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The Lawyer and The Odnako

An Address by HUD Secretary James T. Lynn at the Federal Bar Association's 1974 Annual Convention in September. Reprinted from the November 1974 issue of ***Federal Bar News*** *with permission.*

...I would [like] to talk about a couple of things that came out of my ruminating the other day that I've been in government now almost six years. This span has given me a number of things, like a vested pension, a vast array of wonderful friends, a return, unfortunately, to the cigarette habit, which I hope I'll kick again, and so on.

But it's also given me some things that we call in my family Lynn's laws and Lynn's learnings that may be old hat to all or some of you, but I hope not. So let me first share with you just a few of these laws and learnings of a bureaucrat who's now older, and hopefully maybe a little bit wiser.

My first of Lynn's learnings is really an embellishment on one that was given to me by an old hand when I first became general counsel at Commerce. It goes like this. Government is like the game of baseball. All you have to do on any plan of action is touch all the bases. The only difference is that there are a lot more than four bases, and their locations are constantly changing. That one maybe takes a little bit of embellishment, but all I would say to that point on Lynn's law is how many times in your career have you had a situation where you've planned it very, very carefully, you thought you had it all ready to go, and because you forgot to touch one base, or touched it too late, you either lost the whole ballgame, or it had to go into extra innings?

Another Lynn learning overlaps the first to a large extent. I think one of the toughest things to do in government, and yet absolutely imperative that we do them, is to get communication and coordination among those who have the primary responsibility for a matter and others who should at least be consulted. Let me give you the one example that I know is preaching to the choir, that never-ending challenge of getting the program people to consult with their lawyers, and to do it before the thing is so far along that the lawyer becomes the villain because he sees changes that are absolutely imperative to make.

But I have some other examples. How often do you get blank stares when you ask the proud bearer of a full-blown ready-to-go recommendation questions like these? By the way, what do you think our appropriation committees will think of that? Aren't there some important environmental or equal opportunity aspects that ought to be checked out? Or, do you want a super grade for that assistant of yours? What does administration think? What do the other program chiefs have? What's the precedent effect? Or, job training for public housing tenants? I seem to recollect that the Department of Labor has some job training programs, something called BETA, or CETA, or something like that.

I have another one, maybe more bureaucratic, but one that I found a very useful Lynn law, and that is, the more one is willing to throw away the pure group communication syndrome and stop looking for somebody in your sister department or agency of your own rank to deal with, the better your chances are of getting fast and first-rate results. First of all, you have to appreciate that your peer over there has a heck of a lot of things on his blotter that are far more important than what you are particularly interested in. Secondly, down in his organization there's somebody to whom your issue is very important, whether he's a deputy, an assistant, or what have you, whether an executive level five, GS-18, 17, 16, 15 or lower. I don't mean bypass that peer over there. He's entitled to know you're messing around in his organization, but find me that knowledgeable, experienced, practical, interested fellow or gal down below,

The Army Lawyer

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anytime. They're the people that make this government tick.

Now let me give you a triple-header. They're self-explanatory. Ready? If you have good people to do the job—turned on, energetic, able people—you can have the lousiest organization chart known to man, and the job will get done, and nine times out of ten it'll get done very well. Two, the reverse. You can have the dandiest organization chart in the world, but if the people aren't motivated, if they don't believe in what you're trying to do, or aren't or can't be trained to do it, that beautiful piece of paper, machts nicht, the job isn't going to get done. And third of that triple-header, every major organization change costs you at least a year of substantially diminished results, because during that period, quite understandably, everybody's jockeying for position.

A few more Lynn's law: all constituencies and all people wear two hats. Let me explain. I think our battle against inflation is a good example, what President Ford characterizes as public enemy number one. I go before various groups interested in housing, interested in community development. One thing every person in that room wants is to battle inflation. Every person in that room wants to have federal expenditures kept down. Everyone feels responsibility of a citizen, that we must have sacrifice on the part of programs, on the part of efforts of various people, whether we're talking about price and being restrained in that, restrained in wages, or whatever else it might be. But at the same time, every man in the street, every group, has another mission that they want, that they will say, yes, let's be careful with expenditures, but not for me. Don't do as I do, do as I tell you. And I think this is a difficult thing for all of us. It's very hard for us in the various departments because each one of us sees our own mission as the most important of all.

Let me give you one other one, and that is, before I move on, that it is 100 times more difficult to get rid of a program that doesn't work than to adopt a new one. That's one of the reasons I'm so proud of the new Act. Congress, in this process, that President Ford said in his opening address to the American people, is—if I can get it right—communication, conciliation, compromise and cooperation—has come up with a law particularly on the community development side that rids us of seven programs in community development: urban renewal, model

cities, and so on, and presents the American people in the communities with a new law that I have very high hopes for.

One more Lynn's learning. There are pitifully few people from outside government who work with us inside who have learned that full disclosure of the arguments against their position—in other words, a balanced presentation—has infinitely greater clout than a one-sided, legal brief-like story. Government people in responsible jobs welcome a well-done balanced job. I remember what very early on in my practice of law in Cleveland I had one of our older, wiser lawyers say to me when I first was introduced to him to do some brief writing. He said, Jim, organize your brief, write your brief in a way that the judge that you're before, or panel of judges that you're before, can take out a few adjectives and adverbs here and there and put his name at the bottom as the opinion of the court. I think there's a lot of learning to be done in this regard by the people who deal with us on the outside.

You know, sometimes I see people within the government, whether it's on the Hill or in the executive branch, that seem totally turned off by the position of a particular group or a particular viewpoint, and I very often ask myself whether that may not have been the result of having had a time earlier in his career where that person had taken a viewpoint, accepted it gladly, and put it forth somewhere only to have his legs chopped off by somebody presenting the other view that he hadn't been familiarized with originally. In other words, we need people who present to us the other hands as well as the pros of their position.

I could cite many other laws and learnings, but the last one about covering the other hands, it seems to me, gives me a pretty good transition. Contrary to the Shakespearean wisdom that the first thing we do, let's kill all the lawyers, a view shared, alas, by a fair number of people today, I believe the prevalence of lawyers in government is a darned good thing. Popular sentiment notwithstanding, I think that lawyers leaven government. All government, said Edmund Burke, is founded on compromise and barter. A lawyer's training suits him to this process better than any other. It teaches him to look for what, from my Soviet negotiations of 1972, I now call the "odnako". That's the Russian word for however, or on the other hand, or but. Lawyers know there's always another side to every question, perhaps two or three. In order to succeed in the profession, they must learn to oppose without rancor, to compromise with grace, and at all times to retain a balanced perspective on the relative merits of any given point of view. The business of government offers many opportunities, indeed needs, to exercise that kind of judgment.

Let me mention, though, to put that in perspective, just a few of the "odnako" situations that are serious indeed and very important at very high level policy. Protection of our environment against degradation to the point where our land is no longer safe for habitation is an absolute. There aren't any "odnakos". If this planet isn't fit to live on, nothing else really matters. There can't be "odnakos", no on-the-other-hand. But we want more than this for America. We want better environmental conditions than we have now, and we want to preserve our open spaces, and so forth and so on. But "odnakos" are involved here. We want to get there; the question is, how fast? What about our present urgent needs for greater self sufficiency in energy, for power plants for more oil, more gas, for utilization of our vast coal reserves?

We all want better protection of the consumer against shoddy business practices, but "odnako," do we reach a point where the great protection we have, that old-fashioned thing we call competition, starts eroding in the face of pervasive regulation, minimum standards of performance which all too often in the world we live in become the maximum benefit.

Take our social programs across the board. It's to our great credit we want to help those less fortunate than ourselves in every way possible and as soon as possible. Certainly if you sit where I do at HUD and see the unmet needs, this has to be your goal. But what's the "odakos"? If we try to go too fast, if we try to pay for it by debt, we end up with inflation, public enemy number one, which is really the cruelest, most regressive tax of all, a hidden tax but nonetheless a tax which hurts those we're trying to help more than anybody else.

Let's take some "odnakos" in my own current field, in housing, The housing situation is by no means good. We've had a precipitious decline in housing starts in the country. It's increasingly difficult for people to find better housing, but how do we cure it? There are some things I think we can consider, but let me point out some of the on-the-other-hands. Last year the total

amount of net mortgage increases in the United States were something like 70 billion dollars. Of that the federal credit agencies supplied, directly or indirectly, some eight billion dollars. So if the money isn't there in the savings and loans, the thrifts and others, how can we possibly make up the difference in the federal government, or even approach it, in one year without tremendously overheating those already overheated money markets, thus driving up interest rates more, thus taking more money out of the savings and loans and the thrift industries, thus adding to the cost of all things that we pay for as citizens in the country, and thus making housing even more difficult to get.

Some other people say let's just allocate credit. Let's put more credit by government fiat into housing, and let's put less in other areas. But what does that mean? "Odnako". I come from a Commerce background of four years. If I allocate substantially more money for housing, what about those tremendous demands of industry and commerce for labor-saving devices, for greater productivity devices, which, as we know, historically has resulted in higher productivity, higher real income, more jobs? You can't have housing without the people out there to pay for it, so what do we do about that one? On the other hand, I suppose, we could take away freedom of choice of the American consumer, and pay more for housing, but you folks that want an automobile, a piano, who want to pay for your children's education, and other things in the consumer field, have to wait. These are difficult things.

The Defense budget—all of us, especially people like me or Cap Weinberger or other people who have the social programs within our jurisdiction, look over at that Defense budget and say, if there's going to be cutting, they should bear the substantial part of it. As President Ford has said, there are no sacred cows, and Defense will take its share along with the rest of us. But our instincts are, them more than us. But you know, although I want to get that Defense budget down, the only way we're ever going to get it down safely, with assurance of preservation of our liberty, is by mutual reduction of arms. And then the question comes up, how are you ever going to get agreement on reduction of arms unless the other fellows sees it as useless to add more strength all the time, because we will simply match each time in order to retain parity. And on and on, from large issues of the kinds I've mentioned—the ones way up there, where I don't have any ready answers to them—to some very small ones. In each case, the "options approach" ferrets out the advantages and disadvantages, the pros and the cons, the "odnakos."

The lawyer's training, particularly where the Socratic method is used by first-rate teachers, prepares the lawyer for this kind of thought process. Not that lawyers have a corner on it. Indeed, even some of the lawyers never fully adapt to it. But law schools and the people attracted to them, both students and faculty, tend to have it to a very high degree.

Let me mention just one other point on lawyers. The ability to communicate, both orally and in writing. Lawyers by disposition, by training and by practice, have to learn to communicate persuasively, in the courtroom, across the negotiating table. Again, by no means are all really good at it, but lawyers surely have their share.

Well, I've talked a little bit about some of Lynn's learnings and Lynn's laws, and talked a little bit about "odnako" and why it is that I think lawyers fit the "odnako" situation very well. But in closing, I'd like to sum up my feelings about approaching my sixth year in government by addressing a few words to those of you who are still serving in our government. I think now I have a lot better idea than I did in February of 1969 as to what makes you tick. By that I mean I think I know why, even with the slings and arrows and frustrations you face daily, you not only persist, but attack your problems with enthusiasm and dedication. I guess maybe I can sum it up best by sharing with you the one thought that haunts me daily.

One day, when I go back to the private sector, I'm sure I'll look upon this period as the most satisfying and rewarding of my life. Thank you.

Reserve Component Technical Training (On-Site) Suspended

Due to severe cuts in travel funds thoughout Department of the Army, The Judge Advocate General's School has been forced to suspend the "on-site" instruction to reserve units and JAGSO teams. The duration of the suspension of this instruction cannot be determined at the time this article goes to press.

The Judge Advocate General's School has prepared instructor materials for a series of one-to three-hour blocks of instruction, and these lesson plans and handout materials are now available to any unit training officer who desires to conduct substantially similar blocks of instruction for JAGSO teams or individual reserve units. Each packet of instruction contains the instructor's complete outline, student handouts, if applicable, and background material necessary to familiarize the instructor with the subject. These materials are designed to assist instructors in presenting lectures; they are not designed for individual student instruction. Individual instruction continues to be available through the medium of correspondence courses and audio or video cassette presentations.

During the period of the suspension of on-site instruction the following materials are available upon request:

a. *Procurement Law.*

(1) Terminations for Default—instructor's outline and materials necessary to present a three-hour block of instruction.

(2) Terminations for Convenience—instructor's outline and materials necessary to present a three-hour block of instruction.

(3) Video and audio cassettes of the instruction on terminations presented in the 60th Procurement Attorneys Course, 19 and 20 November 1974.

b. *International Law.*

(1) Interrelationship Between the Law of War and Law of Peace—instructor's guide and reference material for a three-hour presentation.

(2) Code of Conduct—instructor's outline and backup material for a three-hour presentation.

c. *Administrative and Civil Law.*

(1) Claims—instructor's outline and supplementary material for a three-hour presentation.

(2) Legal Assistance—instructor's outline and supplementary material for a three-hour presentation.

c. *Criminal Law.* Instructor's materials and student handouts for a one to two-hour block of instruction in the following subjects:

Jurisdiction
Military Justice Administration
Speedy Disposition of Charges
Search and Seizure; Eyewitness Identification
Article 15
Review of Special Courts-Martial
Scientific Evidence
Use of Articles 133, 134

Requests should be directed to The Judge Advocate General's School, U.S. Army, ATTN: Office of Nonresident Instruction, Charlottesville, Virginia 22901.

