges, and BG O'Roark, BG Hansen, and MG Suter, who served as Chief Judges of the ACMR. We found no evidence that COL Bozeman had discussed 3d Armored Division issues with any of them. Nor did we find any evidence that they perceived these calls as anything other than routine.

General O'Rourke stated that the Chief Judge prepares a proposed assignment slate for sitting judges and that the recommendations of the Chief Judge carry substantial weight in determining future assignments. He stated that the involvement of the Chief Judge in the assignment process ensured that the sitting judges are treated fairly.

Several witnesses said that the ACMR judges were treated fairly and got either their first or second choice of assignment. We noted that several of the judges who were most critical of COL Bozeman got their first choice.

2. COL Bozeman's Assignment as SJA for the 18th Airborne Corps

We found no evidence of impropriety in connection with COL Bozeman's assignment as the SJA of the 18th Airborne Corps in August 1987. In particular, we are satisfied that the allegation that there was an improper effort to create a vacancy for him has no merit.

3. COL Bozeman's Relationship with MG Overholt

It is alleged that COL Bozeman prepared MG Overholt's tax returns and gave him financial advice. Both deny that COL Bozeman prepared MG Overholt's tax returns or that their occasional discussion of financial matters such as mutual funds were of any significance. We concur. There is no evidence of any impropriety.

C. TJAG OBSTRUCTION OF DAD

1. MG Clausen's Opposition to the DAD Proposal to Send a Fact Finding Team to Europe

We find no support for the allegation that MG Clausen obstructed the DAD by objecting to their going to Europe on a fact-finding trip in connection with the 3d Armored Division influence issue. Although MG Clausen raised objections and alternative approaches (as well as his voice and his emotions), he promptly approved the trip.

2. The "Illegal" Order

The issue relates to the appellate representation of over 150 former service members whose appeal rights had been exhausted prior to the development and resolution of the 3d Armored Division command influence cases.

Beginning in February 1984, the DAD came up with a strategy for dealing with this subset of the 3d Armored Division cases. There was an exchange of memoranda on the subject, with the

Criminal Law Division taking the position that there was no statutory, regulatory, or ethical requirement for representation as contemplated by the DAD. By February 1985, a memorandum for MG Clausen's signature was prepared setting forth guidelines for appellate representation that precluded representation as contemplated by the DAD.

Col Eckhardt described the guidelines as an order which, if issued, would require him to violate his professional responsibility to the former service members. He believed that the discovery of new evidence created an ethical obligation to inform the former service member of the possibility of a challenge to the conviction or sentence, and to represent the former service member if he or she elected to pursue the challenge. The guidelines allowed the DAD to inform, but not to represent.

BG Fugh was the Assistant Judge Advocate General for Civil Law by the time the guidelines were prepared. He testified that he considered the guidelines unwise and unnecessary. He felt that the DAD should have had some latitude, and that the unusual circumstances presented in the 3d Armored Division, as well as some 1st Armored Division cases that were also before the ACMR at the time, limited the precedential aspect of the DAD strategy. BG Fugh told COL Eckhardt not to file pleadings on behalf of former service members without his permission, and instructed COL Eckhardt to ensure that no defendant got hurt. BG Fugh granted permission each time it was requested, effectively assuming responsibility for failure to comply with the guidelines.

COL Eckhardt testified that he would have complied with the guidelines if they had been formally issued, but that he would have placed the matter before the ACMR and on the public record when he did so. He believes that the guidelines were never issued because several unnamed JAG general officers transferred them from one general's "in" box to another's to prevent MG Clausen from signing the document. The issue died when MG Clausen retired and MG Overholt became TJAG.

We consulted the OGC, DoD, on the authority of TJAG to issue the guidelines in question, and on the ethical implications of compliance. The response was that TJAG had the authority to act, and that there is some question about the authority of Government attorneys to represent former service members in the absence of express statutory provisions.

The ethical issue was the obligation of judge advocates to former clients (whose appellate rights had been exhausted) in cases where information is discovered which might form the basis for a petition for extraordinary relief. The OGC, DoD, advised that the obligation is satisfied by informing the client of the

new information and of the possibility of seeking relief. A judge advocate is not obliged to resume representation of the former client and may, as noted above, be precluded from doing so.

PART SEVEN

SYSTEMIC PROBLEMS IN THE JAG CORPS

I. INTRODUCTION

A number of the issues raised in the ABCMR record and the SASC letter relate to the system of JAG Corps personnel management. There is a perception problem and perhaps a real personnel management problem in the JAG Corps. We had neither the time nor the expertise to determine whether the complaints we heard were representative or are any different from those one would expect in any small hierarchical organization where there has been little change at the top in the past eight years. With the changes in leadership that will be coming, we hesitate to recommend a full personnel management review at this time. We also hesitate to pass on some of our more pertinent general observations since they are largely anecdotal in nature, however, for what they are worth, they follow.

II. GENERAL OBSERVATIONS

There were repeated suggestions that the selection of members for promotion and other Boards was a manifestation of what may be called the "cloning" process. Selection of Board members who share the experiences of the "in-crowd" is said to lead to improved promotion opportunities for junior officers who show clone potential. No suggestion is made that there is an active effort to tilt in favor of unqualified officers, either in the selection of Board members or in the selection of officers for promotion or schools. The theory is that people unconsciously give greater weight to the value of their own experiences, and those who have experiences in common with the evaluator will fare better than those who do not.

Selection of Board members is largely in the hands of TJAG. The PP&TO prepares a list of officers who meet the statutory and regulatory criteria for Board membership, and annotates the list to show minorities, acquisition law specialists, and others. That list is presented to TJAG, and he makes the selections. MG Suter said that when, several years ago, he noted a pattern of repeat Board membership, the OTJAG began providing TJAG a chart showing Board membership over the previous six years along with the list of eligibles. MG Suter also described efforts to diversify the membership of Boards by including acquisition law specialists, a mix of field and headquarters personnel, and officers with trial defense backgrounds. We did not attempt to evaluate the success of that diversification effort by further analysis of Board member records.

We were told that an examination of Promotion Board membership over a six year period would reveal patterns of repeat

membership and of excessive membership by former XOs and former PP&TO staff members. We did not find these patterns among the officers below the grade of brigadier general.

There was a noticeable pattern in Board membership among the JAG Corps general officers. While MG Suter, BG Holdaway, and BG O'Roark served on Boards regularly during the period we examined (1984 to 1989), BG Fugh served less frequently and BG Hansen served only twice. During a period when BG Holdaway served on eight Promotion Boards and one school selection Board, BG Hansen (an officer with comparable seniority) served on two Promotion Boards, none since 1986. We were offered a number of reasons for that disparity. One was that BG Holdaway had moved around in general officer positions more than BG Hansen, and that this gave BG Holdaway a better basis for evaluating officers. Another was that MG Overholt had lost confidence in BG Hansen's judgement, particularly after BG Hansen began seeking a post-retirement job several years ago. Finally, we were told that neither BG Hansen nor BG Fugh had any experience in the personnel business, and that neither had taken any steps to learn.

The pattern of general officer participation on Boards was cited as evidence that BG Hansen and BG Fugh were, respectively, the [redacted] of the JAG Corps general officers. Both were said to have been "not TJAG's choice for BG" when selected. BG Hansen's [redacted] status was further evidenced by his removal from the 1989 JAG Corps Brigadier General Promotion Board after he provided comments to MG Overholt on some of the potential leading candidates. BG Hansen was also excluded from participation in the OTJAG opinion on MAJ [redacted] request for promotion reconsideration. We found a number of adherents to the [redacted] view, not least among them BG Hansen and BG Fugh.

The tenure of JAG Corps general officers was one of the concerns most frequently expressed to us, by both colonels and general officers. MG Overholt served two years as a brigadier general, and eight years as a major general, breaking a tradition that an officer moved on after serving as either TJAG or TAJAG. MG Clausen served as TAJAG for two years, and took over as TJAG after his predecessor had health problems. MG Suter, after one year as a brigadier general and four years as a major general in the position of TAJAG, has been nominated for a four-year term as TJAG. BG Holdaway and BG Hansen have served eight and eight and one-half years, respectively, as brigadier generals, becoming the most senior brigadier generals in the Army. The extended tenure of MG Overholt, BG Holdaway, and BG Hansen led to a four-year gap between brigadier general promotion opportunities. Colonels who would otherwise have been considered during that period were passed over in favor of officers who would normally have been in the 1989 year group.

One result of the general officers' extended tenure was that a number of colonels feel that they did not have an opportunity to compete for promotion to brigadier general. More importantly, some in the JAG Corps feel the Corps and the Army have suffered because the same officers occupied key leadership positions for so long; the reinvigoration which comes with a change in leadership did not occur, and the views of one man dominated the Corps for eight years. None of the critics suggest that MG Overholt was not doing what he perceived to be the right thing for the JAG Corps, but they do suggest that his dominance over such an extended period was not good for the Corps. Because it has so few general officer positions, the JAG Corps does not have the same ability as other corps to move its general officers around. The critics say that, if a general officer does not move on to timely retirement, that officer's personal imprint can become too firmly imbedded.

7 APR 82

TOPICS

1. Summary courts-martial (SCM): an underused disciplinary tool.
 - a. 3AD: 35 SCM's in FY 81; other comparable jurisdictions: 200 plus.
 - b. Goal: SCM within 7 to 14 days of the offense.
 - c. A sentence including at least 10 days confinement at hard labor should result in shipment to US Army Retraining Brigade (USARB).
 - d. Failure to perform at USARB will result in administrative discharge. FY 81: 29% discharged; of these soldiers, most received discharges for unfitness.
 - e. Key point: ensure SCM officer gets thorough briefing by JAG prior to commencing duties.
 - f. Generally, SCM is O4 business. A captain, while acceptable, will tend to yield to delays. Consider switching cases with another battalion. This is not essential, but may be useful to enhance appearance of fairness.
2. Delays: take a hard look at (a) Article 32 Investigations, (b) waiting for MP/CID reports, and (c) delays in processing military justice actions between headquarters.
 - a. Article 32 Investigations.
 - (1) Many Art 32 Officers are sending legal clerks off to transcribe proceedings from tape recorders.
 - (2) Hold Art 32 Officers to tight suspenses (7-10 days), advise them not to use tape recorders, and tell them to summarize the evidence personally (the legal clerk won't have nearly as much to type).
 - (3) If the message doesn't get through, consider not sending your legal clerk to the Art 32 Investigation.
 - b. Waiting for MP/CID reports.
 - (1) MP/CID will usually speed up reports if you tell them prosecution is contemplated.
 - (2) No need to await lab report in marijuana cases at Article 15 level. Less than 1% come back negative. Set aside the Article 15 if you get one of the 1%.
 - c. Transmittal delay between headquarters: be critical of large gaps of time (5 or more days) between preferral of charges and indorsements at succeeding levels.

3. Pretrial confinement.

a. Assure all subordinate commanders know 3AD policy: SJA is final authority for approvals, but only CG can disapprove.

b. Any soldier who threatens a witness in one of your cases should ordinarily go to jail (Art 134: threat/obstruction of justice).

4. Court membership.

a. Nominate best qualified soldiers available. This will assure fair trial for accused and the Government.

b. Court-martial duty takes priority over TDY, alerts, FIX's, etc.

c. Once detailed, a court member can only be excused by the CG (request made through the SJA).

d. Occasional problem: Intermediate excusal (a subordinate commander tells court member another duty takes priority).

5. Command influence.

a. Do what you think is right; have the courage to stand behind your decisions (whether to prefer charges; what level of disposition to recommend).

b. Inquiries about incidents on the blotter do not indicate the CG is dictating a course of action. Get this point to company-level commanders.

6. Underused disciplinary tools.

a. CG letter of reprimand. We do very little of this business. Send the witness statements to the SJA and let him write the letter if you don't have the time.

b. Chapter 14. Watch for the case where a soldier has been permitted to continue after two or three Article 15's without some form of adverse administrative action.

c. Bars to reenlistment. We still see cases of frequent acts of misconduct but no bar to reenlistment.

7. Driving while intoxicated: the 15-6 requirement.

a. Policy applies to 3AD commanders, but is a good idea for all to consider to enhance level of supervisor awareness of this serious problem.

b. 15-6 should be appointed immediately; no waiting for blood alcohol tests where there is other visual evidence of DWI; forward all reports to CG through the SJA.

70

8. Military justice training.

a. As part of your officer and NCO professional development program, get the JAG's to give military justice classes.

b. Emphasize instruction in NCO authority; many NCO's don't know what they can and can't do.

9. Information: correctional custody.

a. SJA is staffing proposal to restore 30 days CCF authority to field grade commanders imposing Article 15 punishment.

b. Proposal contemplates evaluation within seven days as to potential for satisfactory future service. If soldier has no service potential, initiate Chapter 13 or 14 while CCF is being completed.

10. Witnesses on extenuation and mitigation.

a. Common scenario: serious offense at BCD level; company commander testifies that soldier (can be rehabilitated) (should not be discharged) (should not be confined) (should be returned to the unit "this afternoon").

b. Apprise company level commanders of the general inconsistency of recommending a GCM or BCD and discharge of the accused from the service, and then testifying to the effect that the accused should be retained.

c. CAUTION: These remarks don't mean don't testify for one of your soldiers or tell a subordinate not to testify. It is occasionally appropriate to seek a result that an otherwise good soldier will be placed under a suspended punitive discharge. If retention in the service is appropriate, maybe you've recommended the wrong level of disposition.

11. Personal property of soldiers sent to jail. Commanders need to review procedures. Too much property is turning up missing. Problem has attention of DAIG.

12. Drug statistics from USAREUR. USAREUR statistics indicate 10% of soldiers with drug offense arrests receive no punishment. The statistic is high enough to warrant inquiry by commanders about how subordinates are disposing of individual cases.

13. Leave and Earnings Statements (LES). A good practice is to suspense a reminder to check the LES of a disciplined soldier after a couple months to assure that the forfeitures were effected.

14. Physicals. When a commander sees a soldier headed for Chapter 14 proceedings, a good practice is to schedule a physical in connection with a counseling session. That may serve as an attention-getter and will expedite the process later on if the soldier continues unacceptable performance.

71

(BLACK F)

AFFIDAVIT

I, Mark A. Mueller, [REDACTED] Lieutenant Colonel (LTC), United States Army, having been sworn, do state the following:

1. From mid-June 1980 to 1 May 1981 I was the provost marshal for the 3d Armored Division (3AD) headquartered at Frankfurt, Federal Republic of Germany (FRG). In July 1981 I assumed duties as the commander, 709th Military Police (MP) battalion headquartered at Gibbs Kaserne in Frankfurt, FRG. That battalion is a five company unit with two companies (564th and 127th) in the Butzbach/Giessen/Fulda/Ranau area; one company (284th) in the Frankfurt area; and two companies in the Wiesbaden/Mainz/Darmstadt/Baumholder areas. As a result of this wide dispersion and the unique concept of area court-martial jurisdiction in Europe, the battalion is subject to three different general court-martial convening authorities. The bulk of the 564th and all of the 127th are within the jurisdiction of the 3AD and provide military police support in that area and to that command. As the battalion commander, I was located in Frankfurt and my chain of command was through the V Corps Provost Marshal (and 2d MP Group commander) to the Deputy Commanding General (DCG), V Corps.


2. Because my headquarters was not within the 3AD jurisdiction and because I did not exercise any court-martial jurisdiction over my units located within the 3AD's area, I was not aware of nor did I attend the 13 April 1982 meeting held by the 3AD's commander and general court-martial convening authority, Major General (MG) Thurman E. Anderson. Also, because of the area jurisdiction concept, I did not as a matter of course have input to the convening authority as to my recommendation for appropriate disposition of charges. I did, however, monitor all disciplinary actions within the battalion and offered my thoughts and recommendations as the battalion commander when I deemed it appropriate. I was assured by the 3AD SJA at a later date that my input was always welcome. Also, on two occasions I testified in 3AD trials on behalf of accused soldiers, in both instances urging that they be retained in service. In both cases no punitive discharge was adjudged.

3. In March 1982, I testified for Specialist Four (SP4) Gregory Johnson, 564th MP Company, who was accused in an August-1981 killing of a civilian while SP4 Johnson was effecting an apprehension for suspected blackmarketing. He was charged with negligent homicide. ~~It was 3AD jurisdiction and I was not consulted as to disposition.~~ Because of his lack of training and inadequate supervision, I was of the

opinion at the time that SP4 Johnson had been put in over his head. These factors, I felt, significantly mitigated his culpability, and consequently the severity of punishment which would be merited. When I was asked by the defense counsel to testify as to my opinion, I agreed to do so. I recommended to the court-martial that he be retained and he was. Subsequently, in the fall of 1982, several months after my testimony, I was contacted by LTC John A. Bozeman, the JAD Staff Judge Advocate. He stated that MG Anderson had become aware of the Johnson case and had learned that Johnson was still in MP in '82 back. MG Anderson was upset that Johnson had been retained and had not been immediately reclassified. I had left Johnson in the company performing non-MP duties and with a bar to reenlistment until I could determine appropriate disposition. I eventually reclassified him when I completed the evaluation process. Ultimately, he departed active duty at the expiration of his term of service.

4. In August-September 1982, Sergeant (SGT) David Sweet, 564th MP Company, was tried and convicted pursuant to a guilty plea of receiving stolen property. Again I was not given the opportunity to recommend appropriate action. SGT Sweet was one of ten or so members of the 564th implicated in a theft ring. He was the only one I testified for. I urged his retention because I felt that the incident, though a serious lapse of judgment and moral courage, was an isolated incident for him, not indicative of his true character and commitment, and one that he could soldier back from. In my opinion he was one of the finest soldiers in the entire battalion. The court-martial did not adjudge a punitive discharge. Again, I subsequently received a call from LTC Bozeman. He stated that MG Anderson had read the record and was upset with my testimony. He (Anderson) could not understand how a battalion commander could allow an individual to be court-martialed and then come in and testify as to his good character. LTC Bozeman in effect then stated to me that when a commander recommends court-martial the accused is guilty and should be punatively discharged. I earnestly and repeatedly expressed my disagreement with such a concept to LTC Bozeman and prepared a memorandum for the DCG, V Corps (Incl 1), expressing my concern. This memorandum was also motivated in part by information from the V Corps Provost Marshal (my father) that MG Anderson had complained to the DCG, V Corps (my senior witer) that he (Anderson) was not happy with my puning of the battalion. My testimony for Sweet was one thing - I knew for sure he was unhappy about.

9. As a result of these calls from LTC Bozeman critical of my testimony and stating that MG Anderson was very displeased with my involvement, I requested personal copies of my trial testimony. I felt that the coercive atmosphere required that I be prepared to present my side of the story.



MARK A. MUELLER
LTC, MPC

Subscribed and sworn before me this 17 day of September, 1984.



