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Doing Away With the Exclusionary Rule

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"The criminal is to go free because the constable has blundered." [1] This had been the rule in military courts-martial involving illegal searches and seizures since 1922. Isn't it now time to devise a better rule—one that both protects the rights of the citizen and yet also protects the innocent or negligent military policeman or commander? It is our opinion that an alternative to the exclusionary rule does exist in the military.

The fourth amendment does not expressly or implicitly provide a remedy for its violation. The remedy the courts have fashioned when there is an illegal search or seizure is the exclusionary rule or suppression doctrine. The exclusionary rule was first applied to the federal courts in *Weeks v. United States*,[2] when the Supreme Court held that evidence obtained in violation of the fourth amendment cannot be admitted in evidence at a criminal trial of the person whose rights were violated. In *Weeks*, the Court stated that without such a rule, the amendment would be of "no value" to those accused of a crime and "might as well be stricken from the Constitution."[3] The exclusionary rule was not held applicable to the states until *Mapp v. Ohio*[4] was decided in 1961. The military, however, adopted the exclusionary rule much earlier with the Navy adopting it in 1922[5] and the Army in 1924.[6]

The exclusionary rule was set forth in the 1951 *Manual for Courts-Martial*[7] and was carried over into the current 1969 Revised *Manual*.[8] The first paragraph of paragraph 152 of the present *Manual* provides that evidence that is "unlawfully" obtained is inadmissible in evidence if the defense has standing to raise the issue. The *Manual* also indicates that the exclusionary rule applies to derivative as well as primary evidence. The Analysis of Contents of the 1969 *Manual* indicates that paragraph 152 was intended to follow the exclusionary rule as announced by the Supreme Court.[9] Similarly the Court of Military Appeals has indicated that it follows the fourth amendment standards announced by the Supreme Court.[10] Thus it can be assumed that the military law of the fourth amendment is primarily a reflection of the applicable federal civilian law.

The intent of this article is to focus on the necessity for future use of the exclusionary rule within the military. The rule itself has been also literally enshrined, despite widespread protest, in the civilian law.[11] Yet it is a rule that seemingly allows both the criminal and the erring policeman to go unpunished while society suffers the consequences. The justifications behind the fourth amendment exclusionary rule [12] are two: judicial integrity and deterrence of improper police conduct.

Rationale for Exclusionary Rule.

Courts have often stated that judicial integrity requires the exclusion of illegally obtained evidence. Arguing for the exclusion of evidence seized through illegal wiretapping in *Olmstead v. United States*,[13] Justices Brandeis and Holmes asserted in their dissenting opinions that the issue of judicial integrity is a moral or ethical question not susceptible of easy solution. In *Olmstead*, Justice Holmes stated that it was not enough for the Court to disapprove of the way the evidence was obtained. Rather, he thought it better for some criminal to go free rather than the government "play an ignoble part" in admitting the evidence at trial.[14] Justice Brandeis said that illegally obtained evidence must be excluded to "preserve the judi-

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cial process from contamination." "If the Government becomes a law breaker," he stated in an oft-quoted passage, "it breeds contempt for law; . . . it invites anarchy." [15] In 1968, the Court in *Terry v. Ohio* [16] reemphasized the question of judicial integrity:

> Courts which sit under our Constitution cannot and will not be made a part to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasion.[17]

While lawyers and judges alike should be deeply concerned about the integrity of the judicial process, English courts have admitted such evidence for years [18] without noticeably losing their integrity. Indeed what integrity exists in letting the guilty and potentially dangerous escape justice?

The second and, we believe, the principal justification for the exclusionary rule [19] is the deterrence of illegal police conduct. As stated by the Supreme Court:

> The purpose of the exclusionary rule "is to deter—to compel respect for the Constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."[20]

There is little doubt that the fourth amendment exclusionary rule owes its existence to the perception that it offered the only chance of deterring improper police conduct.[21] The courts have indulged in two basic presumptions: that the rule does in fact deter improper conduct and that no reasonable alternatives to the rule exist. Both presumptions are open to serious question. At present it seems safe to say that most commentators and many of the judiciary have concluded that there is no evidence that the exclusionary rule does deter police misconduct.[22] That leaves the second prong of the exclusionary rule's support—the absence of alternative remedies.

Alternatives to Exclusionary Rule.

Historically in the United States the type of remedy available in England to victims of police misconduct—civil law suit against the

police [23]—has been notoriously unsuccessful. Other remedies have been slow to take root and it is fair to say that at the time of the *Mapp* decision, let alone *Weeks*, no viable alternative to the exclusionary rule may have existed. This, however, is no longer the case, whether in the civilian world or the military community. A serviceman or woman who believes that a fourth amendment violation has occurred may take any or all of the following steps: request relief under Article 138, UCMJ;[24] institute a law suit under state substantive law;[25] institute suit under section 1 of the Civil Rights Act of 1971;[26] institute a federal law suit pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics;*[27] submit a claim under the Federal Tort Claims Act;[28] or prefer criminal charges under Articles 98, 133 or 134 of the UCMJ.[29] The availability of these varied remedies is crucial for if the exclusionary rule is not the sole legitimate remedy for a fourth amendment violation, it may well be that the exclusionary rule could be dispensed with. Chief Justice Burger stated in *Bevins v. Six Unknown Named Agents of the Federal Bureau of Narcotics* [30] that:

> The [exclusionary] rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities . . . . If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule.

It is our thesis that viable alternatives to the exclusionary rule do exist within the military, and that consideration should be given to creation of a system of remedies that will allow illegal seized evidence to be admissible at trial while correcting the mistakes that led to the illegal seizure. After all, unlike the fifth amendment (and Article 31) exclusionary rule and the exclusion of evidence at trial for irrelevancy, all of which is partially based on an assumption of unreliable evidence, evidence seized illegally under the fourth amendment is perfectly relevant and probative—only public policy prevents its admission. It is not within the scope of this article to create a complete system of alternative remedies—that must await an expanded version to be printed at a later time. However, we believe that when combined with the other remedies that already exist, creation of one new military institution—a military fourth amendment review board to be created at the installation or division level—would allow departure from the exclusionary rule.

The Review Board.

It is our assumption that military police and commanders alike would approve of a local review board that would implement the fourth amendment so long as:

1. There was a clear set of guidelines for military police and commanders to follow; and
2. Military police and commanders were represented on the review board.

The review board would review alleged violations of a set of model rules designed to render the fourth amendment comprehensible and to supply implementing authorities with clear guidelines as to their legal authority in various situations. The rules would be similar in scope to the *Model Rules for Law Enforcement: Warrantless Searches of Persons and Places* written by the Project on Law Enforcement located at Arizona State University.[31] The review board would not have disciplinary authority per se. If it found that an individual had committed an *intentional* or *flagrant* abuse it would have the power to recommend disciplinary action to the appropriate commander. On the other hand, if it were to find that a violation of the fourth amendment had taken place through negligence or ignorance it could recommend that no action be taken, that the individual be counseled by an attorney in the office of the staff judge advocate as to the nature of the mistake, or where it was clear from past actions of the individual that he was unable, despite good intent, to apply the rules to real life situations, that appropriate administrative action be taken. Particularly important would be the board's ability to recommend changes in the local rules to ensure that they were as workable as possible in view of the constitutional restraints. The reader may suggest that such a board would be of little use

in protecting the important constitutional rights involved. However, this is to ignore two important points. Firstly, if the board establishes a history of failing to take appropriate action, the local trial judge will have no option but to bring back the exclusionary rule. Secondly, to allow intentional or flagrant violation of promulgated rules is no less a violation of military discipline than any other disobedience of orders or military procedure, and certainly our brethen of the line would not tolerate such behavior once the rules were sufficiently clear to be understood and enforced.

Composition of the Review Board.

The effectiveness of a review board would depend to a great extent on its membership. The board could be composed entirely of commanders or officers. However, a better and more effective board would probably contain a mixture of commanders, military police, and at least one JAGC officer. Thus the board could take advantage of the expertise of its members when weighing the actions of a commander or military policeman (to include the CID) or when considering changes within the model rules. Since the board would be composed of military personnel intimately familiar with the realities of law enforcement it would tend to be less tolerant of unjustified error and equally less prone to recommend severe corrective actions solely because of an academic mistake. Similarly its decisions should be subject to great deference within the military law enforcement community. Since the police would be policing themselves, our law enforcement personnel could take pride in the board rather than resenting its actions.

Procedure.

The board's procedure can only be suggested in the most general terms. Experience at the local level will be essential for proper functioning. However, some elements can be suggested. A complaint may be brought before the board by any member of the armed services in the jurisdiction served by the board who claims to have been the victim of a fourth amendment violation, by any board member or by the defense counsel or commander of an individual so aggrieved. While an anonymous complaint *might* prove desirable we think that it could too easily be made a vehicle for harassment and believe that an individual making a complaint must be prepared for his identity to be made known to the board. In terms of general procedure it is suggested that the board act pursuant to Army Regulation 15-6 and thus comply with all regulatory requirements.

Promulgation of Model Rules.

The model rules for search and seizure should not hinder the functions of the commander, military police, or criminal investigators. The rules would be promulgated at the local level by the local board after appropriate consultation with the staff judge advocate, and they could be updated as experience requires. Lest there be fear that the rules might fail to comply with constitutional requirements, the reader should keep in mind that failure to conform to constitutional minimums would invalidate the board and reintroduce the exclusionary rule. Additionally, the existence of the board should have no effect on the various fiscal remedies that would exist concurrently. The model rules would be explicit guidelines that could be followed by laymen rather than vague principles of academia.

Benefit of a Set of Model Rules.

A set of *specific* guidelines for personnel with law enforcement responsibilities would increase their efficiency by providing the military policeman or commander with as many specific answers as can be foreseen. The rights of the individual soldier should receive increased protection since the guidelines would be specific enough to prevent predictable fourth amendment mistakesm Placing the rule-making authority in the hands of the experts involved, bearing in mind as always that the board *must* comply with fourth amendment standards, would ensure realistic and comprehensible rules giving ample consideration to local problems and interests. Centralized decision making by the board when promulgating or updating the rules would allow the commander, military policeman, or criminal investigator to function according to the rules and with less fear of the con-

sequences of making a fourth amendment decision.

The use of a review board at post level when coupled with a set of model rules would provide a reasonable alternative to the exclusionary rule. The "police officer's" blunder would no longer require that the evidence be suppressed. Rather the evidence would be admissible (except perhaps in the most egregious intentional violation) and the "policeman" could be subject to the type of administrative correction any impartial professional law enforcement agent would accept. For good faith mistake remedial education or simply a *full* explanation of the error might be appropriate. For repeated good faith error, possible MOS reclassification or other remedy could be appropriate. And for gross negligence or intentional violation, the entire variety of administrative and criminal penalties would be available. Thus society and the "police" would be protected. Only the criminal would lose.

A Possible Scenario.

While the courts may well accept substitutes for the exclusionary rule, they are likely to be most hesitant in doing so. It is highly unlikely that the military trial bench or our appellate courts would allow use of illegally seized evidence simply because a post has promulgated model rules and set up a review board. We think that for maximum likelihood of success, a command would have to set up its system and operate it for a reasonable time period—six months or longer—before the government could attempt to persuade the local trial judge that a viable alternative to the exclusionary rule existed in the jurisdiction. At that test case, the prosecution would have to prove that the board had been effective. Proof would require adequate evidence of attempts to publicize the board's existence, the number and nature of complaints brought before it, and the board's action in each case. Follow-up actions or lack thereof would also have to be demonstrated. Would the prosecution succeed? That would obviously depend on the trial judge. For a test case to survive for consideration of the appellate courts, the military judge would have to rule that a search or seizure was illegal but that the exclusionary rule didn't apply. Further, to do so the judge would have to depart from the seemingly clear language of the *Manual for Courts-Martial*. This, however, should not be as difficult at it might seem. As illustrated herein, the military has applied civilian fourth amendments standards and paragraph 152 of the *Manual* can easily be interpreted as applying only federal fourth amendment law including the rationales for the exclusionary rule already discussed. Precedent for this conclusion and approach can be found in the decision by the Court of Military Appeals in United States v. Clark.[32] In that case the court nullified the plain meaning of paragraph 140*a*(2) of the *Manual* which requires offer of counsel during any interrogation of a military suspect or accused, holding that the intent behind that paragraph had only been to adopt *Miranda*.

Creation of a legitimate alternative to the fourth amendment exclusionary rule will not be easy. At a minimum it will take a great deal of effort and time. It could well prove fruitless at any specific installation or command. However, at the very least creation of the rules and board should improve search and seizure practices. The effort to arrive at a replacement for the exclusionary rule will not be simple, but haven't too many criminals gone free already?

Footnotes

1. People v. Defore, 242 N.Y. 13, 21, 150 N.E.2d 585, 587 (1926) (opinion by Mr. Justice Cardozo).
2. 232 U.S. 383 (1914). The history of the exclusionary rule is set forth in an article written by Chief Justice of the United States Supreme Court Warren E. Berger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 4–10 (1964).
3. Weeks v. United States, 232 U.S. 383, 393 (1914).
4. 367 U.S. 643 (1961).
5. CMO 10–1922, p. 12.
6. Dig. Ops. JAG 1912–40, 220 (CM 165750).
7. Manual for Courts-Martial, United States, 1951 para. 152.
8. Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 152.
9. Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, 27-39 thru 27-40 (1970).

   The matter pertaining to search and seizure was completely rewritten due to the many changes effected in this area by the Supreme Court of Military Appeals.

   . . . .

   The exclusionary rule, of course, applies to derivative

evidence obtained as a result of information supplied by the illegal search on the ground that it, too, has been obtained as a result of the illegal acts. However, in Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court stated that evidence would be considered as having been obtained as a result of the illegal acts only if it has been come at by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality.

10. *See, e.g.*, United States v. Poundstone, 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973).

11. *See generally*, Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & C. 1 (1975).

12. *Compare* Weeks v. United States, 232 U.S. 383 (1914) and Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) with Elkins v. United States, 364 U.S. 206, 217 (1960) and People v. Cahan, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955).

13. 277 U.S. 438 (1928).

14. *Id.* at 470.

15. *Id.* at 484–85.

16. 392 U.S. 1 (1968).

17. *Id.* at 13. *See also* Mapp v. Ohio, 367 U.S. 643, 659 (1961), placing emphasis on the "imperative of judicial integrity."

18. *See e.g.*, Kuruma v. The Queen [1955] A.C. 197; Callis v. Gunn [1963] 48 Crim. App. Reps. 36; King v. Reginam [1968] 52 Crim. App. Reps. 353; Regina v. Murphy [1965] Northern Ireland Courts-Martial Appeal Court 138. *But see* Regina v. Payne [1963] 1 All E.R. 848; Hampton Criminal Procedure and Evidence 407–08 (London 1973).

19. United States v. Calandra, 414 U.S. 338, 347 (1974).

20. Mapp v. Ohio, 367 U.S. 643, 656 (1961), quoting Elkins v. United States, 364 U.S. 206, 217 (1960). The lack of a federal remedy was a substantial factor in the Court's decision to impose the exclusionary rule. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 S. CT. REV. 1, 2–20.

21. *See e.g.* People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) in which Chief Justice Traynor stated:

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.
>
> When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. . . , 37

22. Galligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule*, 66 J. CRIM. L. & C. 1, 2–5 (1975).

23. *See e.g.* HAMPTON CRIMINAL PROCEDURE AND EVIDENCE 707 (London 1973). Statistics indicate for example that total complaints against police in England and Wales excluding the Metropolitan Police equaled in 1968, 9,286 of which 1,158 complaints were substantiated. This number appears reasonably consistent for the years 1965 through 1968 varying from a low of 8,183 complaints in 1966 to the 1968 high. ENGLISH, CASES AND MATERIALS ON THE RIGHTS OF THE INDIVIDUAL IN THE CRIMINAL PROCESS (unpublished materials University of Exeter, England, 1970) citing the 1970 Report of the Advisory Committee on Drug Dependence, *Powers of Arrest and Search in Relation to Drug Offenses*, paras. 58, 59. The cited statistic apparently refer to complaints for all reasons. As to the English penchant for bringing suit against police officers, *see e.g.* Christie v. Leachinsky [1947] A.C. 573; Dallison v. Caffery [1965] 1 Q.B. 348; Wiltshire v. Barrett [1965] 2 All E.R. 271.

24. Uniform Code of Military Justice art. 938, 10 U.S.C. § 138 (1970).

25. Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

26. 42 U.S.C. § 1983 (1970).

27. 403 U.S. 388 (1971).

28. 28 U.S.C. §§ 1346, 2674 *et seq.* (1970).

29. Uniform Code of Military Justice arts. 98, 133 and 134, 10 U.S.C. §§ 898, 933 and 934 (1970).

30. 403 U.S. 388, 413–14 (1971).

Punitive vs. Nonpunitive Regulations: The Emasculation of Article 92

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In recent years, the punitive application of Article 92(1), Uniform Code of Military Justice, has been diminished by a series of decisions rendered by the military appellate courts. Article 92(1) provides that "any person subject to [the Code] who violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct."[1] A superficial reading of the statute would seem to indicate that *any* lawful general regulation could provide the basis of a prosecution under Article 92(1). Military courts, however, have

narrowly interpreted Article 92(1) to include only penal or punitive regulations that can withstand the traditional rules of statutory construction.[2] A more difficult issue is presented by the characterization of regulations as punitive or nonpunitive.

This distinction hinges primarily on the drafter's intent and presents an issue different from the question of the regulation's specificity and the degree to which it affords the accused adequate notice of his alleged offense. A regulation which is clearly punitive can still be void for vagueness under the usual rules of construction of criminal statutes. Similarly, a specific, narrowly defined regulation could be nonpunitive in nature. Originally, the Court of Military Appeals (USCMA) phrased the issue of punitive intent in terms of whether or not the regulation in question was a general regulation at all.[3] Subsequent case law, however, is directed more at the drafter's purpose and reveals several basic guidelines that can be used to determine the existence of punitive intent.

This dichotomy was first recognized in 1958 when USCMA overturned a conviction under Article 92(1) in *United States v. Hogsett.*[4] The accused was charged with violating a lawful general regulation entitled "Postal Service, Joint Military Postal Procedures, Guide for Military Postal Clerks" which prohibited the affixing of stamps by postal clerks. Significantly, this regulation restated and interpreted federal postal laws and did not provide a penalty for noncompliance with the regulation. The USCMA reversed the conviction and held that the "guide" was not a general regulation for purposes of Article 92(1). In so holding, the court considered the disproportionality of the maximum punishment under Article 92(1) when compared to the relative harmlessness of noncompliance. Even use of the word "will" did not make the regulation mandatory since it was primarily advisory in nature.[5] The court did not write in terms of "punitive" or "nonpunitive" regulations, but that distinction was implicit in the court's decision.

Following *Hogsett*, other regulations shared the same fate. In *United States v. Farley*,[6] USCMA held that an Air Force regulation was merely a statement of "policy." Similarly, the Air Force Board of Review in *United States v. Henderson* [7] held that portions of a regulation entitled "Ethical Standards of Conduct" were not penal but only advisory in nature. The regulation proscribed behavior that gave even an appearance of wrongdoing. This concern for mere "standards" of conduct, however, was considered beyond the scope of criminal law and, hence, nonpunitive.[8]

The USCMA next considered the issue in the series of "MACV Directive" cases. In *United States v. Baker*,[9] the court reversed a conviction based on a regulation which stated in part that "No individual will purchase in any month more postal money orders, treasury checks, banking instruments, or any combination thereof than he draws in [Military Payment Certificates] that month." The court considered this provision to be a mere guidepost offering information to postal clerks and held that it did not punitively apply to a person who purchased treasury checks in contravention of the regulation.[10] In contrast, the court held punitive in *United States v. Benway* [11] a regulation similar to that in *Baker* but which was viewed as a "comprehensive attempt to control black marketing." As in *Baker*, the court considered other provisions of the regulation to determine the existence of a punitive purpose.[12] Significantly, the regulations stated that violations would be punishable under the UCMJ. Similarly, in *United States v. McEnany*,[13] USCMA upheld a regulation similar to that in *Baker* because it "prescribed rules" rather than "established procedures," and it replaced "policies" with "prohibitions."[14]

Two years later, the Court of Military Appeals spoke on the similar issue of implementation. Avoiding the issue in previous cases, the court held squarely in *United States v. Nardell* [15] that a general order does not apply punitively if its provisions must be implemented by subordinate commanders. This position was reiterated in *United States v. Scott* [16] with the caveat that drafters should state to whom regulations apply and the extent to which they must be implemented before criminal sanctions attach.[17] Similarly, the Army Court of Military

Review (ACMR) recently declared regulations nonpunitive in *United States v. Jackson* [18] and *United States v. Bala* [19] because they were not self-executing and required further implementation.