SIDPERS: The Army's New Personnel Accounting System and Its Effect Upon Military Justice

By: Captain Ronald L. Gallant, Defense Appellate Division, U.S. Army Judiciary

I. SIDPERS; Reasons For Change; Operation.

1-1 SIDPERS(Standard Installation Division Personnel System) is an automated, integrated personnel system designed to provide personnel data support at the corp, division, installation, brigade, battalion and unit levels. SIDPERS has replaced the Personnel Management and Accounting Card Processor System(PERMACAPS) and the Military Personnel Management Subsystem (MPMS) of the Base Operational Information System(BASOPS) in approximately 61% of Army units. Further extension of the SIDPERS system is contemplated. DA Forms 1 and 188 will no longer be used in SIDPERS units.

SIDPERS performs four major functions:

a. Strength accounting

b. Organizational and personnel record keeping.

c. Information exchanges with systems performing finance and accounting functions.

d. Command and staff reporting designed for use by the functional manager, personnel manager and data analysts.

1-2. Reasons. The two sybsystems of BASOPS referred to in paragraph 1-1 were developed independently, resulting in different equipment, training and functional requirements. This had

limited systems flexibility and caused increased operational costs. In addition, the lack of a coding structure common to all data processing systems prevented the direct exchange of data between existing data processing systems. The effect has been increased workload and errors in reporting and recapturing personnel information.

SIDPERS is one of the Army's attempts to solve the above problems and has the following objectives:

a. Improve the personnel information available to the soldier.

b. Provide sufficient management information to the commander to enable him to manage his personnel effectively.

c. Improve the automated support of personnel and administrative functions at the operating level.

d. Allow the exchange of information between this system and other existing automated information systems.

e. Improve the accuracy of personnel data.

f. Provide a standardized personnel system which can be easily adapted to changing requirements.

Thus, it is anticipated that the SIDPERS system will save time and eliminate effort at the unit level. The technical and detailed requirements for preparing DA Form 1, *i.e.* number of blocks to fill out, proper abbreviations and code symbols, etc., will be reduced since DA Form 4187, for example, requires only straight language entries.

1-3. Forms. DA Form 4187 (Personnel Action), is a preprinted carbon interleaved, four-part form. Sections I, III, IV and V are for use Army-wide. Section II (Duty Status Change) is used only by units supported by SIDPERS. Section III (Request For Personnel Action) will not be used by non-SIDPERS units. DA Form 4187 is designed for:

a. Reporting duty status changes of service members which involve pay entitlement.

b. Use in military courts-martial proceedings or in adjudication of claims based on the duty status of the claimant (*But see* 2-1, 2-3 and 4-14 *infra*).

c. Use by service members in accordance with DA Pam 600-8 when requesting a personnel action.

The second important SIDPERS form is DA Form 2475-2 (Personnel Data Card). DA Form 2475-2 is a historical and legal document pertaining to an individual during the period of assignment/attachment with a specific unit.

SIDPERS Change Reports for all personnel are entered on the reverse side of the form thus creating a chronological list of all personnel actions concerning the individual soldier.

1-4. Operation. Once a duty status change occurs, the unit clerk will fill out a DA Form 4187 and enter the specific duty status change in Section II. For example:

> SECTION II - DUTY STATUS CHANGE
> The above member's duty status is changed from *present for duty* to *AWOL* effective *0700* hours, *10 Nov. 1974*. (See DA Form 4187).

The clerk will also make an appropriate entry on the reverse side of the serviceman's DA Form 2475-2. Both forms will then be taken to the unit commander (or "authorized representative", see IV, below) for certification. The certifying official must insure that the information has been recorded on SIDPERS Change Report (DA Form 3728) for submission to the central computer and properly entered on DA Forms 4187 and 2475-2.

Paragraph 5-9*f* Army Regulation 680-1, C.7, 18 June 1974.

The four copies of DA Form 4187 are distributed as follows:

a. Copy #1 is the original copy and is forwarded to the servicing Military Personnel Office (MILPO) for inclusion in the individual's Military Personnel Records Jacket (MPRJ).

b. Copy #2 is forwarded to the Finance and Accounting Office.

c. Copy #3 is retained by the unit for 1 year and then destroyed.

d. Copy #4 is given to the individual, if appropriate.

The individual's DA Form 2475-2 will be kept in the unit records for one year following reassignment and then sent to the Army's permanent storage facilities. An exception to this procedure is the DFR entry. When a person is dropped from the rolls for unauthorized absence, his DA Form 2475-2 is sent to the Military Personnel Office for inclusion in his MPRJ. A duplicate copy remains for unit use. If/When

the individual returns, the original DA 2475-2 is sent back to the unit.

II. Applicability to Military Law.

2-1. Official Records. DA Forms 2475-2 and 4187 must qualify as official records to be admissable in a court-martial to prove an unauthorized absence. The basic principles for the admissibility of official records require:

a. a writing made as a record of a fact or event;

b. by a person within the scope of his official duties;

c. those duties include a duty to know the truth of the fact or event or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event;

d. a duty to record the fact or event; and

e. the person who had these duties performed them properly. Paragraph 144*b*, *Manual for Courts-Martial, United States, 1969 (Revised edition).*

DA Forms 2475-1 and 4187, like morning reports, will be official records and thus admissible as exceptions to the hearsay rule. *United States v. Masusock,* 1 USCMA 32, 1 CMR 32 (1951). The key principles in the recordation of morning reports and the new SIDPERS forms require that they be kept and prepared in substantial conformity with United States Army regulations *(United States v. Parlier,* 1 USCMA 433, 4 CMR 25 (1952)) and be made in the performance of a legally imposed duty to record the event of AWOL and its dates. *United States v. McNamara,* 7 USCMA 575, 23 CMR 39 (1957). See requirements for preparation, AR 680-1, Chapter 5, Change 7, dated 18 June 1974.

2-2. Presumption of Continuous Unauthorized Absence. When the dates of the inception of an unauthorized absence and of a later return to military control are shown by DA Forms 1 or 188, it may be inferred that a continuous unauthorized absence existed for the entire period. Paragraph 164*a*, *Manual for Courts-Martial, United States, 1969 (Revised Edition): United States v. Creamer,* 1 USCMA 267, 3 CMR 1 (1952). SIDPERS forms, prepared in accordance with paragraph 144*b* of the Manual (see 2-1) will qualify as official records and thus will be accorded the same treatment as DA Forms 1 and 188. Since different DA Forms 1 and 188 may be used to show an inception and a termination date, situations may arise where one form is admissible and the other is not, thus supporting a conviction for an unauthorized absence of one day at most. *United States v. Lovelle,* 7 USCMA 445, 22 CMR 235 (1956). The same result will occur using SIDPERS forms.

2-3. Made Principally With a View Toward Prosecution. SIDPERS Forms 2475-2 and 4187 probably will not be rendered inadmissible as made principally with a view toward prosecution. *(But see* IV, *infra.).* These forms are made principally for the purpose of reflecting day-to-day events as they affect strength in personnel and other administrative matters not within the limitation. Paragraph 144*d*, *Manual for Courts-Martial, United States, 1969 (Revised edition).*

III. Use of SIDPERS in Court-Martial Proceedings.

3-1. Evidence. DA Forms 2475-2 and 4187 will be the primary evidentiary documents in AWOL and desertion cases. The requirements and procedures for use and maintainance of these forms are prescribed by Army Regulation 680-1, C.7, dated 18 June 1974 and controlled by the "official documents" and "best evidence" provision of the *Manual, supra.* (See paragraph 143). As such, trial counsel's use of the SIDPERS forms at trial may result in a number of legal errors. (See IV, *infra.*). Trial counsel's options follow.

3-2. Use of Original DA Form 2475-2 From Unit Files. Paragraphs 5-3, 5-5, and 5-6, AR 680-1, impose upon unit commanders the mandatory requirement of preparing and maintaining DA Forms 2475-2 for each assigned/attached member. Thus, in the instance of a member not dropped from the rolls as a deserter, the unit commander can authenticate the DA Form 2475-2 as an official record. A possible authentication certificate for the original DA Form 2475-2 would contain words such as:

(Date certificate prepared)

I certify that I am the commanding officer of the organization recorded in part I of this form, and the official custodian of the personnel data - SIDPERS Cards, DA Form 2475-2 of the organization recorded in Part I, and that the attached/foregoing is the original of the DA Form 2475-2 of said organization maintained at

relating to (Grade)
(First name), (Middle name),
(Last name) (SSN)

(Signature)

Typed Name, Grade, and Branch of Service

3–3. Use of Duplicate DA Form 2475–2 From Unit Files. In the event a photocopy of the original DA Form 2475–2 is offered as evidence, its admissibility will be subject to the best evidence rule. A possible authentication certificate for a photocopy of the DA Form 2475–2 would contain words such as:

(Date certificate prepared)

I certify that I am the commanding officer of the organization recorded in Part I of this Form, and the official custodian of the Personnel data SIDPERS cards, DA Form 2475–2, of the organization recorded in Part I, and that the attached/foregoing is a true and complete copy of the DA Form 2475–2 of said organization maintained at

relating to (Grade) (First name)
(Middle name) (Last name)
(SSN)

(Signature)

Typed name, grade, and Branch of Service.

3–4. Use of Original DA Form 2475–2 From MPRJ. Paragraph 5–6b(9), C.7, AR 680–1, requires the inclusion of the original DA Form 2475–2 in a member's military personnel records jacket once he has been carried as DFR. Thus, once a member is DFR'd, the MPRJ custodian can authenticate the DA Form 2475–2 as an official record. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's. However, because Paragraph 5–6b(8), C.7, AR 680–1, requires that the unit maintain a duplicate of the DA Form 2475–2, that copy could still be authenticated by the unit commander.

3–5. Use of "Copy 3" of DA Form 4187 From Unit Files. Paragraph 5–3a(1), C.7, AR 680–1, requires that unit commanders prepare and maintain DA Forms 4187 for all assigned/attached personnel. Paragraphs 5–10a(1), (2), and (3) require retention, at unit level, of copy 3 of a submitted 4187 for one year. Thus, in all AWOL and desertion cases, the unit commander can authenticate DA Forms 4187 as official records. If copy 3 is to be introduced into evidence, an authentication certificate could read as follows:

(Date certificate prepared)

I certify that I am the commanding officer of the organization listed on the attached/foregoing form, and the official custodian of copy 3 of the personnel action sheet, DA Form 4187, of the organization listed thereon, and that the attached/foregoing is a true and complete duplicate original (carbon copy) of the DA Form 4187 of said organization submitted at , relating to (grade)

(first name), (middle name),
(last name) (SSN)

(signature)

Typed name, grade, and branch of service.

But see IV, 4–10 *infra.*

3–6. Use of Original DA Form 4187 From MPRJ. Paragraph 5–10a, C. 7, AR 680–1, requires that the original (copy 1) of DA Form 4187 be forwarded by unit commanders to the servicing MILPO for inclusion in a member's MPRJ when Section II is completed. Therefore, the MPRJ custodian can authenticate DA Forms 4187 as official records. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's.

3–7. Computer Print-Outs. It is not anticipated that actual computer print-outs will be utilized at court-martials. However, for possible legal treatment, *see* paragraphs 143*a*(2)c and 144b *Manual, supra;* D.A. Pam. 27–2, "Analysis of Contents, *Manual for Courts-Martial, United States, 1969 (Revised edition)*" page 27–15.

IV. Possible Legal Errors

4–1. Presumption of Regularity. The basis of admissibility of the SIDPERS forms is their status as official records within this exception to the hearsay rule. The key element in the official

records exception is that the appropriate person properly performed his duties in the preparation of the document. If the document is regular on its face, military courts apply a presumption that the responsible official properly prepared the record, *United States v. Creamer*, 1 USCMA 267, 3 CMR 1 (1952). If it can be shown, however, that the SIDPERS form in question was not properly prepared, the document is hearsay and not within the official record exception. Hearsay cannot be waived at trial by trial defense counsel's failure to object. Paragraph 139*a*, *Manual*, *supra*. Many of the following possible errors concern attacking the presumption of regularity. (All paragraphs referred to will be from Army Regulation 680–1, C.7)

4–2. DA Form 2475–2 Tenure Block. Paragraphs 5–5*e*(1), 5–5*f* and 5–6*b* provide that the unit commander will sign and enter the appropriate date in the "tenure" block of DA Form 2475–2 upon three occurrences: (1) change of command, (2) reassignment of the individual soldier, and (3) a "DFR" entry. Thus the question remains unanswered as to whether or not a Form 2475–2 is admissible to prove an unauthorized absence of a member not dropped from the rolls if the commander has signed or entered tenure dates without the occurrence of any of the three events mentioned above.

4–3. DA Form 2475–2. "Authorized Representative." Paragraph 5–5c(1) requires entry of the names, grade and initials of all "authorized representatives" on DA Form 2475–2 who may approve and initial entries on the reverse side of the form. Paragraph 5–5c(1) states that "authorized representatives should be limited to commissioned officers, warrant officers, 1 SG's, DAC's, or senior enlisted personnel (E7, E8, or E9)." If someone not included in the above paragraph is designated as an authorized representative, it is open to question whether or not the court would strictly limit the list of representatives to exclude the individual listed.

4–4. DA Form 2475–2. Change of Authorized Representatives. An authorized representative must initial all personnel status changes on the reverse side of DA Form 2475–2. Paragraph 5–5*d*. Paragraph 5–5g provides that a commander may change his authorized representatives by lining out their names on the DA Form 2475–2. No provision is made for dating these changes. Thus it can be argued, in any case where there is no date and where a former (lined-out) representative has initialed a personnel action, that the individual was no longer an authorized representative at the time he initialed the personnel entry.