ROBERT S. JOHNSON
Captain, JAGC
10 U.S.C. § 936



ACTV-MFB-00


22 January 1983

MEMORANDUM FOR DEPUTY COMMANDING GENERAL, V CORPS

SUBJECT: MG Anderson's Reference to Court Martial Testimony

1. Attached is an extract of the SGT Sweet Special Court Martial record of trial with my testimony and that of my company commander. We were called as defense witnesses to elaborate on his suitability for retention.
2. SGT Sweet pled guilty to a charge of accepting a stolen TV and case of whiskey. He was on the fringe of the Giessen hoods who had trapped him with a "gift". He was the only exceptional soldier caught up in that ring of thieves and the only one I testified in behalf of.
3. In over eighteen months I have only testified for retention (pre-sentencing) two times. In both instances I wanted to ensure the correct punitive remedy for the Army.
4. My discussion with the JAD SJA determined that:
 - a. MG Anderson had recently reviewed the SWEET trial record.
 - b. We have a distinct difference of opinion regarding recommendations for Courts Martial, exacerbated by the confounding geographically-based legal jurisdictions that we have in USAREUR. The JAD SJA asserts that commanders recommending EPON/GCM automatically conclude that the subject is guilty and should be given the maximum punishment allowed by the CM. I differ (and must in those cases I have no decision in during the pre-trial process) in that the maximum punishment may be inappropriate, as it would have been in SWEET's case. Since my company commander forwarded the initial charges that eventually reached MG Anderson, I concurred fully. However, as mentioned, I desired a punishment without discharge, the recently toughened reenlistment criteria notwithstanding.
5. I do not expect to alter MG Anderson or his SJA's perception in this matter but I do assert that I must influence this codified legal process at the appropriate entry point in unusual cases.

1 Incl
as


MARK A. MUELLER
LTC, MFC
Commanding

Enclosure 3

AFFIDAVIT

1. I, John R. Bozeman, Colonel, U. S. Army, having been sworn do state the following in response to the affidavit of LTC Mark A. Mueller, dated 14 Sep 84 (hereafter called 1984 affidavit), enclosing his memorandum to the Deputy Commanding General (DCG), V Corps, Subject: MG Anderson's Reference to Court Martial Testimony, dated 12 Jan 83 (hereafter called 1983 memo).

2. I have never had a conversation with LTC Mueller either criticizing him, or relaying criticism from anyone else, for testifying in any case. On two occasions described below, I encouraged LTC Mueller to make his views known earlier so that the convening authority would have their benefit in connection with his referral decision. I never saw or heard of LTC Mueller's 1983 memo or 1984 affidavit before their association with appellate proceedings. In none of our many professional and social encounters since his 1983 memo did LTC Mueller ever mention a belief that he had been criticized for testifying.

b5
 3. Every staff judge advocate in Europe encounters at least one commander who intensely dislikes area jurisdiction. LTC Mueller was one of mine. Like others of these commanders, his objections to the system, in theory, were expressed in terms of desire to affect normal discipline in his unit; but, in fact, his objections devolved to a desire to control the system to shield favorite soldiers from normal consequences of misconduct.

4. LTC Mueller implies that our conversation about the Sweet case was followed relatively contemporaneously by his 1983 memo. In fact, our conversation occurred two months earlier, on or about 4 Nov 82. What occurred during that two month period -- essentially Nov-Dec 82 -- helps to explain the confusing juxtaposition of thoughts in LTC Mueller's 1983 memo. During the interval, LTC Mueller had significant command problems related directly or indirectly to 3d Armored Division. Each of these problems raised questions about his leadership; none involved any relation whatever with his testimony for Sweet. Most can be read on or between the lines of his 1983 memo. These problems were:

a. A major dispute over the role of 503d MP Company (assigned to 3d Armored Division) in augmenting MP operations in Frankfurt Military Community.

b. Area jurisdiction.

Enclosure 4 page 1 of 12

FL App Ex XXII

6. The Johnson case, March 1982.

a. LTC Mueller is wrong when he says that he "recommended to the court-martial that he (Johnson) be retained." There were no witnesses on sentencing. LTC Mueller appeared as a defense witness on the merits for a limited purpose described below. That he now believes he testified for retention of Johnson is an example of his bias at work on his memory.

b. About a week before the Johnson negligent homicide case (tried 31 Mar 82), CPT Chris Maher, the trial counsel, told me LTC Mueller might appear as a defense witness on the merits on the issue of military police training as to use of weapons in connection with apprehensions. At this point (March 1982) we had over 140 cases at all stages of processing and a drastic shortage of court reporters.. It had always been a special concern to me that we were prosecuting a military police soldier for an incident which occurred in execution of his duties, so I called LTC Mueller to review the case with him. He told me that he had written a "very emotional" letter to MG Ulmer (then, 3d Armored Division commander) urging that trial by general court-martial be reconsidered. He said that he did not mail it in part because SP4 Johnson had made a series of allegations pending trial which caused him to wonder whether Johnson might indeed be the cocky person with poor judgment that the Government's view of the case suggested. I told LTC Mueller everything we knew about the case for the purpose of obtaining the benefit of his viewpoint. I told him our reasoning for dropping charges associated with a negligent gun-waving incident a week before the homicide. LTC Mueller did not seem to know about that incident. LTC Mueller seemed reassured and left me with the impression that he did not find Johnson's actions on the day of the shooting justified. He did maintain that military police training could be improved in this area. I told LTC Mueller that we would always appreciate his views as to disposition of his cases, but needed them early. He agreed.

7. The cases involving SFC Whipple and nine other Giessen MP thieves, June-October 1982.

a. On a couple of occasions in his 1984 affidavit, LTC Mueller alleges that he "was not given the opportunity to recommend appropriate action" in connection with the Sweet and Johnson cases. These claims are so puzzling in light of actual circumstances. From the initial investigation of the Giessen MP theft cases in June 1982 through to Whipple's trial in October 1982, LTC Mueller called me to ensure that we understood his view that Whipple was the ringleader and that trial by general court-martial was a necessity (in his words, "we've got to get Whipple").

b. We spoke on this subject at least three times in the June-October time frame with the last call just a few days before the trial on 29 Oct 82. After a conversation with CPT Umphres, the trial counsel, LTC Mueller called to say that he was very concerned that CPT Umphres would be a forceful advocate for the Government in the Whipple prosecution. I assured LTC Mueller that what he was hearing was only the typical range of concerns by any prosecutor before a big case, that convictions were never a certainty, and that some of CPT Umphres' concerns related to our inability to develop a strong case for LTC Mueller's view that Whipple was the "ring leader" who dominated the other nine MP's by force of personality.

c. In none of these conversations did LTC Mueller express concern about any of the other nine cases. At the point of our last conversation about the Whipple case, Sweet had already been tried. Until our conversation about the Sweet case on or about 4 Nov 82, I never heard a word from him regarding the advisability of prosecutions in the other cases.

d. What makes LTC Mueller's assertions most puzzling is that he knew very well how and when to make his views known when he wanted forceful prosecution. I have concluded from this that his true complaint is not lack of opportunity to recommend appropriate disposition, but lack of opportunity to control disposition of cases.

8. The Johnson MOS reclassification problem.

a. In September 1982, Mr. Ed Bellen asked me to review his remarks prepared for the USAREUR Criminal Law Conference. Enclosure 1 is an extract of the portions of those remarks dealing with the Johnson case. Some of Mr. Bellen's description of LTC Mueller is unflattering, but I dismissed the implications at the time. However, my experience to this date would support (1) "domineering personality" (page 23 of extract), to the extent of describing one who attempts to use force of personality to subordinate the thoughts and desires of others; (2) "motorboat mouth" (page 23 of extract), to the extent of describing one given to rapid expression of unrelated or indefensible thoughts; and (3) "self-styled lawyer" (page 23 of extract), to the extent of describing one who thinks he knows the law, but doesn't. Mr. Bellen also describes LTC Mueller as an individual given to various positions on the same subject (page 51 of the extract) and one who would resort to an impermissible alternative (putting Johnson on leave to avoid extra duty) to preclude a result with which he did not personally

agree (pages 66 and 67 of the extract). My experience with LTC Mueller in the Johnson MOS reclassification problem, the Whipple post-trial problems, and the Hodges case would tend to support all of this, but at the time I attributed LTC Mueller's actions to those of a strong-willed commander in a tough job with an intense dislike for area jurisdiction.

b. Mr. Sellen's representation that Johnson was still an MP in Butzbach caught my attention. Beginning in October 1982, I asked officers at Butzbach Legal Center to find out if Johnson were still an MP and, if so, whether he would be reclassified. Over the next several weeks I received answers which were at first ambiguous and then suggested that CPT Koval, 564th MP Company commander, did not want to reclassify Johnson out of his MP MOS.

c. I am addressing the beginning of the MOS reclassification problem at this point to keep it in chronological order. My conversations with LTC Mueller on this subject all occurred later and are addressed in paragraph 10.

9. Conversation with LTC Mueller about the Sweet case, o/a 4 Nov 82.

a. On or about 4 Nov 82 I called LTC Mueller to tell him the results of initial action by the convening authority in the Sweet case. This was a routine practice in cases like this, which involved no confinement. Early in my tour my office had been criticized in these circumstances because a soldier had served several additional weeks before the commander received the court-martial promulgating order through distribution. Problems for the command were exacerbated by problems for the affected soldier who would usually be spending his pay at a higher grade level, not realizing that the finance office would recoup the overpayment.

b. When I informed LTC Mueller that Sweet's reduction and forfeitures had been approved, LTC Mueller launched into a broad criticism of court-martial in Sweet's case. He was disturbed about the consequences in respect to Sweet's ability to reenlist. (In fact, the clemency petition for Sweet indicated that he was on the promotion list for E6 in his new unit.) LTC Mueller viewed the case as an unfortunate consequence of the area jurisdiction system in Europe. He said, in just about these words: If Sweet's case had been handled at V Corps, he would have received a letter of reprimand; in 8th Infantry Division, an Article 15; and only in 3d Armored Division would he receive a court-martial.

c. LTC Mueller's criticism prompted me to review the Sweet case in a step-by-step attempt to explain why it was handled as it was at each stage of the process: from Article 32 investigation, to referral, to pretrial agreement, to approval of sentence. My intent was to convey how much thought and concern had been invested in the case and to help LTC Mueller understand a process which seemed to be confusing him.

d. This explanation was in the nature of an analysis of the case, John Bozeman talking to Mark Mueller. The phone call would have lasted nearly 30 minutes. At this point we had been associated professionally in our discussion of the Johnson case and in several discussions about the Whipple case. I do not believe we had begun discussion of the Johnson MOS reclassification problem.

e. In discussion of the referral process, I pointed out that CPT Koval, 564th MP Company commander, had recommended general court-martial. As CPT Koval was a subordinate of LTC Mueller, we had assumed that LTC Mueller agreed with CPT Koval unless we heard further from him. LTC Mueller argued that his role, in his view, required him to support his subordinate commander's recommendation. I told LTC Mueller that there were two problems with this approach. First, it did not appear certain that CPT Koval believed trial by general court-martial or even BCD special court-martial was necessary as he had testified for retention of the accused. Second, I pointed out to LTC Mueller that he needed to make his position known before referral, as failure to do so left Sweet in jeopardy of the maximum punishment at the BCD special court-martial level.

f. Our discussion was never about MG Anderson's views of the Sweet case. LTC Mueller's 1983 memo supports this proposition, as the core theme in that memo is our disagreement about the timing of recommendations affecting courts-martial.

g. Our discussion was never about the fact that LTC Mueller or anyone else testified in favor of Sweet. In the context of discussing appropriateness of punishment and adverse consequences as to reenlistment, I told LTC Mueller that I did not agree with his proposition that integrity is more important for MP's than for other branches. He disagreed that he had said that and asked me to send him his testimony so he could see for himself. I cautioned him to be aware that the record was summarized and I acknowledged that his meaning could have been watered down in the summarization process. -

h. I sent the case to LTC Mueller with the hope that he would learn from it and never again let the system proceed without making his recommendations known at the appropriate point in the decisionmaking process.

10. Discussions with LTC Mueller about the Johnson MOS reclassification problem.

a. Sometime in November or December 1982, I began a series of three or four phone calls to LTC Mueller, spread over as many weeks, on the subject of reclassifying Johnson.

b. LTC Mueller is wrong when he says I told him that "MG Anderson was upset that Johnson had been retained and had not been immediately reclassified." (I assume LTC Mueller means retained in the MP MOS, but it makes no difference in the facts. I don't recall that MG Anderson ever told me anything one way or the other about retention of Johnson on active duty.)

c. We had a crushing workload in 3d Armored Division during this period and I simply didn't need more problems than would come in due course. My first call to LTC Mueller was just to tell him about the problem. I told him that I thought reclassification was required by the regulation, but didn't know for certain. He said he didn't know what Johnson was doing, but would look into it.

d. In our next conversation, LTC Mueller said that Johnson was not performing duty involving weapons, but that no action to reclassify was underway. He said he did not believe reclassification was mandatory. I still did not know myself and was hoping LTC Mueller would do the research and resolve the issue himself.

e. In our next conversation, which would have occurred in the December 1982 time frame, I read the regulation to LTC Mueller and told him it would be unfortunate if the Army had to litigate a case involving Johnson in another gun incident. LTC Mueller reluctantly responded that he would take appropriate action.

f. Only at this point did I inform MG Anderson that we had resolved a question about the MOS reclassification of Johnson. About two months later LTC Mueller told me that Johnson had been reclassified.

g. In his 1984 affidavit, LTC Mueller makes his actions seem like routine delay to "complete the evaluative process." What really happened was a delay of nearly nine months from convening authority action to reclassification. During most of this time LTC Mueller claimed to be unaware of the circumstances or reluctant to do what the regulation required.

11. The continuing impact of Whipple; the Hodges case.

a. After the Whipple trial (Oct 82), our conversations about Whipple continued periodically. Whipple had been sentenced to reduction to E6 and was still in LTC Mueller's command. He was a continuing problem because of adverse morale consequences in situations like this (as I recall, he was too close to the date of his return from oversea assignment to reassign elsewhere), and he made a series of allegations throughout the period regarding leadership in 709th MP Battalion, particularly affecting CPT Koval and LTC Mueller.

b. LTC Mueller sought my advice in connection with proposed nonjudicial punishment of SSG Whipple for theft of papers which provided a basis for some of Whipple's allegations. The case was a weak circumstantial one and, in the midst of investigation into Whipple's complaints, nonjudicial punishment would have appeared retaliatory.

c. Whipple's allegation's appeared correct with respect to command efforts to shield SSG Hodges, a member of 564th MP Company, from appropriate punishment. A customs investigator had told SSG Hodges that a member of his platoon was involved in a blackmarketing offense (unlawful transfer of stereo equipment) expected to take place in the near future. On 28 Dec 82, Hodges told the soldier that he was the target of a customs investigation. Later, the soldier told the customs investigator what happened and an investigation of Hodges ensued. After several weeks, CPT Koval told the trial counsel (CPT Umphres) he was still investigating. In mid-February 1983, CPT Koval told CPT Umphres that the case was more complex than thought originally and was still being investigated. CPT Koval expressed concern at that time with MG Anderson's influence in the case. I spoke to CPT Koval and explained that his interest was only in the nature of discovering what, if anything, was being done, as he had received an anonymous letter to the effect that CPT Koval was attempting to "sweep the matter under the carpet." CPT Koval stated he was continuing to look into the case. In mid-March 1983, I was informed that Hodges had received a Summarized Article 15 (oral reprimand and one week extra duty). Subsequently on 6 Apr 83, MG Anderson gave Hodges a letter of reprimand for his misconduct.

d. During the investigation and delay associated with the Hodges case, I had several conversations with LTC Mueller who was from the beginning my point of contact regarding what was transpiring as to the "investigation." It was LTC Mueller who told me (1) that the case was a vendetta by the customs investigators in Giessen, and (2) that the only reason this case was being pursued was because Whipple had brought it to the command's attention. At first he told me that the customs investigators had pressured the soldier into saying falsely that Hodges told him about the investigation. Later, he said that Hodges told the soldier because the soldier was not too smart and customs rules were poorly publicized and difficult to remember. I told LTC Mueller that I might agree if we were talking about how many grams of coffee could be given to a local national, but here we were talking about sale of stereo gear to a German.

e. Eventually, investigations were conducted affecting LTC Mueller and CPT Koval. (I did not know about the investigation affecting LTC Mueller until recently in conversation with MAJ Richardson, then the deputy for 2d MP Group, LTC Mueller's next higher headquarters.) MAJ Richardson investigated allegations affecting 564th MP Company. A DA Form 751 recording my input is Enclosure 2. I do not know the results of the investigation affecting LTC Mueller but, from my knowledge of Whipple's complaints, I assume it was not unfavorable.

f. While the Hodges case occurred largely after LTC Mueller's 1983 memo, the manner in which LTC Mueller handled the matter is, I believe, instructive as to his general attitude in cases affecting soldiers in his command.

12. The MP augmentation dispute.

a. Following bombings of V Corps headquarters in the summer of 1982, LTC Mueller supported a plan to augment his military police units with assets of the 503d MP Company (a 3d Armored Division unit) for MP operations in Frankfurt Military Community. In the November-December 1982 time frame, 3d Armored Division withdrew from this arrangement, in part because of a view that LTC Mueller was not running MP operations effectively.

b. On 12 May 83 I was present when COL Isaacson came to see MG Anderson about the Hodges letter of reprimand. MG Anderson had approved the letter of reprimand for permanent filing on the previous day, but COL Isaacson wanted to see him anyway. COL Isaacson repeated a view I knew to be held by LTC Mueller that SSG Hodges was just showing good leadership as to a "not particularly bright" soldier in his platoon who would not be expected to know much about intricacies of customs rules. I told COL Isaacson that the problem with that view was that Hodges himself denied that he told his soldier about the investigation. COL Isaacson immediately moved on to another topic which caused me to believe his primary purpose was to "mend fences" with 3d Armored Division. The MP support situation had calmed down at this point. MG Anderson expressed reservations about LTC Mueller's running of the battalion and pointed out specific circumstances in which MP support for Frankfurt Military Community had been ineffective. COL Isaacson did not object to MG Anderson's view, though perhaps just to "keep peace." Rather, he told MG Anderson that LTC Mueller had been showing strain from being in a demanding job and that a replacement expected in May -- a former infantry officer -- was expected to help remedy previous problem areas. At no point was LTC Mueller's testimony in any case mentioned.

c. While others will have to supply details of this problem between LTC Mueller and 3d Armored Division, I am satisfied that it was a significant factor in LTC Mueller's thought process in connection with his 1983 memo. He acknowledges it in his 1984 affidavit as an alternative motivation. In addition, he addresses his 1983 memo to the DCG, V Corps, who is the Frankfurt Military Community Commander, the one highly concerned with military police support to the community and with allegations affecting LTC Mueller's command of the 709th MP Battalion.

13. Drug problems in 709th MP Battalion. During November and December 1982 LTC Mueller confronted significant allegations of rampant drug use by soldiers in 127th MP Company (the Millberg case) and 284th MP Company (the Hinesly case). In both cases, testimony broadly suggested drug involvement of a kind which strong leadership might have precluded or brought to light earlier. These were not the only drug cases in the battalion, just two which had much broader implications.

14. LTC Mueller's 1983 memo.

a. From my knowledge of the context of time and circumstances, I have no difficulty reading LTC Mueller's 1983 memo for what it is: the effort of a commander to shift the blame for some leadership problems onto area jurisdiction. Our conversations about area jurisdiction continued into 1983 and I helped LTC Mueller construct an action to obtain approval for his exercise of field grade nonjudicial punishment authority over companies in 3d Armored Division's jurisdiction. It took him a long time to get the matter in writing but it was finally submitted on 22 Apr 83 and disapproved on 3 Jun 83. I helped him with the rationale and suggested an interim solution, which he adopted, of asking in the alternative for a six-month test period.

b. I always wondered why LTC Mueller took so long to submit his request for exception to area jurisdiction policy. Now, after seeing his 1983 memo, I believe his intention was to attempt a more direct route of escalating command attention to his circumstances in an effort to obtain quick command support.

