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Speedy Trial

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The defense counsel can move to dismiss a charge or specification on the ground that the government has denied the defendant a speedy trial.

A. Sources of Right

The defendant's right to a speedy trial is based upon five sources. The first source is the Sixth Amendment, which states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." [1] A second source is Article 10, UCMJ, which provides "A person placed in arrest or confinement prior to trial. . .immediate steps shall be taken to inform him of the specific wrongs of which he is accused and to try him or to dismiss the charges and release him." [2] The Court of Military Appeals has indicated that the requirements of Article 10 of the Code are presumed to be more stringent than the Sixth Amendment.[3] However, the court has not relied on Article 10 as an independent basis for granting relief because of a denial of the right to a speedy trial. The third source is military due process.[4] A fourth source is Article 33 of the Code.

> When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges together with the investigation and allied papers, to the officer exercising general court martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reason for the delay.[5]

The court has not held that the failure to comply with the eight-day rule set forth in Article 33 is a basis for a dismissal on this ground alone. It has been one factor the court has looked at in determining whether there is a violation of the right. These four sources are combined into what is called a non-*Burton* motion for speedy trial.

The fifth source is *United States v. Burton,*[6] which sets forth the last two reasons for granting a motion for a denial of the right to a speedy trial. *Burton* is a nonstatutory, nonconstitutional rule and applies to an offense committed after December 17, 1971, for which the defendant has been in confinement for more than 90 days. As the court stated in *Burton:* "[I]n the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds 3 months." [7] The court also stated:

> [W]hen the defense requests a speedy disposition of charges, the Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief.[8]

B. Raising the Issue. The issue can be raised by addressing a demand for a speedy trial to the convening authority, by making a motion to dismiss addressed to the military judge, or by raising the issue for the first time on appeal. The issue is addressed to the military judge at an Article 39(a) session prior to the plea. The difficulty in not raising the issue at trial is that a waiver may take place although the court on some occasions has allowed the issue to be raised for the first time on appeal.

C. Waiver—90-day Rule. The failure to raise a *Burton* error at the trial level is a waiver "in the

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absence of a compelling reason, to disregard the accused's failure to object at trial." [9] Delay is a common defense tactic. The tactic may very well work to the advantage of the defendant because witnesses may become unavailable, forgetful, or in some cases they may be intimidated by a third party. For this reason, and the fact that judicial economy would argue against the government being required to set forth the reasons why the defendant was not denied a speedy trial absent notification based upon a motion being made, the failure to raise the issue at trial should be considered to be a waiver by the defense. Bear in mind defense attorneys are duty bound to object at trial where there is a perceived violation of the defendant's rights. It may well be that if the issue was raised the government could establish extraordinary circumstances, defense request for delay, or misconduct by the defendant which would result in an exceeding of the 90-day period set forth in *Burton*.

D. Waiver—Other Than 90-Day Rule. Earlier, the Court of Military Appeals had indicated that the failure to raise the speedy trial issue at the trial level did not amount to a waiver.[10] To prevent the guessing game on appeal, the government under this rule at trial was required to present evidence to show why the defendant was not denied a speedy trial even though the issue was not raised. To avoid this apparent waste of time one of the most recent pronouncements of the court indicates that the failure to raise the issue is a waiver.[11] But this holding the court said was not to be understood "as constituting a relaxation of the emphasis on speedy trial."

Some courts have applied a demand-waiver doctrine. Generally under this rule the failure to demand a speedy trial would constitute a waiver. The Supreme Court in *Barker v. Wingo*,[12] commented upon a demand rule which is similar to one of the prongs of the *Burton* standard. The Court stated that "presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights." The Court has indicated waivers should be intentional relinquishment or abandonment of a right which should not be presumed because of inaction or

acquiescence. The same presumption against waiver was also set forth in *Miranda v. Arizona.*[13] The fact that a delay because of the lack of the demand may work to the benefit of the defendant rather than to his detriment "does not argue for placing the burden of protecting the right solely on defendants." [14] Because society has an interest, especially in the military community, in swift prosecution it is the prosecutors who should be the ones who should attempt to obtain a speedy trial and protect the right to a speedy trial.[15]

E. Differences Between Burton and Non-Burton Speedy Trial Motions. The difference between the two motions may be crucial. The non-*Burton* motion applies regardless of the date the offenses were committed even though the defendant is not in confinement for 90 days. The non-*Burton* motions apply to the period beginning with the date charges are preferred, or the accused arrested, restricted or confined, whichever is earlier. The government's burden is one of showing the delay was not unreasonable or oppressive. However, where the accused suffers more than 90 days of pretrial confinement, the government is presumed to have denied the accused a speedy trial. The burden that is placed upon the government is heavier when there is a violation of the 90-day rule or the constitutional right to a speedy trial, than when there is a demand rule violation. In the first two cases the government must show extraordinary circumstances.

As part of a negotiated agreement with a convening authority the convening authority cannot require the defendant to waive his speedy trial rights or agree not to raise the issue at trial.[16]

F. Remedy. The only judicial remedy for the lack of a speedy trial is the dismissal of the charges.[17] Reduction of the sentence is not a remedy for the denial of a speedy trial.[18] A non-judicial remedy that has seemingly fallen by the wayside is Article 98 of the Code, which provides that any person who was responsible for an unnecessary delay shall be punished as a court-martial may direct.[19]

G. Speedy Trial Motions. The issues shall be broken down in non-*Burton* speedy trial motions and *Burton* speedy trial motions. The first to be discussed will be the non-*Burton* speedy trial motions.

1. *Non-Burton Speedy Trial Motions.*

a. *Period of Government Accountability.*

(1) *Charges, arrest or confinement.* The earliest date on which the government will be accountable for the period of time prior to trial will be the date of charges, confinement or arrest, whichever is earlier. It has been held that restriction to post is the equivalent of arrest.[20] Government accountability does not start upon the expiration of a term of service or from the period of "legal hold"—or what has been commonly referred to as "flagging action." [21]

(2) *Civilian confinement.* Where the defendant, because of surrender or arrest, is in civilian confinement the government is responsible for the period of time after it has been notified of such confinement.[22] It *may* be that the government will be responsible from the time not only of notification but will have the added responsibility for attempting to obtain the defendant's release for a military trial when reasonable inquiry would have established the defendant's confinement.[23] The trial counsel should contact the civilian authorities and make efforts to secure the individual's release from pretrial confinement.[24] Where the defendant is in civilian confinement, has exerted every effort to get the military to try him, and shows prejudice, there will be a denial of right to speedy trial.[25] In *United States v. Pierce,*[26] the court held that where the delay was beneficial to the defendant this factor may be considered in denying a speedy trial motion raised for the first time on appeal.

Even if the prisoner does not demand release, the prosecutor should seek to obtain the prisoner's release.[27]

Where the defendant is under military charges and is released to the civilian authorities under Article 14, UCMJ, the government will be accountable for the time spent in civilian custody awaiting trial on civilian charges.[28]

1. *Non-Burton Factors to be Considered.* In *Barker v. Wingo,*[29] the Supreme Court indi-

cated that there were at least four factors that could be examined in determining whether there is a denial of the right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Two other factors are the defendant's awareness of the charges against him and whether there was a government design to delay the trial. If the defendant was aware of the charges against him, such knowledge goes to negate a showing of prejudice.[30] However, in determining whether the accused is aware of the charges it is a violation of his rights under Article 31 of the Fifth Amendment for the judge to question the accused about this factor.[31]

Second, was the government delay oppressive or unreasonable? One of the factors to be examined here is the nature of the restriction or pretrial restraint imposed upon the defendant. In *United States v. Hester*,[32] the court found that five month pretrial restriction to a military intelligence unit in Korea built like a maximum security penitentiary was vexatious and oppressive resulting in the denial of the right to speedy trial.

Failure to explain the reason for not forwarding the charges within eight days is not grounds in and of itself for a reversal of the conviction where there is no prejudice,[33] but the failure to comply with this requirement is weighed against the government in determining whether due diligence has been exercised.[34]

The next factor to consider is prejudice to the accused.[35] At trial, the defense counsel makes a motion to dismiss, thereby placing the burden upon the government to affirmatively justify the delay.[36] After the prosecutor shows that any delay was reasonable, the defense counsel may then show that the delay was not reasonable because of the prejudice to the defendant.[37] Although it is advisable for the defense to show that there has been prejudice to the defendant, this is not an absolute requirement imposed upon the defense.[38] To state it another way, reasonable delays may become unreasonable in light of specific harm to the defendant. This may be the loss of material witnesses, such as was the factor in *United States v. Parish*.[39] Failure to so advise the defendant of his right to consult counsel during the lengthy pretrial confinement may be prejudicial in and of itself.[40]

Also considered is whether the accused demanded a speedy trial. The failure to demand a trial does not automatically indicate that there is no denial of the right to a speedy trial but it is one of the factors that has been considered both by the Supreme Court in *Barker* and the Court of Military Appeals on a number of occasions. In *Burton* the court indicated that a failure to respond to such a request for a speedy trial may itself justify a dismissal of the charges or, as phrased by the court, "extraordinary relief." However, the *Burton* requirement for a government response to the demand and either proceeding to trial or explaining the further delay has been held not applicable when the defendant is not in pretrial confinement.[41] The weight to be attached to a demand should depend on the "frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection."[42] The judge must also consider whether the difference from the design of defense counsel not to object to the delay for tactical reasons and no objection because no counsel was appointed.

The primary factor to examine is the length of delay and its reasonableness. Again, delay can benefit both the prosecution and the defense. Delay may be because of government negligence or an intentional attempt to hamper the defense. With delay memories become hazy and witnesses are lost. However, delay also diminishes the possibility of a severe sentence because there is generally a loss of retributive impulse. Finally, minimal delay will lessen the likelihood of witness intimidation by both sides.

2. *Burton Speedy Trial Motions.*

a. *General.* (1) For offenses occurring after December 17, 1971, (2) in the absence of a defense request for a delay, a presumption of a violation of Article 10 exists (3) when the pretrial confinement of the defendant for the offense charged (4) exceeds 90 days.

In addition to this 90-day rule and the presumption applicable to it, the court in *Burton* also stated that when the defense requests speedy disposition of the charge the government

must (a) respond to the request and proceed immediately, or (b) show an adequate cause for further delay. The "adequate cause for further delay" in response to a demand rule and the "extraordinary circumstances" may be one and the same in some factual situations, although the latter standard seems to be much more stringent than the former. Where there is a delay of more than 90 days extraordinary circumstances must be shown, but after a defense request for speedy trial the government must respond and proceed or, as generally happens, show "adequate cause for the delay." The adequate cause normally would show a reason for delaying which does not reach a total of 90 days. However, for the purposes of this article, both will be discussed together.

b. *Demand for Trial Rule.* The demand for trial rule set forth in *Burton* is an independent rule, not dependent upon the expiration of 90 days in confinement. The government can establish that the demand for trial has been met by proceeding immediately either with the trial or by immediately releasing the defendant from pretrial confinement.[43] A third possible way to respond, although it is not the recommended way, is to docket the defendant's case for trial.[44] Dismissing charges may be a fourth response. When the initial charges have been dropped, the accountability of the government will depend on the relationship between the final charges and the original.[45]

The demand rule is an *independent rule* to avoid placing the defense counsel on the horns of a dilemma. To require a demand to trial as a prerequisite to granting a motion to dismiss for lack of a speedy trial would be grossly unfair to the defendant. To fail to demand a speedy trial he may be in danger of waiving the defendant's right while at the same time if he expedites the case he may be unable to prepare his case in a manner that will insure a fair trial to the defendant.

c. *Prerequisites for 90-Day Rule*

(1) *Offenses Committed after December 17, 1971.* The *Burton* presumption is inapplicable to offenses committed prior to December 17, 1971.[46] The inception date determines "committed" date in absence without leave[47] and desertion.[48] Where there are multiple offenses, the *Burton* rule will only apply to those offenses occurring after December 17, 1971.[49]

(2) *90 Days.*

(a) *Defense Request for Delay.* Defense requests for delay may reduce the period of time for which the government is accountable. The Court of Military Appeals in *United States v. Driver*[50] stated, "[C]ontinuances or delays granted only because of a request of the defense and for its convenience are excluded" from the 90-day period.[51] The period deductible will only include the period that the defendant was in pretrial confinement. Where he has been released during the delay requested by the defense, the only period that will be deducted will be the period actually spent in confinement.[52] Another period that may be deducted is a delay that the parties stipulate should not be considered in determining whether the 90-day rule is applicable.[53] A third period of time whether either *tolls* or is deductible as a factor to be considered as to whether *Burton* applies is where the defendant's misconduct or his absence has either affected or prevented the government from processing the charges.

Certain defense actions may constitute either a defense request for a delay or be extraordinary circumstances. For example, a request for administrative discharge in lieu of trial[54] will not be considered a defense request for delay, absent specific defense request for delay while the application is processed, nor is it "extraordinary circumstances" absent a showing that processing the request for discharge caused the government undue delay.[55] The attempt to negotiate a pretrial agreement may under some circumstances be a request for a continuance by the defense,[56] but it appears the government must show its effect upon the ability to proceed to trial, absent a specific defense request for delay. However, the exercise of the defendant's right to delay between service of charges and trial is not held against the accused in determining a speedy trial issue because this is an absolute right of the defendant.[57] Another example of defense requested delay is where the trial date is set to accommodate the defense counsel's work schedule and his leave. This will be consid-

ered an extraordinary circumstance.[58] However, the mere acquiescence in a new trial date already set is not a defense request for delay.[59] A defense request for joinder of all charges at one trial has been held not to be a defense request for delay.[60] A defense request for the delay of the Article 32 investigation may properly be considered an extraordinary circumstance where the Article 32 investigating officer does not schedule the hearing on a date on which he knows the accused and defense counsel will not be available.[61]

Normally, the defense counsel's request for leave is not a defense-requested delay. "It might be argued in an appropriate case that the action of a defense counsel in requesting leave is tantamount to request for delay of the case, *e.g.*, if the government was prepared to go to trial during the time the defense counsel was on leave." [62] A defense counsel's leave will be defense-requested delay when the judge at an informal docketing session extends the trial date to accommodate defense counsel's leave.[63] Where the defense counsel leaves post in a duty status to go on TDY, this will not be a defense-requested delay, unless it is shown that the TDY travel was for personal or other defense purposes.[64]

A common delay that takes place prior to trial is the period of hospitalization for psychiatric examination of the appellant. Recently, in *United States v. Hensley*,[65] the Court of Military Review indicated that hospitalization for psychiatric examination of the appellant or a subsequent medical check-up for the benefit of appellant are defense-requested delays because these are beyond the control of the prosecution. Lastly, where the defendant, at the initial Article 39a session, initiates a request for other counsel, a reasonable delay in obtaining requested counsel is considered to be a defense-requested delay.[66]

(b) *Defendant's Misconduct.* Misconduct prior to confinement or while in confinement may have the effect of being considered "extraordinary circumstances" or increase the 90-day period.[67]

(3) *Confinement.*

(a) *Confinement—Generally. Burton* is applicable when the pretrial *confinement* of the defendant for the charge to which the motion is directed exceeds *90 days*.[68] The courts have indicated that restriction does not constitute confinement for *Burton* purposes.[69] Generally, the confinement must relate to the charge to which the motion is directed.[70] This does not mean that where the defendant is in confinement the government is in a position to proceed in a leisurely fashion until charges are either preferred or forwarded. The period of time for which the government is accountable "should commence when the government had in its possession substantial information on which to base the preference of charges." [71] But, confinement within the meaning of *Burton* does not include confinement on a previously adjudged sentence.[72]

(b) *Confinement by Civilian Authorities.* Where the defendant is apprehended or surrenders to civilian authorities the *Burton* 90-day period will not begin to run until a reasonable period of time has elapsed to allow the government to return the defendant to the place where the trial will be held.[73] The period of accountability begins the date that the government reasonably has control or can gain control of the defendant.