4–5. DA Form 2475–2. Processed—Unprocessed. On the reverse side of DA Form 2475–2, are two columns, one marked "P" and the other "U". Each personnel entry must be checked either "P" (processed) or "U" (unprocessed). If the "U" column is checked, the action is invalid and is required to be processed again. Procedure 5–1, DA Pam. 600–8. Therefore the remaining entries should be checked to see that the personnel action was again entered. A check should also be made to determine if the effective dates of the two entries are identical.

4–6. DA Form 2475–2. "Remarks." Part I of DA Form 2475–2 contains a section labeled "REMARKS." This provides the occasion for the entry of irrevelant and possibly prejudicial statements, *e.g.*, uncharged misconduct.

4–7. DA Form 4187. Commander's Signature. Each Form 4187 reflecting a duty status change must be certified by the unit commander or an authorized representative. Paragraph 5–9*f*. While paragraph 5–9*f* does allow an oral designation of an authorized representative, the language of paragraph 5–9*f* requiring "exceptional circumstances" is stricter than paragraph 5–5c(1). See 4–3 *supra*. Enlisted personnel below E7 very likely may not sign DA Form 4187.

4–8. DA Form 4187. Authorized Representatives Position or Title. Paragraph 5–9*f* also requires that an authorized representative indicate his position or title. Since there is no "position" or "title" block on Form 4187, cases most likely will arise where an authorized representative neglects to enter his rank or position.

4–9. DA Form 4187. Mistakes. Paragraphs 5–8c and 5–11*a* establish specific procedures to correct mistakes made on Form 4187. Erasures may not be made. The incorrect entry will be lined out and initialed by the person certifying the form. The correct entry will then be entered above the line-out. The second method of correction is to prepare a new Form 4187, indicating that there is a change made. Any deviation in these procedures will render the document irregular on its face.

4–10. Authentication of "Copy 3." DA Form 4187. When trial counsel cannot obtain the original DA Form 4187 (located at the military per-

sonnel center), he will probably attempt to use "Copy 3" of the form (located in the unit's files). Whether or not this carbon copy (the signature is, of course, also a carbon copy) can be authenticated as indicated in Section III, 3-5, is an open question. *But see* paragraph 143*a* *Manual for Courts-Martial, United States, 1969 (Revised edition).*

4-11. "REMARKS." DA Form 4187. Like DA Form 2475-2, DA Form 4187 also has a "REMARKS" section. Thus, the possibility exists that objectionable and prejudicial material will be erroneously presented to the court. Attention should be paid to determine whether trial counsel masked the objectionable information.

4-12. Name. DA Form 4187. Paragraph 5-8*b* states that "extreme caution will be exercised to guard against errors in personal identification entries . . ." Paragraph 5-9*b*(1) requires that the full name of the soldier be entered: last name, first name, middle name. No middle initial will be used unless the initial is the soldier's full middle name. In spite of these explicit requirements, the section for the soldier's name on DA Form 4187 states only: "Name." Thus situations will undoubtedly arise where a DA Form 4187 is admitted into evidence without the "name" block filled out according to AR 680-1.

4-13. Address. DA Form 4187. The address blocks of Form 4187 are to be filled out according to Paragraph 5-9*a*.

4-14. Purposes of Prosecution. DA Form 4187. It is arguable that "copy 1" of DA Form 4187 is prepared primarily for the purposes of prosecution and therefore does not qualify as an exception to the hearsay rule. Paragraph 144*d*. While "copy 2" and "copy 3" have valid personnel accounting purposes with the finance office and at the unit level, "copy 1" remain in the soldier's MPRJ until charges are about to be filed.

4-15. Mandatory Preferral of Charges. Paragraph 5-6*b*(9) originally required that charge sheets and the appropriate SIDPERS forms be sent to the Military Personnel Office and included in the individual's MPRJ "as an action pending document" when the individual was dropped from the rolls as a deserter. However, an amendment to paragraph 5-6*b*(9) added the provision that the charge sheets be forwarded through the officer "exercising summary court-martial jurisdiction, in accordance with Paragraph 33*b*, *Manual for Courts-Martial, United States, 1969 (Revised edition).*" (Statute of limitations). An issue may develop as to whether or not this procedure is, in effect, ordering that an individual be charged with an offense under the Uniform Code of Military Justice.

4-16. Burton Problems. The SIDPERS documents used to prove unauthorized absences will remain at the unit level for relatively short periods of time. Indeed AR 680-1 provides for destruction of many of the forms within 1 year of preparation and the central storage of other copies at Fort Benjamin Harrison, Indiana and other "holding areas" or "overseas records centers." *(See, e.g.* Paragraph 5-6*a*, 5-10*a*). Thus, especially for long absences, trial counsel will occasionally be hard pressed to obtain the appropriate SIDPERS forms within the 90-day limit. This may result in attempts on the part of trial counsel to offer unorthodox and possibly improper SIDPERS documents to prove their cases. Documentary evidence in cases involving lengthy absences tried immediately prior to expiration of the *Burton* limit should be examined closely.

4-17. Authentication. The precise form of the authentication used by trial counsel should be reasonably similar to those listed in Section III, above. Objection to improper authentication can be waived by failure of trial defense counsel to object specifically to the attempted authentication. Paragraph 143*b*(1), *Manual, supra, United States v. Castillo,* 1 USCMA 352, 3 CMR 86 (1952). *See* paragraph 143*b*(2) for authenticating official records.

Check List of Errors

I. DA Form 2475-2.
- A. Tenure Block (4-2)
- B. "Authorized Representative" (4-3)
- C. Change of Authorized Representatives (4-4)
- D. Processed - Unprocessed (4-5)
- E. "Remarks" (4-6)

II. DA Form 4187.
- A. Commander's Signature (4-7)
- B. Authorized Representative's Position or Title (4-8)
- C. Mistakes (4-9)
- D. Authentication of "Copy 3." (4-10)
- E. "Remarks" (4-11)
- F. Name (4-12)
- G. Address (4-13)
- H. Purposes of Prosecution (4-14)

III. Miscellaneous
A. Mandatory Preferral of Charges (4–15)
B. *Burton* Problems (4–16)
C. Authentication (4–17)

TJAG Outlines Duties of Chief, USALSA

The Judge Advocate General has suggested the following correspondence be reproduced at this time for the information of all Judge Advocate officers.

DAJA/MJ 1974/11446 20 Jun 74

Brigadier General Emory M. Sneeden
Chief, U.S. Army Legal Services Agency
Nassif Building
Falls Church, Virginia 22041

Dear Emory:

The purpose of this letter is to provide you my thoughts concerning your responsibilities as the Chief, United States Army Legal Services Agency, and the Chief Judge, United States Army Judiciary and United States Army Court of Military Review. These offices you are now assuming incorporate many activities which are critical to the Army, its military justice administration, and consequently its mission.

The United States Army Legal Services Agency is a Field OperatingActivity, so created by General Orders No. 17, Headquarters, Department of the Army, 23 May 1973, to perform many of the functions within the general responsibility of The Judge Advocate General as prescribed in Army Regulations 10–5 and 27–1. The organization and functions of the United States Army Legal Services Agency are set forth in JAGO Regulation 10–4. By virtue of your assignment, you are the commander of that activity. Army Regulation 600–20 outlines your duties and responsibilities as a commander. Pursuant to Chief of Staff Regulation 10–34, The Assistant Judge Advocate General exercises immediate supervision for this office over you and your command.

A portion of the United States Army Legal Services Agency is designated as the United States Army Judiciary, outlined in Chapter 9, Army Regulation 27–10, and emphasized by General Orders No. 56, Headquarters, Department of the Army, 26 September 1962. Included in the Judiciary are the United States Army Court of Military Review and the Trial Judiciary. In accordance with Article 66, Uniform Code of Military Justice, I have designated you as the Chief Judge of the United States Army Court of Military Review.

As the Chief Judge, you, along with the other members of the Court, are the final arbiters of military criminal law within the Army. In addition to the performance of your judicial functions as a member of the Court, you, as the Chief Judge, are responsible for the overall operation and administration of the Court in accordance with the Code, the Manual, policies prescribed in the Uniform Rules of Procedure as set forth in Army Regulation 27–13, and such other guidance as may be prescribed by The Judge Advocate General. Pursuant to Article 66, you have the authority to determine the membership of each of the panels of the Court, and to designate a senior judge for each panel. Although you yourself will sit as a member of one of the panels, you are responsible for supervising and monitoring the work of all the panels. As Chief Judge, it is expected that you will implement effective procedures to assure that all pending cases are heard and decided as expeditiously as possible. You likewise have the opportunity to play a lead role in molding the body of law under which the Army operates. In this regard, I urge that the Court expressly recognize and reaffirm as a guiding policy the doctrine of *stare decisis*. Although the Court is comprised of the different panels, steps should be taken to preserve the one-court concept among the panels. Cases presenting unresolved divergent views between panels should be referred to the Court sitting *en banc* for resolution. This *en banc* decision should then be binding on all the panels. In addition, cases which involve issues of exceptional importance to the administration of military justice or principles of law which, although presently controlling, are of doubtful vitality, should be considered for *en banc* resolution.

As the Chief Judge, your views will be given weighty consideration by members of the Congress, the news media, and professional groups who consistently overview the functioning of

the military justice system. As the Chief Judge, you have full judicial independence, even though your overall function is as a subordinate of The Judge Advocate General. On matters of policy, as distinct from matters involving your judicial function, the views you express should reflect the overall policy of the Department of the Army as conveyed by The Judge Advocate General.

Apart from your responsibility with regard to the United States Army Court of Military Review, you have the general responsibility for the effective functioning, the internal administration, and the judicial management of the trial judiciary, outlined in Army Regulation 27-10. The publication of rules of procedure, guides, and memorandum impacting directly upon military judges will be under your supervision.

I intend that no trial or appellate judge will be so designated without a determination by you as to his personal and professional merit, qualification, and acceptability. I expect your opinion to be given great weight in determining the establishment of new posts for military judges and changes to the existing bases for the judges. Trial judges must be allowed to act independently, free from criticism, in the performance of their judicial functions, adhering to the Code of Judicial Conduct of the American Bar Association. The supervision of the trial judiciary is also your responsibility. You should insure trial judges are following correct procedures, are acting to expedite the trial of their cases, and fulfilling their responsibility for dispensing justice. Complaints concerning the performance of duty by a military judge will be referred to you for inquiry and necessary action. I charge you to work toward deserved, enhanced prestige for the members of the U.S. Army Judiciary.

If you discover that a policy, practice, or procedure of a questionable nature is being followed by a field commander, staff judge advocate, or counsel you should bring this matter to the attention of The Judge Advocate General.

As the Chief Judge, you will have your finger on the pulse of the military justice system. It is expected that you will provide the impetus for ascertaining desirable changes in the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1969 (Revised edition).*

With this in mind, I plan to designate you as the chairman of a soon to be formed committee tasked to report to me changes to the Code and the *Manual* you deem desirable.

It is the policy of The Judge Advocate General to promote the fullest independence and autonomy of the United States Army Judiciary in the performance of its judicial functions, and to enhance the professional competence of its officers. The United States Army Judiciary, along with the other elements comprising the United States Army Legal Services Agency, is a part of the Army's Judge Advocate General's Corps, functioning for the purpose of implementing the Uniform Code of Military Justice and assisting me in carrying out my judicial and other responsibilities arising under the Uniform Code of Military Justice and as legal advisor to the Secretary of the Army and all officers and agencies of the Army. In this connection, I expect to be able to have full consultation with you regarding any proposed policy decisions concerning the judiciary.

I have the utmost faith in your ability to perform these very important duties, and I hope that together we will accomplish the goals so necessary for the administration of justice in the Army.

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

Proposed Change to AR 608-50 and the Expanded Legal Assistance Program

The following letter from The Judge Advocate General was sent to the field in late December 1974.

As you are aware, in July comments from the field were solicited regarding the question of representing eligible clients in criminal cases through the Expanded Legal Assistance Program (ELAP). The response from your offices was greatly appreciated as this has been a most difficult decision to make. It may be of interest that the opinions were nearly evenly divided be-

tween removing and continuing criminal case representation, with a slight edge to continuance if available resources permitted.

Your views in regard to this decision were requested at a time when our Corps and the entire Army are seeking to perform increasingly demanding tasks without an increase in resources. Certain of our JAGC functions, including military justice; litigation, contract appeals and the appellate processing of courts-martial, have required herculean effort; these, and other functions, must not be ignored or deferred even briefly. At the same time we are working hard to retain and hopefully to expand the services available to the Army personnel through legal assistance activities.

It appears clear from your letters, and from the reports which we review concerning ELAP, that few of our offices handle felony cases. Where as this is possibly due to the constraints imposed by the availability of resources, other factors which must be and are being considered are our relationships with the local bars and judiciary, as well as the availability of the same service through other channels.

Recognizing the positive aspects of criminal representation; including the excellent training provided our counsel, as well as the enhancement of the morale of the service members concerned, the following are guidelines to be considered in future cases. A reading of these guidelines will demonstrate only a slight modification from the present guidance, based mainly upon what is actually being done and what present JAGC resources are capable of doing while performing our overall JAGC mission.

