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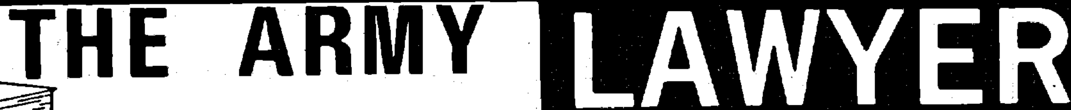

THE ARMY LAWYER

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Obstruction of Justice: The Federal and Military Offenses

By: Captain G. P. Bryson, JAGC, Fort Carson, Colorado

The Federal Offenses.

The federal offenses of obstruction of justice, which are arguably applicable to military judicial proceedings according to *United States v. Long*, 2 USCMA 60, 6 CMR 60 (1952), are defined and made punishable by Title 18, United States Code, Section 1503 and 1505. Section 1503 makes punishable, by confinement for no more than five years and by a fine not in excess of $5,000, the acts of intimidating, influencing, or injuring the person or property of an officer, juror, or witness in a proceeding before "any court of the United States or before any United States magistrate or other committing magistrate", or of "endeavoring to" intimidate, influence, or injure the person or property of the same class of individuals listed previously, on account of the person's participation or expected participation in a cause pending in the fora noted above. Section 1505 deals similarly with acts directed toward the same classes of persons described above involved in proceedings pending before "any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress", and prescribes the same penalties upon conviction as noted above in connection with Section 1503.

In addition to the offenses described above, Section 1503 contains an omnibus provision, couched in general language set forth in the latter portion of the provisions, which the federal courts have applied to any of the manifold methods by which the due administration of justice may be obstructed, impeded, or influenced. Application of this general proscription of obstructive behavior may be demonstrated by reference to the two related cases of *United States v. Solow*, 138 F. Supp. 812 (S.D. N.Y. 1956) and *United States v. Siegel*, 152 F. Supp. 370 (S.D. N.Y. 1057), *cert. denied* 354 U.S. 1012 (1959), *rehearing denied* 361 US 871 (1959). In *Solow*, the indictment alleged that a federal grand jury was conducting an investigation of matters with respect to which certain correspondence in the possession of the defendant was material and relevant, that the defendant knew of the investigation, that he believed and had reason to believe that he would be called as a witness by the grand jury, that he had reason to believe that the grand jury would require the production of the correspondence, and that he knowingly, willfully, and corruptly destroyed the correspondence to prevent its production during the course of the investigation. In denying the defendant's motion attacking the suffiency of the indictment on the basis that the grand jury had not subpoenaed the correspondence prior to its alleged destruction, the court noted that the defendant had been indicted for a violation of the omnibus provision of Section 1503 which is directed at ". . . whoever . . . corruptly . . . obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice . . ." (quoting from the statute as it was then drawn). The option continued by adding:

> "This latter provision, under which the defendant has been indicted, is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice."

In *Siegel*, the federal grand jury subpoenaed notes and memoranda generated by a law firm concerning conversations had with the subject of the inquiry by representatives of the firm. It was alleged, *inter alia*, that the original notes

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and memoranda had been destroyed and, in certain instances, the fraudulent documents had been fabricated for presentation to the grand jury. In its opinion denying the defendant's motion for dismissal on the basis that the indictment failed to assert the materiality of the subpoenaed documents, the trial judge addressed the propriety of alleging such acts as a violation of section 1503 in the following remarks:

> "The first portion of the section is for the protection of witnesses, jurors and court officers. The latter portion of the section deals generally with the obstruction of justice. It condemns the corrupt influencing, obstructing or impeding of the due administration of justice and corruptly endeavoring to do so."

Federal Offense Applicable to Armed Services.

The Court of Military Appeals in *United States v. Long*, *supra*, did not decide the question of whether obstruction of justice occurring in the armed forces should be alleged under Article 134, Uniform Code of Military Justice (UCMJ), as a violation of Section 1503 or of 1505. Since courts-martial are, at best, only one of a variety of "courts" existing by virtue of Congress' power set forth in Article I, United States Constitution, and since "United States Magistrates" are unknown to military justice systems, it seems clear that Section 1503 offenses could not occur in the armed forces. It also seems patent that "court of the United States", as mentioned in Section 1503, refers to Article III courts, and that the quoted term could not entail courts-martial or Article 32, UCMJ, proceedings. On the other hand, it is probable that courts-martial would be comprehended by the expression "department or agency of the United States" and that obstructions of justice arising in the land and naval forces could be prosecuted under the third clause of Article 134, UCMJ, as violations of Title 18, U.S.C., Section 1505.

Similar Constructions.

Section 1505 is analogous to Section 1503 by virtue of the almost identical language con-

tained in the Sections. Though Section 1505 has been seldom construed by federal courts, there are numerous federal decisions which interpret the terms of Section 1503. Since the language used in both sections is quite similar, Section 1505 should be construed and limited in accordance with the considerations expressed in federal cases analyzing Section 1503.

Pendency of Proceedings.

Sections 1503 and 1505 recite, respectively, that they were enacted in efforts to enhance the "due administration of justice" (1503), and the "due and proper administration of the law" (1505), and federal cases have established that a person may be found guilty of a violation of Section 1503 only if the acts or "endeavors" were calculated to impede participants or the due administration of justice in a particular case or inquiry. According to the most recent federal decisions, the operative fact predicating application of the section appears to be the mere pendency of the proceedings before the particular forum regardless of whether the witness unlawfully approached has already testified in the undecided cause, and regardless of whether the officer, juror, or witness was actually persuaded to follow the course of action at a hearing in progress because of the unlawful intrusion. It has been due to the specific language contained in the body of Section 1503 that the federal case law has inclined to limit application of this statute, by applying the constructional theory of *generis ejuesdem*, to offenses occurring in relation to specific, pending causes rather than to offenses arising after final decisions have been rendered and which might affect "due administration of justice" only prospectively. Such federal cases have also reasoned that acts or "endeavors" addressed to officers, jurors, or witnesses in a federal proceeding, coming after final decision has been rendered in the case, cannot affect the outcome of a matter that has been settled and cannot affect the due administration of the case. An example of a case offering such an interpretation, cited with approval in the second *Daminger* case (which is reported as *United States v. Daminger*, 31 CMR 521 (AFBR 1961)), is *United States v. Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956) which provides at page 621 that "to constitute an offense under the statute, the act must be in relation to a proceeding pending in the federal courts . . ." In view of the *Daminger* case's favorable reception of *Scoratow's* inclination, with regard to Section 1503 offenses, to punish only obstructions occurring while proceedings are pending, it would seem that acts of obstruction could be prosecuted under the terms of Section 1505 only if they occurred prior to the point where the proceedings have been concluded.

Initiation and Cessation of Culpability.

The *Daminger* cases, reported at 30 CMR 826 (AFBR 1960) and at 31 CMR 521 (AFBR 1961), were primarily concerned with the identification of the earliest point in time at which an improper approach to a witness could be alleged to be an obstruction of justice and punished as such. The Air Force Board of Review decided in the second *Daminger* case that military proceedings were pending at the time when formal, sworn charges were preferred, likening the preferral of charges to the filing of a complaint or information, or of the return of an indictment. While the *Daminger* decisions dealt with defining the inception of a serviceman's possible culpability for an act amounting to an obstruction of justice alleged under federal statute and as a military offense, opinions by military appellate bodies have not served to define the point in the proceedings at which culpability ceases for the same acts. In federal criminal cases, the applicability of Section 1503 would terminate at the point in the proceedings where the defendant was either acquitted or sentenced. Of course, it could always be argued that a military proceeding, such as an Article 32 investigation or a court-martial, was pending until such time as the result of the proceeding became final. Since courts-martial become final, according to the terms of Article 76, UCMJ, when the review for legal sufficiency under the provisions of Article 65(c), UCMJ, has been performed or when the automatic appellate procedures in accord with the terms of Articles 66 and 67, UCMJ, have been exhausted, it well might be

that that notion of finality will be accepted in prosecutions of Section 1505 by armed forces justice systems. In view of the fact that automatic military appeals for cases invoking the provisions of Articles 66 and 67, UCMJ, can require years of disposition to be effected, the rule may well be established that finality, for purposes of terminating prosecutions for obstruction of justice, should attach following the rendition of sentence by court-martial since an accused may at that time be ordered into confinement to begin serving a portion of his sentence. This approach in shortening the period of exposure to culpability would probably be more in keeping with federal constructions of Section 1503 than a mechanical adherence to the concept of finality enunciated by Article 76, UCMJ.

Independent Military Offense.

Military appellate courts have repeatedly acknowledged the existence of a distinct military offense of obstruction. The first *Daminger* case stated that

> "In military law, the leading case on the offense of 'obstructing justice' is that of United States v. Long, supra. There the several accused had assaulted a witness who had appeared against them in a summary court-martial. . . ."

The court held it need not determine that matter; *i.e.*, whether it was proper to prosecute under Section 1503 or 1505 "as the offense of obstructing justice was cognizable under the first two clauses of Article 134 . . ." *Daminger* continued in asserting that "obstructing justice is an offense indictable at the common law as well as by Federal Statute . . . It has also been recognized as a military offense" (citing *United States v. Long, supra, United States v. Rossi,* 13 CMR 896 (AFBR 1953), and *United States v. LeSage* 22 CMR 853 (AFBR 1956)). The case of *United States v. Rossi,* contains the following remarks in its opinion:

> "Under the rationale of the above cited case [*United States v. Long*] we unhesitatingly conclude that the specifications herein allege disorders in violation of Article 134 and that the elements of a similar offense denounced by the United States Code as interpreted by decisions of Federal courts are not controlling or determinative of the constituent elements of the offenses herein involved".

Therefore, separate and apart from the offenses of obstruction of justice as defined by federal statutes is the military offense of obstruction of justice as alleged under clauses one and two of Article 134, UCMJ. There seems to be no real question that Congress, in a properly worded enactment, could constitutionally exercise the authority to determine and punish offenses against participants in proceedings before courts, magistrates, agencies, departments, and Congress itself, "on account of" that participation, even if the proceedings have been concluded. The provision of criminal sanctions, to prevent interferences with the activities of those bodies enumerated above, would be both necessary and proper to the exercise and integrity of the various federal functions created, delegated, and supervised by Congress. The military offense, unfortunately, is commonly alleged only as set forth in Appendix 6c, *Manual for Courts-Martial,* which pirates the form allegation for 1503 offenses as established by the Justice Department. The form, therefore, relates only to the method of specifying offenses in violation of Section 1503. It should be noted, though, that, in the prefatory remarks to the Appendix, it is provided that the form allegations furnish only formats for ease of pleading rather than representing an exhaustive or exclusive compilation of forms for alleging military offenses from which the pleader may not deviate.

Therefore, with regard to the military offense, it should be obvious that the case of *United States v. Long,* is the fount from which the military law of obstruction of justice flows. In that case, a witness was beaten for having testified in a summary court-martial against a friend of the assailants. The witness' testimony had been a contributing factor leading to the conviction of the assailants' friend in the trial. Without having discussed, or having otherwise dealt with, the questions of whether the con-

vening authority had acted in the case, or whether a review for legal sufficiency had been performed, the Court of Military Appeals defined the military offense of obstruction of justice as proscribing acts directed against participants in a court-martial and other acts of obstruction which would tend to impede the administration of justice for future cases as well. There was subsequently reported the case of *United States v. LeSage, supra,* in which *United States v. Long* was cited, and in which the Air Force Board of Review upheld a conviction for obstruction of justice where the accused had injured the property of a witness against him at a court-martial held 26 days before.

Broader Military Offense.

From a reading of *Long* and *LeSage,* which cases have evidently not been reversed either expressly or *sub rosa* by later military cases, it seems clear that the limits of the military offense of obstruction of justice are broader than those fixed by federal statutory and decisional law on the subject. When a case arises by virtue of an act committed against a participant in a court-martial on account of past participation, or by virtue of any other act which corruptly creates an impediment to a proceeding and the convening authority has not acted in the subject proceeding, it may be argued that, even assuming that federal and military laws concerning obstruction of justice are concurrent in application, the proceeding is yet "pending" since the convening authority has not acted to approve or disapprove the result of the court-martial, nor has the case received a review for legal sufficiency in accord with Article 65 (c), UCMJ. In the alternative, the cases of *United States v. Long* and of *United States v. LeSage* may be cited as being supportive of the proposition that the military offense is broader than its civilian analogue, and applies to acts, coming after termination of proceedings, which affect due administration of justice prospectively.

It would seem that the authority to declare a broader military offense of obstruction of justice is fairly comprehended within Article 134, is proper, and is a constitutional exercise of authority to declare acts criminal. Congress is empowered by Article I of the United States Constitution "to make Rules for the Government and Regulation of the land and Naval Forces", and has, in exercise of that power, enacted the UCMJ, which includes Title 10, United States Code, Section 934 which, by reference to clauses one and two, makes punishable acts causing the armed forces to be discredited. Since courts-martial are the vehicles for the enforcement of Congress' rules, Congress would be authorized per the Necessary and Proper Clause to ensure the integrity of the mechanism of administration of military justice. This authority would necessarily include proscriptions meant to protect participants in a court-martial and to protect the integrity of evidence used or to be used in the court-martial, before or after a final determination was made, just as Congress would have the same power with regard to proceedings before an Article III court or before a federal agency or department. Since the Congress of the United States possesses such authority and has properly exercised the authority by enactment of Title 10, U.S.C., Section 934, the Court of Military Appeals acted properly in defining the military offense of obstruction of justice with more expansive contours than those established by federal statute. The Court of Military Appeals has construed the "general article" in a limited fashion in an effort to avoid its being voided by overbreadth or vagueness, and the military offense has been defined for more than 20 years by virtue of *Long,* decided in 1952. If people are presumed to know the law, a definition of an offense of such long standing should not be considered to be vague. Though the recent case of *Parker v. Levy,* 417 US 733 (1974) did not do much to lay overbreadth and vagueness issues to rest, sounding as it did as a decision on a standing issue, it can be cited as marginal support, in conjunction with *United States v. Frantz,* 2 USCMA 161, 7 CMR 37 (1953) and *United States v. Sadinsky,* 14 USCMA 563, 34 CMR 343 (1964), for the proposition that Article 134, UCMJ, is a valid criminal statute.

Proposed Form For Pleading Military Offense.

From the dearth of recently reported cases on point with *United States v. Long* and with *United States v. LeSage*, it may be inferred that military pleaders have been intimidated, and inhibited, in bringing allegations against military accused under the authority of the above noted cases due to an absence of a form allegation in Appendix 6c of the *Manual of Courts-Martial*, due to limiting federal interpretations of Section 1503 of Title 18, violations of which are represented by the only form allegation of obstruction of justice in Appendix 6c, and because of the continuous judicial attacks of the past several decades upon offenses alleged under the authority of clauses one and two of Article 134, UCMJ. It is contended, however, that military justice systems possess a powerful instrument with which to expiate congressional authority in the realm of protecting participants in courts-martial proceedings and of ensuring the integrity of military proceedings themselves, an instrument which may be lost through desuetude unless the authority is exercised. In order to promote usage of the pleader's full latitude in specifying an obstruction of justice in a proper case, the following form is presented as a supplement to the one provided in the *Manual for Courts-Martial:*

> In that _______ did, at (on board) __________, on or about _______, wrongly, corruptly, and unlawfully (endeavor to) (while believing or having reason to believe that the _______'s production would be required as evidence) [(destroy _______ in order to prevent its production as evidence in) (obliterate a material portion of _______ in order to prevent its intact production as evidence in)] [(fabricate a fraudulent_______ in order to influence, impede, and obstruct the due administration of justice in)] [(influence) (intimidate) (injure the person of) (injure the property of) _______ on account of the said _______'s having (attended and testified as a witness in) (attended and acted as a court member in) (attended and acted as a military judge or a summary court-martial in) (attended and acted as Article 32 Investigating Officer in) (attended and acted as Trial or Defense Counsel in) the (____ Court-Martial of) (Article 32 proceedings with regard to) _______ held on______ and with respect to whom sworn charges were preferred on ______.

Explanation of Proposed Form.

In the form set forth above, general words such as "influence", "intimidate", and "injure" were used since they have the stature derived from being statutory language, and because, in a single format, general words are necessary to describe the plethora of methods and means by which a participant in a court-martial may be improperly approached. *United States v. Long* represents the proposition too that the act may be pleaded in a conclusionary fashion such as by alleging that the accused assaulted and battered the witness. It is recommended, however, in connection with the use of the form, that the general words not be used but that the improper act predicating the allegation be alleged with more specificity. The acts pleaded in place of the general words in the form, and which are alleged to have been directed against a participant in a court-martial, need not rise to the level of an independent offense under the UCMJ, however. In instances where the acts do not amount to a separate offense under the Code, it is suggested that the pleader simply allege the facts constituting the improper endeavor or completed act of influence, intimidation, or of injury to person or property as an obstruction of justice.

In the proper case, in which a demonstrable nexus exists between the overt act or endeavor directed towards a person and that person's prior participation in a military judicial proceeding, alleging obstruction of justice as recommended above serves to characterize the acts more accurately, and to authorize the imposition of more appropriate punishment, upon conviction of the accused, than would be the case in pleading only the mere act or endeavor if it should rise to the status of an offense under the Code.

Conclusion.

It is submitted in conclusion that, since acts of obstruction of justice represent, in their ramifications, pernicious attacks upon the military justice system in its attempts to administer justice in compliance with law, it would be a travesty for military justice officials in a proper case to be satisfied with exposing an accused to conviction and sentencing for only the overt act or endeavor; i.e., a simple assault or a simple assault and battery, etc. Therefore, a realization of the possibilities of pleading and proving a charge and specification of obstruction of justice, as the military offense has been defined by military appellate bodies, would be useful to any command.