This startling trend initiated by *Hogsett* has found more recent expression in *United States v. Wright* [20] and *United States v. Branscomb* [21] decided ACMR in 1974. In *Wright*, the court reversed a conviction under Article 92(1) on technical grounds but nevertheless offered considerable dictum on the characteristics of punitive regulations. In effect, *Wright* reiterated older principles taken from previous cases but also emphasized that drafters of regulations must clearly indicate their intent on the face of the regulation. Moreover, the wording must be simple and the regulation widely distributed among military personnel before punitive intent may be effective. Similarly, the court in *Branscomb* held squarely that punitive regulations should contain a "criminal sanction" clause such as that included in AR 600–50. The court also noted that a mere change to a lengthy and otherwise nonpunitive regulation could not form the basis for a felony conviction. Whether the dictum in *Wright* and the holding of *Branscomb* will be adopted in the future by USCMA is speculative, but its implications are nevertheless disturbing. Indeed, the foregoing case law, and particularly *Wright*, render many prosecutions under Article 92(1) so fraught with hazards that some distilled guidelines are appropriate.

The case law defining "punitive" regulations is consistent insofar as it has progressively restricted the use of Article 92(1), but it offers no single test whereby most regulations can be easily classified "punitive" or "nonpunitive." The following guidelines digest the principles applied by USCMA and ACMR and will, hopefully, provide a useful checklist in analyzing a given regulation for its punitive effect.

1. *Examine All Provisions of the Regulation.* A court must look to the whole regulation and not just the part relied upon by the prosecution since no single characteristic of a regulation is determinative of its drafter's intent.[22] A clearly punitive section or paragraph can provide notice that other sections of the regulation are punitive as well.[23] But the fact that a regulation is aimed at more than one objective, some of which are nonpunitive, does not necessarily make other provisions nonpunitive.[24] Thus, it is advisable for trial or defense counsel to place the entire regulation in the record so that the court may consider the allegedly punitive provisions in the proper context.[25]

2. *Consider the Format of the Regulation.* The organization and format of a regulation may provide a clue to its drafter's intent. No purpose will be imputed to a regulation that is not on the face of the document itself.[26] In addition, the court will consider the length of the document and how comprehensively it deals with its subject matter.[27] The longer and more comprehensive the regulation, the more likely its drafter (at least arguably) intended a punitive effect. Similarly, the title, table of contents, and stated purpose are evidence of the drafter's intent.[28] If the regulation is procedural in nature, rather than substantive, it is probably nonpunitive.[29] Moreover, prefatory language that recites mere "truisms" are not sufficient to impart a punitive intent.[30]

3. *Is Implementation Required?* If a regulation directs commanders to implement its remaining provisions, it appears to be almost conclusive that the regulation is nonpunitive.[31] But if the regulation is "self executing" the mere fact of implementation by lower commanders should not deprive what might otherwise be a punitive regulation of its penal effect. Similarly, even though some portions of a regulation may require implementation, the other provisions may be self-executing and, hence, may still be punitive in nature. Moreover, the fact that implementation is not required is hardly evidence that the drafter intended punitive effect. But if implementation is required, such fact may be strong evidence that the regulation is not punitive.

4. *Are There Words of Prohibition?* The simplest measure of a penal intent is an actual declaration of punitive purpose in the regulation. If the provision indicates that violations of the regulation subject the offender to prosecution under the UCMJ, particularly Article

92(1), there seems to be little doubt as to the drafter's intent.[32] An outstanding example would be the "contraband" regulation, AR 600-50.[33] In fact, dictum in *Wright* and the holding in *Branscomb* could be construed to indicate that such a statement is almost a condition precedent to punitive effect.[34] Moreover, ACMR in *United States v. Edell* [35] specifically held a regulation punitive because it "cites to penal legislation in its references." [36] The USCMA, however, has consistently held that no single characteristic is determinative of penal intent. Less affirmative language may, therefore, be sufficient. Nevertheless, counsel should look carefully to see if any kind of penalty is mentioned, either specifically or by reference. The absence of any such penalty may be strongly indicative of a nonpunitive intent.[37] Even statements that violators will be reported for "appropriate disciplinary action" and will be "held accountable" are insufficient to constitute a criminal penalty.[38]

Ordinary words of prohibition might also be sufficient to support criminal application. The USCMA has held that "shall not" and "will not," can, in the proper circumstances, indicate a penal purpose and even "may" can be construed to be mandatory if the context of the regulation so indicates.[39] The word "prohibited" or its derivatives, however, are not punitive *per se*, but are merely one factor to be considered among others.[20]

5. *Guidelines or a Code of Conduct?* Regulations of an advisory or instructional nature indicate a nonpunitive intent. Similarly, if the regulation offers only guidelines, a penal intent will not be presumed. But, if the document actually regulates conduct, it may be considered punitive. Again, the regulation must be viewed in its entirety to determine if a "code of conduct" exists.[41] Recently, ACMR considered a regulation punitive because, *inter alia*, it contained "explicit prohibitions addressed to individuals." [42]

6. *The "Common Sense" Test.* Another measure of intent is the degree of likelihood that the drafter intended the conduct in question to be "criminal" in the ordinary sense of the word. This necessarily involves a certain amount of common sense. In *Henderson*, the court noted that "ethical standards" could not possibly be the subject of criminal law. "We know of no law that renders the mere impression of criminality a crime." [43] Similarly, the court in *Hogsett* found it difficult to believe that the drafter of the "Guide for Postal Clerks" intended that a person who did not properly affix stamps should be subject to confinement at hard labor for two years.[44] It may, therefore, be profitable for counsel to consider if the maximum penalty under Article 92 is or is not disproportionate to the offense. A more recent expression of "common sense" was found in *Edell* when ACMR held punitive a regulation because it "pertains to public safety." [45] By fair implication, any regulation that is not related to public safety may not logically be considered penal.

7. *Relationship to Other Laws.* A regulation that merely interprets or restates another law may not be considered penal. This is especially true if the laws restated are civilian statutes or regulations.[46] Mere incorporation of other laws by reference, however, should not deprive a regulation of its otherwise punitive character.[47] This is a relatively weak argument on which defense counsel may rely, since only the *Hogsett* case in 1958 raised the issue, and then over a vigorous dissent by Judge Latimer.

8. *Is the Regulation Specific?* If a regulation is vaguely worded, it is arguable that the drafter did not intend criminal application since vagueness is more indicative of advisory instructions or guidelines.[48] Moreover, even specific wording could be construed to be only a detailed definition of the scope of the regulation.[49] Trial counsel may, however, be able to justify a lack of specificity with *Parker v. Levy* [50] in which the Supreme Court held that Articles 133 and 134 were not unconstitutionally vague. The *Wright* case suggests that Article 92(1) is similar to Article 134.[51] To the extent this is true with regard to a given regulation, vagueness may be permissible or even justified.

9. *How Widely Distributed?* Dictum in the *Wright* case suggests that the regulations "should be widely and publicly disseminated to

all military personnel" before they may be considered punitive.[52] Implicit in this statement is a requirement that the prosecution prove the accused had at least constructive knowledge of the regulation. It is well settled that "Article 92(1) contains no requirement that any kind of knowledge be either alleged or proved in a prosecution thereunder for violating or failing to obey a general order or regulation." [53] Knowledge may, however, be necessary where an omission or otherwise passive behavior violates a regulation.[54] To that extent, wide distribution, or the lack thereof, may be indicative of the drafter's intent. But in other instances this dictum by ACMR seems to be without support. Since USCMA has not yet adopted so extreme a position, defense counsel may find this an unconvincing argument.

10. *Simplicity.* The *Wright* case also called on drafters to "exert every effort to simplify the wording of punitive regulations so as to be understandable to soldiers of 'ordinary sense and understanding.' " [55] Since this is only an exhortation and not a requirement, complex wording should not be indicative of a nonpunitive intent. The trial counsel may effectively argue that simple wording is typical of criminal statutes and, therefore, indicates a punitive purpose. Indeed, ACMR has held that the "contraband regulation," AR 600–50, was punitive in part because the accused was given "ample, clear and unambiguous notice," and was not therefore, misled.[56]

* * *

The most appropriate manner of determining the punitive effect of a regulation is, of course, the motion by defense counsel to dismiss for failure to state an offense. But if the regulation involved is clearly nonpunitive, or the trial counsel is unsure of its effect, there are several alternatives to charging the accused under Article 92(1). Even a nonpunitive regulation may be implemented by a simple direct order, violations of which could be prosecuted under Articles 92(2), 91(2), or 90(2). Since an order is presumed to be legal, the burden would be on the defense to prove it illegal.[57] The existence of a regulation covering the subject matter of the order, even if nonpunitive, would lend strong support to the legality of that order. Similarly, nonpunitive regulations may already be implemented by local punitive regulations. In addition, the conduct considered in a nonpunitive regulation may yet be violative of Article 134. But the general article may also require proof of a regulation, even though nonpunitive, in proving the conduct to be prejudicial to good order and discipline.[58] These alternatives to Article 91, however, presume the existence of the facts required to utilize them. The prosecution is not always so fortunate.

In the long run, the uncertainty created by *Hogsett* and its progeny can best be settled by rewriting the countless regulations whose punitive effect was unquestioned before *Hogsett*, but now possess dubious validity. As the Army Court of Military Review stated in *Wright:* "It is difficult to comprehend after more than fifteen years following the dictum in *Hogsett* highlighting this problem why any command would not take notice of the many decisions by appellate courts and update those regulations that it intends to be punitive." [59] In the meantime, trial counsel must educate commanders in the proper methods of "building a case" that can withstand a motion to dismiss or directed verdict. Indeed, when seen in this light, the "emasculation" of Article 92(1) is a sound development insofar as it not only protects the rights of an accused but may persuade commanders and staff officers to reevaluate existing regulations.

Footnotes

1. Art. 92, Uniform Code of Military Justice.

2. *See, e.g.*, United States v. Baker, 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969); United States v. Wright, 48 C.M.R. 319 (ACMR. 1969); United States v. Jackson, 46 C.M.R. 1128 (ACMR 1973); United States v. Bala, 46 C.M.R. 1121 (ACMR 1973); United States v. Henderson, 36 C.M.R. 854 (AFBR 1965).

3. *See, e.g.*, United States v. Woodrum, 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971); United States v. Tassos, 18 U.S.C.M.A. 12, 39 C.M.R. 12 (1968); United States v. Farley, 11 U.S.C.M.A. 730, 29 C.M.R. 546 (1960); United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958). Later opinions by the Court of Military Appeals [hereinafter cited as USCMA] and the Army Court of Military Review [hereinafter cited as ACMR] seem to take for granted that the regulations in question were lawful general regula-

tions, but were not punitive and could not provide a basis for prosecution under Art 92(1), UCMJ. *See, e.g.*, United States v. Wright, 48 C.M.R. 319 (ACMR 1974) *and* United States v. Jackson, 46 C.M.R. 1128 (ACMR 1973). The distinction, however, is one without a difference since both interpretations require a punitive intent on the part of the regulation's drafter.

4. 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958).

5. *Id.* at 189.

6. 11 U.S.C.M.A. 730, 29 C.M.R. 546 (1960).

7. 36 C.M.R. 854 (AFBR 1965).

8. *Id.* at 856. But in United States v. Brooks, 20 U.S.C.M.A. 28, 42 C.M.R. 220 (1970) USCMA held that other parts of the same regulation were punitive, notwithstanding the result in *Henderson*.

9. 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969).

10. *Id* at 219.

11. 19 U.S.C.M.A. 345, 41 C.M.R. 345 (1970).

12. *Id* at 346.

13. 19 U.S.C.M.A. 556, 42 C.M.R. 158 (1970).

14. *Id.* at 159.

15. 21 U.S.C.M.A. 327, 45 C.M.R. 101 (1972).

16. 22 U.S.C.M.A. 25, 46 C.M.R. 25 (1972).

17. *Id.* at 29.

18. 46 C.M.R. 1121 (ACMR 1973).

19. 46 C.M.R. 1128 (ACMR 1973).

20. 48 C.M.R. 319 (ACMR 1974).

21. CM 430867 (ACMR, 31 Dec 1974).

22. United States v. Nardell, 21 U.S.C.M.A. 327, 45 C.M.R. 101, 103 (1972); United States v. Wright, 48 C.M.R. 319, 320 (1974).

23. United States v. Benway, 19 U.S.C.M.A. 345, 41 C.M.R. 345, 348 (1970). *See, e.g.*, Army Reg No. 600–50, para 1–1 (Change No. 2, 19 April 1973) which provides that "the enumeration in this chapter is not intended to preclude prosecution of military personnel under the UCMJ for violation of other chapters of this regulation when such prosecution is appropriate."

24. United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 191 (1958) (dissent); United States v. Benway, 19 U.S.C.M.A. 345, 41 C.M.R. 345, 346 (1970); United States v. Brooks, 20 U.S.C.M.A. 28, 42 C.M.R. 220, 222 (1970); United States v. Stacy, 42 C.M.R. 547, 551 (ACMR 1970).

25. United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974); United States v. Jackson, 46 C.M.R. 1128, 1130 (ACMR 1973); United States v. Atkins, 46 C.M.R. 572 (ACMR 1972).

26. United States v. Baker, 18 U.S.C.M.A. 504, 40 C.M.R. 216, 219 (1969).

27. United States v. Benway, 19 U.S.C.M.A. 345, 41 C.M.R. 345, 346 (1970). In United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974), the court noted, "we find that the insertion of an isolated paragraph concerning possession of drug paraphernalia in a change to a fourteen page regulation which in detail establishes procedures and policies for the safeguarding and control of weapons, ammunition, and sensitive items (watches, binoculars, and other pilferable items) lacks the requirements for notice and clarity of purpose to form the basis for a felony conviction."

28. *Id. See also* United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 188 (1958); United States v. Scott, 22 U.S.C.M.A. 25, 46 C.M.R. 25, 28 (1972); United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974); United States v. James, 41 C.M.R. 417 (ACMR 1969).

29. United States v. McEnany, 19 U.S.C.M.A. 556, 42 C.M.R. 158, 159 (1970); United States v. Bala, 46 C.M.R. 1126 (ACMR 1973).

30. *See, e.g.*, United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 188 (1958); United States v. Jackson, 46 C.M.R. 1129 (ACMR 1973).

31. United States v. Nardell, 21 U.S.C.M.A. 327, 45 C.M.R. 101 (1972); United States v. Bala, 46 C.M.R. 1121 (1973); United States v. Jackson, 46 C.M.R. 1128 (1973).

32. United States v. Scott, 22 U.S.C.M.A. 25, 46 C.M.R. 25, 29 (1972); United States v. Benway, 19 U.S.C.M.A. 345, 41 C.M.R. 345, 347 (1970); United States v. LaCour, 17 C.M.R. 559, 562 (ABR 1954).

33. Army Reg No. 600–50, para 4–1 (Change 2, 17 April 1973) reads "Violation of the provisions of this chapter provides a basis for disciplinary action under the UCMJ for persons subject to its provisions." Interestingly enough, this regulation was held punitive without mention of its "criminal application clause." *See* United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974); United States v. Stacy, 42 C.M.R. 547 (ACMR 1970).

34. The court in *Wright* stated: "The regulation does not refer to the fact that a violation of its provisions will subject an offender to punishment under the provisions of Art 92, UCMJ . . . [W]e find it incumbent upon drafters of punitive regulations to clearly indicate proscribed conduct and the punitive nature of the regulation . . . [T]hey should contain an averment of criminality of sufficient certainty as to immediately impress upon a reader that violations of their proscription will subject the offender to punishment under applicable provisions of the Uniform Code of Military Justice." United States v. Wright, 48 C.M.R. 319, 320 (ACMR 1974). Similarly, the *Branscomb* court noted, "In the instant case there is no warning in the regulation that is remotely similar to either the standard required by law or the

clear language of AR 600-50. . . ." United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974).

35. 49 C.M.R. 66 (ACMR 1969).

36. *Id.* at 67.

37. United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 189 (1958); United States v. Bala, 46 C.M.R. 1121, 1125 (ACMR 1973).

38. United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 189 (1958). *But see* United States v. Stacy, 42 C.M.R. 547, 550 (1970).

39. *See, e.g.*, United States v. Brooks, 20 U.S.C.M.A. 28, 42 C.M.R. 220, 223 (1970); United States v. Benway, 19 U.S.C.M.A. 345, 41 C.M.R. 345, 348 (1970). But this is not always the case. *See* United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 188 (1958) where "must not" was construed to be non-punitive and United States v. James, 41 C.M.R. 417 (ACMR 1969) where "will have" was construed to be directory only.

40. United States v. Farley, 11 U.S.C.M.A. 730, 29 C.M.R. 546, 550 (1960); United States v. Branscomb, CM 430867 (ACMR, 31 Dec 1974); United States v. Wright, 48 C.M.R. 319, 320 (ACMR 1974); United States v. Jackson, 46 C.M.R. 1128, 1129 (ACMR 1973). "Prohibited" is, however, much more indicative of punitive intent than words such as "policies." *See e.g.* United States v. McEnany, 19 U.S.C.M.A. 556, 42 C.M.R. 158, 159 (1970).

41. United States v. Scott, 22 U.S.C.M.A. 25, 46 C.M.R. 25 (1972); United States v. Nardell, 21 U.S.C.M.A. 327, 45 C.M.R. 101 (1972); United States v. Baker, 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969); United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958); United States v. Bala, 46 C.M.R. 1121 (1973).

42. United States v. Edell, 49 C.M.R. 66, 67 (1974).

43. United States v. Henderson, 36 C.M.R. 854 (1965).

44. United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 189 (1958). *See also* United States v. Bala, 46 C.M.R. 1121 (1973).

45. United States v. Edell, 49 C.M.R. 66, 67 (1974).

46. United States v. Hogsett, 8 U.S.C.M.A. 681, 25 C.M.R. 185, 188 (1958).

47. *See, e.g.*, United States v. Vlakos, 41 C.M.R. 494 (1968); United States v. Story, 42 C.M.R. 547 (1970).

48. United States v. Jackson, 46 C.M.R. 1128, 1130 (1973); United States v. Henderson, 30 C.M.R. 854, 857 (1965). *See also* United States v. Nardell, 21 U.S.C.M.A. 327, 45 C.M.R. 101, 104 (1972).

49. *See, e.g.*, United States v. Scott, 122 U.S.C.M.A. 25, 46 C.M.R. 25, 29 (1972).

50. 417 U.S. 733 (1974).

51. 48 C.M.R. 319, 320 (1974).

52. *Id.* at 321.

53. Para 171, MCM (1969) Rev. *See also* United States v. Tinker, 10 U.S.C.M.A. 292, 27 C.M.R. 366 (1959).

54. Lambert v. California, 355 U.S. 225 (1957).

55. 48 C.M.R. 319, 320 (1974).

56. United States v. Story, 42 C.M.R. 547 (1970).

57. United States v. Bayhard, 6 U.S.C.M.A. 762, 21 C.M.R. 89 (1956).

58. United States v. Jackson, 16 U.S.C.M.A. 509, 37 C.M.R. 129 (1967).

59. 48 C.M.R. 319, 320 (1974).

The Federal Rules of Evidence

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On 1 July 1975, the Federal Rules of Evidence became effective. Although it could have made the Federal Rules directly applicable to trials by courts-martial, Congress did not do so.[1] Nevertheless, certain provisions of the Rules will be incorporated into military practice through paragraph 137 of the *Manual for Courts-Martial* which provides:

> So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with those rules, at common law will be applied by courts-martial.