Assuming compliance with existing eligibility standards and the agreement of the local bar and judiciary, misdemeanor cases involving military personnel may be handled through ELAP if the appropriate Staff Judge Advocate determines that his resources are sufficient. Felony cases will not be defended without the specific permission of the SJA, after consideration of the time, effort and special nature of the case and the availability of comparable representation through an existing local civilian program. In the event the decision is made to provide a military defense counsel in a particular felony case, The Judge Advocate General (ATTN: DAJA-LA) will be notified before any action is taken by the counsel.

I thank you for your comments regarding this extremely important area of our military practice. I urge each of you to apply the same thought and candor to all of our areas of responsibility so that we can continue to improve the services which we perform for our clients.

Test Yourself

How good is your knowledge? Set forth below is the first quarterly examination administered in TJAGSA New Developments Course for reservists and active duty personnel. How well would you have done on this exam? Pick the one correct answer. See page 28 for solutions.

Criminal Law.

1. A robbery has happened at the First Federal Bank at approximately 10:00 a.m. The perpetrator of the offense, a Caucasian about six feet tall with blond hair and an elongated face, was seen driving from the bank in a vehicle described as a 1973 blue Pontiac with state plates BTL 150 at about the same time. Thirty minutes later a vehicle fitting the description above driven by an individual with the same physical characteristics as that described by the bank officials was seen speeding down Maury Avenue. Patrolman Connolly upon seeing the vehicle and realizing that both the vehicle and its driver fit the description announced on the all points bulletin pursued it with the siren blaring. After a high speed chase the individual driving the car was stopped. He was told to get out of the car and placed in a wall search position at the hood of the vehicle. Patrolman Connolly searched the individual and found a .38 caliber snub nose pistol on his person. Finding no other evidence on the person of the arrestee the individual was handcuffed with his hands placed behind his back and the handcuffs running between his belt. Patrolman Connolly then searched under the driver's seat and found the money taken from the bank. In the trunk of the car he finds some burglary tools. Defense counsel moves to suppress the money found under the driver's seat. The trial judge should rule that the evidence is:

   A. Admissible because obtained pursuant to a search incident to a lawful arrest applying a radius test.

B. Admissible because obtained pursuant to a valid stop.
C. Inadmissible because the evidence was not obtained incidental to a lawful arrest applying the radius test.
D. Inadmissible because the evidence was not obtained incident to a lawful arrest applying the subjective test.

2. Defense counsel moves to suppress the burglary tools found in the trunk. The trial judge should rule that the tools are:

A. Inadmissible applying the radius test.
B. Admissible applying the radius test.
C. Admissible because obtained as part of lawful inventory.
D. Admissible applying a subjective test.
E. Admissible applying a totality of circumstances test (objective test).

International Law.

3. The United States is reluctant to agree to an expansion of the territorial sea from 3 to 12 miles primarily because:

A. Three miles has been the maximum breadth recognized under international law.
B. Such expansion would unduly restrict and hamper our seafishing industry.
C. Twelve miles would be an unrealistic limit in light of present state claims of territorial seas extending outward up to 200 miles for the state's coast line.
D. Such expansion would place many straits that are presently in international waters within coastal states' territorial seas and this could hamper international navigation.

4. The United States' position on marine scientific research is that:

A. It is adequately regulated under the 1958 Continental Shelf Convention.
B. Coastal states' interests in protecting their coastal interests must be afforded by giving them the right to allow marine research on their continental margins only with their consent.
C. Coastal state interests can be adequately served by withholding their power to prohibit scientific research on their continental margins and by imposing a series of obligations on a state conducting such research.
D. Marine scientific research should be allowed only when the researching state has established the validity of its research program to an international agency and has a research license granted by the agency.

Procurement Law.

5. John Doe has a Government contract with an agency other than the Department of Defense. In the event that he has a dispute under the contract, his appeal on the Contracting Officer's final decision is to that agency's appeal board. If Mr. Doe's notice of appeal is sent on the 31st day after receipt of the Contracting Officer's final decision, the probable outcome will be:

A. The same regardless of which agency is involved, since all have a 30-day filing provision in their contract.
B. Different than the probable outcome at the ASBCA, if the agency involved is the General Services Administration, since the GSA tends to agree with the Court of Claims interpretation of the 30-day rule.
C. The same as the ASBCA if the agency involved is the Post Office Department, since it tends to agree with the ASBCA in its interpretation of the 30-day rule.
D. Different than the ASBCA regardless of which agency is involved since no Board at the present time agrees with the position taken by the ASBCA regarding their interpretation of the 30-day rule.
E. More than one of the above will be a correct probable outcome.

6. Which of the following would be appropriate in attempting to solve the current conflict regarding the 30-day rule between the ASBCA and the Court of Claims?

A. Have the Secretary of Defense positively state his intentions whether the 30-day rule is jurisdictional by amending the Charter of the ASBCA.
B. Have the Comptroller General issue a formal published decision deciding the issue of jurisdiction.
C. Have the Contracting Officer decide the conflict by issuing a legally proper final decision.
D. More than one of the above would be appropriate in solving the conflict.
E. None of the above would be appropriate in solving the conflict.

7. In a defective pricing dispute the contractor has the initial burden of proof concerning:

A. Whether or not certain data should have been given to the Government.

B. The amount of increase in contract price which resulted from the lack of disclosure of data.
C. The amount of "set-off" to which the contractor is entitled if the Government is successful in obtaining a reduction in the contract price.
D. Both A and C above.

8. The price of the contract will not be reduced if:

A. No Certificate of Current Cost or Pricing Data was ever submitted.
B. The Certificate of Current Cost or Pricing Data was executed only after the award of the contract.
C. The contractor can find an understatement of costs of any amount and thereby prove an offset.
D. Both A and B.

9. If the Government acts in such a way as to lead a bidder to believe that he has a Government contract, and, in reliance upon such conduct, the bidder incurs contract performance costs, which of the following authorities can authorize compensation for such incurred costs?

A. The Comptroller General
B. Head of a Procuring Activity (HPA)
C. Court of Claims
D. Both A and C above.

10. If an appropriate forum determines that the Government is estopped to deny a contract, the Contracting Officer has which of the following options with respect to such a contract?

A. Terminate the contract for convenience.
B. Permit the contractor to perform.
C. Terminate the contract for default.
D. Either A or B.

Litigation Notes

From: Litigation Division, OTJAG

Attempts to Enjoin Courts-Martial. Collateral attacks on courts-martial have proliferated in recent years. Not the least of such attacks have been attempts to enjoin courts-martial. Trial counsel in some of these cases have not vigorously opposed motions for continuance so that the accused can seek collateral relief in federal court. The government's response to such motions should be governed by considerations of military justice only. This is consistent with Department of the Army policy to oppose the intervention of federal civil courts in courts-martial proceedings.

The foregoing is aptly illustrated by a recent significant "win" for the Army. On 11 November 1974 the U.S. District Court in Hawaii dismissed the complaint of a sergeant seeking to enjoin his trial by special court-martial for the off-post transfer of marihuana *(Evilsizer v. Callaway, et al).* Upon his motion, the court-martial was delayed while he pursued this action in the federal district court. In dismissing the civil action, the court overruled *sub silentio* its decisions in two earlier cases where Navy courts-martial for similar offenses were enjoined *(Schroth v. Warner,* 353 F. Supp. 1032; *Redmond* v. *Warner,* 355F. Supp. 812).

Hawaii is in the Ninth Judicial Circuit. The courts in four other circuits have considered this issue and decided against enjoining military prosecutions. *Scott* v. *Schlesinger,* 498 F. 2d 1093 (5th Cir., 1974); *Dooley* v. *Ploger,* 491 F. 2d 608 (4th Cir., 1974); *Sedivy* v. *Richardson,* 485 F. 2d 1115 (3rd Cir., 1973), *cert. pending; Mascavage* v. *Richardson,* 494 F. 2d 1156 (D.C. Cir., 1974) (decision without opinion). In only one circuit — the 10th — is the Army currently enjoined from proceeding to trial. *Councilman* v. *Laird,* 481 F. 2d 613. In that case, a captain is charged with the off-post sale of marihuana to an undercover CID agent. The Supreme Court has granted certiorari, however, and Solicitor General Bork argued the case for the government on 10 December 1974 (*cert. granted sub nom Schlesinger* v. *Councilman,* 414 U.S. 111 (1973).

The *Evilsizer* case, *supra,* was prepared, briefed, and argued by Captain James Gleason of the Litigation Division, OTJAG. The following excellent, succinct treatment of the jurisdiction to enjoin courts-martial is extracted from Captain Gleason's "MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PRAYER FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT WITH MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF."

1. *Federal Courts May Enjoin An Ongoing Military Prosecution Only When There Is Evidence Of Bad Faith Or Harassment And Plaintiff Makes No Such Claim.*

Plaintiff in this action requests this Court to issue an order prohibiting his pending criminal prosecution in a military court-martial.

Such a request is not slight for it calls upon the Court to reject "a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court-maritals or anticipate the results of proceedings before military tribunals." *Levy* v. *Corcoran*, 389 F.2d 929 (D.C. Cir., 1967). This tradition is, at least in part, based upon the rule which is applicable to attempts to avoid state prosecutions. On several early occasions the Supreme Court addressed itself to requests for equitable relief to enjoin an ongoing state criminal prosecution and each time the Court refused to intervene. *Ex Parte Young*, 209 U.S. 123 (1908); *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943). The Supreme Court has consistently held that a criminal prosecution will not be enjoined unless there is a showing of bad faith by the prosecutors. As the Court stated in *Douglas:*

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constutionality of the statute on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. *Douglas, supra* at 163.

In traditional legal terms, the rationale for the rule is two-fold. First, no extraordinary equitable remedy should be granted absent a showing of the threat of irreparable injury. Secondly, since premature federal court action could well result in needless friction between two court systems, the threat of irreparable injury must be both "great and immediate" before the federal court can enjoin a state prosecution. The threat of the injuries which may be incidental to every criminal proceeding is simply neither great nor immediate enough to justify premature interference with another judicial system. Although it appeared for a moment in *Dombrowski* v. *Pfister*, 280 U.S. 479 (1965), that the Supreme Court would create an exception to this rule where the state prosecution involved impairment of First Amendment freedoms, the Court reiterated in *Younger* v. *Harris*, 401 U.S. 37 (1971), that the danger of irreparable injury which would justify enjoining a criminal prosecution would only be present where the pending prosecution was in bad faith or for harassment of the defendant. See also *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Levy* v. *Corcoran, supra;* and *Locks* v. *Laird*, 441 F.2d 479 (9th Cir., 1971), *cert. denied*, 404 U.S. 968 (1971). The rule does not prevent or impair eventual review by the federal courts of the issues raised. It only requires that the defendant present those issue to the court system in which he is being prosecuted.

The Supreme Court decided long ago that the requirement for exhaustion of state court remedies was completely applicable to military court proceedings. The Court has been reluctant since the earliest times to interfere with ongoing military trials. See *Wales* v. *Whitney*, 114 U.S. 564 (1885). And in *Gusik* v. *Schilder*, 340 U.S. 128 (1950), the Court expressly applied the rule requiring exhaustion of available state court remedies to a request for habeas corpus relief from a court martial:

> An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. . . .The policy underlying that rule is pertinent to a collateral attack of judgements rendered in state courts. If an available procedure has not been employed to rectify the alleged error. . .any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military court is saved. 401 U.S. 128 at 131-2.

The extent of the exhaustion required is shown by the fact that Gusik had completely exhausted his military court remedies and it was a statutory administrative review by The Judge Advocate General that the Court required him to apply for, a review that did not even exist when he filed the habeas corpus petition. In *Noyd* v. *Bond*, 395 U.S. 683 (1969), an Air Force officer

convicted of disobedience was confined pending appellate review and brought a habeas corpus action alleging that his confinement violated certain provision of the Uniform Code of Military Justice. Relying on *Gusik* and quoting the same passage reprinted above, the Court held that granting of the writ would be improper until available military remedies had been sought by Captain Noyd. The principle that has thus evolved from *Douglas* through *Gusik* to Noyd is that an ongoing military prosecution, like an ongoing state prosecution will not be enjoined by a federal court. The only exception to this rule is where the prosecution is in bad faith or for harassment. *Locks* v. *Laird, supra; Levy* v. *Corcoran, supra; Angle* v. *Laird,* 429 F.2d 892 (10th Cir., 1970). Plaintiff's only attempt to present his claim for relief to the military judiciary was his motion at a preliminary trial session. Plaintiff makes no allegation of bad faith prosecution. Under these circumstances, this Court should refuse to enjoin the criminal proceedings against him.

2. *Plaintiff's Claim That The Alleged Offense Is Not "Service-Connected" Does Not Negate The Requirement That He Exhaust Military Judicial Remedies.*

Plaintiff claims that the court-martial lacks the power to try him for the alleged offense because the offense lacks the "service-connection" necessary to the exercise of military jurisdiction under the principles announced in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969). In effect, he asserts that this type of "jurisdictional" claim is another exception to the *Douglas-Gusik-Noyd* rule requiring exhaustion of military court remedies. There is no exception. In light of *Younger* v. *Harris, supra,* where the plaintiff claimed that the Syndicalism Act under which he was being prosecuted was unconstitutional, it is clear that the mere fact that a criminal defendant asserts violation of substantive or procedural constitutional guarantees will not justify the consideration of injunctive or habeas corpus relief by a federal court. In *Locks* v. *Laird, supra,* three airmen sought to enjoin their prosecution for violation of a regulation which they contended was an unlawful intrusion upon their First Amendment rights. The Ninth Circuit, citing *Younger* and *Gusik,* held that such an assertion did not present the required "great and immediate danger" of irreparable injury and that only proof of a bad faith prosecution would present such a danger. In *Levy* v. *Corcoran, supra,* an Army Captain awaiting court-martial sought injunctive relief on the grounds that the statutes under which he was charged (Arts. 133 and 134 of the Uniform Code of Military Justice) unconstitutionally infringed upon his First Amendment freedoms. The District of Columbia Circuit specifically rejected his claim that such an assertion negated the requirement for exhaustion of miliary remedies.