Processing Freedom of Information Act Requests

By: Captain Robert E. Gregg, Administrative Law Division, OTJAG

This is the second of three articles discussing the recent amendments to the Freedom of Information Act (FOIA). The first article reviewed the substantive changes in the Act and the general impact on the processing of requests for information. This article is concerned with the processing of requests for information from a practical, "how-to" standpoint. The format chosen for the first portion of this article is a step-by-step approach to the processing of requests, and is intended to provide an informal checklist to be used with Army Regulation 340-17, 25 Jun 1973, as changed by Change 1, 24 January 1975. The second portion of the article contains guidance, in addition to that provided in the checklist, for processing specific requests for information. All the paragraph or appendix citations refer to Army Regulation 340-17, *supra*. It is hoped that the checklist and the other guidance provided will be of assistance to those receiving and processing initial requests.

I

The step-by-step checklist set forth below will provide Army lawyers with guidance as to how to process FOIA requests received by their offices. Because of the time restraints imposed on the processing of requests by the 1974 amendments to the FOIA, a checklist can be a useful means to insure that requests are processed in a timely manner.

Step 1. Action office/agency receives a request for information.

Step 2. Ascertain whether the request is properly addressed in accordance with Appendix B.

(*Note:* All FOIA requests from representatives of the press or other mass communications media will be directed to the appropriate command/organization information office and processed in accordance with para 2-6*g*.)

— If properly addressed, proceed to Step 3.

— If the request is improperly addressed, and

(1) the request is of proper concern to another Army element, complete those actions required by paragraph 2-6a(1);

(2) the request is of proper concern to an agency outside the Army, complete those actions required by paragraph 2-6*a*(2); or

(3) the information requested is a combination of Army records and those of one or more identifiable sources other than the Army, refer non-Army portions to originating agency, if practicable, as required by paragraph 2-6*a*(3). Proceed to Step 3.

Step 3. Determine whether the request indicates in writing, expressly or implicitly, that the records are being requested under FOIA. (*See* para 2-3*a*.)

— If it does, proceed to Step 4.

— If it does not, process as a routine request

for information. (*See* Army regulations in the 360 series.)

Step 4. Determine if the request reasonably describes an Army record.

(*Note*: There is no requirement to create a record; para 2-3*b*.)

— If it does, proceed to Step 5.

— If it does not, notify the requester that he has failed to identify a record, and that his request cannot be processed.

Step 5. Estimate the cost of research and duplication (App D and DA message 142150Z Feb 1975).

— If the estimated fee exceeds $10.00 and will not be waived under the exceptions of Appendix D, and if the requester had not specifically stated that he will pay whatever cost is involved in processing his request, notify him that: (1) his request will not be processed until the estimated fee is received; (2) that if the actual fee is different from the estimated fee, the difference will be assessed or refunded as appropriate; and (3) that the 10-working-day time limit will not begin to run until the estimated fee is received (para 2-6*b*(1)). Appeals to a refusal to waive charges should be forwarded to the Office of the Army General Counsel, Headquarters, Department of the Army, Washington, D.C. 20310. Upon receipt of the estimated fee, deposit it at the local finance office under the proper account classification: 21X6875, Suspense Department of the Army. (Prior coordination with that office should be accomplished.) Proceed to Step 6.

— If the request specifically states that the requester will pay whatever cost is involved in processing the request, the estimated fee does not exceed $10.00 or the fee has been waived under the exceptions of Appendix D, the 10-working-day time limit commenced to run on the date the request was received by the proper addressee (para 2-6*b*(2)). Proceed to Step 6.

Step 6. Locate the requested records.

— Keep an accurate accounting of the search time. The clerical and professional cost of searching for the record ($5.50 and $11.00 respectively per hour) is chargeable to the requester (App D and DA message 142150Z Feb 1975).

— When there is a need to search for and collect the requested records from offices that are widely separated from the office processing the request, or to search for, collect, and appropriately examine a voluminous amount of separate and distinct records, and where it appears that processing the request will not be completed within the 10-working-day time limit, contact the responsible initial denial authority (IDA) who may, after consultation with the Army General Counsel, authorize an extension of up to 10 working days (para 2-6*f*).

— If the requested record is not available, process in accordance with paragraph 2-6*e*. Proceed to Step 7.

Step 7. Review the requested record to determine if it falls within one of the exemptions listed in paragraph 2-12.

— If it appears that processing the request will not be completed within the 10-working-day time limit and that an unusual circumstance as defined in paragraph 2-1*b*(4) exists, apply for an extension of the time limits in accordance with paragraph 2-6*f*.

— If the record is not within one of the exemptions, proceed to Step 8.

— If the record is within one of the exemptions, and

(1) no legitimate purpose exists for withholding it (other than records containing national security information or information whose nondisclosure is required by statute), the record was prepared locally, and the IDA has not withdrawn authority to release the record locally, proceed to Step 8 (para 2-1*a*(a)); or

(2) a legitimate purpose exists for withholding the record, the request was not prepared locally, or there is no authority to release the record locally (para 2-1*a*(2)), proceed in accordance with paragraph 2-6*d*.

(*Note:* No official other than the Initial Denial Authority and the Secretary of the Army may *deny* a request for Army records; para 2-1*a*(5).)

Step 8. Compute the fee to be charged, if any, and within 10 working days from the date (*see* Step 5) when the time limit began to run,

— Forward a copy of the requested records to the requester if the fee has been paid or waived, and assess or refund, as appropriate, the difference between any estimated fee paid and the actual fee; or

— Notify the requester that the record will be forwarded to him upon receipt of the fee covering the cost of search and duplication, and upon receipt of that fee, forward a copy of the requested records to the requester.

(*Note:* Upon receipt of the fee, deposit it at the local finance office under account classification 212259.2 for reproduction costs and 212419.22 for search costs (DA message 142150Z Feb 1975). If there is any possibility that any of the funds received will have to be returned to the requester, the account to be credited will be 21X6875, Suspense Department of the Army.)

II

The remaining portion of this article provides guidance for processing certain specific requests for information.

While medical and personnel records are normally exempt from release to the general public under the sixth exemption of the FOIA (5 USC 552 (b) (6)) as a clearly unwarranted invasion of personal privacy, they are not exempt for release to the individual who is the subject of the record. Paragraph 2-9 sets forth certain circumstances where release of information from medical or personnel records does not result in a clearly unwarranted invasion of personal privacy. Offices responding to requests for information from these records should follow the guidance in this paragraph, whether or not the request cites the FOIA. Access to these records is also authorized for federal, state and local agencies in the performance of official government business (App C).

Frequently state courts will issue subpoenas for Army records, particularly civilian employee pay records. Copies of such requested records should be released under the authority of Appendix C.

Where the request for medical or personnel records (or any other records) is received from a member of Congress, it will be processed in accordance with paragraph 2-10.

A request for Army records in connection with litigation, tort claims, or contract disputes will be processed in accordance with paragraph 2-11.

The New Nonappropriated Fund Regulations

By: Captain Stephan K. Todd, Administrative and Civil Law Division, TJAGSA

The past six years have been a period of review and revision for the Army's nonappropriated fund system. During this period Army Regulation No. 230-1 (8 April 1968) and Army Regulation No. 230-60 (8 January 1971) were the subject of frequent and numerous changes. With the recent republication of these regulations, we may be entering a period of tranquility—a culmination of the renovation and innovation that has taken place concerning the nonappropriated fund system since the disclosure and investigation of the open mess scandals in the Republic of Vietnam. The purpose of this article is to highlight some of the differences between the new regulations and their predecessors. In addition, reference will be made to some of the areas of confusion that exist under the new regulations. It is noted that a change to Department of the Army Pamphlet No. 27-21, *Military Administrative Law Handbook* (October 1973) will be distributed imminently to the field. While that change does include a

chapter on the nonappropriated fund system it is based upon the superseded regulations. An even newer change to the *Military Administrative Law Handbook* is currently being prepared to incorporate the new regulations.

Army Regulation No. 230-1 (2 January 1975).

Like its predecessor, this is the basic regulation governing the Army's nonappropriated fund system, and provides general guidance for all activities supported by nonappropriated funds. One of the first changes to be noted in the new regulation concerns the definition of terms. The phrase "morale, welfare, and recreation programs" has been adopted to refer to all programs which the Army operates for the morale, welfare, and recreation of service members, regardless of the source of the funds—appropriated or nonappropriated—for the operation of such programs. [1] Historically, the phrase "nonappropriated funds" referred to both the source of the moneys and the activities supported by such moneys. Under the new regulation, however, "nonappropriated funds" refers only to the source of the funds: "[C]ash and other assets received by nonappropriated fund instrumentalities from sources other than moneys appropriated by the Congress of the United States." [2] The phrase "nonappropriated fund instrumentality" has been adopted to refer to the activity supported by nonappropriated funds. [3]

Along with the definitional changes, the Army has adopted a new classification system for nonappropriated fund instrumentalities [NAFI's]. Under this new classification system, which was prompted by the Department of Defense, [4] there are four major groups:

1. Resale revenue-producing NAFI's; [5]
2. Welfare and recreation NAFI's; [6]
3. Membership association NAFI's; [7] and,
4. Common service NAFI's. [8]

There is a ready alignment between resale revenue/producing NAFI and welfare and recreation NAFI's and the old revenue-producing fund and welfare fund classifications. Generally, membership association NAFIs and common service NAFI's are derived from the old sundry fund classification.

A seemingly unsettled issue under this new classification system concerns the status of packaged alcoholic beverage stores. Army Regulation No. 230-1 now lists "Class VI agencies and locker funds overseas" as examples of resale revenue-producing NAFI's. [9] An early draft of the present Army Regulation No. 230-1 provided that all packaged alcoholic beverage stores would be classified as resale revenue-producing NAFIs, removing them from their traditional adjunct status to Army clubs. Under this proposal, the income of the packaged alcoholic beverage stores would have been shared by welfare and recreation NAFIs and Army clubs. While this proposal was not included within the published regulation, the potential for change is still believed to be viable.

The area of nonappropriated fund procurement has historically engendered confusion. While it is beyond the scope of this article to delve into the peculiarities of nonappropriated fund procurement, it should be noted that the new regulation, in addition to having an expanded section on procurement, directs that Department of the Army Pamphlet No. 27-154 [10] be used as a general guide for procurement by all NAFI's. [11]

Two areas covered in the old Army Regulation No. 230-1 have been curtailed in the new regulation. The section of the old regulation dealing with personnel [12] has, to a great extent been deleted from the new regulation. [13] Army Regulation No. 230-2 [14] is now the governing authority for matters concerning NAFI employees. The other area deleted from the new regulation concerns those activities traditionally referred to as "private associations." These activities, now referred to as "private organizations," are now governed by Army Regulation No. 210-1. [15]

For matters concerning insurance coverage for NAFI's, reference must be made to Army Regulation No. 230-16. [16] Under this regulation, establishing the Risk Management Program, NAFI's are self-insurers for property

and casualty insurance losses. This program is administered by the Army Central Insurance Fund. In addition, the Army Central Insurance Fund centrally purchases workmen's compensation insurance from commercial insurance carriers for all NAFI's. The reasons for the Risk Management Program are two-fold:

1. Assuring that all NAFIs have the necessary insurance coverage to protect their assets.

2. Providing lower insurance costs to individual NAFI's.

Another area involving Army Regulation No. 230-16 concerns the payment of tort claims arising out of the operation of NAFI's. The new Army Regulation No. 230-1 provides that tort claims will be paid by the Army Central Welfare Fund or the Army Central Mess Fund.[17] However, Army Regulation No. 230-16 provides that tort claims in excess of $100 will be forwarded to the Army Central Insurance Fund for payment; claims of $100 or less are to be paid by the NAFI incurring the claim.[18] This dichotomy appears to have resulted from the delay incurred in the printing of the new Army Regulation No. 230-1. For the field, the issue of whether the Army Central Welfare Fund, or the Army Central Mess Fund, or the Army Central Insurance Fund pays the claim is not that important. However, the "$100 deductible" provision that is included in Army Regulation No. 230-16, but not in Army Regulation No. 230-1, can have a direct impact on NAFI's at an installation.

For general reference purposes, it should be noted that, in addition to its numbered predecessor, the new Army Regulation No. 230-1 supersedes the following Army regulations:

1. Army Regulation No. 230-4 (17 May 1968);

2. Army Regulation No. 230-11 (21 July 1972); and,

3. Army Regulation No. 230-18 (27 December 1961).

Army Regulation No. 230-60 (30 April 1975).

The title of this regulation—The Management and Administration of the US Army Club System—denotes the fact that it is concerned only with Army clubs (open messes). Its predecessor governed all sundry funds, including open messes. All membership association NAFI's, other than Army clubs, and all common service NAFI's are now governed by Army Regulation No. 230-1. In the past, Army clubs have been the largest source of problems within the nonappropriated fund system. It is not unexpected, therefore, that their control and operation have been the subject of change.

The predominant change in the Army club system concerns the United States Army Club Management Agency (USACMA). USACMA has existed as an entity within the Army club system for several years. However, the new Army Regulation No. 230-60 clearly sets out its role and function in the control and operation of Army clubs.[19] Under the new system, Army clubs are not under the autonomous control of the installation commander. Yet, neither are they under the sole control of USACMA as was proposed at one point in time.

The basic concept provides for the centralization of all Army club activities (officer, NCO, and enlisted) into a single installation club system.[20] The separate activities are operated as branches of the centralized system. In furtherance of the centralization concept, installation commanders may establish a "joint club facility" or a "consolidated club branch" to serve the members of all the club activities on the installation.[21] Installation commanders must obtain the approval of USACMA prior to establishing any Army club or club system at an installation.[22]

The driving motive behind the revamping of the Army club system was to impart greater control over the operation and activities of the clubs. Accordingly, as with USACMA, Army Regulation No. 230-60 enumerates the duties and responsibilities of installation commanders,[23] installation club managers,[24] and branch and annex managers.[25] In addition, the regulation sets forth operating procedures and internal controls for Army clubs. The Commander, USACMA, is assisted in performing his duties and responsibilities by Regional Club

Management Headquarters in oversea areas [27] and field assistance offices within CONUS [28]

The absence of regional USACMA headquarters within CONUS is probably attributable to Congress' refusal to appropriate funds for the operation of USACMA. This necessitated not only a reduction of operating expenses, but also required the development of a new source of operating funds for USACMA. Effective 1 July 1974, an assessment program based primarily upon the monthly gross sales of packaged alcoholic beverage stores was initiated to provide the necessary operating funds.[29] While the new Army Regulation No. 230-60 does not provide for the assessment program, it is noted that the document implementing the program is not listed as having been superseded by the new regulation. This assessment program is keyed very closely to the unsettled status of packaged alcoholic beverage stores. If these activities are classified as resale revenue-producing NAFI's as they now are in overseas areas,[30] assessing their gross sales to support USACMA appears to be a questionable practice in view of the prohibition against membership association NAFIs receiving dividends or grants from other groups of NAFI's.[31]

Conclusion.

The purpose of this article was to alert judge advocates to the new nonappropriated fund regulations. It was not intended to discuss all the changes contained in these new publications. But, it should be borne in mind that, for all practical purposes, the basic concept and structure of the nonappropriated fund system remains unchanged. In many cases, it is only a matter of new terminology.

It was noted earlier that we may be entering a period of tranquility, a slowing of the rate of activity that has marked the nonappropriated fund system in the past years. However, a pragmatist may view the new regulations as simply providing a new basis for change. At a minimum, Army Regulation No. 230-1 will require change to clarify existing ambiguities and conflicts. As to Army Regulation No. 230-60, because of the lack of appropriated funds for USACMA's operation, the structure of the Army club system is still under study, with particular emphasis on the continued role of USACMA and the assessment program.

Footnotes

1. Army Reg. No. 230-1, para. 1-3*a* (2 January 1975).
2. *Id.* at para. 1-3*b*.
3. *Id.* at para. 1-3*c*.
4. DOD Instruction 7000.12 (17 July 1974).
5. Army Reg. No. 230-1, paras. 1-3*d* and 1-8 (2 January 1975).
6. *Id.* at paras. 1-3*e* and 1-9.
7. *Id.* at paras. 1-3*f* and 1-10.
8. *Id.* at paras. 1-3*g* and 1-11.
9. *Id.* at para. 1-3*d*.
10. U.S. Dep't of Army, Pamphlet 27-154, Procurement Manual for Clubs and Construction By Certain Nonappropriated Funds (1 June 1973). This pamphlet is currently under revision.
11. Army Reg. No. 230-1, para. 1-19 (2 January 1975).
12. Army Reg. No. 230-1, paras. 1-25 through 1-27 (2 January 1975).
14. Army Reg. No. 230-2 (1 June 1969), as changed.
15. Army Reg. No. 210-1 (7 March 1974).
16. Army Reg. No. 230-16 (10 December 1974).
17. Army Reg. No. 230-1, para. 3-8c (2 January 1975). Army Reg. No. 230-1, para. 4-8*c* (16 February 1972), provided that claims within the monetary jurisdiction of field settlement authorities would be paid from major command welfare funds with reimbursement from the "Self-Insurance Reserve" of the Army Central Welfare Fund. Although the new regulation continues the distinction between claims within field settlement authorities' monetary jurisdiction and those not, there is no provision for payment out of major command welfare funds.
18. Army Reg. No. 230-16, para. 18 (10 December 1974).
19. Army Reg. No. 230-60, para. 1-8 (30 April 1975).
20. *Id.* at para. 2-1*a*.
21. *Id.* at para. 2-1*e*. See *Id.* at paras. 1-4*i* and *j* for the distinction between a "joint club facility" and a "consolidated club branch."
22. *Id. at para 2-7.*
23. *Id.* at para. 1-12.
24. *Id.* at para. 1-13.
25. *Id.* at paras. 1-15 and 1-16.
26. *Id.* at Chaps. 6 and 7.
27. *Id.* at paras. 1-4*c* and 1-9.
28. *Id.* at para. 1-10.
29. HQDA Letter 230-74-4 DAAG-CMP-FM(M) (3 Jun 74), subject: Nonappropriated Fund Support of Army Central Mess Fund (ACMF) and US Army Club Management Agency (USACMA).
30. Army Reg. No. 230-1, para. 1-3*d* (2 January 1975).
31. *Id.* at para. 1-3*f*.