15. Conclusion. By nothing in this affidavit do I mean to say or imply that LTC Mueller is a dishonest person. What I am saying is that otherwise unconnected circumstances have distorted his recollection in significant respects. A most evident display of this proposition is in paragraph 4 of his 1984 affidavit where he says that I told him MG Anderson was upset with his testimony and could not understand how he could testify as to good character. Any lawyer who believes that statement must have a blind desire to believe the worst about this case. My knowledge of the rules in this regard is well-established. Moreover, I never heard MG Anderson express such a view. MG Anderson's concern was never anything more than to urge trial at the lowest appropriate level by encouraging commanders not to recommend a level of court-martial offering punishment excessive to the offense. This simple proposition made so much sense in the face of a crushing case load, but has been repeatedly distorted by a number of individuals, including LTC Mueller, whose own knowledge of basic military justice decision points and processes is insufficient to permit differentiating between perfectly acceptable propositions and unlawful ones. Some were so intimidated by MG Anderson that every contact, however normal, was perceived as being coercive. LTC Mueller was never

subjected to coercion with respect to his testimony. What he received was a series of routine staff inquiries and comments designed to help him do his job better and urge him to make decisions at the appropriate time based on full understanding of facts, circumstances, and consequences.


JOHN R. BOZEMAN
COL. (JAGC)

Subscribed and sworn before me this 10th day of October,
1984.


THOMAS R. KELLER
Major, JAGC

Subj Hearing

UNITED STATES)
)
)
)
 HOLDEN THOMPSON)
 Private E1,)
 Correctional Holding Detachment,)
 United States Disciplinary Barracks,)
 Fort Leavenworth, Kansas 66027-5060)

SPECIAL FINDINGS
 4 December 1985

66

FINDINGS OF FACT:

- A. Favorable Character Witnesses at Trial.
1. The accused was a member of Co A, 1st Bn, 32d Armor from December 1980 until his trial on 29 December 1982. During his first year in the unit as an E5 his Platoon Sergeant was SSG Tomlinson and his Platoon Leader was SFC Wentzell (AEFL XIII). From December 1981 to the date of trial the accused's Platoon Sergeant was MSG Bradford - on two separate occasions - and a SGT Morgan for an undetermined time in between. His Platoon Leader after November 1981 was a Lieutenant Brizinski. From approximately April 1982 to the date of trial the accused's Tank Commander was SSG Lewis. There is an indication Lieutenant Brizinski was his Tank Commander at one time. During the accused's assignment to A/1/32, he received a Summary Court-Martial (AEFL XII), a less than favorable EER (AEFL XIII), a Bar to Reenlistment (AEFL XVI) and a rehabilitative transfer to a new platoon. The accused was continuously in pretrial confinement from late August 1982 to the date of his trial.
 2. Counsel for the accused did seek favorable character witnesses on behalf of the accused. Personnel within the company chain of command were interviewed. They included the Commanding Officer, CPT Nowell, the Platoon Sergeant, MSG Bradford, and the Tank Commander, SSG Lewis. It can be assumed the First Sergeant and Platoon Leader were also interviewed. The Supply Sergeant, SSG Reddick, was also contacted. No one outside the chain of command was contacted although favorable testimony was available in the unit (SFC Parks).
 3. Of the chain of command, the only person who had favorable testimony on behalf of the accused was SSG Lewis. All others would have given unfavorable testimony concerning the accused's character for truth and veracity similar to the testimony actually presented by the First Sergeant at the trial. The Supply Sergeant's testimony - while generally favorable, would have been of minimal impact due to his lack of knowledge of the accused's duty performance or character. Favorable character evidence was weak; government rebuttal evidence was strong.

United States v Thompson - Special Findings

4. On or before the date of trial no member of the unit ever heard General Anderson or any other member of the Officer or NCO chain of command speak or say anything which could even be construed as discouraging favorable character testimony. The January Haga letter became known to the unit after the accused's trial. The atmosphere in the unit, at the time of trial, was that individuals accused in disciplinary proceedings were entitled to favorable witnesses; this routinely occurred; the NCO's expected to become involved in the process; and no one was ever criticized for so doing.

5. The only witness who expressed concern or fear of testifying during this time frame was SSG Reddick. His fear was not based upon any unlawful command influence but was directly attributable to his concern for his job - a general feeling that if he was ever perceived to be "rocking the boat" it would be to his detriment. This feeling was entirely self-generated and totally unrelated to any influence by General Anderson or anyone else.

6. There is not one shred of evidence that anyone attempted directly or indirectly to deprive the accused of favorable character testimony. To the contrary, the atmosphere in the unit was that such testimony was expected. Even SSG Reddick agreed with this.

7. After the accused's trial, there was evidence that CSM McGuire, Bn CSM, held a meeting wherein the subject of Bn NCO's involved with drugs came up. Whether or not CSM McGuire's statements were inappropriate, they had nothing to do with the accused or his trial and there is no evidence there was any connection with any expressed views of MG Anderson, CSM Haga or any other Commander or senior NCO.

8. SSG Lewis left the Division in February 1983. He never heard of the unlawful command influence issue. MSG Bradford left the Division in 1984 and only learned of the issue through the August 1984 Army Times Article (AEFL XI). SFC Parks, a member of the accused's unit, testified that in March or April 1983, he received a phone call from a female specialist who identified herself as CSM Haga's secretary. She asked SFC Parks if he was aware of CSM Haga's policy on not testifying for accused and referred him to NCOPP letter #16. SFC Parks believed this was related to his contact and interview by defense counsel in the case of US v Smith - one of the important drug cases within 1st Bn, 32d Armor. NCOPP letter #16 came down in distribution a few days later and was discussed with the First Sergeant. A retraction was announced soon thereafter. SFC Parks appeared to be a credible, strong witness with good memory retention. I cannot discount this phone call as "missed communications." If, as he asserts, this phone call occurred after General Anderson's letter of 4 March, it portends the most serious misconduct and illegal intent on the part of CSM Haga and possibly MG Anderson. I believe, however, on the evidence presented that the phone call occurred in February 1983 - before CSM Haga's letter came to the attention of COL Bozeman. The phone call and the

United States v Thompson - Special Findings

letter, which was quickly retracted, had no chilling effect on SFC Parks and was not generally disseminated within A/1/32. This circumstance had no impact on the accused's trial.

B. The "Mueller Affidavit":

1. From July 1981 to July 1983, LTC Mueller was the Commander, 709th MP Battalion with Headquarters in Frankfurt, Germany. Units of the Battalion were spread over a very large segment of Germany, in many military communities, and under the GCM jurisdiction of several Division or higher Commanders pursuant to USAREUR's Area Jurisdiction concept. With the exception of his Headquarters element, LTC Mueller was not in the official military justice chain of his command. This fact was a source of deep irritation to LTC Mueller and throughout his command he initiated several efforts to neutralize, modify or alter area jurisdiction to have the Battalion Commander officially placed in the military justice chain. All his efforts failed. LTC Mueller never became sure just how he was to informally interface with the various justice chains - especially that existing within the 3d Armored Division GCM area.

2. In addition to the problems he had with extended command lines, LTC Mueller had several other perceived problems. Notable were actual and potential terrorist activities within his area - especially in Frankfurt, and a perception that the crime rate among his MP's was inordinately high. In the latter category, two cases or incidents provide the background for the "Mueller memo - Jan 83" and the "Mueller Affidavit - Sep 84."

a. US v JOHNSON. As a young MP detailed to CID, Johnson shot and killed a German civilian in the PX parking lot. He was charged with involuntary manslaughter and ultimately convicted of negligent homicide. Trial was held on 31 March 1982, approximately one month after General Anderson's assumption of command. The case primarily turned on the degree of negligence exhibited by Johnson. Testifying for the defense as an "expert" was LTC Mueller - for the prosecution the accused's community Provost Marshal, Major Buchanan. After the conviction, resulting in no punitive discharge, Johnson retained his 95B MOS until his ETS in February 1983.

b. US v SWEET. Sweet was one of several Glessen MP's implicated in an on-duty theft ring. Tried by BCD SPCM on 30 August and 10 September 1982, Sweet was convicted. On Extenuation and Mitigation his Company Commander and LTC Mueller testified for retention - that is, no punitive discharge. No punitive discharge was awarded by the court. MG Anderson took action in the case on 4 November 1982.

3. In his affidavit of September 1984, LTC Mueller seems to aver that he was contacted by COL Bozeman, after trial, concerning his favorable defense testimony in each case. COL Bozeman did call LTC Mueller on 4 November 1982 concerning the Sweet case. He called LTC Mueller a week before the Johnson case. LTC Mueller admitted that there were a

United States v Thompson - Special Findings

number of calls between he and COL Bozeman in the last 3 months of 1982 wherein these cases, area jurisdiction and other justice matters arose.

4. COL Bozeman called LTC Mueller on 4 November 1982 to inform him that the CG had signed the action in the Sweet case. The purpose of the call was to appraise the command that effective that day Sweet would be reduced in grade and that care had to be taken or Sweet's finances would be adversely affected. This was addressing a specific problem COL Bozeman had faced in the past - a reduced soldier being paid at his former grade for months after the Action and then months of recoupment action by Finance - placing the soldier in financial difficulties. This conversation or contact was not pursuant to General Anderson's implicit or explicit request or suggestion. The conversation evolved into a wide ranging discussion of the Sweet case area jurisdiction and other interwoven matters. At no time did COL Bozeman state to LTC Mueller that MG Anderson was upset with the testimony. The offending statements attributed to COL Bozeman and implicitly or explicitly General Anderson were the conclusions of LTC Mueller based on philosophical concepts and the rehash of the Sweet case.

5. Sometime in late 82, COL Bozeman found out that Johnson, although convicted in March 1982, was still carrying an MP MOS in his military community. Ultimately it was determined that mandatory reclassification action had not been initiated and no steps to that end were in the offing. Several telephone conversations ensued in November and December 1982 between COL Bozeman and LTC Mueller concerning the potential danger of this situation. These telephone calls which would, on occasion, delve into side issues such as area jurisdiction, etc, did not produce a meeting of the minds as to the action required on Johnson. It was only after an apparent meeting of the minds that MG Anderson was even appraised of the potential problem.

6. To understand how LTC Mueller came to his memo of Jan 83 and his affidavit of Sep 84 one has to take into consideration the relationship and personalities of the two communicants. COL Bozeman, as clearly seen in his affidavit and observed from the stand in his testimony, has a very precise way of speaking. His words mean just what he says and no more - devoid of insinuation or innuendo. He does not communicate in generalities. LTC Mueller during the conversation in question - also a tendency observed in his testimony, was frustrated by the "confounding" area jurisdiction, had feelings that there might be command dissatisfaction with his performance as commander and was approaching most of his conversations in a defensive and combative - "I'm right, you are wrong" - manner. He was in no mood to receive such precise communications as those coming from COL Bozeman. He was receptive to "you are all against me" thoughts and possible interpretations. His affidavit and memo are summarizations, conclusions and perceptions he admitted may be wrong, not meant or not stated (R 372,380,383).

United States v Thompson - Special Findings

7. LTC Mueller testified that his conversations left him uncertain as to what COL Bozeman was actually professing as a policy. He pressed for written clarification. Based upon the testimony of his superiors and observation, I am certain a person of LTC Mueller's make-up, if told the CG was questioning his right to testify for his men, would have made a much different memorandum than the one he did on 12 January 1983. The memorandum, based primarily on a 4 November conversation but on subsequent philosophical disputes as well, is primarily a blast at area jurisdiction and perfectly compatible with COL Bozeman's recollection of the several conversations they had. The 12 January 1983 memo is not compatible with the reaction of LTC Mueller to receiving a phone call to the effect that both the SJA and the CG were criticizing him for giving favorable testimony for an accused. One specific area of LTC Mueller's testimony was discussed and that was his opinion that MP's must meet a higher standard than "normal" soldiers. Both COL Bozeman and General Anderson disagree with that concept. This disagreement may have been mentioned by the SJA.

8. Both the rater and senior rater of LTC Mueller testified they felt he was doing a superb job under very difficult conditions and so rated him. There is no evidence whatsoever that MG Anderson tried to affect this area nor is there any evidence he contacted these officials with any complaint about LTC Mueller's conduct or performance.

C. Review and Action: Appearance of Unlawful Command Influence. The testimony of MG Nichols was very illuminating on the entire issue of Unlawful Command Influence and the "consistency theory" during MG Anderson's tour as CG, 3d Armored Division and fills in many gaps left by Giarratano, Treakle, et al.

1. General Anderson has had his "consistency theory" for many years and began to espouse it at least while he was the CG, 2d Armored Division and the GCM Convening Authority of the unit. That assignment came just prior to his assignment as 3d Armored CG. CSM Haga also followed General Anderson from 2d Armored to 3d Armored.

b5
2. MG Anderson's theory is that: When a commander forwards a case to a punitive level court-martial, recommending elimination of the service member, it is inconsistent for that commander, after conviction, to testify on Extenuation and Mitigation that the accused should not be punitively discharged. This is his theory in its pure form - unadulterated by summarization for effect.

3. It is uncertain what the genesis of this "concern" was. It is clear that MG Anderson had a habit of reading the entire SJA Review of a case as well as a considerable portion of the record - especially the testimony in Extenuation and Mitigation. This is a bit unusual, especially in a very busy jurisdiction. This "concern" came with him to 3d Armored Division. It also appears the General's concern was not generated by any fall-out from inconsistencies. The discharge rate

United States v Thomson - Special Findings

was not low. There was no perceived concern that lawyers, court-members, court reporters, etc., were being ill used. The concern was not directed toward the solving of any particular problem area in the administration of military justice. COL Bozeman did testify that the CG was very interested and involved in the court-martial process and that he was concerned that everything went according to the rules and regulations - as he understood them.

4. There is no question that the concern expressed by MG Anderson was directed toward the officer responsible for the inconsistency (R 663,752) and not toward the idea that a soldier was unnecessarily placed in jeopardy. The CG's reaction when he read or detected an example of this inconsistency was that the individual didn't know what he was talking about (R 664).

5. The only explanation for MG Anderson's concern in this area and his subsequent emphasis on it is that this is a pet peeve he has. It shows to him a lack of intestinal fortitude in the person to stand up and be counted. MG Anderson mentioned his pet peeve to groupings of commanders as well as staff and also to senior NCO's. The consistency theory (C1, above) does not lend itself to a hard hitting, quick concept by a General walking up and down the stage, covering many subjects in a short period of time. Having spoken on the consistency theory many times, both in the 2d Armored Division and the 3d Armored Division it became abbreviated to "What really pisses me off is when someone sends a case forward for a BCD and then comes in and testifies on his behalf." It was very illuminating that MG Nichols during his testimony reverted to the use of the words "testify in his behalf" when it was clearly understood that we were all talking about testifying for retention or no punitive discharge (R 750,788).

6. MG Anderson discussed his consistency theory with MG Nichols frequently. They seemed to have the same philosophy. MG Nichols appeared to clearly understand what concerned MG Anderson, how it affected him and how and why he chose to address this subject to his command. The testimony of MG Nichols is very significant as it appears to articulate MG Anderson's thought process -when not under attack.

7. The only explanation MG Anderson could give for including groups of senior NCO's in his consistency theory pitch was that they work closely with their commanders and consult closely and are therefore part of the court-martial recommending process.

CONCLUSIONS OF LAW:

1. The government has shown by clear and convincing evidence that the accused was not deprived of favorable character witnesses - either before findings or on the sentencing portion of the trial. Character witnesses were contacted and the weight of the unfavorable testimony caused the trial defense counsel to elect not to present such favorable testimony as he had - as a trial tactic.

United States v Thompson - Special Findings

2. MG Anderson did propound his consistency theory to various groups of officers and senior NCC's within the 3d Armored Division. In its abbreviated form when being presented, persons who heard the General could conclude the General disapproved of the chain of command testifying favorably once the accused had been convicted - although that was not his desire or the intent of his remarks. Furthermore, when reviewing and acting on a BCD or GCM wherein the Commander or First Sergeant had testified for no discharge or to that effect, the CG would tend to question that testimony in his own mind as such testimony was from the same chain of command who had recommended such level of court. This did not impact on the accused's trial as he had no favorable chain of command testimony.

3. General Anderson neither directly nor indirectly through his SJA, criticized LTC Mueller for presenting favorable testimony in any court-martial. Nor did General Anderson make any complaints about LTC Mueller to that officer's rating chain.

4. The case is returned to the Convening Authority for transmittal to the USACMR.



R. D. COLE
COL, JA
Military Judge



DEPARTMENT OF THE ARMY
HEADQUARTERS, 3d ARMORED DIVISION
APO NEW YORK 09019

AET7-CSM

23 January 1981

SUBJECT: NCOFF Letter #16 - Personal Conduct and Integrity

SEE DISTRIBUTION

1. As Noncommissioned Officers, we are expected to set the example at all times, and in all things. Two areas in which we cannot falter are our personal conduct and our integrity.

2. Personal Conduct: The Commanding General has published a policy letter (#25) dealing with the standards of conduct of soldiers assigned to the 3d Armored Division. In this letter he discussed the policies regarding the wearing of the uniform off-post, alcoholic beverages, language, and dress. I will not reiterate his policy letter here, except to say that I agree with and support his policy completely. Instead, I will discuss another important aspect of personal conduct that I feel needs additional emphasis among the Noncommissioned Officer Corps, and that is morality and integrity.

3. Morality: Webster's Dictionary defines morality as "conforming to ideals of right human conduct." It is an easy task to apply this definition to our Corps of Noncommissioned Officers by keying-in on words "ideals" and "right." As in all things that we do, we must set our standards high. Our standard of personal conduct must be the ideal or perfect standard. To accept anything less would be an affront to all members of the Corps of Noncommissioned Officers. Everything that we do must reflect the highest standards of moral behavior in order to set that example which the soldiers whom we lead deserve. In a nutshell, every aspect of our personal conduct must be right. Always remember that a MATURE person lives under the rules of his society and thinks before he acts.

4. Integrity: FM 21-100, Military Leadership, defines integrity as the "uprightness and soundness of moral principle, the quality of truthfulness and honesty..." Truthfulness and honesty are virtues to which all Noncommissioned Officers must adhere. A few years ago, honesty was the hallmark of a man of good character, but it has been set aside for an "It's all right if you don't get caught" philosophy. Only when we are in court are we required to tell the truth, the whole truth, and nothing but the truth. This is bull pucky. We've got to get the message across in this Division that 3d Armored Division Noncommissioned Officers speak with truthfulness yesterday, today, and tomorrow. It is not always an easy task to state what you know to be true. At times we must stand-up and accept the criticism of others but at the same time all men will respect a leader who does not shirk from the truth. The bottom line here is a Noncommissioned Officer whose integrity has been successfully challenged is of no further use as a leader, his superiors will not trust him, and his subordinates will not respect him. He is finished.

18

Incl 1 to Incl 1

Enclosure 6 page 1 of 3

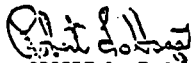
ASTF-CSM

23 January 1983

SUBJECT: NCOPP Letter #16 - Personal Conduct and Integrity

5. In this letter I have tried to define an ideal, a code which we as professional Noncommissioned Officers can live by. It is not any easier to write about than it is to live by, but we must in order to earn the confidence of our officers and the respect of our soldiers whose lives have been entrusted to us.