The assertion of a claim based upon *O'Callahan* has no special constitutional status. Surely *O'Callahan* itself did not create such an exception since O'Callahan had exhausted his remedies within the military system and the Court was not being asked to enjoin any pending military court action. In recent decisions, Four Circuits have applied the exhaustion requirement to objections based on a lack of "service-connection": *Dooley* v. *Ploger,* 491 F.2d 608 (4th Cir., 1974); *Scott* v. *Schlesinger,* 498 F.2d 1093 (5th Cir., 1974); *Sedivy* v. *Richardson,* 485 F.2d 1115 (3d Cir., 1973), *cert. pending; Mascavage* v. *Richardson,* 494 F.2d 1156 (D.C. Cir., 1974) (decision without opinion). To the extent that this Honorable Court's decision in *Schroth* v. *Warner,* 353 F.Supp. 1032 (D. Hawaii, 1973) and *Redmond* v. *Warner,* 355 F.Supp 812 (D. Hawaii, 1973) are to the contrary, Defendants respectfully disagree with this Court's conclusion that exhaustion is not required and urge the Court to reconsider the matter. Defendants submit that this case does not come within the following exception found in Footnote 8 of the *Noyd* opinion, relied upon in part by the Court in *Moylan* v. *Laird,* 305 F.Supp. 551 (D. R.I., 1969) and adopted by this Court in *Schroth* (353 F. Supp. at 1036):

> Petitioner contends that our decisions in *Toth* v. *Quarles,* 350 U.S. 11 (1955); *Reid* v. *Covert,* 345 U.S. 1 (1957); and *McElroy* v. *Gugliardo,* 361 U.S. 281 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Consitiution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complaints' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitu-

tional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military requirements when the complaints raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us. *Noyd* v. *Bond, 395 U.S. 683, fn. 8 at 696 (1969).*

The Toth, Reid and *McElroy* decisions do not support the exception to *Noyd* exhaustion attributed to them by *Moylan.* Those cases dealt with the jurisdiction of the military to try *civilians* by court-martial and did not explain their excusal of exhaustion. *Dooley, supra* at 613. In *Dooley* the petitioner relied on the "civilian cases — *Noyd* footnote" in urging that exhaustion is excused regardless of whether the challenged jurisdictional prerequisite is the status of the defendant or "service-connection." The Fourth Circuit rejected this stating:

> If the correctness of Dooley's characterization of his claim is "jurisdictional" were determinative of whether the exhaustion doctrine applied, a closer examination of *O'Callahan* and the debate...in *Gosa* of Dolley's claim would be necessary. But we do not think the examination is warranted. The doctrine of exhaustion of remedies is a flexible, discretionary one grounded upon several policies (footnote omitted). Its application, including application to a jurisidictional challenge, turns upon consideration of those policies in the light of the questions raised by the case, as well as any extraordinary circumstances calling for early judicial decision. *There is no general exception to the exhaustion requirement for jurisdictional challenges* (emphasis added); here, as in cases where the challenge may not be termed "jurisdictional," it is important to respect the orderly process of the military court system, to avoid needless friction, and to have the facts developed and the law interpreted by the expert adjudicatory tribunals charged in the first instance with responsibility for offenses of members of the armed services (footnote omitted). *Dooley, supra,* at 613.

The argument advanced in *Moylan, supra,* and adopted by this court in *Schroth, supra,* and *Redmond, supra,* that resolution of the "service-connection" issue does not call for the special expertise of the military tribunal overlooks the nature of the issue as well as another compelling reason for the exhaustion requirement. There is no doubt that a court-martial has *in personam* jurisdiction to bring plaintiff before it. There is no doubt that if the facts show that the offense is "service-connected" the court-martial has the power to try him for that offense. After *OE'Callahan* decided the legal proposition that for the appropriate exercise of military jurisdiction a connection is required between the offense and the military service, the only issue that remains is the factual detemination of "service-connection." It is this determination that plaintiff asks this Court to prevent the military courts from making. Certainly in *Toth, Reid,* and *McElroy*-type cases the "expertise of military courts" is not essential to the factual determination of whether a person is a civilian or not. But where the issue is whether, under the particular facts alleged, the offense has a special significance to the military service, the policy for avoiding friction between the systems is augmented by a policy in favor of getting the views of a specialized tribunal on a very specialized question. The Fourth Circuit recognized this in *Dooley, supra* at 614, stating in part:

> *The significant distinctions between the civilian cases and the instant appeals is that here "the expertise of military courts (does) exten(d) to the consideration of constitutional claims of the type presented* (emphasis added). Unlike Dooley's claim, the civilian cases involved no disputed question of fact and no questions on which the expert opinion of the military courts would be helpful (footnote omitted). Resolution of the *O'Callahan* questions ...depends for the most part on the fact-finding process — which will determine the circumstances under which any offense has been committed — and on a judgment of the impact of the offense on the combat effectiveness of the armed forces. Expert understanding of the special circumstances of military life obviously would influence what facts are found from the evidence and what significance is attached to them. *Thus, in the immediate case, unlike the civilian cases, the expertise of the military courts is most relevant to constitutional decision* (emphasis added).

See *Scott, supra* at 1097, where the Fifth Circuit adopted the *Dooley* rationale.

Noyd was never intended to be cited as a basis for negating the requirement that the views of this specialized justice system be sought prior to the intervention of a federal district court. As *O'Callahan* itself demonstrates, the Defendants do not ask that the federal courts not review the decisions of military courts where appropriate. All Defendants ask is, in accordance with the long-standing and well-reasoned rule of law, that this Court not presume that the military court system will exceed its jurisdictional limitations and that this Court not preempt the military court system from making a decision which is particularly suited for that system.

3. *Adequate Remedies Within The Military Judical System Are Still Available To Petitioner.*

Prior to entering his plea of not guilty at the court-martial, plaintiff moved the military judge to dismiss the charges against him on the ground that the court-martial lacked jurisdiction over the offense. After an evidentiary hearing, the military judge denied the motion. Several other avenues for the presentation of plaintiff's *O'Callahan* claim lie ahead of him.

Plaintiff's case has been referred for trial by special court-martial. He can proceed to trial on the merits, which could result in a judgment of acquittal; in the event of conviction, he has several potential levels of appellate review available. Appellate review is provided for in the Uniform Code of Military Justice, 10 U.S.C. 864 (convening authority), 10 U.S.C. 866 (Court of Military Review), 10 U.S.C. 867 (Court of Military Appeals) and/or 10 U.S.C. 869 (Judge Advocate General). The Court of Military Review will not only consider the legal questions involved but "it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." 10 U.S.C. 866(c). The Court of Military Appeals may be petitioned to grant review of claims not upheld by the Court of Military Review. Neither of these Courts has ever shyed away from a determination of "service-connection." See the seemingly unending list of cases cited in *Relford* v. *Commandant*, 401 U.S. 355 (1971), at footnote 8, p. 358–359.

Plaintiff claims the need for immediate extraordinary relief. That remedy is readily available to him in the military tribunals. As the Supreme Court noted in *Noyd* v. *Bond*, the Court of Military Appeals has the power to adjudge precisely the remedies sought by plaintiff. *Noyd, supra* 395 U.S. at 695. This power has been acknowledged. *United States* v. *Frischholz*, 16 U.S. C.M.A. 150, 36 C.M.R. 306 (1966); *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). Since *Noyd*, the Army Court of Military Review has also held that it as the power to grant extraordinary relief. *United States* v. *Draughon*, 42 C.M.R. 447 (1970). See Rankin, *The All Writs Act and The Military Judicial System*, 53 Mil. L. Rev. 103 (1971). Thus, there are at least two military tribunals awaiting Plaintiff.[1]

For the reasons set forth in this argument, Defendants respectfully request that this Court refuse to enjoin the criminal proceedings against plaintiff; and, further, that this Court dismiss plaintiff's Verified Complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. Rule 12(b)(1), 12(b)(6), Federal Rules of Civil Procedure.

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[1] Any suggestion that plaintiff should be excused from the exhaustion requirement because it would be a predictable exercise in futility is erroneous. As stated by the Fifth Circuit in *Scott* v. *Schlesinger, Supra* at 1099:

> Although it is true that the Court of Military Appeals has indicated that it considers all sales of drugs by one serviceman to another to be service-connected, United States v. Rose, 1969, 19 U.S.C.M.A. 3, 41 C.M.R. 3, this area of the law is now in some uncertainty, e.g., Councilman v. Laird, 10 Cir. 1973, 481 F.2d 613, cert. granted sub nom., Schlesinger v. Councilman, 1973, 414 U.S. 1111, 94 S. Ct. 839, 38 L. Ed. 2d 737, and it is not unreasonable to suppose that the Court of Military Appeals might reconsider its views in this area. (footnote omitted).

Even if the possibility of reconsideration is rejected in the case before this Court, plaintiff has not exhausted the available fact-finding mechanisms. The trial is the primary fact-finding mechanism. However, plaintiff's case is potentially reviewable by the Court of Military Review. As Defendants previously pointed out, the Court has fact-finding powers and reponsibilities. 10 U.S.C. 866(c). The Fourth Circuit clearly requires exhaustion of the fact-finding mechanisms of the military judiciary notwithstanding the fact that an appeal to the Court of Military Appeals may be said to be predictably futile. *Dooley* v. *Ploger, supra* at 615.

Judiciary Notes

From: U.S. Army Judiciary

1. Administrative Note

Several rehearings ordered by the U.S. Court of Military Appeals or U.S. Army Court of Military Review have been delayed because the accused is in an AWOL status. It is urged that staff judge advocates monitor these cases with frequent checks by all practical means as to whether the accused continues to be in an AWOL status. Sometimes the accused returns to military control at another station.

2. Recurring Errors and Irregularities

December Corrections by ACOMR of Initial Promulgating Orders:

a. Failing to show the accused's name and SSN correctly—two cases.

b. Failing to reflect the charges and specifications correctly—six cases.

c. Failing to reflect the pleas correctly—one case.

d. Failing to reflect the findings correctly—two cases.

e. Failing to state that the sentence was adjudged by a military judge—five cases.

f. Failing to state the correct number of previous convictions—five cases.

g. Other miscellaneous errors—three cases.

3. Note from Defense Appellate Division

Limitations on the Use of Pretrial Statements

By: Captain David A. Shaw, JAGC; Defense Appellate Division; USALSA

A pretrial statement—an alleged confession or admission by an accused—is frequently the most damaging piece of evidence the government has. Court members and the military judge tend to be conclusively persuaded by an accused's pretrial acknowledgement of guilt. If possible; defense counsel should attempt to keep such statements from the trier of fact.

The admissibility of an accused's alleged out-of-court statement depends upon proof of the circumstances under which it was made. It must have been made voluntarily and without the promise or suggestion of mitigated punishment. In a custodial interrogation situation; the accused must have also been advised of his rights under Article 31; Uniform Code of Military Justice. If an accused was advised of his Article 31 rights, that warning must have been legally sufficient under the standards announced in *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967).

Additionally, an accused's pretrial statement may be worded in such a way that it could not be attributed to him or it contains language similar to the elements of the offense.

In such cases; the *Manual* now draws a distinction between statements which are claimed by an accused not to have been made or not made in the form offered by the Government and those which the accused claims to be involuntary. *(See generally* DA Pamphlet 27-2; *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition);* paragraph 140*a*(3), p. 27-9).

Paragraph 140*a*(3), *Manual for Courts-Martial, United States; 1969 (Revised edition)* provides defense counsel with an often overlooked or underutilized trial tactic in pretrial statement cases. This *Manual* provision can be advantageously used when the accused admits making a pretrial statement but denies making the statement in exactly the form being offered, or when the accused denies making the statement at all.

In the majority of cases, the pretrial statement will not have been written by the accused himself. Rather, it will have been transcribed from an oral interrogation by a CID investigator, and it may or may not have been signed by the accused after transcription. Whether the accused has signed the statement or not, if the wording is later questioned, or if the statement in its entirety is questioned, these issues can be contested by exercising the rights pursuant to Paragraph 140*a*(3), in addition to the standard warning issues, without jeopardizing the balance of the defense.

Paragraph 140*a*(3) provides the accused the right to testify that he did not make the purported statement, and this testimony is limited to the question of whether or not he did in fact make the statement. He may not be cross-examined on any other issues in the case or upon the truth or falsity of the disputed statement. However, the accused will be subject to proper cross-examination as to whether the statement was made by him, and as to his credibility. If requested, the right to testify and establish that the statement was not made in the form purported, will be accorded the accused at a hearing out of the presence of the court members before a ruling is made on the admissibility of the statement.

If, however, a pretrial statement has been received in evidence, the accused can still attack the statement and place the accuracy of the statement into issue before the ultimate trier of fact. If placed into issue; Paragraph 140*a*(3) imposes a *sua sponte* duty on the military judge to instruct the court that before they may consider the statement against the accused, they must first find *beyond a reasonable* doubt that the accused in fact made the statement.