The courts have indicated that confinement on *civilian* charges is not chargeable to the government under *Burton*.[74] However, when the defendant who is turned over to the civilian authorities pursuant to Article 14(a), UCMJ, the government may be accountable for the time spent in civilian custody awaiting trial on civilian charges.[75]

(c) *Confinement at Another Installation.* Where the soldier has absented himself from post and surrenders at another installation and is returned to his home station, the burden is on the government "to pursuade [the judge] factually why some other date other than the [original] commencement of confinement ought to be the commencement of the *Burton* period." [76]

(d) *Defendant's Misconduct.* Misconduct that affects the period of government accountability may be the result of the defendant's

misconduct in confinement or his absence without leave resulting in apprehension and return to military authority at another post. While in confinement for the absence without authority, offenses at his original installation may be unearthed.[77]

(d) *Circumstances Justifying Delay.* In *United States v. Marshall,*[78] the court stated:

> [W]hen a *Burton* violation has been raised by the defense, the Government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay.

Some examples of extraordinary circumstances are as follows: (1) case arising in combat environment;[79] (2) case arising in a foreign country. However, the mere fact that a case arises in a foreign country is not an "extraordinary circumstance." The government must show specific problems caused by the location, *e.g.*, investigation by foreign police, difficulties in obtaining foreign national witnesses, travel problems, or contested jurisdictional issues.[80] (3) The case is either serious or complex. However, "a riot involving a horde of individuals in an open community at night where complicity may be difficult to establish. . .may be [a complex case], but riot occurring in daylight in [a] confinement facility with many witnesses is not [a complex case]." [81] The issue of "complexity should not be confused with uncertainty." [82] (4) Operational demands.[83] (5) The unavailability of a military judge on the proposed date has been held not to be an "extraordinary circumstance" beyond the control of the government.[84] (6) The unauthorized absence of an essential prosecution witness is an extraordinary circumstance,[85] although the government must proceed to effect the witness' return to duty. (7) The diversion of investigative or legal personnel to investigate apparent sabotage of an important operational unit of the fleet has been held an "extraordinary circumstance." [86] But not where such diversion did not affect the government's ability to proceed.[87]

e. *Circumstances Not Justifying Delay.* What the court has termed "normal incident of military practice" will not be circumstances justifying a delay under the *Burton* rule. Some examples are as follows: (1) shortage of personnel,[88] (2) illness, injury, absence of convening authority, staff judge advocate or deputy staff judge advocate,[89] (3) backlogs resulting from shortage of personnel,[90] (4) inexperienced personnel,[91] (5) heavy caseload of the office, defense counsel or military judge,[92] and (6) request for administrative discharge.[93]

H. Termination of 90-Day Period. The Court of Military Appeals has not indicated what terminates the 90-day period. Some alternatives may be the Article 39(a) session, the introduction of evidence, the findings or sentence in the case. In *Burton* the court indicated that Article 10 was not intended to adopt a practice that the charges against the defendant should be automatically dismissed "if he is not brought to trial within a specified time after being charged." [94] This "brought to trial" language does not appear in the paragraph announcing the 90-day rule or the demand rule. But the language should apply to such rules. Later, the court has indicated in dictum that the "essence of the *Burton* presumption. . .is that the accused should not unnecessarily be confined while his guilt remains judicially undetermined." [95] It may be that an Article 39(a) session will terminate the 90-day rule if it is called in good faith to dispose of pretrial motions. However, if it is called merely to terminate the application of the 90-day rules and the government is still not ready to proceed with the case in chief it is questionable whether *Burton* has been satisfied.[96]

I. Defendant's Misconduct. The defendant may absent himself from a post on the west coast and be apprehended at or near his home on the east coast. Because of the expense and delay that would be involved in transferring an absentee back to the west coast for trial, his trial will be on the east coast. Such a defendant has no right to be returned to the west coast for trial and the government will be allowed a reasonable period of time to obtain his records in evidence.[97] The same defendant may have committed other offenses on the west coast that were not known at the time of his absence or possibly at the time of

his apprehension. The government will be allowed (1) a reasonable period of time to discover the offense, or (2) if it is already known the government will be allowed a reasonable period of time to prefer charges after the possession of substantial information on which the charges might be based. The government may be unreasonable as to the discovery of the offense but very expeditious in preferring the charges, thus not violating the defendant's rights. The period of time under the *Burton* rules does not start at the date of preferral but does start after the government has obtained substantial information on which to prefer the charges.[98]

Any succeeding offenses will be treated separately in determining the government accountability. There may be a violation of *Burton* as to one offense but not another.[99]

The defendant's misconduct also comes into play where he is released from pretrial confinement prior to the expiration of the 90-day period and at some point during the release commits another offense excluding absence from his unit. As a result of the second offense he is placed in confinement. The court has indicated that a new 90-day period does not start upon being placed in confinement. The question is whether the government has proceeded reasonably on both the original charge and the additional charges. One of the key factors to consider is how the defendant's second offense has affected the government's ability to proceed on both the original and additional charges.[100] However, where the additional offense after release from confinement is absence without leave for a substantial period of time this may result in a new 90-day period or in the combining of the segmented periods of confinement.[101]

J. Repeated Offenses. What happens when a person who has been released from confinement commits one offense, is reconfined and then commits a series of offenses over a number of days in the stockade? When does the period of government accountability start, both for the 90-day period and for the Sixth Amendment right? It would appear that the option is with the government at this time. The public interest would be to proceed after an appropriate number of charges because witnesses may die, their memories may fade, witnesses may become tired of being interrogated by counsel or investigators over a period of time. These rights or these detriments which accrue to society would not benefit the defendant because by his own misconduct he has in effect forfeited his right to a speedy trial.

The Court of Military Appeals in *United States v. Ward,*[102] seems to have struck a different balance between the conflicting procedural principles of the right to a speedy trial and the policy set forth in paragraph 31*g* of the Manual that all known charges be combined. The Manual provision is of benefit to both the defendant and the government. Thus the court indicated that defendant is better able to judge whether advantages of combining all known charges outweigh the disadvantage of postponing the trial on the original charges. The practical solution would be to serve notice on the defendant asking him to elect separate trials or a trial on all known charges.

K. U.S. Army Europe 45-Day Rule. The supplement to Army Regulation No. 27-10 imposes the following rule:

> Unless charges referred to a summary or a special court-martial (including a special court-martial empowered to adjudge a bad-conduct discharge) are brought to trial within 45 days from the date pretrial confinement, arrest, or restriction is imposed or the date charges are preferred, whichever is earlier, the charges will be dismissed by the general court-martial convening authority upon written application of the accused submitted prior to his being "brought to trial" when either the court or an Article 39(a) session is called to order.[103]

In *United States v. Walker,*[104] the court in dictum stated that where a government agency promulgates a rule or regulation to guide its action these agencies will be bound by the rules even though they are not constitutionally required. However, the court stated that the defendant waived his right to have the rule enforced by failing to raise the issue at the trial level and by his plea of guilty. Where there is no

waiver a military judge may review a convening authority's decision and, if he finds that the convening authority abused his discretion, he should take appropriate action to include dismissal of the charges.[105] In contrast to the dictum in *Walker* the Army Court of Military Review in *United States v. Cruz,*[106] indicated that a violation of the 45-day rule is one factor to consider in determining whether there has been denial of the right to a speedy trial.

The 45-day period is tolled when an Article 39(a) session is called to order only for the purpose of tolling the rule and not to bring the defendant to trial at that time. Even though the 39(a) session was called in bad faith the court indicated in *United States v. Glahn*[107] that the 45-day rule was not breached "no matter why [the 39(a) session] was called or whether the government was ready to proceed with the trial."[108] The question of a termination of the 90-day rule similar to the factual situation in *Glahn* was presented in *United States v. Marell.*[109] The defendant was charged with five specifications and an Article 39(a) session was held within the 90-day period at which time the defendant entered a plea to two of the specifications and a third was dismissed. The last two specifications were tried resulting in a dismissal of one and a conviction of the other. While the court indicated that the plea of guilty waived the violation of *Burton* as to the two specifications the court indicated in dictum that the 90-day period is not terminated by calling an Article 39(a) session. "The essence of the *Burton* presumption. . .is that an accused should not unnecessarily be confined while his guilt remains judicially undetermined."[110] It would seem that in the intent of *Burton* was also the intent of the 45-day rule and thereby the conclusion reached by the Army Court of Military Review was possibly wrong.

Footnotes

1. U.S. CONST., amend. VI.

2. 10 U.S.C. § 810 (1970).

3. United States v. Houndshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

4. *See* Tichenor, *The Accused's Right to a Speedy Trial in Military Law,* 52 MIL. L. REV. 1, 5 (1971).

5. 10 U.S.C. § 833 (1970).

6. United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).

7. *Id.* at 118, 44 C.M.R. at 172.

8. *Id.*

9. United States v. Sloan, 22 U.S.C.M.A. 587, 589, 48 C.M.R. 211, 213 (1974); *see also* United States v. Smith, 23 U.S.C.M.A. 98, 48 C.M.R. 659 (1974); United States v. Scarborough, 49 C.M.R. 580 (ACMR 1974).

10. *See, e.g.,* United States v. Schalack, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

11. United States v. Pierce, 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

12. 407 U.S. 514 (1972).

13. 384 U.S. 436 (1966). The Court held to show a waiver of a fourth amendment right was not necessary for the prosecution to show that the defendant was aware of his right to object to the search. *But see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

14. Barker v. Wingo, 407 U.S. 514 (1972).

15. *Id.*

16. United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968).

17. Strunk v. United States, 412 U.S. 439 (1973); United States v. Hubbard, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971).

18. *See* United States v. Hubbard, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971).

19. 10 U.S.C. § 898 (1970). MCM, 1969, (Rev.), para. 127c provides that the maximum punishment is a bad conduct discharge, confinement at hard labor for six months and total forfeitures and reduction to E-1. There has not been any reported case of an individual charge for a violation of article 98.

20. United States v. Smith, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968) (restriction to post equivalent to arrest for speedy trial purposes); United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967) (restriction to unit the equivalent to arrest). *See also* United States v. Marion, 404 U.S. 307 (1971). "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engages the particular protections of speedy-trial provisions of the Sixth Amendment."

21. United States v. Admundson, 23 U.S.C.M.A. ___, 49 C.M.R. ___ (February 7, 1975).

22. United States v. Keaton, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969).

23. Note, 77 YALE L.J. 767, 777 (1968).

24. *See* Smith v. Hooey, 393 U.S. 374 (1968).

25. *Cf.* Dickey v. Florida, 398 U.S. 30 (1970).

26. 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

27. *Cf.* ABA Standards, Speedy Trial § 2.3 (1968).

28. United States v. Swartz, 44 C.M.R. 403 (ACMR 1971).

29. 407 U.S. 514 (1972).

30. United States v. Hawes, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969).

31. United States v. Turnipseed, 20 U.S.C.M.A. 137, 42 C.M.R. 329 (1970).

32. 37 C.M.R. 652 (ABR 1967).

33. United States v. Gatson, 48 C.M.R. 440 (NCMR 1974).

34. United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971); United States v. Fernandez, 48 C.M.R. 460 (NCMR 1974).

35. Moore v. Arizona, 414 U.S. 65 (1973).

36. United States v. Brown, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

37. United States v. Amundson, 48 C.M.R. 914 (NCMR 1974).

38. United States v. Brown, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

39. 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968).

40. United States v. Przybyczien, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969).

41. United States v. Mock, 49 C.M.R. 160 (ACMR 1974).

42. Barker v. Wingo, 407 U.S. 514, 529 (1972).

43. United States v. Mock, 49 C.M.R. 160 (ACMR 1974); United States v. Stevens, No. 430296 (ACMR 9 May 1974).

44. *Compare* United States v. Stevens, No. 430296 (ACMR 9 May 1974) ("The docketing of the case. . .was a sufficient response") *with* United States v. Mitchel, No. 429740 (ACMR 29 January 1974) ("We doubt that an Article 39(a) session for arraignment purposes only will be sufficient of itself to satisfy the mandate to 'proceed immediately.' ").

45. *Cf.* United States v. O'Neal, 48 C.M.R. 89 (ACMR 1973); United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972).

46. United States v. Gray, 22 U.S.C.M.A. 443, 47 C.M.R. 484 (1973).

47. United States v. Harmash, 48 C.M.R. 809 (ACMR 1974); United States v. Georgio, 48 C.M.R. 620 (NCMR 1973).

48. United States v. James, 48 C.M.R. 698 (ACMR 1974).

49. *See, e.g.*, United States v. Ellis, 48 C.M.R. 904 (NCMR 1974).

50. 23 U.S.C.M.A. 243, 245, 49 C.M.R. 376, 378 (1974).

51. *Id.* at 245, 49 C.M.R. 378.

52. United States v. O'Neal, 48 C.M.R. 89 (ACMR 1973).

53. United States v. Montague, 22 U.S.C.M.A. 495, 47 C.M.R. 796 (1973).

54. *See, e.g.*, United States v. Bush, 49 C.M.R. 97 (NCMR 1974).

55. United States v. Shavers, 50 C.M.R. 298 (ACMR 1975). Request for administrative discharge is not a defense requested delay where the record is silent as to whether appellant specifically sought a delay in the proceedings, pending action on his request. Moreover, the request for discharge did not impede the progress of the case in any way. *See also* United States v. Abner, 48 C.M.R. 557 (ACMR 1974) (specific defense request for delay); United States v. Parker, 48 C.M.R. 241 (ACMR 1973) (record shows no request for delay); United States v. Cook, No. 429795 (ACMR 3 Oct. 1973) (specially requested trial be delayed until disposition of request for discharge). *Cf.* United States v. Walker, 50 C.M.R. 213 (ACMR 1975). A defense requested "reasonable delay" to permit processing an administrative discharge is not defense requested delay when the request did not impede the government processing of the case.