6. I strongly recommend that the contents of this letter be a subject for an NCOPP Class in the near future. I have inclosed a list of specific DO's and DON'Ts which should assist the instructor in preparing his/her lesson plan.



ROBERT L. HAGA

CSM

Division Sergeant Major

1 Incl

as

DISTRIBUTION:

A+

30 - CSM, 3AD

CF:

CSM, V Corps

APO 09079

19

2

Enclosure 6 page 2 of 3

DO's and DON'Ts

As a guide to the NCOPP instructor, I have compiled this list of DO's and DON'Ts. It is not intended to be all inclusive, but it should help to clarify my feelings on this subject.

Noncommissioned Officers DON'T:

- PCS without paying their last months rent and phone bill.
- File false claims for TDY expenses or household goods damages.
- Fraternize with junior soldiers.
- Park in unauthorized parking areas or in spaces reserved for handicapped.
- Commit adultery (sleeping with someone else's wife/husband or sleeping with someone who is not your husband/wife.
- Stand before a court martial jury or an administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty.

Noncommissioned Officers DO:

- Pay their bill on time.
- Insure that their families are properly supported, even during periods of separation and when divorce actions are pending.
- Buy tickets before they get on the Strassenbahn.
- Reads everything before he signs his name to it.
- Remembers that his signature indicates that he has read and verified the correspondence which he is signing.
- Set the example for his soldiers and is proud of it. (When the Noncommissioned Officer is a moral upright person who always exercises integrity, he doesn't have to worry about somebody throwing "darts" at his character.
- What is right all the time.

- Incl 1



APO NEW YORK 01020

AETFCG

4 MAR 1953

SUBJECT: Testifying on Behalf of an Accused Soldier

SEE DISTRIBUTION

1. Let's all understand several rules related to testifying on behalf of an accused soldier.
2. At courts-martial or administrative elimination proceedings, an accused soldier has an absolute right to have available witnesses, if any, testify about his or her good conduct, reputation or record for efficiency, or any trait desirable in a good soldier. Stated another way, if a witness has information favorable to the accused soldier and useful to the court-martial or elimination board in determining an appropriate sentence or recommendation, that witness is duty-bound to provide testimony to that effect. Indeed, to go a step further, I believe that the witness ought to take the initiative to let the accused soldier or his defense counsel know what information he has.

THURMAN E. ANDERSON
Major General, USA
Commanding

DISTRIBUTION:
A+
30 - CSM, JAD

Serial 2

Enclosure 7



HEADQUARTERS, 3RD ARMORED DIVISION
OFFICE OF THE COMMANDING GEN.
APO NEW YORK 09039

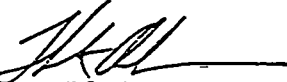
AETFCG

SUBJECT: Testifying on Behalf of an Accused Soldier

15 SEP 1983

SEE DISTRIBUTION

1. This letter addresses this command's policy and my personal views on the right of an accused soldier to have favorable testimony presented in his behalf.—On occasions I have addressed members of this command concerning commanders and noncommissioned officers testifying at trial for accused soldiers. Perhaps some of you misunderstood my comments or misconstrued their purpose. In the event it was not clear before, and to ensure that no misunderstanding now exists as to my views, I want to emphasize again my position on this subject.
2. I believe it is the inherent right of every accused to have full and fair litigation of all issues at his trial. This includes the accused's right to present witnesses and other evidence favorable to his case which might influence the court to render a verdict of not guilty, to adjudge lesser punishment, or to establish grounds for clemency or other relief by the court-martial convening authority. This evidence may include any matters related to the soldier's duty performance, professional attributes, potential to the Army, and personal life, as well as to circumstances surrounding the offense.
3. Our judicial system mandates, and I insist, that no commander or supervisor prohibit individual soldiers and members of the accused's chain of command from coming forward with any and all favorable information concerning an accused. Also, as commanders and noncommissioned officers, you should not feel inhibited in making such evidence known to the accused and his defense counsel and to testify to such matters at trial.
4. I personally expect that, as the leaders of 3rd Armored Division soldiers, you will adhere to these principles in your personal conduct and ensure your subordinates do likewise. It is our moral and professional obligation to do so.


THURMAN E. ANDERSON
Major General, USA
Commanding

DISTRIBUTION:

A+

92

Enclosure 8

6.7

Affidavit: b6

I am Captain Stephen R. Kane [redacted] and am currently assigned to the United States Army Legal Services Agency, United States Army Trial Defense Service, attached to HHC, 3d Armored Division with duty at the Hanau Legal Center, APO NY 09165. I serve as the Senior Defense Counsel for the USATDS Hanau Field Office. I have held this position since arriving in USAREUR on 19 July 1982. I have been a member of the JACC since 21 Jan 1979. Prior to this I served on active duty as an enlisted man from 31 June 1969 to 12 January 1972, 18 months of this tour was spent in Vietnam.

In late February 1983, I believe the 26th or 27th, a trial defense counsel in my office, CPT Stephen Avera, while working on one of his cases in Budingem, discovered the existence of NCOPP letter #16 dated 25 January 1983 written by CSM Robert L. Haga, 3d Armored Division CSM. The next day my office procured a copy of NCOPP letter #16 from a DIVARTY unit. After telephonically informing my Regional Defense Counsel, Major Buck James of this letter I took him a copy. It was determined to disclose this letter to the 3d Armored Division Staff Judge Advocate, LTC John Bozeman. It is my understanding that Major James delivered a copy to the 3d AD Deputy Staff Judge Advocate, Major Robert Gonzales who in turn gave it to the SJA. On 3 March 1983 I went to Armstrong Barracks, Budingem to just randomly stop people I saw and ask them if they were aware of CSM Haga's NCOPP letter #16. I found out that a number of enlisted members of both units located at Armstrong Barracks, 3d Battalion 61st Air Defense Artillery and the 3d Squadron, 12 Cavalry had read the letter or had some type of NCOPP class where the letter by CSM Haga was read to them. Further, I spoke with a couple of officers who related that they, too, had read CSM Haga's NCOPP letter. While in Budingem on 3 March 1983 I also spoke to CPT Steve Daffron commander of C Troop, 3/12 Cav. In his office he related that MG Anderson, 3d AD commander had put out something similar to what CSM Haga had penned in his NCOPP letter. CPT Daffron, referring to his notes from an officer's call on 3 December 1982 held by MG Anderson related that the 3d AD CG, under the topic of taking care of the soldier had said something to the effect of: "I can't believe that officers and senior NCOs testify at sentencing as to [an accused's] good character, do what you want but don't be dumb about it." Further, that the CG had referenced, he recalled, an NCO drug case. CPT Daffron went on to relate that this meeting was for all the commanders in the 2d Brigade and the two battalions at Armstrong Barracks. He also said that he did not want to be identified as the source of this information and that he would not give me a sworn statement until after he left command.

Between the 4th of March and the 8th of March 1983 Major James and I met with LTC Bozeman. The SJA indicated to us that the 3d AD CG was going to issue a letter to combat any improper perception the Haga letter had engendered and that CSM Haga would be issuing a retraction letter. Major James and I were shown some drafts of the Haga retraction for comments. We indicated we could not be bound by these drafts and would not offer any specific recommendations on how he should proceed. *SRIC*

LTC Bozeman in talking about the Haga letter generally stated that its issuance was unfortunate that the letter did not represent the CG's views and that basically Haga was a "loose round." The SJA indicated that the letter's dissemination appeared limited and cited the 3/12 Cav as an example since he had personally spoken to the Squadron commander, LTC Muzzy, and been told by him that the Haga letter was sitting on his CSM's desk and had not been and would not be distributed. I informed LTC Bozeman that the Haga letter had been distributed in the 3/12 Cav and that LTC Muzzy was in error if he had said it wasn't put out. Major James and I then told LTC Bozeman that there was an officer who had attended a CG officer's call on 3 December 1983 who believed the CG had made comments similar in intent to what was in Haga's letter. The SJA was then told what those comments were and that the CG had referenced a case about an NCO selling drugs. LTC Bozeman wanted to know who this officer was and I told him that I was not free to reveal any information about the source of this information. LTC Bozeman assured us unequivocally that the CG would never have made any comments of that nature. He had heard the CG speak on justice related topics before and that the CG's theme was always that commanders should know what they are doing when recommending cases to court, and that the CG would never try to discourage any member of his command from testifying.

On 10 March 1983 I attended a previously scheduled quarterly Command Sergeants Majors conference for all CSMs and separate company First Sergeants. At this meeting CSM Haga asked the group how many people had distributed or held classes on NCOPP letter #16. Out of the some 30-40 people there only 3 people raised their hands as having distributed the Haga letter. These people were told to gather the letter up and to have follow-up classes based on the 8 March 1983 NCOPP retraction letter.

By 10 March 1983, after attending the 3d AD CSM's conference I was not sure if there was a problem or not. I felt that there was some potential conflict on how wide-spread the Haga letter dissemination was and really was not sure about the information I had gotten from CPT Daffron, especially in light of LTC Bozeman's unequivocal assurance that the CG would never have made the type of comments attributed to him.

On 14 March 1983 a meeting was held to question MG Anderson and as well to "clear the air" on the Haga letter. I was not in attendance as I was in a contested GCM. I did, however, read the verbatim transcript of this meeting. I felt that the CG had given an emphatic denial as to the 3 December 1982 Gelnhausen officer's call and his comments being any form or type of directive to his subordinates not to testify on behalf of an accused.

In late March 1983 CPT Gaylen Whatcott submitted a request for discovery in the case of U.S. v Stanley from the 533d MI Battalion. LTC Bozeman spoke to me, and I believe the RDC and the other SDCs that worked with 3d AD cases that he would answer the Stanley discovery request for all 3d AD TDS field offices. Further, that he would be doing an extensive search to insure all TDS counsel that there was no problem with the Haga letter or any other

SFK

potential command influence problem. My impression was that the government search would attempt to find any potential form of command influence problem, whether specifically requested in the Stanley Request for discovery or not and regardless of who may have written or spoken on the subject of testifying for an accused soldier. The response to the Stanley discovery request was received in Hansu on 22 April or a day or so thereafter. It can be found as Appellate Exhibit XV in the Giarratano record. Within the Stanley discovery response was a DF from CPT John Morris, (Appendix A) OIC Gelnhausen Legal Center, who had spoken to the 2d Brigade Commander and been assured no type of policy or document existed concerning testifying for an accused soldier and further, that he had conducted an independent search of Gelnhausen and Budingon Sub-Communities and not found any type of document or policy. However, on about 19 August 1983 I found that in fact, CSM Campbell Reid former 2d Brigade CSM had published a DF type policy letter that had been distributed to all 2d Brigade NCOs according to the distribution format. (Appendix B). When I showed the Reid policy DF to CPT Morris he was genuinely flabbergasted at its existence, and he assured me he had never seen it before. I found the Reid DF when interviewing 1SG Robert McCrimmon and going through his unit's policy and precedent file.

Prior to discovering the Reid policy DF I had spoken to CPT George Baker in April 1983. He told me that he had attended a new commanders seminar, he believed, in October 1982 where MG Anderson spoke. He was unable to recall any wording used by the CG but had the distinct impression that the CG did not want anyone defending a soldier that had been put up on courts-martial charges.

After speaking to both CPT Daffron and CPT Baker I felt that perhaps the problem was larger than just the Haga letter, and that the "don't testify for an accused soldier" may have been put out by the CG. However, the reluctance of people to come forward on the issue, the Stanley discovery response and the SJA's assurances that there were no other incidents where this type of "policy" may have been spoken about led me to feel that I did not have any real direct evidence that the Haga letter was anything more than a "loose round", as LTC Bozeman had described it. Nonetheless, the potential impact of Haga's letter and the belief from two other officers that perhaps the CG had uttered similar comments caused me to request courts-martial panels from non-3d AD division units. My feeling was that if the CG had made comments, then it would effect potential court-martial members. I made this request of LTC Bozeman in his office prior to the case of U.S. v Floyd, a contested GCM which was tried 14-16 April 1983. LTC Bozeman agreed to advise the CG to select a non-3d AD panel. I also felt that if MG Anderson had made these comments or comments similar to the Haga letter "don't testify" theme, then it would be improper for him to review the case and take final action and that in any event the Haga letter could well be believed to be the CG's policy since it had come from the CG's chief enlisted spokesman *SRK*

The first Goode response I submitted I believe was on 1 May 1983 in U.S. v. Anderson, a case from the Butzbach - Kirch-Goens area. It addressed only the issue of the Haga letter and its potential as being perceived to be the CG's policy. I had no sworn statements at this time.

On 3 May 1983 I persuaded both CPT Baker and CPT Daffron to provide me with sworn statements as to what they recalled MG Anderson saying in October and December 1982. These were the first statements referring to MG Anderson I received. Their statements caused me some concern. Given MG Anderson's 14 March 1983 denial of any impropriety in speaking on justice matters, the 4 March 1983 letter from the CG on the moral obligation to testify, I felt that officers within the division who believed they had heard the CG say something different would be under great career pressure when and if they were ever called as a court-martial witness. In my opinion, a tangible document, under oath, and signed by potential witnesses was necessary. Other wise I believed it would be extremely difficult to procure their testimony for a trial. I feel my belief is illustrated by the situation with CPT Joseph Barto, who after telling CPT Gaylen Whatcott, CPT Rodney Hubbard and CPT Steve Avers what is essentially related in CPT Whatcott's affidavit of 2 June 1983, (Appendix C) then, later executed a substantially different version on 21 June 1983 after speaking with LTC Bozeman and rendering a sworn statement to CPT John Morris (Appendix D). I did not receive or learn about CPT Barto's 21 June 1983 sworn statement until September 1983, when LTC Kullman, the new SJA made it immediately available to defense when he learned that I had never been provided a copy of it or the CPT Day 5 July 1983 statement, by his predecessor.

On 11 May 1983 CPT Steve Avers, of my office, and I spoke with LTC Daniel Bartholomew commander 2d Battalion, 6th Field Artillery. CPT Avers and myself initially spoke to LTC Bartholomew about the manner in which a Chapter 13, AR 635-200 discharge board had been appointed on one of his soldiers. After initially speaking with LTC Bartholomew outside we went to his office. There I asked him if he recalled any meeting with the CG that concerned witnesses or testifying on behalf of an accused soldier. LTC Bartholomew went to his notes from his meetings with the CG. I specifically asked him about a meeting in the spring of 1982 that I had heard a possibility of, a few days earlier. Looking through his notes, he came upon a meeting from a 13 April 1982 "How To" type conference. His notes became very important to me because it was the first tangible evidence that, in fact, MG Anderson had spoken on the topic that he took a "dim view" of the chain-of-command speaking on behalf of an accused soldier. It also demonstrated that MG Anderson's recollection of what he believes he said might well have been faulty. His notes also added some credibility to CPT Baker's and CPT Daffron's statements. After our interview, and after reading my notes to LTC Bartholomew he said that we would probably ask him next for a sworn statement, which we did.

I drafted a statement and called him on 13 May 1983. I explained I had a statement based on our conversation and I read it to him over the phone. He agreed the statement was O.K. I asked if I could come to his office to let him physically read it and if he then again agreed that it was accurate, swear him to it. He agreed to this procedure. *SRK*

left my office and drove to his office - about a 10 minute trip. When I arrived at his office he was in a staff call. After waiting about 30-40 minutes I asked the SDO if I could use a phone to call my wife and let her know I'd be late. I was told I could use the German civilian phone in the commander's office, but I needed to log the call in the telephone control log. As I logged my call I saw that above my call was a call placed by LTC Bartholomew to Frankfurt for "Legal Advice." I copied down this number on a piece of paper. I subsequently learned this number was LTC Bozeman's home phone number. When LTC Bartholomew ended his meeting we went into his office. He reviewed the statement and told me he wanted to check with his legal advisor before he would be prepared to sign it. He indicated he would get back in touch with me.

I called LTC Bartholomew on 13 June 1983 as he had not contacted me in the interim. He told me that he was waiting to sit down with his legal advisor, that he had spoken to LTC Bozeman as recently as last Friday (10 June 1983) and talked about a meeting date but nothing had been solidified. I asked him if he anticipated any major revisions and he said no. I again called LTC Bartholomew on 20 June 1983 and he said he was meeting with LTC Bozeman that day and that he would know which way he was going reference his statement tomorrow. I did not call him the next day but called a few days later and learned he was on leave and not due to return until about 6 July 1983.

On 7 July 1983 I called LTC Bartholomew about his statement, he said he had spoken to LTC Bozeman, and that he, LTC Bartholomew had no problem with the accuracy of the statement which had been prepared. However, he was very concerned and had to think of the uses and purpose of his statement. He said he was worried about how it made his boss look. He further told me that he felt he had been taken advantage of and that he did not want to be manipulated or embarrassed. He also told me that he just didn't know how we talked about this stuff-that we had started out talking about an administrative discharge board and suddenly the page got flipped to the other thing. He said he felt "had", repeated that he did not want to make his boss look bad and finally that he preferred a question and answer format. I told him the purpose of the statement and that if he were called into a court-martial I'd ask him if the statement were true and he could adopt it on the witness stand, especially since he had repeatedly assured me it was accurate. He asked me to call him the next morning, which I did. He said he'd sign the statement. I went to his office, he read it made some spelling or grammatical corrections, initialed it, swore to it, and signed it. He again told me he felt "had."

On 21 May 1983 I filed a Goode response that contained the only two statements I had-CPT Baker and CPT Daffron. On 25 May 1983 I received a telephone call from LTC Bozeman. He asked me whether I had any other case law other than that cited in the Goode response dealing with the defense proposition that MG Anderson was disqualified from reviewing and taking final action. I said that I thought that was about it. Article 37 UCMJ SRK

me up as we talked and he stated that he did not feel that Article 37 covered the Daffron/Baker situation even if you assumed that Daffron's and Baker's statements were accurate. He felt Article 37 went only to a member or witness at an actual or identified court proceeding and did not cover the situation of comments made to potential witnesses outside of an actual court-proceeding, thus there was no unlawful command influence in the strict sense of Article 37.

We also discussed the Haga letter. LTC Bozeman told me about the McLenithen trial, that occurred in 1983 where similar comments were attributed to CSM Haga at a new 1SGTs/ company commanders meeting from January 1983 and that "Haga needs to think about the January meeting." LTC Bozeman expressed concern that Haga was being confronted with a variety of people who have different views of what they recall him saying and that the Haga letter problem might be so pervasive and so extensive, reaching all levels, that a more extraordinary solution or restatement is necessary. LTC Bozeman also told me that what LTC Bartholomew said he heard from the CG in April 1982 was "categorically wrong", that the CG was more defense oriented in that the CG's message was don't over refer cases. LTC Bozeman went on to relate that somehow LTC Bartholomew had drifted into the proposition that the CG sought to get the "dim view" concept out to subordinate commanders. LTC Bozeman added that he would give me a copy of the McLenithen MFR he had. This MFR was dated 4 May 1983 and I got a copy of it in early June 1983.

On 9 June 1983 LTC Bozeman responded to a Goode response I submitted in U.S. v Floyd. He attached the notes from CPT Daffron resulting from an interview he had with him. In his 9 June 1983 addendum to his review he characterized the defense concerns about MG Anderson's comments as "defense speculation". On 15 June 1983 I spoke with LTC Bozeman about the Floyd case and I told him I would be submitting additional comments based on his addendum. LTC Bozeman told me that he had spoken to the other officers in Hansu TDS and wanted to tell me what he had told them. He went on to say that now was the proper time to request clemency relief. He told me that the CG just cannot understand the problem anymore, given his belief that whatever was said was just misinterpreted. Yet, the dynamics of the situation were interesting to observe with the CG because you can only accuse a person just so much of what he believes is unfair before that person begins to humanly look for ways to prove you wrong. LTC Bozeman went on to repeat that now was the proper time to ask for sentence relief because the CG was sensitive to the point of being accused that he did not consider Extension and Mitigation Testimony—a point that the Goode responses were addressing.