An earlier series of articles published in *The Army Lawyer* [2] contained a comparison of the *Manual*'s evidentiary provisions with the Federal Rules as then promulgated by the Supreme Court. Since Congress substantially revised certain parts of the Rules, those articles are dated. The purpose of this article is to update that earlier piece. An appreciation of the Rules can only be obtained through an understanding of the revisions that the Rules underwent before

they were promulgated by the Supreme Court and enacted by Congress. Two drafts [3] of the Rules were published prior to the time the Supreme Court finally adopted the Rules on November 20, 1972. In addition, the Rules were considered and revised by the following congressional committees: the Subcommittee on Criminal Justice of the House Judiciary Committee, the House Judiciary Committee, [4] the Senate Judiciary Committee [5] and a Conference Committee.[6] Some Rules were changed in each committee while others passed through Congress untouched.

Application of the Rules to Courts-Martial.

As noted earlier, portions of the Rules will be incorporated into the military law of evidence through the operation of paragraph 137. Several categories of evidentiary rules will be encountered. First, certain rules that are treated in the Federal Rules of Evidence are not mentioned in the *Manual for Courts-Martial.* For example, the Federal Rules contain hearsay exceptions (such as declarations against interest, present sense impressions, and ancient documents) for which there are no corresponding *Manual* provisions. Where the *Manual* is silent the Federal Rules will be directly applicable under paragraph 137.[7] Second, in situations in which the *Manual* rule is ambiguous, the Federal Rules of Evidence should supply the rule of decision. In *United States v. Massey,* [8] for example, the Court of Military Appeals turned to federal authorities in order to interpret a *Manual* provision concerning the scope of the husband-wife privilege.

Third, some evidentiary rules are treated in both the *Manual* and the Federal Rules. In many cases, however, the treatment is not identical. Both the *Manual* and Rules contain hearsay provisions based upon the common law business entry exception. Under Federal Rule 803(6) the exception is referred to as "records of regularly conducted activity." The Rule goes on to define such records as those prepared by a "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." The *Manual* provision covers records of a "business, profession, occupation, or calling of any kind." [9] The *Manual* definition appears to limit the exception to commercially-oriented records,[10] whereas Congress intended to expand the common law exception to include additional categories of records. Church records would be included under the Federal Rules exception but arguably would not come within the *Manual* exception. If counsel should attempt to introduce church records in a court-martial, the military judge would have to decide whether the *Manual* provision preempts the area by limiting business records to commercial records or whether such records would still be admissible under the incorporation clause of paragraph 137. The better view would be that the drafters of the *Manual* intended to limit the business records exception to commercial records and therefore the *Manual* has preempted this area of evidence law. Whether this view will actually be accepted will have to await the first appellate cases involving the Federal Rules.

Such a preemption doctrine would not end the matter if a hearsay exception were involved. The Federal Rules contain two "catch-all" exceptions—Rules 803(24) and 804(b)(5). These provisions permit the judge to admit hearsay statements that do not fall within the exceptions specified under the Rules if certain conditions are met. Military counsel could argue that although church records would not qualify as a business entry, they would fall within the purview of Rules 803(24) or 804(b)(5) and that these rules are incorporated through paragraph 137.

Finally, a *Manual* provision may be interpreted as being illustrative of the federal common law of evidence.[11] In such a case the new Federal Rules of Evidence would supplant the common law and apply in courts-martial.

Familiarity with the Federal Rules will be important for military counsel and judges for another reason. The Rules will be persuasive authority even in situations in which they are not directly incorporated into military practice. Several states, including Wisconsin, Nevada, New Mexico, and Maine, have enacted evidence codes based on the Federal Rules, and the Uniform Rules of Evidence have recently been revised to conform with the Federal Rules.

Moreover, the military appellate courts have cited the Rules on several occasions. In *United States v. Miller*,[12] for instance, the Court of Military Appeals approvingly cited Rule 806 as providing an appropriate method for handling the examination of laboratory examiners after the laboratory report has been introduced into evidence.

Article I—General Provisions.

With the exception of the rules pertaining to privileges, Federal Rule 104(a) relaxes all the rules of evidence when the judge decides preliminary questions concerning the qualifications of witnesses, the existence of a privilege, or the admissibility of evidence. This provision was apparently adopted because most evidentiary rules are based on the premise that the jury will not be able to handle certain types of evidence. Such a concern is not present when the judge decides an issue. Privileges are excepted because disclosure would destroy the purpose of the privilege. Paragraph 137 of the *Manual* permits the military judge to relax the rules of evidence only with respect to the availability of witnesses and for continuances.

Rule 104(b) limits the judge's ruling on issues of conditional relevancy to a determination that the evidence is "sufficient to support a finding of the fulfillment of the condition." The authentication of documentary evidence, identification of a speaker, and identification of real evidence would be examples of the types of evidence that raise conditional relevancy issues. Under paragraph 53*d*(2)(*e*) of the *Manual* such issues seem to be treated as preliminary questions of fact on which the military judge rules with finality.

Both paragraph 140*a*(2) of the *Manual*, and Rule 104(c) incorporate the Supreme Court's holding in *Jackson v. Denno*,[13] requiring the judge to make a preliminary finding on the voluntariness of a confession. Rule 104(c) also requires that other preliminary issues be considered outside the hearing of the jury when the interest of justice so requires or when the accused is a witness and so requests. The same result can be obtained in military practice through the liberal use of the Article 39(a) hearing.[14]

Rule 106 applies the "rule of completeness" only to writings and recorded statements whereas in military practice the rule is also applicable to certain types of oral statements such as former testimony under paragraph 145*b* of the *Manual*.

The congressional version of the Federal Rules deleted a section recognizing the judge's power to comment on the evidence.[15] Paragraph 73*c* of the *Manual* explicitly recognizes such a power for the military judge.

Article II—Judicial Notice.

Rule 201 covers judicial notice of "adjudicative facts" as opposed to "legislative facts." [16] The Advisory Committee distinguishes the two types of judicial notice as follows:

> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other handn are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of legal principle or ruling by a judge or court or in the enactment of a legislative body.

Although the *Manual* does not employ such terminology, it is clear from the contents of paragraph 147*a* that only adjudicative facts were meant to be covered.

Both the Rules and the *Manual* permit the judge to take judicial notice of matters of general knowledge and of matters capable of accurate and ready determination. The only difference in this respect is that the *Manual* contains an extensive list of illustrations, whereas Rule 201 does not.

Rule 201 differs from the *Manual* in two respects. First, the Federal Rule does not cover judicial notice of law. The Advisory Committee took the position that "the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure." Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 26.1 control this area with respect to foreign law. Within the *Manual* paragraph 147*a* provides for a judicial notice of law and para-

graph 147*b* covers the special requirements for establishing foreign law.

Paragraph 147*a* and Rule 201 differ in another respect. The *Manual*, but not the Federal Rule, permits the judge to take judicial notice of the genuineness of official signatures and seals for the purpose of authenticating documentary evidence. Federal Rule 902, however, makes many official documents self-authenticating. Therefore the same result is reached, although by different theories. One result of this difference in approach is that military counsel may introduce rebuttal evidence and argue to the fact finders against the inference of the genuineness of an official signature or seal after the judge has taken judicial notice.[17]

Rule 201(g) prohibits the judge from instructing the jury that judicially noticeable facts have to be accepted as conclusive in criminal cases. This provision was inserted by Congress in deference to "the spirit of the Sixth Amendment right to a jury trial."[18] The *Military Judge's Guide* appears to take the same position.[19]

Article III—Presumptions.

Rules 301 and 302 deal with presumptions in civil cases. The Supreme Court version of Rule 303 concerned the subject of presumptions in criminal cases. This Rule, however, was deleted by Congress because the subject was being considered in detail in bills revising the federal criminal code. The *Manual* treats the subject of inferences and presumptions in paragraph 138*a*.

Although not covered in the Federal Rules, criminal presumptions are an important subject for the military practitioner.[20] The bad check presumption contained in Article 123a [21] of the Uniform Code of Military Justice is perhaps the best example of a presumption that is constitutionally suspect under the Supreme Court's analysis.[22]

Article IV—Relevancy.

The Federal Rules adopt an orthodox position on relevancy. Relevancy is defined in Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Rule 402 all relevant evidence is admissible unless excluded by the Constitution, statute, or by the Rules. Even if relevant, Rule 403 permits the exclusion of evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." There are two noteworthy points that should be kept in mind. First, "surprise" was not included as a danger; the Advisory Committee felt that a continuance would be the proper remedy for such a problem. Second, a danger must "substantially" outweigh the probative value of the evidence before exclusion is appropriate. This "substantiality" requirement plus the liberal definition of relevancy manifests a strong bias in favor of admissibility. Paragraph 137 of the *Manual* defines relevancy in similar terms. The *Manual* does not deal directly with the dangers except for a reference to evidence that is "too remote."

Character Evidence. Under Rule 404(a) character evidence is generally inadmissible. There are three important exceptions to this rule: (1) the accused may offer character evidence and if he does, the prosecution may rebut with the same; (2) evidence of a victim's character may be offered by the accused, and rebutted by the prosecution; and (3) character evidence of the truth and veracity of a witness may be used to impeach under Article VI. The *Manual* provisions are generally in accord with this rule. One of the principal differences is that under the Federal Rules character evidence is limited to specific character traits; evidence of general law-abiding character is excluded. Paragraph 138*f* permits the accused to introduce general character evidence.

Both paragraph 138*f* and Rule 405 permit proof of character by the introduction of reputation and opinion-type evidence. This is a change in the Federal Rule. Formerly only reputation-type evidence, a form of hearsay, was admissible in the federal courts.

Uncharged Misconduct. Both paragraph 138*g* of the *Manual* and Rule 404(b) set forth the general rule that evidence of other acts of mis-

conduct are not admissible to prove the character of the defendant. Both the *Manual* and the Federal Rules, however, provide that acts of misconduct may be introduced for other purposes, such as motive, intent, identity, absence of accident and so forth. In the military, other acts of misconduct are not admissible unless they are: (1) logically relevant, (2) have a reliable basis, and (3) have a "substantial value" as tending to prove a fact in issue. The Federal Rule is not as stringent as the *Manual* rule and does not require the satisfaction of the substantial-relevancy rule despite the highly prejudicial nature of evidence of uncharged misconduct.

Paragraph 138*h* provides that opinion evidence is admissible "concerning habit or usage." This rule is comparable to Federal Rule 406.

Offers to Plead Guilty and Withdrawal of Guilty Pleas. As promulgated by the Supreme Court, Rule 410 had provided that neither a withdrawn guilty plea nor an offer to plead guilty, nor any statement made in connection with such a plea or offer was subsequently admissible against the accused in the event the plea was withdrawn. Congress amended the Supreme Court version to permit the use of such statements if they were voluntary, reliable, on the record, and used for impeachment or in a subsequent perjury prosecution. Congress also provided that this Rule would not be effective until 1 August 1975, the day on which proposed Federal Rule of Criminal Procedure 11 would be operative: the latter differs from Rule 410 and Congress apparently wanted more time to consider the issue. Although the *Manual* is silent on the issue, military courts have not permitted the subsequent use of admissions by the defendant during the providency inquiry or in the accompanying stipulation of fact.[23]

Article V—Privileges.

The Rules as promulgated by the Supreme Court contained numerous specific privileges, including those relating to psychotherapist and patient, state secrets, and informer identity. This Article generated the most controversy in the congressional hearings and Congress deleted the entire article, substituting a new Rule 501 which states that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Article VI—Witnesses.

Competency. Paragraph 148*b* of the *Manual* sets out the requirements for a witness' competency to testify: the witness must recognize his moral duty to tell the truth and have the physical capacity to observe, recall, and describe the facts in question. Persons over 14 years of age are presumed competent. Rule 601 simply states that "[e]very person is competent to be a witness unless otherwise provided in these rules." The drafters took the position that mental qualifications "have proved elusive in actual application" and few witnesses have actually been disqualified on this ground. In short, the moral and mental capacity of a witness were left to the jury's evaluation as issues of weight and credibility.

Under Rule 602 the firsthand knowledge rule is treated as an issue of conditional relevancy. Testimony is admissible if sufficient evidence is introduced to support a finding of fact that the witness had firsthand knowledge. Paragraph 53*d*(2)(*e*) seems to leave the issue with the judge as a preliminary question of fact.

Rule 605 provides that the presiding judge is not a competent witness. The *Manual* treats this problem from a different perspective. Under Article 26(d) and paragraph 62*f*(4) the military judge is challengeable for cause if he will be a witness for the prosecution. The same result is reached under paragraph 62*f*(13) if the judge is a prospective defense witness.

Rule 606(a) makes a juror an incompetent witness. The *Manual* provides that court-members, like the military judge, are subject to challenge if they are prospective witnesses. Rule 606(b) deals with impeaching a verdict through the testimony of a juror, permitting testimony only as to whether extraneous prejudicial information was improperly brought to the jurors' attention or improper outside influence was brought to bear on the jurors. Para-

graph 151*b*(1) makes court deliberations privileged. By adopting such an approach, the *Manual* drafters created a privilege without a holder.

Bolstering Credibility. Generally, the proponent may not bolster his witness' credibility before it is attacked by his opponent. Rule 608 sets forth this specific rule and does not allow bolstering under any circumstances. In the military there are two exceptions to this general rule. First, if the witness makes an in-court identification of the defendant, the proponent may, under paragraph 153*a*, prove that the witness made a prior out-of-court identification provided this identification was not in violation of due process of law or the accused's right to counsel. Second, paragraph 142*c* provides that if the alleged victim of a sexual offense has already testified, the proponent may prove that the victim made a fresh complaint to the authorities soon after the offense. Such evidence, however, is limited to the fact that the complaint was made and the defendant identified. The witness cannot go into the details.

Impeachment. Paragraph 153*b* of the *Manual* specifically provides that a proponent may not impeach his own witness. The only exceptions to this rule are situations in which the witness' testimony is indispensable or unexpectedly adverse. Rule 607 abandons this traditional rule and allows impeachment by any party.

The presentation of evidence of a witness' character with respect to truthfulness and veracity is a traditional method of impeachment. Such evidence can be proved through testimony concerning the individual's reputation in the community or a witness' opinion of this character trait. Rule 608 and paragraph 153*b* permit the introduction of both types of evidence.

Another method of impeachment with respect to truthfulness and veracity is evidence of a prior criminal conviction. Both paragraph 153*b*(2)(*b*) and Rule 609 provide that a person may be impeached by showing that he has been convicted of a crime. Rule 609(a) provides that the conviction (1) must relate to a crime punishable by death or imprisonment for more than one year or (2) involves dishonesty or a false statement regardless of the punishment. The *Manual* rule is similar in that it allows the opponent to use a conviction involving moral turpitude or otherwise affecting credibility for impeachment purposes. Those convictions involving "moral turpitude or otherwise affecting credibility" are defined as follows: (1) a conviction by court-martial of an offense for which a punishment of a dishonorable discharge or confinement at hard labor for more than one year is authorized, regardless of the punishment actually adjudged; (2) a conviction of any offense involving fraud, deceit, larceny, wrongful appropriation, or the making of a false statement; (3) a conviction by a federal court of a felony offense that is punishable by confinement for more than one year; or (4) a conviction by any court of an offense which is characterized as a felony offense in that jurisdiction. The evidence of a prior conviction may be proved by extrinsic evidence.

Paragraph 153*b* of the *Manual* provides no time limitations upon using evidence of a prior conviction for impeachment.[24] "The time limitations upon the introduction of evidence of previous convictions set forth in 75*b*(2) do not apply to impeachment proceedings." As opposed to the *Manual*, the general rule under Rule 609 is that evidence of a prior conviction is not admissible for impeachment if a period of more than 10 years has elapsed since the date of the conviction or the release of the witness from confinement whichever is the later date.[25] An exception to the rule may be made when the court determines "in the interest of justice, that the probative value of the conviction supported by these specific facts and circumstances substantially outweighs its prejudicial effect."

A fourth type of impeaching character evidence involves proof that the witness (other than the accused) committed an act of misconduct which tends to diminish his credibility. Both the *Manual* and Rule 608 provide that extrinsic evidence ordinarily cannot be used in the proof of such misconduct. Paragraph 153*b*(2)(*b*) makes one exception in the case of a sex offense prosecution in which lack of consent is an element: the cross-examiner may introduce extrinsic evidence of "specific acts of illicit sexual in-

tercourse or other lascivious acts" to impeach the complaining witness' credibility as well as to prove consent.

Both Rule 613(a) and paragraph 153*b*(2)(*c*) provide that an opponent may cross-examine the witness about a prior material inconsistent statement to impeach the testimony of the witness. The *Manual* provides that before cross-examining the witness about the statement, the opponent must direct the attention of the witness to the occasion on which the statement was made, identifying it with sufficient particularity as to time, place, and persons present as to fully insure that the witness can recognize it. Rule 613 abolishes the foundation requirement, providing that, on the opponent's request, the proponent must disclose and show the statement to the opponent's counsel. This rule guarantees the witness an opportunity to explain or deny the statement, but this opportunity need not precede the evidence. Under the Federal Rules, some prior inconsistent statements [26] that are admissible for impeachment are also admissible as substantive evidence. The *Manual* provides that even if the witness admits making the inconsistent statement, extrinsic evidence may be introduced in addition to the admission. A statement offered solely for impeachment purposes and not offered and accepted under one of the hearsay exceptions may not be used to prove the truth of the contents.

Impeaching Character Witnesses–Form of Question. Cross-examination is one method of impeaching a character witness. Prior to the enactment of Rule 405, a character witness in the federal courts could only testify as to the defendant's reputation in the community. Because reputation evidence is an accumulation of hearsay, the Supreme Court indicated in *Michaelson v. United States* [27] that the proper form of the question must be "have you heard?" rather than "do you know. . .?" This rule was strictly applied by the federal courts and the appellate courts have rebuked prosecutors who have deviated from the *Michelson* standard.[28] The reason for the strict rule on the form of the question is that normally the question deals with prior convictions, arrests, or other acts of misconduct. Under Rule 405 and military practice the appropriate form of questioning is unclear. The Advisory Committee suggests that the form of the question asked a witness who testifies as to his opinion of the defendant's character is immaterial. In military practice character may be proved by reputation or opinion evidence. Since the witness who provides both types of character evidence is testifying based on his own personal knowledge (opinion) as well as hearsay (reputation), the form of the question would also appear immaterial.

Examination of Witnesses. Both the *Manual* and Rule 611 adopt the restrictive view of the scope of cross-examination, limiting cross-examination to matters raised on direct examination and issues affecting credibility. Leading questions under the Rule are restricted to cross-examination except when the witness is hostile, is an adverse party, or is identified with an adverse party. Paragraph 149*c*(1)(*b*) permits leading questions of hostile witnesses but no reference is made to an adverse party or adverse witnesses identified with the adverse party.

Rule 612 extends the common law doctrine of refreshing recollection to the pretrial use of documents. An adverse party can require the production of such a document for inspection prior to trial "if the court in its discretion determines it is necessary in the interest of justice." Documents covered by the Jencks Act [29] are exempted from this provision. In contrast, paragraph 146*a* permits the opposing military counsel to obtain and use the memorandum only if the witness uses it in court to refresh his memory.

Rule 614 gives the judge power to call and question witnesses on his own motion. The *Manual* recognizes such a power of the judge and court members but limits it in certain respects. Paragraph 149*b*(3) provides that when questioning an accused the judge may only ask questions which "would be permissible on cross-examination of the accused by the prosecution" and when questioning character witnesses offered by the defense the judge must confine himself to "matters which could properly be inquired into by the prosecution."

Rule 615 gives the judge power to exclude prospective witnesses from the courtroom during the testimony of other witnesses. Paragraph 53f states that the sequestration power is also possessed by military judge.

Article VII—Opinions and Expert Testimony.