In appropriate cases, during an Article 39*a* session defense counsel should utilize Paragraph 140*a*(3) to contest the admissibility of purported pretrial statements. The military judge should be informed that the accused desires to testify only on the issue of whether the statement was made, or made in the form offered by the government. Defense counsel should prepare the accused to testify only on that issue, and insure the government's cross-examination is limited to that issue. Also, in appropriate cases, request that the investigator testify and inquire as to the exact procedures followed in transcribing the statement. In certain cases, a motion to suppress the entire statement will be proper. In other cases, a motion to strike portions of the statement not made by the accused or not made in the form offered will be appropriate. If the statement is admitted, relitigate the issue in open court and request an appropriate instruction under Paragraph 140*a*(3).

Thus, through proper use of this *Manual* provision, defense counsel may have the opportunity to exclude from evidence certain pretrial statements which may be very damaging to their client's cause.

Administrative Law Opinions*

(Separation From The Service—General) **Approval Of Chapter 10 Improper After Acquittal.** Advice was sought on the propriety of approving a request for discharge submitted under the provision of Chapter 10, AR 635–200, 15 July 1966, as changed, after the member had been acquitted at trial. It was opined that, while paragraph 1–13 of the cited regulation was not expressly applicable to the situation posed, its general policy should nevertheless also control in Chapter 10 cases. TJAG noted that in DAJA 1973–4302, 1 Aug 1973, it was opined that a member could not be discharged under Chapter 10 after the sentence in his case had been fully executed and appellate review was complete. The same result was urged in the instant case due to the fact that the thrust of Chapter 10 in an appropriate case is to benefit the government by reducing the admistrative burdens of court-martial and confinement; and to benefit an accused by eliminating the stigma of conviction and reducing potential punishment. It was reasoned that after the member was acquitted of underlying charges, the aforenoted purposes would be ill-served by approval of the request for discharge. (DAJA-AL 1974–4151, 5 Jun 1974)

(Enlistment and Induction—General) **TJAG Outlines Disposition of "Forced Volunteers" In Light Of *Catlow*.** In view of the USCMA decision in *United States v. Catlow*, 48 C.M.R. 758 (1974), an opinion was sought by MILPERCEN concerning the separation of Private Catlow, and whether future enlistments of such "forced volunteers" should be treated as voidable or void. It was opined that Private Catlow should be separated from the Army UP paragraph 5–12; AR 635–200; 15 Jul 1966, as changed, because the court's decision constituted "the final judicial determination of a . . . military appellate agency that (the) individual is not currently a member of the Army." Noting that the *Catlow* decision held that enlistment of a forced volunteer under extremely coercive conditions was void—and that Army jurisdiction over an individual is retained only to the extent that a constructive enlistment arises and is es-

* The headnotes for these opinions conform to the list of topic headings found at Appendix 8-A to DA Pamphlet No. 27–21, *Military Administrative Law Handbook* (1973).

tablished—TJAG opined that similar future cases would have to be judged on their individual facts to determine whether the degree of coercion evident was sufficient under the *Catlow* criteria to cause the enlistment to be void, or whether a constructive enlistment had arisen. (DAJA-AL 1974-4567, 29 Jul 1974)

(UCMJ—Article 138) **Recent Disposition Of Article 138 Complaints.** A 138 Complaint wrote the Secretary of the Army seeking an opportunity to argue his case before The Judge Advocate General, and to rebut evidence and interpretations concerning his complaint submitted by the general court-martial convening authority and the informal investigating officer. A copy of the convening authority's report of inquiry in the case was also requested. Both requests were denied on the basis that neither Article 138 nor AR 27-14, 10 Dec 1973, gives a complainant the right to participate in any proceedings after the filing of a complaint. It was opined that no useful purpose would be served in converting the administrative procedure for the disposition of Article 138 complaints into an adversary, judicial type of formal hearing as requested. However, in view of complainant's request, The Judge Advocate General's review was held in abeyance for two weeks in order that the complainant could submit any additional information he thought relevant to the disposition of his case. (DAJA-AL 1974/5109,3 Oct 1974)

A member was unsuccessful in his appeal of an Article 15; made an unsuccessful written demand for redress from his commander and thereafter filed an Article 138 complaint. The general court-martial convening authority referred him to the Army Board for the Correction of Military Records for relief.The Judge Advocate General determined that the ABCMR was not a specific channel for redress within the intended meaning of paragraph 5*d*(2), AR 27-14, *supras*. It was pointed out that the appropriate action for the convening authority would have been to consider whether he could address the merits of the complainant's Article 15 as a "superior authority" UP paragraph 3-28, AR 27-10; 26 Nov 1968, as changed, which provides that any superior authority may mitigate, set aside or take any other action with respect to a punishment available to the officer who imposed the punishment, whether or not an appeal has been made. The opinion noted that such consideration by the convening authority under AR 27-10 would constitute a proper measure for redress; recourse to the ABCMR would be thereafter appropriate upon denial or election not to consider the merits of the punishment. (DAJA-AL 1974/4123, 12 Jun 1974)

Disposition of a housing complaint filed by a member on active duty, but not resolved until he had attained civilian status, indicated that he was not wronged. The complainant's present civilian status had no bearing on The Judge Advocate General's determination, as a member of the Army seeking redress under Article 138 need only be on active duty at the time a complaint is filed. (DAJA-AL 1974/4398, 18 Jul 1974)

An Article 138 complaint collaterally attacked an Article 15 punishment. The general court-martial convening authority determined that the complaint was not cognizable UP Article 138; instead he treated the complaint as an appeal of the Article 15 and granted it. The convening authority's determination that the complaint was not cognizable was noted by The Judge Advocate General as incorrect, but the granting of the appeal made it unnecessary for TJAG to take further action on the Article 138 complaint. It was pointed out that under AR 27-14, *supra*, all complaints, whatever their subject, are cognizable under Article 138 if a commander is a proper respondent; however, if other channels exist for the resolution of a complaint, such as the appeal procedures for Article 15 punishments, the complaint may be referred to those channels. Referral to other channels, if appropriate, constitutes a proper measure for redressing the wrong complained of under paragraph 5*d*, AR 27-14 *supra*. It was noted that the convening authority's decision to treat the complaint as an Article 15 appeal was appropriate, and his action thereon granted the requested redress. (DAJA-AL 1974/4852, 20 Sept 1974)

A complainant urged that he was wronged by his failure to be promoted to the grade of Specialist Five. The file revealed that a staff sergeant had been primarily responsible for failing to recommend the member's promotion. Nothing indicated that the commissioned officer named as respondent had wronged the complainant—in fact the file showed that all commissioned officers in his chain of command had done all that was possible to assist him in his request for promotion. As the fault for the alleged wrong rested with one who was not a commanding officer under the terms of Article 138, The Judge Advocate General determined

that the complaint was not cognizable. (DAJA-AL 1974/4494, 30 Apr 1974)

A complainant attacked a letter of reprimand administered to him by a superior commander. Upon forwarding, the general court-martial convening authority referred the complaint to the appeal procedures prescribed in AR 600-37, 16 Oct 1972, and to the Army Board for the Correction of Military Records. The Judge Advocate General opined that the convening authority's referral to the Department of the Army Suitability Evaluation Baord (AR 600-37) constituted a proper measure for redressing the complaint UP paragraph 5*d*, AR 27-14, *supra*. (DAJA-AL 1974/4554, 26 Jul 1974)

In determining that an Article 138 complainant was not wronged, The Judge Advocate General observed that 114 days had elapsed between submission of the complaint and notice of denial. It was pointed out that delays in the processing of complaints could result in the denial of administrative due process or an additional 138 complaint, and that unnecessary or unexplained delays in the processing of future complaints should be avoided. (DAJA-AL 1974/4929, 20 Sep 1974)

JAG School Notes

1. Military Justice Course. The annual two-week Military Justice Course has been replaced by two new courses, Military Justice I and Military Justice II, which will be offered in alternate years. These courses are designed primarily to enable officers of the reserve component to complete the criminal law requirements of The Judge Advocate Advanced Course by resident instruction during active duty training. The first Military Justice I course will be held from 16-27 June 1975. It will cover jurisdiction, common law evidence, constitutional evidence, and military crimes (JA Subcourses 130, 131, 132, and 137). The Military Justice II course, which will be offered for the first time in 1976, will cover pretrial procedure, trial procedure, post-trial procedures and review, and appellate review (JA Subcourses 133, 134, 135, and 136). By attending both Military Justice I and Military Justice II, reserve officers can complete the entire criminal law requirement for the Advanced Course. The alternative of completing all or part of this requirement by correspondence courses remains available.

2. Trial Attorneys' Course. The 1st Trial Attorneys' Course is scheduled for 23 to 27 June 1975. The four and one-half day course will be open only to active duty JAGC officers and will be trial advocacy oriented. The course will feature lecture, seminar sessions, trial technique exercises, expert guest speakers and workshop exercises. A completed agenda will be published in the near future.

3. New Audio Cassette Program. In an effort to increase the library of audio-visual programs to which lawyers in the field might have access, TAGSA has added four new audio cassette programs produced by the State Bar of Texas. The four programs presented at a Practicing Skills Institute entitled "Salvation for the Solo Practitioner" are: "Six Systems that can be Installed in Your Office Monday Morning to Organize Your Work, Your Files and Your Time;" by J. Harris Morgan; "New Solutions for Old Problems in Office Routines, Supplies and Equipment," by Samuel Smith; "Utilizing Staff Organization and Automatic Equipment to Double Productivity," by Bernard Sterin; and "Questions for Panel." These tapes are not for reproduction; but any person wishing to borrow one of these programs should send a written request to TJAGSA, ATTN: Nonresident Instruction, Charlottesville, Virginia 22901.

Available for loan and duplication is our latest tape, "Due Process—Eyewitness Identification" (JA-A-4), which features the remarks of LTC George G. Russell, Jr., Chief of our Criminal Law Division, updating the state of the low since the 1967 *Wade* and *Gilbert* cases. The presentation examines *Neil v. Biggers*, 409 U.S. 188 (1972), discusses the varied applications of tests to determine potential due process violations during pretrial identifications, and details acceptable lineup procedures under present decisional standards. The tape runs 15 minutes. It is the latest addition to our "Lessons in the Law" Program noted in last month's JAG School Notes and the June issue.

Additional programs available for both loan and duplication include:

"Lessons in Management—Law Office Management" (JA-A-1), by J. Howard Hayden (2 sides: 35 minutes and 27 minutes); "Search Incident to a Lawful Arrest" (JA-A-2), by Major Francis A. Gilligan (19 minutes); and "The Plain

View Doctrine" (JA-A-3), by Major Francis A. Gilligan (22 minutes). These last two tapes can be combined on a single 60 minute cassette. Any individual desiring to retain the information on one of these casettes for his own personal library may have a duplicate made at no expense by the Audio Visual Division; TJAGSA. Such individuals should send a blank cassette with a written request as to which program or programs he desires duplicated.

4. JALS Has New Look. Beginning with the next issue of the *Judge Advocate Legal Service* (JASS) readers will notice a change in scope. A decision made at the time *The Army Lawyer* began publication limited the JALS largely to military criminal law content. The Judge Advocate General desires to furnish a more complete "case-digest" service to field judge advocates; accordingly, the "new" JALS will include case (judicial and administrative) digests in all areas of the law of interest to practicing judge advocates.

Each entry in JALS will continue to carry a headnote. When possible, the headnote will contain both a verbal and a numerical element, keyed to the *Manual for Courts-Martial.*

While the initial issue of the new JALS will not be all inclusive, subsequent issues are expected to grow in scope with the help of OTJAG divisions and field operating agencies, including the School's faculty. Expanding the scope of the JALS both necessitates and permits improvements in the indexing. Under development is a scheme which will permit a more comprehensive index. It is planned to include tables as well as a word index, and to include other Corps publications as well as the JALS, *The Army Lawyer* and *Military Law Review.*

5. *Military Law Review* Part of New Indicies. Two major new research tools include references to the *Military Law Review.* The Review is included in the *Index to US Government Periodicals* and *The Social Serices Citation Index;* each of which is a computerized periodical index and fills a real need for the military lawyer.

The *Index to US Government Periodicals;* a service of Infordata International, Inc., has accumulated the contents of 114 major periodicals issued by government agencies. It will be issued quarterly and cumulated annually. The form is much like that of the *Index to Legal Periodicals* in that major topic entries are frequently divided into subtopics with articles listed alphabetically thereunder. Thus, the keyword you pick is critical to the speed and accuracy of your research. All major military legal periodicals are included in this service, as are *Federal Probation;* the *FBI Law Enforcement Bulletin;* and the *Civil Rights Digest.*

The second new aid is unique and vastly more inclusive and ambitious: *The Social Sciences Citation Index* (SSCI) has undertaken to index more than 3,000 journals and monographs from 25 branches of learning, including law. Just getting all this between covers each year will help many frustrated scholars, but the editors have provided four roads into their materials. One of the four ways to access the data in SSCI is especially promising. A citator service to journal articles permits the researcher to find all the occasions an article of interest to him was referred to by later writers in any of the 3,000 journals in the 26 disciplines indexed. Those who are aware of the importance of periodical literature in most disciplines and of the losses of progress which occur through human inability to "track" it all will greet this warmly. In addition to this citator service, one may get into the materials through conventional subject and author indexing; and a fourth way, the "Organization Search." This last system accumulates authors by the school, foundation, etc., for which they customarily write. Thus, if all the important work in beehive law is being done at Northern South Carolina State, all the authors associated with that program will be grouped under the School's rubric with references to all the journals in which their work appeared.