On 20 June 1983, statements from SFC Gue and SFC Majors were obtained. At this time these statements concerned how the Haga letter had been disseminated, and were not particularly significant for any other purpose since I was not aware of MG Anderson having put out any comments to NCOs similar to what CPT Baker, Daffron or LTC Bartholomew heard. I was not aware MG Anderson had in fact urged NCOs to not testify for an accused or convicted soldier.

SRIC

²¹
 On 7 July 1983 ILT David Sanders executed a sworn statement before CPT John Hoffman of my office. And on 15 July 1983 I received a statement from a LTC Charles Stephens. On 19 July 1983 I received a sworn statement from CPT Steven Miller. However, he conditioned his giving me the statement on my not using it or releasing it for any purpose until at least 15 August 1983 which would be when he would have left the command.

On 20 July 1983 I spoke with CSM Campbell Reid. He indicated he was not aware of any policy anywhere against testifying on behalf of an accused or convicted soldier. He was also unaware of the Haga letter as he left the 3d Armored Division earlier in January 1983. However, on 19 August 1983 I discovered the CSM Reid policy DF and on 22 August 1983 I obtained a substantiating sworn statement from ISG McCrimmon. The interview and subsequent statement from SGM Glenn Johnston on 12 August 1983 was the first evidence I had that MG Anderson had also spoken about not testifying to division senior NCOs. The discovery of the CSM Reid policy DF coming as it did one week after SGM Johnston's statement dramatically altered my belief and approach to the 3d AD command influence problem.

It was clear to me that there had been a failure of discovery on the Stanley discovery response, especially since I had found the Reid policy DF in Gelnhausen while looking at the RHC, 1/48th Infantry policy and precedent files. The repeated representations and unequivocal assurances from the SJA that the CG had not ever said anything about not testifying and that LTC Bartholomew was categorically wrong in his notes were no longer valid. My personal belief that the government was trying to rectify any command influence problem was shaken. I recontacted CSM Reid in early September and read him his DF. He told me that the thoughts and ideas in that DF had come from MG Anderson at a meeting he believed had occurred in October 1982 at Friedberg. Had my office learned of the Reid policy DF as part of the Stanley discovery response our approach to this problem would have been different.

The only written action taken by the government to this time was the 4 March 1983 letter from the CG and the 8 March 1983 NCOPP #16 retraction letter. Both of these documents concerned only the original Haga NCOPP Ltr #16 and did not address any of the meetings the CG had spoken at. The Reid policy DF, had it been known in April 1983, would have enabled the defense to conduct truly meaningful interviews with the chain-of-command reference our pending cases from a position of knowledge and not rumor, and as well, have enabled the defense to thoroughly investigate, at a much earlier time, the issue of the Convening Authority's role in the "don't testify for an accused" policy. By not having had the benefit of the Reid policy DF, the defense relied on the assurances of the government that there were no other incidents except the Haga letter, but continued nonetheless, its own inquiry. As a result it was not until August 1983 that I became aware that the CG had indeed spoken to senior NCOs on the topic of witness testimony. ²¹

around the same time as the discovery of the Reid policy DF, I was called at my home by CPT Chris Maher from OTJAG Criminal Law Division. He told me that his office had read the U.S. v Barry J. Anderson Goode response. He asked that I send to his office ATTN: Major Donald DeCort the statements and information the Hanau field office had. He said that they would be briefing TJAG on the 3d Armored Division command influence problem prior to TJAG's arrival in Europe. On 22 August 1983 via the Bundespost express mail, I sent a copy of the Hanau Field Office's most recent Goode response and the sworn statements I had to Major DeCort. My cover letter is Appendix E. My Regional Defense Counsel was aware of the request and I also informed LTC Kullman's office of the request. In late August early September the SJA's office put together a package of all command influence material they had which they forwarded to Heidelberg for the USAREUR JA.

After discovery of the Reid policy DF interviewing witnesses became somewhat easier as we now had a fairly decent picture of what the CG had said to NCOs. However, most of the witnesses which MG Anderson had spoken to who were really willing to speak to me were stateside. As we interviewed officers, a number of them recognized parts of the DF as being similar to what they had heard MG Anderson talk about. To me and my office it seemed clear that the CG was discouraging officers and NCOs from coming forward to testify for an accused or convicted soldier and that the philosophy was if the chain-of-command put the soldier up for a discharge level court-martial then he was not a good soldier, was guilty and by virtue of being at that level of court, must be discharged. CSM Reid's sworn statement executed on 10 September 1983 and others that followed made it clear to the Hanau TDS office that the CG had in fact not been enunciating a pro-defense line of don't "over refer" cases to court since the people who had heard the CG just did not feel or believe they had been hearing a class on the court-martial referral process.

In September the Hanau TDS office began extensive research into case law on command influence, construction of a brief, a paragraph 113(a), MCM, 1969 witness request plus material that could be used at any Article 32s that were pending. A variety of command influence issues were raised in U.S. v Giarratano which was litigated from about 7 October till 10 December 1983. Even during this litigation additional witnesses were interviewed and statements taken, and government rebuttal witnesses indicated additional meetings where the CG had spoken to NCOs and officers that the defense had not been aware of. It was not until around mid October that I learned that an SJA representative had given a class mildly oriented towards not testifying favorably for an accused to officers of the 3d AD's 1st Brigade in Kirch-Goens.

On 8 November 1983 CPT Avera, the assistant defense counsel in Giarratano and I interviewed Colonel Boreman who had returned from the Army War college to testify in Giarratano. The interview became less of an interview for the next day's proceedings and more of a discussion on the overall command influence problem. Colonel Boreman told me that there was no problem of command influence. He stated that CSM Haga's letter had somehow been picked up on by people in the division and then attributed to MG Anderson: that MG Anderson had not said the things attributed to him. He felt that somehow Haga's letter and its controversy had "collapsed in and around the CG." Further, that in speaking to potential witnesses the defense had exacerbated and fostered this collapse in and around the CG: that in effect it was a SLK

manufactured issue on the part of the defense. He indicated that he had great respect for the defense function and that this was a tough issue but that I had approached it cynically and the Haga letter problem just collapsed in on MG Anderson. I asked him about the Reid policy DF and its not being disclosed and he responded in effect that it had just fallen through the cracks. RL



STEPHEN R. KANE
CPT, JAGC
Senior Defense Counsel

Signed, subscribed and sworn to before me, this 29th day of March 1984, at Hanau, Federal Republic Germany.



10 U.S.C. 936

CPT, JAGC

My commission expires: Indefinite.



DEPARTMENT OF THE ARMY
HEADQUARTERS, 10 ARMOURED DIVISION
APO NEW YORK 07030

8 MAR 1983

AETF-CSM

SUBJECT: NCOPP Letter #16 - Personal Conduct and Integrity

SEE DISTRIBUTION

1. The inclosure to my letter dated 25 Jan 83, subject as above, is superseded by the inclosure to this letter.
2. Special attention must be given to the changes, which relate to the subject of testifying at courts-martial or administrative elimination proceedings. If you have already had a NCOPP class which addressed the business of not testifying regarding a soldier's good performance of duty, conduct a follow-on class as soon as possible to clarify this important area. This letter must receive the widest possible dissemination to underscore the integrity of our courts-martial and administrative elimination boards.
3. In his letter of 4 Mar 83, Subject: Testifying on Behalf of an Accused Soldier, General Anderson made the following comments, which I repeat here for emphasis.

"At courts-martial or administrative elimination proceedings, an accused soldier has an absolute right to have available witnesses, if any, testify about his or her good conduct, reputation or record for efficiency, or any trait desirable in a good soldier. Stated another way, if a witness has information favorable to the accused soldier and useful to the court-martial or elimination board in determining an appropriate sentence or recommendation, that witness is duty-bound to provide testimony to that effect. Indeed, to go a step further, I believe that the witness ought to take the initiative to let the accused soldier or his counsel know what information he has."

4. The principles stated by General Anderson have my total support. I would underscore these principles by repeating what I hope you understood as one of the major themes in NCOPP Letter 16:

"...Noncommissioned Officers speak with truthfulness yesterday, today, and tomorrow. It is not always an easy task to state what you know to be true. At times we must stand-up and accept the criticism of others but at the same time all men will respect a leader who does not shirk from the truth."

S. J. 3

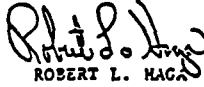
21
(RED FLAG)

Enclosure 10 page 1 of 3

AETP-CSM:

SUBJECT: NCOPP Letter #16 - Personal Conduct and Integrity --

Courts-martial and administrative elimination boards must have the truth about a soldier's performance when that matter is under consideration. Our soldiers deserve nothing less. The expression "good soldier on duty" can have many meanings and must be evaluated on a case by case basis, taking into consideration the sometimes competing interests of the accused soldier, the unit, the command, and the United States Army.



ROBERT L. MAGA
CSM, USA
Division Sergeant Major

1 Incl
as

DISTRIBUTION:

A+
30 - CSM, 3AD

CF:
CSM, V Corps
APO 09074

22

Enclosure 10 page 2 of 3

DO's and DON'Ts

As a guide to the MCOPP instructor, I have compiled this list of DO's and DON'Ts. It is not intended to be all inclusive, but it should help to clarify my feelings on this subject.

Noncommissioned Officers DON'T:

- PCS without paying their last month's rent and phone bill.
- File false claims for TDY expenses or household goods damages.
- Fraternize with junior soldiers.
- Park in unauthorized parking areas or in spaces reserved for handicapped.
- Commit adultery (sleeping with someone else's wife/husband or sleeping with someone who is not your husband/wife).

Noncommissioned Officers DO:

- Pay their bills on time.
- Ensure that their families are properly supported, even during periods of separation and when divorce actions are pending.
- Buy tickets before they get on the Strassenbahn.
- Read everything before signing it.
- Remember that your signature indicates that you have read and verified the correspondence which you are signing.
- Set the example for your soldiers and take pride in it. (When the Noncommissioned Officer is a moral upright person who always exercises integrity, he doesn't have to worry about somebody throwing "darts" at his character.)
- What is right all the time.

Incl 1

23

TRANSCRIPT
of
MEETING

held at the office of the Commanding General, Drake Kaserne,
Frankfurt, Federal Republic of Germany, on 14 March 1993, at
1722 hours.

PERSONS PRESENT:

MAJOR GENERAL THURMAN E. ANDERSON, Commander

LIEUTENANT COLONEL JOHN R. BOZEMAN,
Staff Judge Advocate

and the following defense counsel:

MAJOR ANTHONY V. JAMES

CAPTAIN GAYLEN G. WHATCOTT

CAPTAIN STEPHEN R. AVERA

CAPTAIN RODNEY L. HUBBARD

CAPTAIN THOMAS M. O'LEARY

CAPTAIN GREGG A. MARCHESAULT

CAPTAIN MARK T. McDONOUGH

CAPTAIN ROBERT C. ERICKSON

CAPTAIN MARK D. NYVOLD

LTC BOZEMAN

Sir, we have her as you can see, the defense counsel, most of them from the 3d Armored Division and the Frankfurt area, as well as some from an outlying area or two, those who have an interest at this stage in the impact of Command Sergeant Major Haga's letter.

I would ask, for the purpose of this meeting and for the benefit of Mrs. Batey, that when you're talking, you do so with a view toward projecting your voice to her so that she can record the questions or the observations accurately.

We have talked somewhat about this to Major James and to Captain Kane. I think everybody in the command realizes that from the defense counsel's perspective you've gotten in front of a serious issue here which each of you is compelled to look at and to travel to the end of the road, as it were, to find out what you've got at that point; everybody appreciates that.

MAJOR JAMES:

Sir, as I understand it, the purpose of this meeting today is twofold: One, basically to reduce the number of visits to your office by defense counsel who might want to conduct interviews regarding potential motions and witnesses; and, two, basically to clear the air with the defense bar in the 3d Armored Division.

MG ANDERSON:

I'm more interested in the second purpose than I am the first. I don't mind defense counsel coming to my office.

the surface with us most recent / was, as you are aware, Command Sergeant Major Haga's letter of 25 January 1983 and some other information of which some defense counsel became aware last week, most importantly, information concerning a 3 December meeting between you and 2d Brigade officers. I will attempt today to address questions of common concern to most counsel here in order to economize on time and to reduce inconvenience to you. I would hope that this would also reduce the necessity for numerous future witness or motions interviews that otherwise might be conducted.

I apologize if some of the questions seem somewhat repetitious -- they're not intended to be -- but later on they may appear to address some of the subject covered in the first few questions.

Questions by Major James, addressed to and answered by Major General Anderson:

Q This first question, sir, does not refer to the 3 December meeting. Have you, in the time that you have been the commanding general of 3d Armored Division, expressed any concern regarding the substance of testimony at courts-martial or administrative boards to any members of your staff, either individually or in a group?

A To members of the staff, no, not in a sense of telling them not to. I want to clarify what I told them. It's the same thing I tell everybody, that is, when I refer all the courts that go into the

referral process here, I look at who signs them. Then, when you look at who goes into the courtroom to testify that the guy should not be thrown out of the Army, a lot of times we have the same guy who forwards the charges to me and says, "Refer it to a BCD; he should be adjudged a bad-conduct discharge," this same person stands up in the courtroom and says, "No. I don't think he ought to be thrown out of the service." So I tell them: "You've got to be consistent. If you don't believe he should be thrown out of the service on the last day, then you really ought to think about it when you're signing the charges. Are you signing because you don't really want to look him in the eye and tell him he should be thrown out of the Army, but when you're in the courtroom looking him in the eye, it's another story. Just what has caused you to do that? You should be consistent. If you believe that he should not be thrown out of the Army, then don't forward the charges with the recommendation of a BCD court-martial. Write down what you're thinking." That's all I tell them every time.

Q All right, sir. Basically the same question with regard to any concerns you might have had about the substance of testimony or the testimony at administrative boards.

A Boards? No. Not about testimony. I had one board that I thought was not a good board. I do not remember the names of the board, but I do remember that

it was not a good board because the recorder basically presented evidence only on the respondent's behalf, not on the government's behalf. So, as to that board, I wrote a letter and sent it on to DA and asked that they override the board and that the man be discharged from the Army. So I did talk to the AG, because he has to process the boards; but it was not about testimony.

Q Thank you, sir. Again, this is not in reference to the 3 December meeting. Some members of your command have apparently perceived to some extent the policy that they should not testify on behalf of soldiers, especially with regard to good character. Has this particular subject area been discussed with members of your command or staff?

A To the best of my knowledge and belief, no, with the exception of the same thing that I told you just now: "If you think he ought to have a BCD, send it to a BCD. If you don't, do not send it to a BCD."

Q Thank you, sir. Are you aware, sir, of any letter written by the Chief of Staff which addressed the subject of testifying at courts-martial?

A No. I am not.

Q Sir, have you ever expressed to the members of 3d Armored Division any philosophy -- and I realize that this may be somewhat repetitive -- that, if a soldier is a good soldier, he would not be in court?

A No.

Q Sir, have you ever talked to any members of a standing court-martial panel about courts-martial, courts-martial duties, or philosophy about courts-martial?

A To the best of my knowledge and belief, no.

MAJOR JAMES: Thank you.

Q Sir, have you ever talked to a member of an appointed board about boards, board duties, or any philosophy about boards?

A To the best of my knowledge and belief, no.

In fact, I'm not always sure who is sitting on boards.

MAJOR JAMES: Yes, sir.

A When I talk to people, I'm not sure whether they're on boards, or not. They could be on a standing board order, and I don't remember that they're on a board. But I don't go around giving a lot of philosophy about boards.

MAJOR JAMES: Thank you, sir.

Q Other than the reference you have made in prior answers concerning commanders who may have recommended a certain level court and come in and testified otherwise, have you ever discussed your philosophy, if any, regarding retention of soldiers in the Army who are facing courts-martial or board actions with members of your staff or command?

A I probably have, but I would be hard-pressed to tell you exactly who, what, or when. Being that we're

int. the quality upgrade, quote. of the Army, when we're talking about a soldier with two Article 15's and whether he should be allowed to reenlist, or three Article 15's, or courts-martial, or whatever, and whether he should be allowed to reenlist into the Army, in that context, yes. I've talked about that.

Q To your knowledge, sir, have you expressed any certain type of criteria -- for example, two Article 15's or other adverse actions -- that might reflect your opinion as to whether a man should be retained in the service as a result of a court-martial?

A As the result of a court-martial, no. I have talked to them about retention under the reenlistment rules. In fact, I changed the rules to where I'm the only guy who can sign the waivers to allow them to stay in the Army, which now the rest of the Army has picked up on.

MAJOR JAMES: Yes, sir.

Q Sir, did you address to your command or staff late last fall any displeasure or dissatisfaction with the witnesses who come into court and testify on behalf of soldiers, further expressing an interest that some sort of educational briefing be initiated to inform 3d Armored personnel as to their duties or responsibilities before a court or board?

A Boards, yes. You've got to have a briefing for people on boards, which the AG has given, which explains the regulations and how boards are conducted. It's

essentially an admin briefing as to how a board is to be conducted and to get in the guidelines of time-frame so we don't drag these boards out for months and months and months, that we give the guy a fair shot. He goes to the board, and he gets his board overwith. It doesn't go on for months to where you have the guy walking around in the troop, battery, or company, and everybody says, "That's our Chapter 13," or, "That's our Chapter 14," or whatever chapter. I don't think it's fair to the guy. So we do do that.

Q Sir, to be more specific on the question, have you expressed any displeasure or satisfaction with witnesses who, say, may have testified before --

A Specific witnesses?

Q Witnesses in general, sir.

A No. The only thing I've done is the same story as I told before. "When you sign the charge sheets, you ought to be consistent. If you think he shouldn't have a BCD, don't send him before a BCL court. If you do, then I'm not sure that you're being consistent when the same guy goes in and testifies in his behalf that he should not be thrown out of the Army." And the rest of the sentence that goes in there, by the way, is, "You have a moral obligation to go in and testify if you know something that should be told."

Q Sir, to follow that question up, have you discussed with any particular witness his testimony in a court-martial or board?

Q Sir, have you discussed with any witness commander that witness' testimony before a court?

A Never. In fact I haven't discussed any cases with a commander in any way, shape, or form.

MAJ JAMES: Thank you, sir.

Q Sir, did you at one time draft, or have drafted, a letter or letters to a Captain Oscar Holland or other board members admonishing or counselling them as to the result that they returned on a particular board action?

A I don't know if it was Captain Holland, or not, but at one time after a board a set of letters was produced, which was not circulated. When they got to me, they went back and were destroyed; or, I guess they were destroyed.

Q Was that draft by you or by the AG? Do you recall?

A By the AG. But, again, I'm not sure whether it was the same board, or not. They only brought out half the case. They only brought out the respondent's side. They didn't bring any government witnesses in for the other half of the case. It was just not a well-done board; it was a poorly-run board from day one.

Q So apparently this set of communications was not sent out to the officers concerned as a written communication. Was this communication given orally to Oscar Holland or any other officers?