Both the Rules and the *Manual* permit opinion testimony by laymen under certain conditions. Paragraph 138*e*'s so-called "collective facts" exception requires that the opinion be based upon personal knowledge, be an opinion layman commonly draw, and that the recitation of the underlying facts would not adequately convey the witness' impression of the court. Rule 701 is not as restrictive in that it permits lay opinions if "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Rule 702 is the basic rule on expert testimony. Such testimony is proper if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." This represents a slight liberalization in that the common law and paragraph 138*c* limit expert testimony to matters that are beyond the comprehension of laymen.

The common law limited the bases of expert testimony to matters personally observed by the expert or hypothetical questions. Rule 703 and paragraph 138*e*, in addition to the above methods, allow an expert to testify based on reports and other works that are customarily considered in his field of specialty. Such reports and works do not have to be admissible.

Rule 704 abandons the rule that opinion testimony embracing an ultimate issue is prohibited. The *Manual* is silent on this issue.

Rule 705 allows an expert to give an opinion without first disclosing the underlying facts of data upon which the opinion is based. The judge, however, is given discretion in this matter and may require the expert to disclose the basis of his opinion during direct examination. The underlying facts are a proper subject for cross-examination. Paragraph 138*e* of the *Manual* contains a similar rule.

Rule 706 provides a detailed procedure for use of court-appointed experts. Such experts can be appointed on the judge's motion or pursuant to the request of counsel. A deposition of the expert's testimony may also be taken. Either party may call the expert and either may subject him to cross-examination, even if that party called him in the first place. Both parties still retain the right to call their own experts. While the *Manual* does not contain such detailed procedures, the judge does have the power to call new witnesses and this power would presumably include experts. Moreover, paragraph 116 authorizes the convening authority to employ experts.

Article VIII—Hearsay.

While the *Manual* and Rule 801 embrace similar definitions of hearsay, the Rule goes on to exclude from that definition two of the traditional exceptions. First, prior inconsistent statements under Rule 801(d)(1) fall outside the hearsay rule. Such statements when made under oath at a prior hearing or trial are not considered hearsay and are admissible as substantive evidence. Paragraphs 153*b*(2)(*c*) and 139b allow such statements to be used only for impeachment and not as substantive evidence. Prior consistent statements offered to rebut an impeachment claim of recent fabrication are also admissible as substantive evidence under the Rule. Second, under Rule 801(d)(2) admissions by a party-opponent are also not considered hearsay. Under paragraph 140 confessions and admissions constitute hearsay but fall within an exception. Co-conspirator statements are also treated as non-hearsay statements under the Rules, but not the *Manual*.

The Federal Rules divide the hearsay exceptions into those that require a showing of unavailability (Rule 804) and those exceptions that do not (Rule 803). There is only one standard of unavailability in the Rules whereas the *Manual* follows the orthodox view of providing different standards of unavailability for each specific exception.

Declarations Against Interest—Rule 804 (b)(3). The Rules recognize declarations against

penal as well as pecuniary and proprietary interests. Declarations against penal interests, however, must be corroborated. This exception is not mentioned in the *Manual*.

Present Sense Impressions—Rule 803(1). This exception is similar to the excited utterance exception but without the requirement of a "startling event." The timing element, however, is stricter under this exception. This exception is also not mentioned in the *Manual*.

Ancient Documents—Rule 803(16). Statements contained in documents at least 20 years of age whose authenticity has been established are admissible. The *Manual* contains no comparable exception.

Learned Treatises—Rule 803(18). Federal Rule 703 allows an expert to testify based on works commonly used in his field. Rule 803(18) permits such works to be admitted as substantive evidence, if the expert relied upon them or they are shown to be reliable by an expert. The exception is limited to treatises relating to "history, medicine, or other science or art." This exception must be used in conjunction with expert testimony. The *Manual*, in paragraph 138*e*, limits the use of learned treatises to impeachment and not substantive evidence.

Records of Regularly Conducted Activities—Rule 803(6). This exception covers records prepared by a business, institution, association, profession, occupation, and calling of every kind. The definition set forth in paragraph 144*c* of the *Manual* does not include the terms "institution" and "association," and therefore may be limited to records of commercial enterprises. On the other hand, the Rule requires personal knowledge on the part of the entrant whereas the *Manual* does not.

Statements for Purposes of Medical Diagnosis or Treatment—Rule 803(4). This exception covers statements relating to past symptoms, pain or sensations if made for the purpose of diagnosis or treatment. Paragraph 142*d* of the *Manual* limits state of mind or body utterances to those involving a "then existing motive, intent, or state of mind or body."

Public Records and Reports—Rule 803(8). This Rule governs the traditional official records exception. The Rule specifically excludes police investigatory reports in criminal cases. This same result is reached under paragraph 144*d*, which excludes matters prepared principally for the purposes of prosecution. Under the Federal Rules other investigative and evaluative reports may be used against the government but not the defendant in criminal cases.

Other Exceptions—Rules 803(24) and 804(b)(5). Under the Federal Rules the judge has the power to admit statements that do not fall within the specified exceptions if other evidence which could be procured on that point is not as probative and the ends of justice would be served. Advance notice to the opposing counsel, including the name and address of the declarant, is required.

Rule 806 allows the party against whom a hearsay statement has been admitted to attack the credibility of the declarant. The Rule also allows that party to call the declarant as a witness and cross-examine him.

Article IX—Authentication and Identification.

Rule 901 deals with the traditional requirement that the proponent of demonstrative or real evidence, including writings, must establish that the item is genuine as a condition precedent to admissibility. With a few exceptions, all the illustrations of authentication outlined in the Federal Rule have been recognized in the *Manual* or military cases. One such exception is the ancient document rule which permits the authentication of a document 20 years of age if it is unsuspicious on its face and is produced from a place where such a document would naturally be. Computer printouts are also covered in Rule 901(b)(9). This exception will be important for authenticating computer-created personnel records and morning reports. The ancient documents rule and computer print-out authentication should be acceptable methods of authentication in courts-martial because paragraph 143*b* permits a writing to "be authenticated by any competent proof that it is genuine. . . ."

Rule 902 recognizes numerous methods of self-authentication. Most of the documents that are self-authenticating are official records. The *Manual* reaches the same result as Rule 902 by permitting the military judge to take judicial notice of the genuineness of official signatures and seals. Paragraph 143*b*(2)(*c*) provides that United States records may be authenticated by "Any authentication provided for by any law of the United States." Since Rule 902 is part of a statute, all the self-authenticating methods outlined in the Rule would apply to courts-martial.

Article X—Contents of Writings, Recordings, and Photographs.

This provision of the Federal Rules deals with best evidence. The major change is found in Rule 1003 which treats the admissibility of duplicates. Rule 1001(4) defines "duplicates" to include all the modern methods of reproducing writings, including photocopies. Rule 1003 provides that duplicates are admissible unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." In other words, the burden is on the party attempting to exclude the duplicate. The common law and paragraph 143*a* of the *Manual* place the burden on the party attempting to introduce the duplicate to show why the original cannot be produced.

Conclusion.

While the extent of the impact that the Federal Rules of Evidence will have upon military practice remains unclear, a recent case decided by the Court of Military Appeals indicates that the impact may be significant. In the very recent case of *United States v. Weaver* [30] the court placed great reliance on a provision of the new Rules, and reiterated its position that "federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment."

Footnotes

1. Federal Rule of Evidence 1101 sets forth with specificity the types of proceedings in which the Rules are totally or partially applicable.

2. Imwinkelreid, *The New Federal Rules of Evidence*, THE ARMY LAWYER (April 1973) at 3; Imwinkelreid, *The New Federal Rules of Evidence—Part II*, THE ARMY LAWYER (May 1973) at 1; Imwinkelreid, *The New Federal Rules of Evidence—Part III*, THE ARMY LAWYER (June 1973) at 1; Imwinkelreid, *The New Federal Rules of Evidence—Part IV*, THE ARMY LAWYER (July 1973) at 10.

3. A preliminary draft was published at 46 F.R.D. 161 (1969) and a revised draft was published at 51 F.R.D. 315 (1971).

4. H.R. REP. No. 93-650, 93d Cong., 1st Sess. (1973).

5. S. REP. No. 93-1277, 93d Cong., 2d Sess. (1974).

6. H.R. REP. No. 92-1597, 93d Cong., 2d Sess. (1974).

7. United States v. Weaver, ___U.S.C.M.A.___, ___ C.M.R. ___ (25 Jun 1975). This position is supported by another *Manual* provision with respect to the hearsay exceptions. Paragraph 139*c* provides: "The principal exceptions to the hearsay rule applicable in court-martial trials are stated in 140 through 146." The insertion of the word "principal" implies that other exceptions can be recognized.

8. 15 U.S.C.M.A. 273, 35 C.M.R. 247 (1965). The evidentiary rule announced in *Massey* was subsequently changed in the 1969 *Manual*. *Manual*, para. 148*e*; United States v. Menchaca, 23 U.S.C.M.A. 67, 48 C.M.R. 538 (1974).

9. *Manual*, para. 144*c*.

10. *See* MCCORMICK ON EVIDENCE § 308 (2d ed. 1972).

11. *Cf.* United States v. Clark, 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1973).

12. 23 U.S.C.M.A. 249, 49 C.M.R. 380 (1974).

13. 378 U.S. 368 (1964).

14. *See Manual*, para. 57*g*(2).

15. Rule 105 of the Supreme Court version.

16. *See* MCCORMICK ON EVIDENCE § 328 (2d ed. 1972).

17. *See* U.S. Dep't of Army Pamphlet 27-9, Military Judges Guide, para. 9-18 (19 May 1969 as changed).

18. H.R. REP. No. 93-650, 93d Cong., 1st Sess. 7 (1973).

19. U.S. Dep't of Army Pamphlet 27-9, Military Judges Guide, para. 9-18 (19 May 1969 as changed).

20. In recent years the Supreme Court has decided several cases involving such presumptions: *See* Barnes v. United States, 412 U.S. 837 (1973); *see also* MCCORMICK ON EVIDENCE § 344 (2d ed. 1972).

21. *Manual*, para. 202*a*.

22. *See* Hug, *Presumptions and Inferences in Criminal Law*, 56 MIL. L. REV. 81 (1972).

23. United States v. Barben, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963); United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

24. However, in United States v. Weaver, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (25 Jun 1975) The Court of Military Appeals cited Federal Rule 609's 10-year limitation in holding that a military judge, in accordance with established federal practice, must exercise discretion in determining whether to allow the impeachment of an accused by previous convictions. The court added in footnote that: "it is believed that military judges should rarely exercise their discretion to admit convictions over 10 years old and then only in exceptional circumstances."

25. For the application of Rule 609 to the military, *see* United States v. Weaver, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (27 Jun 1975).

26. *See* Rule 801(d)(1) (treating some prior inconsistent statements as substantive evidence).

27. 335 U.S. 469 (1948).

28. *See* Veith v. State, 267 So.2d 480 (Ala. 1972) (not grounds for reversal); Robertson v. State, 44 Ala. App. 205, 205 So.2d 524 (1967) (improper but not reversable); Comi v. State, 202 Md. 472, 97 A.2d 129, *cert denied* 346 U.S. 898 (1953) (questions objectionable in form only).

In Gandy v. United States, 386 F.2d 516, 520 (5th Cir. 1967), *cert. denied* 309 U.S. 1004 (1968), the court wrote:

> Prosecutors, however, would be well advised to carefully acquaint themselves with the opinion in *Michelson*, clearly a masterpiece in the field, and particularly that language [T]he form of the inquiry, "Have you heard?" has general approval and "Do you know?" is not allowed.

See also Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967); Bryan v. United States, 373 F.2d 403 (5th Cir. 1967); Stewart v. United States, 104 F.2d 234, 235 (D.C. Cir. 1939). *But see* Lyons v. State, 133 P.2d 898 (Okla. Crim. App. 1943).

29. 18 U.S.C. § 3500.

30. ___ U.S.C.M.A. ___, ___ C.M.R. ___ (25 Jun 1975).

Prugh Addresses International Law Society

An address given by then Major General George S. Prugh, The Judge Advocate General, United States Army, to the Panel Meeting of the American Society of International Law in Washington, D.C., on 26 April 1975.

The second session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict began in Geneva, Switzerland on 3 February 1975. President Graber of the Swiss Government opened the Conference noting that there would not be in attendance at this session representatives from China, Albania, and South Africa. He did not elaborate on the reasons for their absence.

The working style of the second session started off in much the same manner as at the first session with a high degree of politics and very little apparent interest in the substance of the Conference. It began with dispute arising out of the attempted seating of the Vietcong as voting member in the Conference equal to that of the Republic of South Vietnam. Once this issue was determined (adversely to the Vietcong), the Conference did settle down to substantive work. This was achieved by the use of working groups within committees. I think it's fair to say that the fact that the Conference did thereafter move ahead and reach consensus agreement on a substantial number of articles is attributable largely to the use of small working groups to prepare agreements especially where there were difficult issues involved. I spent the bulk of my time working in Committee I and these remarks are limited to the work of that committee at this second session of the conference. You will recall that the only article that seemed to reach any form of final shape in the first session of the Conference in 1974 was Article I of Protocol 1. The effect of Article 1 on the rest of the protocol was a matter of considerable study during the period between the sessions. At the time the second session opened, there was very little agreement as to just what the impact of Article 1, as amended, would be upon both the Convention and the Protocol. It became very clear however that it would be highly unlikely that Article 1 of Protocol 1, as amended, would be greatly changed. It was also apparent that there would be considerable sensitivity to any suggestion, especially on the part of the Western countries, that could be interpreted by the Third World as being an attempt to erode the victory that they had achieved in the language that had been accepted by Committee 1 during the first session.

The American position in this regard was to move ahead and see what substantive improvements could be made in the Protocol, having in mind that the amendment language of Article 1 would probably stand. It seems as if the primary interest of many states at this second session focused on the issue of whether there would be an attack on the amended Article 1 of Protocol 1, and once it was determined that the Western states were not making such an attack, interest in the substantial number of countries seemed to wane. Toward the end of the conference, there were only between 60 and 70 states actively participating in the voting and there were times during the period that I was still present, up through the third week of the Conference, when in a discussion there would be representatives of only 40 states, about 20 of them being European, 10 of them other Western states, and then the remainder representing all the rest of the globe.

Committee 1 settled down to discuss, through debate, Articles 2 through 7 of Protocol 1 and then Article 1 through 5 of Protocol 2. Debate was completed and the Articles were then, in turn, referred to a working group. Ultimately the Committee formed two working groups. One, to deal with issues arising out of Protocol 1 and the other one out of Protocol 2. Committee progress was deliberate. By the end of the second week discussion of all of the Protocol 1 Articles 2 through 7 was completed. By the end of the third week the Committee had completed a compromise on the language of Article 5, subparagraph 3, which is one of the most critical articles. At the same time a small informal working group met to discuss possible solutions to Articles 84 and 88. On the 14th of March working group A, on the Protocol 1 articles, had come up with text for all seven articles under its consideration. And working group B had furnished text on Articles 1 through 5 of Protocol 2. The Committee had also considered a provision on the protection of journalists, a resolution which was referred from the United Nations General Assembly.

On the third week of March the Committee took up Articles 6 through 10 of Protocol 2 and completed the debate in that week, referring the articles to the working group. In the last week of March debate centered around Articles 70 through 73 of Protocol 1. Through votes around the 13th, 14th, and 15th of March, Committee 1 adopted the text of the Articles which are furnished here at this meeting.

An important article from the American point of view was the development of a workable text to improve the situation concerning the appointment and effective application of the system of a protecting power. Common Article 8 of the Conventions provides that the Conventions shall be applied with the cooperation and under the scrutiny of the protecting powers whose duty it is to safeguard the interests of the parties to the conflict. In Common Article 9 reference is made to the humanitarian activities of the ICRC or any other impartial humanitarian organization which may, subject to the consent of the parties to the conflict concerned, undertake actions on behalf of the victims. Common Article 10 is the basic Article that provides for the entrusting of certain duties to a protecting power. The first paragraph specifically says "The high contracting parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties encumbent on the protecting powers by virtue of the present Convention." The second paragraph of that article goes on to refer to a situation when the victims do not benefit from the appointment of a protecting power, in which case it provides that the detaining power shall request a neutral state or such an organization to undertake the functions performed under the Convention by a protecting power, designated by the parties to a conflict. Then in the third subparagraph of same article, if protection still is not arranged, the detaining power "shall request or shall accept" the offer of the services of a humanitarian organization, such as the ICRC to assume the humanitarian functions performed by protecting powers under the present Convention. As to this particular article, the USSR, East European, and some other states made specific reservations.

This system of a protecting power has not been effective. It was not used in the Vietnam War. Neither was it possible for arrangements

to be made to get a substitute for a protecting power to look after concerns of Americans held as prisoners of war in North Vietnam. It was a major concern of the American delegation to try to improve the arrangements so that if it was otherwise impossible to assure the presence of a protective power, there would at least be machinery which would bring about an effective substitute for humanitarian functions. It should be noted however in this last regard that there was an effort made during the Vietnam War to introduce a form of a substitute which did not meet the requirement of an impartial humanitarian organization when the Falk and Dellinger Delegation went to Hanoi and arranged for the release of three American prisoners of war there. This incident of course did serve to highlight the propaganda use and the political machinations which could develop in the use of a substitute. Early in the discussion of Article 5 of Protocol 1 (the article relative to protecting powers), it became apparent that the protecting power system would not work unless there was an agreement by both sides of an armed conflict. The Soviet view allowed as many steps as were wished in order to provide the greatest opportunity for arriving at some form of an agreement regarding the protecting power or the substitute, but it opposed any automatic result. After much negotiation Committee I has now come up with an approved Article 5 which is aimed at accomplishing several things. In the first paragraph the Article sets forth a recognition of the duty that the parties to a conflict have from the very beginning of that conflict to seek the applications of the system of the protecting power. I might say that this paragraph is the off-shoot of an American proposal made in the small working group in the third week of the Conference. The basic concept was adopted by a vote of 72 to 1, with two abstentions. The second paragraph (which was adopted by general consensus of the Committee) provides that each party to the conflict shall without delay designate a protecting power and shall without delay permit the activities of a protecting power which has been accepted by it after it has been so designated by the adverse party. In the event that agreement is not reached, however, then the provision of the third party comes into play. This was adopted by a vote of 65 to 0 with three abstentions. In substance, what it does is to authorize the ICRC to offer its good offices with a view to obtaining the designation of a protecting power. Now this recognition of the ICRC is "without prejudice to the right of any other impartial humanitarian organization to do likewise". In undertaking this job the ICRC may ask each party to provide it with a list of at least five states which would be considered acceptable to act as a protecting power. Then the lists are compared and within two weeks an agreement sought on the name of the state that appears on both lists. Paragraph 4 is a further step in the event that no agreement has yet been reached, either by the parties themselves or the parties with the aid of the ICRC. This particular paragraph 4 was adopted by the vote of 53 to 10, with eight abstentions. And this is as far as the Conference is able to go in the direction of any form of automatic action. It provides that if there is no protecting power, despite all of the machinery set forth above, then the parties shall accept an offer which "may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy". This will follow consultations with the said parties. Of course, the ICRC, or that "other organization" referred to, would act as a substitute, subject to the consent of the parties to the conflict, and endeavor to fulfill its task under the Conventions and the Protocol. You will note that it does not specify what those tasks are. The fifth paragraph of Article 5 stresses that the designation and acceptance of the protecting power does not affect the legal status of the parties to the conflict or of any territory, including occupied territory. The sixth paragraph provides that the maintenance of diplomatic relations does not constitute an obstacle to the appointment of a protecting power and neither does the appointment under the Vienna Convention on diplomatic relations. Finally, Article 7 notes that, whenever mention is made of a protecting power, that mention also includes any substitute. Article 2 includes now a definition of a protecting power as a neutral or other state not party to the conflict, which has been designated by a party to the conflict and accepted by the adversary party and has agreed

to carry out the functions assigned to a protecting power under the Conventions and the present Protocol. Article 2 also defines a substitute as an organization acting in place of the protecting power in accordance with Article 5.