Bicentennial Series

History of the Judge Advocate General's Department

By: Major General Thomas H. Green (1889–1969),

The Judge Advocate General, U.S. Army, 1945–1949

As noted in last month's issue, this piece begins a series of short items gleaned from the chronicles of the Judge Advocate General's Corps' 200 years of service to the nation and the Army. We hope this bicentennial series will impart to each JA officer a greater understanding and appreciation for the heritage and history of the Corps. General Green's short historical sketch of the Corps is reproduced as he wrote it for presentation in 1947.

* * *

Sometime ago one of my busy aides managed to find time to write a history of the Department, which I consider very good. Since I intend to crib liberally from that history, I desire to give credit to its author, Lieutenant Colonel William F. Fratcher, JAGD, who is now on duty in the European Theater.

On July 3, 1775, General George Washington assumed command of the sixteen thousand New England militiamen besieging Boston and established General Headquarters of the Continental Army at Cambridge, Massachusetts. The history of the Judge Advocate General's Department seems to have started 23 days later when the Second Continental Congress, sitting at Philadelphia, elected William Tudor, Esq., Judge Advocate of the Army. An order issued from General Headquarters the following day announced the appointment and directed that the Judge Advocate was "in all things relative to his office to be acknowledged and obeyed as such."

William Tudor was born at Boston in 1750. He graduated from Harvard College in 1769, and studied law under John Adams. In January 1776, "That no mistake in regard to the said articles may happen," the "Judge Advocate of the Army of the United Colonies" was directed in orders from General Headquarters to countersign each copy of the new articles of war. On July 4, 1776, the United Colonies became the United States of America and, on August 10, Congress accorded Mr. Tudor the title of Judge Advocate General and the rank of lieutenant colonel in the Army of the United States.

He was succeeded in 1777 by John Laurance of New York, who entered the Army as a second lieutenant, 4th New York Regiment, in August of the same year.

In addition to his duties as a staff officer at General Headquarters of the Continental Army, Colonel Laurance assisted in many important military trials. In the summer of 1778 he was judge advocate of the general court-martial which found Major General Charles Lee guilty of disobedience of orders, misbehavior before the enemy, shameful retreat and disrespect to the Commander-in-Chief. In the following year Colonel Laurance conducted the prosecution of Major General Benedict Arnold for permitting a vessel to leave an enemy port, closing the shops in Philadelphia, and using public wagons for his own private business. This proceeding, resulting in his being reprimanded by General Washington, embittered General Arnold. (Flagship Philadelphia incident) in September 1780, Colonel Laurance was recorder of the board of officers, which investigated the case of Major John Andre, Adjutant General of the British Army, and recommended his execution.

After the war Colonel Laurance returned to the practice of law in New York City where he became a distinguished authority on admiralty law and served as a vestryman of Trinity Church, trustee of Columbia College, Regent of the University of the State of New York, and director of the Bank of the United States. He was a member of the Congress of the Confederation, New York State senator, first member of Congress from New York City under the present Constitution, United States

District Judge for the District of New York, and United States Senator from New York.

Several of the judge advocates who served during the Revolutionary War are noteworthy. Outstanding among these is Captain John Marshall, 15th Virginia Regiment, who was a member of Congress, Secretary of State, and later Chief Justice of the United States. Major John Taylor, 1st Virginia Regiment, became a prominent Jeffersonian Democrat, a political writer of note, and a bitter critic of Chief Justice Marshall. Major Taylor served as United States Senator from Virginia for a number of years.

Colonel Laurance was succeeded in October 1782 by his chief deputy, Thomas Edwards of Massachusetts. He entered the Army as a private, Massachusetts Militia, in April 1775.

War with England being imminent, Congress, by the act of January 11, 1812, authorized the raising of thirteen regiments and provided that there should be appointed to each division a judge advocate.

Of the judge advocates who served during the War of 1812 the best known is the distinguished authority on international law, Henry Wheaton of New York. Major Wheaton was reporter of the United States Supreme Court for a number of years and is the "Wheat." which appears in law citations.

From 1821 to 1837 the Adjutant General of the Army performed most of the normal functions of a Judge Advocate General for the small Army of the period. Indeed, some of the letters written by Adjutants General of that period, calling attention to irregularities in court-martial records, are unpleasantly similar to the "skin letters" which emanated from the office of The Judge Advocate General today.

One of those Adjutants General was Colonel Roger Jones of Virginia, who had once been an officer of the Marine Corps. Colonel Jones seems to have been a colorful figure. In 1830 he was sentenced by a general court-martial to be reprimanded for issuing orders without authority and saying to the Commanding General of the Army, Major General Alexander Macomb, "I defy you, sir: I defy you!"

An act of Congress passed on July 17, 1862 directed the appointment of a Judge Advocate General with the rank and pay of a colonel of cavalry. On September 3, 1862, Joseph Hold of the District of Columbia became the fourth Judge Advocate General of the Army and the first since the Revolutionary War. Born in Kentucky in 1807, General Holt graduated from Centre College and practiced law with distinction in Kentucky and Mississippi.

Of the Civil War judge advocates Major John A. Bolles of Connecticut, afterward Judge Advocate General of the Navy, Major Henry L. Burnett of Ohio, who was prominent in the case of *Ex parte Milligan* and afterward an outstanding member of the New York bar, and Major John A. Bingham of Ohio, member of Congress for 18 years, Minister to Japan for 12, co-prosecutor with General Holt of the Lincoln assassins, and one of the House managers for the impeachment of President Andrew Johnson, are noteworthy. Major John Chipman Gray of Massachusetts is the best-known to legal scholars of all the Civil War officers of the department. He was a member of the faculty of Harvard Law School for 44 years, founded the *American Law Review*.

After thirteen years as Judge Advocate General, during which period he was brevetted major general and tendered appointments as Attorney General by President Lincoln and Secretary of War by President Grant, both of which he declined, General Holt retired on December 1, 1875. He was succeeded by his assistant, Colonel William McKee Dunn of Indiana.

General Dunn was succeeded in 1881 by Major David G. Swaim of Ohio. In 1884, General Swaim was suspended from rank and duty for a period of twelve years, pursuant to sentence of court-martial, he having been found guilty of improper conduct in a business transaction. Colonel Guido Norman Lieber of New York, the Assistant Judge Advocate General, was Acting Judge Advocate General from July 22, 1884 to January 11, 1895, eleven years, when he accepted appointment as Judge Advocate General. General Lieber was a son of Dr. Francis Lieber, the eminent authority on the

laws of war who, as special legal adviser to the War Department, drafted General Order No. 100 for 1863, the basis of the modern law of land warfare. Lieber became well known in the Army as the author of *Remarks on the Army Regulations* (1898), *The Use of the Army in Aid of the Civil Power* (1898). General Lieber collected an exceptionally fine library on military law and history which has become part of the library of the Office of The Judge Advocate General. [Ed.—Now at TJAGSA.]

The history of the Judge Advocate General's Department in the nineteenth century would be incomplete without mention of the services of Colonel William Winthrop of New York who entered the department in September 1846 after creditable service as a line officer. He published the first edition of his monumental treatise, *Military Law and Precedents*, in 1886, It has been revised from time to time but it is still sort of a Bible to students of military law.

Colonel George B. Davis of Massachusetts was the next to become Judge Advocate General in 1901. General Davis was an enlisted man during the Civil War, graduated from the United States Military Academy in 1871, and served as a cavalry officer for seventeen years. General Davis was the author of treatises on military law, international law, and the elements of law. He represented the United States at the Geneva conferences of 1903 and 1906 and the Hague Conference of 1907. General Davis retired with the rank of major general February 14, 1911.

General Davis was succeeded by General Enoch H. Crowder of Missouri. I believe him to have been one of the outstanding soldiers of all time. He was a graduate of the United States Military Academy, Class of 1881, who had served thirteen years as a troop officer of cavalry, completed the law course at the University of Missouri in 1886, and became a major and judge advocate in 1895. General Crowder had been a member of the commission to determine the capitulation of Manila and the Spanish Army in 1898, an associate justice of the Philippine Supreme Court, a member of the commission to treat with General Aguinaldo respecting his surrender in 1899, legal adviser to the Military Governor of the Philippines, observer with the Japanese Army in the Russo-Japanese War (1904-1907), legal adviser to the Provisional Government of Cuba (1906-1909), and delegate to the Fourth Pan-American Conference at Buenos Aires in 1910. In addition to his duties as Judge Advocate General, General Crowder was Provost Marshal General (which position was equivalent to that of the present Director of Selective Service), from 1917 to 1919 and, after his retirement as a major general on February 14, 1923, Ambassador to Cuba from 1923 to 1927. General Crowder died in 1932.

Several of the World War I judge advocates are noteworthy. Colonel Edmund M. Morgan, Colonel Eugene Wambaugh and Major Felix Frankfurter won distinction as members of the Harvard Law Faculty and Major Frankfurter is now an Associate Justice of the United States Supreme Court. Colonel John H. Wigmore, Dean of Northwestern University Law School, was an outstanding authority on the law of evidence. Major Henry L. Stimson of New York served as judge advocate in 1917 and thereafter as a line officer. Major Stimson has been Secretary of War, Secretary of State and Governor General of the Philippines. Lieutenant Colonel Patrick J. Hurley of Oklahoma, later of New Mexico and later Secretary of War also served as judge advocate. Colonel Charles Beecher Warren of Michigan was Ambassador to Japan and Mexico and Lieutenant Colonel Nathan William MacChesney, an eminent member of the Chicago bar wore the full dress uniform of a colonel, Judge Advocate General's Department Reserve, when he presented his credentials as Minister to Canada in 1932. General Hugh S. (Iron pants) Johnson became well known as Administrator of the National Recovery Administration. Colonel Guy D. Goff became United States Senator from West Virginia and Major Charles Loring has been a justice of the Supreme Court of Minnesota since 1930.

Colonel Walter A. Bethel of Ohio, who had served during World War I as a brigadier general and judge advocate of the American Expeditionary Forces in France, was ap-

pointed Judge Advocate General on General Crowder's retirement. General Bethel graduated from the United States Military Academy in 1889, from the Atlanta Law School in 1892 and, with an LL.M., from George Washington University Law School in 1894. He served in the artillery with the volunteers during the war with Spain. General Bethel retired for disability on November 15, 1924, and was succeeded by Colonel John A. Hull of Iowa, who had been judge advocate of the Services of Supply, American Expeditionary Forces in France, during the War. General Hull, who held Ph.B. (1894) and LL.B. (1895) degrees from the State University of Iowa, was the son of Senator Hull, Chairman of the Military Affairs Committee. He retired at the expiration of his four-year term on November 15, 1928, and subsequently served as legal adviser to the Governor General of the Philippines and as an Associate Justice of the Supreme Court of the Philippine Islands.

General Edward A. Kreger of Iowa, came next. He had served during the war as "Acting Judge Advocate General" in charge of the Branch Office of the Judge Advocate General in France. General Kreger graduated from Iowa State College in 1890 and practiced law in Iowa until May 1898, when he entered the service as a captain in the 52nd Iowa Infantry. General Kreger was retired in 1931, and was succeeded by Colonel Blanton Winship of Georgia. General Winship graduated from Mercer University in 1889 and from the University of Georgia Law School in 1893. He entered the service as a captain in the 1st Georgia Infantry in May 1898. General Winship's World War I service was unusual for a judge advocate in that, for a time, he commanded a force of infantry and, while doing so, earned the Distinguished Service Cross for heroism in action. He was White House aide for President Coolidge. This man is a rare combination. He is model of gentlemanliness, and yet a firm and brave soldier. General Winship retired in 1933. Subsequently he served as Governor of Puerto Rico and was recalled to active duty in World War II to serve with the Inter-American Defense Board. (Attempted assassination incident)

Colonel Arthur W. Brown of Utah, who had been acting Judge Advocate of the United States Expeditionary Forces at Vera Cruz in 1914 and judge advocate of the Third Army in France during World War I, was appointed The Judge Advocate General in 1933. A native of Iowa, General Brown graduated from Cornell University Law School and entered the service as a private in Battery A, Utah Light Artillery, on May 9, 1898. General Brown was succeeded by Colonel Allen W. Gullion of Kentucky, who had served in the Provost Marshal General's Office and as judge advocate of the 3rd Army Corps during World War I and was well known as the trial judge advocate who prosecuted the late Brigadier General William Mitchell, Assistant Chief of the Air Corps. General Gullion graduated from Centre College in 1901, from the United States Military Academy in 1905, and from the University of Kentucky Law School in 1914. Here was a man of exceptional gifts, whose orations were spectacular.

On December 1, 1941 Myron C. Cramer of Connecticut was appointed Judge Advocate General where he served during World War II as head of the Legal Department of the Army. It was under his jurisdiction the Judge Advocate General's Department increased from about 100 officers to more than 2800. General Cramer was a graduate of Wesleyan University and Harvard Law School and entered in the service in World War I as an officer of the Washington National Guard. On November 30, 1945 General Cramer retired and at the present time General Cramer is serving as American representative on the American International Military Tribunal for the Far East, which is now sitting in Tokyo, Japan, and is hearing the major cases of the Japanese war crimes.

On December 1, 1945 I succeeded to the great office of The Judge Advocate General. I am the youngest Judge Advocate General on record and came in at perhaps the hardest period of our history. I have completed one year in that position. In my office are the pictures of all of my predecessors back to and including General Crowder. They have handed me the torch and how well it is carried I leave to the historians.

Title Filing: A System of Maintaining the Military Lawyer's Professional Papers

By: Captain Henry J. Hogan, III, JAGC, Presidio of San Francisco, California

The maintenance of professional papers is certainly not the most pressing problem weighing upon the minds of military attorneys but it is nonetheless one worthy of comment. In fact, these comments come at the suggestion of those who have seen my personal system of filing professional papers and felt it worthy of attention. This system that I endeavor to describe employs two widely known methods of legal indexing, modified to accept materials from the JAG practice.

Sometime early in my JAG career I determined that much of my work required travelling research paths I had been over before. The problem was how to organize previously acquired materials in a fashion that combined the qualities of immediate access, mobility, protection and simplicity of operation. I believe there is a need for a uniform system of organizing the papers, briefs, notes, memoranda of law, professional articles, and bibliographies that the individual JA collects in the course of his practice.

There are other more sophisticated indexing systems demanding space and supplies complete with cross-referencing codes. However, I simply never had the time or the desire to do much more than what this TITLE filing I now use calls for. It is possible to expand on what I have done and probably make it as complex as the individual feels he needs. I kept my files simple because I don't like filing. The net result of title filing is a clutter-free office with files full of current usable materials that I have read.

In originally organizing the system it was necessary to dissect the JAG practice and to identify its various elements. I have defined nine different parts of the practice which I have termed TITLES. These TITLES are the major classifications into which a piece of material is initially sorted, e.g. "Environmental Law, Procurement, etc." After the material has been identified under the appropriate TITLE, it is then sorted into the most applicable TOPIC. The TOPICS are words and phrases of military and administrative law which have been extracted from handbooks, various military legal services regularly distributed and legal research texts. The system utilizes this catalogue of military and administrative law related TOPICS and is really nothing more inventive than tailoring the headnote or topic method of legal research to the military practice.

Perhaps the best way to explain the system is to describe the process used to file a piece of material. The sample material here will be an outline of the remarks made by Dr. Russell S. Fisher, Chief Medical Examiner for the State of Maryland. His presentation, "Determining the Cause of Death in Suspected Criminal Homicide Cases," was given to the Short Course for Prosecuting Attorneys in Northwestern University. It is a valuable outline of medicolegal pathology. Without reading it and only knowing the name it can be properly TITLED in the system under that segment of the JAG practice which I have labeled "Criminal Law and Military Justice." After reading the contents the appropriate "words and phrases" TOPIC must then be chosen. A review of the catalogue of TOPICS under that TITLE offers the selection: "Homicide," "Expert Evidence" or "Murder". After selecting "Homicide" and then placing an identifiable "H" on the cover page of the outline it may be placed in a file separator. It is then necessary to prepare a 3 x 5 card labeled "Homicide" and copy the TITLE onto the card. A zealot would no doubt prepare separate 3 x 5's for "Expert Evidence" and "Murder" upon which would then be marked "see Homicide." I believe this wastes times, sacrifices simplicity and clutters the index with 3 x 5 cards. The result of this work is that filed copies have been read, labeled under the proper JAG practice TITLE and an index card has been prepared under the applicable heading for quick reference. I am convinced that the most attractive motivation to employing this system is that it gets the material out of sight and yet the same material

is easily found when needed by going from index to file drawer.

The basic elements of the system are: (1) The catalogue of TOPICS arranged by TITLE; (2) the index; and (3) the files.

The reader will find that it is possible to take most of the material on hand and file into one of the available *topics*. If not, then simply add a topic. The reader is reminded that to maintain simplicity a low number of *topics* under a given *title* should be the rule.

It takes time to read through all of the papers and to label each piece under the appropriate title. The real work is marking each piece and preparing an index card with the topic and a one sentence description of the piece of material. This is the most time-consuming part of the filing system. I have found that by keeping just a few pieces of material in my briefcase or on my desk there are moments during the day to read the content, mentally place it in the proper title, then give it a topic and finally scribble the sentence out in longhand. The actual filing and card preparation is busy work which can be done anytime. The index is the 3 x 5 file box that contains the cards separated into titles and then alphabetically by *topic*. "Legal Assistance" and "Military Justice and Criminal Law" have the largest selection of topics. It is possible to have a very general list of topics under one title while another is more specific, the obvious determining factor being the individual JA's area of specialization. The actual files can be made of stiff cardboard separators marked with appropriate TITLES. Thus the outline "Determining the Cause of Death in Suspected Criminal Homicide Cases" would be filed under the TITLE "Criminal Law and Military Justice" alphabetically under "Homicide." The prepared 3 x 5 would similarly be filed by TITLE, TOPIC and alphabetically in the index.

Included among the advantages is the mobility of the JA's papers. When necessary the files can be collected in order and packed in issue corrugated cardboard boxes (15 x 12 x 10 inches; Requisition Number GS 05s 09465 S-W-91391 1J) and unpacked at destination in the same order immediately ready for use.