56. *See, e.g.*, United States v. Perkins, ___ C.M.R. ___ (ACMR 9 June 1975) (request one day prior to trial); United States v. Batton, No. 429786 (ACMR 10 December 1975).

57. *See, e.g.*, United States v. Pergande, 49 C.M.R. 28 (ACMR 1974); United States v. Parker, 48 C.M.R. 241 (ACMR 1973).

58. United States v. O'Neal, 48 C.M.R. 89, 91 (ACMR 1973). *See also* United States v. McIlween, 49 C.M.R. 761 (ACMR 1975). Partner of law firm requested continuance after client had severed relationship with firm unbeknownst to military judge who granted continuance. Seems to place on individual counsel who knows of continuance an obligation to object prior to the new trial date. *But see* United States v. Wolzok, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (18 July 1975).

59. United States v. Wolzok, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (18 July 1975); United States v. Reitz, 22 U.S.C.M.A. 584, 48 C.M.R. 178 (1974). *Cf.* United States v. Buskirk, 49 C.M.R. 789 (ACMR 1975). Two days prior to trial date, defense counsel proposed an agreement with the government that the defendant would be released from confinement and the defendant would work as undercover informant. The defendant battalion commander returned to the unit from field operations four days after scheduled trial date. The six-day delay was at the defendant's request.

60. United States v. Ward, 23 U.S.C.M.A. 391, 393–94, 50 C.M.R. 273, 275-76 (1975). "[T]he accused did not ask the Government to stay or slow the processing of the original charges, and the Government did not agree to do so in response to such a request. The decision as to how the Government would proceed was left entirely to it.

"[W]hile the Manual policy on joinder of offenses may provide advantages to the accused as well as the Government, he [the accused], not the Court; is better able to

judge whether those advantages outweigh for him the disadvantages of postponement of trial on the original charges."

61. United States v. Birner, No. 430506 (ACMR 15 Jul 6 1974). *See also* United States v. Driver, 23 U.S.C.M.A. 243, 245, 49 C.M.R. 376, 378 (1974). "[C]ontinuances are delays granted only because of a request of the defense and for its convenience are excluded from the three-month."

62. United States v. Perkins, __ C.M.R. __ (ACMR 9 June 1975). Defendant was in pretrial confinement 19–20 April 1972, 29 April –3 June 1972, 14 March 1973–13 July 1973. The court held defense counsel's leave from 10 May 1973–7 June 1973 was not defense requested delay.

63. United States v. Lyons, __ C.M.R. __ (23 June 1975). At docketing session on 26 June 1974 attended by trial and defense counsels and the military judge, a trial date of 22 July 1974 was established because defense counsel had planned leave between 3–12 July 1974.

64. United States v. Lyons, __ C.M.R. __ (ACMR 23 June 1975).

65. __ C.M.R. __ (ACMR 10 June 1975).

66. United States v. Smith, __ C.M.R. __, __ n.1 (ACMR 18 July 1975).

67. *See* nn. 78, 87.

68. The language in *Burton* was "three months" but this was amended to "90 days" in United States v. Driver, 23 U.S.C.M.A. 240, 246, 49 C.M.R. 373, 379 (1974).

69. *See, e.g.*, United States v. Molina, 47 C.M.R. 752 (ACMR 1973); United States v. Linton, 47 C.M.R. 587 (NCMR 1973).

70. United States v. Johnson, 23 U.S.C.M.A. 91, 48 C.M.R. 599 (1974).

71. *Id.* at 93, 48 C.M.R. at 601. *See also* United States v. Georgio, 48 C.M.R. 620 (NCMR 1973); United States v. Gettz, 49 C.M.R. 79 (NCMR 1974).

72. United States v. Gettz, 49 C.M.R. 79 (NCMR 1974); United States v. Georgio, 48 C.M.R. 620 (NCMR 1974).

73. United States v. Halderman, 47 C.M.R. 871 (NCMR 1973). *Cf.* United States v. Smith, No. 740314 (NCMR 14 May 1974).

74. United States v. Ward, 49 C.M.R. 110 (NCMR 1974); United States v. Emmons, 48 C.M.R. 373 (NCMR 1973).

75. *Cf.* United States v. Swartz, 44 C.M.R. 403 (ACMR 1971).

76. United States v. Howell, 49 C.M.R. 394, 395 (ACMR 1974).

77. *See* nn. 96–99.

78. 22 U.S.C.M.A. 431, 435, 47 C.M.R. 409, 413 (1973).

79. United States v. Marshall, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973).

80. United States v. Stevenson, 22 U.S.C.M.A. 454, 47 C.M.R. 495 (1973); United States v. Marshall, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973); United States v. O'Neal, 48 C.M.R. 89 (ACMR 1973).

81. United States v. Presley, 48 C.M.R. 464 (ACMR 1974).

82. United States v. Mitchel, No. 429740 (ACMR 27 January 1974). *But see* United States v. Toliver, 23 U.S.C.M.A. 197, 48 C.M.R. 949 (1974).

83. United States v. Marshall, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973).

84. *See, e.g.*, United States v. Johnson, 49 C.M.R. 13 (ACMR 1974); United States v. Sawyer, 47 C.M.R. 857 (NCMR 1973).

85. United States v. Johnson, 23 U.S.C.M.A. 91, 48 C.M.R. 599 (1974).

86. *Id.*

87. United States v. Toliver, 23 U.S.C.M.A. 197, 48 C.M.R. 949 (1974).

88. United States v. Holmes, 23 U.S.C.M.A. 24, 48 C.M.R. 316 (1974); United States v. Stevenson, 22 U.S.C.M.A. 454, 47 C.M.R. 495 (1973).

89. United States v. Marshall, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973).

90. United States v. O'Neal, 48 C.M.R. 89 (ACMR 1973).

91. United States v. Stevenson, 22 U.S.C.M.A. 454, 47 C.M.R. 495 (1973).

92. *See, for example*, United States v. Pyburn, 23 U.S.C.M.A. 179, 48 C.M.R. 795 (1974); United States v. Johnson, 49 C.M.R. 13 (ACMR 1974) (unavailability of military judge not beyond control of Government); United States v. Sawyer, 47 C.M.R. 857 (NCMR 1973) (no showing another judge could not have been obtained). *But see* United States v. Slaughter, No. 429715 (ACMR 29 March 1974) (the unavailability of the judge is neither a defense or government-caused delay); United States v. Eaton, 49 C.M.R. 426 (ACMR 1974) (*Slaughter* distinguished since it was a two-week delay compared to a six-week delay in incident case).

93. United States v. Shavers, 50 C.M.R. 298, 302, n.9 (ACMR 1975). Request for administrative discharge not considered extraordinary circumstance.

94. United States v. Burton, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971).

95. United States v. Marell, 23 U.S.C.M.A. 240, 241, 49 C.M.R. 373, 374 (1974).

96. United States v. Beach, __ U.S.C.M.A. __, __ C.M.R. __ (18 July 1975). *But see* United States v. Glahan, 49 C.M.R. 47 (ACMR 1974). The court seemed to indicate that the calling of the article 39(a) session terminated the running of the 45-day rule based upon the express language of the U.S. Army Europe regulation. It is questionable whether Glahan is correct in light of the intention of the

regulation where there is an express finding that the Article 39(a) session was not initiated in good faith.

97. United States v. O'Brien, 22 U.S.C.M.A. 557, 48 C.M.R. 42 (1973).

98. United States v. Johnson, 23 U.S.C.M.A. 91, 48 C.M.R. 599 (1974). *See also* United States v. Ward, 23 U.S.C.M.A. 391, 50 C.M.R. 273 (1975). The government accountability begins when the trial counsel received the district attorney file relating to charge that civilian authorities had initially planned to pursue. United States v. Shavers, 50 C.M.R. 298 (ACMR 1975).

99. United States v. Johnson, 23 U.S.C.M.A. 397, 50 C.M.R. 279 (1975).

100. *See* United States v. Brooks, 23 U.S.C.M.A. 1, 48 C.M.R. 257 (1974).

101. *See* United States v. Bush, 49 C.M.R. 97 (NCMR 1974).

102. 23 U.S.C.M.A. 391, 50 C.M.R. 273 (1975). *Cf.* United States v. Owens, No. 742981 (NCMR 31 Jan 1975). Escape from confinement facility the day Article 32 investigation completed "destroy government's accountability for pretrial confinement suffered prior to commencement of [39 days] absence."

103. U.S. Army Europe Supplement 2 to Army Regulation No. 27-10 (31 Oct 1974).

104. 47 C.M.R. 288, 290 (ACMR 1973).

105. United States v. Dunks, 50 C.M.R. 312, 313 (ACMR 1975).

106. 47 C.M.R. 299 (ACMR 1973).

107. 49 C.M.R. 47 (ACMR 1974).

108. *Id.* at 48. *But see* United States v. Beach, __ U.S.C.M.A. __, __ C.M.R. __ (18 July 1975). Implicit rejection of prosecution argument that calling Article 39a session for whatever reason whatever the substance of the matter marks the end of 90-day period.

109. 23 U.S.C.M.A. 240, 49 C.M.R. 373 (1974).

110. *Id.* at 241, 49 C.M.R. at 374.

The Military Legal Advisor Program in Japan

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Background of the Military Legal Advisor Program

The US Army Military Legal Advisor Program (MLAP) was conceived in mid 1971 to aid in the protection of servicemen's rights in foreign criminal jurisdiction cases. In July of that year, the International Affairs Division, Office of The Judge Advocate General (DAJA-IA) was assigned the task of articulating and planning this concept for its ultimate implementation in the field. The primary area of concern was that many service members lacked confidence in the foreign judicial system and their retained counsel because they lacked understanding of the system and the procedure. The concept was designed to form a communications bridge between the foreign defense counsel and the accused so that the accused could better understand the procedure, and to reassure the accused that he would be fairly treated. Although established liaison organizations had performed much of the function, there were no attorney-client relationship between liaison personnel and the accused. By creating such a relationship, it was believed that a better rapport could be established between the accused and his counsel through the Military Legal Advisor. It should also be emphasized that the MLA was envisioned in the role of legal advisor, perhaps akin to a British solicitor; never as a trial lawyer who would address the foreign investigative judges or the court. Information and opinions on this idea were solicited from a number of sources both within and without DAJA, and the results were made known to The Judge Advocate General, Major General George S. Prugh, in September of 1972.

That solicitation revealed a number of potential problem areas. While recognizing a need for enhancing the support, communication and confidence afforded an accused pending trial in foreign courts, the remedy of appointing military counsel to aid such accused could cost excessively in terms of manpower expended for practical benefits derived. A training program in foreign law and practice, and ideally language, was also felt to be necessary to obviate possible complications resulting from the introduction of inadequately trained counsel into the foreign criminal jurisdiction system. Assigning an Army JAGC lawyer as an assistant to a local national attorney, with no opportunity to pre-

pare or argue a case, might also prove to be counter-productive in terms of retaining young officers in the JAGC.

To further explore the MLAP concept, the next step by OTJAG was to circulate the idea with all SJA's of major oversea commands for their comments. The views of the respective oversea SJA's were particularly sought regarding the impact of such a program on their commands. While the responses indicated no material objections to the concept, nor major impact foreseen, one problem area of paramount concern was noted repeatedly by the oversea SJA's, *i.e.* manpower. It was felt that while this program was of value, office staffing must be increased for commands attempting to implement it.

Implementation of the MLAP

To test the concept and positively identify problem areas, on 1 August 1973, the first Army MLAP was established, in United States Army, Japan (USARJ) on a trial basis. The Military Legal Advisor Program was structured to follow the same basic lines as the HQ USARJ SJA office's organization, and the USARJ International Affairs Division had supervisory responsibility for the program. A military attorney was designated as the chief of the program. This officer was tasked with assigning Military Legal Advisors (MLA) in each foreign criminal jurisdiction case, maintaining liaison within the command in each case, maintaining files on the advisees' case progress, reporting quarterly to the SJA on the progress of the program within the command, and maintaining files of all reports on the program from all sources within USARJ. The program chief also insured that other staff sections within the command, as well as potential advisees, were notified that the services of a military legal advisor were available to enable immediate utilization thereof upon the exercise of criminal jurisdiction by Japan. Finally, the chief was responsible for the training of new military legal advisors upon their arrival in-country, as well as insuring their knowledge of the function of an MLA, and the MLAP. Particular care had to be exercised by the chief to insure that potential MLA's were familiarized with the local national legal system. The responsibilities of the MLAP chief were outlined in a Letter of Instruction (LOI), which also established the procedures for the assignment, education, and utilization of JAGC officers as Military Legal Advisors (MLA's) in the command. This LOI was published in December of 1973 (Appendix A).

US Army Garrison, Okinawa, a USARJ subordinate command, implemented the USARJ LOI noted above on 1 February 1974, by means of an SJA Standing Operating Procedure (SOP), which did not materially alter the terms of the LOI. An MLA program chief was appointed within the Okinawa office to administer the program upon lines similar to those used in mainland Japan. Two attorneys who functioned primarily as defense counsel were assigned as advisors. The program chief was also tasked with furnishing quarterly reports for eventual transmittal to the SJA office in mainland Japan.

Progress of the MLAP

The "lessons learned" from this program during its early months were many and varied. The first, and probably most important, was that the utilization of the MLAP to aid only those personnel who had already been indicted by the Japanese was unrealistic in many cases. Often, because of the existence and visibility of the program, personnel who were in various pre-indictment stages of involvement individually sought out MLA's for help. Equally as often, dependents of such personnel sought and received legal assistance and counseling aid from the MLA's. Units also called seeking advice from an MLA for a member in pretrial confinement, as well as guidance regarding the unit's right or duty to visit its members in such confinement.

JAGC officers acting as MLA's also found that entering a case only at the indictment stage had distinct disadvantages if the MLA were to function as the accused's advocate within the command, and also be of any assistance during the entire period of the foreign proceedings. The ability to procure evidence and witnesses for use during all phases of the proceedings, especially during pretrial investigations, was of great value and importance, and early entry into a

case was a necessity to fully utilize that ability. The presentation of evidence at administrative board hearings was also facilitated by early entry, since witnesses could be prevented from leaving the country, or depositions could be taken to preserve their testimony. Solicitation of character references through the mails benefitted by the longer lead time as well. In those cases where the Japanese granted bail, the MLA was also able to aid in the procurement of bail money to facilitate the release of an accused from pretrial confinement, an act that would have been impossible if entry had been delayed until indictment.