Describing what's accomplished by Article 5, I suppose it's fair to start by noting what it does not do. It does not have a time limit. It stresses action "without delay", a rather uncertain and possibly abused standard. It does not have an automatic appointment of a substitute in the event the agreement is not reached on a protecting power. Paragraph 4 of Article 5 has made it possible for a party to fend off action as long as consultations can be undertaken regarding either the ICRC or any other organization which purportedly offers guarantees of impartiality and efficacy. The potential for protracted consultations and inaction is certainly great. On the other hand, Article 5 does accomplish something. It stresses that the parties have a duty to initiate the system and clearly this is a plus. An affirmative statement reaffirms and clarifies the Article 8 responsibility the parties have in this regard. The new Article 5 does establish some machinery which if carefully carried out could result in the appointment of a protecting power or in a substitute. A third benefit is the recognition in the article that the International Committee of the Red Cross does have a specific role to play in arriving at a protecting power, and that it may participate as a substitute. Attention should be invited, however, at this point to the fact that Common Article 9 of the Conventions notes that the provisions of the Convention do not constitute an obstacle to the humanitarian activities of the ICRC, which may be undertaken subject to the consent of the parties to the conflict concerned, for the protection of war victims. Now there is no such statement reaffirming that principle in this Article 5 of Protocol 1. There is, it seems to me, another deficiency in this Article 5 which is likely to lead to serious trouble. The ICRC made it plain in the course of the debate that it would never undertake any function, either as a substitute or as an impartial humanitarian organization, without having determined in advance that it had consent of both parties to the conflict. Furthermore, it seems evident that the ICRC would only undertake certain humanitarian functions. The debate did not elaborate on which were the functions of the protecting power or substitute which the ICRC saw fit to accept or to reject. The trust of Protocol 1, as it was drafted, would impose substantial burdens on a protecting power, burdens which are already quite enormous under the Conventions themselves. It cannot be expected that the ICRC or any other impartial humanitarian organization would wish to undertake the complete gamut of protecting power functions, which include all that relate to the "safeguarding" of the interests of the parties of the conflict.

One issue that arose after I left Geneva was a proposal initiated by the Norwegian Delegation and some of the Arab states for another Article 5 paragraph, known as three *bis*, which would have provided, in the event of a failure to agree upon the protecting power or a substitute, for the UN to designate a substitute. This proposal, of course, was opposed by a great many states. The United Nations representative stated that he doubted that the United Nations' charter gave a legal basis for the UN to assume that role. But the proponents of three *bis* intended to carry it on. The proposal did not, however, reach any substantial support and was not accepted by the Committee.

The other major issue which arose in Committee 1 related to Article 1 of Protocol 2, which is the article referring to material field of application of the protocol, intended to deal with internal conflicts, that is, at least conflicts not included in Article 1 of Protocol 1. Of course, the amendment of Article 1 of Protocol 1 expanding it to include conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" made the subject very confusing. Just where does Protocol 2 pick up from Protocol 1? Within the American Delegation it had been our thought that there should be no hiatus between the armed conflicts dealt with in Protocol 1 and Protocol 2. However we described it, Protocol 2 should pick up everything in the armed conflict area that was not covered by Protocol 1. At the same time it was our thought that the funda-

mental intent of Protocol 2 was to flesh out Common Article 3 of the Conventions. You will recall that Common Article 3 deals with "armed conflicts not of an international character, occurring in the territory of one of the high contracting parties". The debate that centered around the initial article of Protocol 2 inevitably wrestled with what has generally been referred to as the threshhold question. In other words, how high an intensity of the conflict must occur before Protocol 2 becomes applicable? And will that threshhold be congruent with Article 1 of Protocol 1 and Common Article 3 of the Conventions? A substantial number of states view Protocol 2 with little enthusiasm. These states are concerned that Protocol 2 deals with matters coming within the domain of domestic affairs of a sovereign state. At the same time there is concern that Protocol 2 might be used to justify interference in the domestic affairs of a sovereign state. Canada has from the beginning been one of the major proponents of Protocol 2 and has generally been supported by the Western states, including the United States. But it's fair to say, by and large, the Third World has considerable scepticism about Protocol 2. In general, those who have little enthusiasm for Protocol 2 have urged a higher threshhold level of violence as a predicate for the application of the protocol. Leaders in establishing this high threshhold included India, Pakistan, Nigeria, Mexico, and some Latin American countries. They reflected what was probably a majority view of opposition to any protocol on non-international conflicts which might be applicable within their country. One has to regard, then, as a remarkable achievement, the fact that Article 1 of Protocol 2 was finally adopted by consensus in Committee 1. The adopted article refers to Common Article 3 and to Article 1 of Protocol 1, indicating that, with regard to the former, it is developing and supplementing but not modifying its conditions of application. And, with respect to the latter, that this Protocol 2 is applicable to all armed conflicts which are not covered by Article 1 of Protocol 1. So far so good. It then proceeds, however, to establish a new and additional requirement thereby elevating the threshhold. It notes that the armed conflict must take place between organized armed groups which "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present protocol" The Committee then has established some fundamental criteria: (1) that the groups be organized, (2) that they be under responsible command, and (3) that they exercise control sufficient to permit them to implement the present protocol. It was reported to me that a lower threshhold than this was not even negotiable. The control over the territory which is referred to here need not be total control or continuous. While the words "sustained and concerted" were not given any interpretation in the Committee it was apparent in the working group that it was intended that these words would measure the duration and the scale of the conflict. It was intended that Protocol 2 would apply to low intensity but continuing armed conflict. Even under this view, for the Protocol to come into play an armed force would be expected to have sufficient control to enable it to conduct coordinated attacks with some frequency and over a reasonable period of time. Protocol 2 would also apply where there was a higher intensity conflict but one of shorter duration if the control was sufficient to permit continuous large scale operations.

It remains to be seen whether a meaningful and useful Protocol 2 can be created upon this base. Clearly the provisions of substance will be important in that determination, but the beginning is not auspicious.

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Speedy Trial Note. A recent decision of the United States Court of Military Appeals, *United States v. Johnson*, ____ USCMA ____, ____ CMR ____ (CM 430007, 9 May 1975), reemphasizes the need for careful case management from staff judge advocates and the trial

judiciary. In *Johnson*, the accused was brought to trial 118 days from the date of the original offenses. However, he had committed intervening offenses of assault and disobedience while in the stockade. These offenses were 82 days old when brought to trial. On certification the court affirmed the findings of the Army Court of Military Review, *United States v. Johnson*, 49 CMR 13 (ACMR 1974), in dismissing all charges and specifications for lack of speedy trial. Both courts recognized that the commission of intervening offenses and preferral of additional charges could amount to an extraordinary circumstance and justify a delay beyond 90 days, citing *United States v. Marshall*, 22 USCMA 431, 47 CMR 409 (1973). However, both courts were quick to note that in the instant case it took 25 days to prepare the pretrial advice and another 34 days to bring the case to trial. The court also noted that the offenses were "relatively complicated assault and disobedience offenses." Therefore, there existed no "extraordinary circumstances" to justify a delay in excess of 90 days. The court also rejected the government's contention that the additional charges were within the *Burton* time limit as there had been a defense demand for trial on the 89th day of confinement, yet it took 29 days to get to trial. The court refused to accept a crowded trial docket and the TDY and emergency leave of the resident judge as adequate reasons for delay. As a solution, however, the court observed that in cases where intervening charges resulted in original charges being placed in a *Burton* situation, separate trials for each set of offenses could result. The court noted that, although the *Manual* provides that all known charges should be tried at a single trial, this is only a statement of policy and the speedy trial provisions of the UCMJ take precedence.

The court also noted in the *Johnson* case that the record did not indicate extraordinary circumstances or unusual difficulties in prosecuting the case and urged the government to make any such difficulties a matter of record in response to a defense motion for dismissal of the charges. Therefore, it would seem appropriate that trial counsel carefully document the reasons for delays in similar cases, the problems caused by the intervening charges, and any difficulty occasioned by the nature of the charges. A good record enables the appellate divisions to raise and combat the issues raised in the case.

The trial judiciary has also recognized its duty in case management and that military judges should work with staff judge advocates in guaranteeing an accused a speedy trial. If a judge is not available on a requested date and his docket cannot be changed to accommodate a case, the judge concerned should inform the command that he is not available on the date requested but that another judge will be requested from the circuit or from the Chief Trial Judge. Staff judge advocates facing a *Burton* problem and desiring "emergency service" from the judiciary should be prepared to present justification, for if eleventh hour requests for judicial service are repeated by a command and many cases are "emergencies," docket turbulence will result in other inefficiencies. Effective case management by staff judge advocates and trial judges, along with a good record, will insure compliance with the *Burton* dictates and forestall problems such as appear in *Johnson*.

2. Word Processing Caveat. Magnetic typewriters provide the capability of storing standard information, such as personal data of an accused, for later use in a pretrial advice, Chapter 10 discharge action, extension of pretrial confinement, post trial review, etc. Unfortunately, portions of that information may be subject to change. For instance, preliminary review may produce a record of a previous conviction, but it may be determined at trial to be inadmissible, and therefore not properly includable in the post-trial review. See *United States v. Dixon*, ___ CMR ___ (30 Apr 65). Magnetic typewriters can increase office efficiency and production, but their use requires additional checks for accuracy and completeness.

3. Videotape and Depositions. In a recent United States Air Force court-martial proceeding, an interesting technique was employed in the use of videotape. The charges, involving larceny of government property, were referred to trial in Korea. The accused desired the testimony of two character witnesses who were resident on or near Norton Air Force Base,

California. One was a civilian with no military affiliation who had supervised the accused in an off-duty job where he handled both money and foodstuffs. This witness was willing to travel to Korea to testify, at government expense. The second witness was an Air Force lieutenant who had supervised the accused during the latter's service at Norton. In response to a defense request for the presence of the witnesses, the trial judge ordered that their testimony be preserved by videotape deposition (Norton Air Force Base contains one of the best television studios in the Air Force).

To comply with this order of the trial court, the prosecution arranged to have the witnesses and a deposition officer present at the Norton Air Force Base television studio in California. The accused, trial counsel, and defense counsel, all located in Korea, were placed on a conference telephone hook-up whereby each could hear the other as well as the deposition officer and witnesses located in California. Only the deposition officer and witnesses appear on the videotape portion of the transcript while the audio portion contains the voices of all parties. The defense did not consent to this procedure and accordingly entered an objection which occured on the videotape.

The videotape commenced with the usual preliminary remarks by the deposition officer, and additionally, he established that the telephone hook-up was operative, with the parties in Korea being able to hear and transmit. Next, the television production coordinator was called and sworn. Then the witnesses were called, and sworn. They testified in response to the telephone questions of each counsel. The deposition officer closed the proceedings. A clock was positioned on the wall behind the deposing officer and witnesses which was visible at all times. Its presence assured against issues arising concerning editing and tampering with the videotape.

The depositions were offered into evidence by the defense at trial without waiving the defense objection to lack of presence of the witnesses. The accused was acquitted of all charges and specifications, thus precluding appellate review of the technique.

The use of videotaped depositions involves two constitutional considerations: The accused's right to confront the witnesses against him; and the accused's right to have compulsory process for obtaining witnesses in his favor.[1] The right to confrontation possesses the components of cross examination and the ability of the fact finder to observe the demeanor of the witness.[2] It is concerned with witnesses *against* the accused and consequently is of no moment in analyzing the videotape technique under discussion. The accused's right to compulsory process of witnesses in his favor is involved here. Article 46, UCMJ, states that:

> "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. . . ."

In *United States v. Thornton* [3], this language was construed to mean that ". . .an accused cannot be forced to present the testimony of a material witness of his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom". *Thornton* involved the improper denial at trial of a defense request for a civilian witness located in New York to appear at a court-martial conducted in Alabama. This witness's testimony was described by the court as going to the core of the defense.[4]

In *United States v. Sweeney* [5], the good character of the accused was described as being "the core of his defense".[6] Sweeney had been denied the in-court testimony of an admiral and a lieutenant who allegedly would have testified to Sweeney's honesty and reliability in rebuttal of charges alleging conspiracy to commit larceny and larceny of more than $50. The witnesses and the court were located in the United States.

The question arises whether the Air Force videotape technique could have been used to satisfy the *Sweeney* court. The opinion stressed that ". . .the weight to be given to testimony of a witness upon an accused's character is based in large part upon the personal appearance and the manner of testifying of the witness".[7] A good quality videotape presentation certainly satis-

fies this requirement. That environmental differences exist between courtrooms and television studios is beyond question. The courtroom atmosphere is more likely to cause a psychological reaction in a witness which will manifest itself in a physiological manner. However, the proponent of a witness is the party likely to benefit from the more relaxed studio atmosphere. Nonetheless, will court members or trial judges consciously wonder how the videotaped witness would have reacted in a courtroom and thus develop doubt as to the proper weight to be attributed to his testimony?

In conclusion, *Sweeney* requires that character evidence be presented live where it forms "the core of the defense". In the Air Force case at hand, it would appear that both witnesses should have been provided if good character was a core defense. While videotaped depositions would figuratively satisfy this requirement, they would not do so literally.

In *United States v. Manos* [8], trial defense counsel sought the attendance of three chief petty officers and a civilian resident of New York City to testify in extenuation or mitigation on behalf of the accused at a trial conducted in Japan. The petty officers presumably would have testified that Manos was a good sailor, obedient, and a good worker while the civilian's expected testimony is not specifically described. In *Manos*, the court rejected the government contention that Article 46 does not apply to the presentencing phase of courts-martial.[9] The court did refrain from describing in Sixth Amendment terms the accused's right to presentencing witnesses. The *Manos* opinion concluded by stating that the witnesses or their depositions should have been made available. *Manos* does not require the production of every witness requested. A recent decision discusses compulsory process but only in conjunction with the merits of the case as opposed to the presentencing phase.[10] *United States v. Daniels* states that ". . .the possibility that the accused would receive a fair trial was gravely impaired where a witness could not be obtained." [11] While this remark concerned a defense-requested witness on the merits, it may be that the absence of a crucial witness in extenuation or mitigation would also deprive the accused of a fair trial.

Manos and *Daniels* would permit the videotape deposition of many extenuation and mitigation witnesses. However, the dramatically important witness should be presented in person. Sweeney's admiral would be such a witness. At least one of Manos' three petty officers would probably be such a witness. And, had Daniels pleaded guilty, the victim witness in that case might well have been crucial in extenuation and mitigation.

Of course, if the holdings of *United States v. Davis* [12], United States v. Gaines [13], and *United States v. Ciarletti* [14], apply to Article 46 questions as well as the right of confrontation, a service member must be provided as a witness unless he is otherwise *unavailable*. However, those cases deal with the accused's right to confront prosecutorial witnesses on the merits. They do not deal with the accused's right to present witnesses on his own behalf much less the presentation of those witnesses in extenuation and mitigation.

Paragraph 146b, *Manual for Courts-Martial, United States, 1969 (Revised Edition)* permits the defense to introduce "[W]ritten statements . . . concerning the character of the accused. . . ." as an exception to the hearsay rule. This may be done at any stage of a trial at which his character is material. A reasonable interpretation of the *Manual* rule, in view of its purpose, would permit its application to audio or videotapes. In some cases, the defense may perceive an advantage in using those devices instead of attempting to secure the personal presence of witnesses because, although the "statements" may be rebutted, the declarants are not subject to cross-examination.

Footnotes

1. United States v. Davis, 19 USCMA 217, 41 CMR 217 (1970); United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974).

2. Barber v. Page, 390 U.S. 719, 725, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968); United States v. Gaines, 20 USCMA 557, 43 CMR 387 (1971).

3. United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957).

4. *Id.*

5. United States v. Sweeney, 14 USCMA 599, 34 CMR 379 (1964).

6. *Id.* at 34 CMR 379, 384.

7. *Id.*

8. United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967).

9. *Id.*

10. United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974).

11. *Id.* at 48 CMR 655, 657.

12. United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974).

13. United States v. Gaines, 20 USCMA 557, 43 CMR 387 (1971).

14. United States v. Ciarletti, 7 USCMA 606, 23 CMR 70 (1957).

Judiciary Notes

From: U.S. Army Judiciary

1. Chief Judge Outlines Duties of US Army Chief Trial Judge. The following letter is published because it contains material which pertains to all trial judges and which should assist other officers better to appreciate the military judicial functions.

JAAJ-CJ 10 JUN 1975

Colonel Wayne E. Alley
Chief, Trial Judiciary
Nassif Building
Falls Church, Virginia 22041

Dear Colonel Alley:

As you are becoming more accustomed to your new duties, I wish to take this opportunity to convey to you my concept of your responsibilities and my support of you in seeing that they are fulfilled. The Judge Advocate General, acting upon my recommendation, has appointed you to your present position as Chief, Trial Judiciary; a detailed explication of your duties in this capacity appears in JAGO Regulation 10-4.

By now I trust you are thoroughly familiar with the sources of the organization and functions of the trial judiciary, in particular Article 26, Uniform Code of Military Justice, and Chapter 9, Army Regulation 27-10. Because the trial judiciary is a part of the United States Army Judiciary, which is an element of the United States Army Legal Services Agency, I am your immediate supervisor with respect to both agency matters, primarily administrative, and policies and procedures within the judiciary. I encourage you to avoid confusing these two areas of responsibility in order that a smooth functioning, administratively well supported, but nonetheless judicially independent system may be maintained.

Military judges of general and special courts-martial are to be independent in the exercise of their judicial functions. Your supervision over the trial judiciary should never present even the appearance of intervention affecting the disposition of particular cases. Rather your administration and supervision should be aimed toward the general objective of providing high quality, timely, responsive trial judicial service for the Army by the effective and efficient use of personnel and materiel resources.

Without an exhaustive list of all your duties, I wish to specify the following of your responsibilities which are of special interest to me:

a. Assisting me in advising The Judge Advocate General regarding the certification, designation, and assignment of military judges, pursuant to Article 26, by establishing a system for recruiting and screening candidates through personal review of qualifications and by making recommendations, which I assure you will be influential;

b. Developing judges' abilities by assisting in their initial training, providing continuing legal educational opportunities, and disseminating useful information to them;

c. Overseeing judges' locations, travel, and docketing to assure that judicial service is available when and where it is required;

d. Planning for the future of the trial judiciary and participating with other elements of the Office of The Judge Advocate General and with other interested agencies in revising and improving the law and its administration;

e. At appropriate opportunities, representing and speaking for the interests of Army trial judges when decisions affecting them are being considered;

f. Transmitting to Army trial judges those policies of mine and of The Judge Advocate General which affect them, as well as your own guidance for judicial administration in the field;

g. Assisting in the development and implementation of the Military Magistrate Program. In this regard, JAGOR 10-4 will soon be modified to reflect the Military Magistrates as a part of the Trial Judiciary.

h. Enhancing the prestige of the trial judiciary.

I would encourage you and the trial judges to continue to separate judicial independence and judicial isolation. Commanders, staff judge advocates, counsel, and a host of other persons perform indispensable functions in the administration of military justice. It is important that everyone involved in military justice exhibit mutual respect and understanding, thereby forestalling most frictions.

In those exceptional instances of complaints about the performance of duty by trial judges reported to you, you should ascertain the facts and take any corrective action indicated. Complaints made by trial judges about questionable practices of commanders, staff judge advocates, or counsel, or about the administration of military justice in general, which have not been satisfactorily resolved by the persons concerned, should be reported to me in order that the goal of fair trials with independent judges and qualified, competent counsel can be achieved. Moreover, you should be alert to all opportunities to improve the efficiency and enhance the quality, fairness and effectiveness of the entire military justice system.

From time to time you will preside at trials yourself, as requirements arise and your other duties permit. I encourage you to do so to maintain your own proficiency and also your sensitivity to current conditions encountered by the trial judges under your supervision. However, your important duties as Chief should not be permitted to suffer because of personal trial commitments. I trust your judgment in identifying the necessary balance in your responsibilities.

Your experience as a trial judge as well as your service on the US Army Court of Military Review contribute greatly, I am certain, to your appreciation and understanding of the needs and goals of the trial judiciary, as well as the problems faced in reaching those goals. I assure you of my firm commitment to the preservation of independence for military judges in the exercise of their judicial functions, my pride in their professional manner of discharging their arduous work, and my confidence that with your leadership the high prestige they now enjoy will continue to increase.