Also, the fact that materials are in a file drawer where they can be removed individually and put back satisfies the demands for immediate access. The entire process requires only three actions by the user. Although it may appear complicated all that need be done is "read, write and file." I believe another advantage of the system is that the user is forced to *read* all of his material and not just scan it. In order to file properly the material must be fully read and analyzed for the proper TOPIC.

This system should be attractive to the newer JA's as it provides a means of developing a personal library of information and sources which will complement the desk-book type materials received at a basic class. The opportunity to approach the first assignment "organized" can be of tremendous value, while the more experienced JA's, both active and reserve might give thought to adopting some form of this system as well. Too often, valuable, helpful materials are refused by newer JA's because of the reluctance to sort through stacks of papers that haven't been reviewed for years. There is also the problem of physically incorporating papers from one filing system into another, where the two systems may have nothing in common.

There is a legacy of professional materials that could be offered by terminating or retiring JA's to those who carry on. It would seem that where both donor and donee have similar filing systems the giving and receiving of professional papers could be a practical and valuable tradition of the JAG Corps.

Feedback on the use of this system is invited. Contact: Captain Henry J. Hogan, III, Assistant Army Judge Advocate, Office of the Army Staff Judge Advocate, Headquarters Sixth United States Army, Presidio of San Francisco, California 94129.

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Titles of the JAG Practice

Claims and Civil
Litigation

- Criminal Law and Military Justice
- Environmental Law
- International Law
- Legal Assistance
- Military and Civilian Personnel Law
- Military Law Materials and Professional Training for Lawyers
- Miscellaneous
- Procurement

Catalog of Topics

CLAIMS AND CIVIL LITIGATION

- Animals
- Attorney
- Automobiles
- Carriers
- Claims Office
- Claims Officer
- Compromise and Settlement
- Cost of Repairs Evidence
- Costs
- Customs
- Damages
- Department of Justice
- Employee Status
- Estimates
- Examiners
- Explosives
- Federal Civil Procedure
- Finding Lost Goods
- Fraud
- Government Bill of Lading
- Highways
- I.C.C. Regulations
- Inspections
- Insurance
- Inventory
- Medical Care Recovery
- National Guard
- Notice
- Oath
- Officers
- Payment
- Principal Agent
- Property
- Real Estate
- Records
- Reorganization
- Reports
- Review
- Safeguarding Property
- Shipping
- Sonic Boom Damage
- Submission of Claim
- Subrogation
- Theft
- Vehicles
- Warehouseman
- Weapons
- Weights

CRIMINAL LAW AND MILITARY JUSTICE

- Absence without Leave
- Accessories before the Fact
- Absentia
- Accident
- Accomplices
- Accuser
- Administrative Reprimands
- Aiding and Abetting
- Alcoholism
- Allowances
- Amendment
- Apprehension and Arrest
- Argument of Counsel
- Arraignment
- Arrest
- Articles of UCMJ
- Assault
- Automobiles
- Bad Conduct Discharge
- Burden of Proof
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JAG School Notes

1. JAG School on the Move. Lease negotiations with the University of Virginia having been concluded, The Judge Advocate General's School began its move to new quarters on the North Grounds of the University before the last week in May. In accordance with sound tactical principles, the "high ground" was seized first with the Officers' Open Mess occu-

pying its position atop the new building. Next came the Billeting Office and advance supply and administration elements. These moves, made under our "own power" in advance of the award of a movement contract, made possible the successful hosting of the Board of Directors of the International Society of Military Law and the Law of War (*The Army Lawyer*, May 1975, p. 25). Delegates from Canada, the United Kingdom, The Netherlands, Belgium, France, Germany, Austria, Turkey, Italy, Spain, Zaire, and Australia, were among the first to use the new billets and dine in the Officers' Open Mess. Simultaneously, the 77th Basic Class began use of the practice court and seminar facilities, and, on 30 May 1975, the 23d Advanced Course graduation exercises were held in the largest amphitheater-style classroom. Major General George W. Putnam, Jr., Director of Military Personnel Management, ODCSPER, HQDA, became the first guest speaker in the new facility. Yes, in Virginia there *is* a new JAG School. Remaining elements of the School will move during the first two weeks of June. (Please see our new telephone information which follows this entry.) Formal dedication ceremonies are being planned for Wednesday, 25 June 1975.

2. TJAGSA Phone Numbers. As of press time, the listing below reflects TJAGSA telephone numbers for the new School building. Many of the numbers are the same as formerly listed, but there are some additions and changes where indicated by asterisk. Autovon access to TJAGSA is still through the Army Foreign Science and Technology Center at Charlottesville, Virginia. The AUTOVON number is 274-7110. The FSTC operator connects callers to TJAGSA commercial numbers.

	Commercial No.	*FTS No.*
Commandant	293-3936	300
Duty Officer * (Nonduty Hours)	293-4047	
Academic Department		
Director	293-2028 */9298	302/260
Director, NRI	293-6286/7945 */4046 *	304/309
Resident Course Info & Quotas	293-7475	302/260
Correspondence Course Info & Quotas	293-4046	304
Command & Management	293-2546 */4730	307
Administrative & Civil Law Division	295-4230, 293-4095*	308
Procurement Law Division	293-3938/7945 *	309
International Law Division	293-2546 */7245 *	328
Reserve Affairs		
Assistant Commandant	293-6121 */6122 *	301/209
Career Management	293-6121 */6122 *	301/209
Training Office	293-6121 */6122 *	301/209
Developments, Doctrine & Literature		
Director	293-4668/7376 *	394
Developments	293-4668/7376 *	394
Doctrine & Literature Division	293-4668/7376 *	394
School Secretary		
School Secretary	293-4732	303
Assistant School Secretary/Post Judge Advocate	293-4731	393
Visitors Branch	293-4731	393
AG Operations	293-4047/4059	306
Logistics	293-2402	305
Library	293-9824	393
Officers' Open Mess	293-4590	393
Billeting	293-2402	305

3. JAG Conference. The Chief of Staff, United States Army, has approved the 1975 Judge Advocate General's Conference, to be held during the period 14–17 October 1975. Please note that Conference activities will start with a social get-together for the arriving conferees on the evening of Monday, 13 October (Columbus Day).

4. Admin Law Handbook Changes. Change 1 to DA Pam 27–21, *Military Administrative Law Handbook*, is in distribution. The change is in looseleaf format and covers substantive revisions recessitated by statutory and regula-revisions necessitated by statutory and regula-new chapter, Chapter 9, has been added to serve as both a research and instructional tool in the area of nonappropriated funds. Because of the recent republication of AR 230–1 (2 January 1975) which governs the Army's nonappropriated fund system, certain portions of this chapter are now out of date. An explanation of this republished regulation can be found in Captain Stephan K. Todd's article on "The New Nonappropriated Fund Regulations" in this issue of *The Army Lawyer*. Users of the Handbook are invited to send comments and suggested improvements to The Judge Advocate General's School, US Army, ATTN: Administrative and Civil Law Division, Charlottesville, Virginia 22901.

5. Law Office Management Course. The 5th Law Office Management Course which was cancelled earlier in this academic year because of travel restrictions has been rescheduled for early in the coming year: 22–26 September 1975. The course is designed to provide warrant officers, senior legal clerks, and civilian administrators with a working knowledge of the administrative operation of a staff judge advocate office and those managerial principles involved in controlling and allocating resources—human and nonhuman.

Only a few years ago, staff judge advocate offices were staffed with relatively few personnel. However, it is not unusual to find an office with 30 attorneys and a similar number of civilian and enlisted personnel. Efficiency in an organization of such size requires a capable administrator—the individual who takes care of the nonlegal problems within the office effectively and with a minimum of turmoil. However, he must be adequately trained to "people manage." Newly appointed legal administrative technicians and those "old timers" who did not attend the last previous course should make every effort to attend. Staff Judge Advocates are urged to encourage the attendance of their administrators at this course.

6. Criminal Trial Advocacy Course. The 1st Criminal Trial Advocacy Course (originally the 1st Trial Attorney's Course) will take place 23–27 June 1975. The four and one-half day course is open only to active duty JAGC officers and will be practice-oriented. In addition to updates on the year's legal developments, the course will offer both seminar and lecture classes—in motion strategy and practice (including discovery), electronic eavesdropping, SIDPERS, forensic science, the Federal Rules of Evidence, Article 31 and psychiatric testimony, legal ethics, post-trial actions, and use of videotape, tape recordings, and demonstrative evidence. Workshops and roundtables are scheduled in use of voir dire, examination of witnesses, preparation of tailored instructions for submission to the military judge, and extenuation and mitigation (including rebuttal). The course will be highlighted by three distinguished civilian guest speakers. Professor Richard Christie, perhaps the country's foremost authority on sociological and psychological jury selection, will speak on "jury" selection; Mr. Richard Sprague, famous for his work as the Assistant District Attorney of Philadelphia (including the Yablonski murder case prosecution) will speak on the preparation and trial of complicated cases; and Mr. Robert Bruce Kendall a noted trial lawyer from Norfolk, Virginia, will speak on the proper use of closing arguments. The course will end with a special set of separate trial and defense counsel seminars.

7. Military Justice Course. As announced earlier, 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 offi-

cers of the reserve components to complete the criminal law requirements of the Judge Advocate Officer 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 component officers can complete the entire criminal law requirement for the Advanced Course. The alternatives of completing all or part of this requirement by correspondence courses or in a USAR School remain available.

8. Judge Course. The 14th Military Judge Course will be held from 14 July-1 August 1975. The course is designed to provide the training necessary to qualify previously selected active duty officers to perform duties as military judges at courts-martial. Attendance is restricted to personnel selected by the US Army Judiciary. Conferences, panels and seminars cover substantive military criminal law, defenses to crimes, rules and principles of evidence, trial procedure and other current legal problems. In addition, guest speakers discuss their areas of expertise.

9. International Law Course. The 19th International Law Course will be held from 21 July-1 August 1975. The program of instruction will include the international state system, jurisdiction and jurisdictional immunities, international agreements, international organizations and Status of Forces Agreements. This course is designed to prepare active duty officers for assignments, especially overseas, in which they may deal with international law problems. It is also designed to enable reserve officers to complete part of the international law requirements of the Judge Advocate Advanced Course by resident instruction during active duty training. However, this resident course covers only the Law of Peace (JA subcourses 141 and 143), not the Law of War (JA subcourse 142) as the 1 February 1974 Correspondence Course Catalog incorrectly reflects.

10. Installation Command Legal Problems Cassettes. A six-lesson series in TJAGSA's growing library of CLE audio cassettes is our best offering to date. This program is comprised of audio tapes on installation command legal problems, accompanied by a reference text on the legal basis of command—all part of our larger on-going program of lessons in military administrative law. Major Dennis M. Corrigan, Senior Instructor of the School's Administrative and Civil Law Division, is the tape narrator.

Tapes in this common program address the effect of state or federal regulation on the daily operation of and activities on a military installation. The topics and tape numbers include: State Regulatory Control (JA-A-213); State Criminal Law (JA-A-216); Law Enforcement—Control of Pornography (JA-A-217); and Dissident Activities (JA-A-218). The lessons are intended to assist JA's in analyzing and resolving typical installation legal problems. Emphasis is placed upon the need for determination of the law—state or federal—which applies to a particular situation and the identification of the legal limitations on the exercise of command on a military installation. Each tape contains a statement of a factual situation, a reading assignment, a suggestion for the preparation of a short memorandum and a suggested solution. These programs also lend themselves to training groups of lawyers. In this framework, the group leader can assign a reading of materials prior to a meeting. The fact situation can then be played, followed by a discussion period of from one to two hours per lesson. The solution can then be played. Group leaders can prepare their discussions by previewing the taped solutions. Materials can be requested for loan from the Office of Nonresident Instruction, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901.

The cassettes listed are available on a loan basis or, if a blank cassette is sent in, may be

duplicated without charge by the Audio-Visual Division, TJAGSA. All six lessons can be taped onto two 60-minute cassettes. As an alternative, the JAG School Bookstore carries a stock of cassettes as follows: 60-minute, $.70; 90-minute, $1.00; 120-minute, $1.75. those desiring to purchase blank cassettes for duplication need only send a note to the Custodian, TJAGSA Bookstore, indicating which tapes are to be copied. Checks should be made payable to "Fort Lee Exchange, Branch 1603."

Judiciary Notes

From: U.S. Army Judiciary

1. Administrative Notes.

JAG-2 Quarterly Reports. Staff judge advocates of commands *having* general court-martial jurisdiction should forward the JAG-2 Report for the period 1 April-30 June 1975 not later than 11 July 1975. It should be mailed to HQDA (JAAJ-CC), Nassif Building, Falls Church, Virginia 22041. Negative reports are required.

2. Recurring Errors and Irregularities.

April 1975 corrections by ACOMR of Initial Promulgating Orders.

a. Failing to show that the sentence was adjudged by a Military Judge—four cases.

b. Failing to show that a certain specification has been amended after arraignment—three cases.

c. Failing to show in the PLEAS paragraph that certain specifications had been dismissed on motion—two cases.

d. Failing to show in the name paragraph the SSN or correct SSN—two cases.

e. Failing to show the correct number of previous convictions by the court-martial—two cases.

f. Failing to set forth certain Charges and Specifications upon which the accused had been arraigned but thereafter dismissed.

g. Failing to show in the FINDINGS paragraph that a motion for a finding of not guilty as to a certain specification had been granted.

New Review and Action. It has been noted that in a number of cases where a new review and action has been taken, pursuant to a mandate of the United States Court of Military Appeals or a decision of the Army Court of Military Review, the promulgating court-martial order rescinded the initial one. This is unnecessary. In this connection, attention is invited to items on page 10 of the February 1973 issue of *The Army Lawyer* pertaining to new reviews and actions.

Applications Under the Provisions of Article 69, UCMJ. In a number of applications (DA Form 3499) under the provisions of Article 69, UCMJ, the relief requested in Item 13, has been, for example, "A new trial", "Reversal of the findings of guilty and vacation of the sentence. In the alternative, a new trial" or "if this appeal is denied, a new trial". Judge advocates assisting applicants should assure that those individuals understand that a new trial may be granted only under Article 73, UCMJ, on the ground of fraud on the court or newly discovered evidence. The relief which may be granted under Article 69 is vacation or modification of the findings or sentence, or both, on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the person or offense, or error prejudicial to the substantial rights of the accused. A clear concise statement of the relief requested under Article 69 will expedite the disposition of the application.

3. Defense Appellate Notes.

Defense Counsel Roster. Included in Volume 7, Number 1 of *The Advocate* (mailed 14 March 1975) was a "Roster of Senior Defense Counsel and Defense Counsel" prepared by PP&TO. The list is subject to continual change. It will

be updated quarterly by PP&TO and distributed by Defense Appellate Division.

General Coggins Speaks to Defense Counsel. The following letter was sent to all Defense Counsel from Brigadier General Bruce T. Coggins, Assistant Judge Advocate for Civil Law on 25 April 1975.

DAJA-ZC 25 April 1975

TO: ALL DEFENSE COUNSEL

One of my duties, and an important one, is to act as senior mentor for all JAGC defense counsel, which includes the constant monitoring of the operations of our legal defense system. I view my function as supportive and, if the need arises, corrective.

Some defense counsel periodically confront the problem of having no one immediately available to consult for advice and assistance. For this reason, I wish to note and highlight the presently informal defense counsel structure existing within the Corps. It includes personnel at your own installation, at higher headquarters, in the Defense Appellate Division, and me. The current issue of *The Advocate* includes a roster of defense counsel throughout the world, and in one sense, identifies our structure.

While The Judge Advocate General supervises and assists all Judge Advocates in regard to professional matters, I am his chief advisor in matters regarding the defense function. Together with the Chief, Defense Appellate Division, I evaluate and initiate appropriate action whether in response to complaints, inquiries and requests for assistance from JAGC defense counsel, or as new initiatives to enhance the defense function.

While my attention is generally devoted to the smooth functioning of the defense system, the Chief, Defense Appellate Division and his appellate counsel stand ready to furnish specific, technical assistance in regard to cases in litigation, including matters of trial tactics and pertinent precedents. A "case of first impression" arising at your installation may well have been researched, briefed, and litigated by the Defense Appellate Division among the thousands of cases it receives annually. While DAD does not serve as a substitute for your initial research, it has available for your assistance voluminous files of updated, practical research. A phone call or letter to them is all that is needed.

At your installation level, solid preparation and courtroom experience are your most valuable assets in the various stages of the case. Senior Defense Counsel within larger JAG offices and at major area command headquarters provide experienced, client-oriented attorneys to whom junior officers can turn for assistance in preparing their clients' defenses. The capabilities and responsibilities of our Senior Defense Counsel should serve as a point of coordination between the defense counsel on one hand, and the Staff Judge Advocate on the other. However, as your senior defense counsel, I encourage you to contact me directly with any problems, comments or suggestions you may have, if other approaches prove unavailing. The use of technical channels is encouraged, but not required. Use your Senior Defense Counsel within your office and at higher headquarters; and those who are the Senior Defense Counsel, monitor, supervise and assist in an active fashion.

Sincerely,

BRUCE T. COGGINS
Brigadier General, USA
Assistant Judge Advocate
General/Civil Law

The Article 38c Brief: A Renewed Vitality

A Note From The Defense Appellate Division
By: Captain David A. Shaw, Defense Appellate Division, USALSA

Article 38(c), Uniform Code of Military Justice and Paragraph 48*k*(2), *Manual for Courts-Martial, United States, 1969 (Revised edition)* provide that in every court-martial

proceeding which results in conviction, defense counsel may submit for attachment to the record a brief of matters which should be considered in behalf of the accused. This brief should include *any* objection to the contents of the record. Although both the Uniform Code of Military Justice and the *Manual* specifically authorize the trial defense counsel to file appellate briefs in behalf of their clients, this post-trial avenue of relief is rarely used by counsel. Defense counsel should never deem the representation of a client complete without considering the possibility of submitting a brief pursuant to the provisions of Article 38(c).