Problems surrounding the provision of bail at locations remote from Army installations, but close to other services' installations, were dealt with early in the history of the MLAP. Through close coordination with those other services, via the finance and JA offices of the respective services involved, Army personnel were released on bail in cases where the money was provided by another service. Such interservice legal cooperation became the rule during the course of the MLAP, as it had been for many years among foreign criminal liaison personnel in the various SJA offices in Japan.

MLA and Foreign Criminal Liaison Personnel Interrelationships

An MLA, upon being initially assigned to the program, was required to do certain basic research to prepare himself for his new role. Unfortunately, the great majority of reference works on the Japanese criminal justice system are published only in Japanese. Less than a dozen relevant publications were available to the new MLA, necessitating a great deal of personal exposure to the system with which they would be dealing. However, Japanese Criminal Law and Liaison sections were in existence in the SJA offices in Japan. Staffed by personnel, lawyer and nonlawyer, with many years of experience in Japan, and with the capability to deal in the Japanese language, these sections were an invaluable aid in training MLA's. Of course, the relationship between the members of these sections and the MLA's required an initial adjustment period.

The long-time trial observer and liaison personnel felt that the Japanese were accustomed to dealing with them, and they were not inclined to upset that balance. Also, they felt the accused could get an impression of the Japanese legal system as being unfair vis-a-vis a court-martial because the MLA's were not accustomed to a code type of criminal law system, and could not adequately explain the system to the accused. They also felt that, since they advised the accused, aided him in finding Japanese counsel and answered his questions, the uncoordinated activities of the MLA's would not assist, and would frequently add to, their workload. They even felt that a soldier would be more reluctant to visit them than to seek aid from a military attorney. Finally, they felt the MLA's should be part of the liaison sections, because approaches to prosecutors and judges are liaison, not MLA, functions.

For their part, the MLA's had reservations too. They felt that Japanese defense counsel did not utilize what they offered to aid the accused service member. They had to contact the Japanese attorney to offer aid in the cases they were assigned to. They also felt that the serviceman was reluctant to contact them, until the time of trial was near and he needed statements and witnesses. There was a feeling that they received less than complete cooperation from liaison personnel in many cases, at least initially.

The majority of the doubts noted above have been resolved as the MLAP has matured. While the program is still separate from the liaison sections of the JA offices, close and continuous relationships are maintained with those sections to aid in the functioning of the program. MLA's often travel to various penal institutions with liaison personnel to make and develop contacts with Japanese confinement personnel. Liaison personnel are able to utilize MLA's to act as Class A agents in cases where bond money needs to be posted, and also as research associates in those areas where changes in military law or administrative regulations may affect the exercise of Japanese jurisdiction. In short, a symbiotic relationship has apparently evolved between the MLA's and the criminal law and liaison personnel in the same SJA of-

fices, resulting in a cooperative, rather than compartmentalized, approach to aiding an accused service member involved with Japanese proceedings. As both MLA's and liaison personnel become better trained in the concept and operation of the MLAP, it is reasonable to expect an even more expeditious handling of foreign criminal jurisdiction cases.

Reactions to the MLAP

All the problems encountered to date have not been completely resolved of course. The minds of SJA's involved with such programs are still burdened by numerous areas of concern.

During the pendency of the test phase, the USARJ Chief of the MLA Program circulated a survey among PACOM SJA's of all services in preparation for a seminar panel of the 1975 Pacific Command Legal Conference.

Initially, a questionnaire was sent to all prospective members of the panel, soliciting their views and comments on the Military Legal Advisor Program in their respective commands. Replies were received from members of the Army, Navy, Air Force, Marine Corps and Coast Guard in the Western Pacific area. Some responses confirmed that their respective services had no formal MLA programs (to the best of the knowledge of the responding individuals). The remaining replies evidenced a great deal of personal experience in the MLA program area, in the various commands, but it was apparent that there was little service interaction regarding this program. Several replies were received to the effect that other services in the same geographic area had programs, but little or nothing was known of their operation. A few replies merely stated that nothing was known of even the existence of such programs among the other services in a given country.

Generally, the concept of this program was familiar to the officers surveyed, even those whose services had not formally instituted such programs. The indications were that it was favorably received and felt to be useful. Of particular note, however, especially in light of the theme of the Conference (Reduced Manpower Resources), was the evident reluctance of most SJA's to commit their limited legal resources in full support of this program. Special language and legal training for MLA's, while indorsed as desirable, drew negative responses when the question of funding arose, especially with regard to out-of-country training courses. Extreme reluctance to curtail other JA functions in order to support an MLA program was noted in almost all replies. One reply did note that administrative areas, such as Article 15's, might be curtailed to increase support for an MLA program, and another opted for an overall reduction of JA functions rather than curtailing any specific one. But, if such a program functions in a command, most SJA's felt that it would have to be supported, if at all, by their present manpower resources (since none would be forthcoming from higher headquarters).

Another broad area of concern with the MLAP appears to be that of guidance from the parent services regarding MLA duties. Most respondents felt adequate guidance on MLA utilization had been published. However, a strong dissent was evident here. AR 27/50/SECNAVINST 5820.4D/AFR 110-12, Status of Forces Policies, Procedures and Information (5 September 1974) was felt to be insufficient to base a comprehensive program upon, and it had not been supplemented by all the services as yet. The nature and extent of MLA duties and responsibilities vis-a-vis local national civilian counsel was also raised as an area of concern by the SJA's responding.

The survey responses seemed to suggest that, if the MLA program were implemented DOD-wide, there would appear to be little or no problem of opposition by SJA's in the field, *assuming* staffing was provided for. Most surveyed SJA's felt that broad latitude could be given the MLA to represent his client, and coordinate with local national defense counsel. While some concern was expressed about the possibility of the MLA antagonizing local court officials with an adversary approach, it was not a major issue in the replies. The main problems expressed, repeatedly, were those of lack of resources, and insufficient service guidance on MLA utilization.

In Conclusion

Once having analyzed the broad spectrum of program experiences and survey responses it was clear that those problems identified during the planning phase of the MLAP were noted in the field, but only to a degree. The manpower resources question, in all its facets, worried SJA's in the field far more than anything else. The problems anticipated between local national prosecutors and MLA's, damage to international relationships, and severe handicapping of SJA office resources have not risen to the levels initially anticipated.

Then, too, benefits were perceived in this program. As anticipated, accused soldiers were observed to feel more a part of the Army while involved with the MLAP, than was formerly true while undergoing the exercise of criminal jurisdiction by a foreign power. Also, military attorneys manifestly had the opportunity to become significantly more acquainted with the host country's foreign legal system, particularly in its criminal aspects, than would otherwise have been the case. This experience worked to broaden the horizons of such JAG's. Finally, by assigning the MLA function as an additional duty, the problem of a potentially unattractive career specialty seems to have been avoided.

Opinions on the Program's Potential

Notwithstanding that the MLA program has served and is serving the function it was designed to do, its permanence would still appear to be a subject of debate. Even granting its myriad benefits, it is not without drawbacks. It is possible to assign the MLA function in Japan as an extra duty, but such a system may not be practicable elsewhere. As previously noted, in Japan proper and on Okinawa, highly trained and experienced Japanese Criminal Law and Liaison sections are contained within the respective SJA offices. Representing many years of carefully constructed and nurtured intergovernmental contacts, such sections ease the initial shock of assignment as an MLA by aiding in instructing prospective MLA's in the Japanese criminal law system, and introducing them to its implementers, the Japanese prosecutorial personnel. Additionally, due to the nature of the US Army's presence in Japan the court-martial caseload is relatively low, as is the troop strength, leaving more of an administrative and international law practice resulting in greater flexibility to administer MLA cases without the pressures of a heavy court-martial docket.

In the final analysis, it appears that a program such as the MLAP, requiring the attorney resources it does (Appendix B) and placing upon an office the burden that it does, should be tailored to a particular country. Where the incidence of retention of jurisdiction by the host country is greatest, the MLA program should be instituted and staffed by DAJA. In areas where the foreign caseload is low, the safeguards contained in this program could be provided on an "as-needed" basis. The problem of the shortage of office resources, and the consequent effect thereof on SJA operations, would be alleviated by such implementation of the MLAP concept, while insuring the safeguards of the program where the need is greatest. A system of worldwide implementation, based a separate defense corps structure, would not appear to be feasible, desirable, or necessary in the Army.

Appendix A

USARJ JA 7 DEC 1973

SUBJECT: Letter of Instruction for Assignment and Utilization of Military Legal Advisors in Foreign Criminal Proceedings

I. GENERAL:

1. The purpose of this Letter of Instruction (LOI) is to establish procedures for the assignment and utilization of Judge Advocate officers in this command as Military Legal Advisors in foreign criminal proceedings involving U.S. Forces personnel assigned to United States Army Japan.

2. Subordinate units are permitted to adjust the operational procedures set forth in this LOI to conform to local requirements; however, all procedures relating to this subject promulgated by subordinate headquarters must include the

substantive provisions set forth herein. This headquarters will be notified of all adjustments made to these procedures.

II. OPERATING PROCEDURES:

1. *Scope of Program:*

a. A Military Legal Advisor will be made available to all USARJ personnel indicted for an offense over which the Government of Japan (GOJ) has either the exclusive or primary right to exercise criminal jurisdiction, and which is likely to proceed to a formal trial.

b. Commanders, CID Investigators and Military Police will be advised to notify all personnel accused of offenses which are subject to the primary exercise of jurisdiction by Japanese legal authorities that a Military Legal Advisor is available to advise and assist all indicted accused at the appropriate Office of the Staff Judge Advocate.

c. Upon notification from the Justice Ministry of Japan that the GOJ will exercise jurisdiction in a particular case, the Japanese Law and Liaison branch of the appropriate Office of the Staff Judge Advocate will include in the letter to the Commander concerned announcing the exercise of such jurisdiction, a notation to the effect that a named Military Legal Advisor is available through the appropriate Office of the Staff Judge Advocate. Such notation will constitute a separate paragraph in the letter of notification for a formal trial.

2. *Appointment and Training of Military Legal Advisor:*

a. The Military Legal Advisor will be an officer of the Judge Advocate General's Corps and will normally be selected from the officers assigned to the International Affairs Division.

b. The Military Legal Advisor normally will not act in any case in which he has served or is likely to serve as Trial Observer under the provisions of AR 27-50.

c. As a minimum, the Military Legal Advisor will read and be familiar with the following publications:

(1) The Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan (US-GOJ SOFA).

(2) USFJ Pamphlet 121-1, Criminal Jurisdiction in Japan (1 September 1970).

(3) Japan Country Law Study.

(4) AR 27-50, Status of Forces Policies, Procedures, and Information (28 June 1967).

(5) USARJ Regulation 27-50, Criminal and Disciplinary Jurisdiction Under the Status of Forces Agreement (22 December 1972).

(6) Criminal Law and Procedure in the Civil Law System (March 1966).

(7) Outline of Japanese Judicial System published by the Supreme Court of Japan (1970).

3. *Functions of the Military Legal Advisor:*

a. The Judge Advocate Officer assigned to this duty will act as Legal Advisor to the accused and serve as liaison between the accused and his locally-hired civilian attorney. In addition, he will be available to represent the accused in the event he is subject to elimination proceedings under the provisions of AR 635-206 (except in USARBCO when accused is confined in Mainland Japan.)

b. When appropriate, the Military Legal Advisor will obtain witnesses and evidence, or present facts, to the local attorney to be used in the defense of the accused.

c. The Military Legal Advisor should counsel the accused on the following matters:

(1) The accused's rights under the U.S.-GOJ Status of Forces Agreement and pertinent policies developed in accordance therewith.

(2) The accused's rights under AR 27-50.

(3) The pertinent provisions of the Japanese judicial system. (See NOTE below.)

NOTE: The Legal Advisor should avoid any criticism, intentional or otherwise, of the Japanese judicial system.

(4) The possible applicability of discharge proceedings under AR 635-206.

d. It must be clearly understood by the accused that the local attorney procured under the provisions of paragraph 13, AR 27-50, is the counsel of record and thus ultimately responsible for disposition of the case. The local attorney is in charge of the case and the role of the Military Legal Advisor is to render pertinent assistance as outlined in this LOI. He is *not* to assume the role of defense counsel or interfere with the local attorney's handling of the case or attempt the practice of law in the Japanese courts. The local national defense counsel will be informed of the name, and role, of the Military Legal Advisor by means of a notation accompanying the contract for the defense counsel's services.

e. A confidential attorney-client relationship will attach to the Military Legal Advisor's association with the accused serviceman.

f. The Military Legal Advisor will conduct himself strictly in accordance with the Code of Professional Responsibility of the American Bar Association in order to maintain the highest standard of professional ethics.

III. ADMINISTRATION:

1. Staff Judge Advocate offices will maintain appropriate records relative to this program including the following:

a. A legal assistance advice record (HQ USARJ Form 3029) will be utilized for each individual detailed the services of a Military Legal Advisor. Such records, and case files, will be maintained in the office of the International Affairs Division of the appropriate Staff Judge Advocate office.

b. Cases involving Congressional Inquiries, Inspector General's Complaints, etc., will be so annotated and separate figures maintained on a monthly basis regarding such activity. The sole purpose of such information is to provide a basis for judging the effectiveness of the program in eliminating or diminishing the number of such complaints. Subject to the requirements of the attorney-client privilege, information upon which a reply can be based, and/or answers, to such inquiries, complaints, and other correspondence will be the responsibility of the detailed Military Legal Advisor in each case.

c. A Chief Military Legal Advisor will be appointed by the appropriate Office of the Staff Judge Advocate. This individual has the responsibility of preparing, and submitting, a quarterly report to the Staff Judge Advocate. This report will include the following as a minimum:

(1) Statistics on all cases involving Congressional Inquiries, Inspector General's Complaints, and other correspondence.

(2) Copies of, and replies to, all correspondence involved in the type of cases in (1), *supra*.

(3) Statistics on administrative board actions as a result of convictions by Japanese courts.

(4) The total number of hours worked by all Military Legal Advisors during the quarter.

(5) The number of hours spent on cases involving the types of correspondence set forth in (1), supra.

(6) Projected case-load for the next quarter, insofar as possible.

(7) Recommendations on additions to, deletions from, and changes in the program.

d. The Military Legal Advisor(s) will maintain a time sheet on a weekly basis to record the number of hours per week devoted to this program. In addition, all information contained in c, above, and the weekly time sheets, will be forwarded to the Chief Military Legal Advisor on a monthly basis.

e. Copies of all data and reports listed above will be forwarded by the Staff Judge Advocates of all subordinate commands to the Staff Judge Advocate, HQ, US Army Japan.