Sincerely,

/s/

EMORY M. SNEEDEN
Brigadier General, USA
Chief Judge

2. Recurring Errors and Irregularities.

June 1975 Corrections by ACOMR of Initial Promulgating Orders.

a. Failing to show the correct SSN—five cases.

b. Failing to show the correct number of previous convictions.

c. Failing to show date in "Action" paragraph.

The following errors in final promulgating orders (as set forth in messages to field commands from the Office of The Clerk of Court requesting corrective action be taken).

a. Failed to set forth proper appellate action taken pursuant to Article 66—10 cases.

b. Failed to order into execution that portion of the sentence already served—three cases.

c. Orders sentence into execution twice in both initial and subsequent promulgating orders—four cases.

The failure to provide a complete certificate of attempted service on the accused of a decision of the ACOMR, as required by Chapter 15, AR 27-10, is a continuing problem—three cases in June.

Clemency: A Useful Rehabilitation Tool

A Note from the Defense Appellate Division
By: Captain David A. Shaw, Defense Appellate Division, USALSA

An important post-trial avenue of relief available to the client is the petition or request for clemency. The clemency avenues for an individual are varied and flexible.

In appropriate cases and where possible, immediately after the sentence has been announced trial defense counsel should seek clemency recommendations from the trial counsel, military judge, or court members. These may be submitted in writing for attachment to the record to be considered by the military judge, the members of the court, or the convening authority. Paragraph 77*a*, *Manual for Courts-Martial, United States, 1969 (Revised edition).*

Article 71(d), Uniform Code of Military Justice, gives the convening authority suspension powers at the time of his action. Therefore, where appropriate the defense counsel should request a personal hearing, or at least an interview, with the convening authority to submit clemency matters and to request suspension of all or part of the sentence.

In a memorandum of 2 January 1975 (DAJA-CL 1974/12056), to all Staff Judge Advocates, The Judge Advocate General expressed his keen interest in using clemency as a rehabilitation tool. In that memorandum, all staff judge advocates were urged to look for instances where clemency action would be appropriate in court-martial cases. It was requested that staff judge advocates stress the value of suspended sentences to commanders at all levels. The memorandum stated the suspension and/or remission of an individual's discharge might provide an incentive for the individual, set an example for others in similar circumstances, encourage good behavior, and improve morale.

If the convening authority has approved a sentence to confinement and the client is transferred to the Disciplinary Barracks, eligibility for clemency is governed by Army Regulation 190-36 (17 November 1971). The Army and Air Force Clemency and Parole Board acting for the Secretary of the Army considers each individual for possible clemency. In cases involving less than eight months' confinement this occurs as soon as possible after arrival at the Disciplinary Barracks. In cases involving sentences to confinement between eight months and two years, clemency considerations occur between four and six months of the effective date of confinement and annually thereafter. In cases involving confinement of two years or more, consideration first occurs between six and eight months of the effective date of confinement and annually thereafter. Clemency does not depend upon the completion of appellate review or application by the individual. The client must, however, be informed of his pending clemency hearing and if clemency matters have not previously been appended to the record of trial, trial defense counsel should consider forwarding all clemency matters to the Board for consideration.

Clemency by the Army and Air Force Clemency and Parole Board is extended to mitigate a patently excessive sentence; to reward a prisoner whose progress warrants such action; and to change a discharge when warranted by the offense, by the offender, or by a change in the offender in the correctional setting. *See* Caughlin, "Army and Air Force Clemency and Parole Board—A Brief Summary," AFRP 125-2 *Security Police Digest* 16 (Summer 1968); *The Advocate*, Vol. 6, No. 1 (July 1974) at page 12.

Another avenue of clemency relief available to the client is a petition for clemency pursuant to Article 74(a), Uniform Code of Military Justice. This Article provides that the Secretary of the Army or his designee may remit or suspend any part or amount of the unexecuted part of any sentence. The Secretary's remission and suspension powers under Article 74(a) have been delegated to The Judge Advocate General by paragraph 2*a*, AR 190-36. In the memorandum discussed *supra*, The Judge Advocate General declared his intent to continue to exercise those powers in cases in which the individual concerned desires rehabilitation and has manifested characteristics which indicate that rehabilitation is a distinct possibility.

An example of a good case for a clemency petition to The Judge Advocate General was described in the memorandum as an individual whose sentence to confinement was short; his previous record was unblemished; and his sentence to confinement was served without incident followed by a return to duty to await completion of appellate process prior to the execution of a punitive discharge.

Such a petition, normally accomplished with the cooperation of trial and appellate defense counsel must be accompanied by a statement from the individual stating the reasons why he desires restoration to duty or believes the adjudged sentence is too severe. The petition for clemency should include a summary of the individual's military service, highlighting the length of productive service, combat service, decorations, awards and recommendations. It should include a summary of the prior disciplinary record of the client demonstrating a lack of prior proceedings. The offense should be summarized and the motivation behind the offense should be described. If the client has cooperated with the law enforcement officials this should be discussed as it will highlight the fact that the client has realized his mistake and seriously desires to correct it. Any substantial educational effort by the client after conviction should also be noted. It will be viewed with favor as it indicates the individual's efforts to achieve certain goals. If the client has undergone a severe personal hardship of a serious nature as a result of the sentence, this should be fully discussed. Finally, supporting statements from past or present commanders, noncommissioned officers and work supervisors attesting to the individual's attitude, performance and character are very important.

A potentially useful, but frequently unused source of clemency provided for by AR 190-36 are those powers given to the commanding officer of a person convicted by courts-martial who has the authority to appoint a court of the kind that imposed the sentence. Subject to certain limitations, such a commander may mitigate, remit or suspend in whole or in part any unexecuted portion of a sentence. These clemency powers can be exercised by the commander at any time prior to the execution of the sentence, *i.e.*, when the final action is taken *after* appellate review is completed. Paragraph 3*a*, AR 190-36 states that commanders will exercise their authority when they deem such action is merited and will result in restoration to duty or otherwise contribute to the rehabilitation of the individual.

Trial defense counsel who have clients desirous of restoration to duty and/or obtaining a favorable discharge may wish to petition the commander requesting that clemency action be taken in that individual's case. Such action will usually include a remission or suspension of the punitive discharge. Such a request for clemency may be successful when accompanied by positive statements from the individual client and supporting statements from past or present commanders.

A final avenue for clemency relief is a petition under Article 74*a* directly to the Secretary of the Army. This petition should be drafted substantially the same as the petition to The Judge Advocate General and should be drafted as a combined effort between trial and appellate defense counsel.

As The Judge Advocate General stated, "this clemency/rehabilitation policy can benefit the individual, the Army, and the taxpayer as the proper retention of trained personnel saves the expense of recruitment, training a replacement, and provides an experienced member of the

force in the event of emergencies." Trial defense counsel are urged to maintain a continuing interest in their clients progress through rehabilitation and should attempt to explore every avenue of clemency available to aid in this process.

JAG School Notes

1. Judge Course. The 56 attendees at the School's 14th Military Judge Course heard presentations from three principal guest speakers: James B. Zagel, Esq, Chief of the Illinois Criminal Justice Division, who was also presented with an honorary membership on the TJAGSA faculty; The Honorable Albert B. Fletcher, Chief Judge of the US Court of Military Appeals, on his first visit to the School; and Charles Morgan, Esq, of the American Civil Liberties Union in Washington, DC. In addition to the active Army JA's in attendance, the 14 July–1 August class included 17 Marines, 12 Navy and three Coast Guard officers. Among the reserve attendees, two presently serve as civilian judges in California: Judge Bruce W. Sumner (Major, USMCR) of the Superior Court in Santa Ana and Judge Leighton Hatch (Major, USAR) of Sacramento's Municipal Court. Other featured guest speakers at the three week course were: Brigadier General Emory N. Sneeden, Chief of the US Army Legal Services agency; Colonel Wayne E. Alley, Chief Trial Judge of the US Army Judiciary; Captain Horace H. Morgan, USN, Chief of the Navy-Marine Corps Trial Judiciary; Colonel James E. King, USMC, Officer in Charge of the Marine Corps special Court-Martial Judiciary Activity; Lieutenant Colonel Donald W. Hansen, Chief of the Government Appellate Division; Lieutenant Colonel James Kucera, Executive, Defense Appellate Division; Major David M. Brahms, USMC, HQ US Marine Corps; Major Thomas Cuthbert, Staff Judge Advocate at Fort Leonard Wood; Major Barry Steinberg, Staff Judge Advocate at Aberdeen Proving Grounds; and Commanders James E. Brown and Norman Lynch, USCG, HQ US Coast Guard.

2. International Law Course. The 19th International Law Course began on 21 July with three allied visitors in attendance for the two-week program. Those honored guests included: Ivan M. Rogen of Belgium, *Avocate General pres la Cour Militaire* (Chief Military Prosecutor); Retired Judge Wongse Virapongse of the Thai Supreme Court; Captain Andre Raymond Powers, Director, Law/Claims 2 of the Canadian Armed Forces; plus representatives from each of the sister services among the 79-member class. Featured guest speakers at the course were John Arthur Boyd, Attorney-Advisor, Division for Management and Security and Consular Affairs, Office of the Legal Advisor, Department of State, and Captain James Gleason from OTJAG's Litigation Division.

3. JAG Conference Reminder. Judge advocate officers are reminded that the 1975 Judge Advocate General's Conference will be held at TJAGSA during the period 14–17 October 1975. Should you have any suggested programs or topics for discussion as part of our agenda please feel free to call or write: The Judge Advocate General's School, US Army, ATTN: Director, Academic Department, Charlottesville, Virginia 22901, commercial telephone number (804) 293-2028 or -9298.

4. TJAGSA Phone Numbers (Revisited). Due to a printer error in last month's issue we are running a revised listing of TJAGSA telephone numbers. This updated compilation also reflects our "stabilized" condition at the new building. Autovon access to TJAGSA between 0715–1630 hours is through the Foreign Science and Technology Center in Charlottesville, Virginia. That Autovon number is 274-7110. The FSTC operator connects callers to TJAGSA commercial numbers. Calls to the School during nonduty hours should be directed to the Staff Duty Officer at commercial number (804) 293-4047.

Commandant	293-3936
Information (Duty Officer/AG Opns)	293-4047
Academic Department Director	293-9298

Director, Nonresident Instruction	293-6286
Resident Course Info & Quotas	293-7475
Correspondence Course Info & Quotas	293-4046
Administrative & Civil Law Division	293-4095
Command & Management Division	293-9850
Criminal Law Division	293-4730
International Law Division	293-7245
Procurement Law Division	293-3938
Reserve Affairs	
Assistant Commandant	293-6121
Career Management	293-6121
Training Office	293-6121
Developments, Doctrine & Literature	
Director	293-4668
Developments Office	293-4668
Doctrine & Literature Division	293-7376
School Secretary	
School Secretary	293-4732
Assistant School Secretary/Post Judge Advocate	293-4731
Visitors Branch	293-6885
AG Operations	293-4047
AG Personnel	293-4059
Supply & Transportation	293-2402
Purchasing, Contracting & Budget	293-7460
Library	293-9824
Officers' Open Mess	293-4590
Billeting & Housing	293-2402
Bookstore	293-3383

5. Telecopier at TJAGSA. Speaking of communications, our readers are reminded that a Xerox 400-1 telecopier is installed in the School's AG Operations Office. Anyone wishing to transmit a document to TJAGSA via telecopier should call (804) 293-6051.

6. TJAG and General Counsel Visit School. As noted in the "Reserve Affairs Items" of this issue, Major General Wilton B. Persons, Jr., The Judge Advocate General, and the Honorable Charles D. Ablard, General Counsel, Department of the Army, paid a July visit to the School to receive briefings on TJAGSA operations and activities, principally on the career management and training of reserve judge advocate officers. Mr. Ablard is not unfamiliar with this area, having recently served as a colonel in the Air Force Reserve holding mobilization assignments as Chief of the International Law Division and the Litigation Division, Office of the Air Force Judge Advocate General.

Legal Assistance Items

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

1. Items of Interest.

Family Law—CHAMPUS—Pastoral Counselors, Family and Child Counselors, and Marital Counselors. In February 1975 it was announced that CHAMPUS coverage for the services of pastoral counselors, family and child counselors, and marital counselors would be terminated, however as a result of a suit brought in the United States District Court in the District of Columbia by the American Association of Marriage and Family Counselors, Inc., a temporary injunction has been obtained against implementation of the 27 February 1975 Change Directive pending final resolution of the case. Until further notice and pursuant to the injunction, retroactive to 28 February 1975, CHAMPUS is to process and pay all otherwise appropriate claims for treatment of a nervous or mental condition by qualified marriage, family or pastoral counselors in the same manner as such claims were processed prior to that date. Further information or clarification may be obtained from the Army Liaison Officer, Liaison Activities Directorate, OCHAMPUS, Denver, Colo. 80240 (AUTOVON: 943-8507; COMMERCIAL: 303-366-5311 (Ext. 22107). [Ref: Chs. 20,29, DA Pam 27-12].

Federal Taxation—Nonrecognition of Gain From Sale of Residence. Section 1034 of the Internal Revenue Code provides for the nonrecognition of capital gains upon the satisfaction of strict time requirements regarding the sale of the old residence and purchase of the new home, upon showing that the cost of purchasing the new home exceeded the adjusted sales price of the old home, and upon showing that both the old and the new residence are or were "principal places of residence." The IRS has recently interpreted this section of Rev. Rul. 75-238. The ruling states that the §1034(a) nonrecognition provision is also applicable to newly married spouses who each sell their separate principal

places of residence and jointly invest the proceeds into a new "marital home." *See also*, Rev. Rul. 74-250 (§1034(a) similarly applies in the reverse situation where spouses, upon a decision to live separate and apart, sell the marital home and reinvest the proceeds in two separate residences). Cross-reference: "Legal Assistance Items," *The Army Lawyer*, March 1975 (Time requirements applicable to members of the armed forces (§1034 (h)). [Ref: Ch. 41, DA Pam 27-12].

Family Law—Child Support—Effect of Legislative Change of Age of Majority. Upon obtaining a decree of divorce or dissolution of marriage the noncustodial parent is ordinarily ordered to pay a fixed sum of money each month for the support of any children of the marriage. The separation agreement and property settlement are in most instances drafted by the parties' respective attorneys, and at the time of the divorce or dissolution they are incorporated into the court decree. The duration of the child support responsibility varies, but usually, per the decree, it will continue "until the child reaches the age of 21" or "until majority" or "until the child is otherwise emancipated."

In part as a result of the impetus provided by the passage of the Twenty-Sixth Amendment (U.S. CONST. amend. XXVI, §1. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." (effective July 5, 1971)) many states in recent years have lowered the age of majority from 21 to 18 years. The issue of the retrospective application of these state statutes in the context of child support decrees has been extremely difficult. Many parents feel that in light of the new age of majority they have the legal right to discontinue such payments upon the child(ren) reaching age 18.

There has been very substantial disagreement among those states which have faced the question. Although this brief comment does not claim to be exhaustive with regard to noting all those jurisdictions, it appears that at least 11 states have held that the noncustodial parent ordinarily must continue making child support payments until the child reaches age 21, *i.e.* the divorce and support decree is to be interpreted in light of the age of majority in existence at the date of said decree. Those states which have so held are as follows: Arizona (*Ruhsam v. Ruhsam*, 110 Ariz. 326, 518 P.2d 576 (1974), *supplemented*, *Ruhsam v. Ruhsam*, 110 Ariz. 426, 520 P.2d 298 (1974)); California (*Ganschow v. Ganschow*, Calif. Sup. Ct., 5/5/75); Florida (*Finn v. Finn*, Fla. Sup. Ct., 3/26/75); Illinois (*Walkdron v. Walkdron*, 13 Ill. App. 3d 964, 301 N.E. 2d 167 (1973)); Maryland (*Monticello v. Monticello*, 271 Md. 168, 315 A. 2d 520 (1974), *cert. denied* 42 L.Ed. 2d 121 (1974); Minnesota (*Brugger v. Brugger*, Minn. SupCt., 4/18/75); Michigan (*Barbier v. Barbier*, 45 Mich. App. 402, 206 N.W. 2d 464 (1973); North Carolina (*White v. White*, N.C.Ct.App., 3/19/75; *But see Shoaf v. Shoaf*, 282 N.C. 287,192 S.E.2d 299 (1972); Virginia (*Paul v. Paul*, 214 Va. 651, 203 S.E.2d 123 (1974); *But cf. Eaton v. Eaton*, Va.Sup.Ct., 4/28/75 (Statutory reduction in majority age terminates court-ordered support obligation where separation agreement was unincorporated); Washington (*Baker v. Baker*, 80 Wash. 2d 736, 498 P.2d 315 (1972). *Cf.* New York, *In Re. D'Onofrio*, NYSurrCt., Nassau Cty, 3/12/75. Contrariwise, at least eight states have ruled that the parent's liability for child support is to be determined in accordance with the existing age of majority. Those states are as follows: Kansas (*Jungjohann v. Jungjohann*, 213 Kan. 329, 516 P.2d 904 (1973); Iowa (*In Re. Briggs*, I.Supt.Ct., 2/19/75); Connecticut (*Sillman v. Sillman*, Conn.Sup.Ct. 3/18/75; *But see, Vicino v. Vicino*, 30 Conn.Sup. 49, 298 A.2d 241 (1972)); Louisiana (*Bernhardt v. Bernhardt*, 283 So.2d 226 (La. 1973); New Mexico (*Mason v. Mason*, 84 N.M. 720, 507 P.2d 781 (1973); Oklahoma (*Lookout v. Lookout*, 526 P.2d 1405(1974); Tennessee (*Garey v. Garey*, 482 S.W.2d 133 (1972); Wisconsin (*Farish v. Miller*, Wis SupCt., 3/28/75).

As noted in a recent article (Comment, "Oregon's New Age of Majority Law and Existing Child Support Decrees," 11 WILLAMETTE L.J. 70 (Winter 1974) (hereinafter Comment) the courts' contradictory holdings stem from reliance upon inconsistent bases for decision. The courts may independently rest their decision on any of the following lines of argument:

(1) The contractual nature of the agreement which is subsequently merged into the court decree;

(2) The judicial rule of construction that newly-enacted laws should be applied prospectively, but not retroactively;

(3) The parties intent at the time and the language of the support decree; *But see, Carpenter v. Carpenter*, Ill. App. Ct. 2d (8/28/74) (No "premature termination" of father's obligation to continue support until child reaches majority as contemplated at the time of the initial decree); *White v. White, op. cit.*, ("It is hardly conceivable that the Husband-petitioner herein could have anticipated the age . . . reduction by Legislature and intended support only to the reduced age of 18"). Note that to the extent the court's determination turns upon the exact wording of the decree, it is questionable that the parties' intent should be summarily inferred from the "prediliction of the lawyer drafting the property settlement and the divorce decree for the judge's signature." Comment, at 77.

(4) The decree's operation as a vested or nonvested right as regarding either the parents or the child himself;

(5) The saving provision enacted by the Legislation which attempts to define the degree, if any, to which the statute is to affect pre-existing agreements, contracts, liabilities, decrees, or causes of action.

The disparity among the states remains very great and in guiding a client either regarding the drafting or interpretation of a child support provision it may be necessary to attempt to ascertain the state's interpretation, if any, of the effect of a change of age of majority statute. With the enactment of the Social Services Amendments of 1974 providing for the garnishment of federal wages for purposes of alimony and child support, it may be expected that many persons will resurrect their previously unenforceable decrees.

In a related development the Kansas Supreme Court recently ruled that a minor's enlistment into the armed services does not automatically effectuate an "emancipation" and thereby relieve the responsible parent of further child support liability. *Baker v. Baker*, Kan SupCt, 6/27/75. [Ref: Chs. 20,26,DA Pam 27-12].