The Court of Military Appeals has interpreted Article 38(c) very broadly. In *United States v. Lanford,* 6 USCMA 371, 20 CMR 87 (1955) the court stated that the nature of the matters which may be noted in the post-trial brief are not delineated in the Code. Likewise, the Code does not directly indicate to whom the brief should be forwarded. Judge Quinn, writing for the court concluded "it is clearly inferable that the brief may include factors relating to the sentence and that it is to be forwarded to the convening authority." 20 CMR at 97. The court went on to indicate that the fair intendment of the statute contemplates an oral presentation as well.

The Court of Military Appeals has also been concerned with failure of counsel to utilize the provisions of Article 38(c) in submitting post-trial briefs on behalf of their clients. In *United States v. Fagnan*, 12 USCMA 192, 30 CMR 192 (1961) Judge Ferguson stated it was "the responsibility of the trial defense personnel for including in the record all possible information which may have a bearing on the sentence to be adjudged and approved. Moreover, we refer once more to the infrequently invoked provisions of [Article 38 (c)] which permit the defense counsel to prepare a brief to be forwarded "for attachment to the record." In *Fagnan* the court concluded that the Boards of Review were limited to consideration of the "entire record" in reviewing cases under the provisions of Article 66(c), Uniform Code of Military Justice, but added that an Article 38(c) brief was part of the "entire record."

The most recent pronouncement of the Court of Military Appeals about its concern over trial defense counsel's lack of diligence in discharging post-trial duties pursuant to Paragraph 48*k*(2), *Manual,* and the plethora of cases involving errors in the Staff Judge Advocates' post-trial review is the case of *United States v. Goode,* 23 USCMA __, 49 CMR __ (4 April 1975). Senior Judge Ferguson, writing for the court, opined that post-trial reviews of staff judge advocates have occasioned recurrent assignments of error and resulted in unnecessary litigation of cases in which errors of this type have been alleged. Because of the "continual and often repeated claims of error, plus the delay in determining their validity and correction, we deem it appropriate and expedient to take corrective action." The court then pronounced that a copy of the staff judge advocate's review must be served on trial defense counsel and an opportunity afforded counsel to correct or challenge any matter deemed "erroneous, inadequate, or misleading, or on which he otherwise wishes to comment." The failure of trial defense counsel to fully avail himself of this opportunity to insure the rights of the accused to receive an adequate post-trial review will be "deemed a waiver of any error in the review." Thus, trial defense counsel must carefully peruse the post-trial review in every case and prepare comments thereon to protect the rights of their client.

The clear import of a juxtaposition of *Fagnan* and *Goode* is that matters may be included in an Article 38(c) brief which are not otherwise included in the record or post-trial review. The Article 38(c) brief becomes a very important, if not mandatory, tactic for counsel who have either forgotten to include some important evidence in extenuation and mitigation or who determine some additional matters need be considered by the reviewing and appellate authorities.

The development of the interpretation of Article 38 (c), from *Fagnan* to *Goode,* provides insight to the uses of the brief. For the most effective use to be made of the brief it should be first filed for consideration by the convening authority and subsequently attached and made

a part of the "entire record" for use at the appellate level: *United States v. Lancaster*, 31 CMR 330 (ABR 1961). In *United States v. Cash*, 12 USCMA 708, 31 CMR 294 (1962) the Court of Military Appeals held that the brief may be used by counsel to rebut or correct omissions in the post-trial review: *compare Goode, supra*. The brief has also been used to discuss a void in the record of trial created by unrecorded conversations: *United States v. Strahan*, 14 USCMA 41, 33 CMR 253 (1963). Judge Quinn, writing for the court in *Reed v. Ohman*, 19 USCMA 110, 41 CMR 110 (1969) stated that under the broad language of Article 38 (c) it is permissible for counsel to present matters on the issue of appropriateness of restraint of the accused pending appellate review of a conviction. Moreover, since the client's freedom is involved, Judge Quinn continued, "it would appear that, regardless of specific statutory authority he [accused] should have the opportunity to submit matter favorable to himself or to oppose unfavorable material before the decision-making authority, including the probability of reversal or substantial modification of the conviction." (41 CMR at 114). The most expansive reading of Article 38(c) occurred in *United States v. Tawney*, 33 CMR 459 (ABR 1963) where the court stated that the absence of an Article 38(c) brief diminished the credibility of an appellant who first made allegations of irregularities on appeal.

Frequently appellate defense counsel will adopt the Article 38(c) brief as the appellate brief and merely expand on the allegations during oral argument: *United States v. Harris*, 34 CMR 522 (ABR 1963).

Thus, Article 38(c) provides an excellent, if not mandatory vehicle for trial defense counsel to protect the interests and continue the representation of their clients.

Admissibility Problem of DA Form 2475-2

A Note From the Examination And New Trials Division

By: Captain Stephen R. Burns, Examination and New Trials Division, US Army Judiciary

The advent of SIDPERS (Standard Installation Division Personnel System) produced, not only the now familiar DA Form 4187 (Personnel Action), but also the DA Form 2475-2 (Personnel Data Card), which paragraph 5-4, AR 680-1 (11 Sep 1969, as changed) aptly deems a multi-faceted personnel management tool. Pursuant to an application for relief submitted under the provisions of Article 69, UCMJ, The Judge Advocate General in *Kern*, SPCM 1975/3142, had occasion to consider the legal operation of the DA Form 2475-2, in the context of an accused's timely objection to its admission, to prove both the inception and termination of his alleged AWOL.

AR 680-1 imposed upon the accused's commanding officer the mandatory requirement of preparing and retaining for one year, as an official record in the unit files, a DA Form 2475-2 for each assigned/attached member, reflecting chronologically all personnel actions concerning an individual. When a duty status change occurred with respect to the accused, *i.e.*, his unauthorized absence, the unit clerk executed not only the requisite DA Form 4187, but contemporaneously made an appropriate entry on the accused's DA Form 2475-2. Both forms were then presented to the duly authorized representative of the unit commander for verification and certification to insure proper entry of information thereon, and also on the DA Form 3728 (SIDPERS Change Report) for transmission of the data through SIB (SIDPERS Interface Branch) to the central computer at MILPERCEN. In conjunction with the necessary source documents, the unit clerk then sent forward the data.

A DA Form 2475-2 is generally entitled to the same treatment by reviewing courts as was accorded DA Form 1 (Morning Report) and DA Form 188 (Extract Copy of Morning Report): *United States v. Masusock*, 1 USCMA 32, 1

CMR 32 (1951) (official records admissible as exceptions to the hearsay rule); *United States v. Parlier,* 1 USCMA 433, 4 CMR 25 (1952) (prepared and retained in substantial conformity with applicable regulation); *United States v. McNamara,* 7 USCMA 575, 23 CMR 39 (1957) (made in proper performance of legally imposed duty to record cognizable event); *United States v. Creamer,* 1 USCMA 267, 3 CMR 1 (1952) (document regular on its face presumed properly prepared by responsible official).

A standard sample entry on a DA Form 2475-2 for an unauthorized absence might appear as: 7211Ø9, DYST PDY/AWL/Ø8ØØ/ 7211Ø8/1PBAAA, 7211Ø8, N.C. KJ 72111Ø, "P". Reading from left to right, 7211Ø9 is the date the transaction was reported to SIB; 7211Ø9 is recorded for 9 November 1972. DYST PDY/ AWL is the action reported, *i.e.*, a duty status change from present for duty to absent without leave. Ø8ØØ/7211Ø8 is the time/date of inception, *i.e.*, 0800 hours, 8 November 1972. 1PBAAA is the identity code for the unit from which the member absented himself. 7211Ø8 is the effective date of the transaction reported, *i.e.*, the unauthorized absence. N.C. are the initials of the unit commander, or his authorized representative, which indicate his verification and certification of the data. KJ 72111Ø, "P", indicate an appropriate cycle/date entry reflecting forwarding of the action for processing ("P").

In his application for relief, accused attacked the following entry used to prove inception of the alleged AWOL on 3 February 1975: 75Ø2Ø4, PDY/AWL/Ø73Ø/ (*omission*) / G2NALO, 75Ø2Ø3, GAW, (cycle/date entry), "P". On 4 February 1975, a duty status change was reported showing that accused went from present for duty to absent without leave from his unit. Troop L, 3d Squadron, 3d Armored Cavalry Regiment (unit identity Code: G2NALO), at 0730 hours. The effective date of the transaction reported, *i.e.*, the AWOL inception, was 3 February 1975, as alleged and 1LT William (GAW), a duly authorized representative of the commanding officer, verified the accuracy of the reported data not only for its proper transmission by the unit clerk to SIB, but also for contemporaneous preparation of an appropriate DA Form 4187. Finally, a cycle/date entry, as well as a check in the "P" block, evidenced that the personnel entry had been accordingly processed at higher headquarters. The questioned discrepancy was the failure to include a date along with the transaction mnemonic (PDY/AWL/Ø73Ø) reflecting the action reported.

The effective date of the transaction reported, as noted in the questioned entry, was sufficient to prove inception. Standard sample entries, reflecting duty status changes concerning AWOL, *e.g.*, PDY/AWL, usually include a date along with the transaction mnemonic in the "action reported" block; however, that date is identical to the one appearing in the "effective date" block, and logic dictates the concurrence. At least insofar as AWOL is involved, the date of the occurrence of the action to be reported will *a fortiori* be the effective date that the member undertakes that very transaction. Accused raised the same objection to the entry used to prove termination of the alleged AWOL, and that issue was also resolved adversely to him for the same reasons. A further omission, however, was apparent in the second entry.

The questioned second entry read: 75Ø22Ø, AWL/PDY/14ØØ/G2NALO, 75Ø219, GAW, (omitted cycle/date and "P" entries). On 20 February 1975, the following transaction was reported to SIB: accused returned from AWOL to present for duty at 1400 hours to his unit. The effective date of his return was 19 February 1975, as alleged. 1LT Williams again verified the foregoing data. The usual remaining entries, *i.e.*, cycle/date and processing notation ("P"), were missing. The significance of the omitted data, and the legal effect thereof, lies in the rudimentary understanding of its basic function.

After the unit clerk has sent forward his data to SIB, which in turn will have collated it for ultimate forwarding to the central MILPERCEN computer, feedback will be reflected by the cycle/date and processing entries. These two entries function as an audit trail to insure that the unit clerk is constantly attuned to what the computer believes is a member's

current duty status. These entries are the feedback link, indicating to the unit clerk that the transaction reported on the DA Form 2475-2 has gone forward to the computer, been processed, and upon retrieval, computer output will reflect that same data. Without the audit trail, the unit records could vary significantly from what the computer would show, and the unit clerk would be hard-pressed to reconcile the assigned/attached strength of the unit against rosters, unit manning reports, other strength related documents, and the computer itself.

The absence of the cycle/data and processing notations in the entry indicated a broken feedback linkage. Either the unit clerk totally failed to send forward the basic "transaction reported" data, or more likely, a failure to complete the audit trail occurred through nonreciprocation of feedback from the computer or simple failure of the unit clerk to note accomplished feedback actually received. Obviously, the break in the audit trail will cause the unit clerk problems in reconciling his records whenever he must next deal with the computer. However, the broken feedback linkage did *not* undermine the integrity of the basic data actually noted, that is, the accused did return from AWOL to present for duty to his unit at 1400 hours, 19 February 1975, as alleged, and appropriate authority, *i.e.*, 1LT Williams, verified the same. While a defective audit trail will result in administrative problems, no legal encumbrance to admissibility attached to the proffered DA Form 2475-2.

It remains hornbook law in military jurisprudence that morning report entries are writings which meet all tests required in the official record exception to the hearsay rule. An official record should be prepared as prescribed in pertinent regulations, but not every irregularity, or omission, in an entry destroys its admissibility.

The question was whether the failure to complete the audit trail deprived the underlying document of its officiality, or was a harmless omission, which while not in keeping with proper procedures, did not of itself put the document outside the official record exception to the hearsay rule. Where a failure goes to the very heart of a document's officiality—*United States v. Teal,* 3 USCMA 404, 12 CMR 160 (1953) (DA Form 1 not signed); *United States v. Henry,* 7 USCMA 663, 23 CMR 127 (1957) (DA Form 1 merely initialed)—The document will be deprived of that degree of officiality considered a necessary ingredient to the hearsay exception. Conversely, regulatory omissions do not render documents inadmissible: *United States v. Anderten,* 4 USCMA 354, 15 CMR 1954) (failure to state that morning report entry was a delayed or corrected entry); *United States v. Tuten,* 15 USCMA 387, 35 CMR 359 (1965) (failure to date a record of previous convictions). Only those irregularities that are material to the execution of an official record destroy its admissibility.

The failure to complete the audit trial affected the probative weight to be given the questioned DA Form 2475-2, but not its admissibility. The omitted feedback data was not material to the execution of those entries having legal and evidentiary significance, which showed *prima facie* an inception and a termination, and which had in fact been verified by a responsible official. The omissions only collaterally affected the trustworthiness of the basic entries, *i.e.*, the care and diligence of the unit clerk. Even the collateral effect was of little significance, because the irregularity was not attacked as reflecting palpably erroneous data.

If it can be shown that a DA Form 2475-2 has not been properly prepared, the document is hearsay and not within the official record exception. However, counsel's inquiry regarding preparation of the document must be sharply focused so as to finely distinguish between the subtleties of harmless administrative deficiency and fatal material irregularity.

Since *MANEY*

A Note From the Contract Appeals Division

By: Captain Paul B. Haseman, Contract Appeals Division, USALSA

As all government procurement attorneys will recall, the case of *Maney Aircraft Parts, Inc.* (citations below) and its progeny involved a challenge by the contractor to the 30-day appeal filing time limit. This time limit contained in the standard Disputes Clause of the Armed Services Procurement Regulation (ASPR 7-103.12) makes the decision of the contracting officer final and conclusive unless appealed within 30 days. Maney was late. However, Maney insisted that the 30-day time limit was not a jurisdictional bar and that the Armed Services Board of Contract Appeals (ASBCA) would waive the time limit and hear Maney's appeal on the merits. After the Board refused to hear the appeal (ASBCA No. 14363, 70-1 BCA ¶8076), Maney went twice to the Court of Claims. The first time, the court ruled that the ASBCA has discretion to waive the 30-day time limit: 197 Ct. Cl. 159, 453 F.2d 1260 (1972). The board disagreed: ASBCA No. 14363, 72- BCA ¶9449. The court, under new remand powers—28 U.S.C. §1491 as amended by P.L. 92-415 (86 Stat. 652)—then ordered the Board to exercise its discretion and determine whether to waive the 30-day time limit: 202 Ct.Cl. 54, 479 F.2d 1350 (1973). Although maintaining that it still did not have jurisdiction under the Disputes Clause, the ASBCA acted under the direction of the court order and exercised discretion vis-a-vis the 30-day rule. After review of all the facts and arguments relating to the late submission by Maney, the ASBCA decided that waiver of the 30-day time limit was inappropriate: ASBCA No. 14363, 73-2 BCA ¶10,326. On Maney's third and final appeal to the Court of Claims, the court sustained the ASBCA decision : Ct.Cl. Order No. 191-70 dated 13 December 1974, 20 CCF ¶83,543. In analyzing Maney's allegation of abuse of discretion on the part of ASBCA, the court simply adopted the ASBCA language and concluded that the plaintiff, Maney, had not shown good cause or justifiable excuse.

Since *Maney,* the ASBCA has stuck to its guns on several cases of which *Linair, Inc.*, ASBCA No. 19377, 75-1 BCA ¶11,116, is a good example. The board stated: ". . . When a contractor fails to dispatch its notice of appeal within thirty days after receipt of the Contracting Officer's final decision, we lack jurisdiction to consider the appeal on its merits."

Obviously, the ASBCA still considers the 30-day time limit as jurisdictional but, as in *Maney,* it will exercise its discretion when so ordered on remand from the Court of Claims: *J.R. Youngdale Construction Co., Inc.*, ASBCA No. 18090, 75- BCA ¶11,115 (dtd 24 Feb 75). However, three questions still remain.

First, if a contractor finds itself more than 30 days after a final decision with a desire to appeal the decision, is there recourse other than appeal to the ASBCA, which will undoubtedly deny the appeal for lateness, thereby delaying possible recovery? The answer is a qualified yes. Another possible, but as yet untried approach under the facts of a late appeal, would be a direct appeal to the Court of Claims. Such an appeal is risky in light of possible dismissal by the court for failure to exhaust the administrative remedy. However, this risk is not as great as it might first appear under the guidance provided in *United States v. Grace,* 384 US 424 (1966), in which the Supreme Court stated ". . .the parties will not be required to exhaust administrative procedures if it is shown by clear evidence that such a procedure is 'inadequate or unavailable.' " 384 US at 429-30. Clearly, administrative review at the ASBCA is not available on the merits for a late appeal regardless of the reason for lateness.

A second question would be whether the Court of Claims can go forward with review on the merits or must the court remand the case to the administrative board for exercise of discretion on the timeliness issue and a subsequent administrative hearing on the merits if the board decided that waiver was appropriate. The recent Court of Claims decision in *Man-*

power, Inc. v. United States, __Ct. Cl.__, (No. 230-74 dated 16 April 1975) certainly keeps open the door for immediate review at the Court of Claims when the court finds that the administrative remedy is not available from the particular contract appeals board. In *Manpower*, the plaintiff alleged that the two-year delay in issuing a final decision by the Department of the Navy was both arbitrary and a breech of the Disputes Clause thus discharging the plaintiff from any obligation to pursue the administrative remedy. The court agreed with the breach of contract allegation and remanded the case to its own trial division for proceedings on the merits. In the area of timeliness of appeal, the Court of Claims is certainly of the opinion that the failure of the administrative boards to exercise discretion in the first instance, without court order, is an arbitrary act and possibly a breach of the Disputes Clause as interpreted by the Court of Claims. However, the similarity as to breach ends there; just because an administrative board interprets the 30-day time limit as jurisdictional does not lead to a finding that the administrative board can not reach a fair decision on the merits when so directed. So although contractors might reasonably expect a sympathetic ear at the Court of Claims on the timeliness issue, the Court of Claims is unlikely to sustain an allegation of breach of contract based on the failure of an administrative board to exercise discretion on its own volition as to timeliness.