2. The effective date for implementation of this program is 1 August 1973.

Appendix B

Attorney Time Expenditure Table

Quarter	*Attorney Hours*	*Number of Attorneys*	*Hours Worked on Special Correspondence*
Aug 73 Thru Oct 73	85	3	0
Nov 73 thru Jan 74	100	4	0
Feb 74 thru Apr 74	284.10	7	30.25 (2 cases)
May 74 thru Jul 74	358.80	7	45.00 (2 cases)
Aug 74 thru Oct 74	143.40	6	0
Nov 74 thru Jan 75	315.50	6	34.50 (3 cases)
Feb 75 thru Apr 75	165.50	6	0
	1452.30	39	109.75
Average per Quarter	207.47	5.57	15.67

Guidelines For Investigating Officers

Fort Campbell's "guidelines" have proved to be quite helpful for line officers in board actions and other investigations arising out of aviation mishaps and the like. The 101st Airborne Division (Airmobile) Command found them so useful that they were disseminated as a Fort Campbell directive. Although these guidelines were drafted to supplement an aircraft investigation, the principles therein are equally applicable to any investigation. Fort Campbell's Staff Judge Advocate Office has submitted these guidelines for the information of all JA officers in their briefings of investigating officers. With local variations, they should be of added assistance when reproduced and distributed to IO's in any command.

* * *

The procedure for conducting an investigation is generally found in AR 15-6. This regulation may be used as the sole reference for some investigations. Other investigations are conducted with AR 15-6 used in conjunction with a second regulation; collateral investigations (AR 95-5) is an example of the latter. Although investigations conducted pursuant to AR 15-6 are frequently related to strictly military matters, it should be noted that AR 15-6 authorizes the Command its use in an almost unlimited variety of situations. AR 15-6 procedures may even take precedence over civilian personnel hearing procedures in certain circumstances. What follows here are comments which may assist the investigating officer in doing his job. Some of these comments may seem too obvious to need stating, but experience has shown the need for these reminders.

Conducting the Investigation.

(1) Read your appointing orders. They frequently list all of the Army regulations which constitute the basis for your investigation. Note especially whether there are any "special instructions" listed in your appointing orders. Be sure your investigation is undertaken with a view toward what the appointing authority has stated he wants investigated, not simply what you may think he wants.

(2) Study the regulations which govern your investigation. Ninety percent of the questions which investigating officers initially ask the Judge Advocate General or other support agencies can usually be answered with a little study of AR 15-6 and other pertinent regulations. After the first barrage of easily answered questions are disposed of, there sometimes arise a few "close" questions which your local judge advocate will be happy to discuss with you. Usually the place to go is the Administrative Law Division, Staff Judge Advocate.

(3) Be familiar with Chapter 7, FM 27-1, "Legal Guide for Commanders." It contains a good general description of investigative techniques and AR 15-6 investigations.

(4) Consider all aspects of the subject matter of your investigation. As stated in paragraph 9b, AR 15-6: "The investigating officer or board should develop complete answers to the questions: What occurred? When did it occur? Where did it occur? How did it occur? Who were involved (and the extent of their involvement)? If property involved, an exact description thereof and its value, should be included in the record."

(5) Don't ask an "ultimate" question. The procedure employed by the Army is designed to elicit from the investigating officer his own judgment based upon a thorough and impartial evaluation of the facts. Therefore, survey officers should not ask, "Is my man pecuniarily liable?"; collateral and F.E.B. investigators, should not query, "What should I recommend?"; etc. The whole point here is to obtain the balanced judgment of a man (or woman) with your common sense, background, and experience. The approving authority, assisted by his staff, will take whatever action he deems appropriate in due course.

(6) Don't be reluctant to ask support agencies questions if the regulations do not give you a clear answer or where the rights of individuals may be infringed. The Army is interested in giving every individual a fair shake in its procedural methods.

(7) Know when a hearing is required and what a hearing entails. See paragraph 6a and b, AR 15-6. As Professor Davis describes it, "a hearing is any oral proceeding before a tribunal. Hearings are of two principal kinds—trials and arguments." K.C. Davis, Law Professor, University of Chicago Law School, "Administrative Law." The trial aspect consists of the presentation of facts; the argument portion focuses on the proper policy or conclusion to be made on the basis of the facts presented. (Remember that the Report of Survey system requires an investigation pursuant to AR 735-11. However, only "exceptional cases" under provisions of paragraph 4-3b, AR 735-11, require full AR 15-6 procedures, including a hearing.)

(8) Be prepared to ask "hard" questions. Most investigations require the investigators to ask people questions in order to get the facts. Occasionally, the questions you feel are necessary may be embarrassing or insinuating; your job may not be an easy one, but a polite and respectful interrogation will ease the discomfort.

(9) Know the extent of your interrogatory discretion. As a general proposition, the investigating officer can ask and demand an answer to any question which is (a) relevent to the investigation and (b) not self-incriminating to the individual questioned (these apply to civilian employees as well as military personnel). Whenever a Fifth Amendment/Article 31 problem arises or is likely to arise, discuss it with an attorney familiar with administrative law. When doubt is expressed as to the relevancy of a particular question, the rule to follow is this: Any question that is arguably relevant may be asked; those which are patently irrelevant should be discarded. [The above statements are not true in the case of an Aircraft Accident Safety Investigation. If there should be some overlap between your investigation and a prior safety investigation, be sure to consult paragraph 7f(1), AR 95-30.]

(10) Prepare the questions you intend to ask a witness before you meet with him. The questions asked should be well thought out in advance and contingent questions should be prepared in the event the answer to a primary question raises a further question. Finally, all pertinent regulations which are relevant to the issues should be available throughout all phases of an investigation; this is especially true during hearings when the personal testimony of a witness sometimes blurs the central issues.

(11) If a hearing is required, be sure the arrangements (a room, chairs, recording equipment, etc.) are adequate.

(12) If the investigation board consists of more than a single investigating officer, make all reasonable efforts to insure that all members attend each session, meeting, and conference required by the governing regulations. It could prejudice the investigation if one member absents himself without good cause.

(13) Consider whether it might be expeditious during the actual hearing to make use of prior written statements of witnesses instead of having them repeat their whole prior statement in ritual fashion. Be careful in the use of this and all other "shortcuts" to insure that the procedural rights of concerned individuals are not infringed. In this instance, for example, the witness can be asked under oath at the hearing whether the prior written statement represents his true and accurate testimony, and whether he reaffirms that it accurately reflects his view of what occurred. At the same time, the individual(s) who may be adversely affected by such testimony should be given a full opportunity to read and comprehend the statement in advance of the hearing; in this way, he will be afforded the procedural right to know the evidence against him and will be prepared to cross-examine the witness against him or present any other evidence he deems appropriate.

(14) Remember that investigating officers have statutory authority to administer oaths and to act as notary. Article 136(b)(4). Thus, prehearing witness statements can be memorialized under oath.

(15) Finally, if you are an investigating officer in a complex controversy, or one involving an attorney representing a party in interest, do not hesitate to confer before the hearing with a judge advocate. Experience has shown that complex cases as well as those involving attorneys are for a number of reasons more successfully conducted when the hearing is established along the lines of a trial-type presentation. Each case will have its own peculiarities and the finer points of the procedure must accommodate for those peculiarities; in all cases, fair play for all concerned is the objective.

Preparing the Report.

(1) Remember to use the right report form. Generally, an investigation pursuant to AR 15-6 requires the use of DA Form 1574 (*see* paragraph 24, AR 15-6). Other kinds of investigations may require the use of specially designed forms; for example, a Report of Survey pursuant to AR 735-11 utilizes DD Form 200.

(2) Read all the instructions on the report form carefully. For example, Item 8, DA Form 1574, requires a statement concerning the respondent's procedural rights. If "no" is the answer given in Item 8, then Item 31 ("Remarks") must contain an explanation.

(3) Be sure to number all pages of the narrative as well as individual exhibits, pictures, maps, etc. *Remember:* Your report will be thoroughly reviewed. It is extremely difficult for the reviewer to study the report if each page and reference is not specifically identified.

(4) Include all documents required by the regulation which governs your investigation. For example, in the case of collateral investigations, those documents listed in paragraph 8-11, AR 95-5, should be included. Item 23, DA Form 1574, provides space for this listing.

(5) Design the substance of your report so that it reflects logical thinking fully supported by authority. In a nutshell, the report of proceedings should reflect the investigator's thought process: findings of fact (Item 28, DA Form 1574) should be based on evidence in the report; if the finding is based in part on one or more regulations, they should be cited as authority; each finding should be accompanied by the page and location of supporting evidence in the report of proceedings. For example, if a finding states "The pilot did not receive an adequate weather briefing prior to the flight," the finding should indicate the location within the report of evidence showing (a) what briefing, if any, he did receive, (b) what basis, if any, there is for a requirement (implied in the finding) that there be a weather briefing prior to flight, and (c) what regulation or other authority sets the standard of adequacy. For further discussion *see* paragraph 7-2c, FM 27-1.

(6) Be specific in your findings. Findings should be as particularized as the writer can make them. Thus, if the investigator grossly concludes that "The crew was negligent," it is difficult to understand how specific recommendations (Item 30, DA Form 1574) as to each member of the crew were arrived at. This leads to the next point.

(7) Make only recommendations which are logically and clearly supported by the findings. If the findings are sufficiently specific, the function of providing sound recommendations is that much easier. In the example previously used, findings "CPT *A* was negligent in that. . .; CPT *B* acted properly in that. . ." make it easily understood why different recommendations are provided for different individuals. *See* paragraph 7-2d, FM 27-1.

(8) If the reasoning process includes accepted standards in the specialty concerned (*e.g.*, aviation), but not specific regulations, state the accepted standards. Remember that the reviewer may not be familiar with your specialty, but he should nonetheless be able to understand your reasoning without further research outside the report.

(9) Remember to consider the implications of the investigation you are conducting. If it's one of those cases where "accidents will happen" (no matter how many precautions are taken), recognize it as such. If, on the other hand, the case has wide implications, concerns a recurring problem, or involves a lot of money which could be jeopardized again in the future or in similar situations, do not hesitate to recommend strong medicine.

Judiciary Notes

From: U.S. Army Judiciary

1. Recurring Errors and Irregularities.

August 1975 Corrections by ACMR of Initial Promulgating Orders:

a. Failing to set forth the number of previous convictions considered at the end of the sentence paragraph—three cases.

b. Failing to properly reflect the date of a particular offense—one case; the date the sentence was adjudged—one case.

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

a. Failing to show accused's correct social security number—three cases.

b. Incorrectly ordering sentence into execution before accused was served with ACMR decision.

Processing of Post-Trial Reviews

A Note From The Government Appellate Division

By: Lieutenant Colonel Donald W. Hansen, Government Appellate Division, USALSA

Scope of Comment.

There have been a number of recent developments, some of them not final, that are of interest to the practicing judge advocate. Those I wish to address are the forwarding of records to the next higher commander for action when the convening authority has been disqualified, the use of "courtesy" reviews, and the necessity for the convening authority to explain his reasons for taking action different from that recommended by his staff judge advocate. Since these developments involve practices which have been followed by staff judge advocates for many years, it is likely that substantial modification of procedures in the office will be required.

Forwarding of Record for Action.

In a number of cases, the USCMA has held that a commanding general is precluded from taking action on a case he convened when one of his subordinates granted immunity or clemency in some manner to a prosecution witness in return for his testimony (*See, e.g., United States* v. *Sierra-Albino,* 23 USCMA 63, 48 CMR 534 (1974); *United States* v. *Dickerson,* 22 USCMA 489, 47 CMR 790 (1973)). In the recent case of *United States* v. *Chavez-Rey,* 23 USCMA 412, 50 CMR 294 (1975), the USCMA expressed its opinion that a base commander who grants immunity disqualifies his superior, the convening

authority, at the numbered Air Force level from acting on the case.

The undecided question is whether a general court-martial convening authority at the post or division level who is disqualified from acting because of a grant of immunity has also tainted his superior at the FORSCOM, TRADOC or Corps level. *Chavez-Rey* does not dictate that result because the Holloman Air Force Base commander was only a special court-martial convening authority, and the case was in fact convened by 12th Air Force. However, the case represents an extension, factually, of *Dickerson* and *Sierra-Albino* in that the two commands were located at separate bases, and each was the commanding officer of his own post.

Doing a little crystal ball gazing, it seems highly likely that the USCMA would extend the cases to the general court-martial superior/subordinate relationship as well. It is suggested that when this situation arises prudence dictates that the case should be laterally transferred to a general court-martial not in the chain of command of the convening authority. To avoid waste of valuable time under *Dunlap* v. *Convening Authority*, 23 USCMA 135, 48 CMR 751 (1974) coordination with the common superior headquarters should be accomplished telephonically, and the record forwarded directly to the commander who is to take the action.

Forwarding of "Courtesy" Review.

There are a number of cases currently pending where the disqualified general court-martial staff judge advocate forwarded a "courtesy" review to the commander who is to take action on the case. This has been a common practice for many years that has recently surfaced because the forwarding command, in an attempt to justify delay under *Dunlap* has noted time taken to prepare the "courtesy" review.

These reviews are now being attacked as having been actually prepared by one who was disqualified to do so. Citation to such cases as *United States* v. *Coulter*, 3 USCMA 657, 14 CMR 75 (1953) (trial counsel preparing the post-trial review), *United States* v. *Crunk*, 4 USCMA 290, 15 CMR 290 (1954) (SJA concurrence in review prepared by LO not an impartial review); *United States v. Marsh*, 20 USCMA 42, 42 CMR 234 (1970) (review prepared by Article 32 officer to support the argument.); and *United States* v. *Jolliff*, 22 USCMA 95, 46 CMR 95 (1973) (Article 32 officer prepared draft, which became basis of final review) tends to support that position. This argument has some persuasiveness in the situation where the SJA was disqualified because of his involvement in the grant of immunity (See *United States* v. *Diaz*, 22 USCMA 52, 46 CMR 52 (1972), as opposed to the action of a subordinate commander.

It is recommended, therefore, that the practice of forwarding "courtesy" reviews be discontinued until such time as the issue can be resolved.

Convening Authority Reasons for Taking Action Different From Recommendation of Staff Judge Advocate.

The recent USCMA case of *United States* v. *Keller*, No. 29,343 (5 Sept 1975) held that when a convening authority takes action different from that recommended by the staff judge advocate he is required under the provisions of para. 85*c*, and 91*a*, *Manual for Courts-Martial, United States, 1969* (Rev.) to state the reasons.

In the past the Government Appellate Division has received a number of cases where no justification was submitted or where either the SJA or the convening authority merely noted that the action was "not inadvertent." Cases have also been found where in fact the convening authority signed the wrong action, although intending to follow the advice of his staff judge advocate. It is anticipated that most cases will involve clemency disputes as the convening authority normally follows the recommendations of his SJA on legal issues.