A Not that I know of. I don't even know who Oscar Holland is, nor do I know his unit.

Q Do you know what prompted the AG to draft this letter?

A I would say that it was probably when he sent the board proceedings over here and I read it, I probably told him that he ought to draft out a set of instructions to board members indicating that they have an obligation to understand all the rules of the board system before they sit on boards. That would be my guess as to how that happened. Without sitting down with a specific case and working my way all the way through it, I couldn't tell you about that. I usually read them, sign them, and throw them out, and go on to the next one.

MAJ MILLER: Thank you, sir.

Q Sir, as you are no doubt aware now -- we informed Colonel Bozeman of this information last week since we became aware of it -- an officer who attended a meeting between you and the 2d Brigade officers on 3 December 1982 stated to one of our defense counsel from notes and memory that you had stated words to this effect at the meeting, "Basically, I cannot believe that officers and senior NCO's would testify at sentencing as to a convicted soldier's good character. It's inconceivable to me that this man can be taken to court, and then the chain of command would come in and say things like, 'He's a great

soldier,' or, 'We would take him back.' You can do what you want. If you feel you need to testify, then do so, but don't be dumb about it." Sir, do you recall having made any remarks of this nature?

A Not exactly like that. We talked about the same thing, "Be consistent. If you sign a charge sheet saying that the man should be adjudged a bad-conduct discharge, then I have problems with your going into the courtroom, saying, 'He is a good soldier, and I would like to have him back in my unit.'" That, to me, is not consistent. They should be consistent. If they really believe that a man should not be adjudged a bad-conduct discharge, then they should not sign the initial piece of paper that says to send him to that level of court. They should send it up here, and I will make the decision; or the special court-martial convening authority will make the decision for what he does. And if it comes to me, then I will make the decision as to what level of court to send it. Then I tell them, "If you want to go into the court, then you should go into the court and testify. You have a moral obligation to go testify. Whether I like it or not, you have a moral obligation to testify if you know something the court-martial should know."

Q So, if I understand you correctly, those remarks - were addressed to those in the preferral process and in the transmittal process of charges rather than witnesses.

Am I correct?

A I talked to company commanders and battalion commanders throughout the division on a host of subjects. That happened to be one of the subjects I talked to them about.

Q Sir, do you recall whether those remarks were made with reference -- or whether you had reference -- to a particular case in this 3 December '82 meeting?

A There was no reference to a specific case.

MAJ JAMES: Thank you, sir.

Q Sir, am I correct that you have read Command Sergeant Major Haga's letter of 25 January 1983?

A I read it the day one of you brought it over and gave it to John Bozeman. I don't know who brought it in. That's the first time I had seen it when it came here through the Trial Defense Service.

MAJ JAMES: Thank you, sir. You've just answered the next question.

Q Even though you have indicated that you've seen the letter in question, sir, do you have any knowledge at this time whether that letter was contained in any reading file, command, staff, or AG reading file?

A It was not in any reading file that I saw. Whether or not it was in any of the others, I have no idea. I'm a victim of somebody sorting out what goes in the reading file. I read only what they want me to read.

Q Do you know, sir, if the command sergeant major's

letters are normally reviewed by someone before they are disseminated to the command?

A Normally, they are reviewed by whatever staff officer has that jurisdiction, i.e., if he works on a uniform regulation, he normally gets the G-1 to do it. If he works on something to do with maintenance, he normally gets the G-4 to look at it. If he's working on something to do with dining facilities, he usually goes to the G-4. In this case, he should have gone to see my friendly staff judge advocate, which, obviously, he did not do.

MAJ JAMES: Thank you, sir.

Q I may know the answer to this question by virtue of the subsequent letter you signed, but I will ask the question nevertheless: How do you personally feel about the letter that Command Sergeant Major Haga wrote?

A He was out of line. He can't say that. That may be his personal belief, but with the title that hangs on his door over there, he can't put out a letter like that.

MAJ JAMES: Thank you.

Q Sir, have you expressed to any member of your command or staff any feelings that soldiers have been treated unduly leniently with regard to DUI or DWI offenses?

A I don't know. I probably have, because--I can think of some cases where they were not -- they may not even have been members of my command. You know, they come floating through from the jurisdictions, and I see

what they've done to people for DWI. In some cases, they didn't even revoke the guy's driver's license. The regulation says that the license will be revoked. So we have to get that fixed.

MAJ JAMES: Sir, that concludes the general questions. I have, basically, set up an order of specific questions, or follow-up questions, with certain counsel. The first officer, sir, will be Captain Whatcott.

MG ANDERSON: Very well.

Questions by Captain Whatcott, addressed to and answered by MG Anderson:

Q Sir, you have indicated that, in your discussions with people in your command, they should be consistent: in other words, if they send a guy to a BCD Special, then they must want the guy to have a BCD Special.

A That's how they signed.

Q Does it concern you at all that, perhaps, the charges could initially loom large and then, later, they're seen in perspective and there is a change of mind?

A No. It concerns me that they've got to do what they have to do. If they have to go into the courtroom and testify that the man should not be thrown out of the Army, that's what they've got to do.

Q Are you concerned, sir, about, perhaps, the chilling effect that your comments might have on members of the command?

A No. I don't think so, because I try to tell them

that they have a moral obligation to go into that courtroom. Whether I like it, or whether somebody else likes it is immaterial. They have a moral obligation to go in that courtroom and do what they believe is right. That's what I try to tell them to do. It has to do with everything we do, with the integrity, the morals, everything else we do; they have to do what is correct. And if they feel they need to go into the court to testify in behalf of the soldier they have put in there, then they are morally obligated to do that. And I have told them that. That same lieutenant, whoever he was, in Gelnhausen who took those notes was told that exact same thing. "You have a moral obligation to testify for your people when your conscience dictates that."

Q Sir, you indicated that you sort of changed the rules, and they have been adopted Army-wide, to where you no longer permit retention under certain circumstances. May I ask you, sir, why you changed the rules?

A Because the Army put out a set of policies that said that we need to watch who we are reenlisting in the Army, because we were taking people and keeping them in the Army who had either courts-martial or Article 15's; they were obviously substandard soldiers, so we should not allow them to reenlist. So, when I watched the number of waivers that were going through -- they were not going through command channels, I might add. They go through the reenlistment sergeant through

the retaining machine, all the way up the chain, without any of the commanders getting involved. So I got involved by stopping it here. I said, "Bring them to me, and I can save the machine a lot of work of forwarding a lot of them"; because, if a person has had three or four Article 15's -- in one case the soldier averaged an Article 15 every eighteen months for the past nine years, and I wasn't sure he should stay in the Army, particularly when you see the up-and-down on the promotion sheet of his records where it goes private 1, private 2, private 3, and he had filled up the whole sheet with his ups and downs. Had he been promoted continuously, he would have been sergeant major of the Army; but he was about an E-5, because he'd make it up to an E-5 and back to E-4, or less -- in one case I think he made it up to E-6 before he went back to E-4. So I just said that I will not waiver those people to stay in the Army. So I did that, and I would not let them reenlist, which is within the rules.

Q It sounds like you have established some kind of criteria --

A The Army established the criteria. There had to be a waiver if a soldier had an Article 15 on his record.

Q Evidently you would consider it improper if that person's record were to be waived and he would be allowed to reenlist. Is that correct?

A It would be improper. It would be a violation of the intent of the Department of The Army to keep him in the Army.

Q Is that notwithstanding the fact that the fellow might have a good work record?

A Yes. There is no such thing as an eight-hour soldier. A day has twenty-four hours in it, and everything you do goes toward that record, off duty or on duty. There is no off duty, on duty. You're on duty all the time.

Q Sir, have you ever expressed an opinion or a feeling to the effect that military policemen who find themselves in trouble are more likely candidates for courts-martial or pretrial confinement than other non-MP service members?

A No.

Q Do you harbor such a feeling?

A No. I just say that, if you're going to be a military policeman, you've got to have a clean record. We can't have bad cops; crooked cops, I guess would be a better word for it than bad. You can be bad just by not being proficient in your duties, I guess. We can't have a crooked cop.

Q As a follow-up, then, sir, is it your feeling that a military policeman, perhaps, would be a more likely candidate for an MOS reclassification if he found himself

in trouble than a serviceman in another branch?

A He probably would be. It's just like being in the PRP program. You have to have certain qualifications to work in the Nuclear Surety Program; and when you mess that up, you're out. I think it's the same way with the military policemen. It's hard for him to enforce the drug laws if he's buying, selling, or using drugs; he obviously doesn't believe in the law he's required to enforce. So I would say yes, he's a candidate.

CPT WHATCOTT: Thank you, sir. That concludes my questions.

MAJOR JAMES: Captain Avera.

Questions by Captain Avera, addressed to and answered by MG Anderson:

Q Sir, when Command Sergeant Major Haga came to this organization, I believe back in the fall, were you aware of his intent to start the NCOPP Letter program to the units involved in the training of enlisted persons in the 3d Armored Division?

A No, but I knew he puts out letters because I've worked with him before. I knew he puts out letters.

Q I understand that there are sixteen or seventeen in the series. Had you read any of the previous letters?

A Some of them, when we were talking about a specific subject and he said, "I've written a letter about that," and showed it to me.

CPT AVERA: I have no further questions. Thank you, sir.

MAJOR JAMES: Captain Hubbard.

CPT HUBBARD: Yes, just one follow-up question to one of the questions by Major James.

Questions by Captain Hubbard, addressed to and answered by MG Anderson:

Q Sir, in reference to the letter concerning Captain Holland and the fact that you felt that the board, itself, was not a very well-run board because the recorder did not bring out the government's side, did you tell the AG to draft a letter in the nature of a reprimand or instruction?

A It was more of an instruction than a reprimand.

Q So this would not be a letter that we file in anybody's file?

A No. I would never do that; whether I would want to or not, I wouldn't do it.

Q Do you know what, in the substance of that letter, would pertain to the individual?

A I don't have the foggiest idea.

Q Was this directed toward the board members or toward the recorder?

A To the board members, if I remember correctly. I'm not even sure whether it went to the president of the board.

Q Board members, as I understand it, sir, act much like court members, and they do not present evidence. How would they present more of the government's case?

A They could ask questions. You know, you don't sit there like a knot on a log. You have to ask questions. And in some cases, when you read the boards and all the actions, you'll find that the board members are not familiar with the regulation that governs the board on which they have to make a determination on the case. They just don't know the administrative procedures nor what the regulation says the board will do. They make absolutely no preparation for sitting on the board, such as reading the regulation that pertains to what they're about to do.

CPT HUBBARD: No further questions.

MAJOR JAMES: Captain O'Leary.

CPT O'LEARY: Yes, sir. Thank you.

Questions by Captain O'Leary, addressed to and answered by
MG Anderson:

Q Sir, in your exhortations to the officers concerning the inconsistency in not only their recommendations for referrals but their eventual testimony, what is your purpose in telling the officers this?

A I guess my purpose is that I feel that part of my job is to train officers. So, when I go around and give officers calls, or whatever you want to call them, I talk about a host of subjects, one of which is military justice.

Q Do you generally speak about military justice at officers calls?

A At, maybe, a third of them, or forty percent, some thing like that.

Q In your distinction between someone recommending a BCD-special referral with the initial forwarding of charges and someone eventually testifying in court as to two different things, one, whether a soldier should remain in the service and in the unit and, second, whether he was a good soldier, do you find it inconsistent to testify that a soldier was a good soldier and yet recommend a BCD special?

A I think I would probably find it inconsistent, because I'm not sure, in my case, if I would sign a court-martial document referring a case to a court-martial after having read whatever must be read before you can make that determination, that I could then sit down and say, "Yes, this is a good soldier. I'd like to keep him in the Army."

Q Would it not be that some charges, just by their nature, must go --

A They read the charges before they send them in. They usually have to read enough of the evidence to determine, in their own minds, that there is a case there. Very seldom does a case just evaporate between the time it is signed. I think, after he reads all the statements, that he would have a hard time saying that the man was a good soldier. Now, there are times when he would have to do that, and there are times when

he should do that. But I'm not sure, in my case, if I were sent a charge sheet -- if I were a company commander or a battalion commander -- that I wouldn't go tell them before the case comes to court, "I think this ought to be taken out of the BCD realm and go down to a straight special, or a summary, or throw it out totally, because the case has not come forward now that we've gone further into the investigation," or the Article 32 revealed something. You're not stuck with your recommendation at all times. But, unfortunately they stay stuck because they don't come forward.

Q Generally, the individuals signing these forwarding documents are commanders. Did you worry at all about those individuals in noncommand positions as to the tone or text of your comments and what actions they make take in testifying?

A To the best of my knowledge and belief, there was nobody in the room except commanders and aides. The aides don't get to do anything like that.

Q So you have never given any of these comments to officers who were noncommanders, except for aides?

A I don't normally do that. Normally, when we have an officers call, I talk to commanders. When we have officers calls, I don't remember ever having covered the same subject, but I may have. Again, it was always on the same thing, that is, being consistent with what you're doing and thinking about what you're doing

ahead of time.

Q Sir, have you become aware of any cases which were referred to summary court and you felt that that was an improper referral?

A No. I don't know of any referred to summary court. They don't ever get to me.

Q Are you aware of any current cases at the BCD-special level which were once at summary-court level and were taken out of summary court without any additional charges?

A No. There may have been some, but I don't have the foggiest idea what they were. I may have signed some sending them over to the courtroom, but I don't have any recollection of that.

Q Would you tell me, sir, in doing the review that you do of trials for the purpose of taking action on a case, how you feel about a case if an individual recommended a BCD special and then later did testify? Do you consider his testimony worthwhile, or worthless, or how do you judge it?

A I read it to see what the guy has to say. As far as I know, there are very few people who go into -- that's not a good statement -- I started to say, "who go into a courtroom and give worthless information"; but, having sat on some courts, I know that's not a good statement. There is some testimony which really accomplishes nothing more than filling up the pages of documents. Now, I read

the testimony to see what he had to say about an individual and what he knows about the individual, because I do know of some cases where people would testify in a court and what they said in court did not correspond with the facts -- this is on E and M.

Q Did you find that true in cases of commanders? Or would this have been individuals who were not commanders?

A No. This was in a case I felt was a friend of the guy being tried who went in and testified about the facts of the case and about the individual when, in truth, had he sat in the court and listened to all the evidence, he would never have gotten up in the court and said what he had to say.

CPT HUBBARD: I have no other questions. Thank you very much, sir.

MAJ JAMES: Captain Marchessault.

CPT MARCHESSAULT: Thank you, sir.

MG ANDERSON: How did you pick this order out, Major James?
Did you draw straws?

MAJ JAMES: As they walked in the door, sir.

Questions by Captain Marchessault, addressed to and answered by MG Anderson:

Q Do you ever have the opportunity, sir, to address the noncommissioned officers in the 3d Armored Division?

A Noncommissioned officers, no. I've talked to the command sergeant majors, and the command sergeant majors

sit in on some of the monthly Readiness Briefings of the commanders meetings we have. Are you saying insofar as all of the NCO's?

Q Not necessarily, sir. I take it, of course, that you have the opportunity to talk to all of the command sergeant majors. Do you also ever address first sergeants?

A Yes. At one time -- when did I get them together? -- at one time I had them bring in the first sergeants and the command sergeant majors; that was at Friedberg, I think. It could have been just before Christmas, the finish of one year and about to start another.

Q During this conversation you had with them, did you also go into the aspect of testimony that could be expected from them at a court-martial?

A I don't have the foggiest idea. I probably did, but I don't know.

Q Did you ever go into the aspect of, possibly, being loyal to command, sir, or supporting the command?

A No.

Q- Do you remember exactly what you informed them as to military justice actions, if you did so?

A If I told them anything to do with military justice, it was the same thing I've said before: If they know anything about a case, they must go into court and testify and they should think about what they're going to say and how they would do that. Again, it has to

do with the people who sit in the chain and recommend soldiers for court-martial and then come up on the other side of the fence. A first sergeant of a company of a man who is being referred to a BCD court usually has a say in that through discussions with the commander. A commander usually knows how his first sergeant feels about that. If they don't think he should be thrown out of the Army with a BCD, at that point they should not sign a piece of paper sending it to a BCD special. It wastes a lot of everybody's time when you do that. If they do that -- sign that he should be thrown out by putting it into a BCD special -- then we go back into the matter: How do you say over here that he should be thrown out of the Army and come up over here saying, "No, he really shouldn't be thrown out. I'd like to have him back in my unit"? I don't know how they do that, unless something drastic has happened to change the situation. I just have trouble with that.

Q Well, sir, since it's the commander who usually refers a case to trial, do you also find it inconsistent if the noncommissioned officers in the chain of command would differ with the opinion of the commander?

A Some of them, but not all of the noncommissioned officers. I find it difficult to envision that the first sergeant of a company whose commander signs the charge sheet would differ that much from the commander. Usually, those two people work fairly closely together, and the commander and the first sergeant are usually in agreement on what should be done. I would say that it could

happen that they would disagree; but I would further say that that would be the exception to the rule that the two would not be thinking the same about a particular person as to whether he should or should not stay in the Army and whether he should go to a BCD, a special, a summary court, or whether it should be a board case, because those two people are fairly close and discuss everything that goes on about people in the command and usually know more about them than anybody else. At least, they should; they've dealt with them. So I would say that there could be a difference in opinion and, if there is, then it has to be expressed; but, normally, there is no difference in opinion.

Q Thank you, sir. In reviewing the courts-martial that have come before you, if you ever have seen a divergence of opinions between the commander and the noncommissioned officers in the chain, have you ever taken any action to discuss that with them?

A No. I have never discussed testimony with any individual. I get angry when I read some of it, but I've never discussed it with anybody.

CPT MARCHESSAULT: Thank you. I have no further questions.

MAJ JAMES: Captain McDonough.

CPT McDONOUGH: No questions, sir.

MAJ JAMES: Captain Erickson.

CPT ERICKSON: Yes, sir. Thank you.

CPT ERICKSON: I would like to ask you some specific questions about the military policemen.

Questions by Captain Erickson, addressed to and answered by Major General Anderson:

Q Specifically, have you ever made any remarks or given an instructions to the provost marshal here, Colonel Leson, concerning the disposition of cases where a military policeman is the accused?

A No.

Q Have you, in fact, put out any policy or guidance to the effect that, for X-crime, a military policeman should go to jail where another soldier could be disposed of at a lesser --

A No.

Q Have you put out any policy or guidance to Colonel Leson, or talked to him at all about the fact that you find it unbelievable that MP's will come in and testify that other MP's are good soldiers, in other words, the MP chain of command will come in and back up an MP soldier?

A No.

Q Recently we had an MP informant in the 503d uncover some evidence of drug use. Were you aware of that, sir?

A Yes, when they came by here and told me.

Q Who told you, sir?

A I don't know if it was Leson or the company commander.

Q Did you direct any action? Did you direct Captain Kirelis, the company commander, to take any action against

those soldiers, any specific action?

A As far as a court-martial, no.

Q As far as pretrial confinement is concerned?

A I told him he should consider putting those guys in pretrial confinement.

Q Did you direct that charges be preferred against those soldiers as a condition preceding the pretrial confinement?

A No. I told him he should consider putting them in pretrial confinement.

Q This was direct with Captain Kirelis, face-to-face, I assume?

A Yes, but it had to do with what went on after the drug bust, after the barracks was vandalized, and after his car was vandalized. The names of three people who were part of the drug bust came up. So, I told him to consider putting those three in pretrial confinement if they couldn't stay in the barracks without demolishing the barracks. We couldn't do anything else with them.