A third question is by what standard will the Court of Claims review the exercise of discretion that it may direct administrative boards to exercise? The answer as set out in *Monroe Tapper v. United States*, __ Ct. Cl. __ (19 Mar 75), is that the Court of Claims will review allegations of abuse of discretion under standards of the Wunderlich Act, 41 U.S.C. §§321-322, requiring that an administrative decision not be fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In *Tapper*, the decision of the Postal Board on the timeliness issue was found to be arbitrary and the case was remanded to the Postal Board for a *de novo* hearing on the merits of Tapper's appeal.

In summary, the ASBCA has been little influenced by *Maney*. Thirty days still means 30 days unless a court order from the Court of Claims directs the ASBCA to exercise discretion. Following Wunderlich Act standards, abuse of discretion by an administrative board will lead to remand by the Court of Claims to the board for a hearing on the merits. The conflict between the ASBCA and the Court of Claims on the interpretation of the 30-day time limit could lead to a Supreme Court decision.

Reserve Affairs Items

From: Reserve Affairs, TJAGSA

1. Reserve JA's Participate in Medical Legal Conference. On Sunday, 4 May 1975, a number of Reserve Component Judge Advocate General's Corps officers participated in the preparation and presentation of the 44th General Hospital's Spring Medical-Legal Conference held at the USAR Center in Madison, Wisconsin. Lieutenant Colonel Lyle E. Strahan, JAGC, USAR, Staff Judge Advocate of the 633d Direct Support Group, was co-chairman of the conference along with Lieutenant Colonel James H. Bradenburg, Medical Corps, United States Army Reserve. Lieutenant Colonel Roy Moscato, SJA of the 86th Army Reserve Command, Captain Tom Olsen, Commander of the 93d JAG Detachment, Lieutenant Colonel Dean Massey, Commander of the 98th JAG Detachment, and First Lieutenant Norman Jeddello, Legal Officer of 308th Civil Affairs Group, presented various programs on the legal implications involving malpractice and military medicine. The conference provided a unique opportunity for doctors and lawyers to combine their professional resources to identify and resolve problems affecting both fields.

2. TJAGSA—Schedule of Continuing Legal Education (Reserve Component Personnel)

Number	*Title*	*Dates*	*Length*
	Reserve Component Training JAGSO Teams	2 Jun 75–13 Jun 75	2 wks
5F–F30	1st Military Justice I Crs	16 Jun 75–27 Jun 75	2 wks
	USAR School (Civil	7 Jul 75–18 Jul 75	2 wks
7A–713A	5th Law Office Management Crs	22 Sep 75–26 Sep 75	4½ days
5F–F2	3d Reserve Senior Officer Legal Orientation Crs	20 Oct 75–23 Oct 75	3½ days
5F–F10	64th Procurement Attorneys' Advanced Crs	10 Nov 75–21 Nov 75	2 wks
5F–F11	6th Procurement Attorneys' Advanced Crs	5 Jan 76–16 Jan 76	2 wks
512–71D20/50	3d Military Lawyer's Assistant Crs (Criminal Law)	19 Jan 76–23 Jan 76	4½ days
512–71D20/50	4th Military Lawyer's Assistant Crs (Legal Assistance)	19 Jan 76–23 Jan 76	4½ days
5F–F10	65th Procurement Attorneys' Crs	8 Mar 76–19 Mar 76	2 wks
5F–F10	66th Procurement Attorneys' Crs	26 Apr 76–14 May 76	2 wks
5F–F31	1st Military Justice II Crs	21 Jun 76–2 Jul 76	2 wks
5F–F20	1st Military Administrative Law Crs	21 Jun 76–2 Jul 76	2 wks
	USA Reserve School BOAC and CGSC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction)	11 Jul 76–24 Jul 76	2 wks

TJAGSA Resident Courses for Reserve Officers 1975–76

TJAGSA will offer a variety of resident instruction in Academic Year 1975-76. These resident courses will provide continued legal education to judge advocates and advanced training for judge advocates of the Reserve Components.

Students enrolled in the JA Officer Advanced Course (USAR School or correspondence course) will have the opportunity to complete portions of that program's requirements by attending resident instruction in Phases II, IV, and VI at the Judge Advocate General's School. The following courses will be offered:

Military Justice II (5F-F31, 24 May –4 June 76) is a new course offered for the first time. It is designed to provide a working knowledge of the duties and responsibilities of field grade JA officers in connection with pretrail procedure, trial procedure, post trial procedures and review, and appellate review. This course fulfills one-half of the requirements of Phase II of the nonresident/resident Advanced Course and includes one-half of the material presented in the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase II. Equivalent credit is given for JA 133, 134, 135, and 136.

There are three Procurement Attorneys' Courses (5F-F10, 64th–1-12 Dec 75; 65th–8-19 Mar 76; and 66th—26 Apr–7 May 76) offered in 75–76. Completion of any of these courses fulfills one-half of the requirements of Phase VI of the nonresident/resident Judge Advocate Advanced Course (JA 112, 113, 114) and covers one-half of the material presented in the USAR School Judge Advocate Advanced Course (BOAC) ADT Phase VI. The course consists of basic instruction in the legal aspects of government procurement at the installation level, including the authority of the government and its personnel to enter into contracts, contract performance, and contract appeals. Substantially the same material may be obtained in half the time at the USAR School to be held at TJAGSA 6–19 Jun 76. Open to all reserve component officers, the USAR School will give all of Phase VI, BOAC which, in addition to

the above procurement courses, also includes International Law (JA 141, 142, and 143).

The Administrative and Civil Law Division has revised its resident/nonresident courses to parallel the instruction offered in the Judge Advocate Officer resident advanced Course. Military Administrative Law (5F-F20, 21 Jun – 2 Jul 76) is designed to fulfill one-half of the requirements of Phase IV of resident/ nonresident Judge Advocate Officer Advanced Course. This two-week course is in two phases: (1) Phase I—Judicial Review of Military Activities and Military Personnel Law (a revision of subjects formerly offered in Civil Law II, Phase I), and (2) Phase II—Legal Basis of Command (Command of Installation, Freedom of Information, Military Assistance to Law Enforcement and Environmental Law) (a revision of subjects formerly offered in Civil Law I, Phase I). Students may attend either or both weeks. It should be noted that correspondence subcourses of Phase IV are in the process of revision by the Administrative and Civil Law Division. Upon completion of this revision a table will be published, describing the correlation of the subjects offered in the resident Judge Advocate Officer Advanced Course, the BOAC Program, and the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase IV.

The 19th International Law Course (5F-F3, 21 Jul–1 Aug 75) is designed to provide attorneys with a general knowledge of the interpretation and application of international law. The course covers JA 141 and 143. As stated earlier, this material and instruction equivalent to JA 142 will be covered in the USAR School to be held at TJAGSA in June 1976.

The Senior Reserve Officer Legal Orientation Course (5F-F2, 20–30 Oct 75) is designed to acquaint reserve component commander of brigades and comparable units, and commanders and principal staff officers of higher units, with installation and unit legal problems encountered in both the criminal and admin law fields. The same type of information is provided to active duty officers in the four Senior Officer Legal Orientations conducted annually. For officers unable to attend a Senior Officer Legal Orientation Course in residence, a nonresident correspondence version is available, too.

Conferences.

Three conferences are also scheduled. These are the Annual Judge Advocate General's Conference (13–17 Oct 75) for active duty JA's, the Reserve Conference (3–6 Dec 75), and the National Guard Conference (7–10 Mar 76). Conferences are for senior legal officers in each category.

Inquiries concerning these courses should be directed to Commandant, The Judge Advocate General's School, U.S. Army, ATTN: Academic Department, Charlottesville, Virginia 22901.

Legal Assistance Items

By: Captain Mack Borgen, Administrative and Civil Law Division, TJAGSA

1. Items of Interest.

Civilian Indebtedness—Commanders' Form Letters. In accordance with AR 600-15, "Indebtedness of Military Personnel," 11 February 1970, a commander is required in most instances to acknowledge the receipt of correspondence from a creditor alleging the "nonpayment of a just debt" by a member of the command. Pursuant to Interim Change to AR 600-15 (Change 2) (31 April 1975) an Appendix E is added to that regulation. The appendix consists of a number of standardized form letters which may be used by a commander in responding to a creditor complaint. *But see,* Sec. K, Ch. 9, DA Pam 27-12 (Regarding state creditors' communications statutes which limit the creditor's right to communicate directly with the employer-commander in attempts to force debtors to pay their [alleged] obligations."). [Ref: Ch. 9, DA Pam 27-12].

Estate Planning—Survivor Benefit Plan. Until 1972 the Retired Serviceman's Family Protection Plan, 10 U.S.C.A. §1431, *et. seq.*, was the basic annuity plan offered for the survivors of retired military personnel. For a number of reasons such as the relatively high cost of the plan and, relatedly, the low "participation" in the plan (approximately 12–18 percent), the RSFPP was replaced by the Survivor Benefit Plan (SBP), 10 U.S.C.A. §1447, *et. seq.*, in September, 1972. The annuities under the SBP are purchased via retired pay deductions and may provide an amount equal to 55 percent of the deceased's full retirement pay. The exact cost of the annuity is a function of the beneficiary option selected by the retired member (spouse only, spouse and dependent child (ren), dependent child(ren), and in certain instances, a "natural person with an insurable interest"). The SBP is somewhat complicated and has been the source of considerable comment and continuing legislative refinement, however the "participation" in the plan is much higher than under the old RSFPP. It was recently reported that approximately 50–60 percent of those eligible do purchase annuities under the SBP. Participation appears to be considerably higher among officers (approximately 75 percent) than among enlisted personnel. Although the SBP can be an excellent estate planning tool, it must be recognized that it is not appropriate in all situations. A new regulation, AR 608-9, "The Survivor Benefit Plan," 24 March 1975, has recently been promulgated. It is hoped that the new regulation will be extremely useful in answering questions and rendering guidance relating to the annuity plan. [Ref: Chs. 13, 15 DA Pam 27-12].

Legal Assistance Program—Enlisted Personnel Survey Results. Several questions regarding the military legal assistance program were included in a recent MILPERCEN Quarterly Samply Survey of Military Personnel. The results of the survey and a brief analysis of the data are as follows:

1. *Question:* How many times in the last five years have you or any of your dependents visited the Legal Assistance Office for aid or advice?

Sampling:	*Total*	*E1-E4*	*E5-E9*
	5537	2172	3365
Data:			
A. Never	53%	33%	65%
B. One time	20%	25%	16%
C. Two times	12%	18%	9%
D. 3-5 times	11%	19%	6%
E. More than 5 times	4%	6%	3%

Analysis: Nearly one-half of the surveyed enlisted personnel had visited the Legal Assistance Office for aid or advice during the previous five years. Lower-ranking enlisted personnel have or perceive a need for personal legal services more frequently than persons in the E5-E9 grades. Alternatively, this could indicate that senior enlisted personnel are "substituting" civilian counsel for the military LAO, however, as will be seen below, very few enlisted personnel of any grade hire civilian counsel. It may be significant that nearly 7 out of 10 E1-E4's had used the legal services and more than 4 of 10 had used the Legal Assistd ance Office more than once. The potential significance here is the fact that for many, if not most, enlisted personnel the JAG Officer is first met in his role as a LAO. The EM's first impression of the JAG Office may, to a certain extent, be based upon this interview. [*Note:* Of course JAG Officers also serve in instructional or representative roles (*e.g.* law of war, military justice), however it is this LAO who most frequently meets the individual in an attorney-client relationship]

Question: The last time you visited the Legal Assistance Office, in which area did you seek help?

Sampling:	*Total*	*E1-E4*	*E5-E9*
	5542	2169	3373
Data:			
Subject		*E1-E4*	*E5-E9*
Power of Attorney		31%	22%
Wills		10%	9%
Divorce/Separation		9%	7%
Income Taxation		5%	7%
Personal Finance/Indebtedness		4%	6%
Immigration and Naturalization		3%	3%
Credit Contracts		3%	4%*
Landlord-Tenant Problems		3%	4%*
Purchase or Sale of Home		3%	1%*
Other Civil Matters		29%	38%**

* Although generally it appears that E1-E4's have very similar legal problems to those of E5-E9's, the order of frequency of certain subjects is not exactly the same.

** Not equal to 100% due to rounding.

Analysis: This caseload distribution is very similar to the 1972 data for the Army legal assistance program. That data, listed below, is based upon the then-required reporting system and includes both Enlisted and Officer Clients.

Subject Matter	*Percentage*
Family Law	15%
Adoption and Change of Name (2%)	
Domestic Relations and Paternity (10%)	
Non-support (3%)	
Power of Attorney	13%
Personal Finance and Debts	12%
Taxation	8%
Wills and Estates	8%
Personal Property, Automobiles, etc.	8%
Real Property, Sales, Leases	4%
Citizenship and Naturalization	4%
Torts	3%
Civil Rights	1%
Miscellaneous	23%
	[1%=12,658 cases]

In both sets of data the "miscellaneous" category could include a very broad range of subjects such as small claims court inquiries, consumer protection problems, emergency assistance requests, POW/MIA assistance, and so forth.

3. *Question:* How many times in the last five years have you or one of your dependents hired a civilian attorney instead of using the Army Legal Assistance Officer?

Sampling:	*Total* 4942	*E1-E4* 2036	*E5-E9* 2906
Data:			
Never hired a civilian attorney	76%	72%	79%
One time	16%	19%	13%
Two times	5%	6%	5%
Three to five times	2%	2%	3%
More than five times	1%	1%	1%

Analysis: Based upon this data it appears that enlisted military personnel very rarely hire civilian counsel for their personal legal problems. There are structural and analytical problems with this question, but it appears that civilian attorneys are infrequently retained. This could be a result of the relative unavailability of civilian attorneys, prohibitive cost, the "military-related nature" of the legal problem, or the general unfamiliarity with the use and retention of attorneys by low and middle-income families.

4. *Question:* How satisfied are you with the service you received in the legal matter you indicated above in Question?

Sampling:	*Total* 2695	*E1-E4* 1530	*E5-E9* 1165
Data:			
Very Satisfied	43%	53%	31%
Satisfied	37%	34%	41%
Unsatisfied	11%	7%	15%
Very Unsatisfied	9%	6%	13%

Analysis: Although there is, and always will be, great room for improvement in the quality and efficiency of legal services rendered by the military legal assistance program, there appears to be a relatively high degree of client satisfaction. Nearly four of five persons using legal assistance services responded that the services they received were either "very satisfactory" or "unsatisfactory."

The meaningfulness of surveys such as the one discussed above does of course turn upon many factors such as the size and representative accuracy of the sampling and the clarity and neutral phraseology of the questions and alternative responses, but it is hoped that this data reflect in part the potential significance, the nature of the practice, and the quality of services being rendered under the military legal assistance program. This information is based upon raw data which is presently being further reviewed and analyzed by MILPERCEN survey technicians in preparation for subsequent publication of a final report. [Ref: Ch. 1, DA Pam 27-12].

Army Community Service Program–Personal Commercial Affairs. Pursuant to a recent revision of AR 608-1, "Army Community Service Program," (Effective 1 July 1975), the program has been "revised to include personal commercial affairs as one of its basic services." The services should include "[at] a minimum (subject to installation/command capabilities), consumer education and information, budget counseling, debt prevention classes and seminars, and liquidation services." *See*, DA Cir. 608-52, "Personal Commercial Affairs," 1 April 1975. [Ref: Part 6, DA Pam 27-12].

2. Articles and Publications of Interest.

Consumer Affairs—Handbook. Department of the Army Pamphlet 608-3, *Your Consumer*

Affairs Handbook, 1 June 1975. This DA Pamphlet is designed as a "supplement . . . to assist members of the installation Army Community Service staff in obtaining information on ways to assist service members in protecting their personal welfare, finances, and economic well-being." Of particular interest to Legal Assistance Officers is that a list of state and local consumer affairs offices (name/address/phone numbers) and of state insurance commissioners is included as an appendix to the publication.[Cross-reference: *See* Items of Interest, "Army Community Service Program—Personal Commercial Affairs," *supra*] (Ref: Ch. 6, DA Pam 27-12].

Military MIA Status Determinations.— "Administrative Law—Due Process for Dependents in Military MIA Status Determinations," 12 J. FAMILY L. 860 (1973–1974). [Ref: Ch. 46, DA Pam 27–12].

Returned Prisoners of War and Missing in Action—Family Legal Problems. Stewart, "Legal Problems of the Returned Prisoners of War and of the Families of Those Still Missing In Action," 6 U.W.L.A.L. REV. 22 (Winter, 1974). [Ref: Ch. 46, DA Pam 27–12].

Veterans' Benefits—Veterans' Administration—Preclusion of Judicial Review. Rabin, "Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis," 27 STAN. L. REV. 905 (Feb., 1975). Many military-related emoluments are administered by the Veterans Administration and are based upon "administrative determinations" by that agency. Professor Rabin in a very fine article analyzes the procedures and practices of the Veterans Administration, and then he focuses upon the fact that the "VA stands in splendid isolation as the single federal administrative agency whose major functions are expressly insulated from judicial review."[38 U.S.C. §211(a)(1970)]. Professor Rabin argues, albeit based upon a "tentative appraisal," that the "case for access to court seams strong—sufficiently strong to case a long shadow over the preclusion statute." *Id.*, at 923.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Determination of Maximum Punishments. In a 28 March 1975 memorandum for trial judges, Subject: Determination of Maximum Punishments, the Chief of the Trial Judiciary provided judges with useful information regarding maximum punishments for offenses not listed in the *MCM*'s Table of Maximum Punishments. As the information contained in that memorandum may be of substantial benefit to counsel and SJA's as well as to judges, the body of the memorandum is reprinted below *in haec verba*.

1. A number of cases received for appellate review reveal a misunderstanding or neglect of the rule of paragraph 127c(1), *Manual for Courts-Martial, United States, 1969 (Revised edition)*:

> "Offenses not listed in the table [of maximum punishments] and not included within an offense listed, or not closely related to either, are punishable as authorized by the United States Code (see, generally, Table 18) or the Code of the District of Columbia, whichever prescribed punishment is the lesser. . ."