In *Keller*, the USCMA expressed the view that "[r]equiring government officials to justify their actions is a healthy procedure which encourages more effective government and enhances the integrity of any criminal justice system." The decision offers the staff judge advocate, while assisting the convening authority in preparing the necessary justification to meet

the requirements of *Keller*, an excellent opportunity to closely question the convening authority to insure that he is not applying an improper standard (*See, e.g., United States* v. *Howard*, 23 USCMA 187, 48 CMR 939 (1974); *United States* v. *Lacey*, 23 USCMA 334, 49 CMR 738 (April 14, 1975)) thus depriving the accused of the individualized review to which he is entitled. Where such is evident from the discussion, the convening authority can be advised of the correct standard so as to insure the accused's case is properly considered. Review of the justification will, I assume, be ultimately examined for an abuse of discretion notwithstanding the convening authority's plenary power in this area, so it is important that the justification accurately reflect the convening authority's reasons for his action.

Errors In The Post-Trial Review

A Note From The Government Appellate Division

By: Captain William A. Poore, Government Appellate Division, USALSA

In recent months, Staff Judge Advocate Reviews have been plagued by inaccuracies which are for the most part unwarranted, and serve only to hamper the efficient administration of military justice. In the last fiscal year, 57 cases were returned to the field for new reviews and actions as compared to only 11 for the previous year. This figure does not include those cases in which the errors did not necessitate, under the circumstances, a new review and action.

Many of these errors are technical in nature—resulting from clerical oversight, negligence or mere inattention to detail. Nevertheless, where there exists the possibility of substantial prejudice to an accused, the cause or reason for the error becomes irrelevant. The normal remedy for a deficient review, that of a new review and action, results in the expenditure of judicial resources at both the trial and the appellate level and unnecessarily prolongs the final disposition of the case. Thus, in the hope of precluding the occurrence of similar errors in the future, an enumeration of some of the more common errors may be of some value.

Perhaps the most common error results from a transfer of data from the first page of the pretrial advice to the first page of the post-trial review without taking into account the numerous intervening events that may have taken place. Some charges have been dismissed by the convening authority, others dismissed by the military judge, and still others have resulted in a finding of not guilty. Nevertheless, the entire list finds itself transferred to the post-trial review.

The major impact is usually on the maximum authorized punishment. It is not unusual for the convening authority to be advised that the maximum authorized punishment was 20 years' confinement at hard labor (based on the original charges) while in fact the maximum authorized punishment at the time of sentencing was only five years. It appears that the officer preparing the post-trial review directed the support personnel to transfer the data from the pretrial advice, and did not critically review their work.

Other errors frequently arise where the Staff Judge Advocate's Review simply fails to properly indicate either the accused's plea or the findings of the court. Most prevalent, is the situation where an accused has contested his guilt at trial, but the review nevertheless advises that the conviction was based upon his plea of guilty (*see e.g., United States v. Garcia*, __ USCMA __, __ CMR __ (11 July 75); *United States v. West*, 49 CMR 71 (ACMR 1974)). A variation of this theme occurs where, despite the accused's plea of not guilty, the convening authority is nevertheless reminded of his obligation to independently determine the providency of the plea in order to support the conviction (*see, e.g., United States v. McIlveen*, 23 USCMA 357, 49 CMR 761 (1975); *United States v. Schwarz*, __ USCMA __, __ CMR __ (25 July 75)). Notwithstanding the correct designation of the pleas elsewhere in the review, appellate courts have generally declined to speculate as to whether the convening authority was misled, and have demanded corrective action.

In all candor, no apparent justification exists

for errors of the nature set forth above. Even granting the volume of cases handled by the busy staff judge advocate and his office, the situation is much like that of the running back who carries the ball for 100 yards only to drop it on the goal line. This may be avoided by a simple review of the record, with particular regard to whether the initial plea was subsequently modified or withdrawn during the course of trial.

A second source of continual appellate litigation lies in the failure of the review to provide the convening authority with the necessary legal guidelines through which he must reach an informed decision. Recent cases indicate that legal standards relative to such trial issues as; entrapment (*United States v. Burston*, __ USCMA __, __ CMR __ (11 July 1975); voluntary intoxication (*United States v. Tirado-Cumba*, No. 10145 (ACMR 27 Feb 1975); and aiding and abetting (*United States v. Morgan*, No. 430508 (16 May 1975) have either been entirely omitted or inadequately presented in the review. Here again, the courts have consistently held that reviews which are incomplete or misleading on such essential issues are unacceptable.

Certainly not everything that has taken place during the trial has to be discussed in great detail if for no other reason than that the review would be as long as the record. However, a perusal of defense counsel's closing statement provides one of the best sources of information as to which issues were determined to be crucial to the defense case and which must be presented to the convening authority for his independent consideration. This is particularly important in cases tried before a judge alone where no instructions are available for the convening authority's reference. Where doubt remains as to whether any issue has been adequately raised, the better practice would be to include it in the review. Moreover, although "boiler plate" or format insertions may be employed in preparing the review, such materials should be periodically evaluated and revised to insure conformity with recent developments in the law. Inclusion of a defective review in the format file merely perpetuates the error when a new attorney utilizes it as a "model."

Finally, the review must provide the convening authority with all factual matters in order that he can adequately determine the guilt or innocence of the accused. Testimony relating to a critical issue and which might have a substantial influence upon the convening authority must be summarized in the review. Of particular importance are instances where a major prosecution witness testified pursuant to a grant of immunity or receives a cognizable benefit in exchange for his testimony (see, *e.g.*, *United States v. Nelson*, 23 USCMA 258, 49 CMR 433 (1975) (witness believed he was testifying under a grant of immunity); *United States v. Maisonettle*, No. 431593, (ACMR 8 Apr 1975) (witness testified while administrative discharge was still pending)). In such cases, therefore, the review should contain a complete synopsis of the challenged testimony, as well as an enumeration of all relevant factors which might bear upon the witnesses' veracity or worthiness of belief.

Yet to be determined is the impact of *United States v. Goode*, 23 USCMA 367, 50 CMR 1 (1975), upon errors similar to those previously examined. At first blush, however, it would certainly appear that *Goode* has placed an affirmative duty upon defense counsel to object to a review which they deem misleading, insufficient, or otherwise prejudicial to the interest of their client. Under normal circumstances, the failure to interpose an objection, after having examined the review, will be deemed waiver.

The Court of Military Appeals' rationale in *Goode* is apparent. Initially, the court has recognized that any deficiency in a review which is not so egregious or blatant as to warrant attention by defense counsel, need not normally be addressed or considered by an appellate court.

Implicit in the court's holding is that defense counsel are in the best position to evaluate and determine whether significant inaccuracies are present in the post-trial review. He, in conjunction with the Staff Judge Advocate can preserve the accused's "best opportunity for relief" by insuring that the review is complete, impartial and free from error.

Although this author has indulged in speculation, the true parameters of *Goode's* applicabil-

ity are, at this time, unknown. It may however, be reasonably expected that *Goode* will be subject to the traditional exceptions to the waiver doctrine (plain error, manifest miscarriage of justice, etc.). A review, postulated by a panel of the Court of Military Review has restricted *Goode's* waiver provisions to matters which are adverse and outside the record (*United States v. Austin*, No. 9868 (ACMR 9 June 1975)). Pretermitting comment upon the questionable conclusion reached in *Austin*, that case nevertheless serves to underline a significant point: while perhaps increasing defense counsel's responsibility, *Goode* does not proportionately decrease the Staff Judge Advocate's obligation to prepare a review which fully complies with *Manual* requirements. He should, therefore, take all necessary steps to prepare a review which is legally and factually sufficient, and free from the unnecessary errors which needlessly delay the appellate process.

MONTHLY AVERAGE COURT-MARTIAL RATES PER 100 AVERAGE STRENGTH APRIL—JUNE 1975

	General CM	*Special CM*		*Summary CM*
	BCD	*NON*	*BCD*	
ARMY-WIDE	.15	.12	.80	.35
CONUS Army commands	.12	.12	.87	.39
OVERSEAS Army commands	.22	.10	.66	.26
U.S. Army Pacific commands	.09	.03	.61	.02
USAREUR and Seventh Army commands	.25	.12	.68	.32

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

NON-JUDICIAL PUNISHMENT MONTHLY AVERAGE AND QUARTERLY RATES PER 1000 AVERAGE STRENGTH APRIL—JUNE 1975

	Monthly Averages Rates	*Quarterly Rates*
ARMY-WIDE	18.59	55.76
CONUS Army commands	19.19	57.57
OVERSEAS Army commands	17.29	51.86
U.S. Army Pacific commands	16.98	50.94
USAREUR and Seventh Army commands	17.51	52.52

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

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Speedy Trial Memo. The following observations concerning speedy trial problems are extracted from a 7 July 1975 memorandum to all trial judges from Colonel Alley, Chief Trial Judge, U.S. Army Judiciary. All trial attorneys must be aware of these potential problem areas and cooperate fully with trial judges in insuring that a proper docketing procedure is followed and that any defense delay is properly documented for the record.

In *United States v. McClain*, 23 USCMA __, 50 CMR __ (27 June 1975), the U.S. Court of Military Appeals dismissed charges on grounds that a defense motion at trial seeking dismissal for denial of speedy trial should have been granted. Pre-trial actions by the military judge, well-intended no doubt but fatal to affirmance, contributed a substantial amount of the "accountable" time for purposes of the presumption created in *United States v. Burton*, 21 USCMA 112, 44 CMR 166 (1971). Because the trial judiciary should be an instrument for attacking the problem of pre-trial delay and not a contributor to the problem, a postmortem of the actions in *McClain* follows:

a. When trial counsel called the judge for a trial date, the call being made on 8 June 1973 when charges were referred, the judge set the case for a date more than five weeks later as that was the first open date on his own docket. *With the benefit of cases and other materials published since mid-1973,* one may observe that in *McClain:*

(1.) The docketing procedure was conducted between trial counsel and the judge, without defense participation. The examples of acceptable docketing procedures given in Revised Rule 33, Docketing and Calendar Management, Uniform Rules of Practice Before Army Courts-Martial, do not include any wholly *ex parte* procedure, which should not be used. The least formal example given is solicitation of *mutually* recommended dates from counsel. Active defense participation in docketing is especially desirable in view of *United States v. Reitz*, 22 USCMA 584, 48 CMR 178 (1974), which holds that defense acquiescence in the prosecution's announcement to it of a trial date set beyond the 90-day *Burton* period is not such a defense agreement to the date as tolls the passage of time under *Burton*.

(2.) The judge set a trial date far in the future after considering only *his* next open date. It is the intendment of Revised Rule 33 that a case will be brought to an early trial by active calendar control, which in cases like *McClain* (or *Reitz*, or *United States v. Johnson*, 23 USCMA __, 50 CMR __ (9 May 1975)) must include taking action to obtain another judge under existing procedures and recording the results in the minutes contemplated by the Rule. Trial Judge Memorandum, Subject: Trial Delays, 16 August 1974, which anticipated *McClain*, requires the exercise of initiative to bring in a visiting judge if that is necessary to obviate a *Burton* problem.

(3.) When the judge set the case for trial, he communicated to the defense through trial counsel (who garbled the message in a way which aggravated the problem) that the defense should inform the judge if it wanted an earlier trial date, in which event the docketing judge would seek to obtain outside assistance. According to *McClain*, "An accused and his counsel need not do anything to speed his case to trial." Passive waiver relative to the passage of time under the *Burton* presumption is a concept which has been urged in several different situations. The Court of Military Appeals is not receptive to it. The only sure tolling situation before the initial trial session is a defense request for "continuance."

(4.) The judge did not convene an immediate Article 39(a) session for conducting arraignment and hearing motions. *United States v. Marell*, 23 USCMA 240, 49 CMR 373 (1974) left open the question whether the convening of an Article 39 (a) session terminates the passage of time under *Burton* as to charges to which the plea is "not guilty." Even so, as the case law stands, there is much to gain and nothing legally to lose by convening the session. Guilty pleas might be entered, or both parties might affirmatively express on the record their preference for a trial date lying outside the 90-day period. In any event, the argument can still be made that, as an Article 39(a) session is a part of the trial, once the first session is convened the only issue in setting later sessions is whether the judge abused his discretion either in granting the government a continuance or controlling his own calendar. Finally, after an accused has been arraigned at a 39(a) session, trial can continue in his voluntary absence and there is often no justification for continued confinement so he may be released. [On the issue of the effect of an Article 39(a) session on time computations under *Burton*, trial participants should consider *United States v. Beach*, 23 USCMA __, 50 CMR __ (18 July 1975), which was decided after the Chief Trial Judge's Memorandum was distributed.]

b. While it is certainly not the trial judiciary's function to save cases for the government, it is our collective function to move cases to an early disposition, as Revised Rule 33 makes clear. There is no improper partiality in a requirement that trial judges control dockets to avoid a *McClain* result, which snuffs out a party's right even to trial. Otherwise, the paradoxical case will come along in which a trial judge must conclude under *McClain* and *Johnson*, *supra*, that he has to dismiss charges because of his own pre-trial conduct.

2. Keeping Track Under *Burton*. Colonel James D. Clause of the U.S. Army Judiciary has devised a simple but effective means for keeping up with the period of the government's accountability under *United States v. Burton*, 21 USCMA 112, 44 CMR 166 (1971). A sample form is reproduced below. The form may be adapted to meet local needs or individual tastes.

In using the form, the accused's name can be entered on the short vertical line at the right side of the page. The sequential numbers along the left side of the vertical lines represent the days since the government first became accountable. The date of the first day of accountability is entered opposite the number 1. The remaining days of the month and of succeeding months are entered to the right of the vertical line. A notation of the month can be made at the tick mark between months. The blank space to the right of the vertical lines may be used to note all significant events that may affect the computation, such as: accused confined; charges preferred; Article 39(a) session; defense request for delay; docketing session, etc. Thereafter, a computation of accountable time can readily be made by reference to this form.

1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30

31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 | 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58 | 59 | 60

61 | 62 | 63 | 64 | 65 | 66 | 67 | 68 | 69 | 70 | 71 | 72 | 73 | 74 | 75 | 76 | 77 | 78 | 79 | 80 | 81 | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90

91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 100 | 101 | 102 | 103 | 104 | 105 | 106 | 107 | 108 | 109 | 110 | 111 | 112 | 113 | 114 | 115 | 116 | 117 | 118 | 119 | 120

JAG School Notes

1. TJAGSA Hosts Civil Service Commission Legal Education Institute and JA Task Group. The Civil Service Commission's Institute for Legal Counsels, a four-day seminar for General Counsels, Solicitors, Chief Counsels, Deputy General Counsels, Deputy Solicitors, and Deputy Chief Counsels in grades GS 15–18, was "guest" of the JAG School during 30 September–3 October. The Institute was one of the many examples of the United States Civil Service Commission's commitment to the development of a full-time program of continuing legal education for government attorneys. We were especially pleased to provide TJAGSA facilities for the use of the Institute—the Commission's Director of Legal Education is Dr. Gary E. Mozza (MAJ, JAGC, USAR); our former Post Judge Advocate and Assistant School Secretary, William R. Robie (CPT, JAGC, USAR) serves as Associate Director. . . . Upcoming, on 6–7 November, the School will also host a meeting of the Task Group for Judge Advocate Programs, formed under the aegis of TRADOC's Interservice Training Review Organization. The Group was created to aid in the achievement of economies in JA professional development short course training. This "Phase I" meeting at TJAGSA will be a continuation of the Group's efforts to establish the capacity of current educational facilities and to review and identify those legal education curricula with commonality of subject matter, apparent duplication and/or overlap. Reports on the progress of the Task Group meetings will be featured in the "CLE News" section of *The Army Lawyer*.