2. Recently Enacted Legislation.

Family Law—Alimony and Child Support—Social Services Amendments of 1974. By Public Law 94-46 (approved 30 June 1975) Congress has changed the effective date of certain sections of the Act from 1 July 1975 to 1 August 1975. Section II, §101(f) of P.L. 93-647 (Social Services Amendments of 1974) should now establish an effective date of 1 August 1975. The other major provision of the Act authorizing the garnishment of federal wages "to provide child support or make alimony payments" was effective 1 January 1975. In a related development the House of Representatives has passed (357 to 37) and forwarded to the Senate a measure which would repeal several of the Act's requirements such as the creation of an HEW parent locator service, the authorization for use of federal court to enforce court orders for delinquent child support, and the HEW certification procedure to the IRS for collection of delinquent support amounts in a manner the same as the IRS collection procedure for delinquent taxes. The House measure does not affect the garnishment provisions. [Ref: Chs. 20,26, DA Pam 27-12].

3. Pending Legislation.

Survivor's Benefits—Dependency and Indemnity Compensation—Veteran's Disability Compensation. The Senate Committee on Veterans Affairs recently reported favorably on a bill which would provide significant "cost-of-living" increases in DIC and veteran's disability rates. The bill (S. 1597) would provide a 14 percent increase in DIC payment to widows and children of deceased servicemembers who dies of a service-connected injury or illness. Although the DIC rates were increased in each of the last two years (P.L. 92-197 (10%) (1972); P.L. 93-295 (17%) (1973)), the Committee has recommended enactment of the new rates due to the continuing rapid increase in the Consumer

Price Index (10.1% from May 1, 1974 to April 31, 1975). The current DIC program provides benefits to more than 369,000 beneficiaries, and with regard to qualifying widows this bill would provide increases as indicated in the chart below.

TABLE 8.—COMPARISON OF DIC RATES UNDER PRESENT LAW AND S. 1597

Pay grade	Present law	S.1597	Estimated number of DIC widows—fiscal year 1976
E-1	$215	$245	38,900
E-2	221	252	24,400
E-3	228	260	21,200
E-4	241	275	20,000
E-5	248	283	19,700
E-6	254	290	18,260
E-7	266	303	19,700
E-8	281	320	2,400
E-9	294	335	1,100
W-1	271	309	1,200
W-2	282	321	1,800
W-3	291	332	640
W-4	307	350	680
O-1	271	309	3,300
O-2	281	320	6,100
O-3	301	343	9,500
O-4	318	363	8,100
O-5	350	399	6,800
O-6	394	443	5,500
O-7	427	487	440
O-8	467	532	420
O-9	502	572	90
O-10	549	626	40

Another provision of the bill would grant "automatic entitlements," *i.e.*, eliminate the necessity of a VA service-connection determination, to widows of veterans who were totally and permanently disabled for a period of one year or more prior to the servicemember's death. The bill also affects the veteran's disability compensation system. Payment under that program would increase from 12% to 14% depending upon the degree of disability. *See generally*, S. REP. NO. 94-214, 94th CONG., 1st Sess (1975). [Ref. Chs. 16, 44, DA Pam 27-12].

Voting—Private Citizens Residing Outside the United States. The Senate has passed the Overseas Citizens Voting Rights Act of 1975 and the proposed Act has been sent to the House of Representatives for action. The Act is designed "to assure the right of otherwise qualified private United States citizens residing outside the United States to vote for President and the Congress in their State of last voting domicile even though these citizens may not be able to prove that they intend to retain that State as their domicile for other purposes." S.REP.NO. 94-121, 94th CONG., 1st Sess. 1 (1975). All states have statutes expressly allowing military personnel, and often other governmental employees, and their dependents to register and vote from outside the country, however only 28 states have similar absentee registration and voting procedures for citizens "temporarily residing" outside the United States in a non-governmental capacity.

Of the estimated 750,000 American citizens of voting age so residing outside the country only approximately 25 percent did or were able to vote in the 1972 election. The reasons many such citizens find it "difficult and confusing, if not impossible" to vote in federal elections is that many states impose rules which require a voter's actual presence, or maintenance of a house or other abode in the state, or interpose bars to registration if the citizen is uncertain of his date of return. This bill would provide for a uniform absentee registration and voting procedure and would require, *inter alia*, that the individual apply not later than 30 days prior to the election. Election officials would be required to promptly mail out balloting and other election materials to the individual within seven days upon their receipt of a properly completed application for an absentee ballot. *See* DA Pam 360-503, *Voting Assistance Guide*, Oct. 1, 1973, for an explanation of the Federal Voting Assistance Program and a state by state analysis of absentee voting procedures. [Ref: Ch. 45, DA Pam 27-12].

4. Articles and Publications of Interest.

Commercial Affairs—Consumer Protection—Credit. DOD Information Guidance Series (DIGS) Nos. 8E-2, -3, -4, "Credit and the Service Family (I)(II)(III), July, 1975. [Ref:Ch. 10, DA Pam 27-12].

Domicile—Establishing Change. Dolan, "Establishing Change of Domicile," 5 TAX ADVISER 459, 551, 604 (Aug., Sept., Oct. 1974). This series of articles briefly outlines the law of domicile and discusses those steps which should be taken to effectuate a change of domicile. The series also includes a thorough and extensive 34-section checklist which can be used by the Legal Assistance Officer in aiding a client in the obtaining and substantiation of a new domicile. [Ref: Ch. 25, DA Pam 27-12].

Family Law—Alimony and Child Support—The Social Services Amendments of 1974. Hylden, Dodson, "The Social Services Amendments of 1974—A Joint State-Federal Child Support Enforcement Program," 1 FAM. L. REP. 4049 (June 10, 1975). This BNA Family Law Reporter Monograph (No. 8) succinctly summarizes the many provisions of the Act. *But see,* Recently Enacted Legislation, *supra.* [Ref: Ch. 26, DA Pam 27-12].

Real Property—Landlord-Tenant. DOD Information Guidance Series (DIGS) No 8A-37, "The Military Tenant," July 1975. *See also,* DA Pam 360-611, *The Military Tenant,* 1972. [Ref: Ch. 34, DA Pam 27-12].

Veteran's Benefits. A booklet entitled "Federal Benefits for Veterans and Dependents" has been prepared recently. Copies may be obtained by writing Consumer Information, Dept. 23, Pueblo, Colorado 81009. ($0.75). [Ref: Ch. 44, DA Pam 27-12].

Copyright Law Items

By: Captain Frank Agovino, Patents Division, OTJAG

1. Russian Works Protected by U.S. Copyright Law. As of 27 May 1973 the U.S.S.R. acceded to the Universal Copyright Convention (UCC). The terms of the UCC provide that each contracting country will extend its copyright privileges to citizens of all other contracting countries. This protection is afforded to foreign citizens of contracting countries of the UCC under Title 17, United States Code, Section 9 (c). Therefore, all Russian works bearing the proper copyright notice (© accompanied by the name of the copyright proprietor and the year of first publication) and published on or after 27 May 1973 are protected by Title 17. The UCC specifically provides that its terms are not retroactive so that all Russian works published before 27 May 1973 are in the public domain and can be translated and reproduced freely.

Inequity arises from the fact that U.S. Government works are not copyrightable according to 17 USC 8 whereas Russian Government works are copyrightable and are, in fact, copyrighted and maintained by a Russian agency. Negotiations are presently underway with the Russians to correct this inequity. Inadvertant copying without permission by Army agencies of protected Russian works has hindered these negotiations, but procedures are being arranged by Patents Division, OTJAG, so that Army agencies can obtain, without difficulty, a license to translate and reproduce Russian works in exchange for a reasonable royalty payment.

2. Army Policy. As stated in AR 27-60 Patents, Inventions and Copyrights, paragraph 8-1 "It is the policy of the Department of the Army to avoid, whenever practicable, the infringement of privately-owned rights in . . . copyrighted works. For this reason, necessary rights in such . . . copyrighted works should be acquired when it is in the Government's interest to do so and when such rights can be obtained at a fair value." Section 1498(b) of title 28 United States Code provides that whenever a copyrighted work is infringed by the government, the owner's remedy shall be suit against the United States in the Court of Claims for the recovery of reasonable and entire compensation for such infringement. Therefore, Section 1498(b) recognizes the right of the government to infringement of a copyrighted work when it is in the best interest of the government to do so or when such rights cannot be obtained at a fair value.

3. Fair Use. Notwithstanding the above, certain acts of copying are considered "fair use" and are not actionable as infringement. The Supreme Court recently affirmed a Court of Claims decision in *Williams & Wilkins Co. v. United States*, 419 US 962 (1975), aff'g by an equally divided Court 487 F2d 1345 (Ct. Cl. 1973), upholding the doctrine of fair use. In that case the National Institute of Health Library was being sued for infringement of plaintiff's copyrights. The Library was reproducing copies of plaintiff's medical journals upon request from Library patrons. Holding the copying to be fair use, the Court stated that fair use must be determined from the facts of each case. There are four main considerations to be evaluated in determining fair use:

a. purpose and character of the use;
b. nature of the copyrighted work;
c. amount and substantiality of the material used in relation to the copyrighted work as a whole; and
d. the effect of the use on a copyright owner's potential market for and value of his work.

The Court also stated that copying of an entire copyrighted work can be considered fair use recognizing the right to copy for editorial purposes.

Reserve Affairs Items

From: Reserve Affairs, TJAGSA

1. The General Counsel of the Army and The Judge Advocate General are Briefed on Reserve Affairs. The honorable Charles D. Ablard, General Counsel of the Army and Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army received a briefing on Reserve Affairs from Colonel William S. Fulton, Jr., Commandant of TJAGSA, and Lieutenant Colonel James N. McCune, Assistant Commandant for Reserve Affairs, on 16 July. The briefing included discussions on the number of Reserve Component officers in the Ready Reserve; the types of units in the selected reserve having Judge Advocate offices assigned; the career management and training of these officers and future plans for improving mobilization readiness. The briefing was set up at the request of the General Counsel, Mr. Ablard.

2. Headquarters Detachment Training. JAGSO Headquarters Detachment quadrennial training at TJAGSA during the first two weeks of June was highlighted by a mobilization practical exercise. Each detachment was "alerted" and given problems to solve. The Detachment personnel exhibited imagination and good judgment in resolving the questions presented and demonstrating their readiness. The administrative support and enlisted MOS training were provided by the 1034th U.S.A.R. School from Manchester New Hampshire. It was the second year at TJAGSA for this school in support of JAGSO training. Through the hard work and leadership of Colonel Ledo Lospennato, the Commandant, and Lieutenant Colonel Robert Heald, the Deputy Commandant of the 1034th, the training was carried out in an outstanding manner. Fifty-nine officers, 13 warrant officers and 95 enlisted members participated in the program.

3. BOAC Phase IV and Reserve Component General Staff Course. TJAGSA was also the site for the BOAC Phase IV (Administrative and Civil Law) and the Judge Advocate General's Reserve Component General Staff Course in July. The 2093d USAR School of South Charleston, West Virginia, under the command of Colonel Gene Hal Williams, provided the instruction for the general staff course and one-half of the BOAC course. Ninety officers attended the BOAC Course and 45 field grade officers were in attendance at the General Staff course. Major General W. B. Dixon, Commander of the 99th ARCOM, paid a staff visit to the school during the courses.

4. Reserve Conference Dates. 3-6 December 1975 has been scheduled for the U.S.A.R. Con-

ference for senior reserve Judge Advocates here at TJAGSA.

5. TJAGSA CLE for Reservists. Our reserve readers should note that all future listings of TJAGSA continuing legal education courses for reserve component personnel can be found within the "CLE News" Section of *The Army Lawyer*. This format change was effected in order that all continuing legal education programs of interest to the Corps could be conveniently centralized in one section of our publication.

6. Chief Judge United States Army Judiciary (MOB DES) Selected. Colonel Demetri M. Spiro was selected on 25 June 1975 to fill the position of Chief Judge United States Army Judiciary (MOB DES). Colonel Spiro's military experience dates back to 1943 when he served as a combat infantryman in World War II. During a reserve career which began in 1949 and has spanned 26 years, Colonel Spiro served in such assignments as: instructor for the Headquarters Fifth Army Judge Advocate School and the Chicago USAR School; Claims Officer for the Fifth United States Army (on extended active duty from 1949 to 1951); Staff Judge Advocate of the 86th Army Reserve Command; Commander of the 7th JAG Detachment; and as Assistant Commandant of The Judge Advocate General's School (MOB DES).

Colonel Spiro received his BA in 1941 and Juris Doctor degree in 1948 from DePaul University. He has completed additional postgraduate work in the fields of psychology, trust and budget accounting and industrial management. His military education includes the JAGC Career Course, The National Defense Seminar of the National War College and the JAGC Reserve Component General Staff Course.

In addition to his private law practice, Colonel Spiro has been active in a wide range of professional and community activities. He is currently vice president of the National Strategy Information Center, Executive Vice President of Spiro, Kane and Fee, and Chairman of the ABA's Standing Committee on Education About Communism. He has formerly served as assistant to the president and director of the Executive Services of the American Bar Association.

7. Special Legal Assistance Program. Printed below is an updated roster, listing state and city locations, of the reserve officers currently designated on orders as Special Legal Assistance Officers. The attorneys listed are authorized to represent members of the active Army and their dependents in accordance with paragraph 5b(2), AR 608-50.

Officers so designated receive no military pay and are not allowed to accept any fee for their services. They are, however, entitled to receive retirement points which are creditable towards their reserve requirements. To request the award of retirement points for work performed in accordance with this program, officers should prepare and forward to the Office of the Assistant Commandant for Reserve Affairs, The Judge Advocate General's School, Charlottesville, Virginia 22901, a copy of Record of Individual Performance of Reserve Duty Training (DA Form 1380). The form will be reviewed for purposes of certification and then forwarded to the Reserve Components Personnel and Administration Center, St. Louis, Missouri, for granting of appropriate credit.

Staff Judge Advocates and Legal Assistance Officers are encouraged to detach and retain this roster for use by their legal assistance offices. Any questions, comments or suggestions with regard to the operation of the program should be directed to the above named office.

Roster of Reserve Judge Advocates Designated as Special Legal Assistance Officers Pursuant to Paragraph 5b(2), AR 608-50

State and City	*Name*	*Business Address*	*Telephone Number*
Arizona			
Sierra Vista	Shull, Charles J., MAJ, USAR RCPAC Control GP (MOB DES) (SO #115, 18 Dec 73)	11 North Canyon Drive Sierra Vista, AZ 85635	(602) 458-8070
California			
Sacramento	Verzyl, Edwin, LTC, ARNG, HQ 79th Support Center, CA ARNG (SO #56, 18 Jun 73)	2667 El Paseo Lane Sacramento, CA 95821	(916) 483-3202
San Francisco	Najarian, Melvin K. MAJ, USAR (SO #26, 14 Apr 75)	451 Jackson Street San Francisco, CA 94110	(415) 788-6330
District of Columbia	George, W. Peyton, MAJ, USAR, RCPAC Control Group (Reinf) (SO #2, 10 Jan 75)	Suite 1304, 1730 K St, N.W. Washington, D.C. 20006	(202) 293-5325
Florida			
Coral Gables	Shepherd, Frank A., 1LT, USAR, 168th JAG Detachment (SO #15, 10 Mar 75)	5729 Marius Street Coral Gables, FL 33146	(305) 358-8181
Miami	Graham, Thomas A. III, CPT, USAR, 174th JAG Detachment (SO #15, 10 Mar 75)	11270 SW 175th Street Miami, FL 33157	(305) 373-1893
	Holden, Francis E., Jr., 1LT, USAR, 168th JAG Detachment (SO #15, 10 Mar 75)	2101 Brickell Avenue, Apt 107 Miami, FL 33129	(305) 885-1475
	Raattama, Henry H., Jr., CPT, USAR, 168th JAG Detachment (SO #15, 10 Mar 75)	1600 1st National Bank Bldg Miami, FL 33137	(305) 373-6451
North Miami	Lilly, Lawrence G., MAJ, USAR 109th JAG Detachment (SO #15, 10 Mar 75)	865 NE 146th Street North Miami, FL 33161	(305) 350-5571
Pompano Beach	Sullivan, William F., CPT, USAR 169th JAG Detachment (SO #15, 10 Mar 75)	P.O. Box 2166 Pompano Beach, FL 33062	(305) 941-5110
Illinois			
Moline	Fackel, Joseph F., CPT, USAR, RCPAC Control Gp (SO #56, 18 Jun 73)	1st National Bank Building Moline, IL 61265	(309) 762-0736
Maryland			
Denton	Kent, Roland C., MAJ, USAR RCPAC Control Gp (MOB DES) (SO #56, 18 Jun 73)	118 Market Street Denton, MD 21629	(301) 479-2570
Massachusetts			
Boston	Rogers, Herbert, COL, USAR RCPAC Control Gp (Reinf) (SO #56 18 Jun 73)	148 State Street Boston, MA 02109	(617) 742-0080
New Jersey			
Jersey City	Hornstein, J. Leonard, COL, USAR 78th Division (Tng) (SO #38, 16 Jun 75)	921 Bergen Avenue Jersey City, NJ 07306	(201) 656-2838

State and City	*Name*	*Business Adress*	*Telephone Number*
New Mexico			
Albuquerque	Boyd, David F., Jr., COL, USAR 210th JAG Detachment (SO #205, 23 Oct 73)	Suite 504 400 Gold Avenue, S.W. Albuquerque, NM 87101	(505) 842-8287
Ohio			
Dayton	Hunt, Carroll E., LTC, USAR 146th JAG Detachment (SO #26, 14 Apr 75)	Suite 1520, Hulman Bldg 120 West 2d Street Dayton, Ohio 45402	(513) 223-0808
Pennsylvania			
Philadelphia	Cohen, Gene D., CPT, USAR 153d JAG Detachment (SO #115, 18 Dec 73)	3604 Weightman Street Philadelphia, PA 19129	
	Jaffee, Jerome, LTC, USAR 157th JAG Detachment (SO #56, 18 Jun 73)	1201 Chestnut Street 7th FLoor Philadelphia, PA 19107	(215) 563-1288
Texas			
Amarillo	Hill, Edward H., LTC, USAR RCPAC Control Gp (Reinf) (SO #26, 14 Apr 75)	1500 Amarillo National Bank Building Amarillo, TX 79116	(806) 376-5613
El Paso	Miranda, Ralph G., MAJ, USAR RCPAC Control Gp (Reinf) (SO #74, 19 Nov 74)	202 Moonglow El Paso, TX 79912	(915) 544-3022
	Shelton, Glen H., CPT, USAR RCPAC Control Gp (Reinf) (SO #33, 29 May 75)	299 Kings Point Drive El Paso, TX 79912	(915) 544-3732
	Weinert, William E., MAJ, USAR RCPAC Control Gp (Reinf) (SO #74, 19 Nov 74)	516 Marthmont Way El Paso, TX 79912	(915) 544-3022
Lubbock	Davidow, Robert P., MAJ, USAR RCPAC Control Gp (MOB DES) (SO #33, 29 May 75)	7710 Louisville Avenue Lubbock, TX 79423	(806) 742-6273
Tennessee			
Union City	Warner, John L., Jr., CAPT, USAR RCPAC Control Gp (Standby) (SO #56, 18 Jun 73)	P.O. Box 6 Union City, TN 38261	(901) 885-2424
Vermont			
South Royalton	Burstein, Richard I., CPT, USAR HQ 167th Support Gp (SO #115, 18 Dec 73)	Box 131 E. RFD #2 South Royalton, VT 05068	(802) 295-3040
Virginia			
Norfolk	Cloud, John M., MAJ, USAR 300th Support Group (SO #56, 18 Jun 73)	108 The Mall Janaf Shopping Center Norfolk, VA 23502	(804) 853-2316
	Furr, Carter B.S., MAJ, USAR 300th Support Group (SO #56, 18 Jun 73)	801 Bank of Virginia Norfolk, VA 23510	(804) 622-3239

State and City	*Name*	*Business Adress*	*Telephone Number*
Washington			
Redmond	Diesen, Charles F., CPT, USAR 226th JAG Detachment (SO #56, 18 Jun 73)	7969 Gilman Street Redmond, WA 98052	(206) 885-1227
Wisconsin			
LaCrosse	Lukoff, Mark, 1LT, USAR 407th Civil Affairs Company (SO #	515 West Moreland Blvd. Waukesha, Wisconsin 53186	(414) 544-8066
Milwaukee	Burroughs, Charles C., CPT, USAR RCPAC Control Group (SO #56, 18 Jun 73)	1902 Marine Plaza Milwaukee, WI 53202	(414) 272-8550

CLE News

1. Format Change. In order to centralize all future continuing legal education information, the "CLE News" Section of *The Army Lawyer* will now contain, as regular internal features, separate listings of this year's TJAGSA Courses for Active Duty and for Reserve Component Personnel, plus our preview of selected civilian CLE programs for the upcoming quarter.