SSCI is published by the Institute for Scientific Information, Philadelphia, PA (current subscription rates were $1,250 per year). It is not widely available, but it is an important service and should be sought out by those with access to major libraries foundations and research groups.

The inclusion of the *Military Law Review* in these indices (in addition to the *Index to Legal Periodicals)* enhances the value of the Law Review and extends the scholarship found therein.

6. Flag Waver. On 19 December 1974 we received the following correspondence from Captain Thomas F. Dewey, Jr., SJA for Headquarters, 2d Support Command (Corps), APO New York.

Believe it or not the following is a true story:

The Article 32 Investigating Officer was a particularly meticulous individual. While setting up the room for the hearing he arranged the various tables and chairs in accordance with the Investigating Officer's Pamphlet. Unfortunately, there was no flag in the room as presented in the diagram. He commenced a search of the headquarters looking for a flag, but one could not be found. When the defense counsel and the accused arrived for the hearing, the investigating officer asked the defense counsel if it would be all right to proceed without the flag. Whereupon the defense counsel replied, "No problem. I'll waive the flag."

Legal Assistance Items

From: Administrative and Civil Law Division; TJAGSA

1. Items of Interest.

Army Times Reports. The Army Times periodically publishes very excellent "Reports" on selected topics. These "Reports" may be extremely useful to Legal Assistance Officers. They cover a broad range of subjects such as social security benefits for servicemen and veterans, benefits for retirees and survivors, and dependency and idemnity compensation. A subject and price (ordinarily $0.25) list may be obtained by writing the Army Times Service Center, 475 School Street, S.W., Washington, D.C. 20024.

Support-Relative Responsibility Laws. In the July issue of *The Army Lawyer* the case of *Swoap v. Superior Court of Sacramento County,* 10 Cal. 3d 490, 516 P.2d 840 (1973) was noted. That case held that the state may constitutionally require adult children to contribute to the support of needy parents. While the case was the basis of considerable discussion, *see, e.g.,* Note, "Constitutional Law - Equal Protection-Relatives Responsibility Statutes Do Not Create a 'Suspect' Classification Based on Wealth," II Fordham Urb. L.J. 587 (1974), the holding, to many persons, did comport with a degree of recognized familial responsibility and social equity. A municipal court in California has recently struck deeply at the heart of many a beloved pocketbook by going in the other direction. The lower court accepted the state's argument that, reversedly, parents may be held liable for public assistance paid to their *adult* children. This cavalier extension of financial responsibility of support will be the subject of appeal.

Survivor Benefit Plan—Proposed Legislation. The Survivor Benefit Plan (SBP), 10 U.S.C.A. § 1447 *et seq.*, went into effect in September 1972. It was modeled after the Civil Service annuity plan, 5 U.S.C.A. § 8331 *et seq.*, and was designed to supplant the relatively costly and neglected Retired Servicemen's Family Protection Plan, 10 U.S.C.,A. § 1431 *et seq.* The SBP has been a seemingly endless source of articles, commentaries, and litigation during the past several years. Certain provisions have been attacked as inequitable and will be the basis for legislative proposals in the 94th Congress. Five issues which are likely to be raised in the next session and which have been identified as having "very high priorities" this year by such organizations as The Retired Officers' Association are as follows:

(1) To provide for a more equitable method of computation of the Social Security offset for widows;
(2) To eliminate the current provision with regard to widows of deceased servicement who died from a service-connected cause wherein the full amounts of VA payments, such as dependency and indemnity compensation, are deducted from the annuity payments;
(3) To eliminate the "lock-in" clause whereby retired servicemen are required to continue making annuity "premium payments" despite the death of or divorce from the original "widow beneficiary." *See,* P.L. 93-474 (Oct. 26, 1974) *amending* 5 U.S.C.A. § 8339(j) and eliminating the "lock-in" provision fron the similar civil service annuity plan cited above;
(4) To reduce the two year eligibility requirement for spouses to one year. Currently, if the spouse was not married to the retiree at the time he(she) was eligible for retired pay and at the time of the service member's death or if there was no issue of the marriage, then to be eligible for the annuity the surviving spouse must have been married to the deceased for two

years (proposed one) immediately before his death and at the time of his death; and

(5) To extend the coverage under the SBP to widows of reserve retirees who died after completing 20 qualifying years and before the age 60. Note the similarity of this proposal with the recently-enacted provision of the Veterans' Insurance Act of 1974 extending Servicemen's Group Life Insurance to reservists in the same retirement and age position.

Because of the significance of the proposals and the general overall significance of the SBP in the estates of many servicemen, it is essential that Legal Assistance Officers track these bills during the next year.

2. Articles and Publications of Interest.

Crime Victims Reparations Act. Rothstein, "How the Uniform Crime Victims Reparations Act Works," 60 ABA J. 1531 (Dec 1974). Twelve states (Ala., Calif., Ga., Haw., Ill., Md., Mass., Nev., N.J., N.Y., R.I., Wash.) presently have some form of crime victims reparations acts. The Senate passed S. 300 in 1973 providing for such reparations for crimes occurring on federally-governed locales and providing for the 75% federal financing of qualifiying state programs. The prospects of House approval are described as "good" by Mr. Rothstein in this excellent and succinct article. The author briefly analyzes many of the major issues of debate such as whether compensation to victims should be a function of financial need; whether "pain and suffering" should be compensable; whether property damage should be included; whether payments from "collateral sources" should be relevant; whether there should be a family-member exclusion in order to avoid fraudulent and collusive claims; to what extent, if any, there should be a responsibility upon the offender for restitution to the state; and whether there should be a limitation imposed upon the nature of the crime which is the basis of the compensation. Legal assistance officers must be familiar with these developments since some clients may now be able to look not only to recovery based upon traditional "private" tort law, which is oftentimes an illusory remedy due to the untraceability or judgment-proof nature of the defendant, but also to the state or federal government.

Family Law. Comment, "Domestic Relations: Pennsylvania Declares the Wife's Right to Divorce From Bed and Board and Alimony Pendente Lite Unconstitutional In Light of the Equal Rights Amendment; *Wiegand v. Wiegand;* 226 Pa. Super. 278, 310 A.2d 426 (1973)", 78 Dick L. Rev. 402 (1974). Invoking the "reciprocal rights" test, the state appellate court used for the first time the Equal Rights Amendment to the Pennsylvania Consititution, Pa. Const. art. 1, § 27, to strike down legislation framed in terms of discrimination based upon sex.

Family Law. Note, "Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions," 7 Loyola U.S. Rev. (LA) 453 (1974). After an introductory discussion of the development of the no-fault standard, the author analyzes the persistent and continuing relevance of evidence of fault because of its admissibility in the custody and property division phases of the proceedings. Additionally, recent cases sustaining the constitutionality of the no-fault act against vagueness and procedural due process challenges are discussed. *See also,* Holman, "A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act," 9 Gonzaga L. Rev. 39 (Fall, 1973).

U.S. Savings Bonds. Department of Defense Information Guidance Series (DIGS) No. 23-60, "United States Savings Bonds," Nov. 1974.

3. Recently Enacted Legislation.

Federal Deposit Insurance. Congress recently amended the Federal Deposit Insurance Act, 12 U.S.C.A. § § 1811-31. The Depository Institutions Amendments of 1974, P.L. 93-495 (October 28, 1974) provided, *inter alia,* for an increase in the present ceiling of $20,000 on Federal deposit insurance to $40,000 on individuals' accounts in commercial banks, mutual savings banks, saving and loan associations, and credit unions.

Financial Credit Discrimination Based Upon Sex and Marital Status. The same Act discussed immediately above, The Depository Institutions Amendments of 1974, also contains provisions relating to the Truth in Lending Act, 15 U.S.C.A. § § 1601-77. Congress by the legislation added a title VII entitled "Equal Credit Opportunity." Pursuant to title VII it is now "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction." Oliver Wendall Holmes said that

"the life of law has not been logic—it has been experience," and it remains to be seen the scope of the escape clause in this bill. The "qualifying" clause states that "(a)n inquiry of marital status shall not constitute discrimination...if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of creditworthiness." It has long been documented that many women, and especially divorced women, have great difficulty obtaining credit, loans, housing, and even certain types of insurance, and this legislation is a commendable attempt to eliminate such discriminatory practices.

Marriage in the Canal Zone. Congress recently enacted legislation, P.L. 93-465 (October 24, 1974), which significantly changes the law regarding the issuance and recording of marriage licenses in the Canal Zone.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Access To CID Files. The following excerpts from pages 18 and 19 of the Fall 1974 edition of *The Detective* (CID Pamphlet 360-1-5), the magazine of the United States Army Criminal Investigation Command, are reprinted for the general information of counsel. Counsel requesting to see CID files may find the article useful in gaining access to the files without the requirement for an order from the court.

> *Requirement for Agent Activity Files at Trial.* An increasing number of defense attorneys are requesting production of all available information under the control of CID personnel concerning investigations wherein their clients are pending court-martial. As a direct result thereof, an upsurge in the number of judicial orders by military judges for the production of these files has occurred. This article briefly explains the situtation and generally advises all concerned how to react when confronted with such requests.
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> What then is the status of agent activity files? They should continue to be the working documents of each CID investigation. Care should be exercised to properly maintain them with the utmost degree of accuracy and completeness. While doing so, one must always bear in mind that months later when called upon to testify, this file will be relied upon and properly so, to refresh memories so that testimony will be complete, accurate and positive. Agent activity files will continue to be treated as internal documents to CID and will not be routinely released to counsel. The current law in this area is reflected in the court's decision in *United States* v. *Albo*, 22 U.S.C.M.A. 30, 46 C.M.R. 30, wherein the court declared that notes of CID agents are subject to production under the Jencks Act. This means that the notes of an agent who testifies as to his activities are subject to judicial disclosure. However, this does not generally mean that the entire activity file is automatically releasable for judicial order for disclosure, the CID element concerned should immediately ask the prosecutor, the Staff Judge Advocator the military judge to review our activity file and determine what portions should be released. Experience has indicated that when disclosure is required, a review of the file by counsel at the CID office has satisfied the request.

This article was intended to inform CID agents how to react to defense counsel requests to review CID activity files and notes. Military lawyers, however, should be aware of the intent and the scope of the Jencks Act. 18 U.S. C. §3500. The Act, briefly, was intended to protect government files from needless disclosure, to prevent defense "fishing" expeditions, and otherwise to lend stability to the federal discovery procedures following the *Jencks* decision. L. West, *The significance of the Jencks Act in Military Law*, 30 Mil.L. Rev. 83 (1965). *See Palermo* v. *U.S.*, 360 U.S. 343, *rehearing denied*, 361 U.S. 855 (1959).

As the article states, the Court of Military Appeals help in 1972 in the *Albo* case that the Jencks Act applies to courts-martial. A reading of the statute itself reveals that it is rather precisely written in terms of when government files are to be released. 18 U.S.C.A. §3500(a) states:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which

was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of supena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

While the Jencks Act is applicable to the military, as an available tool for controlling access to government investigative files, its impact is ameliorated by the liberal discovery rules found in military practice as well as by such provisions as paragraphs 115c and 33i(2) of the *Manual.*

Attention is also invited to the 1974 amendment to §552(b)(7), Title 5, United States Code (Freedom of Information Act); which limits the authority to withhold investigatory records. Under the amendment, investigatory records may be withheld only if one of six listed criteria exist. 5 U.S.C. §552(b)(7) now reads:

This section does not apply to matters that are -

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) describe investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

2. Signatures On Records Of Trial. Many records of trial are being received in which the signature of the judge advocate certifying the record as legally sufficient is illegible. Judge Advocates are requested to insure that their names are clearly stamped or printed or typed below their signatures on the front cover of records of trial they review. Interest, especially in cases where Article 69, UCMJ, petitions are filed, is often expressed as to which judge advocate reviewed the record of trial and found the same to be "legally sufficient." Additionally, the stamp, indicating review, is often illegible and does not identify the GCM authority to which a record of an inferior court was submitted for supervisory review. Such information must be readily discernible from the cover of the record of trial.

3. Improperly-Constituted Courts. In a recent issue of *The Army Lawyer*, mention was made of a jurisdictional error in the case of *United States v. Febus-Santini*, 23 USCMA 226, 49 CMR 145 (1974). Pursuant to an inquiry, the possibility of *nunc pro tunc* corrective action to overcome the inadvertent relief of the presiding military judge was explored, but rejected based on the following cases: *United States v. Machlin*, 59 B.R. 343 (CM 302975, 1946); *United States v. Steward, 11 B.R. 385 (CM 218157, 1941); United States v. Beadle*, 11 B.R. 381 (CM 218157, 1941); and, *United States v. Kasprzyk*, 63 B.R. 1 (CM 313009, 1946). The only curative method appears to be disapproval by the convening authority of the findings and sentence and the ordering of a rehearing. The optimum solution to the problem is for trial counsel and military judges to give close scrutiny to orders detailing military judges, counsel, and members of courts-martial. Attentin to such details is necessary to preclude waste of resources.