2. TJAGSA Instructors Receive ALMC Honors. Captain Thomas M. Strassburg, instructor in our Administrative and Civil Law Division, was recently designated an honorary member of the faculty at the U.S. Army Logistics Management Center, Fort Lee, Virginia. Captain Stephan K. Todd, also an instructor in the Ad-

ministrative and Civil Law Division, is due to receive similar recognition later this fall. Captains Strassburg and Todd have been instructing students in environmental management at Fort Lee since the courses began in January of this year. Their instruction provides the students—who are military and civilian officials responsible for various aspects of installation management—with an overview of the laws which requires them to take environmental factors into consideration in the operation of federal facilities. Both instructors emphasize the need to seek legal advice promptly on environmental problems. This, of course, suggests that the judge advocates to whom their course graduates will be qualified to render that advice—the next TJAGSA continuing legal education course in environmental law will be conducted during the period 12–15 January 1976. (3d Environmental Law Course, 5F-F27). Audiocassettes from the 2d Environmental Law Course, conducted during the period 7–10 April

3. Procurement Course. TJAGSA's 64th Procurement Attorneys' Course will be conducted 1975 are also available. Details on these cassettes may be obtained from the Department of Nonresident Instruction, TJAGSA.

during 10–21 November. The two-week course will cover the planning, solicitation, award, performance, and disputes and claims phases of federal procurement. The course is primarily for the benefit of those government attorneys with less than six months of experience in procurement.

Reserve Affairs Items

From: Reserve Affairs, TJAGSA

Law School Liaison Program. The Law School Liaison Program, started two years ago by the School's Assistant Commandant for Reserve Affairs in conjunction with OTJAG's Personnel, Plans and Training Office, is intended to provide a continuing source of information for law school students interested in the Judge Advocate General's Corps. Under this program, Reserve Component judge advocate officers act as the Corps' liaison at law schools throughout the country. These officers are available to provide interested law students with pertinent information concerning assignment with the Judge Advocate General's Corps, both active duty and Reserve Component. Material is distributed by the Assistant Commandant for Reserve Affairs to each liaison officer providing him with the information necessary to answer the wide range of inquiries which he can expect to receive.

In the two years the program has been in effect the number of participants has increased. There are currently 33 volunteers who represent the Corps as liaison to 51 law schools in 21 states and the District of Columbia.

This program provides an excellent opportunity for Reserve judge advocates to participate in an important Corps activity. Greater Reserve participation in the recruiting of new judge advocate officers will bring beneficial results to both the Active Army and the Reserve Components.

Following is a list of law schools which are presently served by a liaison officer. Officers who wish to assist in this program at other schools or who would like additional information should contact the Assistant Commandant for Reserve Affairs, The Judge Advocate General's School, Charlottesville, Virginia 22901.

State	*Institution*	*Liaison Officer*
California	University of California Law School (Davis)	CPT John A. Dougherty
	McGeorge Law School	CPT John A. Dougherty
Connecticut	Yale Law School	MAJ Ernest S. Auerbach
	University of Connecticut Law School	MAJ Ernest S. Auerbach

State	*Institution*	*Liaison Officer*
Delaware	Delaware Law School	MAJ Richard F. Plechner
Florida	Stetson University Law School	MAJ Thomas C. Marks, Jr.
Illinois	University of Illinois School of Law	MAJ Richard H. Mills
	University of Chicago School of Law	MAJ Michael I. Spak
	DePaul University College of Law	"
	Loyola University College of Law	"
	John Marshall School of Law	"
	Northwestern University College of Law	"
Kansas	University of Kansas Law School	COL Jack N. Bohm
Massachusetts	New England School of Law	CPT Kevin J. O'Dea
	Boston College Law School	"
	Suffolk University Law School	"
	Boston University Law School	"
	Harvard Law School	"
Michigan	University of Michigan Law School	1LT Frederick J. Amrose
	University of Detroit School of Law	"
	Wayne State University Law School	MAJ Estes D. Brockman
	Thomas Cooley School of Law	1LT John Hays
Mississippi	University of Mississippi School of Law	COL Aaron S. Condon
Missouri	University of Missouri Law School (Columbia)	COL Jack N. Bohm
New Jersey	Rutgers University School of Law	LTC Joseph S. Ziccardi
	Seton Hall University School of Law	"
New York	Cornell Law School	CPT Mike Manheim
	New York University Law School	MAJ Basil N. Apostle
	Syracuse University College of Law	CPT Mike Manheim
North Carolina	University of North Carolina School of Law	MAJ John Wall Hanft
	Duke University School of Law	"
	North Carolina Central University School of Law	MAJ Malcolm J. Howard
	Wake Forest Law School	"
North Dakota	University of North Dakota School of Law	CPT Murray G. Sagsveen
Ohio	Ohio State University Law School	COL Charles E. Brant
	Capitol University Law School	"
Oregon	University of Oregon School of Law	MAJ Gary E. Lockwood
	Lewis and Clark College, Northwestern School of Law	COL Charles S. Crookham
	Williamette University School of Law	MAJ Gary E. Lockwood
Pennsylvania	Dickinson School of Law	LTC Joseph S. Ziccardi

State	Institution	Liaison Officer
	University of Pennsylvania School of Law	"
	Temple University School of Law	"
	Villanova University School of Law	"
Tennessee	Vanderbilt University School of Law	LTC Abram W. Hatcher (Ret)
Texas	University of Texas Law School	CPT John M. Compere
	Texas Tech University School of Law	CPT David C. Cummins
	St. Mary's University School of Law	CPT John M. Compere
	Baylor University School of Law	Hulen D. Wendorf
Vermont	Vermont Law School	CPT Richard L. Burstein
Wisconsin	University of Wisconsin Law School	MAJ Richard Z. Kabaker
	Marquette University Law School	"
Washington, D.C.	American University Law School	MAJ W. Peyton George

CLE News

1. TJAGSA Commandant Confers in Chicago. Coming up during 10–12 November, Colonel William S. Fulton, Jr., TJAGSA Commandant, will travel to Chicago for the ABA-sponsored National Conference on Continuing Legal Education. The Conference should provide a useful forum for continued discussion of the vital issues regarding current proposals for mandatory CLE, recertification, specialization and their related areas. The meeting will feature the presentation of several papers, along with general sessions and smaller group discussions. Developments will be noted in future issues of *The Army Lawyer*.

2. TJAGSA Courses (Active Duty Personnel).

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: 4th Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 5th 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 Attorneys' 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).

3. TJAGSA Courses (Reserve Component Personnel).

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

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

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

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

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

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

April 26–May 7: 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).

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

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, The Judge Advocate General's School, Charlottesville, Va.

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

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

6–8: FBA-BNA 16th Annual Western Briefing Conference on Government Contracts, Del Coronado Hotel, San Diego, CA.

6–8: Federal Publications Inc. Government Contracting Program, Construction Project Scheduling, 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, Tropicana Hotel, Las Vegas, NV.

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

9–10: ABA Section on Local Government cosponsored with the National Civil Service League, national institute on "Equal Opportunity Law," Fairmont Hotel, San Francisco, CA.

9–10: PLI Program, "Public Interest" Litigation, Southern Methodist University School of Law, Dallas, TX.

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.

12–15: Volunteers in Probation, National

Forum of Volunteers in Criminal Justice, San Diego, CA.

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, Sheraton-Harbor Island Hotel, San Diego, CA.

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

16–17: Federal Publications Inc, Government Contract Program, Defective Pricing, Ramada Inn, Alexandria, 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, Americana Hotel, Los Angeles, CA.

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

24–25: Connecticut Bar Association, annual meeting, Hartford, CT.

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

26–31: Institute for Court Management, Technology of Court Management Workshops: Budget, Planning and Financial Controls in Courts, Denver, CO.

27–28: PLI Program, "Public Interest" Litigation, Association of the Bar of the City of New York, New York, NY.

27–29: Federal Publications Inc, Government Contract Program, Competing for Contracts, International Inn/Thomas Circle, Washington, DC.

27–29: Federal Publications Inc, Government Contracting Program, Construction Project Scheduling, Holiday Inn/Golden Gateway, San Francisco, CA.

28–29: FBA-BNA Briefing Conference in Civil and Criminal Problems Relating to Computers, The Mayflower, Washington, DC.

30–31: Federal Publications Inc, Government Contract Program, Defective Pricing, Americana Hotel, Los Angeles, CA.

30–Nov 2: American Society of Criminology, Annual Meeting, Toronto, Canada.

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

31–Nov 1: ABA Criminal Justice Section, National Institute on Criminal Trial Tactics, Dunes Hotel, Las Vegas, NV.

NOVEMBER

2–5: National College of District Attorneys Course, Pretrial Problems Seminar, Orlando, FL.

2–7: National College of the State Judiciary, Specialty Session in Evidence—Special Courts, Judicial College Building, University of Nevada, Reno, NV.

2–7: National College of District Attorneys Course, Prosecutors Office Administrator Course II, Houston, TX.

2–21: National College of the State Judiciary, Regular Four Week Session (Session III), Judicial College Building, University of Nevada, Reno, NV.

3–4: Federal Publications Inc, Government

Contract Program, Contracting for Service, Washington, DC.

6–8: Illinois State Bar Association, midyear meeting, Pick-Congress Hotel, Chicago, IL.

7: ALI-ABA Committee on Continuing Professional Education, meeting, Philadelphia, PA.

7: Maritime Law Association of the United States, fall meeting, Americana Hotel, New York, NY.

9–14: National College of the State Judiciary, Graduate Session, The Judge and the Court Trial, Judicial College Building, University of Nevada, Reno, NV.

10–11: ABA Section of Local Government Law Co-sponsored with the National Civil Service League, national institute on "Equal Employment Opportunity Law," Fairmont Hotel, San Francisco, CA.

10–12: Federal Publications Inc, Government Contract Program, Government Contract Costs, Tropicana Hotel, Las Vegas, NV.

10–12: National Conference on Continuing Legal Education, meeting, sponsored by the ABA, Kellogg Center for Continuing Education, Chicago, IL.

12–15: National Legal Aid and Defender Association, 53d Annual Conference, Olympic Hotel, Seattle, WA.

14–15: ABA Section of Young Lawyers, national institute on "Consumer Law Practice," Omni International Hotel, Atlanta, GA.

14–15: PLI Program, Medical Ethics and Legal Liability, New York Hilton Hotel, New York, NY.

16–19: National College of District Attorneys, Prosecutor Education Institute, Houston, TX.

17–19: Federal Publications Inc, Government Contract Program, Practical Negotiation of Government Contracts, Twin Bridges Marriott, Washington, DC.

19–21: Federal Publications Inc, Government Contract Program, Negotiated Procurement, Washington, DC.

20–21: FBA-BNA and New York State Bar Association Briefing Conference on Labor Law, The Plaza, New York, NY.

20–21: ALI-ABA Program, Trade, Aid and International Regulation, ABCNY, New York, NY.

21–22: 17th Annual State Tax Institute, Idaho State University, Pocatello, ID.

24–25: Federal Publications Inc, Government Contract Program, Cuneo on Contracts, Los Angeles Mariott, Los Angeles, CA.

30: ALI-ABA Federal Rules Complex, meeting, St. Thomas, V.I.

30–Dec 12: National College of the State Judiciary, Specialty Session in Court Administration, Judicial College, University of Nevada, Reno, NV.

DECEMBER

1–2: ALI-ABA Program, Federal Bankruptcy Procedure Under the New Bankruptcy Rules, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–4: ALI-ABA Program, International Arbitration, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–4: ALI-ABA Program, Federal Criminal Procedure, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–5: Oklahoma Bar Association, annual meeting, Oklahoma City, OK.

3–5: State Bar of Georgia, midyear meeting, Atlanta, GA.

3–5: Iowa State Bar Association, midyear meeting, Des Moines, IA.

3–5: Federal Publications Inc, Government Contract Program, Subcontracting, Lake Tahoe, NV.

4–5: FBA-BNA Briefing Conference on Postal Developments, Stouffer's National Center Inn, Arlington, VA.

4–5: PLI Program, "Public Interest" Litigation, Hyatt on Union Square, San Francisco, CA.

5-6: ALI-ABA Program, Practice Under the New Federal Rules of Evidence, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

5-6: PLI Program, Medical Ethics and Legal Liability, Americana of Bal Harbour Hotel, Miami, FL.

7: ABA Section of General Practice, Committee on Military Law, Meeting of vice chairmen, Washington, DC.

7-10: National College of District Attorneys Course, Law Office Management Seminar, Houston, TX.

8-12: Federal Publications Inc, Government Contract Program, Masters Institute in Government Contracting, Williamsburg, VA.

9-13: National College of District Attorneys Course, Organized Crime Seminar, Portland, OR.

10-12: Federal Publications Inc, Government Contract Program, Government Contract Costs, Hospitality House, Williamsburg, VA.

18-19: Federal Publications Inc, Government Contract Program, Cost Estimating for Government Contracts, Washington, DC.

Litigation Notes

From: Litigation Division, OTJAG

1. Medical Care Recovery Act as an Independent Cause of Action—State Guest Statute No Bar. In *GEICO v. Bates*, PB 75-C-31, USDC for the E.D. of Arkansas, June 25, 1975, the court allowed the United States to recover the value of medical care on behalf of a wife who was a passenger in the car driven negligently by her husband. Under the Arkansas guest statute (Ark. Stats. Ann. §§ 75-913, 75-915), she did not have a cause of action against her husband as operator of the vehicle in which she was injured as a guest-passenger. In construing the Medical Care Recovery Act, the court held that the United States is not merely subrogated to the injured party's claim, but has an independent cause of action, "not subject to the vagaries and inconsistencies of the laws of the various states." Id. at 2. The court relied on *United States v. Moore*, 469 F. 2d 788, (3rd Cir., 1972), *cert. den.* 411 U.S. 905, where it was held that the Maine "interspousal immunity" statute did not bar the United States from a recovery against the negligent spouse.