When an offense is charged under the "crimes and offenses not capital" clause of Article 134, UCMJ, and its nature requires examining beyond the table of maximum punishments, one cannot end his research by finding a prescribed punishment in the United States Code. The next steps must be taken: namely, to search the District of Columbia Code to ascertain whether a punishment for the offense is prescribed there; if it is, to compare the U.S. Code and D.C. Code provisions; and to select the lesser. *See* United States v. Picotte, 12 USCMA 196, 30 CMR 196 (1961); United States v. Almendarez, 46 CMR 814 (ACMR), pet. denied, 46 CMR 1323 (1972).

2. Failure to complete the process described above occurs most often in drug cases. Misuse and abuse of "dangerous drugs" are not punishable by equation to marijuana or habit-forming narcotic drugs, for which entries appear in the table. *See* United States v. Turner, 18 USCMA 55, 39 CMR 55 (1968). Rather, resort must be made to the U.S. Code and D.C. Code. *See* United States v. Towns, 22 USCMA 600, 48 CMR 224 (1974); United States v. Correa, 47 CMR 672 (ACMR 1973). A number of dangerous drug offenses are denounced in §33-701 through 33-712, D.C. Code. Some dangerous drugs are defined in S33-701 itself; others have been added pursuant to §33-701(1) (c). The latter, which were published in the D.C. Register of 6 January 1975, are:

Methaqualone
Phencyclidine (Angel Dust)
Methyphenidate (Ritalin)
Phenmetrazine (Preludin)
Lysergic Acid Diethylamide (LSD)

To apply paragraph 127*c*(1), *MCM*, correctly in drug cases, military judges must therefore be as familiar with the D.C. Code and the list of dangerous drugs within its provisions as with 21 USC§801 *et. seq.*

3. In addition to assuring that their own determinations of maximum punishment are correct, military judges must be alert to the issues which arise when a convening authority or accused or both are mistaken as to the maximum punishment. United States v. Towns, *supra*, is an example (improvident plea of guilty).

4. The process described above does not apply when a drug offense is charged under Article 92, UCMJ. *See* United States v. Ross, 47 CMR 55 (ACMR), pet. denied, 48 CMR 1000 (1973).

2. Backup Recording systems For Verbatim Transcriptions. All staff judge advocates are reminded that USCMA has held that a reconstructed record is not verbatim within the meaning of Article 54, UCMJ. *United States v. Weber*, 20 USCMA 82, 42 CMR 274 (1970); *U.S. v. Webb*, CM 430177 (28 February 1975).

As equipment failure is the primary cause for failure to have a complete record, caution would dictate that back-up recording systems be used in all BCD special and general courts-martial. In using such back-up systems, it is suggested that consideration be given to retaining the recordings at least until the record of trial has been authenticated.

3. DA Form 20B Replaced. DA Form 20B (insert sheet to DA Form 20—Record of Court-Martial Convictions) is being replaced by DA Form 2-2 (insert sheet to DA Form 2—Record of Court-Martial Conviction). The new form and Change 1 to AR 640-2-1 set forth the specific entries to be made after publication of the initial promulgating orders, completion of supervisory review, and any supplementary actions which affect the case.

Upon receipt of DA Form 2-2, use of DA Form 20B will no longer be authorized. Data as to previous court-martial convictions already entered on DA Form 20B's need not be transcribed to the new DA Form 2-2. Completion of data on a case already entered on a DA Form 20B should be effected on the DA Form 20B. Entries of court-martial convictions, after receipt of the DA Form 2-2, should be made on DA Form 2-2 and not on an existing DA Form 20B in an individual's records.

Changes in AR 27-10 necessitated by the adoption of DA Form 2-2 will be included in a future change to that regulation.

4. Dilatory Tactics By Defense Counsel. The cornerstone of any profession is the self-regulation of its members and their adherence to the principles of that profession. The lack of self-discipline leads to the loss of public confidence and possibly to external regulation.

Lawyers are expected to abide by the ethics of their profession. Paragraph 2-32, AR 27-10, states that the Code of Judicial Conduct and the Code of Professional Responsibility of the American Bar Association are applicable to judges and lawyers involved in court-martial proceedings in the Army. Chapter 4, AR 27-10, outlines the procedures for the suspension of counsel who violate these principles.

In recent months, there has been much criticism regarding the use of dilatory tactics by defense counsel. These are most common in overseas areas where delay may result in the government's inability to produce necessary witnesses due to personnel rotation policies.

In the defense of his client, counsel may seek a continuance when he honestly believes that more time is needed in which to prepare his case. However, to delay a trial for the sole purpose of making it more difficult for the Government to bring the case to trial or the accused to be able to present his defense can result only in a loss of respect for our judicial processes and ultimate injury to those involved in those processes. Such tactics must be exposed and vigorously resisted by the opponent counsel. This is his obligation in an advisary system. The opponent counsel must bring to the military judge's attention, in a manner which is not *ex parte* any frivolous or dilatory tactics not noted by the judge *sua sponte*. Then the judge is in a position to discharge the responsibilities contemplated by Canon 3A(5), Code of Judicial Conduct and its commentary.

5. Review of Summary and Special Court-Martial Records UP Article 65c. The U.S. Army Judiciary has found in reviewing applications for relief under the provisions of Article 69, UCMJ that many of the rubber stamp impressions on records of trial and court-martial promulgating orders are out-dated and do not contain the proper language. In an effort to improve and standardize stamps used in Article 65(c) reviews, all staff judge advocates are urged to adopt the formats shown below in all future Article 65(c) reviews. The name of the officer reviewing the file should be typed or stamped beneath his signature.

Suggested Forms to Reflect Supervisory Review of Summary and Special Court-Martial Records of Trials

Hq—————— Office of SJA —————— This record of trial has been examined and the findings and sentence, as approved by convening authority, are correct in law and fact. —— —————— (date) JAGC	Hq—————— Office of SJA —————— This record of trial has been examined and the findings and sentence, as modified or corrected, are correct in law and fact. See (SCMO) (SPCMO) No.——— this hq, dtd ————, attached hereto. —— —————— (date) JAGC

Suggested Forms to Reflect Supervisory Review of Summary and Special Court-Martial Records of Trials

Hq—————— Office of SJA —————— This record of trial has been examined. The (findings) (sentence) (findings & sentence) are not correct in law and fact and are set aside. See (SCMO) (SPCMO) No. ——— this hq, dtd ———, attached hereto. —— —————— (date) JAGC	Hq—————— Office of SJA —————— This record of trial, which resulted in acquittal ( ) has been reviewed for jurisdiction pursuant to Article 65 (c). The court had jurisdiction over the person(s) and offense(s). —— —————— (date) JAGC

Procurement Law Notes

From: Procurement Law Division, OTJAG

TJAG Assumes New Responsibilities in Area of Mistake in Bids and Protests Against Awards. Under new procedures, effective 28 April 1975, The Judge Advocate General will assume certain responsibilities in the area of mistake in bids and protests against awards which prior to the foregoing date were the responsibility of the Assistant Secretary of the Army (I&L).

Procurement Information Letter 75-1, dated 28 April 1975 announces the new procedures and in this regard states in part:

"2. In accordance with Army Procurement Procedure 2-406.3, 2-406.4 and 2-407.8, the Deputy for Materiel Acquisition, Office of the Assistant Secretary of the Army, Installations and Logistics, has exercised

certain authorities with respect to the subject procedures. As the result of restructuring of the Office of the Deputy for Materiel Acquisition, some of these authorities will be performed hereafter by the Chief, Procurement Law Division, Office of The Judge Advocate General.

"3. Concerning mistakes in bids, the list of delegates in ASPR 2-406.3(b)(1) has been revised to add 'Chief, Procurement Law Division, Office of The Judge Advocate General, Headquarters, Department of the Army.' Pending publication of new procedures in a forthcoming Procurement Information Circular, cases of mistakes in bids heretofore handled by the Office of the Assistant Secretary of the Army (Installations and Logistics) under APP 2-406.3 and 2-406.4 will be forwarded to the Office of The Judge Advocate General for action.

"4. New procedures for processing protests will also be published in the near future. In the meanwhile, the following procedures will apply with respect to offices at the level of the HPA:

"a. Copies of documents specified in APP 2-407.8(d) (iii) will no longer be submitted to ASA (I&L).

"b. HPAs subject to the procedures in APP 2-407.8 (d) (iv) will forward cases to Chief, Procurement Law Division, Office of The Judge Advocate General (DAJA-PL), HW, DA, Washington, D.C. 20310 vice ASA (I&L).

"c. APP 2-407.8(h) is being changed to reflect the following: When a protest is filed with the Comptroller General, he will notify the General Counsel, HQ, AMC: General Counsel, COE: or Chief, Procurement Law Division OTJAG, HQ, DA, as appropriate. These offices will, in turn, notify the cognizant HPA or Engineer District or Division who will notify the contracting officer."

Mistakes in bids cases and protests against awards cases under the cognizance of The Judge Advocate General under the above procedures shall be forwarded by cognizant Heads of Procuring Activities directly to HQ, DA (DAJA-PL) Washington, D.C. 20310.

CLE News

1. CLE Calendar.

JUNE

Delaware State Bar Association, annual meeting, Wilmington Country Club, Wilmington, DE.

Idaho State Bar, annual meeting, Vancouver, B.C., Canada.

Montana Bar Association, annual meeting, Bozeman, MT.

The District of Columbia Bar, annual meeting, Washington, DC.

2: Connecticut Bar Association, midyear meeting, Hartford, CT.

2-3: New York State Office of Prosecutorial Services, Seminar on Trial Tactics, Hilton Inn, North Syracuse, NY.

2–4: Americans for Effective Law Enforcement Workshop on Police Civil Liability and Defense of Citizen Misconduct Complaints, Jack Tar Hotel, San Francisco, CA.

2–4: Mississippi State Bar, annual meeting, Biloxi, MS.

4–6: State Bar of Georgia, annual meeting, Savannah, GA.

4–7: Arkansas Bar Association, annual meeting, Arlington Hotel, Hot Springs, AR.

8–10: American Society of Law & Medicine, National Conference on the Medicolegal Implications of Emergency Medical Care, Statler Hilton Hotel, Washington, DC

10–14: American Academy of Legal Assistants, National Seminar, Sheraton Motor Inn. Aberdeen, SD.

11–13: Tennessee Bar Association, annual meeting, Four Seasons Motel, Gatlinburg, TN.

12–14: State Bar of South Dakota, annual meeting, Aberdeen, SD.

12–15: Massachusetts Bar Association, annual meeting, Wentworth-By-The-Sea, Portsmouth, NH.

15–18: 22d National Institute on Crime and Delinquency, Minneapolis, MN

15–20: U.S. Civil Service Commission CLE Program, Administrative Law Judges and the Regulatory Process, Williamsburg, VA.

15–27: National College of District Attorneys Course, Executive prosecutor Course, Houston, TX.

June 15–July 4: National Institute for Trial Advocacy, First National Session, 1975, Boulder, CO.

June 15–July 11: National College of the State Judiciary, Regular Four Week Session (session I), Judicial College Building, University of Nevada, Reno, NV.

16–20: Institute on the Physical Significance of Bloodstain Evidence, Elmira College, Elmira, NY.

17–19: State Bar of Wisconsin, Annual meeting, Lakelawn Lodge, Delavan, WI.

18–20: Minnesota State Bar Association, annual meeting, St. Paul Hilton, St. Paul, MN.

18–20: State Bar Association of North Dakota, annual meeting, Jamestown, ND.

18–21: The Florida Bar, annual meeting, Boca Raton Hotel & Country Club, Boca Raton, FL.

18–21: Utah State Bar, annual meeting, Hilton Hotel, Salt Lake City, UT.

19–21: Iowa State Bar Association, annual meeting, Des Moines, IA.

19–21: Maine State Bar Association, annual meeting, Samoset Treadway Resort, Rockport, ME.

20–21: Virginia State Bar, annual meeting, Marriott Twin Bridge, Arlington, VA.

23–24: PLI Workshop, Legal Problems of Correctional, Mental Health and Juvenile Detention Facilities, Ambassador Hotel, Chicago, IL.

23–25: PLI Workshop, Preparation of Federal Estate Tax Returns, Brown Palace, Denver, CO.

23–28: American University Center for the Administration of Justice, Institute for Leadership and Organizational Development, Washington, D.C.

25–28: Alaska Bar Association, annual meeting, Vancouver, B.C., Canada.

26–27: PLI Program, Land Use and Environmental Regulations, SMU School of Law, Dallas, TX.

27–28: New Hampshire Bar Association, annual meeting, Mt. Washington Hotel, Bretton Woods, NH.

June 29–July 11: National College of the State Judiciary, Regular Two Week Session (session I), Judicial College Building, University of Nevada, Reno, NV.

June 29–July 13: American University Center for the Administration of Justice, International Institute on Corrections, Washington, DC

June 30–July 1: PLI Program, "Practical Will Drafting," Benson Hotel, Reno, NV.

June 30–July 3: State Bar of Texas, annual meeting, Dallas, TX.

JULY

6–25: National College of District Attorneys Course , Career Prosecutor Course, Houston, TX.

8–10: U.S. Civil Service Commission CLE Program, Management Seminar for Chief Administrative Law Judges, Washington, DC.

7–12: Northwestern University Short Course for Defense Lawyers, Northwestern University School of Law, Chicago, IL.

10–11: PLI workshop, Preparation of US Fiduciary Income Tax Return, Delmonico Hotel, New York, NY.

13–19: Association of Trial Lawyers of America Presentation, The National College of Advocacy, University of Southern California, Los Angeles, CA.

July 13–Aug 1: National Institute for Trial Advocacy, Second National Session, 1975, Boulder, CO.

16–17: U.S. Civil Service Commission CLE Program, Freedom of Information/Privacy Acts Seminar, Washington, DC.

18–19: PLI Workshop, Legal Problems of Correctional, Mental Health and Juvenile Detention, Los Angeles Hilton, Los Angeles, CA.

July 20–Aug 1: National College of the State Judiciary, Graduate Session in New Trends in the Law, the Trial and Public Understanding, Judicial College Building, University of Nevada, Reno, NV.

July 20–Aug 15: National College of the State Judiciary, Regular Four Week Session (session II), Judicial College Building, University of Nevada, Reno, NV.

21–25: Fourth Annual Institute of Law Office Administration, presented by Institute of Continuing Legal Education, Ann Arbor, Michigan, and Continuing Legal Education, Minneapolis, Minnesota, Marquette Inn. Minneapolis, MN.

23–25: PLI Workshop, Preparation of Federal Estate Tax Returns, Delmonico Hotel, New York, NY.

23–27: Judicial Conference of Tenth US Circuit Court of Appeals, Santa Fe Hilton, Santa Fe, NM.

24–26: The Lawyer's Assistant: PLI Workshop for the Law Office Administrator, Paraprofessional and Secretary, Los Angeles Hilton Hotel, Los Angeles, CA.

28–29: PLI Workshop, Discovery Techniques, Delmonico Hotel, New York, NY.

29–31: U.S. Civil Service Commission CLE Program, Seminar for Attorney Managers, Washington, DC.

July 30–Aug 1: PLI Annual Prosecutor's Workshop, St. Regis Sheraton Hotel, New York, NY.

31: Virginia Bar Association, midyear meeting, Greenbrier Hotel, White Sulphur Springs, WV.

July 31–Aug 1: PLI Workshop, Preparation of U.S. Partnership Income Tax Return, Sir Francis Drake Hotel, San Francisco, CA.

AUGUST

3–8: National College of District Attorneys Course, Prosecutor Intern Course, Houston, TX.

3–15: National College of the State Judiciary, Regular Two Week Session (Session II), Judicial College Building, University of Nevada, Reno, Nev.

4–9: Northwestern University Short Course for Prosecuting Attorneys, Northwestern University School of Law, Chicago, IL.

7–8: PLI Program, Practical Will Drafting, Americana Hotel, New York, NY.

7–14: ABA Annual Meeting, Montreal, Canada.

8–10: National Association of Women Lawyers, annual meeting, Montreal, Canada.

11–12: PLI Workshop, Preparation of US Fiduciary Income Tax Return, Hyatt Regency Hotel, Los Angeles, CA.

14–15: PLI Program, Land Use and Environmental Regulations, Stanford Court Hotel, San Francisco, CA.

14–16: The Lawyer's Assistant: PLI Workshop for the Law Office Administrator, Paraprofessional and Secretary, Barbizon Plaza Hotel, New York, NY.

15–23: National Institute for Trial Advocacy, Northeast Regional Session, Part One, Cornell Law School, Ithaca, NY.

17–23: Association of Trial Lawyers of America, National College of Advocacy, Roscoe Pound Building, Cambridge, MA.

17-24: National Institute for Trial Advocacy, Southeast Regional Session, Part One, University of North Carolina, Chapel Hill, NC.

18-20: PLI Annual Prosecutor's Workshop, Sir Francis Drake Hotel, San Francisco, CA.

28-30: West Virginia Bar Association, annual meeting, Greenbrier Hotel, White Sulphur Springs, WV.