Q Was this a consideration towards finding out who had vandalized the commander's car or who had vandalized the barracks?

A No. He knew who did; or he said he did.

CPT ERICKSON: I have nothing further. Thank you, sir.

MAJ JAMES: Captain Nyvold?

CPT NYVOLD: No questions.

MAJ JAMES: Captain Rhyne?

CPT RHYNE: No questions, sir.

MG ANDERSON: Rhyne has been here before.

MAJ JAMES: I know, sir. Sir, one more question.

Questions by Major James, addressed to and answered by
MG Anderson:

Q You indicated in response to Captain Marchessault's question that you would find it difficult to have a situation in which the first sergeant and the commander would disagree with reference to preferring charges against a soldier. Did you express that concern about this difficulty to NCO's?

A No. I'm not sure I'd have difficulty understanding it, because I know that there can be differences of opinion. I just feel that, because of the relationship between a company commander and a first sergeant, it would be very seldom that the opinions are really different after completion of the discussions. They may start off differing, but by the time they finish and by the time they have to prepare the charge sheet, my guess is that at that point they're of one mind, either yes or no about the individual.

MAJOR JAMES: Sir, I believe that concludes the questions.

MG ANDERSON: It's your nickel. Does anybody else have anything?

CPT ERICKSON: Sir, I have one other question I would like to ask.

Questions by Cpt Erickson, addressed to and answered by
MG Anderson:

- Q When you read the blotter -- I assume you read it every day. Is that correct, sir?
- A No.
- Q Do you review it regularly?
- A I review it every day, but I have somebody tell me what's on the blotter he thinks I should know about.
- A Do you make any notations on the blotter when you review it?
- A No. Well, I have never thought about this. I probably have put red ink on it at one time or another; but, in the normal case, I do not write on the blotter. Sometimes I may write a note on the blotter and give it to the sergeant major, a note about somebody whose name is on the blotter, or give it back to the provost marshal asking a question. You know, the blotter occasionally will have, for example, a guy who was picked up DWI and driving without license, and they'll have the tag number of the car he was driving; but they don't say whose car it is. So I usually ask the question: Who owns the car? Nine times out of ten, it's somebody else and the MP's didn't ask that question, or it usually belongs to somebody else. So I write notes about such things. Or, occasionally I'll ask: How did he do this? If he was supposed to be restricted or not allowed to have a driver's license -- you know, he's had four other offenses related to alcohol and has had a DWI -- then I'll ask the question, "Why does he have a driver's

license? It looks to me as though the commander should have revoked his driver's license some time ago." If a person has four drunken brawls in the barracks and he still has a driver's license, somebody isn't doing his job. That goes under quality of life, to protect the soldier from himself before he kills somebody or himself.

CPT ERICKSON: Thank you, sir.

MAJ JAMES: Sir, do you have any other remarks?

MG ANDERSON: No. All I can tell you guys is that, to the best of my knowledge and belief, I do not twist anyone's arm on military justice. I have sat on courts-martial where I just knew in my own mind that that guy was as guilty as could be, but he wasn't proven guilty in that courtroom; and I had to vote no, because it has to be done inside those doors. I've had to sit on some of those, and it ruins my whole day to do that and because I couldn't get on the other side and be the prosecutor, because I'd enjoy being the prosecutor, or I couldn't be the defense counsel, either way you want to go.

MAJ JAMES: Sir, thank you very much.

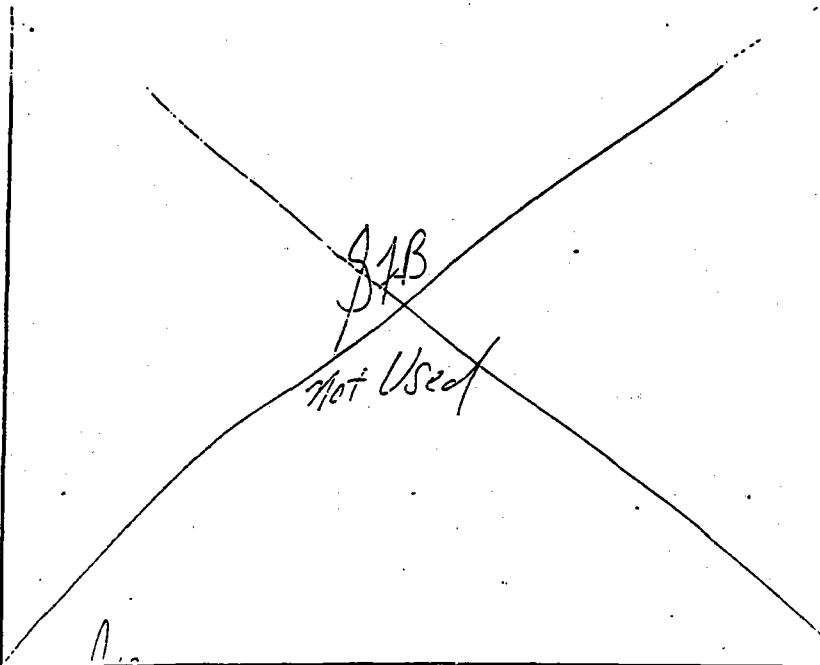
(The meeting adjourned at 1810 hours,
14 March 1983.)

UNITED STATES FEDERAL REPUBLIC OF GERMANY		DATE	FILE NUMBER
LAST NAME, FIRST NAME, M. I. NAME	AL NAME	SOCIAL SECURITY NUMBER	GRADE STATUS
NAME, George F		[REDACTED]	OFFICER
ORGANIZATION OR ADDRESS			
D Company, 45th Medical Battalion, 3rd Armored Division, APO New York 09165			

MS I, CPT George F. Baker, [REDACTED] WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:
 I am Captain George F. Baker, [REDACTED] currently commander of Company D, 45th Medical Battalion, 3rd Armored Division, APO New York 09165. I assumed command 4 June 1982. In October 1982 I participated in a New Commander's seminar for all new company commanders within the 3d Armored Division. This seminar was conducted primarily at Drake Kaserne, Frankfurt, Federal Republic of Germany in the Spearhead conference room. During one day of the seminar the 3d Armored Division Commander spoke to all the new company commanders. He spoke on several different subjects: include important regulations and publications we should have, maintenance, quality of life, etc. He also talked about courts-martials. I cannot recall the exact words but he talked about how hard he found it to believe that a soldier could be taken to a courts-martial and after being convicted having officers and senior NCO's testify about what a great soldier the accused was. He clearly indicated that he not want anybody defending a soldier after courts-martial charges were preferred. I felt defending a soldier after charges were preferred was hypocritical. The inspiration from his talk on this was that ^{it is} ~~is~~ one in the chain of command should defend testify for an accused soldier at a courts-martial. These statements from the CG were periodically reinforced by our former battalion commander LTC James N. [REDACTED].
 ////////////////////////////////////END OF STATEMENT////////////////////////////////////

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 1 PAGE:
12	<i>A- DFB</i>	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF [REDACTED] TAKEN AT [REDACTED] DATED [REDACTED] CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE [REDACTED] OF [REDACTED] PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.



AFFIDAVIT

1. Captain George F. Baker

HAVE READ OR HAVE HAD READ TO ME THIS

STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

George F. Baker, III
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized to administer oaths, this 3d day of May, 1965.

William K. [Redacted]
Police Department [Redacted] 4/18/65
ORGANIZATION OR ADDRESS

H. [Redacted] FRG
Stephen R. Kani
(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

(Typed Name of Person Administering Oath)

10 USC 936

(Authority To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT

PAGE OF PAGE

b6 SAB

61

SWORN STATEMENT			
For use of this form, see AR 190-45; no proposal agency to Office of The Deputy Chief of Staff for Personnel.			
LOCATION	National Defense University Fort L. J. McNair, Wash DC 20319	DATE	5 Oct 83
LAST NAME, FIRST NAME, MIDDLE NAME	CRAVENS, JAMES J., JR.	SOCIAL SECURITY NUMBER	bb
ORGANIZATION OR ADDRESS	National Defense University (National War College) Fort L. J. McNair, Wash DC 20319		

I, JAMES J. CRAVENS, JR. WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH

This statement is provided in response to a request made by CPT S. R. Kane, Hanau Legal Center, Hanau, FRG. It contains my recollection of a remark made by MG Anders 3d Armored Division Commander, at a How-To Seminar on 13 April 1982. I formerly commanded the 3d Battalion, 61st Air Defense Artillery, 3d Armored Division, during the period 14 January 1980 - 12 July 1982 and was present at the How-To Seminar mentioned above. CPT Kane and I discussed this matter on two occasions during which I offered spontaneous comments about what I vaguely remembered of the seminar. Sir, my discussions with CPT Kane, I have attempted to more keenly reconstruct the event in my mind. The information in this statement is a result of my closer examination of the events and most accurately reflects my recollection of the seminar. MG Anderson convened the seminar to discuss several legal matters that were of interest to him. Present at the meeting were 3d Armored Division Brigade and Battalion Commanders and non- 3d Armored Division Special Court Martial Convening authorities under MG Anderson's jurisdiction. One of the topics discussed by MG Anderson was "Witness for Extenuation and Mitigation". This topic was #15 in my notes (attached) for which I had written "BC-GCM soldier should be retained". MG Anderson cited an example of Company Commander who had preferred a General Court Martial charge against a soldier and during matters in extenuation and mitigation in the soldier's trial, testified that the soldier should be retained in the military. MG Anderson was attempting to highlight the inconsistency of the Company Commander's action in the matter. Specifically, the Company Commander preferred a Court Martial charge that could have resulted in the soldier's discharge from the military, yet he testified at the trial that the soldier should be retained in the military. I interpreted MG Anderson's comments to reflect his concern that commanders should exercise common sense and good judgement when preferring Court Martial charges. In this example, the Company Commander probably should have preferred a Special Court Martial charge since he believed the soldier should be retained on active duty. I did not interpret MG Anderson's comments to mean that the Chain-of-Command should not testify on behalf of soldiers, or that it should not recommend retention of soldiers during matters in extenuation and mitigation. I was not prejudiced by MG Anderson's comments about this subject nor did I construe his comments to suggest command influence. To the best of my recollection, I passed the essence of the subject to my Battery Commander in an objective and unbiased manner, without command influence. I have nothing more to add to this statement.

//////////////////////////////////END OF STATEMENT//////////////////////////////////

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT <u>JS</u>	PAGE 1 OF 1 PAGES
---------	--	-------------------

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

STATEMENT (Continued)

NOT USED

AFFIDAVIT

I, JAMES J. CAANEVUS JR HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

[Signature]
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 5 day of June, 1982
at Fort Meade, Dc 20715

ORGANIZATION OR ADDRESS

[Signature]
(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

LARRY F. TOLEMAN, SAC, FA
(Typed Name of Person Administering Oath)
JUDAS ADAMS - 11C U.S. 9730
(Authority To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT [Initials]

PAGE 1 OF 1 PAGES

DEPOSITO FORM

REFERENCE OR OFFICE SYMBOL		SUBJECT	
ACTJOS-CSM		Moral Obligation to Soldiers	
TO	SEE DISTRIBUTION	FROM	CSM Campbell Reid 2d Rde, 3d AD APO New York 09091
		DATE	7 Dec 82
		CMT:	CSM Reid/dfd/730
<p>1. It has been brought to my attention that many NCOs in key leadership positions while giving testimony at courts martials are making statements that are not in keeping with the moral ethics of the NCO Corps and causes us to lose credibility with our soldiers.</p> <p>2. I am specifically addressing the issue of testifying at a court martial when a soldier has been convicted of such crimes as rape, sodomy, use of drugs and various other serious crimes. Some of our NCOs tell the court, "Yes I would take him back in the unit, he's a good soldier."</p> <p>3. Once a soldier has been "convicted", he then is a convicted criminal. There is no way he can be called a "good soldier" even though up until the day he's court martialed he is a super star.</p> <p>4. The NCO Corps does not support "convicted criminals". We are ruthless and unrelenting in our pursuit of law and order and fully accept our role in upholding the moral ethics and principles upon which our nation is founded.</p> <p>5. If you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life.</p> <p style="text-align: center;">Battle Ready,</p> <p style="text-align: center;"><i>Campbell Reid</i> CAMPBELL REID CSM USA 2d Brigade CSM</p> <p>DISTRIBUTION:</p> <p>A (NCOs)</p>			

DA FORM 2496-1 1 FEB 82 ISSUES OF FORM 2496-1 (FENCIL), EXISTING SUPPLIES OF WHICH WILL BE USED AND USED UNTIL 1 FEB 83 UNLESS SOONER EXHAUSTED.

36

Enclosure 15

Special Findings of Trial Court U.S. v. Giarratano 12

(The Article 39(a) session was called to order at 1645 hours, 7 December 1983.)

- MJ: The court will come to order.
- TC: Let the record reflect that all parties who were present when the court recessed on 5 December 1983 are again present in court.
- Mr. Ted Bocan is the reporter for today's session and he has been previously sworn.
- MJ: Counsel, since the last session that we held, I determined that there was an additional appellate exhibit that needed to be appended to the record. That has been marked as Appellate Exhibit CIV, and it specifies the selection of court members in the Third Armored Division. I believe counsel for each side have had the opportunity to examine that?
- DC: Yes, Your Honor.
- TC: The government has, Your Honor.
- MJ: Counsel for either side have anything further on the motion?
- TC: No, sir.
- DC: No, sir.
- MJ: With respect to the defense motion for appropriate relief because of unlawful command influence, I make the following special findings:
- Specialist Five Donald J. Giarratano is a person subject to the Uniform Code of Military Justice. The offense charged is prohibited by Article 134 of the UCMJ. Major General Thurman E. Anderson is a person empowered by

1437

n

Enclosure 16 page 1 of 1

Article 23 of the UCMJ to convene special courts-martial empowered to adjudge a bad conduct discharge, and the personnel of this court-martial were appointed pursuant to Articles 25 through 27 of the UCMJ.

The only statutory disqualification of a convening authority from referring a case to trial concerns his being an accuser, which involves having an interest other than an official interest in the prosecution of the accused.

The charges presently pending against the accused arise out of an alleged transaction that took place on 15 June 1983. This transaction was investigated by MPI Mark P. Gifford of the Hanau Drug Suppression Team. Neither MPI Gifford nor his supervisor, Special Agent Russell Stiefel, was directed to initiate an investigation of the accused. Major General Anderson was unaware that such an investigation was being conducted or had been conducted until the charges had been presented to him for referral on 23 August 1983. The facts and circumstances of the investigation, preferral and referral of the charges in this case demonstrate only an official interest on the part of Major General Anderson in the outcome of the litigation. Consequently, Major General Anderson is not an accuser in this case and is not disqualified from convening the court.

The entire controversy in this case involves comments made by Major General Anderson and his subordinates, which allegedly represent unlawful command influence. The

military justice system operates effectively only when there is public confidence that the system is functioning properly. As such, command influence, either actual or perceived, does violence to the military justice system, as it affects subordinates in unsuspected ways and must be condemned. Indeed, it is prohibited by Article 37 of the UCMJ. While the issue is constitutional in nature, involving the Sixth Amendment guarantee of a right to a fair trial, the reliance by the defense on a violation of Article 37, UCMJ, as supporting the proposition that Major General Anderson cannot properly refer this case to trial, is not in accordance with the law. In the United States versus Blaiock, 15 MJ 193, the Court of Military Appeals noted that "Even in egregious cases of command influence our court has refused to hold that the error was jurisdictional," citing United States versus Ferguson at 17 CMR 68, a 1954 opinion.

I now turn specifically to the allegation of unlawful command influence. Major General Anderson, in an official capacity as the Division Commander, on several occasions between April of 1982 and December of 1982 spoke to his unit and above-level commanders and senior NCO leadership on the topic of "Court-Martial Testimony". Major General Anderson today can recall only the broad general theme of "Be consistent". He states that he thinks he has always indicated that people have a moral obligation to testify. However, Major General Anderson

does not know if he did say this or not. He would like to believe that he did, assumes that he did, or would hope that he did. In order to determine what message Major General Anderson put out to his commanders and senior NCO leadership, this court must look to what the attendees heard and understood. The oral comments of Major General Anderson and the oral and written comments of his subordinates would logically cause members of the Third Armored Division, one, to believe that the chain of command who prefers a case presumably believes the accused guilty; and two, that the extenuation and mitigation testimony made by an accused's chain of command is A, not meaningful; B, not credible; C, should be ignored; and D, once charged and convicted of a drug or sex offense, or other serious crime, the accused should be discharged. Taken together, these comments could reasonably cause an accused to be convicted quicker and the eventual sentence imposed to be greater. On 25 January 1983, Command Sergeant Major Haga published NCO PP Letter Number 16. In this letter he stressed morality and integrity of the NCO Corps. An inclosure listed "Dos and Don'ts for NCOs", one of which addressed testifying for an accused during sentencing. This "Don't" expressed Command Sergeant Haga's personal view that good NCOs don't testify for an accused convicted of serious crimes. Major General Anderson did not see, review or approve NCO PP Letter Number 16 prior to its issuance; nor had Command Sergeant Major Haga

1440

Enclosure 16 page 4 of 11

discussed NCO PP Letter Number 16 or the topic of NCOs testifying for an accused soldier with him prior to publishing the letter.

NCO PP Letter Number 16, dated 25 January 1983, was not transmitted to or received by the 8th Maintenance Battalion or the 71st Ordnance Company.

Major General Anderson first saw NCO PP Letter Number 16, dated 25 January 1983 on 1 March 1983 when it was presented to him by his Staff Judge Advocate.

On 4 March 1983 Major General Anderson published a letter stating that service members have a legal and moral obligation to testify for an accused.

On 8 March 1983 Command Sergeant Major Haga retracted NCO PP Letter Number 16 and issued a new NCO PP Letter Number 16 which quoted Major General Anderson's 4 March 1983 letter.

In December 1982, Command Sergeant Major Reid, then the command sergeant major for the 2nd Brigade, Third Armored Division, published a letter stating his personal view about NCOs testifying for convicted soldiers.

Major General Anderson did not see, review or approve the letter prior to its issuance, and did not know of its issuance until it was presented to him as part of the Goode rebuttal in a Third Armored Division case. This letter was never transmitted to or received by the 8th Maintenance Battalion or the 71st Ordnance Company.

The very nature of military society revolves around the

1441

Enclosure 16 page 5 of 11

superior/subordinate relationship. Being such, subordinates conform their behavior to the desires of their superiors either consciously or unconsciously. NCO PP Letter Number 16, dated 25 January 1963, and signed by Command Sergeant Major Haga, and the 7 December 1982 DF signed by Command Sergeant Major Reid, are extensions of Major General Anderson's philosophy of the appropriateness of testifying on behalf of an accused/convicted soldier at a court-martial. Further, the 7 December 1982 DF represents what Command Sergeant Major Reid believes he heard Major General Anderson say at the meeting in Friedberg.

The convening authority's conduct and expressions reference the preferral of cases by a subordinate, when viewed in its best light by taking the convening authority's own belief of what he said, his position is still, one, a form of command influence; and two, legally incorrect. It adds to the preferral process an added requirement not required or contemplated by Paragraph 32f of the Manual for Courts-Martial, 1969 revision. Nor is there anything necessarily inconsistent with recommending a discharge level court and testifying as to the soldier's retainability in the service.