2. Medical Care Recovery Under State No-Fault Insurance Law. On 15 May 1975, the Insurance Commissioner, Department of Commerce, State of Oregon, ruled that the Oregon Personal Injury Protection (PIP) Law, which is a basic no-fault insurance law, does not preclude the United States from recovering the reasonable cost of medical care provided under CHAMPUS. In Declaratory Ruling #75-5-4, the Commissioner overruled arguments of several insurance companies that the CHAMPUS benefits were included in a section of the statute which reduced primary payment liability "if the injured person is entitled to receive under the laws of this State or of the United States, workmen's compensation benefits or any other similar medical or disability benefits." ORS 743.810(1), ch. 523, sec. 4, O.L. 1971. The Commissioner opined that the phrase referring to "other similar benefits" merely modified workmen's compensation and was meant to include only various types of workmen's compensation. He concluded that the government's obligation under the CHAMPUS program is not insurance or a workman's compensation plan, citing a recent Ninth Circuit decision, *United States of America v. Nationwide Mutual Insurance Company*, No. 73 (9th Cir., July 9, 1774), wherein Judge Duniway commented to that effect in a concurring and dissenting opinion.

This opinion was the result of a petition on behalf of the United States by Captain Daniel L. Rothlisberger, Recovery Judge Advocate, Fort Lewis, Washington. All Recovery Judge Advocates are encouraged to utilize the channels of their respective state insurance commissioners in order to assert recovery actions, especially in the new areas of non-third party situations.

Legal Assistance Items

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

1. Items of Interest.

Legal Assistance Programs and Administration—Obtaining DOD Information Guidance Series (DIGS) Publications. Frequently, the DOD Office of Information prepares DIGS publications which may be of particular interest to the military Legal Assistance Officer. These publications are listed in the "Legal Assistance Items" of *The Army Lawyer.* If the publication is not immediately available, the Legal Assistance Officer may obtain a limited number of copies by writing to the following address:

DIGS—Room 506
Department of Defense
1117 North 19th Street
Arlington, Virginia 22209

Such requests should include the name of the publication, the reference number, and its date. [Ref: Ch. 1, DA Pam 27-12].

Social Security—Direct Deposit Program. Effective 1 October 1975, Social Security recipients may elect to have their checks deposited directly with a bank or other financial institution of their choice. Although the program is entirely voluntary, it is expected that such a direct deposit system will be more convenient for some recipients and will greatly reduce the number of stolen checks. A social security recipient may obtain the necessary application form at his or her bank. The Social Security Administration has advised that the processing time may be approximately 60 days from the date of application. [Ref: Ch. 9 39, DA Pam 27-12].

State Taxation—Section 514 of the Soldiers' and Sailors' Civil Relief Act — Theory — Constitutionality — Present Status of State Taxation of Military Pay. Section 514 of the SSCRA, 50 U.S.C. App. § 574, contains four related and complementary "legal fictions." With regard to a servicemember's military income or his "nonbusiness" personal property, these statutory presumptions, in most instances, foreclose the possibility of a servicemember being taxed by any state except that of his bona fide domicile. The four statutory presumptions are as follows:

1. *Federal Protection of Domicile. The servicemember neither acquires nor loses his domicile or residence for tax purposes solely* because he is present in, or absent from, a tax jurisdiction pursuant to military orders.

2. *Nature of Military Compensation.* Military compensation shall not be deemed "income for services performed within, or from sources within" any state except the state of actual domicile or residence.

3. *Situs of Personal Property.* The personal property of a servicemember shall not be deemed to have a situs in any state except the state of the soldier's domicile.

4. *Broad Definition of Taxation With Regard to Motor Vehicles.* License fees, and excise taxes on motor vehicles are to be considered within the term "taxation," *provided* they have in fact been paid in the servicemember's state of domicile.

It is not surprising that "[s]ection 514 continues to be the most frequently invoked section of the [SSCRA], as well as its most controversial." Comment, "State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act," 36 MIL. L. REV. 123 (April 1967); *see* Flick, "State Tax Liability of Servicemen and Their Dependents," 21 WASH. & LEE L. REV. 22 (1964).

The constitutionality of Section 514 was upheld in the case of *Dameron v. Broadhead,* 345 U.S. 322 (1953). The case involved the assessment of a personal property tax by the City of Denver, Colorado, upon the household goods of an Air Force officer. The Air Force officer was stationed in and "residing" in Colorado, but he was a domiciliary of Louisiana.

The City of Denver argued that Congress, by enacting Section 514, was unconstitutionally attempting to extend governmental immunity from state taxation to the "private" personal property of the servicemember. The city argued that such an "extension" was an invalid invasion of the reserved powers of the states to levy and collect nondiscriminatory taxes.

The United States presented two counterarguments. The government averred that it had the power to exempt from state and local taxation not only its own agents, but also individuals with whom the federal government contracted: *Carson v. Rowe-Anderson Co.*, 342 U.S. 232 (1952), *James v. Dravo*, 302 U.S. 134 (1937). Second, the United States argued that, pursuant to its broad power to provide for the common defense and to raise and support armies, the Congress could exempt the servicemember from the personal property taxes of state and local governments.

The Court in *Dameron* upheld Congress' power and noted that Section 514 does not limit the state in taxing domiciliaries, but merely provides that the domicile or "tax residence" of the servicemember does not change solely because of his presence in the state pursuant to military orders. This reasoning is clearly consistent with the principle of the law of domicile that the requisite physical presence for the establishment of domicile must be one of "voluntary" presence: *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973) (Excellent analysis of the requirement of "voluntary" presence.).

The analysis and reasoning of the Court in *Dameron* is directly applicable to the states' imposition of income taxes upon a servicemember's military income. Although the exact treatment of military income for tax purposes varies from state to state, four broad categories or approaches are evident. These four general approaches are described below, but it is necessary, of course, that reference be made to the specific state statutes before advising any legal assistance client. The state treatments of military pay and other emoluments for tax purposes are as follows:

1. All military pay is exempt, or exempt *provided* the domiciliary servicemember was on permanent duty outside the state during the tax year in question.

2. Certain types of military emoluments (*e.g.*, combat pay, terminal leave pay) are exempt, or a specific amount or percentage of active duty or retired pay is exempt each year, or both.

3. The member's military pay will be exempted if the member meets a three-part definition of nonresidency for *tax* purposes. This three-part "nonresidency test" is being adopted by more states. Although it is not directly designed for servicemembers domiciliaries, it effectively exempts their pay in many instances since servicemembers frequently meet the three conditions as summarized below. The domiciliary of state *X* will be treated as a "nonresident' " for tax purposes if: he maintains no permanent place of abode within state *X*; he does maintain a permanent place of abode outside the state, and he spends no more than 30 days within state *X* during the tax year in question. The states are not presently in agreement as to whether government housing will be considered as a qualifying "permanent place of abode" outside the state.

4. A very few states make no special provisions concerning the income of military personnel.

The above note briefly analyzes the theory, constitutionality, and present status of Section 514 with regard to the state taxation of military pay. This note will be supplemented by an analysis of recent case developments in a forthcoming issue of *The Army Lawyer*. [Ref: Chs. 40, 43, DA Pam 27-12]

2. Recently Enacted Legislation.

Survivors' Benefits—Dependency and Indemnity Compensation—Veterans' Disability Compensation. The rates of both DIC and Veterans' Disability Compensation have been increased by the recently enacted Veterans' Disability Compensation and Survivor Benefits Act of 1975, P.L. 94-71. This legislation provides for a 12 percent increase in DIC payments and a 12-14 percent increase in veterans' disability compensation depending upon the degree of disability. This Act is a compromise measure from those increases proposed by the Senate

Committee on Veterans' Affairs and discussed in the August issue of *The Army Lawyer.* [Ref: Ch. 16, DA Pam 27-12].

3. Proposed Legislation.

Survivors' Benefits—Retired Serviceman's Family Protection Plan (RSFPP). Legislation has been introduced by Rep. Patsy T. Mink (D.) which would apply cost-of-living increases to RSFPP annuities and would continue payments of such annuities to widows or widowers who remarry at age 60 or thereafter. The bill (H.R. 2521) has been referred to the House Committee on Armed Services. [Ref: Ch. 15, DA Pam 27-12].

4. Articles and Publications of Interest.

Commercial Affairs—Small Claims Court. The California State Bar has recently published a brief consumer's pamphlet entitled "Your Small Claims Court." A limited number of free copies may be obtained by writing to the following address: The Public Affairs Department, The California State Bar Association, 601 McAllister Street, San Francisco, California 94102. [Ref: Part Six, DA Pam 27-12].

Commercial Practices and Controls—Consumer Protection. DOD Information Guidance Series (DIGS) No. 8E-1(Rev. 1), "Service Families and Consumer Protection," August 1975. This publication describes the general purposes of the Federal Information Centers and Consumer Information Centers. Additionally, the addresses and phone numbers of the 74 Federal Information Centers are listed. [Ref: Ch. 10, DA Pam 27-12].

Insurance—List of DOD Accredited Insurance Companies Overseas for Fiscal Year 1976. DOD Information Guidance Series (DIGS) 8A-49 (Rev. 2), "DOD Accreditation for Life Insurance Companies Overseas," August 1975. See also, DOD Dir. 1344.1, "Solicitation and Sale of Insurance on Department of Defense Installations," 21 January 1972. [Ref: Ch. 11, DA Pam 27-12].

Real Property—Land Investments in Foreign Countries. DOD Information Guidance Series (DIGS) No. 8A-41 (Rev. 1), "Investing in Land in Foreign Countries," August 1975. See also, DIGS No. 8A-36 (Rev. 3), "Buying U.S. Land," November 1974. [Ref: Ch. 34, DA Pam 27-12].

Veterans' Benefits—Entitlement to Fringe Benefits from Pre-Military Service Employer. Ross, "Returning Veterans' Rights to Fringe Benefits After *Foster v. Dravo Corporation*," 68 MIL. L. REV. 55 (1975). See also, *Jackson v. Beech Aircraft Corporation*, 517 F.2d 1322 (10th Cir. 1975) (Eligibility of returning veterans for longevity pay, length of vacation, and sick leave does not necessarily constitute "seniority" rights protected by the Military Selective Service Act). [Ref: Ch. 44, DA Pam 27-12].

Veterans' Benefits — Illegitimacy — Procedural Due Process. Brown, "Constitutional Infirmities in Veterans' Benefits Legislation," 9 CLEARINGHOUSE REV. 244 (August 1975).

JAGC Personnel Section

From: PP & TO, OTJAG

1. Retirements. On behalf of the Corps, we offer our best wishes for the future to the following individuals who retired 31 August 1975.

Colonel Charles W. Bethany, Jr.
Colonel James E. Macklin
Colonel William E. O'Donovan
LT Colonel Simon Y. Rodriquez

2. Orders Requested as Indicated.

Name	*From*	*To*
	COLONELS	
ALLEY, Wayne E.	USALSA, Falls Church, Va	OTJAG, Wash, DC

LIEUTENANT COLONELS

DEFORD, Maurice	OTJAG, Wash, DC	USALSA, Falls Church, Va

MAJORS

MILLER, Joe D	USAG, Carlisle Bks, Pa.	OTJAG, Wash, DC

CAPTAINS

BROOKS, Clifford	TJAGSA, Charlottesville, Va	Europe
CARAZZA, Dennis	1st Armored Div, Ft Hood, Tx	25th Inf Div, APO SF 96225
KITTELL, Robert	OTJAG, Wash, DC	USA Support Command, Hawaii
KODAK, Robert D	Ft Belvoir, VA	OTJAG, Wash, DC
LANDRUM, Douglas	OTJAG, Wash, DC	Sierra Army Depot, Herlong, Ca
LEHMAN, William	Ft Lewis, Washington	OTJAG, Wash DC
LOHFF, John R	USALSA, Falls Church, Va	172d Inf. Bde, Ft Richardson, Al.
LUEDTKE, Paul J	Ft Belvoir, Va	OTJAG, Wash DC
NORTON, James M	USA Inf Sch, Ft Benning, Ga	USA Inf Center, Ft Benning, Ga
RIVERA ESPANDA,	Ft Sam Houston, Tx	USAG, Ft Buchanan, PR
SHAW, David A	USALSA, Falls Church, Va	OTJAG, Wash, DC
SMITH, Carl W.	USALSA, Falls Church, Va	OTJAG, Wash, DC

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

To Lt Colonel, AUS
YAWN, Malcolm T
To Major, AUS
WOODWARD, William B. Jr.

4. **71D20 Correspondence Course Transferred From TJAGSA to Fort Harrison.** Responsibility for the 71D20 Legal Clerk Basic Correspondence Course has been transferred from The Judge Advocate General's School to the US Army Institute of Administration, Fort Benjamin Harrison, Indiana. All records of currently enrolled students were transferred on 15 September 1975. By 1 October 1975, USAIA will have completed the transfer and will be enrolling new students. Correspondence of currently enrolled students and new applications should be sent to:

Nonresident Instruction
Administration and Processing Branch
USAIA
Fort Benjamin Harrison, Indiana 46249

Current Materials of Interest

Articles.

The Summer 1975 issue of *The Air Force Law Review* (Volume 17, Number 2) contains several articles and comments of note: (1) "The Inherent Authority of the Military Judge," (2) "Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations," (3) "The Law of Air Bombardment in its Historical Context," (4) "The Death of an Estate," and others.

Note, "Post-Conviction Review in the Federal Courts for the Servicemember Not in Custody" 73 MICH. L. REV. 886 (April 1975). A three-part piece which examines the availability of nonhabeas federal court review for those convicted by courts-martial: discussing the function of such review and suggesting a scope of review that would serve that function without unduly

burdening the federal courts; sketching the evolution of nonhabeas review and analyzing the jurisdictional problems surrounding its present status; and recommending statutory and judicial changes to make the review of courts-martial more equitable and efficient.

The Spring 1975 issue of *The JAG Journal* (Volume 28, Number 1) contains two noteworthy articles: (1) "DOPMA and Officer Manpower Law: The Policy Making Process," and (2) "Criminal Trespass on Military Installations: Recent Developments in the Law of Entry and Re-Entry."

Gordon, "The Federal Income Tax Significance of Being a POW or MIA," *Taxes,* Volume 53 Number 9 (September 1975) p. 551.

Comment, "Search Incident to Arrest: *United States v. Robinson*—An Analytical View" 7 CONN. L. REV. 346 (Winter 1974–75).

Bittker, "Federal Income Taxation and the Family" 27 STAN. L. REV. 1389 (July 1975). Examines the theories and pressures that shaped today's Internal Revenue Code and suggests how its provisions may fare under the changing social attitudes toward marriage, women's rights, the two-job couple, communal living patterns, birth control, population growth, and intrafamily rights and liabilities.

Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study," 73 MICH. L. REV. 793 (April 1975).

By Order of the Secretary of the Army:

FRED WEYAND
General, United States Army
Chief of Staff

Official:

PAUL T. SMITH
Major General, United States Army
The Adjutant General