TJAGSA—Schedule of Continuing Legal Education (Active Duty Personnel)

Number *Title* *Dates* *Length*

Number	*Title*	*Dates*	*Length*
5F-F1	1st Trial Attorneys' Crs	23 Jun 75-27 Jun 75	1 wk
5F-F8	21st Senior Officer Legal Orientation Crs	30 Jun 75-3 Jul 75	3½ days
5F-F9	14th Military Judge Crs	14 Jul 75-1 Aug 75	3 wks
5F-F3	19th International Law Crs	21 Jul 75-1 Aug 75	2 wks
5F-F11	63d Procurement Attorneys' Crs	28 Jul 75-8 Aug 75	2 wks
5F-F1	2d Management for Military Lawyers Crs	4 Aug 75-8 Aug 75	4½ days
7A-713A	5th Law Office Management Crs	22 Sep 75-26 Sep 75	4½ days
5F-F22	12th Federal Labor Relations Crs	29 Sep 75-3 Oct 75	5 days
5F-F23	3d Legal Assistance Crs	6 Oct 75-9 Oct 75	3½ days
5F-F1	22d Senior Officer Legal Orientation Crs	28 Oct 75-31 Oct 75	3½ days
5F-F10	64 Procurement Attorneys' Crs	10 Nov 75-21 Nov 75	2 wks
5F-F25	2d Military Administrative Law Developments Crs	8 Dec 75-11 Dec 75	3½ days
5F-F11	6th Procurement Attorneys' Advanced Crs	5 Jan 76-16 Jan 76	2 wks
5F-F27	3d Environmental Law Crs	12 Jan 76-15 Jan 76	3½ days
512-71D20/50	3d Military Lawyer's Assistant Crs (Criminal Law)	19 Jan 76-23 Jan 76	4½ days
512-71D20/20	4th Military Lawyer's Assistant Crs	19 Jan 76-23 Jan 76	4½ days
5F-F1	23d Senior Officer Legal Orientation Crs	26 Jan 76-29 Jan 76	3½ days
5F-F10	65th Procurement Attorneys' Crs	8 Mar 76-19 Mar 76	2 wks
5F-F1	24th Senior Officer Legal Orientation Crs	5 Apr 76-8 Apr 76	3½ days
5F-F10	66th Procurement Attorneys' Crs	26 Apr 76-7 May 76	2 wks
5F-F52	6th Staff Judge Advocate Orientation Crs	10 May 76-14 May 76	4½ days
5F-F24	1st Civil Rights Crs	17 May 76-20 May 76	3½ days
5F-F22	13th Federal Labor Relations Crs	24 May 76-28 May 76	5 days
5F-F32	2d Criminal Trial Advocacy	28 Jun 76-2 Jul 76	1 week
5F-F33	15th Military Judge Course	19 Jul 76-6 Aug 76	3 wks
5F-F1	25th Senior Officer Legal Orientation Crs	26 Jul 76-29 Jul 76	3½ days
5F-F51	3d Management for Military Lawyers Crs	9 Aug 76-13 Aug 76	4½days

JAG Personnel Section

From: PP&TO, OTJAG

1. Retirements. On behalf of the Corps, we offer our best wishes to the future to the following individuals who retired 30 April 1975:

Colonel Joseph C. Van Cleve, Jr
CW3 James A. Warfield
CW2 Byron L. Bailey

2. Orders requested as indicated:

COLONELS

Name	*From*	*To*
De FIORI, Victor	USALSA, Falls Church, Va	OTJAG
HARVEY, Alton H.	Stu Det, ICAF, Ft McNair, Wash	USALSA, Falls Church, Va
PECK, Darrell L.,	TJAGSA, Charlottesville, Va	Stu Det, AWC, Carlisle Bks, Pa

LIEUTENANT COLONELS

FONTANELLA, David A	OTJAG	Stu Det, ICAF, Ft McNair, Wa
HOLDAWAY, Ronald	USALSA, Falls Church, Va	OTJAG
La PLANT, Earl M.	2d Armored Div, Ft Hood, Tx	USALSO, w/sta Ft Hood, Tx
LYMBURNER, John	9th Inf Div, Ft Lewis, Wa	USA CID Agency, Wash DC
OVERHOLT, Hugh R	OTJAG	Stu Det, ICAF, Ft McNair, Wa
POYDASHEFF, Robert	USA Engr Center, Ft Belvoir, Va	Stu Det, AWC, Carlisle, Pa
SUBROWN, James	Infantry Center, Ft Benning, Ga	USAG, Ft Sheridan, Il

MAJORS

BADAMI, James A	OTJAG	USA Elm, OSD, Wash DC
BOZEMAN, John R	Stu Det w/sta Univ of Calif Berkely, Ca	OTJAG
BROOKSHIRE, Robert	1st Inf Div, Ft Riley, Ks	USA MP Sch, Ft McClellan, Al
CARMICHAEL, Harry	Stu Det, w/sta Geo Wash Univ	OTJAG
COLBY, Edward L	USALSA, Falls Church, Va	24th Adv Class, TJAGSA, Charlottesville
CREEKMORE, Joseph	OTJAG	Stu Det, USAC&GSC, Ft Leavenworth
DYGERT, George	Stu Det w/sta Univ of Va	S-F, TJAGSA, Charlottesville, Va
FELDER, Ned E	USALSA w-sta Ft Eustis, Va	USALSA, Falls Church, Va
FLEMMING, Herbert	HQ Ft Huachuca, Arizona	HQ EAMTMTS, Bayonne, N.J.
FOREMAN, LeRoy	USAG, Ft Hamilton, NY	Stu Det, USAC&GSC, Ft Leavenworth
GILLIGAN, Francis	S-F, TJAGSA, Charlottesville, Va	USA Sch Tng Cen, Ft McClellan, Al
HUNTER, Nancy A	S-F, TJAGSA, Charlottesville, Va	USALSO, w/sta Ft Ord, Ca
MALINOSKI, Joseph	OTJAG	Stu Det, USAC&GSC, Ft Leavenworth
McHUGH, Richard	Sch/Tng Cen, Ft McClellan, Al	Stu Det, USAC&GSC, Ft Leavenworth
NICHOLS, John J	USALSA, Falls Church, Va	24th Adv Cls, TJAGSA, Charlottesville
NUTT, Robert M	SAFEGUARD Cmd, Huntsville, Al	Stu Det, USAC&GSC, Ft Leavenworth
ROBERTS, Eldon	S-F, TJAGSA, Charlottesville, Va	24th Adv Cls, TJAGSA, Charlottesville

Name	From	To
SHERWOOD, John	Stu Det, w/sta Univ of Michigan	USALSA, Falls Church, Va
VAN BROEKHOVEN, Rollin	Stu Det, w/sta Geo Wash Univ	USALSA, Falls Church, Va
WATKINS, Charlie	USAG, Ft Stewart, Ga	S-F, USMA, West Point, NY
WHITE, Charles	S-F, TJAGSA, Charlottesville, Va	Stu Det, AFSC, Norfolk, Va
WOODWARD, Joe L	USALSA, w/sta Ft Meade, Md	USALSA, w/sta Ft Bragg, NC
	CAPTAINS	
ARTZER, Paul E	USA Combd Arms Cen, Ft Leavenworth	24th Adv Cls, TJAGSA, Charlottesville
BARRY, Bruce C	USA Security Agcy, Europe	Europe (VII Corps)
BARRY, Michael	USAG, Ft Ben Harrison, Indiana	OTJAG
BOWE, Thomas G	4th Inf Div, Ft Carson, Co	Europe
BOYNTON, Frederick	USALSA, Falls Church, Va	HQ, FORSCOM, Ft McPherson, Ga
BROWN, Patrick	4th Inf Div, Ft Carson, Co	24th Adv Cls, TJAGSA, Charlottesville
BROWN, Stanley	MACTHAI Sup Gp. Thailand	USA Avn Systems Cmd, St Louis, Mo
BRYANT, Edward	SAFEGUARD Cmd, Huntsville, Al	4th Inf Div, Ft Carson, Co
BURT, Thomas W	USA Medical Cmd, Europe	S-F, USMA, West Point, NY
CHERRY, Mack H	USALSA, Falls Church, Va	MACTHAI Sup Gp. Thailand
CHIMINELLO, Phillip	USA Comb Dev Exp Cen, Ft Ord, CA	USA Academy of Health Science Fort Sam Houston, Tx
COLLIER, Charles	QM Center, Ft Lee, Va	USA QM Sch, Ft Lee, Va
DENOOYER, LeRoy	Ft Leonard Wood, Mo	S-F, USMA, West Point, NY
EARL, James D	Def Lang Inst, Monterey, CA	Europe
FAGAN, Peter T	USA Crim Investigation Cmd, Wash DC	Stu Det, w/sta Geo Wash Univ
FOSTER, Paul L	HQ 1st Army, Ft Meade, Md	S-F, USMA, West Point, NY
GALE, Ronald E	MACTHAI, JUSMAG	Electronics Cmd, Ft Monmouth, NJ
GATES, Elmer A	USALSA, w/sta Ft Knox, Ky	24th Adv Cls, TJAGSA, Charlottesville
GRAHAM, David E	S-F, TJAGSA, Charlottesville, Va	Europe
HARROLD, Dennis	Korea	USA Admin Cen, Ft Ben Harrison, In
HEATH, James E	USALSA, Falls Church, Va	USA Admin Cen, Ft Ben Harrison, In
HEDICKE, Robert	Beaumont Gen Hosp, El Paso, Tx	4th Inf Div, Ft Carson, Co
HOPKINS, Gary L	Ofc of Def Sup Svc, Wash DC	24th Adv Cls, TJAGSA, Charlottesville
INGRAM, Allen R	Fitzsimons Gen Hosp, Denver, Co	USA Arsenal, Rocky Mt., Co
JACKSON, Robert	8th USA Area Cmd, Korea	HQ USA Combat Devel Exp Cmd, Fort Ord, Ca
LABOWITZ, Daniel	S-F, USMA, West Point, NY	Stu Det, Inst of Pathology, WRAMC
LAUBE, Garey L	Electronics Cmd, Ft Monmouth, NJ	24th Adv Cls, TJAGSA, Charlottesville
LEMBERGER, Jerome	Armor Cen, Ft Knox, Ky	USA Armor Sch, Ft Knox, Ky

Name	From	To
MARTIN, John B	USAG, Ft Riley, Ks	USA Aero Depot, Corpus Christi, Tx
MAXSE, Paul J	HQ FORSCOM, Ft McPherson, Ga	USA QM Cen, Ft Lee, Va
MOORE, Stephen	HQ MDW, Washington, DC	Def Lang Inst, Monterey, Ca
MORGAN, Donald	USA Depot, Corpus Christi, Tx	USAG, Ft Riley, Ks
MORGAN, Jack H	Korea	USA Combined Arms Cen, Ft. Leavenworth
MURDOCK, Henry	USA Sch/Tng, Ft McClellan, Al	USA Secty Agency, Europe
OSGARD, James L	USAG, Ft Meade, Md	S-F, USMA, West Point, NY
ROBERSON, Gary	Jt Casualty Resolution Cen, APO SF 96310	500th Mil Intel Gp, Ft Shafter, Hi
SAYLES, Jeffrey	USAG, Ft S. Houston, Tx	24th Adv Cls, TJAGSA, Charlottesville
SCHINASI, Lee D	Air Def Cen, Ft Bliss, Tx	USALSA, Falls Church, Va
SHARPHORN, Daniel	OTJAG	S-F, USMA, West Point, NY
SHORT, Daniel	OSD, Washington, DC	Inst of Pathology, WRAMC
SKLAR, David A	USAG, Pres of San Francisco	HQ III Corps, Ft Hood, Tx
TEELE, Arther E	2d Inf Div, Korea	HQ XVIII Abn Corps, Ft Bragg, NC
VISSERS, Christian	Armor Cen, Ft Knox, Ky	24th Adv Cls, TJAGSA, Charlottesville
WILLIAMS, Herbert	Inf Sch, Ft Benning, Ga	24th Adv Cls, TJAGSA, Charlottesville
YUSTAS, Vincent	Armor Center, Ft Knox, Ky	24th Adv Cls, TJAGSA, Charlottesville
ZUCKER, Karin W	USA Engr Cen, Ft Belvoir, Va	Inst of Pathology, WRAMC, DC

3. Promotions. Congratulations to the following officers who were promoted:

To LTC AUS
Raymond K. Wicker

To LTC RA
Wayne E. Alley
Thomas H. Davis
Joseph J. De Francesco
Alton H. Harvey
Edward A. Lassiter
Jack M. Marden
William P. McKay
James A. Mounts
William R. Mullins
James A. Mundt
Hugh R. Overholt
Robert S. Poydasheff
Simon Y. Rodriguez
Byron S. Spencer
Bruce E. Stevenson
Sebert L. Trail

From CW2 to CW3
Ray E. Rauschenberg

From E-8 to E-9
James H. Dawson
Duconz Hancock
Charles E. Pinkham
Selvyn I. Ritzberg
Hiroshi Takenaka
William Wooden
James M. Cunningham

4. General Officer Selection. Congratulations to the following officers selected for Brigadier General, AUS:

Victor A DeFiori
Joseph N. Tenhet, Jr.

5. Legal Clerk's Course. On 1 July 1974 (FY 75), the Legal Clerk Course at the Adjutant General's School, Fort Benjamin Harrison, Indiana, was extended from seven weeks, three days duration to nine weeks, four days. The extension of the course length was the result of the change in Army-wide clerical training wherein the clerical skills necessary in a particular MOS are now taught at the MOS-producing school and not, as in the past, at the various training centers. Therefore, as of 1 July 1974, the majority of Legal Clerk students enrolled were recent graduates of Basic Training possessing MOS 09B. Those clerical skills, including typing, essential to a legal clerk have been integrated into the expanded course.

The following prerequisites are outlined in DA Pam 351-4: member of the active Army or a Reserve component; standard score of 100 or higher in aptitude area CL; must have credit for two years high school level English; nine months or more of active duty service time remaining upon completion of the course; no record of military or civilian convictions for other than minor traffic offenses; and no security clearance required.

Furthermore, anyone in the field may apply for the Legal Clerk Course in the same manner as for any other service school. All SJA's should encourage applicants to attain basic typing proficiency through their local education center or otherwise prior to submitting a request to attend the Legal Clerk Course. This action will, in many cases, prevent the recycling of students and the attendant increase in expense and loss of manpower to the command concerned.

The present schedule for FY 76 is as follows:

Class No.	*Report*	*Close*	*Input*
501	2 Jul 75	11 Sep 75	47
1	6 Aug 75	16 Oct 75	47
2	10 Sep 75	20 Nov 75	47
3	7 Oct 75	18 Dec 75	47
4	7 Jan 76	17 Mar 76	47
5	11 Feb 76	21 Apr 76	47
6	18 Mar 76	26 May 76	47
7	21 Apr 76	30 Jun 76	47
8	26 May 76	4 Aug 76	47
502	6 Jun 76	12 Aug 76	48

Total FY 76 471

6. Admin Law Note—Rebuttal Rights in Applications for Conscientious Objector Status. Although AR 600-43 (12 June 1974) does not expressly require inclosure of a waiver of rebuttal in cases where those rights are not exercised UP paragraphs 2-5*k* and 2-7*c*, absence of *any* statement signed by the applicant concerning rebuttal leaves the record incomplete, and allows an inference that an opportunity to rebut was not afforded the applicant, a misunderstanding occurred, or a statement of rebuttal was submitted but not inclosed. Therefore, review for legal sufficiency UP paragraph 2-6*a* should include a check for an appropriate statement. It should be emphasized that the right of rebuttal applies to the entire record sent forward, including comments and recommendations which seem favorable to the applicant.

7. Geneva Convention Films. Training Film 21-4228, "Geneva Conventions and the Soldier", has been cleared for public, nonprofit screening and sale. Public inquiries received concerning the purchase of this film should be referred to the Motion Picture Distribution and Depository Division at Tobyhanna, Pennsylvania 18466, the agency responsible for DA film distribution."

Current Materials of Interest

Articles.

Poydasheff and Suter, "Military Justice?—Definitely!" 44 TUL. L. REV. 588 (March 1975). Lieutenant Colonels Robert S. Poydasheff and William K. Suter, JAGC, attempt to dispel

some of the lingering misconceptions of military justice by summarizing and recapitulating the basic rights of an accused under military criminal law.

Graham, "The 1974 Diplomatic Conference on the Law of War: A Victory of Political Causes and a Return to the 'Just War' concept of the Eleventh Century," 22 WASH. & LEE L. REV. 25 (Winter 1975). Captain David E. Graham, JAGC, examines the events leading to the 1974 Conference, and Conference itself, and the optional causes of U.S. action at the 1975 Diplomatic Conference.

Bond, "Amended Article 1 of Draft Protocol I of the 1949 Geneva Conventions: The Coming of Age of the Guerilla," 22 WASH. & LEE L. REV. 65 (Winter 1975). James E. Bond replies to Captain David E. Graham's reservations concerning Article I.

Norton, "United States Obligations Under Status of Forces Agreements: A New Method of Extradition?" 5 GEORGIA J. INT'L & COMP. L. 1 (1975). Major William J. Norton, JAGC, examines U.S. obligations to return to various receiving states those personnel encompassed by a SOFA, whether civilian or military, who had departed the receiving state before its criminal process has been completed.

Cundick, "International Straits: The Right of Access," 5 GEORGIA J. INT'L & COMP. L. 107 (1975). Major R. Palmer Cundick, JAGC, suggests appropriate elements for a Law of the Sea treaty providing the framework for resolving present and future problems respecting navigation in international straits.

Matthews, "Is The Code of Conduct Viable?" *Armor*, Volume 84, Number 2 (March-April 1975) p. 34. Captain David J. Matthews III examines the Code in light of the Vietnam aftermath.

Soler, "Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions," 6 CONN. L. REV. 601 (Summer 1974).

Johnson, "The Inflation Crunch and Relief for Government Contractors Under Public Law 85-804," 22 WASH. & LEE L. REV. 5 (Winter 1975).

Plessu, "The When and How of the Freedom of Information Act," 21 PRAC. LAW. 61 (April 1975).

Perr, "Blood Alcohol Levels and 'Diminished Capacity'," *The Journal of Legal Medicine*, Volume 3, Number 4 (April 1975) p. 28.

Moore, "The Blood Alcohol Breath Test: A Look At Its Admissibility," 6 U.W. LOS ANGELES L. REV. 11 (Winter 1974).

Note, "Masters and Magistrates in the Federal Courts," 88 HARV L. REV. 779 (February 1975).

Flower, "Photographs in the Courtroom—Getting It Straight Between You and Your Professional Photographer," 2 N. KY, ST. L. F. 184 (Winter 1974-75).

Altman and Weil, "Rewards for Associate Lawyers—Non-Salary Motivators," 21 PRAC. LAW. 69 (April 1975).

Sohn, "Voting Procedures in United Nations Conferences for the Codification of International Law," 69 AM. J. INT'L L. 310 (April 1975).

By Order of the Secretary of the Army:

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

Official:

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