The following is a list, by approximate date of meetings, where Major General Anderson spoke on this topic of court-martial testimony:

1442

Enclosure 16 page 6 of 11

April 1982, How to Seminar for battalion and above-level commanders at Drake Kaserne.

July 1982, New First Sergeants Seminar at Drake Kaserne.

Summer months of 1982, battalion commanders and command sergeant major meetings at Drake Kaserne.

August through October of 1982, Senior MCCs meeting with the Commanding General to hear policy and guidance, at Friedberg.

October 1982, New Commander's Seminar at Drake Kaserne.

November 1982, Readiness Briefing at Drake Kaserne.

December 1982, 2nd Brigade officers meeting at Gelnhausen.

December 1982 meeting, 3rd Brigade officers at Friedberg.

December 1982 meeting, DIVARTY officers at Hanau.

The unlawful comments of Major General Anderson and his subordinates were directed to an accused's chain of command. An accused's chain of command is best able to evaluate the impact of a remitted or suspended discharge on the unit. The chain of command is best able to evaluate the accused's capabilities.

Finally, the opinion of the accused's company commander, the person who usually prefers the charges, occupies a unique and favored position in military justice proceedings.

- The only meeting where non-Third Armored Division commanders were invited to attend, and where Major General Anderson addressed the topic under inquiry, was the 13 April 1982 meeting held at Drake Kaserne for the

purpose of discussing military justice topics. Captain Connie L. Wood, Lieutenant Colonel Alan C. McGill and Colonel John F. Sobke, the accused's company commander, battalion commander and brigade commander, respectively, have never attended any meetings where Major General Anderson addressed testifying at courts-martial or preferral and referral of courts-martial charges. None of these commanders had any communication with Major General Anderson about the charges pending against the accused, and each of them submitted their own independent recommendation for referral.

Since December 1982, Major General Anderson has addressed his battalion and brigade commanders on the obligation of service members testifying for an accused on two occasions. In March and May of 1983 he stated to these commanders, "Soldiers have a moral and legal obligation to testify". Major General Anderson has not addressed this topic at any other meeting since December of 1982. Major General Anderson has never addressed members of the Third Armored Division concerning their duties as court-martial members or what sentences they should return for any particular class of offense. To date, no effective remedial action has been taken. The 4 March 1983 and 15 September 1983 retraction letters were not effective remedial action necessary to cure the taint caused by the comments of Major General

1444

Enclosure 16 page 8 of 11

Anderson and his subordinates. Further, the retraction letters did not receive the emphasis nor dissemination required to address the problem.

Major General Anderson has stated a preference for assigning commanders and command sergeant majors for court-martial duty. These are persons over whom Major General Anderson exercises the greatest command control. They are also the most likely to have attended the various meetings at which Major General Anderson made his unlawful comments. Panel members must be free from any extraneous prejudicial influence and free from reprisal for lenient action taken during the course of judicial proceedings.

Voir dire may not be sufficient to cure the ingrained views potentially held by Third Armored Division panel members, since there is the inherent unreliability of subordinates' sincere protestations that they are unaffected by the unlawful comments of Major General Anderson and his subordinates.

As the military judge in this case, I have a duty to insure that the accused receives a fair trial. In discharging this duty, should the defense elect a trial by members, as appropriate relief for this egregious case of command influence, I will sustain any defense challenge for cause against a panel member who was a member of a Third Armored Division unit prior to 4 March 1983.

1445

n

Enclosure 16 page 9 of 11

No member of the accused's chain of command testified that they were unlawfully directed or influenced not to testify or to testify less than candidly or honestly about the accused and the charges. Further, no member of the accused's chain of command indicated any fear of adverse consequences, any reluctance or any hesitation to testify. However, in exercising my duty as military judge to insure once again that the accused receives a fair trial, and out of an abundance of caution, I will not receive into evidence any character testimony unfavorable to the accused. This does not, however, preclude the government from introducing records of previous convictions and records of punishment pursuant to Article 15 of the UCMJ, if otherwise admissible.

I do not have the power to determine who will do the post-trial review, should one become necessary, or who would take action in this case. However, I do find in this case the convening authority has a personal interest in the outcome of the present litigation, which serves to disqualify him as the reviewing authority. This personal interest results from Major General Anderson having had his credibility called into question, and it having been alleged that he had exercised improper command influence. In summary, I find:

One, Major General Anderson is empowered to convene this court-martial:

1446

Enclosure 16 page 10 of 11

Two, the oral comments of Major General Anderson and oral comments and writings of his subordinates constitute unlawful command influence.

Further, I am not convinced that members of the Third Armored Division assigned to the Division prior to 4 March 1983 were so unaffected by the unlawful command influence as to render them suitable to sit as court members in this case. Therefore, I have provided the aforementioned remedy of automatic challenge of such members if requested by the defense.

Further, I find by clear and convincing evidence that the accused's chain of command in this case is not affected by unlawful command influence. But once again, out of an abundance of caution, I have provided the aforementioned remedy to insure the appearance of fairness.

MJ: Is there anything further from either side?

TC: Just a clarification, Your Honor. In the court's ruling as to the character evidence, unfavorable character evidence, is the court stating that the government can't present documents that would be permissibly contained within the accused's personnel jacket?

MJ: Perhaps my ruling wasn't sufficiently clear in that area. My ruling was not specifically to preclude anything other than documentary evidence, such as records of previous convictions or Article 15s, from/being received into evidence. Anything pertinent to the accused from the



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310

REPLY TO
ATTENTION OF

DAJA-CL 1983/5857

12 SEP 1983

General Glenn K. Otis
Commander-in-Chief
U.S. Army Europe and Seventh Army
APO New York 09403

Dear General Otis:

Enclosed are various documents, including statements provided this office by the Trial Defense Service, containing allegations that Major General Thurman E. Anderson and his Command Sergeant Major engaged in conduct that may constitute unlawful command influence in violation of Article 37, Uniform Code of Military Justice.

We are concerned about this incident, not only because fundamental fairness requires strict adherence to the law prohibiting illegal command influence, but also because such conduct undermines the perceptions of fairness of the entire military justice system. If founded, such actions could adversely affect several pending legislative and executive proposals designed to provide commanders a more streamlined and responsive military justice system.

Defense Appellate and Trial Defense attorneys are actively pursuing the issue of unlawful command influence and will undoubtedly assert this as an appellate issue in certain 3rd Armored Division cases now pending review at the appellate level. However, if the information contained in the attached statements accurately portrays the nature and scope of guidance attributed to MG Anderson and his Command Sergeant Major, additional action may be required to effectively neutralize this problem. If subordinate officers and noncommissioned officers correctly or erroneously believe that MG Anderson does not want them to testify in behalf of an accused, prompt corrective action should be taken to effectively place this perception permanently to rest. Otherwise, subordinates could be hesitant to testify for an accused even if the accused were to be tried in another command.

Enclosure 17 page 1 of 2

-2-

Especially troublesome are the disconnects between the statements made by General Anderson on 14 March 1983 and subsequent statements by members of the command. I have discussed this aspect with the Deputy Inspector General, Major General Robert B. Solomon, and he concurs in referral of this matter to you for such inquiry and any corrective action or recommendations you deem appropriate.

This office has not attempted to evaluate this information as the 3rd Armored Division has not had the opportunity to provide input thereto. Instead I have attempted to express in detail the reason for our concern while stressing that the information provided to you is not the product of a formal investigation by this office. It seems fairer to all concerned and more suitable from the standpoint of speed and accuracy that this matter be placed in your hands for resolution. I have informed Brigadier General Ron Holdaway of this matter.

Sincerely,



Hugh R. Overholt
Major General, U. S. Army
Acting The Judge Advocate General

Enclosures



REPLY TO
ATTENTION OF:

AEAJA

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY, EUROPE, AND TENTH ARMY
OFFICE OF THE JUDGE ADVOCATE
APO NEW YORK 09443

20 October 1983

MEMORANDUM FOR CINC

SUBJECT: Allegations of Unlawful Command Influence by MG Anderson

1. MG Anderson on several occasions (April through December 1982) complained to officers and NCOs of his command of the inconsistency between forwarding court-martial charges for GCM or BCD SPCH and then appearing as a character witness at the trial to testify for retention of the accused. CSM Haga, the command sergeant major of the 3d Armored Division, in January 1983, in a list of do's and don'ts, stated that good NCOs "don't stand before a court-martial jury ... and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty." When informed of Haga's letter, General Anderson quickly and vigorously repudiated it (BLUE TAB A).
2. It is, of course, unlawful for a commander to deter or inhibit members of his command from testifying favorably for an accused. Because the statement of General Anderson and the command sergeant major raised the possibility of unlawful influence, the Staff Judge Advocate, COL (then LTC) John Bozeman, scheduled meetings between General Anderson and the defense counsel, and Haga and the defense counsel. These meetings were recorded verbatim. At the meeting he had with counsel, General Anderson denied any intent to prohibit or discourage defense testimony. According to him, he was criticizing the inconsistency in forwarding charges and then later requesting retention of the individual. In other words, he felt that if a commander believed an accused soldier should be retained then the mistake was forwarding the charges in the first place (BLUE TAB B). On the other hand, CSM Haga, in effect, admitted that he was wrong in saying what he said in the way he said it. When he realized that he was wrong he rescinded that part of his letter (BLUE TAB C, Red Flag).
3. Two problems are presented by MG Overholt's letter: (a) Unlawful command influence; (b) possible "disconnects between the statements made by General Anderson on 14 March 1983 and subsequent statements by members of the command." I take this to be an allegation that MG Anderson may have misrepresented to the defense counsel the true tenor or intent of the various statements he had made to members of his command on the subject of testifying for accused in 3d Armored Division courts-martial.
4. Analysis and Discussion of Command Influence: (a) If General Anderson's statements had the effect of depriving an accused of favorable testimony, this would constitute unlawful command influence. Similarly, if in CSM Haga's letter he was perceived as being a spokesman for General Anderson and this had the

Enclosure 18 page 1 of 4

AEAJA

20 October 1983

SUBJECT: Allegations of Unlawful Command Influence by MG Anderson

effect of depriving an accused of favorable testimony, this would also constitute unlawful command influence. This is so even though General Anderson might not have intended this to be the result. There can be unlawful command influence without any malign intent or misconduct by the officer who caused it. It is the effect of the commander's statement and not what he intended that determines whether he unlawfully influenced a trial.

(b) Undoubtedly some officers and NCOs perceived that General Anderson was telling them not to testify for an accused (BLUE TAB D). These officers and NCOs were unlawfully influenced. They, in turn, may have unlawfully influenced personnel under them. Whether such influence affected the legality of any trial depends on whether any of these individuals were going to testify and were deterred from doing so.

(c) Others, including importantly the SJA, perceived that the criticism by General Anderson was directed not to the act of testifying but rather to the forwarding of charges under circumstances where the forwarding officers desired retention (BLUE TAB E, Black flag). Interestingly enough, the only evidence whether anyone was, in fact, influenced or not in a particular case came from CPT Daffron who stated he did testify for an accused after having been present at one of General Anderson's briefings. The evidence then as to whether General Anderson's statement resulted, in fact, in unlawful command influence is equivocal. Some may have been unlawfully influenced, others obviously were not. If a convicted soldier is to prevail on this issue on review, he will have to show a reasonable likelihood that a potential witness was, in fact, deterred from testifying. Unlawful command influence "in the air", so to speak, is not sufficient to affect the legality of cases now under review.

(d) There is no doubt, as noted above, that some officers and NCOs because of what they perceived General Anderson to be saying were potentially influenced not to testify had they been inclined to do so. General Anderson must bear some responsibility for these misconceptions. He incorrectly assumed that the entire "chain of command", including NCOs, necessarily concurred in the decision to forward charges. He also assumed that there could not be a change of attitude after charges were forwarded. Further he did not make it clear enough what he was concerned about; his premise, i.e., don't forward the case if you desire retention, was sound enough but he failed to express it as clearly as he should have. Finally, he failed to appreciate the possible misinterpretation of his remarks and the "multiplier" effect that is often given by subordinates to statements made by general officers.

5. The statements of CSM Haga cannot be explained away. He was wrong in what he said and in the way he said it. He now realizes that and has taken steps to correct it. I am sure he has also learned a valuable lesson and will consult the SJA before making further pronouncements on military justice subjects.

AEAJA

20 October 1983

SUBJECT: Allegations of Unlawful Command Influence by MG Anderson

6. Analysis and Discussion of Possible Inconsistency in General Anderson's Statements.

(a) It does appear that there are discrepancies between what some officers and NCOs perceived General Anderson to have said to them and what, several months later, he told the defense counsel he had said. It is important to note that General Anderson, in March 1983, was attempting to recall more or less extemporaneous remarks he had made months earlier. It would neither be fair nor reasonable to expect him to remember exactly what he had said or even the precise context in which he had said it. As pointed out above, the perception of those who were at the various meetings varies considerably. If the only statements available were those attached to General Overholt's letter, that would tend to show inconsistencies, whether or not intentional. Other statements, equally or more credible, indicate that the tenor of General Anderson's remarks was essentially consistent with what he said later to the defense counsel. I am strongly inclined to believe the latter. The SJA who made notes both before the April meeting and afterward states in the strongest possible terms that General Anderson did not in any way attempt to discourage people from testifying for an accused. He also states that he heard General Anderson talk on this subject on other occasions and that he always did so in the same manner (BLUE TAB F, Yellow Flag). I know the SJA, COL Bozeman. He is both knowledgeable in the law and a strong staff judge advocate. He is not a "yes man" in any way. I am convinced had he perceived General Anderson's remarks as even slightly improper, he would have intervened, as he was invited to do by the general, and would have cleared the misperception on the spot. It is my belief, therefore, that General Anderson did not knowingly or otherwise misrepresent to the defense counsel the remarks he had made previously on the subject of testifying at trial. He naturally emphasized to them the point he had intended to make and perhaps stated it somewhat more clearly than he did at those other meetings. This does not amount to inconsistent statements of a material nature.

(b) I do not mean to imply that the individuals who now state that General Anderson was attempting to deter defense testimony are untruthful. I am sure they are sincere. However, they all disclaim remembering General Anderson's precise words and are merely reporting their perceptions of his intent.

(c) General Anderson has since published a letter—re-stating his views on the subject in the strongest possible terms (BLUE TAB G). This should clear up finally and decisively what his views are on this subject. This letter should, at least prospectively, end the problem that has arisen.

7. Based on the facts and the discussion presented, I recommend that:

(a) No further investigation be directed.

(b) I, in my capacity as USAREUR Judge Advocate, discuss this case with General Anderson in a "lessons learned" format and point out to him the

AEAJA

20 October 1983

SUBJECT: Allegations of Unlawful Command Influence by MG Anderson

necessity to carefully consider the different possible interpretations that can be placed on remarks he makes about any subject as sensitive as military justice.

(c) That MG Anderson be directed to counsel CSM Haga for attempting to deter potential defense witnesses from testifying. Haga should be further directed by General Anderson to seek the advice of the Division SJA should he ever again feel the necessity to make pronouncements on the military justice system.

(d) That a copy of this memorandum be forwarded directly to The Judge Advocate General. A copy should also be sent, thru V Corps, to MG Anderson.

(e) Letters to TJAG and General Anderson are attached as RED TAUS A and B.

9 Incl

from 20-277. Anderson
RONALD H. HOLDAWAY
Brigadier General, USA
Judge Advocate

Approved *Glenn K. Otis* 27/10/83 Disapproved _____ See Me _____

Glenn K. Otis
GLENN K. OTIS
General, USA
Commander in Chief

18 190 17:12

P. 5.3



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103



11 October 1989

~~MEMORANDUM THROUGH DEPUTY ASSISTANT SECRETARY (DS & PEOCR)~~

FOR ARMY GENERAL COUNSEL

ABCMR Final
action is at

11 OCT

SUBJECT: Recommendation for Investigation

The Army Board for the Correction of Military Records (ABCMR) has concluded its action regarding the case of and the resulting actions are currently going through the review process. As an action separate and apart from the disposition of that case and as the Chairman of that Board, I am taking this opportunity to bring certain matters to your attention which I consider extremely grave.

In approximately two months, I will have completed fifteen years as a member of the ABCMR and, with the retirement of Mr. Oliver Kennedy, I am now the senior member of that Board. Of the perhaps thousands of cases I have reviewed during this period, I have never been so profoundly disturbed over any case as I am over the case. You have been provided a copy of the verbatim hearing transcript and I urge you to carefully review this sworn testimony from the view of the operation of the Judge Advocate General Corps (JAGC) under the leadership of Major Generals Clausen and Overholt and the actions of other senior members of the JAGC.

The sworn testimony of the applicant and the witnesses, particularly that of some senior and highly respected JAGC officers, paints a picture of:

- A TJAG who tried to influence and direct the results of legal actions to the point of compromising the integrity of attorneys' duties and the rights of individual soldiers.
- A Division Staff Judge Advocate who not only did not properly advise his Division Commander, so as to preclude "command influence" in legal matters, but actually participated in the matter of influence.

Enclosure 19 page 1 of 3

-2-

- That same Division SJA was selected by the succeeding TJAG to fill what is reputed to be the most important Colonel's position in the JAGC, i.e., Executive to TJAG, was appointed by TJAG to sit on a JAGC officer promotion board, and was subsequently recommended for promotion to Brigadier General. All of this took place after he was supposedly investigated by the USAREUR Judge Advocate, after he was severely criticized for his actions by both the Court of Military Appeals and the Court of Military Review, and about whom one witness stated that he committed an act which was "specifically prohibited by law". Conversely, the Chief of the Army's Defense Appellate Division, who was charged with representing soldiers on appeal who had been allegedly aggrieved by these activities, was criticized by TJAG, at least he seems to feel his OER so reflects.

- That same former Division SJA, while serving as the TJAG's Executive Officer, was at least perceived to be using his position as rater of the chief of the JAGC personnel office to his advantage in dealing with the judges who were hearing the appeals in cases in which he was alleged to have participated in command influence.

- The promotion board, to which this same former Division SJA was appointed by TJAG, involved reviewing the records of JAGC personnel who had participated in the appeal of cases in which allegations were made about his former Division Commander and himself.

- A JAGC officer personnel system, without the checks and balances of the Army's regular officer personnel system, which many senior JAGC officers seem to believe is flawed.

This picture is one which, if accurate, should cause serious concern to the Army's top leaders relative to the Army's legal system and its leadership. If this picture is inaccurate and a matter of perception only, the perception can be almost as damaging to Army integrity as fact.

It is difficult for me to comprehend how the two TJAGs mentioned could have permitted the situation described by the witnesses to exist. It is also difficult for me to comprehend how Colonel Bozeman, with the investigation by the USAREUR Judge Advocate, and the criticism by the Court of Military Appeals and the Court of Military Review in his file, could have been selected for the position of Executive to The Judge Advocate General, been selected to sit on a JAGC Officer Promotion Board, and be recommended for promotion to General Officer.

-3-

I am totally convinced of the honesty in the sworn testimony because of the reputation and integrity of the witnesses. It was readily apparent that these senior JAGC officers were deeply troubled to testify to the facts in this case, yet seemed relieved to have a highly troublesome area, which has been festering and compounding for some six years, to come out in the open. Consequently, I strongly recommend a complete investigation be conducted of JAG activities involving the 3rd Armored Division command influence cases, TJAG organization and operations, the JAGC Officer Personnel and Promotion system, and the current recommended JAGC General Officer promotion list.



Charles A. Chase

Chairman

Army Board for Correction of Military Records.

cc: VCSA