Solutions to "Test Yourself" Quiz on Page

Questions are based upon the New Developments lessons indicated:

1. Choice A is correct. Applying either a radius test or a subjective test, the evidence found under the driver's seat would be admissible in evidence. The area under the driver's seat is within the area from which the arrestee at the time he was stopped might reach to grab a weapon or destructible evidence. Also, the testimony of Patrolman Connolly indicated that the evidence would also be admissible applying a subjective test because he believed that the arrestee might reach under the driver's seat to obtain a weapon or destructible evidence. Applying the third test not mentioned here, the objective-subjective test, it is questionable after an individual is handcuffed and placed in a patrol car whether it is reasonable to search under the driver's seat incident to a lawful arrest. However, applying the *Carroll* doctrine (automobile exception) the evidence would have been admissible in evidence because there was

probable cause to search not only the individual but the automobile itself.
Reference:

2. Choice B is correct. Applying a radius test the burglary tools obtained from the locked trunk would be admissible in evidence. However, applying a subjective test the burglary tools would not be admissible in evidence nor would the burglary tools be admissible applying a subjective-objective test or a totality of circumstances test. Again the burglary tools would be admissible in evidence applying the *Carroll* doctrine.
Reference:

3. Choice D is correct. While all distractors may be partial explanations behind the U.S. reluctance to accept a 12-mile territorial sea, our primary concern is that such an expansion would place over 100 straits, presently within international waters, within various coastal states' territorial seas, thus subjecting the use of such straits by ships and aircraft to coastal state regulations.
Reference: Page 398, Text.

4. Choice D is correct. The U.S. feels that the 1958 solution of allowing coastal states the powers to prevent legitimate scientific research on other states' continental margins has been unsatisfactory and a better solution would be to remove this power from the coastal states, but to subject the researching state to a series of obligations designed to protect coastal states' interests.
Reference: Pages 401 and 402, Text.

5. Choice E is correct. While it is true that all agencies have a 30-day notice requirement, the various boards of appeal have interpreted it differently. The General Services Administration Board of Contract Appeals disagrees with the Armed Services Board of Contract Appeals in that the GSA has held that it is within their discretion to waive the 30-day filing period if a valid reason for being late is shown. The ASBCA and the Post Office Department Board of Contract Appeals has held, on the other hand, that it is not within their discretion to waive the 30-days. They state that 30 days is jurisdictional. Presently, there is little agreement among the Boards of Appeal as to whether the 30-day rule is jurisdictional.
Reference: *The Army Lawyer*, August 1973, page 4 (page 22 of materials).

6. Choice A is correct. Since the ASBCA speaks for the Secretary of Defense, it is within his authority to amend or modify their Charter. Once the Secretary decides whether the ASBCA is correct or incorrect in their interpretation of the 30-day rule, the Board's Charter should then be amended to so provide. Neither the Comptroller General nor the Contracting Officer has any authority to settle the conflict.
Reference: *The Army Lawyer*, August 1973, page 4 (page 22 of materials).

7. Choice C is correct. The Government has the burden of proof as to whether certain data should have been given to it and the amount of increase in contract price which resulted from the lack of the disclosure of the data. The contractor, on the other hand, must prove any amount of set-off to which he is entitled.
Reference: American Machine and Foundry case: Cutler-Hammer case; Memorandum.

8. Choice A is correct. If there is no certificate, the contract price will not be reduced. If there is a certificate, however, even if it is executed after award, there may be a reduction in contract price for defective data. An "off-set" of *any* amount will not preclude a price reduction. To actually preclude the price reduction, an "off-set" would have to be of equal value or of greater value than the amount of price decrease which the Government is requesting.
Reference: Culter-Hammer case; Norris Industries case.

9. Choice D is correct. Presently, an HPA has no authority to bind the Government to a contract by estoppel. On the other hand, both the Comptroller General and the Court of Claims have such power.
References: Memorandum; *Emeco Industries, Inc. v. United States;* and Comptroller General B-179040, 29 January 1974.

10. Choice D is correct. A Contracting Officer may either terminate the contract for the convenience of the Government or permit the bidder to perform the contract. In the latter case, of course, the Contracting Officer must assure himself that he has adequate funds to fulfill the contractual commitment before he opts for full performance.
Reference: Comp. Gen. B-179040, 29 January 1974.

How well did you do? If you missed more than three you need to take the TJAGSA New Developments Course. To date, the following lessons are available—these are automatically issued to those enrolled in the course, however individual copies are available on request.

JUDGE ADVOCATE NEW DEVELOPMENTS COURSE

FIRST QUARTER

Phase	Title	Credit Hours
CL-I (Lsn 1)	Search Incident to Arrest	2
CL-I (Lsn 2)	Plain View	2
IL-III (Lsn 1)	Law of the Sea	1
PL-IV (Lsn 1)	The Thirty-Day Rule	3
PL-IV (Lsn 2	Truth in Negotiations: Defective Pricing	3
PL-IV (Lsn 3)	Estoppel of the Government	2
	SECOND QUARTER	
ACIL-II (Lsn 1)	The Posse Comitatus Act	1
ACIL-II (Lsn 2)	Legal Assistance	2
ACIL-II (Lsn 3	Due Process and Consumer Protection	2
ACIL-II (Lsn 4)	Exercise of Constitutional Rights on Military Installations	2
ACIL-II (Lsn 5)	Expanded Government Liability Under the Federal Tort Claims Act	3
ACIL-II (Lsn 6)	Labor-Management Relations: Timeliness Requirements for Representation Elections	1
ACIL-II (Lsn 7)	Labor-Management Relations: Unfair Labor Practices	1
IL-III (Lsn 2)	Draft Definition of Agression	1

Reserve Components Notes

1. Military Cuts Restrict Reserve Activity. Travel funds available to the Department of the Army agencies have been severely reduced which resulted in the cancellation of the Reserve Component Technical Training visits scheduled for last half of the month of January and the month of February 1975. Action officers who have received notification that the technical training visits scheduled for their location have been cancelled should attempt to disseminate this information to all those concerned. This budgetary constraint has also required cancellation of the Judge Advocate General's National Guard Conference scheduled for 3 through 5 March 1975. Further developments regarding the remainder of the Reserve Component Technical Training visits will be disseminated to appropriate action officers and published in *The Army Lawyer*.

Any questions concerning this action should be addressed to the Assistant Commandant for Reserve Affairs, The Judge Advocate General's School, Charlottesville, Virginia 22901. Unit training officers are encouraged to read the note from the Department of Nonresident Instruction concerning the availability of the Reserve Component Technical Training lesson plans, outlines, and materials for utilization by their unit. This notice appears elsewhere within this issue of *The Army Lawyer*.

2. Assistant Judge Advocate General for Special Assignments (MOB DES) Nominated. The President of the United States has recently announced the nomination of Colonel Evan L. Hultman, JAGC, USAR, to fill the position of Assistant Judge Advocate General for Special Assignments (MOB DES). Colonel Hultman's military career dates back to 1943 when he enlisted in the Army as a private in the Infantry. He was commissioned a second lieutenant in January 1945 upon his graduation (1st in his class) from Officer Candidate School and thereafter served as a company commander overseas in the 19th Infantry Regiment of the 24th Division. He was discharged in 1946 with the rank of captain. His reserve assignments include battalion commander of the 2d Battalion of the 410th Infantry, 103d Division, the Assistant Staff Judge Advocate and the Staff Judge Advocate of the 103d Infantry Division, and his most recent assignment as commanding officer of the 450th Strategic Military Intelligence Detachment. Colonel Hultman's military education, in

addition to Infantry OCS, consists of completion of Mountain Warfare School (1948), the Associate Company Infantry Officers Course (1959), the JAG Career Course (1965), the Command and General Staff Course (1969) where he graduated on the Dean's List, and the Industrial College of the Armed Forces (1973).

Colonel Hultman has occupied a wide range of challenging positions during his civilian legal career. Highlights include his service as County Attorney for Black Hawk County, Iowa for two terms, Attorney General for the State of Iowa for two terms, 1960 and 1962 and his current appointment as United States Attorney for the Northern District of Iowa.

Colonel Hultman received a B.A. degree (summa cum laude) in 1949 and a Juris Doctor degree (cum laude) in 1952 from the University of Iowa. In addition to his legal activities Colonel Hultman has been active in a wide range of community activities which encompassed chairmanships of various health funds, continuing participation in the Boy Scouts of America and membership in the Junior Chamber of Commerce. He served as the Legal Counsel for the National Junior Chamber of Commerce from 1958 through 1960.

Colonel Hultman's duties as Assistant Judge Advocate General for Special Assignments (MOB DES) will encompass the responsibility for supervising and directing research concerning the mobilization readiness of the Reserve Component of the Judge Advocate General's Corps and acting as one of the principal advisers to The Judge Advocate General on policies and procedures concerning the Reserve Components of the JAG Corps.

FLITE Announces Instantaneous Search Capability

The Federal Legal Information Through Electronics System, operated by the Air Force for the benefit of all elements of the Department of Defense, is now able to perform immediate searches on a limited number of data bases through the use of computer consoles located in its Denver office. Through the use of these "remote" consoles which are connected to the Justice Department's JURIS system in Washington, FLITE staff attorneys can submit searches to the Washington computer and receive instantaneous results. At the present time such searches may be made on data bases which include the United States Code, a limited number of criminal justice cases decided by the US Circuit Courts of Appeals during 1973 and seven volumes of the *Court of Claims Reports*. FLITE is continually adding more source material to the JURIS data bank to expand its ability to provide instantaneous search results.

This rapid service can provide a complete list of citations in a five to fifteen minute telephone call, and supplements the traditional printed research reports which are available on portions of the *U.S. Reports, Court of Claims Reports, Decisions of the Board of Contract Appeals, Decisions of the Comptroller General* and the *Court-Martial Reports*. FLITE staff attorneys are available to frame and submit instantaneous and overnight computer searches by Department of Defense personel Monday through Friday from 0730 to 1600 hours, Mountain Standard Time at the following telephone numbers. Commercial: (303) 825-1161, ext. 6433; FTS: (303) 825-6433; or AUTOVON: 555-6433.

TJAGSA—Schedule of Resident Continuing Legal Education Courses Through 30 August 1975

Number	*Title*	*Dates*	*Length*
5F-F11	61st Procurement Attorneys	24 Mar–4 Apr 75	2 wks
5F-F11	62d Procurement Attorneys	7 Apr–18 Apr 75	2 wks
5F-F13	2d Environmental Law	7 Apr–10 Apr 75	3½ days
5F-F8	20th Senior Officer Legal Orientation	14 Apr–17 Apr 75	3½ days
(None)	3d NCO Advanced Course	14 Apr–25 Apr 75*	2 wks
5F-F8	**19th Senior Officer Legal Orientation Crs	28 Apr–1 May 75	4 days
5F-F6	5th Staff Judge Advocate Orientation Crs	5 May–9 May 75	1 wk
5-27-C28	22d JA New Developments Crs (Reserve Component)	12 May–23 May 75	2 wks

Number	*Title*	*Dates*	*Length*
	Reserve Component Training JAGSO Teams	2 Jun–13 Jun 75	2 wks
5F–F30	1st Military Justice I Course	16 Jun–27 Jun 75	2 wks
5F–F30	1st Trial Attorneys' Course	23 Jun–27 Jun 75	1 wk
5F–F8	21st Senior Officer Legal Orientation Crs	30 Jun–3 Jul 75	3½ days
	USAR School (Civil)	7 Jul–18 Jul 75	2 wks
5F–F9	14th Military Judge Course	14 Jul–1 Aug 75	3 wks
5F–F3	19th International Law Course	21 Jul–1 Aug 75	2 wks
5F–F11	63d Procurement Attorneys' Course	28 Jul–8 Aug 75	2 wks

* Reflects date change since previous listing in *The Army Lawyer.*
** Army War College only

Current Materials of Interest

Articles.

Cohrrsen and Hoover, "The International Control of Dangerous Drugs" 9 J. INT'L L. & ECON. 81 (Apr 1974).

Ament, "The Right to Be Well Born," *The Journal of Legal Medicine,* Volume 2 Number 6 (November/December 1974) p. 24. Captain Marc Ament, JAGC, won the first annual Letourneau Award presented by the American College of Legal Medicine for this student paper on the legal status of the human fetus. The Letourneau Award, established to honor Charles U. Letourneau, a founder and former president of the College, goes each year to the law student judged to have submitted the best paper in competition.

A thorough description of the Army JAG School's legal center concept is included in the publication of the ABA Section of Legal Education and Admissions to the Bar, *Learning and the Law,* Volume 1, Number 3 (Fall 1974) p. 6. Headlined "A Model Law Center Has Worked in Virginia For Twenty Years," the item appears in the "Letters" section and was written by Colonel John Jay Douglass (JAGC, Ret.) while TJAGSA commandant.

1975 Washington World Law Conference.

The Seventh World Law Conference of the World Peace Through Law Center will be held in Washington, D.C., from 12–17 October 1975. Four thousand judges, lawyers and law professors from over one hundred nations are expected to attend this meeting.

The theme of the Washington World Law Conference will be "The Role of Law in World Cooperation". Among the many subjects included on the Conference's preliminary agenda are the growing problem of global inflation, the international economic situation, the global energy crisis, and the attainment of greater protection of the rights of refugees through wider treaty acceptance. The United Nations declaration of 1975 as the International Year of Women will insure a discussion of legal protection of the rights of women, possibly centering around the Draft UN Convention on Elimination of Discrimination Against Women. Other subjects presently on the Conference's preliminary agenda that may be of special interest to judge advocates include the developing law of the sea, international control of dangerous drugs, the problem of international terrorism, and humanitarian law applicable to armed conflict.

Registration forms and Conference brochures are being sent to all Staff Judge Advocates. Further information and additional registration forms may be obtained by writing the World Peace Through Law Center, 400 Hill Building, Washington, D.C. 20006.

By Order of the Secretary of the Army:

Official:

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

FRED C. WEYAND
General, United States Army
Chief of Staff