2. National CLE Update. In a recent article, Paul A. Wolkin, Director, ALI-ABA Committee on Continuing Professional Education, analyzes the impetus for mandatory CLE programs, raises the question whether attendance at CLE courses guarantees competence and suggests an alternative bar-operated monitoring system of professional competence [*see*, Wolkin, "A Better Way to Keep Lawyers Competent," 61 A.B.A.J. 574 (May 1975); reprinted in two parts within the *ALI-ABA CLE Review*, Vol. 6, No. 27 (July 3, 1975) at 3 and Vol. 6, No. 28 (July 11, 1975) at 3]. Mr. Wolkin's article also presents a comprehensive roundup of the present status of state CLE programs throughout the country. His review indicates the following:

In 1971 the California legislature adopted a resolution requesting its state bar to develop and submit a program for maintaining continuing professional competence. The following year the Kansas Continuing Legal Education Committee recommended a mandatory system to its state bar. The Minnesota State Bar Association later drafted its own proposal for mandatory continuing legal education. Between 1972 and 1974 a report recommending the Minnesota Plan was discussed at meetings throughout the state and the idea gained bar support. Formal approval of the plan was announced by the Minnesota Supreme Court in an order issued on April 3, 1975.

Also during 1975, the Iowa Supreme Court requested comments on a Rule of Court providing for a system of compulsory continuing legal education. The Rule was adopted by the Iowa Court, and an order was issued on April 9, 1975. A CLE plan is presently before the Wisconsin Supreme Court, following its approval by the Board of Governors of the state bar. Similar proposals are now under consideration or are being developed in Colorado, Florida, Georgia, Idaho, Maryland, New Mexico, Oregon, South Dakota and Washington. More plans will be advanced in other jurisdictions within the near future. The text of the various plans and proposals appear in 19 and 20 C.L.E. CATALOGUE (ALI-ABA, Philadelphia, 1974 and 1975).

According to Wolkin, the central feature of these mandatory systems requires each lawyer to report in writing to a supervising agency the completion of a minimum of 10 to 15 hours each year of formal course work in continuing legal

education in programs approved by the supervising agency. Minnesota's program contains a variation which mandates 45 hours every three years. A State Board of Continuing Legal Education approved by the Minnesota Supreme Court supervises that program. The Board may have lay as well as professional representation. A state administrative director of continuing legal education administers the system. The cost of administration is met by a charge on each lawyer in the jurisdiction. Minnesota's penalty for failure to fulfill the mandatory requirements may be probationary status and, ultimately, suspension from the practice of law.

This synopsis reflects the skeletal elements of many of the state CLE plans presently in existence. Judge advocate officer are encouraged to become familiar with their own state bar programs. New developments in this area will be noted within the "CLE News" section of future issues of *The Army Lawyer.*

3. Impact of New Mexico Plan on TJAGSA CLE. The School has received notice from Continuing Legal Education of New Mexico, Inc., that New Mexico is about to implement a mandatory CLE plan which proposes credit for attendance at programs sponsored by any recognized CLE organization, such as members of the Association of Continuing Legal Education Administrators. TJAGSA is a member of ACLEA [*see* "State Bar Requirements for Continuing Legal Education—JAG School Notes," *The Army Lawyer* (April 1975) at 13], and is presently advising New Mexico of its various programs.

4. State CLE Programs. A survey made by the ABA Standing Committee on Legal Assistance for Servicemen revealed that many states do not have up to date information which allows them to contact military attorneys concerning CLE opportunities. With the increased attention being given to recertification requirements, it is imperative that all attorneys be kept informed of the requirements and proposals of their home state Bar Associations. [Editor's note: *The Army Lawyer* will keep you informed of significant developments. However, being on the mailing list of your own state bar and agencies conducting CLE programs is important.]

Below is a listing of state CLE agencies, and their addresses, which have requested information on military attorneys licensed by or located in their respective states, so that the state bar can provide notice of available programs. Other addresses will be provided as available. It is recommended that judge advocates from the states concerned contact these agencies without delay.

Continuing Education of the Bar
University of California
2150 Shattuck Avenue
Berkeley, Ca 94704

Continuing Legal Education Committee
Hawaii State Bar Association
10th Floor American Savings Tower
Financial Plaza of the Pacific
915 Fort Street
Honolulu, Hawaii 96813

Indiana Continuing Legal Education Forum
735 West New York Street
Indianapolis, Indiana 46202

Office of Continuing Legal Education
University of Kentucky
Lexington, Kentucky 40506

Mr. Edward M. Bonney
Maine Bar Association
154 State Street
Augusta, Maine 04210

Institute of Continuing Legal Education
University of Michigan Law School
State Bar of Michigan
Hutchins Hall
Ann Arbor, Michigan 48105

New Hampshire Bar Association
77 Market Street
Manchester, N. Hampshire 03101

Pennsylvania Bar Institute
P.O. Box 1027
104 South Street
Harrisburg, Pennsylvania 17108

Mr. Wm. K. Sahr
State Bar of South Dakota
222 E. Capital
Pierre, South Dakota 57501

Vermont Bar Association
Box 100
Montpelier, Vermont 05602

West Virginia State Bar
E-404 State Capitol
Charleston, West Virginia 25305

(DAJA-LA)

5. TJAGSA Courses (Active Duty Personnel).

July 28–August 8: 63d Procurement Attorneys' Course (5F–F11).

August 4–8: 2d Management for Military Lawyers Course (5F–F1).

September 22–26: 5th Law Office Management Course (7A–713A).

September 29–October 3: 12th Federal Labor Relations Course (5F–F22).

October 6–9: 3d Legal Assistance Course (5F–F23).

October 28–31: 22d Senior Officer Legal Orientation Course (5F–F1).

November 10–21: 64th Procurement Attorneys' Course (5F–F10).

December 8–11: 2d Military Administrative Law Developments Course (5F–F25).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F–F11).

January 12–15: 3d Environmental Law Course (5F–F27).

January 19–23: 3d Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 4th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

January 26–29: 23d Senior Officer Legal Orientation Course (5F–F1).

March 8–19: 65th Procurement Attorney's Course (5F–F10).

April 5–8: 24th Senior Officer Legal Orientation Course (5F–F1).

April 26–May 7: 66th Procurement Attorneys' Course (5F–F10).

May 10–14: 6th Staff Judge Advocate Orientation Course (5F–F52).

May 17–20: 1st Civil Rights Course (5F–F24).

May 24–28: 13th Federal Labor Relations Course (5F–F22).

June 28–July 2: 2d Criminal Trial Advocacy Course (5F–F32).

July 19–August 6: 15th Military Judge Course (5F–F33).

July 26–29: 25th Senior Officer Legal Orientation Course (5F–F1).

August 9–13: 3d Management for Military Lawyers Course (5F–F51).

6. TJAGSA Courses (Reserve Component Personnel).

September 22–26: 5th Law Office Management Course (7A–713A).

October 20–23: 3d Reserve Senior Officer Legal Orientation Course (5F–F2).

November 10–21: 64th Procurement Attorneys' Course (5F–F11).

January 19–23: 3d Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 4th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

March 8–19: 65th Procurement Attorneys' Course (5F–F10).

April 26–May 14: 66th Procurement Attorneys' Course (5F–F10).

June 21–July 2: 1st Military Justice II Course (5F–F31).

June 21–July 2: 1st Military Administrative Law Course (5F–F20).

July 11–24: USA Reserve School BOAC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction).

7. Selected Civilian-Sponsored CLE Programs (This Quarter).

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, NV.

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.

15–16: PLI Program, Constitutional Litigation, Sir Francis Drake Hotel, San Francisco, CA.

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.

18–22: Federal Publications Inc. Government Contract Program, Government Contract Claims, Colosseum Unus-Caesars Palace, Las Vegas, NV.

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

SEPTEMBER

Rhode Island Bar Association, annual meeting

Bar Association of Puerto Rico, annual meeting.

The Missouri Bar, annual meeting.

Wyoming State Bar, annual meeting.

Washington State Bar Association, annual meeting.

2–4: New York University School of Law Program, Bankruptcy Law and Practice Workshop I, Vanderbilt Hall, New York University, New York, NY.

2–5: New York University School of Law Workshop, The Graduate Tax Workshop VI, Vanderbilt Hall, New York University, New York, NY.

3–5: US Civil Service Commission CLE Program, Institute for New Government Attorneys, Washington, DC.

7–10: National College of District Attorneys Course, Consumer Fraud Seminar, Nashville, TN.

9–13: Federal Bar Association, annual meeting, Hyatt Regency Atlanta, Atlanta, GA.

10–12: Federal Publications Inc. Government Contract Program, 22d Annual Institute on Government Contracts, Quality Inn/Pentagon City, Washington, DC.

17–19: State Bar of Michigan, annual meeting, Detroit, MI.

17–19: Federal Publications Inc. Government Contract Program, Risk Management in Construction Contracting, Holiday Inn/Golden Gateway, San Francisco, CA.

17–19: Federal Publications Inc. Government Contract Program, Small Purchasing, Sheraton-Houston, Houston, TX.

18–19: Vermont Bar Association, annual meeting, Basin Harbor Club, Vergennes, VT.

18–20: ALI-ABA Program, Municipal Law and Government Finance, New York, NY.

19–21: National Task Force on Higher Education and Criminal Justice, First National Conference on Alternatives to Incarceration, Sheraton-Boston Hotel, Boston, MA.

21–25: State Bar of California, annual meeting, Los Angeles, CA.

21–25: National College of District Attorneys Course, Trial Techniques Seminar, Registry Hotel, Bloomington, MN.

22–24: Federal Publications Inc. Government Contract Program, Small Purchasing, Holiday Inn/Golden Gateway, San Francisco, CA.

22–25: Federal Publications Inc. Government Contract Program, Fundamentals of Government Contracting, Washington, DC.

23–25: US Civil Service Commission CLE Program, Law of Federal Employment Seminar, Washington, DC.

24–26: Federal Publications Inc. Government Contract Program, Risk Management in Construction Contracting, San Francisco, CA.

24–27: Oregon State Bar, annual meeting, Vancouver, B.C.

26–27: ALI-ABA Program, Defense of White Collar Crime: Recent Federal and State Developments, Los Angeles, CA.

27–Oct 3: Inter-American Bar Association, XIX Conference, Cartagena, Columbia.

28–Oct 3: National College of the State Judiciary, Specialty Session in Probate Law, Judicial College Building, University of Nevada, Reno, NV.

28–Oct 3: National College of the State Judiciary, Specialty Session in Sentencing Misdemeanants, Judicial College Building, University of Nevada, Reno, NV.

29–Oct 1: Federal Publications Inc. Government Contract Program, Construction Contract Modifications, Twin Bridges Marriott, Washington, DC.

29–Oct 3: Federal Publications Inc. Government Contract Program, The Skills of Contract Administration, Holiday Inn-Golden Gateway, San Francisco, CA.

OCTOBER

American Association of Attorney-Certified Public Accountants, Inc., annual meeting, Amsterdam and Luxembourg.

Nebraska State Bar Association, annual meeting.

North Carolina State Bar, annual meeting.

State Bar of New Mexico, annual meeting.

West Virginia State Bar, annual meeting.

Kansas Bar Association annual meeting.

1–3: US Civil Service Commission CLE Program, Institute for Legal Counsels, Charlottesville, VA.

5–10: National College of the State Judiciary, Graduate Session in Evidence II, Judicial College Building, University of Nevada, Reno, NV.

2–3: Federal Publications Inc. Government Contract Program, Contracting for Services, Sheraton-National, Arlington, VA.

6–8: Federal Publications Inc. Government Contract Program, The Learning Theater of Government Contracting, Williamsburg, VA.

7–10: National College of District Attorneys Course, Regional Police-Prosecutor School, Dallas, TX.

8–10: Federal Publications Inc. Government Contract Program, Profit and the Contracts Man, Las Vegas, NV.

8–11: Indiana State Bar Association, annual meeting, Evansville, IN.

9–11: Colorado Bar Association, annual meeting, Colorado Springs, CO.

9–11: ALI-ABA program "Atomic Energy Licensing and Regulation—VI," Mayflower Hotel, Washington, DC.

12–17: National College of the State Judiciary, Specialty Session in Alcohol and Drugs, Judicial College Building, University of Nevada, Reno, NV.

12–17: National College of the State Judiciary, Session in Administrative Law II, Judicial College Building, University of Nevada, Reno, NV.

12–17: World Law Conference, biennial meeting, Sheraton Park Hotel, Washington, DC.

13–15: Federal Publications Inc. Government Contract Program, Competing for Contracts, San Diego, CA.

15–17: Federal Publications Inc. Government Contract Program, Small Purchasing, Sheraton-National, Arlington, VA.

17–18: ALI-ABA Program, Tort Trends 1975, ABCNY, New York, NY.

19–23: National College of District Attorneys Course, Organized Crime Seminar, Boston, MA.

20–22: ALI-ABA Program, Real Estate: Debtors' and Creditors' Rights, Sheraton-Harbor Island Hotel, San Diego, CA.

20–22: Federal Publications Inc Government Contract Program, Practical Negotiation of Government Contracts, Los Angeles, CA.

22–24: Federal Publications Inc. Government Contract Program, Risk Management in Construction Contracting, Quality Inn/Pentagon City, Washington, DC.

23–25: Connecticut Bar Association, Annual Meeting, Hartford, CT.

24–25: ALI-ABA Program, Practice Under the Federal Rules of Evidence, Washington, DC.

27–29: Federal Publications Inc. Government Contract Program, Competing for Contracts, Washington, DC.

31–Nov 1: ABA Section of Young Lawyers, National Institute on "Consumer Law Practice," St. Louis Marriott, St. Louis, MO.

JAGC Personnel Items

1. JAGC To Receive ABA Award of Merit For Law Day Activities. The United States Army Judge Advocate General's Corps will be honored on August 10 with an American Bar Association Special Award of Merit, presented each year to associations demonstrating outstanding service to the general public and to the legal profession. The Corps is being cited for its participation in the 1975 Law Day USA program. The award will be presented during the ABA annual meeting in Montreal, Canada, at a luncheon sponsored by the ABA Section of Bar Activities. Congratulations to the many field judge advocate offices whose activities add to the success of our program.

2. Advanced Course Attendance. Effective immediately, assignments to the resident JAGC Advanced Course will be made by the Chief, PP&TO, from a roster of eligible officers selected by an OTJAG Selection Board. Applications for the Advanced Course need not be made.

Officers selected for the Advanced Course should consult paragraph 2*i*, AR 350–100, with respect to a written declination of acceptance. Any officer who declines acceptance should be aware of the adverse effect of the declination upon his career.

Officers without JAGC field experience will not attend the resident Advanced Course. Accordingly, Funded Legal Education and Excess Leave officers will not be considered for attendance at the Advanced Course until they have at least one year of field experience following graduation from law school.

This supersedes the item on the same subject contained in the July issue of *The Army Lawyer*.

3. Selection of Military Judges.

a. To be a military judge, a JAGC officer must have a broad background of military criminal law experience. He must have impeccable moral character, and even temperament, good judgment, common sense, learning, sound reasoning ability, patience, integrity, courage, a nonabrasive personality and a high degree of maturity. He must be able to express himself, orally and in writing, in a clear, concise manner. It is also important for him to have an understanding of, and experience in, the principles and problems of leadership and exhibit a neat and military appearance.

b. The Judge Advocate General personally selects and certifies the officers who serve as

general court-martial, special court-martial and part-time special court-martial military judges.

c. Special Courts-Martial military judges are selected from applicants experienced in military criminal law who are majors, promotable captains, captains who have completed their obligated tours of service and are in a Regular Army or voluntary-indefinite status, or other highly-qualified company grade officers who have at least two and one-half years of JAGC service and more than one year's service obligation remaining.

d. (1) Application procedures are prescribed by the Chief, Trial Judiciary, who makes a comparative evaluation of applicants' qualifications. An applicant may express his preference for selection either as a full-time or part-time special court-martial military judge; however, the type of selection is within the discretion of The Judge Advocate General upon consideration of individual qualifications and world-wide requirements.

(2) General court-martial judges are selected from field grade officers who have at least eight years' active judge advocate service. Officers may be selected for GCM certification by three processes:

(3) The Judge Advocate General may directly select field grade judge advocates not then assigned in the Trial Judiciary who possess exceptional qualifications and competence in military criminal law.

(4) Lieutenant Colonels or Colonels not assigned in the Trial Judiciary may apply for selection by letter through the Chief, Trial Judiciary and Chief, US Army Judiciary to The Judge Advocate General.

(5) Field grade officers certified as special court-martial military judges and assigned in the Trial Judiciary will be considered for GCM certification without application upon completion of two years' full-time service as military judge. Consideration is automatic, but selection will be made only of those who have demonstrated the personal qualities and professional competence expected of judges who preside over the most complex and important trials.

e. No officer who fails to successfully complete the Military Judge Course or its equivalent will be certified.

f. Officers interested in applying for certification as military judge should make their desires known to the Chief, Trial Judiciary and the Chief, Personnel, Plans and Training Office, Office of The Judge Advocate General.

4. June SOM at Dix. Congratulations to SP4 Michael J. McNamara, whose duty section is the Fort Dix Staff Judge Advocate Office, for his selection as Fort Dix Soldier of the Month in June.

5. June DAC at Gordon. Congratulations are also in order for Ms. Cecilia E. Townes, GS-5, Legal Assistance Branch, Office of the Staff Judge Advocate, US Army Signal Center and Fort Gordon, who was designated Fort Gordon's Department of the Army Civilian for June.

Current Materials of Interest

Articles.

The July issue of the *American Bar Association Journal*, Volume 61, notes the JAGC bicentennial in a one-page item entitled "Judge Advocate General's Corps Is 200 Years Old," at p. 866.

The Summer 1975 issue of the *Military Police Law Enforcement Journal* (Volume II, Number 2) contains several articles of note: (1) "But for the Polygraph" (2) "Rape Prevention" (3) "Processing the Drunken Driver" (4) "Confidence Games," and others.

Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 YALE L.J. 1179 (May 1975).

Baxter, "Humanitarian Law or Humanitarian Politics?" The 1974 Diplomatic Conference on Humanitarian Law, 16 HARV. INT' L L. J. 1 (Winter 1975).

Perr, "The Changing Doctrine of Criminal Responsibility," *The Journal of Legal Medicine*, Volume 3, Number 6 (June 1975) p. 40.

Forkosch, "The Lie Detector and Mechanical Jurisprudence," 28 OKLA. L. REV. 288 (Spring 1975).

Comment, "Application of the Uniform Commercial Code to Federal Government Contracts: Doing Business on Business Terms," 16 WM. & MARY L. REV. 395 (Winter 1974).

Note, at 43 GEO. WASH. L. REV. 647 (January 1975) discusses the holding of *Roscoe-Ajax Construction Co. v. United States*, 449 F2d 639 (Ct. Cl 1974) that the government, unable to appeal decisions of the Boards of Contract Appeals, may counterclaim only where limited to the disputes raised in contractor's suit.

Clements, "Child Abuse: The Problem of Definition," 8 CREIGHTON L. REV. 729 (June 1975). One of six articles in this symposium issue on child abuse.

Comment, "The Home-Office Deduction: Another Tax Loophole?" 11 IDAHO L. REV. 193 (Spring 1975).

Kuhns, "Limiting the Criminal Contempt Power: New Rules for the Prosecutor and Grand Jury," 73 MICH. L. REV. 483 (January 1975).

Note, "Marriage Contracts for Support and Services: Constitutionality Begins at Home," 49 N.Y.U.L. REV. 1161 (December 1974).

By Order of the Secretary of the Army:

Official:

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

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